International Courts and Tribunals

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This article reviews and summarizes significant developments in 2004 concerning international courts and tribunals, particularly events relating to the International Court of Justice, the United Nations Compensation Commission, the Iran-U.S. Claims Tribunal, and the Claims Resolution Tribunal. Significant developments relating to the International Criminal Court, the International Criminal Tribunals for the former Yugoslavia and for Rwanda, proposed additional *ad hoc* international criminal tribunals, the International Tribunal for the Law of the Sea, and the World Trade Organization dispute settlement system and other trade dispute settlement systems are detailed in other articles in this issue.

I. International Court of Justice[1]

The International Court of Justice (the Court or ICJ) is the principal judicial organ of the United Nations (U.N.). The ICJ's jurisdiction is two-fold: to deliver judgments in contentious cases submitted to it by sovereign states, and to issue non-binding advisory opinions at the request of certain U.N. organs and agencies. During 2004, the ICJ's fifty-eighth year since its inaugural sitting on April 18, 1946, the Court decided eight contentious cases pursued by Serbia and Montenegro against NATO member states arising out of NATO's military action in Kosovo.[2] The Court delivered its judgment in a ninth conten-

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1. All International Court of Justice decisions, pleadings, and other documents cited in this section are available at the Court's Web site: http://www.icj-cij.org.

2. *See* Legality of Use of Force (Serb. & Mont. v. Belg.), 2004 I.C.J. 15 (Dec. 15); Legality of Use of Force (Serb. & Mont. v. Can.), 2004 I.C.J. 106 (Dec. 15); Legality of the Use of Force (Serb. & Mont. v. Fr.), 2004

tious case, which involved breaches by the United States of the consular notification provisions of the Vienna Convention on Consular Relations,[3] and rendered an advisory opinion in response to the request of the General Assembly in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.*[4] At the close of 2004, thirteen contentious cases and no requests for advisory opinions were pending.[5] One new contentious case was docketed in 2004.[6] The Court also amended certain aspects of its procedural practice in an effort to further increase its productivity. This section reports briefly on each of these activities as well as the Court's General List and composition at year-end.

A. Contentious Cases During 2004

1. *Avena and Other Mexican Nationals (Mexico v. United States)*

On March 31, 2004, the Court ruled that the United States had violated certain international legal rights pertaining to consular assistance under the Vienna Convention on Consular Relations of 24 April 1963 (Vienna Convention or the Convention)[7] of Mexico and of Mexican nationals facing state death penalty sentences in the United States. The Court ordered the United States to remedy the situation by providing, through means of its own choosing, review and reconsideration of the convictions and sentences of the detainees in question.[8]

Mexico filed its application in January 2003, alleging violations of the Vienna Convention, articles 5 and 36, during the U.S. criminal proceedings of fifty-two Mexican citizens (originally fifty-four), all of whom were sentenced to death.[9] Mexico claimed that at the time of arrest, these individuals were Mexican citizens, a fact of which the arresting and

I.C.J. 107 (Dec. 15); Legality of the Use of Force (Serb. & Mont. v. F.R.G.), 2004 I.C.J. 108 (Dec. 15); Legality of the Use of Force (Serb. & Mont. v. Italy), 2004 I.C.J. 109 (Dec. 15); Legality of the Use of Force (Serb. & Mont. v. Neth.), 2004 I.C.J. 110 (Dec. 15); Legality of the Use of Force (Serb. & Mont. v. Port.), 2004 I.C.J. 111 (Dec. 15); Legality of the Use of Force (Serb. & Mont. v. U.K.), 2004 I.C.J. 113 (Dec. 15), *available at* http://www.icj-cij.org/icjwww/idecisions.htm.

3. *See* Avena and Other Mexican Nationals (Mexico v. U.S.), 2004 I.C.J. 104 (Mar. 31), *available at* http://www.icj-cij.org/icjwww/idecisions.htm.

4. *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 131 (July 9), *available at* http://www.icj-cij.org/icjwww/idecisions.htm.

5. List of Contentious Cases by Country, International Court of Justice (webpage listing contentious cases heard before the International Court of Justice from 1946 to the present), *available at* http://www.icj-cij.org/icjwww/idecisions/icasesbycountry.htm (last visited June 20, 2005).

6. *See* Maritime Delimitation in the Black Sea (Rom. v. Ukr.), *available at* http://www.icj-cij.org.

7. *See* Vienna Convention on Consular Relations and Optional Protocols on Disputes, Apr. 24, 1963, 596 U.N.T.S. 262, 21 U.S.T. 77, *available at* http://www.un.org/law/ilc/texts/consul.htm [hereinafter Vienna Convention or the Convention].

8. *See Avena.* The U. S. Supreme Court has granted *certiorari* in the *habeus corpus* appeal of one of the Mexican nationals whose rights were adjudicated in *Avena.* The petition raised the issue of the ICJ opinion's impact on domestic law insofar as lower federal courts have declined to entertain the merits of petitioner's Vienna Convention claim based on the application of the procedural default rule. *See also* Medellin v. Dretke, 125 S. Ct. 686 (U.S. 2005). (As discussed below, the ICJ determined that application of the procedural default rule would not satisfy the sort of judicial review that U.S. obligations under international law impose.) An opinion is expected from the Supreme Court by early July 2005.

9. *Avena*, ¶¶ 12, 13, 19-21. Mexico's application (and the ICJ opinion that would follow) relied significantly on the Court's first case involving notification obligations under the Vienna Convention. *See* LaGrand Case (F.R.G v. U. S.), 2001 I.C.J. 104 (June 27), *available at* http://www.icj-cij.org/icjwww/idecisions.htm. *See also* Daryl A. Mundis & Mark B. Rees, *International Courts and Tribunals*, 36 Int'l Law 549, 551-52 (2002).

interrogating authorities should have reasonably been aware. Nevertheless, the authorities failed, according to Mexico, to inform these individuals of their rights, under the Vienna Convention, to seek and obtain consular assistance from their home State, or failed to do so "without delay" as is required by the Convention.[10] Mexico further claimed that the authorities failed to inform Mexican consular authorities, in due time, of the detention of and criminal proceedings instituted against these nationals, which consequently impeded Mexico from communicating with, having access to, visiting, rendering consular assistance to, and arranging legal representation of the detainees in a timely fashion.[11]

Most of the individuals concerned were at various stages of legal proceedings at the state or federal level, but three of the detainees had exhausted all appeals. Concerning these last detainees, Mexico, when filing the application, also requested that the Court indicate provisional measures. The Court, finding that those three persons were at risk of execution, perhaps within weeks, promptly ordered the United States to take all measures necessary to ensure that these three individuals would not be executed pending final judgment in the case.[12]

The U.S. presented four objections to the jurisdiction of the Court and five objections to the admissibility of the Mexican claims. Mexico objected to the admissibility of the U.S. challenges. The Court dismissed all of these objections.[13]

On the merits, the Court first examined the right of a detainee to consular information under article 36, ¶ 1(b), of the Vienna Convention. Two major issues were raised in this context: the nationality of the detainees and the meaning of the words "without delay" as used in the last sentence of the subparagraph.[14]

The Court found that the United States was in breach of this subparagraph by not informing, without delay, fifty-one of fifty-two of the Mexicans of their rights.[15] This finding was based on the conclusion that Mexico had met its burden of proof regarding the nationality of the fifty-two detainees and that the United States had not met its burden of proof to support its claim that a substantial number were of dual (Mexican and U.S.) nationality. Hence, the Court concluded that article 36, paragraph 1(b), applied on its face to each of the fifty-two detainees.[16]

Regarding the meaning of "without delay," the Court held that, although this language does not necessarily mean "immediately upon arrest," or "prior to an interrogation," the

10. *See* Vienna Convention, *supra* note 7, art. 36, ¶ 1(b).

11. *See id.*

12. *See* Nancy A. Combs et al., *International Courts and Tribunals*, 38 INT'L LAW. 451, 458-59 (2004). The death sentence of one of the three detainees, Osvaldo Torres, was commuted to a sentence of life without the possibility of parole by Governor Brad Henry of Oklahoma on May 13, 2004. *See also* Press Release, Office of Governor Brad Henry, Gov. Henry Grants Clemency to Death Row Inmate Torres, *available at* http://www.governor.state.ok.us/display_article.php?article_id=301&article_type=1. The decision came after the state Pardon and Parole Board voted to recommend clemency for Torres. Governor Henry noted that, in his careful and thorough review of the case, he took into consideration the Vienna Convention issues raised. *See id.*

13. *Avena*, ¶¶ 22-47, 153(1)-(3).

14. *Id.* ¶ 50. The sentence reads: "The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph."

15. Id. ¶ 153(4) (14-1 vote). Dissenting Judge Parra-Aranguren voted against this subparagraph of the disposition (and the three that follow) out of dissatisfaction with the conclusion that Mexico had met its burden of proof as to the nationality of the detainees. *See id.* (Separate opinion of Judge Parra-Aranguren).

16. *Id.* ¶¶ 53-57.

information must be given "once it is realized that the person arrested is a foreign national, or once there are grounds to think that the person is probably a foreign national."[17] In one of the fifty-two cases, the detainee, upon arrest, had informed authorities that he was a U.S. citizen, and there was no evidence in the record that would have triggered a reasonable belief to the contrary. Accordingly, the Court found that Mexico failed to prove a violation of the Vienna Convention as to this detainee. With respect to the other fifty-one, the issue of timeliness of notification was material in only four cases—forty-seven detainees having received no information at all. As to these four, the Court examined the evidence surrounding each notification and concluded that under the circumstances, the authorities had not acted in a timely fashion. Consequently, the Court found that the United States had violated its notification obligations under this provision of the Vienna Convention with respect to fifty-one of the fifty-two Mexicans.[18]

Regarding the rights of the sending State under article 36, paragraph 1, of the Convention,[19] the Court found that the United States had deprived Mexico of the right to render consular assistance to forty-nine of the individuals in a timely fashion,[20] of the right to communicate with forty-nine of the detainees and to have access to and visit them in detention,[21] and of the right to arrange for legal representation of thirty-four individuals in a timely fashion.[22] For these reasons, the United States was found to have breached the corresponding parts of article 36, paragraph 1 (a)-(c).

In addition, the Court held that the United States was in breach of article 36, paragraph 2, of the Convention by not performing review and reconsideration[23] of the convictions and sentences of the three detainees who had exhausted legal remedies and for whom violations of the right to consular information and assistance had been established; for the other forty-nine, there remained the possibility of review. The Court rejected the U.S. argument that the review and reconsideration requirement was met by application of the "procedural default rule," which generally operates to bar the raising of an issue on appeal not first raised at trial. The failure of the appropriate authorities to meet the Convention's notification obligations may have precluded counsel from being in a position to raise the question of the violation of the Vienna Convention at trial. The Convention's violation and the possible prejudice it caused to the particular conviction and sentence must be fully examined and taken into account in the review process in order for the United States to satisfy its international obligations. The Court quoted approvingly from *LaGrand*, in which it held that, as applied, "the procedural default rule prevented counsel . . . to effectively challenge their convictions and sentences other than on United States constitutional grounds."[24]

The Court next determined that the legal consequences for the United States mandated reparation in an adequate form.[25] With respect to the convictions and sentences of Mexican

17. *Id.* ¶ 63.
18. *Id.* ¶¶ 87-90.
19. *Id.* ¶¶ 91-107.
20. *Id.* ¶ 153(5) (by a vote of 14-1).
21. *Id.* ¶ 153(6) (by a vote of 14-1).
22. *Id.* ¶ 153(7) (by a vote of 14-1).
23. *Id.* ¶ 153(8) (by a vote of 14-1).
24. *Id.* ¶ 112 (quoting from *LaGrand* at ¶ 91).
25. *Id.* ¶ 115-150.

nationals for which violations of article 36, paragraph 1, of the Convention were established, such reparation was held to be the obligation by the United States to provide, by means of its own choosing, review and reconsideration of those convictions and sentences.[26] The Court rejected the U.S. argument that executive clemency procedures were sufficient in themselves for carrying out the requisite review and reconsideration; instead, finding that such review and reconsideration should take place in the context of the defendant's judicial proceedings, and may be supplemented by the clemency process.[27]

Finally, the Court held unanimously that the U.S. efforts to encourage implementation of its obligations under the Vienna Convention met Mexico's request for guarantees and assurances of non-repetition.[28] Nevertheless, should instances occur in which Mexican nationals are sentenced to severe penalties and their rights to consular information and assistance under the Convention have been violated, this should, according to the unanimous opinion of the Court, be remedied by review and reconsideration of such convictions and sentences by the United States, through means of its own choosing.[29] The Court added that its conclusions would apply to foreign nationals other than Mexicans in similar situations in the United States.[30]

2. *Legality of Use of Force (Serbia and Montenegro v. Belgium) (Serbia and Montenegro v. Canada) (Serbia and Montenegro v. France) (Serbia and Montenegro v. Germany) (Serbia and Montenegro v. Italy) (Serbia and Montenegro v. Netherlands) (Serbia and Montenegro v. Portugal) (Serbia and Montenegro v. United Kingdom)*

The Court decided the remaining cases pursued against NATO member states arising out of the military intervention by NATO in Kosovo in the spring of 1999.[31] The applications were filed by the Federal Republic of Yugoslavia (FRY), which, in 2003, changed its name to Serbia and Montenegro. The applications alleged, inter alia, illegal use of force, violation of the non-intervention principle, violation of the sovereignty of another State, and genocide. On December 15, 2004, the Court decided in each case that it had no jurisdiction to entertain the claims.

In the case of Belgium,[32] Serbia and Montenegro asserted jurisdiction based on article 36, 2, of the Statute of the Court (the Statute), article IX of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 (Genocide Convention), and article 4 of the Convention of Conciliation, Judicial Settlement and Arbitra-

26. *Id.* ¶ 153(9) (by a vote of 14-1). The obligation extended to the three detainees who had otherwise exhausted all appeals. *Id.* ¶ 152. As noted above, the sentence of one of the three was commuted to life in prison a short time later. *Id.* ¶¶ 22-47, 153(1)-(3).

27. *Id.* ¶ 143.

28. *Id.* ¶ 153(10)-(11).

29. *Id.*

30. *Id.* ¶ 151.

31. The cases against Spain and the United States were removed from the List of the Court in 1999 for manifest lack of jurisdiction. *See* Legality of Use of Force (Yugoslavia v. Spain) 1999 I.C.J. 112 (Request for the Indication of Provisional Measures Order of June 2, 1999); *see also* Legality of the Use of Force (Yugoslavia v. U.S.), 1999 I.C.J. 114 (Request for the Indication of Provisional Measures Order of June 2, 1999), *available at* http://www.icj-cij.org/icjwww/idecisions.htm.

32. Legality of Use of Force (Serb. & Mont. v. Belg.), 2004 I.C.J. 105 (Dec. 15), *available at* http://www.icj-cij.org/icjwww/idecisions.htm.

tion between the Kingdom of Yugoslavia and Belgium, which entered into force on September 3, 1930 (1930 Convention).[33]

At the outset, in response to the initial issues raised by Belgium and others regarding whether Serbia and Montenegro no longer supported the applications, and thus whether its claims were invalid (thereby warranting a dismissal *in limine litis*), the Court concluded that Serbia and Montenegro had not withdrawn its claims and instead had specifically sought a determination from the Court on the preliminary objections.[34]

The Court then addressed the issue of whether Serbia and Montenegro (through the FRY) properly filed the application as a Member State of the United Nations in 1999. The Court acknowledged that the legal status of the FRY was ambiguous in the 1990s;[35] FRY's admission as a Member State to the U.N. in 2000 clarified the situation. Since such membership did not have retroactive force, the FRY was not a Member State of the U.N. in 1999 when it filed the application. Hence, the Court was not open to it under article 35, paragraph 1, of the Statute.[36]

Under article 35, paragraph 2 of the Statute, the Court is open to non-Member States, "subject to the special provisions contained in treaties in force," on conditions to be determined by the Security Council.[37] The Court came to the conclusion, relying inter alia on the purpose of the provision (it was not intended to allow States, not parties to the Statute, to obtain access to the Court by simply concluding a treaty to that effect) and the *travaux préparatoire* of the Statute, that the quoted provision of the Statute refers to treaties in force at the time of enactment of the Statute.[38] Therefore, since the Genocide Convention entered into force after the ratification of the Statute, jurisdiction could not be based on it.[39]

Finally, the Court held that since the 1930 Convention—even though it entered into force prior to the Statute—refers to the Permanent Court of Justice, the predecessor of the ICJ, and since no transfer of jurisdiction could be read into article 35, paragraph 2, of the Statute, there was no jurisdiction based on the 1930 Convention.[40] In conclusion, the Court held that it had no jurisdiction to entertain the claims made by Serbia and Montenegro.[41]

In the cases concerning Canada, Portugal, the Netherlands, and the United Kingdom, Serbia and Montenegro argued that jurisdiction should be based on the Genocide Convention and on article 36, paragraph 2, of the Statute. In the cases concerning Germany, Italy, and France, the Genocide Convention was invoked, together with article 38, paragraph 5, of the Rules of Court. Applying the same reasoning as in the case against Belgium, discussed above, the Court found that it lacked jurisdiction to hear these cases.

B. Advisory Opinions During 2004: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)

The Court issued its advisory opinion on July 9, 2004, responding on the merits to the following request put to it by the General Assembly:

33. *Id.* ¶¶ 1, 7.
34. *Id.* ¶¶ 25-44.
35. *Id.* ¶¶ 64, 73.
36. *Id.* ¶¶ 79, 91.
37. *Id.* ¶ 92.
38. *Id.* ¶ 113.
39. *Id.* ¶ 114.
40. *Id.* ¶ 126.
41. *Id.* ¶ 129.

> What are the legal consequences arising from the construction of the wall being built by Israel, the occupying power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?[42]

The Court unanimously determined that it had jurisdiction to entertain the question.[43] The Court found that the General Assembly was competent to make the request under the Charter, notwithstanding the Security Council's engagement with Middle East peace issues.[44] It further found that the request was framed in terms of law and raised problems of international law and was thus of a legal character and not purely abstract. Moreover, the Court reasoned, the nature of the motives behind the question or its possible political implications were considerations not relevant to the establishment of jurisdiction.[45] By fourteen votes to one, the Court further found no "compelling" reason to exercise its discretionary power to decline to respond as to the merits.[46] The Court stated that the question presented is one of "acute concern" to the United Nations, because it holds "a much broader frame of reference than a bilateral dispute," and that, notwithstanding Israel's non-participation with respect to the merits, the information and evidence presented in the advisory proceedings afforded a sufficient basis upon which to render an opinion.[47]

Turning to the merits, the Court reviewed the history and status of the territory, highlighting inter alia the so-called "Green Line," the demarcation line between Israeli and Arab forces fixed in the general armistice agreement concluded between Israel and Jordan following the 1948-1949 hostilities.[48] During the armed conflict between Israel and Jordan, in 1967, Israel occupied the territories situated between the Green Line and the former eastern boundary of Palestine. Under customary international law, the Court stated, Israel was thus an occupying power in occupied territories, a legal status that subsequent events have not altered.[49]

The Court then reviewed, based upon information supplied by the Secretary General, the works in these territories that Israel had constructed, or planned to construct, and that

42. G.A. Res. ES-10/14, U.N. GAOR., 10th Emergency Spec. Sess., Agenda Item 5, U.N. Doc. A/ES-10/L.16 (2003). The request was set out in General Assembly resolution A/RES/ES-10/14, adopted on December 8, 2003, (ninety votes in favor, eight against, and seventy-four abstentions), at the 23rd Meeting of the Resumed Tenth Emergency Special Session. The Court's advisory opinion is accompanied by six separate opinions (Judges Koroma, Higgins, Kooijmans, Al-Khasawneh, Elaraby, and Owada) and one declaration (Judge Buergenthal).

43. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 131, ¶ 163(1) (July 9), *available at* http://www.icj-cij.org/icjwww/idecisions.htm.

44. *Id.* ¶¶ 13-35.

45. *Id.* ¶¶ 36-42.

46. *Id.* ¶¶ 43-65, 163(2). Judge Buergenthal departed from his colleagues on the ground that the Court lacked sufficient information and evidence to render the requested advisory opinion. The absence of the requisite factual basis in his view vitiates the Court's sweeping findings on the merits that follow, and his declaration also contains criticism of certain specific aspects of the legal rationale offered by the Court in support of ultimate conclusions. *See id.* (declaration of Judge Burgenthal). (Other judges write separately to express different approaches to the general treatment of the issues once jurisdiction is joined. *See, e.g., id.* (separate Opinions of Judges Higgins and Owada).

47. *Id.* ¶¶ 50, 58.

48. *Id.* ¶ 72. This line, the Court noted, was fixed without prejudice to future territorial settlements or boundary lines or claims of either party.

49. *Id.* ¶¶ 70-78.

were the subject of the advisory opinion request.[50] The "wall" under consideration, the Court noted, is a construction complex not to be understood in a limited physical sense.[51] The complex largely consists of a fence with electronic sensors, a ditch up to four meters deep, a two-lane asphalt patrol road, a trace road paralleling the fence, and six coils of barbed wire marking the perimeter of the complex.[52] The width of the complex is generally between fifty and seventy meters, although it increases at points to one-hundred meters, and the planned 180 kilometers of complex included 8.5 kilometers of concrete wall at the time of the Secretary General's original report.[53] Approximately 975 square kilometers would lie between the Green Line and the wall under the planned route, home to 237,000 Palestinians, with another 160,000 living in almost completely encircled communities.[54] Nearly 320,000 Israeli settlers would live in this area, most in East Jerusalem.[55] The wall is also accompanied by a new administrative regime regulating the movement of Palestinians within certain parts of the area.[56]

Israel has contended, in other fora, that the sole purpose of the wall (Israel prefers the term "fence") is to enable Israel to effectively combat terrorist attacks launched from the West Bank, that it will be removed when it is no longer necessary, and that it does not alter the legal status of the territory.[57] Following an analysis of the rules and principles of international law relevant to the request,[58] the Court concluded, however, that the construction of the wall and its associated regime create a "fait accompli" on the ground that it could well become permanent and, thereby, amount to an illegal *de facto* annexation.[59] In addition, the wall gives expression to the settlements in the occupied territory, whose establishment, the Court, found contravenes international law and Security Council resolutions, and risks further alteration to the demographic composition in the area.[60] Thus, in the Court's view, the wall impedes the exercise by the Palestinian people of its right to self-determination, and constitutes a breach of Israel's obligation to respect that right.[61]

The Court further found breaches of obligations under international humanitarian law and human rights instruments. Specifically, the construction of the wall has led to the destruction or requisition of properties under conditions that violate articles 46 and 52 of the Hague Regulations of 1907 and article 53 of the Fourth Geneva Convention.[62] The wall and its associated regime also impede the liberty of movement of Palestinians in the occupied territory, in violation of the International Covenant on Civil and Political Rights (ICCPR), article 12, paragraph 1.[63] By harming agricultural production and impairing ac-

50. *Id.* ¶ 79-85.
51. *Id.* ¶ 67. The Court noted that the terms "fence" and "barrier" were not more accurate descriptors of the complex, and thus chose to apply the terminology used in the request.
52. *Id.* ¶ 82.
53. *Id.*
54. *Id.* ¶ 84.
55. *Id.*
56. *Id.* ¶¶ 82, 84-85.
57. *Id.* ¶ 116.
58. *Id.* ¶¶ 86-114. The Court determined among other things that international humanitarian law and human rights law apply to Israeli acts in the occupied territory.
59. *Id.* ¶ 121.
60. *Id.* ¶ 115.
61. *Id.* ¶¶ 120-122.
62. *Id.* ¶ 132.
63. *Id.* ¶ 134.

cess to health services, educational establishments, and primary sources of water, the wall and its regime impede rights proclaimed in the International Covenant on Economic, Social and Cultural Rights, and the United Nations Convention on the Rights of the Child.[64] Finally, by contributing to demographic changes, the wall and its associated regime also violate article 49, paragraph 6, of the Fourth Geneva Convention and Security Council resolutions.[65]

The Court noted that international humanitarian law provides for consideration of military exigencies in certain circumstances and that human rights conventions, including the ICCPR, authorize the derogation by a State of certain obligations under various conditions. Based on the materials before it, however, the Court was of the view that the course chosen for the wall was not necessary to attain Israel's security objectives and that the grave infringements of rights of Palestinians residing in the territory occupied by Israel are not justified by requirements of national security or public order.[66]

Finally, the Court concluded that Israel may not rely on a right of self-defense or on a state of necessity in order to excuse the wrongfulness of the construction of the wall. According to the Court, article 51 of the Charter has no relevance here.[67] Article 51, the Court stated, recognizes the existence of an inherent right of self-defense in the case of "armed attack by one State against another State."[68] The Court noted, however, that Israel does not claim that the attacks against it were imputable to a foreign State. Moreover, Israel exercises control in the occupied territory and conceded that the threat originated within, not outside, that territory.[69] With respect to a state of necessity, the Court noted that Israel had the right (and duty) to respond to the numerous indiscriminate and deadly acts of violence against its civilian population to protect the life of its citizens.[70] Such measures, it added, must nonetheless be in conformity with international law and, based on the record before it, the Court stated that it was not convinced that the construction of the wall along the route chosen was the only means to safeguard Israel's interests under the circumstances.[71] Accordingly, the Court found, by a vote of fourteen to one, that the construction of the wall, and its associated regime, were contrary to international law.[72]

The Court then addressed the legal consequences of its findings. With respect to Israel, the Court found an obligation to cease the works of construction of the wall, to dismantle that which is already built, and to repeal all legislative and regulatory acts relating to the wall. Further, Israel is under an obligation to make reparation for all damage caused by the construction of the wall.[73] With respect to other States, the Court found an obligation not

64. *Id.*
65. *Id.* ¶¶ 123-134.
66. *Id.* ¶¶ 135-137.
67. *Id.* ¶ 139.
68. *Id.*
69. *Id.*
70. *Id.* ¶ 141.
71. *Id.* ¶¶ 140-141.
72. *Id.* ¶ 163(3)(A). Judge Buergenthal dissented, as noted above, and the separate opinions depart in certain respects from the reasoning offered in support of this subparagraph of the disposition. For example, Judges Higgins and Kooijmans disassociated themselves from the Court's finding of a violation of the right of self-determination or the obligation to respect that right, and Judge Higgins (with Judge Buergenthal) did not join the Court's analysis of art. 51 of the Charter. Other judges wrote separately to amplify aspects of the Court's reasoning. *See, e.g. id.* (separate opinions of Judges Koroma, Al-Khasawneh, and Elaraby).
73. *Id.* ¶¶ 149-153, 163(3)(B)-(C) (votes of 14-1).

to recognize the illegal situation resulting from construction of the wall and not to render aid or assistance in maintaining that situation.[74] In addition, all States party to the Fourth Geneva Convention, relative to the Protection of Civilian Persons in Time of War of 12 August 1949, are under an obligation, while respecting the Charter and international law, to insure compliance by Israel with international humanitarian law as embodied in that Convention.[75] Finally, the Court stated that the United Nations (notably the General Assembly and Security Council), taking into account the Court's advisory opinion, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated regime.[76]

C. New Cases During 2004: Maritime Delimitation in the Black Sea (Romania v. Ukraine)

Romania filed its application on September 16, 2004,[77] asking that the Court determine the single maritime boundary between the two parties in the Black Sea and, thereby, delimit the continental shelf and the exclusive economic zones of each. Romania premises jurisdiction on the disputes provision of an agreement between the parties that vested jurisdiction in the Court if certain criteria were met, including the entry into force of the Treaty on Romanian-Ukrainian State Border Regime, and the failure of negotiations to resolve this maritime boundary dispute in a "reasonable period of time," not to exceed two years.[78]

D. General List

As of December 31, 2004, the General List of ICJ cases was composed as follows: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*; *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*; *Ahmadou Sadio Diallo (Guinea v. Congo)*; *Armed Activities on the Territory of the Congo (Congo v. Uganda)*; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia and Montenegro)*; *Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*; *Certain Property (Liechtenstein v. Germany)*; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*; *Frontier Dispute (Benin/Niger)*; *Armed Activities on the Territory of the Congo (New Application: 2002) (Congo v. Rwanda)*; *Certain Criminal Proceedings in France (Congo v. France)*; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*; and *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*.[79]

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74. *Id.* ¶ 159.

75. *Id.* ¶¶ 154-159, 163(3)(D). With Judge Kooijmans joining Judge Burgenthal in voting against, the vote on this subparagraph of the disposition was thirteen to two. While voting in favor, Judge Higgins lent her view that the specified consequence for the identified legal violations, contrary to the Court's analysis, has nothing to do with the concept of *erga omnes*.

76. *Id.* ¶¶ 160, 163(3)(E) (vote of 14-1).

77. Press Release, International Court of Justice 2004/31, Romania Brings a Case Against Ukraine to the Court in a Dispute Concerning the Maritime Boundary Between the Two States in the Black Sea (Sept. 16, 2004).

78. Application Instituting Proceedings on Behalf of the Government of Romania, Maritime Delimitation in the Black Sea (Romania v. Ukraine), ¶¶ 1, 4-6, 11 (Sept. 13, 2004), *available at* http://www.icj-cii.org.

79. *See* Current Docket of the Court, International Court of Justice, *available at* http://www.icj-cii.org (last visited May 20, 2005).

E. Procedural Initiatives

As part of its ongoing review of procedures and working methods, the Court announced the adoption of various additional measures to accelerate the disposition of cases before it. As a matter of practice, it will shorten the interval between the close of written proceedings and the opening of oral proceedings.[80] It also clarified that the four-month period for a party to respond to preliminary objections runs from the date of the filing of those objections.[81] In addition, the Court promulgated three new practice directions (bringing the total to twelve). Practice Direction X requests that agents of the parties attend, "as early as possible," any meeting on a procedural issue deemed necessary by the President of the Court.[82] Practice Direction XI limits parties by directing them not to address the merits of a dispute beyond that which is absolutely necessary in any hearing on the indication of provisional measures.[83] Finally, Practice Direction XII prescribes procedures regarding written submissions of international non-governmental organizations in advisory proceedings before the Court.[84]

F. Composition of the Court

As of December 31, 2004, the Court was composed as follows: Shi Jiuyong (China), President; Raymond Ranjeva (Madagascar), Vice-President; Gilbert Guillaume (France);[85] Abdul G. Koroma (Sierra Leone); Vladlen S. Vereshchetin (Russian Federation); Rosalyn Higgins (United Kingdom); Gonzalo Parra-Aranguren (Venezuala); Pieter H. Kooijmans (Netherlands); Francisco Rezek (Brazil); Awn Shawkat Al-Khasawneh (Jordan); Thomas Buergenthal (United States); Nabil Elaraby (Egypt); Hisahi Owada (Japan); Bruno Simma (Germany); and Peter Tomka (Slovakia).

II. United Nations Compensation Commission

The United Nations Compensation Commission (UNCC), a subsidiary organ of the United Nations Security Council, was established by the Security Council at the end of the Gulf War in 1991 to pay compensation to foreign governments, nationals, and corporations for "any direct loss, damage, . . . or injury . . . as a result of Iraq's unlawful invasion and occupation of Kuwait."[86] The processing of claims will only be completed after the Gov-

80. Press Release, International Court of Justice 2004/30, The International Court of Justice Takes Measures for Increasing Productivity (July 30, 2004), *available at* www.icj-cii.org.

81. International Court of Justice, Practice Directions, Practice Direction V (as amended on July 30, 2004) *available at* http://www.icj-cij.org.

82. International Court of Justice, Practice Directions, Practice Direction X, *available at* http://www.icj-cij.org (last visited June 20, 2005).

83. *Id.*

84. *Id.*

85. In November 2004, Judge Guillaume, whose term is scheduled to expire in 2009, announced that he would resign from the bench effective February 11, 2005. The Security Council and General Assembly are scheduled to elect his successor on February 15, 2005. *See* Press Release, International Court of Justice 2004/33, Judge Gilbert Guillaume, Former President of the Court, Will Resign as a Member of the Court as of February 2005 (Nov. 10, 2004), *available at* http://www.icj-cii.org.

86. S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg., para. 16, U.N. Doc. S/RES/687 (1991). For an overview of the structure and jurisdiction of the UNCC, see the UNCC website: http://www.unog.ch/uncc (last visited May 21, 2005).

erning Council, comprised of the membership of the Security Council and typically meeting four times in a year, has approved the recommendations contained in the final reports. In 2004, there were indications that the process is coming to an end. More Commissioner panels concluded their work and, in turn, the Secretariat that services those panels continued to shrink in size. In 2003, the Commission's Governing Council considered and approved a total of twenty-six reports and recommendations of Panels of Commissioners, compared to only twelve in 2004.

By the end of 2004, which marked ten years since the Governing Council approved the first panel reports and recommendations, the Commission has awarded compensation of approximately U.S. $51.8 billion, out of which approximately U.S. $18.8 billion "has been made available to Governments and international organizations for distribution to successful claimants in all categories of claims."[87]

A. Payment of UNCC Awards

The United Nations Compensation Fund (the Fund), administered by the UNCC, is the source of the payment of UNCC awards. Presently, pursuant to Security Council Resolution 1483, the Fund receives 5 percent of all export sales of petroleum, petroleum products, and natural gas from Iraq.[88] Prior to that Resolution, funds were made available to the Fund under the oil for food mechanism established by Security Council resolution 986 and subsequent resolutions.[89] Between 1995 and 2000, the Fund received 30 percent of the revenue derived from sales of Iraqi petroleum and petroleum products; the percentage was reduced to 25 percent by Security Council Resolution 1330.[90]

At its fifty-second session, concluded in July 2004, the Council adopted decision 227, thereby continuing the application of its decision 197 of June 2003, which had established a temporary payment mechanism in light of the reduction in the Fund's income, following the adoption of Security Council resolution 1483.[91] Under this temporary payment mechanism, up to U.S. $200 million from the Compensation Fund is made available for the payment of successful claims, on a quarterly basis, following each session of the Governing Council. Successful claimants in all categories would receive an initial amount of U.S. $100,000, or, if less, the unpaid principal amount of the award with the disbursement of subsequent rounds of payments of U.S. $100,000 to successful claimants in all categories in the order in which they have been approved, until the available funds for distribution have been exhausted.

B. Governing Council Decisions

1. *Fifty-First Session*

The Council approved three reports and recommendations of the panels of Commissioners concerning 1552 claims of individuals in categories "C" (claims of individuals for

87. United Nations Compensation Commission, Governing Council of United Nations Compensation Commission Has Concluded its Fifty-Fourth Session (Dec. 9, 2004), *available at* http://www2.unog.ch/uncc/pressrel/pr_54c.pdf.

88. S.C. Res. 1483, U.N. SCOR, 58th Sess., 4761st mtg., U.N. Doc. S/Res/1483 (2003).

89. S.C. Res. 986, U.N. SCOR, 50th Sess., 3519th mtg., U.N. Doc. S/Res/986 (1995).

90. S.C. Res. 1330, U.N. SCOR, 55th Sess., 4241st mtg., U.N. Doc. S/Res/1330 (2000).

91. Governing Council Decision 227, U.N. SCOR, Comp. Comm., 137th mtg., U.N. Doc. S/AC.26/Dec.277 (2004).

losses up to U.S. $100,000) and "D" (claims of individuals for losses over U.S. $100,000).[92] Compensation was awarded to 882 of those claimants in the sum of approximately U.S. $208 million.

The category "C" report involved 965 claims filed by the Palestinian Authority. Of these, the Panel of Commissioners determined that 406 claims satisfied the threshold eligibility requirement for review, namely whether the claimants had a full and effective opportunity to file their claim, as set out by the Governing Council. Of the 406 eligible claims, the Council approved 390, and awarded a total of approximately U.S. $7.8 million.

The first of the two category "D" reports covered mostly claims for individual business losses. Other common loss types were personal property losses, loss of salary, and real property losses. The Governments of Kuwait, Jordan, Saudi Arabia, and India submitted the majority of those claims.

The second of the category "D" reports included "unusually large or complex" claims, for which the Panel obtained valuation assistance from expert accountant and loss-adjustment consultants.[93] Among the personal property claims was a claim for the loss of three Persian carpets, with an asserted value of U.S. $216,263, for which compensation of U.S. $135,000 was recommended. As proof of ownership, the Panel accepted the claimant's description of the items and a statement from the suppliers, confirming that he purchased the three carpets and their purchase price. The Panel accepted, as proof of loss and causation, the claimant's personal statement describing how Iraqi soldiers occupied the house, and a witness statement from a former guard at the house. In addition, the claimant submitted a copy of a letter from the Iraqi Presidency Headquarters, which stated that the claimant's house was taken as command headquarters for military divisions. The valuation of the loss was on the basis of the report of the expert consultants and the evidence submitted by the claimant.[94]

Another personal property claim involved ten show jumping horses with an asserted value of U.S. $484,429, for which compensation was recommended in the sum of U.S. $190,311. To prove ownership and value, the claimant provided veterinary certificates and certification from the Hunting and Equestrian Club of Kuwait asserting the value of the horses as of the date of Iraq's invasion and occupation of Kuwait. In his personal statement, the claimant identified each horse individually and described them in detail. He also submitted photographs and newspaper articles, which showed that certain horses were of domestic and international renown.[95]

Other personal property claims included: one for a gold wrist watch, inlaid with diamonds weighing fifty-five carats, with an asserted value of nearly U.S. $300 million for which compensation of U.S. $150,000 was recommended; another for Islamic artifacts and antiques with an asserted value of U.S. $1,153,062 for which compensation of U.S. $396,032

92. *See Report and Recommendations Made by the Panel of Commissioners Concerning the Second Installment of Palestinian "Late Claims" for Damages up to USD 100,000 (Category "C" Claims)*, U.N. Doc. S/AC.26.2004/3 (2004); *see also Report and Recommendations Made by the "D2" Panel of Commissioners Concerning Part Two of the Sixteenth Installment of Individual claims for Damages Above USD 100,000 (Category "D" Claims)*, U.N. Doc S/AC.26.2004/1 (2004); *see also Report and Recommendations Made by the "D1" Panel of Commissioners Concerning Part Two of the Seventeenth Installment of Individual Claims for Damages Above USD 100,000 (Category "D" Claims)*, U.N. Doc. S/AC.26.2004/2 (2004) [hereinafter *D1 Panel*].

93. *D1 Panel*, *supra* note 92.

94. *Id.*

95. *Id.*

was recommended; one for a nineteenth-century Egyptian brass candlestick and seven horses, with a total asserted value of U.S. $484,429, for which compensation of U.S. $60,173 was recommended; and another for fifty-one racehorses with an asserted value of U.S. $2,155,709 for which U.S. $737,024 was recommended as compensation.[96]

According to the report, almost all of the items were taken from the claimants' homes, which were targeted by the Iraqis either because the occupants were listed in the Iraqi Revolutionary Command Council Decree dated August 18, 1990, which is one of a number of decrees that identified certain members of the Kuwaiti ruling family and other prominent Kuwaitis, and called for the destruction and confiscation of their property, or because their properties were in strategic locations within Kuwait.[97]

2. *Fifty-Second Session*

The Council approved two reports and recommendations of the panels of Commissioners concerning claims from individuals in category "D" and two other reports and recommendations concerning claims from corporations in category "E." Compensation in the sum of U.S. $380,532,963 was recommended for 807 of the 950 claims covered by the four reports.

The first of the two category "D" reports featured individual business losses as the most common loss type. Other loss types were personal property losses, salary losses, and real property losses. The majority of the claims in the report were submitted by the Governments of Kuwait and Jordan.[98] The report included the review of claims for business losses, as well as related or competing claims of individuals for the ownership of a business.

The claims included two claims that were filed by the same non-Kuwaiti claimant relating to the loss of two large shipping vessels, both of which were allegedly blown up by Iraqi troops on August 2, 1990 in the Ahmadi port in Kuwait. The evidence submitted by the claimant included ownership documents for the vessels, a witness statement from the captain of the vessels, sales invoices, and manifests. The claimant also provided post-invasion documents showing the cancellation of his vessel registrations in Bahrain and said that the registrations were cancelled because of the destruction of the vessels.[99] The Panel could not establish from the Bahraini authorities any more than that the claimant had requested the cancellation of the vessels' registrations in September 1994, and not why the claimant chose to cancel the registrations at that time. The Panel established from the Iranian authorities, however, that the vessels were not in the Iranian port on dates alleged by the claimant, that the documents alleging such presence had been falsified, and that the manifest documents were not authentic. The Panel concluded that the claimant had not established the loss of the vessels and recommended no award of compensation in respect of the claimed losses.

The second of the category "D" claims included 12 "unusually large or complex" claims for high-value personal property items. Six claims in the installment were for asserted amounts exceeding U.S. $10 million.[100]

96. *Id.*

97. *Id.*

98. *Report and Recommendations Made by the "D1" Panel of Commissioners Concerning Part Two of the Eighteenth Installment of Individual Claims for Damages Above USD 100,000 (Category "D" Claims)*, U.N. Doc. S/AC.26. 2004/5 (2004).

99. *Id.*

100. *Report and Recommendations Made by the "D1" Panel of Commissioners Concerning Part Two of the Nineteenth Installment of Individual Claims for Damages Above USD 100,000 (Category "D" Claims)*, U.N. Doc. S/AC.26. 2004/6 (2004).

The two category "E" reports covered claims of corporations, most of which were Kuwaiti, as well as claims of individuals seeking compensation, pursuant to decision 123, for direct losses sustained by companies.[101]

3. *Fifty-Third Session*

The Council approved five reports and recommendations of the panels of Commissioners concerning claims from corporations in categories "C," "D," and "E." Compensation in the sum of U.S. $376,920,824 was recommended for 1749 of 2264 claims involved in the above reports. Among those claims were thirty that were filed pursuant to Governing Council decision 12 by the Government of Kuwait for losses resulting from injuries sustained by claimants as a result of the explosion of landmines and other ordnance in Kuwait after March 2, 1991. All the claims were approved by the Council for compensation, with a total award value of U.S. $551,439.[102]

4. *Fifty-Fourth session*

The Council approved two reports and recommendations of the panels of Commissioners concerning claims from Governments in category "F," for environmental damage and depletion of natural resources.[103]

The first of the two reports covered the following claims: the claim of the Islamic Republic of Iran for remediation of damage to terrestrial resources resulting from the presence of refugees, from contamination from oil well fires, as well as for remediation of damage to groundwater and marine resources; the claim of the Hashemite Kingdom of Jordan for remediation of damage to water, agricultural, wetland, and marine resources; the claim of the State of Kuwait for remediation of damage to marine and coastal resources, damage to terrestrial resources, and damage to certain sites of ordnance repository; the claims of the Kingdom of Saudi Arabia for remediation of damage to terrestrial resources resulting from military encampments, fortifications of roads, and soot deposition, and for remediation of damage to marine resources; the claim of the Syrian Arab Republic for remediation of damage to groundwater, surface water, and forest resources; and the claim of the Republic of Turkey for remediation of damage to forest resources.[104]

The claims of two of these Governments were not successful. For example, in considering the claim by Turkey concerning the remediation of forest resources allegedly damaged by refugees who entered Turkey after having departed from Iraq or Kuwait between August 2, 1990, and March 2, 1991, the Panel noted that although there is evidence in published literature that a large number of refugees passed through Turkey during the relevant period,

101. *See Report and Recommendations Made by the Panel of Commissioners Concerning the Twenty-Eighth Installment of "E4" Claims*, U.N. Doc. S/AC.26.2004/7 (2004); *see also Report and Recommendations Made by the Panel of Commissioners Concerning the Twenty-ninth Installment of "E4" Claims*, U.N. Doc. S/AC.26.2004/8 (2004).

102. *Special Report and Recommendations Made by the "D1" Panel of Commissioners Concerning Thirty Claims Filed Pursuant to Governing Council Decision 12*, U.N. Doc. S/AC.26.2004/12 (2004).

103. *See Report and Recommendations Made by the Panel of Commissioners Concerning Part One of the Fourth Installment of "F4" Claims*, U.N. Doc. S/AC.26.2004/16 (2004); *see also Report and Recommendations Made by the Panel of Commissioners Concerning Part Two of the Fourth Installment of "F4" Claims*, U.N. Doc. S/AC.26.2004/17 (2004).

104. *Report and Recommendations Made by the Panel of Commissioners Concerning Part One of the Fourth Installment of "F4" Claims, U.N. Compensation Commission Governing Council*, U.N. Doc. S/AC.26.2004/16 (2004).

Turkey had provided insufficient evidence to enable the Panel to determine whether the alleged damage was eligible for compensation.[105]

The second report dealt with one claim by Kuwait for compensation in excess of U.S. $6.7 billion for measures already taken or to be taken to remediate alleged damage to its terrestrial environment resulting from Iraq's invasion and occupation of Kuwait. In particular, the claim related to the following: a proposed measure to remediate areas in Kuwait alleged to have been damaged by oil contamination in the form of oil lakes, oil-contaminated piles, oil trenches, and oil spills from pipelines; a proposed measure to re-vegetate desert areas alleged to have been damaged by oil contamination, areas alleged to have been physically disturbed by the construction and subsequent backfilling of oil trenches by Iraqi forces, and by the construction of pipelines by Iraqi forces to transfer oil to fill those trenches; and a proposed measure for expenses incurred by Kuwait Oil Company for measures already taken or to be taken to recover or remove oil released from the many oil wells in Kuwait that were damaged or destroyed by Iraqi forces during Iraq's invasion and occupation of Kuwait. Compensation in the amount of over U.S. $2.2 billion was awarded for this claim.[106]

III. Iran-U.S. Claims Tribunal

The Iran-United States Claims Tribunal (the Tribunal) was established in 1981 by the Algiers Declarations[107] as part of the resolution of the Iranian hostage crisis. The Tribunal adjudicates disputes between Iran and the United States and their respective nationals. It hears two categories of claims: private claims, which are claims brought by a national of one country against the other country, and inter-governmental claims, which are claims brought by one country against the other, alleging either a breach of contract or a violation of the Algiers Declarations. After nearly two decades in operation, the Tribunal has decided virtually all of the private claims, disposing of nearly 4000 cases, and awarded more than U.S. $2.5 billion to the United States and United States nationals and more than U.S. $900 million to Iran and Iranian nationals. Its docket now consists primarily of large inter-governmental claims. The Tribunal decided two inter-governmental claims in 2004 and commenced preparation for the longest hearing in the Tribunal's history, which will occur throughout 2005 and 2006.

A. Decisions on Inter-Governmental Claims

1. *Case No. B1*

On September 9, 2004, the Tribunal issued Award No. ITL-83-B1-FT in Case No. B1.[108] Case No. B1 involves Iran's claim against the United States for compensation for military

105. *Id.*

106. *Report and Recommendations Made by the Panel of Commissioners Concerning Part Two of the Fourth Installment of "F4" Claims*, U.N. Doc. S/AC.26.2004/17 (2004).

107. The term Algiers Declarations refers to the Declaration of the Government of the Democratic and Popular Republic of Algeria (General Declaration), Jan. 19, 1981, *available at* http://www.iusct.org., and the Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration or CSD), Jan. 19, 1981, *available at* http://www.iusct.org.

108. Iran v. United States, Case No. B1, Interlocutory Award No. ITL 83-B1-FT (Sept. 9, 2004).

parts and equipment that Iran allegedly purchased but did not receive from the United States following the hostage crisis. The United States filed a counterclaim in Case No. B1, asserting that Iran had breached confidentiality provisions appearing in certain contracts and seeking compensation for the corrective re-design and re-fitting of its military equipment that the United States was forced to undertake in response to the alleged confidentiality breaches.[109] The Tribunal's Award addressed certain jurisdictional issues regarding the United States' counterclaim. Iran claimed, for instance, that the Claims Settlement Declaration, which governs the Tribunal's work, does not give the Tribunal jurisdiction over counterclaims in inter-government cases involving contracts for the purchase or sale of goods or services (official counterclaims).[110] Alternatively, if the Tribunal determined that it did have jurisdiction over official counterclaims, Iran asserted that the Claims Settlement Declaration requires that the counterclaim be outstanding on the date of the Algiers Declarations and further asserted that the United States had failed to establish that its counterclaim in Case No. B1 was outstanding on that date.[111] Both Iran and the United States agreed that, if the Tribunal had jurisdiction over official counterclaims, then that jurisdiction is limited to counterclaims arising out of the contractual arrangements that form the subject matter of the main claim. Iran, however, claimed that the United States' counterclaim did not arise out of the same contracts as the main claim.[112] Iran, in addition, claimed that the United States' counterclaim is inadmissible because it failed to meet the requirements of article 18 of the Tribunal's Rules, which requires specificity in the filing of claims. Finally, Iran argued that, if the Tribunal determined that it had jurisdiction over the U.S. counterclaim, then jurisdiction is limited to an offset against the amounts that might be awarded to Iran in its main claim against the United States.

The Tribunal held that it does have jurisdiction over official counterclaims. Applying article 31 of the Vienna Convention on the Law of Treaties (Vienna Convention on Treaties), the Tribunal first determined that the text of the Claims Settlement Declaration was not clear on the question of whether the Tribunal has jurisdiction over official counterclaims.[113] The Tribunal's examination of the context of the relevant jurisdictional provision as well as its object and purpose was similarly inconclusive.[114] Article 31(3)(b) of the Vienna Convention on Treaties instructs a court to consider any "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."[115] The Tribunal's examination of the subsequent practice of Iran and the United States was more fruitful, however, and it showed that the parties had "engaged in a concordant, common and consistent practice" of filing counterclaims to official claims.[116] Iran itself had filed counterclaims in six official cases and had reserved the right to file a counterclaim in a seventh official case, which led the Tribunal to conclude that "Iran's objections in the present case to the Tribunal's jurisdiction over official counterclaims have been rendered nugatory by its conduct in other cases."[117] The Tribunal consequently determined

109. *Id.*
110. *Id.* ¶¶ 29-47.
111. *Id.* ¶¶ 48-49.
112. *Id.* ¶ 53.
113. *Id.* ¶¶ 85-86.
114. *Id.* ¶¶ 101, 105.
115. Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, 1155 U.N.T.S. 331, 340.
116. Iran v. United States, Case No. B1, ¶¶ 116.
117. *Id.*

that "the filing of official counterclaims by both Parties demonstrates their common understanding that such counterclaims were allowed under ... the Claims Settlement Declaration."[118]

Although the Claims Settlement Declaration contains no express requirement that counterclaims in official cases be outstanding as of the date of the Algiers Declarations, the Tribunal inferred such a requirement from its examination of the Tribunal's other jurisdictional provisions.[119] The Tribunal declined, however, to decide whether it has jurisdiction over the U.S. counterclaim at issue in Case No. B1, whether that counterclaim is cognizable, and whether the Tribunal's jurisdiction over the counterclaim would be limited to an offset. The Tribunal elected to join those issues to the merits of the case.[120]

2. *Case No. A33*

On the same day that it issued its Award in Case No. B1 (Counterclaim), the Tribunal issued a Decision in Case No. A33, which concerned Iran's performance of its obligation to replenish the Tribunal's Security Account. Paragraph seven of the General Declaration established a U.S. $1 billion Security Account to pay claims against Iran, and the paragraph requires Iran to replenish the Security Account when the balance in the account falls below U.S. $500 million.[121] Iran stopped replenishing the Security Account in 1992, and the United States thereafter filed a claim asking the Tribunal, among other things, to order Iran to replenish. In Case No. A28, decided in December 2000, the Tribunal determined that Iran had been in non-compliance with its Paragraph seven obligations since 1992, but it determined that there was "no need" to order Iran to replenish the account because, the Tribunal stated, it expected both parties to comply with their obligations, and it could not assume that Iran will remain in non-compliance in the future.[122] Iran did not replenish the Security Account after the Tribunal issued its Decision in Case No. A28, however, so the United States filed another claim, Case No. A33, again asking the Tribunal to order Iran to replenish the account and asking the Tribunal to suspend work on Iran's cases before the Tribunal until Iran meets its replenishment obligations.[123]

Iran put forth a number of jurisdictional and merits-based defenses. Among other things, Iran asserted that the claim in Case No. A33 is identical to the claim in Case No. A28 so that the claim in Case No. A33 is barred by the res judicata effect of the Tribunal's Decision in Case No. A28. Iran further contended that the Tribunal is precluded from exercising jurisdiction over the claim in Case No. A33 by virtue of article IV, paragraph 1, of the Claims Settlement Declaration, which provides that "[a]ll decisions and awards of the Tribunal shall be final and binding."[124]

Additionally, Iran argued that the claim in Case No. A33 "represents an impermissible request to the Tribunal to enforce its Decision in Case No. A28."[125] Rejecting these and other defenses, the Tribunal held that, "[a]s long as Iran does not replenish the Security

118. *Id.* ¶¶ 117.
119. *Id.* ¶ 137.
120. *Id.* ¶¶ 140-141.
121. United States v. Iran, Case No. A33, Decision No. DEC 132-A33-FT, ¶¶ 6-13 (Sept. 9, 2004).
122. United States v. Iran, Case No. A28, Decision No. DEC 130-A28-FT (Dec. 19, 2000).
123. United States v. Iran, Case No. A33, *supra* note 121.
124. Claims Settlement Declaration, *supra* note 107, at art. IV.
125. United States v. Iran, Case No.A33, *supra* note 121, ¶ 21. *See id.* ¶¶ 14-25 (for all of Iran's defenses).

Account and does not thereafter maintain it at the required level until the Tribunal President's certification, Iran continues to be in non-compliance with its Paragraph 7 obligation."[126] Citing numerous authorities on continuing breaches, the Tribunal determined that the United States is entitled to assert a new claim, based on Iran's non-compliance since December 19, 2000, the date the Tribunal issued its Decision in Case No. A28. As for the merits of the U.S. claim, the Tribunal observed that in the more than three years since it had issued its Decision in Case No. A28, Iran had made no move towards complying with its replenishment obligation and had indicated that it saw no need to do so. Accordingly, the Tribunal was forced to conclude that the expectation of compliance that the Tribunal held when deciding Case No. A28 did not materialize. Because that expectation of compliance formed the basis for the Tribunal's refusal in Case No. A28 to order Iran to replenish the Security Account, "[o]nce the expectation did not materialize, the basis for the denial disappeared."[127] The Tribunal consequently ordered Iran to comply with its replenishment obligation. The Tribunal went on to determine, however, that it was not empowered to grant the U.S. request to suspend proceedings on Iran's remaining claims until Iran has complied with its replenishment obligation.[128]

B. Hearings for 2005 and 2006

Throughout much of 2005 and 2006, the Tribunal will be conducting a hearing in consolidated Cases Nos. A3, A8, A9, A14, and B61 (collectively Case No. B61). This case concerns Iran's claim for compensation for military properties, held by United States nationals that the United States was allegedly obligated to transfer to Iran.

IV. Claims Resolution Tribunal

On February 5, 2001, a claims process was established to provide Nazi victims or their heirs with an opportunity to make claims to assets deposited in Swiss banks in the period before and during World War II. This process grew out of the settlement of the Holocaust Victim Assets class action litigation (Settlement), brought in the U.S. District Court for the Eastern District of New York (Court) against certain Swiss banks.[129] Under the Settlement,

126. *Id.* ¶ 31.

127. *Id.* ¶¶ 38-39.

128. *Id.* ¶¶ 41-42.

129. The suits alleged that the Swiss banks collaborated with and aided the Nazi regime by knowingly retaining and concealing assets of Holocaust victims and by accepting and laundering illegally obtained Nazi loot and profits of slave labor. The Settlement was for the claims of five represented classes: the deposited asset class; the looted asset class; the refugee class; and two slave labor classes. *See* Claims Resolution Tribunal, CRT-II Home, *available at* http://www.crt-ii.org (last visited May 20, 2005); *see also* Holocaust Victim Assets Litigation (Swiss Banks), *available at* http://www.swissbankclaims.com (last visited May 20, 2005). The U.S. District Court for the Eastern District of New York approved the Settlement in the summer of 2000. *See* In re Holocaust Victim Asset Litigation, 105 F. Supp. 2d 139 (E.D.N.Y. 2000). Several organizations are responsible for disbursing the funds for the four other classes of victims. For more information on these organizations and their work, *see* The Conference on Jewish Material Claims Against Germany, *available at* http://www.claimscon.org (last visited May 20, 2005); The International Organization for Migration, *available at* http://www.iom.int/ (last visited May 20, 2005). In addition, there are a variety of organizations disbursing funds for victims of the Holocaust outside the Settlement. Information on those programs can be found at the Web sites noted above. *See* The International Commission on Holocaust Era Insurance Claims, *available at* http://www.icheic.org (last visited May 20, 2005); *see also* The Presidential Advisory Commission on Holocaust Assets in the United States, *available at* http://www.pcha.gov (last visited May 20, 2005).

the Swiss banks agreed to pay U.S. $1.25 billion, in exchange for the release of the Swiss banks and the Swiss government from, among other things, all claims relating to the Holocaust, World War II, its prelude, and its aftermath. The Settlement later was amended to establish a process to provide compensation for claims concerning World War II-era insurance policies issued to victims or targets of Nazi persecution by certain Swiss insurance companies. The Claims Resolution Tribunal, originally established in 1997 to resolve claims to dormant Swiss bank accounts (CRT I),[130] was designated as the forum for the administration of the claims process for claims to deposited assets and to insurance policies (CRT II).[131] Of the settlement amount, U.S. $800 million was set aside for awards to claimants for the deposited assets in Swiss banks. An additional U.S. $50 million fund was set aside for the settlement of insurance claims.[132]

A number of claims filed with the CRT II involve German account owners whose Swiss bank accounts were closed between 1933 and 1936. Under the Rules Governing the Claims Resolution Process, CRT II presumes in such cases, in the absence of evidence to the contrary, that neither the account owners nor the heirs received the proceeds of the claimed account if, among other circumstances, the account was closed after the date of occupation of the country of residence of the account owner and before 1945 (or the year in which the freeze of accounts from the country of residence of the account owner was lifted, whichever is later). CRT II delayed ruling on these claims pending the results of a study that analyzed German conduct during these early years of Nazi rule towards owners of foreign capital and the Swiss banks' response to such conduct. The report, released in March 2002, found that Nazi expropriation of the Swiss bank accounts of targets of Nazi persecution began as early as 1933.[133] The report further found that Swiss banking practices enabled the expropriations to occur. Based on the results, the Court, in April 2003, approved an amendment to the Rules to define the date of occupation with respect to account owners in Germany as January 30, 1933 (the date of Hitler's accession as Chancellor).

As of January 19, 2005, approximately 33,496 deposited assets claims were filed with 12,000 found to match a published account holder.[134] Of those claims, CRT II had certified and the Court had approved 1,614 awards, totaling U.S. $207 million.

130. CRT I completed its review of claims to dormant Swiss accounts on September 30, 2001. *See* Mundis & Rees, *supra* note 9, at 564 (for a review of the awards).

131. See *id.*, at 565-67 (for a review of CRT II claims procedure).

132. One-half of the U.S. $50 million is funded from the Settlement and one-half from participating companies. A complete list of participating companies is provided on the CRT's web site: http://www.crt-ii.org.

133. Independent Commission of Experts Switzerland, Second World War, Switzerland, National Socialism and the Second World War: Final Report (2002), *available at* http://www.uek.ch/en/index.htm (last visited May 20, 2005). *See* Holocaust Victims Assets Litigation (Swiss Banks), Rules Governing the Claims Resolution Process, Appendix C, *available at* http://www.crt-ii.org/governing_rules.phtm (last visited May 20, 2005).

134. In addition, the Court decided to treat the 560,000 Initial Questionnaires returned by potential claimants during the class action notification process as deposited assets claims. The Initial Questionnaires are being analyzed to identify those that can be processed as CRT II claims forms. Although the deadline for this claims process has expired, an additional list of approximately 27,000 names of account owners and 400 names of Power of Attorney holders was published on January 13, 2005. This 2005 list contains names of possible account holders that had been previously identified but not published. All new claims filed in connection with this 2005 list must be filed by July 13, 2005.