

**DIGEST OF
UNITED STATES PRACTICE
IN INTERNATIONAL LAW**

2011

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Editor

Office of the Legal Adviser
United States Department of State

Introduction

I am delighted to introduce the annual edition of the *Digest of United States Practice in International Law* for 2011. This volume provides a historical record of developments occurring during calendar year 2011, when the State Department's Office of the Legal Adviser marked its 80th birthday since its creation as a statutory entity.¹ For the first time, the State Department is publishing the official version of the *Digest* exclusively on-line. By publishing the *Digest* on-line, we seek to make U.S. views on international law more quickly and readily accessible to our counterparts in other governments and international organizations, scholars, students, and other users, both within the United States and around the world.

The Arab Awakening presented a variety of challenges for the practice of international law in 2011. In addressing events in Tunisia, Egypt, Libya, Bahrain, and elsewhere, the United States government carefully applied what Secretary of State Hillary Rodham Clinton has called "smart power," utilizing a wide array of foreign policy tools to fit the needs of the particular circumstance. In Libya, the U.S. took a multilateral approach, acting quickly at the UN Security Council to pass historic resolutions that established an arms embargo and sanctions regime and made the first ever unanimous referral to the International Criminal Court. Based on Security Council Resolution 1973's authorization for "all necessary measures" to enforce a no-fly zone, and consistent with the War Powers Resolution, the United States was part of a limited, NATO-led military mission in Libya. Various additional legal issues arose during the U.S. response to the situation in Libya, including those related to securing a protecting power, addressing the situation at the United Nations Human Rights Council, recognizing the new Libyan government, and arranging for funds to be made available to the new government using assets of the former regime that had been frozen pursuant to Security Council resolutions. These issues form a significant part of the discussion in several chapters of the 2011 volume of the *Digest*.

In our approach to counterterrorism, applying smart power has meant a continued commitment to the rule of law. In May 2011, the United States completed a lawful operation that resulted in the death of Usama bin Laden, a legitimate target in our conflict with al-Qaida. The United States continued to pursue other leaders of al-Qaida, while ensuring, consistent with President Obama's direction, that all our actions—even when conducted out of public view—comply with our laws and values. The U.S. government's counterterrorism efforts outside of Afghanistan and Iraq have focused on those individuals who present a significant threat to the United States and whose removal would cause a significant disruption of the plans and capabilities of al-Qa'ida and its associated forces. We have worked to uphold our values and the rule of law in our detention and interrogation policies with regard to terrorism suspects,

¹ Our 80th birthday (eight decades after Congress created the office by statute) actually came in our 163rd year of existence. For a review of L's history, culture, and achievements, delivered at a conference attended by many present and former L attorneys, including eight past and present Legal Advisers, see Harold Hongju Koh, *The State Department Legal Adviser's Office: Eight Decades in Peace and War*, 100 *Georgetown Law Journal* 1747 (2012), available at <http://georgetownlawjournal.org/files/2012/06/Koh.pdf>.

including pursuing prosecution of detainees through Article III courts and reformed military commissions.

In 2011, the United States government repeatedly brought international law to bear in the domestic law context. For example, the Office of the Legal Adviser continued in 2011 to pursue compliance with the International Court of Justice judgment in *Avena*, by promoting legislation—the Consular Notification Compliance Act—and supporting the request for a Supreme Court stay in a death penalty case involving an *Avena* defendant. We encouraged domestic courts to weigh international law and foreign policy considerations with suggestions or statements on behalf of the State Department in cases involving the immunity of foreign officials; cases considering the constitutionality of legislation implementing international treaty obligations; cases challenging U.S. state laws concerning immigration; and cases seeking relief outside of the compensation arrangements the United States agreed to with Germany and Austria for claims arising out of World War II. In our initial *amicus* brief in the U.S. Supreme Court in *Kiobel v. Royal Dutch Petroleum*, we argued that a corporation can be held liable under the Alien Tort Statute for violations of the law of nations. In the *Zivotovsky* case, we asked the Supreme Court to respect our long-standing policy to recognize no state as having sovereignty over Jerusalem as a crucial part of our efforts to further the Middle East peace process.

Negotiating, joining, and implementing treaties and international agreements remained an important part of U.S. efforts to promote international law in 2011. We secured advice and consent to the Mutual Legal Assistance Treaty with Bermuda and the Bilateral Investment Treaty with Rwanda. In October, we used congressional-executive agreements to adopt free trade agreements with the Republic of Korea, Colombia, and Panama. Also in 2011, the United States signed maritime law enforcement cooperation agreements with Senegal, Nauru, Tuvalu, and Gambia and an agreement with the members of the Arctic Council on aeronautical and maritime search and rescue. The United States actively assisted the 17th Session of the Conference of the Parties to the UN Framework Convention on Climate Change in Durban in launching a process to develop an agreement by 2015 that will apply beginning in 2020. The Obama administration also sought Senate advice and consent for several important treaties in 2011, including protocols to two nuclear weapon free zone agreements; an agreement on preventing illegal, unreported, and unregulated fishing; and Additional Protocol II to the 1949 Geneva Conventions, which contains detailed humane treatment standards and fair trial guarantees that apply in the context of non-international armed conflicts.

We continued our active engagement with international bodies that promote greater understanding of customary international law. We commented on and commended the work of the International Law Commission, including its approval of draft articles on the effects of armed conflict on treaties. In 2011, Professor Sean Murphy of the George Washington Law School was elected a Member of the International Law Commission, restoring U.S. membership after several years' absence. We remained a strong supporter of the UN Commission on International Trade Law, which adopted a revised model law on public procurement and a judicial deskbook on cross-border insolvency in 2011.

In the area of human rights, the United States continued its active participation in UN processes to review states' records on human rights, including the record of the United States. I had the privilege of making the U.S. presentation to conclude our first Universal Periodic Review at the Human Rights Council. The United States also submitted its Fourth Periodic Report to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights. Our own report on trafficking in persons included for the first time an

evaluation of U.S. anti-trafficking efforts. We also achieved some milestones in 2011 in promoting Secretary Clinton's human rights agenda, including passage of landmark Human Rights Council resolution 16/18 on combating discrimination based on religion without limiting freedom of expression, following up by hosting the first meeting of the "Istanbul process" for implementing that resolution. The United States also led the way with initiatives and a Human Rights Council resolution to protect the human rights of lesbian, gay, bisexual and transgender persons, which was echoed in Secretary Clinton's landmark speech on that subject before the Council on Human Rights Day 2011. The release of the U.S. National Action Plan on women, peace, and security and passage of a UN General Assembly resolution introduced by the United States on women's political participation further exemplified the U.S. commitment to promoting human rights.

The Office of the Legal Adviser worked closely with colleagues in other bureaus and departments on a broad array of resolutions considered and adopted during the year by the Security Council, the General Assembly, and other UN bodies, including the adoption and implementation of a range of critically important resolutions related to peacekeeping missions and sanctions programs in various countries around the world, including Sudan, Eritrea, Somalia, and Côte d'Ivoire. In April, the Security Council unanimously adopted Resolution 1977, extending the mandate of the 1540 Committee which promotes implementation of member states' obligations under resolution 1540 to enforce effective measures to counter the proliferation of weapons of mass destruction. In November, the United States joined in a successful General Assembly resolution condemning an Iran-supported terrorist plot against the Saudi ambassador to the United States.

As in the past, the *Digest* has been a team effort. Its preparation and publication continue to rely on efforts of many dedicated members of the Office of the Legal Adviser. For 2011, I want especially to thank former editor Elizabeth Wilcox for her outstanding work and gathering materials and beginning the drafting process for many of the chapters of the *Digest*. Her ongoing availability and expertise have ensured a smooth transition for our new, able and dedicated editor, CarrieLyn Guymon. Among the many L attorneys who voluntarily contributed to the current volume are Kevin Baumert, Jay Bischoff, John Blanck, Violanda Botet, Gilda Brancato, Mary Comfort, Maegan Conklin, Daphne Cook, Paul Dean, Hollin Dickerson, Lara Flint, Kimberly Gahan, Katherine Gorove, Peter Guthrie, Julie Herr, Brian Israel, Jessica Karbowski, Ron Katwan, Elizabeth Kiingi, Emily Kimball, Jeff Klein, Richard Lahne, Jennifer Lansidle, Oliver Lewis, Keith Loken, Anna Mansfield, Julie Martin, Samuel McDonald, Patricia McDonough, Kathy Milton, Dana Montalto, Holly Moore, Lorie Nierenberg, Judy Osborne, Patrick Pearsall, Alexandra Perina, Catherine Peters, Meg Pickering, Shawn Pompian, David Pozen, Nisha Prabhu, Sarah Prosser, Sabeena Rajpal, Phillip Riblett, Christine Sanford, Tim Schnabel, Nina Schou, Jeremy Sharpe, Mallory Stewart, David B. Sullivan, Gabriel Swiney, Jesse Tampio, Margaret Taylor, Jeremy Weinberg, and Erik Woodhouse. Their dedication to this, as to so many other tasks, is only one of the many reasons it is such a joy to work at L.

Once again, I express very special thanks to Joan Sherer, the Department's Senior Reference Librarian, Legal, for her invaluable technical assistance. Jerry Drake, the records manager for the Office of the Legal Adviser, provided enthusiastic help in formatting the *Digest* as an electronic publication, for which I am also very grateful. For me, it is an especially great honor to work at such a distinguished international law firm, with such tradition, esprit and commitment. Finally, I especially thank my colleague CarrieLyn Guymon for taking on the

crucial role of Editor for this volume; we all very much look forward to her continuing, outstanding work on this important enterprise.

*Harold Hongju Koh
The Legal Adviser
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Note from the Editor

For the first time, the official version of the *Digest of United States Practice in International Law* for calendar year 2011 is being published exclusively on-line, both on the State Department's website and on the U.S. government's law-related website, law.data.gov. I would like to thank my colleagues in the Office of the Legal Adviser and those in other offices and departments in the U.S. government who make this cooperative venture possible and aided in the timely release of this year's *Digest*.

The 2011 volume follows the general organization and approach adopted in 2000. We rely on the texts of relevant original source documents introduced by relatively brief explanatory commentary to provide context. Some of the litigation related entries do not include excerpts from the court opinions because most U.S. federal courts now post their opinions on their websites. In excerpted material, four asterisks are used to indicate deleted paragraphs, and ellipses are used to indicate deleted text within paragraphs.

Entries in each annual *Digest* pertain to material from the relevant year, although some updates (through the end of May 2012) are provided in footnotes. For example, we note the release of U.S. Supreme Court and other court decisions, as well as other noteworthy developments occurring during the first several months of 2012 where they relate to the discussion of developments in 2011.

Updates on most other 2011 developments, such as the release of annual reports and sanctions-related designations of individuals or entities under U.S. executive orders are not provided, and as a general matter readers are advised to check for updates. This volume also continues the practice of providing cross references to related entries within the volume and to prior volumes of the *Digest*.

As in previous volumes, our goal is to ensure that the full texts of documents excerpted in this volume are available to the reader to the extent possible. For many documents we have provided a specific internet cite in the text. We realize that internet citations are subject to change, but we have provided the best address available at the time of publication. Where documents are not readily accessible elsewhere, we have placed them on the State Department website, at www.state.gov/s/l/c8183.htm.

Other documents are available from multiple public sources, both in hard copy and from various online services. The United Nations Official Document System makes UN documents available to the public without charge at <http://documents.un.org>. For UN-related information generally, the UN's home page at www.un.org also remains a valuable source. Resolutions of the UN Human Rights Council can be retrieved most readily by using the search function on the Human Rights Council's website, at www2.ohchr.org/english/bodies/hrcouncil. Legal texts of the World Trade Organization ("WTO") may be accessed through the WTO's website, at www.wto.org/english/docs_e/legal_e/legal_e.htm.

The U.S. Government Printing Office ("GPO") provides electronic access to government publications, including the Federal Register and Code of Federal Regulations; the Congressional Record and other congressional documents and reports; the U.S. Code, Public and Private Laws,

and Statutes at Large; Public Papers of the President; and the Daily Compilation of Presidential Documents. The Federal Digital System, available at www.gpo.gov/fdsys, is GPO's online site for U.S. government materials.

On treaty issues, this site offers Senate Treaty Documents (for the President's transmittal of treaties to the Senate for advice and consent, with related materials), available at www.gpo.gov/fdsys/browse/collection.action?collectionCode=CDOC, and Senate Executive Reports (for the reports on treaties prepared by the Senate Committee on Foreign Relations), available at www.gpo.gov/fdsys/browse/collection.action?collectionCode=CRPT. In addition, the Office of the Legal Adviser provides a wide range of current treaty information at www.state.gov/s/l/treaty, and the Library of Congress provides extensive treaty and other legislative resources at <http://thomas.loc.gov>.

The U.S. government's official web portal is www.usa.gov, with links to government agencies and other sites; the State Department's home page is www.state.gov.

While court opinions are most readily available through commercial online services and bound volumes, individual federal courts of appeals and many federal district courts now post opinions on their websites. The following list provides the website addresses where federal courts of appeals post opinions and unpublished dispositions or both:

U.S. Court of Appeals for the District of Columbia Circuit:

www.cadc.uscourts.gov/bin/opinions/allopinions.asp;

U.S. Court of Appeals for the First Circuit:

www.ca1.uscourts.gov/?content=opinions/main.php;

U.S. Court of Appeals for the Second Circuit:

www.ca2.uscourts.gov/opinions.htm;

U.S. Court of Appeals for the Third Circuit:

www.ca3.uscourts.gov/indexsearch/archives.asp;

U.S. Court of Appeals for the Fourth Circuit:

<http://pacer.ca4.uscourts.gov/opinions/opinion.htm>;

U.S. Court of Appeals for the Fifth Circuit:

www.ca5.uscourts.gov/Opinions.aspx;

U.S. Court of Appeals for the Sixth Circuit:

www.ca6.uscourts.gov/opinions/opinion.php;

U.S. Court of Appeals for the Seventh Circuit:

www.ca7.uscourts.gov/fdocs/docs.fwx?dname=opinion (opinions) and

www.ca7.uscourts.gov/fdocs/docs.fwx?dname=disp (nonprecedential dispositions);

U.S. Court of Appeals for the Eighth Circuit:

www.ca8.uscourts.gov/opns/opFrame.html;

U.S. Court of Appeals for the Ninth Circuit:

www.ca9.uscourts.gov/opinions/ (opinions) and

www.ca9.uscourts.gov/memoranda/ (memoranda and orders—unpublished dispositions);

U.S. Court of Appeals for the Tenth Circuit:

www.ca10.uscourts.gov/clerk/opinions.php;

U.S. Court of Appeals for the Eleventh Circuit:

www.ca11.uscourts.gov/opinions/index.php;

U.S. Court of Appeals for the Federal Circuit:

www.ca9c.uscourts.gov/index.php?option=com_reports&view=report&layout=search&Itemid=12.

The official U.S. Supreme Court website is maintained at www.supremecourtus.gov. The Office of the Solicitor General in the Department of Justice makes its briefs filed in the Supreme Court available at www.usdoj.gov/osg.

Many federal district courts also post their opinions on their websites, and users can access these opinions by subscribing to the Public Access to Electronic Records (“PACER”) service.

Some district courts post all of their opinions or certain notable opinions without requiring users to register for PACER first. For example, the U.S. District Court for the District of Columbia posts its opinions on its website at www.dcd.uscourts.gov/dcd.

Other links to individual federal court websites are available at www.uscourts.gov/links.html.

Selections of material in this volume were made based on judgments as to the significance of the issues, their possible relevance for future situations, and their likely interest to government lawyers, especially our foreign counterparts; scholars and other academics; and private practitioners.

As always, we welcome suggestions from those who use the *Digest*.

CarrieLyn D. Guymon