

Legal Developments

Convention on Supplementary Compensation for Nuclear Damage

The Convention on Supplementary Compensation for Nuclear Damage was adopted on September 12, 1997, by a diplomatic conference held September 8-12, 1997. The United States is one of 13 signatories. The stated purpose of the Convention is to supplement the system of compensation provided pursuant to national law which (a) implements the Vienna Convention on Civil Liability for Nuclear Damage of May 21, 1963, or the Paris Convention on Third Party Liability in the Field of Nuclear Energy of July 29, 1960; or (b) complies with the provisions of the Annex to the Convention on Supplementary Compensation for Nuclear Damage. According to the International Atomic Energy Agency (IAEA), the Convention defines additional amounts to be provided through contributions through states parties on the basis of installed nuclear capacity and UN rate of assessment. All states may adhere to the Convention, regardless of whether they are parties to any existing nuclear liability conventions or have nuclear installations on their territory.

The Convention was opened for signature at Vienna on September 29, 1997, at the 41st General Conference of the IAEA. The convention will remain open for signature until its entry into force. (Pursuant to Article XX, the Convention will enter into force on the 90th day following the date on which at least five states with a minimum of 400,000 units of installed nuclear capacity have deposited an instrument referred to in Article XVIII. After entry into force any state which has not signed the Convention may accede to it.)

The United States became the fourth state party to ratify the Convention in 2008, when President Bush signed the instrument of ratification on March 12 and Ambassador Gregory Schulte deposited it on May 21. Schulte said the Convention was “vital to the continued growth of nuclear power worldwide,” and that the United States “urged all interested parties to act as quickly as possible” to bring the treaty into force.

Host Country Relations

The General Assembly established the Committee on Relations with the Host Country in 1971 to address issues concerning the presence of the United Nations and the UN diplomatic community in the United States. The Committee is composed of representatives of the host country and 18 other member states. The Committee addresses issues including the security of missions, the safety of their personnel, tax questions, visa issues, the diplomatic parking program, assessment of New York property tax on diplomatic staff residences, problems experienced by diplomats and foreign officials on arrival and on departure from New York area airports, the travel

restrictions program, and privileges and immunities. The UN Headquarters Agreement and the Convention on the Privileges and Immunities of the United Nations provide the legal framework for the Committee's work.

In light of the enhanced national security requirements implemented in the United States following the events of September 11, 2001, and the effect of such requirements on representatives to the United Nations arriving and departing from the United States, the U.S. Mission again hosted a special briefing for all missions at the United Nations on August 20, in preparation for the 63rd General Assembly. The briefing included guidance on diplomatic overflight and landing clearances, expedited port courtesies, customs and immigration, the escort-screening program, and other related matters. Member states were encouraged to take the initiative to make the processes work smoothly. As in previous years, the number of credible complaints from delegations to the 63rd General Assembly regarding arrivals and departures was small.

Host Country Committee members continued to express concern about implementation of the parking program for diplomatic vehicles, which became effective in November 2002. On December 11, the General Assembly adopted without a vote the "Report of the Committee on Relations with the Host Country" (Resolution 63/130). The resolution requested that the host country continue to solve, through negotiations, problems that might arise and take all necessary measures to prevent interference with the functioning of the missions; noted that the Committee would continue to review periodically the implementation of the parking program; expressed appreciation for the efforts made by the host country; and noted that the Committee anticipated that the host country would continue to facilitate timely issuance of visas to representatives of member states traveling to New York on official UN business.

International Court of Justice

The International Court of Justice (ICJ) is the United Nations' principal judicial organ. The Court decides cases submitted to it by states and has the authority to give advisory opinions on legal questions at the request of international organizations authorized to request such opinions. The ICJ is composed of 15 judges, no two of whom may be nationals of the same state. The UN General Assembly and the UN Security Council vote separately to 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. As of December 31, 2007, and during 2008, the court members included: Rosalyn Higgins (United Kingdom, President); Awn Shawkat Al-Khasawneh (Jordan, Vice President); Raymond Ranjeva (Madagascar); Shi Jiuyong (China); Abdul G. Koroma (Sierra Leone); Gonzalo Parra-Aranguren (Venezuela); Thomas Buergenthal (United States); Hisashi Owada (Japan); Bruno Simma (Germany); Peter Tomka (Slovakia); Ronny Abraham (France); Kenneth Keith (New Zealand); Bernardo Sepulveda Amor (Mexico);

Mohammed Bennouna (Morocco), and Leonid Skotnikov (Russia). On November 11, the UN General Assembly and Security Council reelected two of the sitting judges and elected three new members to join the Court in 2009.

During 2008 the Court rendered judgments in the following cases: Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks, and South Ledge (Malaysia/Singapore); and Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France).

In 2008 states instituted new proceedings before the Court in the following matters: Peru instituted proceedings against Chile concerning maritime delimitation between the two states; Ecuador instituted proceedings against Colombia over the alleged aerial spraying by Colombia of toxic herbicides over Ecuadorian territory; Georgia instituted proceedings against Russia for violations of the Convention on the Elimination of All Forms of Racial Discrimination; Macedonia instituted proceedings against Greece for a violation of Article 11 of the Interim Accord of September 13, 1995; and Germany instituted proceedings against Italy for failing to respect its jurisdictional immunity as a sovereign state.

During 2008 the Court held several hearings regarding the Request for Interpretation of the Judgment of March 31, 2004, in the case concerning Avena and Other Mexican Nationals (Mexico v. United States of America). Also in 2008 the UN General Assembly requested an advisory opinion from the Court on the unilateral declaration of independence of Kosovo.

International Criminal Court

The International Criminal Court (ICC) is not a UN body, and the United States is not a party to the Rome Statute establishing the ICC. As in previous years the United States dissociated itself from consensus on the annual resolution in the General Assembly on the ICC which, among other things, called on all states that are not parties to the Rome Statute to consider ratifying or acceding to it without delay. In its statement on the resolution in the General Assembly on November 11, 2008, the United States emphasized that it respects the rights of states to become parties to the Rome Statute, but asked in return that other states respect the U.S. decision not to do so. While citing its well-known concerns about the Rome Statute and the ICC, the United States also stressed its commitment to promoting the rule of law and helping to bring violators of international humanitarian law to justice, wherever the violations may occur, and noted that it continues to play a leadership role in righting these wrongs.

In 2008 four situations remained before the ICC for consideration: the situations in the Democratic Republic of the Congo; Uganda; Darfur, the Sudan; and the Central African Republic. Mathieu Ngdolo Chui was surrendered to the court on February 7. He was charged with having committed nine instances of war crimes and four instances of crimes against humanity in the situation in the Democratic Republic of the Congo. In the situation in the Central African Republic Mr. Jean-Pierre Bemba Gombo was arrested in Belgium and surrendered to the court on July 3. He is suspected of

having committed three instances of crimes against humanity and five instances of war crimes.

On July 14, 2008, the Prosecutor submitted an application for an arrest warrant for Umar Hassan Ahmad Al-Bashir, President of the Sudan, on charges of genocide, war crimes, and crimes against humanity.

International Law Commission

The UN General Assembly established the International Law Commission (ILC) in 1948 to promote the codification and progressive development of international law. Its 34 members, each of a different nationality, are persons of recognized competence in international law who serve in their individual capacities. During 2008 the ILC did not have a member from the United States.

The ILC studies international law topics either 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 ILC, special *rapporteurs* typically prepare draft articles or reports for detailed discussion by the members of the ILC. These are considered and refined in a drafting group prior to formal adoption by the ILC. The ILC reports annually on its work to the Sixth (Legal) Committee of the General Assembly.

At its 60th session, which met May 5-June 6, and July 7-August 8, the ILC commemorated its 60th anniversary with a May 19-20 meeting in Geneva between Commission members and the legal advisers of member states. The program included a seminar with legal advisers titled “The International Law Commission: Sixty Years ... and Now?”. During the program State Department Legal Adviser John B. Bellinger delivered remarks.

During the annual consideration by the Sixth Committee of the UN General Assembly of the Commission’s report, the U.S. representative made detailed observations on various procedural and substantive aspects of the ILC’s work, including the following:

- The ILC should be commended for completing draft articles on transboundary aquifers. The United States supported the treatment of such draft articles as non-binding recommendatory principles and the ILC’s recommendation that states enter into bilateral and regional arrangements on the basis of the draft articles.
- As a general matter, it was important to approach the topic of the “effect of armed conflicts on treaties” in a manner that preserved the reasonable continuity of treaty obligations during armed conflict, while taking into account particular military necessities, and also while providing practical guidance to states by identifying factors relevant to determining whether a treaty should remain in effect in the event of armed conflict. The United States commended the special rapporteur for completing draft articles that reflected this approach.

- On the subject “reservations to treaties,” the United States complemented the special rapporteur on the impressive work that had gone into the draft guidelines. However, the United States expressed concerns regarding the *rapporteur’s* 13th Report dedicated to states’ and international organizations’ reactions to interpretative declarations, which in the U.S. view was not ripe for the work of the Commission as there was not sufficient state practice from which to derive suitable guidelines, and the subject went beyond the original mandate of the project regarding reservations to treaties.
- As a general matter, it was important that the ILC proceed cautiously in the area of responsibility of international organizations, and that it carefully assess the unique considerations relevant to this topic and not simply work to develop articles analogous to those developed for states.
- It was important to bear in mind the unique legal and political issues implicated by the topic of expulsion of aliens as the ILC moves forward.
- It was important to note that there was not a sufficient basis in customary international law or state practice to formulate draft articles that would extend an obligation to extradite or prosecute beyond binding international legal instruments that contained such obligations.
- As a general matter, the development of a clear and comprehensive set of rules to govern the immunity of state officials from foreign criminal jurisdiction could prove of enormous benefit to the international community,
- The topic “protection of persons in national disasters” has the potential to produce practical solutions to pressing problems, but it was important not to approach the topic from a rights-based perspective.

International Rule of Law

In 2008 the United Nations continued to pursue numerous activities relating to the rule of law at both the national and international levels.

For example, the General Assembly’s Sixth (Legal) Committee put the topic “The Rule of Law at the National and International Levels” on its agenda for the third time at the 63rd session. “Rule of Law” was first included on the provisional agenda of the 61st session of the General Assembly in 2006 at the request of Liechtenstein and Mexico. At that session the Assembly requested that the Secretary-General prepare an inventory of the current activities of the various organs, bodies, offices, departments, funds, and programs within the UN system devoted to the promotion of the rule of law at the national and international levels for submission at its 63rd session; and also requested the Secretary-General, after seeking the views of member states, to prepare and submit, at its 63rd session, a report identifying ways and means

for strengthening and coordinating the activities listed in the above-mentioned inventory, with special regard to the effectiveness of assistance that might be requested by states in building capacity to promote the rule of law at the national and international levels.

During the 63rd session the Under-Secretary-General for Legal Affairs, the Legal Counsel, introduced the reports of the Secretary-General on the requested inventory of rule of law activities at the national and international levels. The Deputy Secretary-General made a statement on the work of the Rule of Law Coordination and Resource Group.

The United States and several other states also made statements. The member states welcomed the inventory of the current rule-of-law activities performed system-wide by the United Nations, as well as its identifying ways and means for strengthening and coordinating the activities listed in the inventory. Member states also expressed appreciation for the follow-up tools envisioned in the report, such as a joint strategic plan for the implementation of a common approach to rule-of-law assistance, the establishment of a rule-of-law website, and the creation of a trust fund. They noted, however, that the report did not contain sufficient proposals for enhancing coordination within the United Nations.

Several delegations expressed appreciation for the establishment and work of the Rule of Law Coordination and Resource Group in the Executive Office of the Secretary-General, supported by the Rule of Law Unit. Delegations suggested that the Group and the Unit have a coordinating rather than operational function and should focus on technical assistance as the area where progress needed to be made as a matter of priority. It was suggested that a focal point be established to centralize and redirect requests for assistance by member states, with adequate resources being provided through the regular budget.

On November 14, Mexico introduced a draft resolution titled “The Rule of Law at the National and International Levels.” The Sixth Committee adopted the draft resolution without a vote. Under this draft resolution, the General Assembly would request the Secretary-General to submit an annual report on UN rule-of-law activities, in particular the work of the Rule of Law Coordination and Resource Group and the Rule of Law Unit, with special regard to improving the coordination, coherence, and effectiveness of rule-of-law activities. Under Operative Paragraph 10 of the draft resolution, the General Assembly would also invite member states to focus their comments in future Sixth Committee debates on the sub-topics “Promoting the Rule of Law at the International Level” (64th session), “Laws and Practices of Member States in Implementing International Law” (65th session), and “Rule of Law and Transitional Justice in Conflict and Post-conflict Situations” (66th session), without prejudice to the consideration of the item as a whole.

Special Committee on the UN Charter

In 1974 the General Assembly adopted Resolution 3349, which established an Ad Hoc Committee on the Charter of the United Nations. The

Committee was mandated to consider, among other things, specific proposals that governments might make with a view to enhancing the United Nations' ability to achieve its purposes and function more effectively. Since its 30th session the General Assembly has reconvened the Special Committee on the Charter of the United Nations (Special Committee) every year, considered its successive reports, and renewed and revised its mandate on an annual basis. The Special Committee operates by consensus.

The Special Committee held its annual session February 27-March 5 and March 7. The General Assembly's Sixth Committee adopted a resolution adopting the report of the Committee's work and establishing the mandate and schedule for the Special Committee's 2009 meeting. The General Assembly subsequently adopted the resolution by consensus on December 11 (Resolution 63/127).

Resolution 63/27 mandated the Special Committee to continue its consideration of all proposals concerning the maintenance of international peace and security in all its aspects to strengthen the role of the United Nations. It also required the Committee to continue its consideration of a working document submitted by Russia: on basic conditions and standard criteria for introduction and implementation of sanctions; the implementation of the provisions of the UN Charter related to assistance to third states affected by the application of Chapter VII sanctions based on related reports of the Secretary-General and the proposals submitted on the question; the peaceful settlement of disputes between states; any proposal referred to it by the General Assembly in the decisions of the High-level Plenary Meeting of the 60th session of the Assembly in September 2005 that concern the charter and any amendments thereto; and ways and means of improving its working methods and enhancing its efficiency.

War Crimes and Other Tribunals

Khmer Rouge Tribunal

The Extraordinary Chambers in the Courts of Cambodia (ECCC), also known as the "Khmer Rouge Tribunal" (KRT), was established in 2003 by the Royal Cambodian Government and the United Nations to try senior leaders of the Khmer Rouge for crimes against humanity, including genocide. The ECCC is jointly administered by a Cambodian Director and an international Deputy Director. At the end of 2008, Cambodian Director Sean Visoth was on medical leave. International Deputy Director Knut Rosandhaug (Norway), who was also the coordinator of the UN Assistance to the Khmer Rouge Tribunal (UNAKRT), took over from his predecessor, Michelle Lee (China) in June 2008.

The ECCC was organized along French-inspired civil law traditions and consists of three chambers: Pre-Trial, Trial, and a Supreme Court. The Pre-Trial Chamber and the Trial Chamber have five judges each (three Cambodian and two international) and the Supreme Court Chamber has seven

judges (four Cambodian and three international). In addition, there are two prosecutors (one from each group) and two investigating judges (likewise). The officials and their deputies include one American, Paul Coffey, as a reserve co-prosecutor. In September Catherine Marchi-Uhel (France) replaced Martin Karopkin, also of the United States, as a reserve Supreme Court judge.

Throughout 2008 the ECCC conducted investigations into war crimes and crimes against humanity committed by five senior Khmer Rouge officials who had been arrested in 2007. In August the Office of the Co-Investigating Judges (OCIJ) handed down an indictment of Kaing Guek Eav (also known as “Duch”), former governor of the notorious Tuol Sleng Prison, with the trial slated to begin in early 2009. Investigations and pre-trial proceedings for a second case involving four other senior Khmer Rouge officials (Nuon Chea, Ieng Sary, Ieng Thirith, and Khieu Samphan) continued throughout the year. Work also got underway for a possible third case against an additional five senior Khmer Rouge leaders. In addition, the ECCC’s Victims Unit started operations in January with the goal of accepting victims’ complaints and civil party applications and providing legal assistance.

A special Human Resources Management Review was conducted in February to determine whether the management policies and practices on the Cambodian side of the ECCC were transparent, accountable, and up to international standards. This review was conducted in response to allegations in that Cambodian national staff members were forced to pay kickbacks to court officials in return for their appointments to the ECCC. As of the end of 2008, there was still some disagreement between the UN Office for Legal Affairs and the Cambodian side of the ECCC over the establishment of anti-corruption measures.

In September the United States committed \$1.8 million to supporting the efforts of the international side of the ECCC, which should give the United States greater ability to work with the KRT to strengthen court management practices, corruption prevention, and cooperation between the Cambodian government, the UN, and the donor community.

Although the court cannot provide monetary compensation to victims, there are strong indications that the symbolic reparations from finally holding accountable those most responsible for crimes committed under the Khmer Rouge regime will significantly advance the long-delayed healing process for victims and the Cambodian public overall.

International Criminal Tribunal for Rwanda

The UN Security Council established the International Criminal Tribunal for Rwanda (ICTR) in November 1994, pursuant to Resolution 955 (1994). The Tribunal prosecutes individuals accused of committing genocide and other serious violations of international humanitarian law committed in Rwanda or by Rwandans between January 1 and December 31, 1994. Under the Tribunal’s Completion Strategy, as endorsed by the Security Council in Resolution 1503 (2003), the ICTR sought to complete all trials by the end of 2008 and all of its work, including appeals, by the end of 2010. In compliance

with Security Council Resolution 1503, the United States, the tribunal, and various stakeholders of the justice sector in Rwanda continued to work in 2008 to strengthen the capacity of the Rwandan judicial system, in part so that Rwanda could receive and prosecute cases transferred to it from the ICTR. New arrests and the ICTR's preliminary rulings against transferring cases to Rwanda pushed the tribunal's target date for trial completion into 2009.

At the end of 2008 there were 37 defendants in various stages of litigation before the ICTR, including eight awaiting trial, 22 being tried before the court in nine cases, and seven whose judgments were being appealed. Thirty-five cases have been completed before the ICTR, of which six were acquittals. Thirteen indictees remained at large.

Augustin Ndirabatware, a former Minister of Planning in Rwanda, had been arrested in Frankfurt in September 2007 and was finally transferred to the ICTR in October 2008 to face charges of genocide and crimes against humanity for murder, extermination, and rape. He pleaded not guilty.

A continuing issue of debate for the tribunal is how the situation in the Democratic Republic of Congo (DRC) will impact arresting ICTR fugitives believed to be in eastern DRC. A related issue is securing Kenya's cooperation with the ICTR in capturing Félicien Kabuga, who is believed to have been in the country. On May 23 the United States, together with ICTR Chief Prosecutor Hassan Bubacar Jallow, met with Kenyan Prime Minister Wetangula, urging the Government of Kenya to take more steps urgently to honor international obligations to bring Kabuga to justice. On June 3, 2008, the Secretary-General transmitted a letter to the Security Council from the ICTR prosecutor to the Security Council president requesting it to call on the governments of Kenya and the Democratic Republic of Congo (DRC) to cooperate with the ICTR. The letter also asked the Kenyan police to investigate Félicien Kabuga and to freeze his bank accounts. At a December 12 meeting, ICTR Chief Prosecutor Jallow noted that the Government of Kenya had not demonstrated the political will to pursue Kabuga.

On June 4, 2008, ICTR President Dennis Byron and Chief Prosecutor Jallow briefed the Security Council on the implementation of the tribunal's completion strategy and the safeguarding of its legacy. Byron emphasized the importance of member states' cooperating with the arrest and transfer of fugitives. In this session the United States urged the tribunal to continue to implement its completion strategies to fulfill its ultimate mandate of bringing to justice those responsible for crimes in Rwanda. U.S. Alternate Representative for Special Political Affairs Ambassador DiCarlo stated:

"We note the difficulties that the ICTR faces in transferring the cases of indictees to national jurisdictions and we urge the international community to reaffirm its commitment to strengthening the domestic judicial capacity of Rwanda... We want to stress once again that the fugitive indictees must be brought to justice.... It must be clear to them and to those who support them that such a strategy will not succeed."

The Security Council adopted on December 19, 2008, a Presidential Statement acknowledging the need for a mechanism after the closure of the

ICTR and International Criminal Tribunal for the Former Yugoslavia (ICTY) to carry out a number of essential functions of the tribunals, including the trial of high-level fugitives. The statement indicated that the mechanism should be small, temporary, and efficient; that it would derive its authority from a Security Council resolution; and that it follow from standards and rules of procedure and evidence based on those existing for the ICTY and ICTR.

Throughout 2008 the United States continued to monitor the tribunal to ensure adherence to practices that improve efficiency and effectiveness. The United States contributed \$32.6 million in 2008 to the ICTR.

International Criminal Tribunal for the former Yugoslavia

The International Criminal Tribunal for the former Yugoslavia (ICTY) was established pursuant to Security Council Resolution 808 (1993) to investigate and try individuals accused of committing genocide, crimes against humanity, and other serious violations of international humanitarian law in the territory of the former Yugoslavia.

The apprehension and prosecution at the ICTY of persons indicted for war crimes has long been a critical priority for the United States and the Security Council. The United States strongly urges all entities and states, particularly the Republic of Serbia, to cooperate by apprehending and transferring the remaining two indictees, Ratko Mladic and Goran Hadzic, to the tribunal and freezing the assets and restricting the travel of those who support the fugitive indictees. The United States, along with the European Union, has made clear to authorities in the region that meeting their obligations to the ICTY is a prerequisite for full integration into the Euro-Atlantic family.

The United States continued to support domestic courts in the region in their efforts to adjudicate low- and mid-level war crimes cases and supported the processing of cases that had been transferred from the ICTY to domestic courts. The United States provided direct assistance to domestic judicial mechanisms and promoted regional cooperation among judicial professionals.

The ICTY has indicted 161 individuals, (of those, some died or had indictments withdrawn). Two fugitives, Radovan Karadzic and Stojan Zupljanin, were apprehended in 2008. At the end of 2008, the ICTY was conducting eight simultaneous trials. Of those who appeared before the tribunal, 58 were convicted, 10 acquitted, and 13 were transferred to national courts for prosecution.

Special Court for Sierra Leone

In 2008 the United States continued its strong support for the Special Court for Sierra Leone. The United States played an instrumental role in drafting and negotiating Security Council Resolution 1315 (2000), which called on the Secretary-General to conclude an agreement with the

Government of Sierra Leone to create an independent special court to prosecute persons who bore the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in Sierra Leone since November 30, 1996. The successful completion of the Court's work in 2010 remains a top U.S. priority and a key part of the reconciliation process in war-torn West Africa.

The United States contributed \$12.4 million in 2008 to support the work of the Special Court; it has contributed approximately \$60 million since the Court's creation in 2002 and intends to make additional contributions to ensure that the Court completes its important work. As a major contributor to the Court, the United States sits on the Court's Management Committee. More than 40 other nations also have provided funds to support the Court, which operates on voluntary funding. The United States has welcomed efforts to ensure, through additional contributions, that justice will be served, that impunity will not be tolerated, and that peace and stability can be sustained in Sierra Leone and in the region.

Several milestones were achieved in the Court during 2008. The Appeals Chamber delivered final judgments in the case concerning the Armed Forces Revolutionary Council (AFRC), a group of former soldiers from the Sierra Leonean Army led by Johnny Paul Koroma that overthrew the Government of Sierra Leone in 1997 and subsequently joined forces with the Revolutionary United Front (RUF). Final judgments were also delivered in the case concerning the Civil Defense Force (CDF), a pro-government militia which opposed the RUF-AFRC. Proceedings also finished in the case involving the Revolutionary United Front (RUF), a rebel group that invaded Sierra Leone from Liberia in 1991, allegedly with Charles Taylor's support. At the end of 2008 all that remained in the RUF case was the court's judgment and sentencing, if applicable. Finally, in January the Office of the Prosecutor called its first witness in the Charles Taylor trial. The prosecution's case was still ongoing at the end of the year.

The United States joined the Security Council on August 4th in reiterating its appreciation for the work of the Special Court and its vital contribution to reconciliation, peacebuilding, and the rule of law. The Special Court originally intended to complete its work in 2005 but will likely achieve its revised completion date of 2010.