International Institutions

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The events of the past year attest to the vital, if sometimes unheralded, role of international institutions in creating and strengthening the rule of law around the world. These institutions established global standards in areas such as trade, commerce, and the environment; served as fora for cooperation on a variety of complex transboundary issues; provided mechanisms for resolving disputes peaceably between nations; and helped bring international criminals to justice. These accomplishments were all the more noteworthy during a year when significant challenges were posed to the authority and missions of two of the oldest, and most venerated, international organizations: the United Nations (UN) and the International Monetary Fund (IMF).

The United Nations and its affiliated agencies continue to confront significant budgetary and management challenges. Driven in large part by the United States, they have instituted a number of reforms to try to achieve greater efficiency, effectiveness, and accountability in their programs. The UN's budget for the biennium (1996-1997) was cut for the first time ever, and was cut again for the following biennium. Budget austerity and streamlining exercises are also taking place in several UN specialized agencies. In addition, there is a more disciplined approach to authorizing peacekeeping operations.

However, these and other reform efforts were made much more difficult by the fact the United States is approximately $1.5 billion in arrears to the UN and affiliated agencies. This debt makes it difficult to build support for further UN reform, undermines U.S. leadership on global issues, and threatens to weaken respect for the sanctity of international treaty obligations and the rule of law generally. The Administration and Congress agreed in 1997 on a UN arrears payment plan, but the legislative proposal failed to pass when it became linked to unrelated international family planning legislation the Administration could not support.

Beyond these fiscal difficulties, the UN Security Council confronted challenges to its authority under the UN Charter to maintain international peace and security. Libya pressed forward in its suit in the International Court of Justice challenging the Council's authority to require the

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surrender of two Libyan operatives for trial before a U.S. or United Kingdom (U.K.) court. Also, Iraq made a series of demands and threats last Fall in direct violation of the Council's requirements that it cooperate fully and unconditionally with the UN Special Commission, a subsidiary organ of the Security Council.

Unprecedented challenges also confronted the world's leading international financial institution, the IMF. As it moved to contain the financial crisis in Asia, the IMF came under increasing criticism that its lending activities are doing more harm than good, and that significant reform of the IMF's practices is necessary. Nevertheless, the IMF moved last year to strengthen its financial resources and to place itself in a stronger position to support future bail-out efforts. The Administration submitted a request for additional funding for the IMF in 1997, but, like the UN arrears package, it became derailed by its linkage to international family planning legislation. At the same time that the UN and the IMF faced increasing challenges and were subjected to criticisms, many other international institutions began to play increasingly active roles on the world stage. In particular, international tribunals are proving to be increasingly important and useful instruments for settling disputes among countries, establishing legal precedents, and achieving justice. This was evident not only in the active docket of the World Court, but also in the relatively new arena of dispute settlement mechanisms in the World Trade Organization and the increasing pace of trials at the UN war crimes tribunals for the former Yugoslavia and Rwanda.

I. The United Nations System

A. The Security Council

In response to Iraq's 1991 invasion of Kuwait, the Security Council exercised its powers under Chapter VII of the UN Charter to impose a number of requirements on Iraq that the Council judged necessary to restore international peace and security. One requirement was that Iraq cooperate fully with the UN Special Commission, a subsidiary organ of the Security Council established under the cease-fire resolution, UNSCR 687, to document and dismantle Iraq's weapons of mass destruction capabilities. The past year was notable for Iraq's continuing maneuvers to test the limits of the Security Council's authority to enforce its requirements against a backdrop of increasing reluctance in general by many countries to strictly enforce UN sanctions or to impose any additional sanctions (sanctions fatigue).

A major crisis was precipitated by Iraq's decision in late October to deny entry to American weapons inspectors and its threats against American U-2 aircraft flying missions on behalf of the Special Commission. Iraq also admitted to moving certain dual-use equipment and was suspected of removing and destroying documents. This was a direct challenge to the nationality of inspectors and the Council's requirements that Iraq cooperate fully and unconditionally with the UN Special Commission, including allowing overflights and unfettered access to sites in Iraq where it might be hiding or manufacturing weapons. In a series of resolutions (UNSCR 1134 and 1137), the Council condemned the Iraqi actions and demanded that Iraq comply with its international legal obligations. In UNSCR 1137, the Council also imposed a travel restriction on Iraqi officials who were responsible for or who participated in the instances of noncompliance, and suspended regular reviews of the sanctions regime. The crisis also raised the specter of the use of force to compel Iraq's compliance with the UN weapons inspection regime.

With respect to certain so-called Presidential sites, Iraq raised arguments relating to its "national security, sovereignty, and dignity" in refusing to grant access to UN inspectors, particularly Americans who it charged were spies. Iraq's challenges sought to generate questions about the

meaning of these concepts in international law, and their application to a situation where the State is the subject of Chapter VII sanctions. Iraq's protestations can be seen as attempts to chip away at the requirements of Security Council resolutions through attempts to negotiate and modify the terms of their application. On the other hand, it may be that, as a practical matter, the UN weapons inspectors need to reach some operational understandings with the Iraqi authorities on the inspection of certain sites. In February of 1998 the Secretary-General negotiated a Memorandum of Understanding with Iraq concerning the inspection of Presidential sites.

Iraq's challenge to Security Council mandates also took place in the context of the oil-for-food deal that the UN established (first under Resolution 986) to help alleviate some of the humanitarian impacts of sanctions. Iraq (and its supporters) complained that the $1 billion of oil sales authorized per quarter was insufficient to meet its needs, and that the elaborate regime established to oversee implementation, in particular, the system of approving humanitarian contracts and ensuring equitable distribution of goods, is too cumbersome. In renewing the oil-for-food arrangement in Resolution 1143 (1997), the Council signaled its willingness to consider expanding and otherwise improving procedures in response to these complaints. Later, in Resolution 1153 of February 20, 1998, the Council authorized a significant expansion of the dollar value of oil that could be sold under the oil-for-food program.

B. International Court of Justice

The International Court of Justice (ICJ) serves as the principal judicial organ of the United Nations, deciding cases submitted to it by states as well as offering advisory opinions on legal questions at the request of UN organs or international organizations. In February the fifteen judges on the Court elected Judge Stephen Schwebel of the United States as President for a three-year term. Its docket continued to be quite active in 1997.

1. *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahirya v. United Kingdom) (Libyan Arab Jamahirya v. United States of America)*

This case, which arises out of the bombing of Pan Am 103 in December 1988, likewise posed a challenge to the legal limits of the Council's coercive decisions. Libya filed suit in March 1992 against the United States and the United Kingdom to prevent action, including action in the Security Council, that would interfere with its asserted rights under the Montreal Convention (a treaty that criminalizes attacks against aircraft) to investigate and to try the suspects itself. This includes an asserted right by Libya to receive assistance, including relevant evidence from the United States and the United Kingdom in bringing its own proceedings. Libya also argues that the Security Council Resolutions (748 and 883) requiring it to surrender the suspects for trial in the United Kingdom or the United States are improper and exceed the Council's powers under the Charter.

In October 1997 the ICJ heard oral arguments by the parties on preliminary objections filed by the United Kingdom and the United States to Libya's suit. Both the United States and the United Kingdom argued the Court lacked jurisdiction because Libya does not have a valid claim under the Montreal Convention and that in any event, under the UN Charter, the Security Council resolutions trump the Convention and set forth the governing legal rules. In February 1998 the Court ruled that it had jurisdiction over the case, that Libya's claims were admissible, and that objections filed by the United States and the United Kingdom were not "exclusively" preliminary in character and thus would have to be addressed at the merits stage.

2. *Oil Platforms (Islamic Republic of Iran v. United States)*

Iran sued the United States for attacks on two oil platforms in the Persian Gulf during the Iran-Iraq conflict, alleging violations of three articles of the 1955 Treaty of Amity; the Court struck down two of these in its judgment of December 1996. On June 23, 1997, the United States filed its Counter-Memorial and Counter-Claim (pursuant to Article 80(1) of the Rules of the Court) against Iran. The United States alleged Iran's actions against U.S. military and commercial shipping itself violated the Treaty of Amity. On November 18 Iran filed a document captioned "Request for Hearing in Relation to the United States' Counter-Claim Pursuant to Article 80(3) of the Rules of the Court," objecting to the U.S. counter-claim. The United States filed its response on December 18. The Court rejected Iran's request in 1998.

3. *Gabcikovo-Nagymoros Project (Hungary v. Slovakia)*

On September 25 the Court rendered an important judgment on environmental and treaty law issues. Hungary and Slovokia agreed to submit to the ICJ key issues in a dispute arising out of a 1977 treaty between Hungary and Czechoslovakia for the joint building and operation of an integrated system of dams, canals, a hydroelectric generating plant, and flood control works on a 120-mile stretch of the Danube River between Bratislava and Budapest. The project came under heavy criticism in Hungary and, by 1989, Hungary stopped work on the Nagymaros project and its share of the Gabcikovo power plant. Hungary sent Czechoslovokia a note verbale in 1992 purporting to terminate the treaty and claiming that completing the system might damage the environment. The parties tried to negotiate a compromise, but were unsuccessful. Czechoslovokia decided to continue on a modified version of the project known as Variant C, which involved a unilateral diversion of the Danube.

The Court basically found that neither party had fulfilled its obligations, and urged the parties to meet to try to resolve their differences within the context of the treaty. The Court ruled that Hungary was not entitled to suspend and to abandon certain works it was committed to construct by virtue of the doctrine of necessity. The Court said the ecological perils cited by Hungary were not sufficiently established nor imminent, that Hungary had other means to address these dangers, and in any event Hungary could not rely on this doctrine as it had helped to bring them about. The Court further held that the notification by Hungary in May 1992 of termination of the treaty and related instruments was not justified. Rejecting Hungary's arguments that compliance with the treaty was impossible or that it was entitled to suspend fulfillment of its obligations under the Vienna Convention, the Court noted the treaty itself allowed for negotiation and adjustments and there was no fundamental change of circumstances, either politically or in terms of environmental knowledge and law, that undermined the essential basis for agreement of the parties. The Court further held the treaty was binding upon it as it created rights and obligations attaching to specific territories along the Danube that were not terminated upon dissolution of Czechoslovakia. As for Slovakia, the Court rejected the argument that putting into operation its Variant C was a lawful mitigation of damages, noting the treaty required joint operation and construction as opposed to unilateral actions by the parties.

In view of its ruling that the treaty is still in force and that each of the parties acted wrongfully in some respect, the Court required them to work together to carry out the goals of the 1977 treaty. In accordance with the treaty, the Court also directed the parties to settle their financial accounts on the joint projects in accordance with the treaty and to consider renouncing all claims to compensation within the framework of an overall settlement. As of early 1998, the parties were in the process of trying to negotiate a resolution of their conflict.

4. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*

Bosnia and Herzegovina filed suit in March 1993 against Yugoslavia asking the Court to determine that Yugoslavia, through its agents and surrogates, killed, raped, tortured, and otherwise treated the citizens of Bosnia and Herzegovina in contravention of its obligations under the Genocide Convention and that it must pay reparations. Yugoslavia filed preliminary objections to Bosnia's lawsuit in 1996, which were rejected by the ICJ. In July 1997 Yugoslavia filed counterclaims seeking a declaration that "Bosnia and Herzegovina is responsible for the acts of genocide committed against the Serbs in Bosnia and Herzegovina" and that it "has the obligation to punish the persons held responsible" and "take necessary measures so that the said acts would not be repeated." On December 17, 1997, the ICJ rejected Bosnia's challenge to counterclaims filed by Yugoslavia to its lawsuit, ruling that Yugoslavia's counterclaims are "directly connected with the subject matter of Bosnia and Herzegovina's claims" in that they "rest on facts of the same nature" and constitute "separate claims seeking relief beyond the dismissal of the claims of Bosnia and Herzegovina."[1]

C. International Law Commission

The International Law Commission (ILC), which was established by the UNGA in 1948, consists of thirty-four legal experts elected by the UNGA for five-year terms who meet annually in Geneva to promote the progressive development of international law and its codification. Although often criticized in the past for its working methods, the ILC has become more focused and productive in recent sessions. Last year the ILC completed its first reading of a draft preamble and articles on the nationality of natural persons in relation to the succession of states, and adopted a generally sound set of preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties. The ILC also established a useful program of future work on its other topics—state responsiblity, international liability for injurious consequences arising out of acts not prohibited by international law, diplomatic protection, and unilateral acts of states.

1. *State Succession*

The ILC completed its first reading on a preamble, twenty-seven draft articles and commentary, and requested the comments of governments. The ILC's work properly reflects the concern of the international community about the resolution of nationality problems in the case of succession of states, highlighted by recent events in Europe. The draft articles are based on the core principle that every individual has a right to a nationality in the context of state succession. A corollary right embodied in the articles is the obligation of states involved in a state succession to take appropriate measures to prevent the occurrence of statelessness. On balance, the draft articles present a balanced and thoughtful treatment of the issues, and the commentary is extremely helpful.

2. *Reservations to Treaties*

In the wake of the recent assertions that human rights treaty bodies may adjudicate the admissibility of reservations, the ILC undertook a careful study of this controversial area. In

1. Case Concerning Application of the Convention on Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Counterclaims, Int'l Ct. of Justice, Order of Dec. 17, 1997, at 14-15.

its preliminary conclusions, the ILC affirmed its view that the existing law of treaties (based on the Vienna Conventions) offers an effective mechanism for determining which reservations are permitted and which derogate from the object and purpose of the treaty.[2] The ILC rejected arguments for a legal regime on treaty reservations specific to human rights treaties. However, it also sought to carve out some role for human rights treaty monitoring bodies, saying that "where these treaties are silent on the subject, the monitoring bodies established thereby are competent to comment upon and express recommendations with regard, inter alia, to the admissibility of reservations by states, in order to carry out the functions assigned to them."[3] The ILC also suggested that normative treaties include specific language if states want to confer competence on the monitoring bodies to appreciate or to determine the admissibility of a reservation.[4]

II. International Criminal Tribunals

A. Yugoslav War Crimes Tribunal

It was a busy and notable year for the International Criminal Tribunal for the former Yugoslavia (ICTY) as it began to fulfill the promise of a court that war criminals must take seriously. As of the end of 1997, the ICTY had publicly indicted seventy-nine individuals and an unknown number were charged in sealed indictments. In late December the UN General Assembly substantially increased the budget of the war crimes tribunal for 1998, and several countries, including the United States, made contributions to try to facilitate the work of the tribunal. The first verdict by an international war crimes tribunal since the post-World War II prosecutions was handed down in the trial of Dusko Tadic in May 1997. Several decisions on important questions of law and procedure were also rendered that will set important precedents for the future work of the international war crimes tribunals for the former Yugoslavia and Rwanda, and may be of importance for any future international criminal court. International cooperation with the ICTY, which has always been a concern, is improving. For example, ten former members of the political and military bodies of the then Croatian community of Herceg-Bosna surrendered themselves to the custody of the ICTY in October 1997.

1. *Tadic*

Dusko Tadic was put on trial for thirty-one counts of grave breaches of the Geneva Conventions of 1949, violations of the laws and customs of war, and crimes against humanity related to an attack on a village and the expulsion of non-Serb civilians from the municipality, as well as the torture and murder of Muslims at Serb-run camps in Bosnia and certain villages. Tadic was found guilty of eleven counts: a general crime against humanity charge alleging persecution and ten specific counts involving beatings. The acquittals on some of the other twenty counts were on significant grounds.

As to eleven of the twenty counts, two of the three judges on the trial chamber held that the grave breaches provisions of the Geneva Conventions of 1949 were inapplicable because after May 1992, when the Yugoslav National Army officially withdrew from Bosnia, the Bosnian victims of Tadic's alleged acts were in the hands of forces of their own nationality,

2. Report of the Int'l Law Commission on the work of its forty-ninth session, May 12-July 18, 1997, Gen'l Assembly Official Records, 52nd Session, Supp. No. 10 (A/52/10), at 126.

3. *Id.*

4. *Id.* at 126-127.

i.e., Bosnians, and that they accordingly were not "protected persons" within the meaning of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War. On the issue whether the Bosnian Serb forces were acting on behalf of the "Federal Republic of Yugoslavia (Serbia and Montenegro)" (FRY), the majority held that the acts of the Bosnian Serbs could not be considered acts of the FRY because while the FRY provided supplies, weapons, and money, the FRY did not have effective command and control over the Bosnian Serbs. The majority decision, including the legal standard used, is being challenged on appeal by the ICTY's Office of the Prosecutor.

2. *Blaskic*

Croatia filed an appeal in connection with a subpoena duces tecum issued to Croatia and its Defense Minister in the prosecution of Tihomir Blaskic, challenging the power of the ICTY to issue orders designated as subpeona duces tecum to Croatia, or to any other sovereign state, and to high State officials. General Blaskic was indicted in his command capacity for crimes against humanity and war crimes allegedly committed against Bosnian Muslims.

The Appeals Chamber issued a multi-faceted decision addressing some critical issues of first impression. First, it held that while the ICTY may issue legally binding orders or requests to states, which are obliged to cooperate with them under the relevant UN Security Council resolutions, the ICTY is not empowered to issue enforcement measures or penalties against sovereign states. In the case of noncompliance, a trial chamber may make a specific judicial finding to this effect and request the President of the tribunal to transmit it to the UN Security Council. Second, the court found that the ICTY may not issue binding orders or requests to state officials acting in their official capacity. Third, the court determined that the ICTY may issue legally binding orders and subpoenas to individuals acting in their private capacity within the scope of its general powers. In case of noncompliance, the court should normally turn to the relevant national authorities, but also may resort to its own legal remedies, such as contempt of court. Finally, the court opined that states are not allowed to withhold evidentiary materials requested by the ICTY on a claim of national security interests, as this could undermine the functioning of the ICTY. However, the trial court should be alert to accomodating the legitimate national security concerns of states through practical methods and procedures, including the holding of in camera, ex parte proceedings to judge the validity of national security claims.

3. *Erdemovic*

In November 1996 a trial chamber in the ICTY handed down its first sentence—ten years against Drazen Erdemovic, a member of the Bosnian Serb Army, who entered a guilty plea for commiting a crime against humanity through his participation in the murder of approximately 1,200 Muslims at Srebenica. Erdemovic challenged the sentence, and a majority of the five-judge appeals court remanded to a new trial chamber, finding the original guilty plea was not informed. The judges differed on a number of the issues raised, leading to separate and dissenting opinions on difficult and important questions.

A majority of judges agreed Erdemovic's plea was not informed insofar as he elected to plead guilty to a crime against humanity as opposed to a war crime, a crime deemed to be more serious and that ordinarily entails a heavier penalty. The majority concluded the claim of duress could not provide a defense to the crimes with which Erdemovic was charged, but could be considered as a mitigating factor. Therefore, the case was remanded to the trial court for a renewed plea opportunity. Two of the judges, however, would have ruled the guilty plea was equivocal in that Erdemovic continued to insist he had no choice but to participate in the

killings and therefore was under duress, which in their view did provide a defense to the charges. These two judges would have remanded to the trial court to enter a plea of not guilty and to remit the matter for trial to determine whether the conditions for duress were satisfied.

4. *Dokmanovic*

Slavko Dokmanovic was arrested on June 27 by peacekeeping forces affiliated with the UN Transitional Authority for Eastern Slavonia (UNTAES). In a move applauded by many, the ICTY sealed the indictment to enhance the chances of capturing the indictee. On October 22, 1997, a trial chamber denied the accused's motion for release on the grounds the arrest violated the statute and rules of the tribunal, the sovereignty of the FRY, and international law. The Trial Chamber held that the arrest by UNTAES and the Office of the Prosecutor was legitimately executed. Shortly thereafter, an appellate chamber unanimously rejected Dokmanovic's application for leave to appeal.

B. Rwanda War Crimes Tribunal

The International Criminal Tribunal for Rwanda (ICTR) made important strides to redress some of the management difficulties long plaguing it and accelerated the pace of its work. At the end of 1997, the ICTR had issued indictments charging thirty-five individuals with serious violations of international humanitarian law. The ICTR had three trials underway in 1997: (1) the trial of Georges Anderson Rutaganda, the vice president of the Interahamwe militia; (2) the joint trial of Clement Kayishema, the former Prefet of Kibuye, and Obed Ruzindana, a businessman; and (3) the trial of Jean-Paul Akayesu, a former Bourgmastre of Taba Commune in Rwanda, against whom an amended indictment was filed charging him with sexual violence against female civilians.

Some notable figures were arrested at the request of the ICTR in 1997. Seven officials of the former regime in Rwanda, including Jean Kambanda, the Prime Minister of the Interim Government of the Republic of Rwanda during the massacres of April 1994, were arrested in July 1997 by Kenyan authorities at the request of the ICTR. They are charged with genocide, crimes against humanity, and violations of the Geneva Conventions committed in Rwanda in 1994. Also, Georges Ruggin, a Belgian national charged with having issued broadcasts on a radio station in Rwanda inciting violence and hatred, was arrested.

The ICTR had twenty-three suspects in custody as of the end of the year, one fewer than it would have had as the result of a decision by a U.S. magistrate in Texas denying the U.S. Government's request for the surrender of Elizaphan Ntakirutamana, a Seventh Day Adventist preacher indicted in 1996 for genocide, conspiracy to commit genocide, and crimes against humanity, among other crimes. Ntakirutimana is alleged to have gathered Tutsis in a Seventh Day Adventist church/hospital compound and to have organized militiamen and others to attack the compound and murder them. He was further accused of leading armed bands of men into the countryside to kill the survivors and others. The magistrate ruled the extradition request failed on two grounds. First, the 1996 statute authorizing the United States to hand over accused suspects to the international war crimes tribunal was unconstitutional, in that surrender of fugitives could take place only under the terms of a treaty of extradition to which the Senate gave its advice and consent to ratification. The statute implemented an executive agreement between the United States and the ICTR regarding surrender of suspects. Second, the magistrate found that even if the statute was constitutional, there was not a showing of probable cause to support the extradition. He found the affidavit presented by the tribunal, which reflected several witness accounts of the extraditee's presence and activities at the church

compound, to be, inter alia, insufficiently specific or clear on the details of the extraditee's involvement in attacks on Tutsis. Although the U.S. Government expects to prevail ultimately, this decision nonetheless called into question the ability of the United States to surrender suspects to the war crimes tribunals.

C. International Criminal Court

Countries continued to negotiate on the text of a draft statute to establish a permanent international criminal court (ICC). The ILC developed a draft statute that was submitted to the General Assembly in 1994, and was the basis for further work by a Preparatory Committee (PrepCom) created by the General Assembly. Three two-week sessions of this PrepCom were held in March, August, and December of 1997 in New York. These sessions confirmed wider and stronger support among nations for the creation of a court, and important progress was made in narrowing the myriad of proposals, particularly concerning the rules of procedure, into a consolidated text. A further PrepCom was held in April 1998, with a diplomatic conference held in Rome in June, to try to reach agreement on a treaty to establish the court.

Some of the important issues discussed during the past year included: (1) what specific crimes should be included in the jurisdiction of the court and how these crimes should be defined; (2) when and how the ICC should be able to pursue an investigation and prosecution, including the role of the Security Council; and (3) what should be the court's rules of procedure. Many of these controversial, politically charged issues may not be resolved until the diplomatic conference. Substantial work on more technical criminal justice issues, such as the Court's rules of procedure and general principles of criminal law, needs to be completed. Important organizational issues, such as the relationship of the ICC to the UN and the funding mechanism for the ICC, likewise need to be further examined.

1. *Scope of Jurisdiction and Definition of Crimes*

Many countries believe the subject matter jurisdiction of the court should be limited to serious violations of international humanitarian law, namely the "core" crimes of genocide, war crimes, and crimes against humanity. Others expressed support for including aggression and terrorism as well. There are serious difficulties in arriving at an acceptable definition of aggression, especially for purposes of individual culpability, and issues regarding the role of the Security Council in any investigation or prosecution of aggression need to be resolved.

At the Spring 1997 PrepCom meeting, the member states negotiated the specific definitions of the crimes. There was general support for adopting in the ICC treaty the definition of "genocide" in the Genocide Convention of 1949. A negotiable draft text appears to be shaping up on "crimes against humanity." The area of greatest controversy appears to concern the nature and scope of "war crimes" to be included in the jurisdiction of the ICC. Among the sensitive issues to be resolved is whether and to what extent the court should have jurisdiction over offenses applicable to internal armed conflict and over violations of Additional Protocol I to the Geneva Conventions.

2. *Trigger Mechanism*

Many countries agree there should be at least two avenues to initiating a prosecution: (1) a state party's referral of a matter or situation to the ICC; and (2) the Security Council's referral of a matter or situation to the ICC. A third avenue is advocated by the so-called like-minded countries who are the most vocal supporters of the court. They want a standing Prosecutor

who also is able to launch investigations and prosecutions on his or her own authority, with little or no role for states or the Security Council.

The role of the Security Council in the trigger process is particularly controversial. One approach, which is reflected in the ILC draft, requires that when a state refers a matter being dealt with by the Security Council, the ICC should not pursue prosecution until the Council first has a chance to approve the proposed prosecution. Once the Council approves the referral of a matter, however, the Prosecutor has full discretion to investigate particular individuals or crimes. This would keep a prosecution from disrupting the Security Council's efforts to manage an international conflict. It often may be the case that the timing of a prosecution, as opposed to whether or not an investigation may proceed, is inappropriate. Such a role for the Council has been criticized on the grounds that it effectively gives the permanent members a veto over possible investigation by the ICC, and that it will diminish the independence of the ICC. Some countries seem willing to go along with a proposal that permits the ICC to investigate matters being dealt with by the Council, unless the Council took an affirmative decision to block (as opposed to approving) a prosecution.

3. *State Consent*

There was much discussion of the extent to which ICC prosecution might require the consent of certain interested states (*e.g.*, the state of nationality of the accused or the state in which the alleged crime took place). Consent is not an issue for cases of Security Council referral under Chapter VII. Many states believe that once a state joins the ICC, it should automatically accept the court's jurisdiction for the "core" crimes of genocide, crimes against humanity, and serious war crimes. They believe the Prosecutor should be able to pursue prosecutions of these crimes without further state consents. Others want to require the consent of interested states before an investigation or prosecution may proceed.

4. *Complementarity*

Although there is general agreement that the ICC should step in only when national court systems are unable or unwilling to bring prosecutions, it was only at the August PrepCom meeting that a text of a draft article was negotiated to better define this essential principle. Its text should satisfy those concerned that the ICC would serve as a court of appeals passing judgment on the adequacy or effectiveness of national court systems. Rather, the ICC would have jurisdiction to prosecute only under special circumstances; for example, when a country's judicial system collapses or the country acts to shield perpetrators from criminal liability.

III. International Economic Institutions

Numerous multilateral institutions perform a wide range of functions, including the setting of common standards, that are important to the conduct of international business. This was very much evident during the past year when the International Monetary Fund, the Organization for Economic Cooperation and Development, and the World Trade Organization undertook major activities to enhance the foundation for global commerce.

A. International Monetary Fund

1. *The Asian Financial Crisis*

The International Monetary Fund (IMF) became the focus of considerable attention and debate as it moved to contain the financial crisis spreading through Asia. In its role as the

world's primary international financial institution, the IMF arranged financial rescue packages for the three Asian countries whose economies experienced severe losses of foreign and domestic capital over the past year: Korea, Indonesia, and Thailand. These rescue packages, made conditional on a number of economic reforms, are designed to restore confidence in these markets, encourage reinvestment, and allow these countries to meet their debt obligations. At the end of 1997, total financing committed to these three countries totaled well over $100 billion, of which the Fund committed $35 billion of its own resources.

Despite the IMF's playing this leading role, or perhaps because of it, the Asian crisis raised important questions concerning the IMF's activities and mission in 1997. How these questions are answered will be of great importance to the future of the IMF, as well as to governments and markets around the world.

At one level, the nature of the Asian crisis raised concerns that the traditional medicine prescribed by the IMF of higher interest rates and budget cuts, designed to subdue inflation and to restore investor confidence, are inappropriate for dealing with the type of financial crisis witnessed in Asia. In the past, the IMF's attention was generally focused on countries with high foreign debts, profligate government spending, and loose monetary policies. However, given that the loss of confidence and resulting capital flight in Asia stems more from grossly inefficient financial markets than it does from excessive government spending or high inflation, many respected economists and policymakers voiced concerns that, at least in the short-term, traditional austerity measures needlessly exacerbate these countries' economic contractions.

Additionally, the Asian crisis led to questions concerning whether these bailouts should even be happening in the first place. Critics argued that by helping these governments and some private banks to meet their debt obligations, the IMF has essentially guaranteed the debts of foreign lenders and depositors. This, in turn, may encourage excess and inefficient lending to yet other developing countries, increasing the likelihood of further financial crises.

2. *Special Reserve Facility*

Recognizing that many developing countries are increasingly subject to the crises of confidence witnessed in Asia, on December 17 the Fund established a new funding mechanism, the Supplemental Reserve Facility (SRF), to better deal with such problems. Under the SRF, large levels of financing may be provided when such levels of capital, combined with strong adjustment policies, will likely restore investor confidence within a short period of time—reversing capital outflows and leading to an early correction of balance of payments difficulties. By establishing this facility, the Fund no longer needs to seek formal waivers of the annual and cumulative limits on the amount of resources that may be made available to members in designing such front-loaded rescue packages.

In contrast to the Fund's standby and extended Fund facilities, members borrowing under the SRF are expected to repay the Fund within one to one and a half years from the date of disbursement. To encourage this early repayment and to compensate the Fund for the risks involved in providing such large and front-loaded access to its resources, borrowers under this facility pay a surcharge of 300 basis points over the rate of charge on IMF loans. The first disbursement under this new facility ($2 billion) was made to Korea on December 30.

3. *New Funding Arrangements*

Another highlight was the IMF's attempt to shore up its own financial resources. After making new pledges worth $35 billion to Korea, Indonesia, and Thailand in 1997, the IMF retains $40 to $45 billion of uncommitted resources that are immediately available, as well as

access to a $25 billion line of credit pledged by eleven developed countries under the IMF's General Agreements to Borrow. While such funding is adequate given the IMF's current needs, the Fund has admitted that such resources may be inadequate if the crisis spreads.

In reaction to these and other concerns, in early 1997 the IMF's Executive Board adopted a draft instrument containing legal and operational details of a new emergency loan arrangement for the IMF, entitled the New Arrangements to Borrow (NAB). Under this program, twenty-five IMF members are to provide the Fund with a $25 billion emergency line of credit that may be drawn upon to temporarily supplement the Fund's other resources. This program is to complement the existing line of credit pledged by eleven members under the General Arrangements to Borrow, although the NAB is the first recourse in the event supplementary resources are needed, and the amount available under the two arrangements is not to exceed $46 billion. Currently, the Fund has no outstanding borrowing.

In addition to this proposed additional line of credit, in late 1997 the IMF's Executive Board requested a forty-five percent increase in members' capital contributions to the Fund, known as "quotas." Under its system of quota funding, IMF member states effectively make loans of capital to the Fund, which may be returned at any time upon request. Like a bank, the Fund pays member countries interest on their quota contributions.

B. World Trade Organization

1. *Membership/Accession Negotiations*

The membership of the World Trade Organization (WTO) increased last year to 132 countries and customs territories, with negotiations under way in connection with applications from China, Russia, Saudi Arabia, Taiwan, Vietnam, the three Baltic states, and twenty-three other non-members. Notably, there was an intensification in negotiations concerning China's eleven year-old application for WTO membership, with intensive rounds of both bilateral and multilateral negotiations taking place throughout 1997. Considerable attention continued to be focused on bilateral market access negotiations, particularly with the United States. A two-thirds vote of all WTO members is needed to approve a membership application.

2. *Market-Opening Agreements*

In what was perhaps the most active year of its short life, three significant new trade agreements highlighted the WTO's activities during 1997: (1) an agreement on trade in basic telecommunications services; (2) an agreement on trade in financial services; and (3) an agreement to eliminate tariffs on information technology products.

a. Agreement on Basic Telecommunication Services

Following through on negotiations initiated, but not concluded, during the Uruguay Round, sixty-nine WTO members signed a broad agreement liberalizing trade in telecommunications services on February 15, 1997. In signing this agreement—which covers such areas as voice telephone services (local, long-distance, and international), cellular telephone services, fixed and mobile satellite systems and services, facsimile services, and paging services—participants submitted liberalization schedules obligating themselves, with some exceptions, to abolish local monopolies and to grant national treatment to foreign telecommunications providers. All WTO members, regardless of whether they accepted the Agreement, are obligated to provide most-favored-nation (MFN) treatment for basic telecommunication services as of February 5, 1998.

b. Information Technology Agreement

By the end of 1997, forty-three WTO members had agreed to participate in the Information Technology Agreement (ITA) that emerged out of the December 1996 WTO Ministerial Conference. Under this agreement, signatories obligate themselves to eliminate all tariffs on a wide range of information technology products—including computers and computer equipment, semiconductors and integrated circuits, computer software, and telecommunications equipment—by the year 2000. Together, the forty-three participants account for roughly ninety-five percent of $500 billion annual world trade in information technology products. Building upon the success and scope of this agreement, ITA participants agreed in 1997 to expand its product coverage to accelerate tariff reductions for existing ITA products, and to consider the elimination of non-tariff measures inhibiting trade in information technology products. This process, known as "ITA II," commenced in October 1997 with a three month open season, during which several participants identified their priorities for this process.

c. Agreement on Trade in Financial Services

Replacing an interim agreement reached in 1995, a permanent Agreement on Financial Services was adopted by a decision of the WTO Council on Trade in Services on December 12, 1997. Under this agreement, seventy members, accounting for approximately ninety-five percent of world trade in financial services, submitted new or improved commitments to provide access to their financial services markets. In particular, most developed countries generally pledged to provide full MFN and national treatment rights to foreign service providers in a broad range of areas, such as banking services (accepting deposits and lending), brokerage services (securities trading), and insurance sales. While the schedules submitted by developing countries were generally less ambitious, they still constituted significant steps in liberalizing restrictions on cross-border service, sales, and foreign investment.

3. *Formal Dispute Settlement*

Nowhere has the increasing use of international tribunals been more evident than in the WTO's dispute settlement mechanism, which consists of reports by a panel with a right of appeal to a permanent Appellate Body. Since its creation in 1995, over 100 challenges to foreign trade practices were brought to the WTO dispute settlement mechanism. In 1997 alone, fifty new complaints were filed, covering such varied topics as food safety requirements, discriminatory liquor taxes, and intellectual property rights. This reflects the growing belief among WTO members that formal WTO dispute settlement can be a useful, and rather expeditious, tool in addressing unfair trade practices. For this reason, the increasing use of formal dispute settlement corresponded with a general decline in the use of aggressive unilateralism (*e.g.*, threats of unauthorized retaliation) as a means of conducting trade policy.

Notable among the new complaints brought in 1997 is a challenge by the United States, the European Union (EU) and Japan against Indonesia for its national car program. Under this program, Indonesia-owned automotive manufacturers meeting local content requirements for finished automobiles or automotive parts are granted tax and tariff benefits. Also of interest is the challenge by the European Union and Japan of a Massachusetts statute that applies, for purposes of bidding on state government procurement opportunities, a ten percent pricing penalty on companies doing business in Burma.

A number of important WTO panel reports were issued in 1997. Three of the most factually difficult and politically contentious cases follow:

a. EU—Banana Import Regime

In response to a complaint by the United States, Guatemala, Honduras, Mexico, and Ecuador, on May 22 a WTO panel found the EU's import regime for bananas violates its WTO obligations on numerous counts. The principal elements of this regime include a tariff rate quota limiting imports of bananas from Latin America (to the benefit of banana imports from former British and French colonies in the Caribbean) and a licensing system burdening Latin American and U.S. export companies to the benefit of EU firms. The WTO panel found the EU's practice violated, inter alia, its national treatment and MFN obligations under the GATT 1994, various provisions of the WTO Agreement on Import Licensing Procedures, and the EU's national treatment and MFN obligations under the General Agreement on Trade in Services. On appeal by the EU, the WTO's Appellate Body generally upheld the panel's conclusions.

b. EU—Ban of Hormone-Treated Beef

On August 18 a WTO panel agreed with the United States and Canada that the EU's ban of beef treated with certain growth-promoting hormones was inconsistent with the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). The panel, after seeking the advice of scientific experts, essentially found that the EU's import ban had no reasonable basis, since it was not supported by a risk assessment or existing international scientific standards. On appeal, the WTO appellate panel generally agreed, but reversed various parts of the panel's legal conclusions in its January 16, 1998 report. In particular, the Appellate Body reversed the panel's ruling that the SPS Agreement allocates the evidentiary burden to the Member imposing an SPS measure, reversed the panel's conclusion that a Member bears the burden of justifying its measure when it is not based on an international standard, and ruled that non-quantifiable factors may be taken into account when doing a risk assessment.

c. Japan—Measures Concerning Imported Consumer Photographic Film and Paper

The United States complained that a number of Japanese laws, regulations, and administrative actions adversely affect the ability of foreign firms to distribute and to sell imported consumer photographic film and paper. The United States argued these measures violate Japan's national treatment obligations under Article III of the GATT 1994 and conflict with the transparency obligation of the GATT Article X, since many of these measures are neither promptly published nor administered in a uniform, impartial manner. The United States also argued these measures amounted to a "nonviolation nullification or impairment" of benefits to which the United States had an expectation because of Japan's tariff concessions on film and paper. In an interim report issued December 5, a WTO panel rejected these claims. While agreeing with the United States on a number of important legal issues, the panel concluded the United States had not adequately demonstrated the challenged measures violated Japan's obligations under the GATT or constituted nonviolation nullification or impairment. This was the first United States loss in a case it initiated, in contrast to eight victories. The United States announced it will not appeal this decision, making it the first party losing a panel decision not to do so.

C. Organization for Economic Cooperation and Development

1. *Bribery Convention*

On December 17 twenty-eight of the twenty-nine members of the Organization for Economic Cooperation and Development (OECD), plus five other non-member countries (Argentina,

Brazil, Bulgaria, Chile, and the Slovak Republic), signed a Convention on Bribery of Foreign Public Officials in International Business Transactions. This Convention, which was negotiated in the OECD Working Group on Bribery, obligates parties to criminalize bribery of foreign public officials. The Convention enters into force when five of the ten largest OECD exporting parties (representing sixty percent or more of the combined total exports of those ten parties) deposit their instruments of ratification, or at the end of 1998 if two signatories deposited their instruments of ratification and declared their willingness to be bound by the Convention.

2. *Multilateral Agreement on Investment (MAI)*

The members of the OECD have been negotiating the terms of the MAI, a state of the art investment agreement, since May 1995. Although negotiators were unable to meet their goal of completing the Agreement by the May 1997 Ministerial meeting, steady progress was made on a number of core issues, including dispute settlement. Key elements under discussion include: (1) MFN and national treatment requirements for foreign investors; (2) disciplines for trade and investment-distorting performance requirements; (3) prompt and adequate payments for expropriation; (4) international arbitration of investor-host state disputes; and (5) rights concerning the free-mobility of capital and profit by foreign investors. In light of the broad range of difficult and important issues being negotiated, the current deadline for reaching an agreement was extended into 1998. Once completed, the MAI is to be open to all non-OECD members willing to become signatories.

IV. Arms Control and Disarmament

A. Ban on Anti-Personnel Landmines

December witnessed the successful conclusion of an international agreement outlawing the use, production, stockpiling, and transfer of anti-personnel mines. Over 121 countries signed this historic agreement in Ottawa, Canada, which is to come into force once forty nations ratify the treaty. Despite this large number, three of the world's largest military powers—the United States, Russia, and China—as well as most Middle East countries (Iraq, Iran, Israel, Jordan, and Egypt) and other big mine-using states such as India and Pakistan, did not sign the agreement. The United States' decision not to become a signatory was principally due to its failure to secure an exemption for its continued use of mines on the Korean peninsula and an exemption for "mixed munitions" mine systems (those incorporating both anti-personnel and anti-tank mines, all of which self-destruct within a matter of days). Notwithstanding this decision, the United States said in Ottawa it would seek to develop alternatives to anti-personnel land mines and to increase funding for mine removal from $80 million to $100 million annually.

Aside from its substance, the Ottawa agreement is noteworthy on two counts. First, the high number of countries signing this agreement, and the substantial international support for it, was largely the result of strong organizational and lobbying efforts by numerous non-governmental organizations. In recognition of these efforts, one of the lead organizations in this effort, the International Campaign to Ban Landmines, together with its American coordinator, Jody Williams, were awarded the Nobel Peace Prize for 1997. Second, negotiations took place outside the auspices of the historically slower moving UN Conference on Disarmament in Geneva. The success of this agreement may cause some countries to consider meeting outside the consensus-seeking environment characterizing UN negotiation and may serve as a model for future international rule making.

B. Chemical Weapons Convention

On April 29, 1997, the Chemical Weapons Convention (CWC) entered into force—180 days after the 65th instrument of ratification was deposited, as required by the Convention. The CWC, which was opened for signature on January 13, 1993, prohibits the development, production, other acquisition, retention, stockpiling, transfer, and use of chemical weapons. Pursuant to these prohibitions, the CWC contains detailed provisions regarding the destruction of chemical weapons and chemical weapons production facilities. These actions are generally to be completed within ten years. The CWC also establishes a permanent Organization for the Prohibition of Chemical Weapons (OPCW) to administer the Convention. In this role, one of the principal activities of the OPCW is monitoring implementation of the agreement through on-site inspections—including inspections of private (non-military) chemical production facilities.

Presently, over 160 states have signed the CWC, while actual instruments of ratification or accession were deposited by over 100 states. After forty-one months of consideration, the U.S. Senate gave its advice and consent to the CWC on April 24, subject to twenty-eight conditions. Notable among these is Condition 28, which requires the President to certify that proper search warrants will be obtained for any U.S. facility subject to inspection when consent of the owner was withheld. This condition responded to concerns that U.S. businesses could be subject to unreasonable searches and seizures by the OPCW in contravention of their Fourth Amendment rights. The Senate's action allowed President Clinton to deposit the U.S. instrument of ratification on April 25 (four days before the treaty's entry into force), making the United States an original state party to the Convention. Other states that deposited their instruments of ratification or accession include China, India, Iran, and Russia.

V. Environment

A. Kyoto Protocol on Climate Change

Studies indicate that increasing emissions of carbon dioxide, methane, and other gases into the atmosphere trap heat in a greenhouse effect. These gases let sunlight in but retain some of the heat emitted by the Earth, thereby creating the potential for serious environmental consequences. In 1992 the first steps were taken on a multilateral basis to combat global warming through the adoption of the UN Framework Convention on Climate Change. At a conference held December 1-11, 1997, the parties to that Convention took the next major step by adopting a Protocol containing binding emissions targets for developed countries.

The binding emissions targets in the Kyoto Protocol are differentiated depending on the country. The EU agreed to emission levels of eight percent, Japan agreed to six percent, and the United States agreed to seven percent below certain baseline levels of greenhouse gases. Another feature of the Protocol was the adoption of flexible market mechanisms, most notably the concept of emissions trading, to assist states in meeting their targets. Another component adding flexibility is the Clean Development Mechanism, under which developed countries are able to use certified emissions reductions from projects in developing countries to contribute to their compliance with emissions reduction targets. Finally, although developing countries are not subject to binding emissions targets, certain provisions in the Protocol set the groundwork for their participation in reducing greenhouse gas emissions.