LEGAL HIGHLIGHTS OF THE MAIN PART OF THE 65TH SESSION OF THE GENERAL ASSEMBLY

A. General Assembly

On 24 December 2010, the General Assembly concluded the main part of its sixty-fifth session, which had begun on 14 September 2010. By that date, it had taken up a number of legal matters or dealt with the legal aspects of other matters. This short review will not review all legal issues before the Assembly but is an attempt to give an overview concerning new, developing legal issues or new legal instruments or reports of interest. Thus, resolutions or provisions that simply "carry on" existing legal mandates or programmes, or which are largely repetitious of previous resolutions, are not highlighted. As implicitly indicated, the sixth-fifth session is not over, only its main part. The Assembly and various of its committees will continue to convene during 2011 for those items not yet concluded, up until mid-September 2011.

This review will deal first with items considered in the plenary meetings of the General Assembly without reference to one of the Main Committees of the Assembly. It will then deal with items considered first in a Main Committee, beginning with the Sixth (Legal) Committee.

(1) Plenary

(a) The International Criminal Court. The International Court of Justice and the two ad hoc criminal tribunals created by the Security Council (former Yugoslavia and Rwanda) present annual reports to the General Assembly which are considered in plenary meetings but which are not the subject of resolutions by the Assembly; their reports are simply "taken note of". Contrary to that practice, in the case of the International Criminal Court (ICC), its reports have been the subject of substantive resolutions adopted by the Assembly.

In the sixty-fifth session, the Assembly adopted a resolution without a vote (resolution 65/12 of 23 November 2010) by which it noted, inter alia, that the 2010 Kampala Review Conference of States Parties had, inter alia, adopted amendments to the Rome Statute, including one to define aggression and to establish conditions under which the Court could exercise jurisdiction with respect to that crime. It also noted that the Secretary-General (SG) had expressed the view that the amendments to the Rome Statute, including on the crime of aggression, will provide the international community with additional tools for fighting impunity. There was no discussion of the text, other than a statement by Sudan disassociating itself from the resolution and expressing great disappointment that the ICC report contained what he considered distorted information about his country (A/65/PV.52).

(b) Law of the sea items. As is traditional, two law of the sea items were dealt with directly in plenary meetings and were the subject of lengthy resolutions. One resolution was on "Sustainable fisheries, including through the 1995 Agreement for the

Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Migratory Fish Stocks, and related instruments" (resolution 65/38 of 7 December 2010) and was adopted without a vote. It was 26 pages long and contained 146 operative paragraphs. It may be of interest to note that the draft resolution was introduced on behalf of its 11 co-sponsors by the United States, as yet not a party to the 1982 Law of the Sea Convention but a party to the 1995 Agreement.

The other resolution was on "Oceans and the law of the sea" (resolution 65/37 of 7 December 2010), adopted by a vote of 123 in favour, 1 against (Turkey) with two abstentions (Columbia and Venezuela). It should be considered the "omnibus" resolution on the law of the sea, being 38 pages long and containing 244 operative paragraphs, some of which (paras. 82-97) dealt with the legal issues surrounding piracy and armed robbery at sea. With regard to other issues, the reader should compare these resolutions to the prior resolutions adopted on those subjects (resolutions 64/71 and 64/72, respectively, both of 4 December 2009).

Among the new piracy paragraphs of particular legal interest were the Assembly: encouraging States to ensure effective implementation of international law applicable to combating piracy, as reflected in the Law of the Sea Convention, and calling on States to take appropriate measures under their national laws to facilitate the apprehension and prosecution of those who are alleged to have committed acts of piracy; noting that copies of national legislation on piracy received by the UN Secretariat have been placed on the website of the Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs.

Also of legal interest in this resolution was the Assembly noting "with appreciation" the report of the SG prepared pursuant to the Security Council request in its resolution 1918 of 27 April 2010 that he present a report on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, including, in particular options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements, taking into account the work of the Contact Group on Piracy off the Coast of Somalia, the existing practice in establishing international and mixed tribunals, and the time and resources necessary to achieve and sustain substantive results. This allows a summary of what has happened in the Security Council over this same period regarding this report.

The report was issued in July 2010 (S/2010/394), identifying seven options for the Council to consider, ranging from enhancing UN assistance to building the capacity of regional States to Council establishment of an international tribunal under Chapter VII of the Charter. In its Presidential Statement of 25 August 2010, the Council welcomed the report and noted that it identified the challenges faced in tackling the problem, in particular the limited judicial capacity of States in the region, prison capacity and repatriation arrangements for suspects prosecuted by foreign courts, and believed that the report provided a solid basis for future work to enhance international, regional and

national cooperation in bringing pirates to justice. The Council reaffirmed that international law, as reflected in paras. 100, 101 and 105 of the Law of the Sea Convention, sets out the legal framework applicable to combating piracy and armed robbery at sea. It emphasized the need for regular review of progress achieved in prosecution of and imprisonment of persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia with a view to possible further steps to ensure that such persons are held accountable. The Council encouraged the Contact Group to continue discussion in that regard, taking into account the advantages and disadvantages in the SG's report.

In that Presidential Statement, the Council welcomed the intention of the SG to appoint a Special Adviser to him on Legal Issues Related to Piracy off the Coast of Somalia. Subsequently, the SG appointed Mr. Jack Lang (France) to that position with a request that he identify any additional steps that can be taken to assist States in the region, as well as other States, to prosecute and imprison persons who engage in piracy; and to explore the willingness of States in the region to serve as potential host for any of the options for potential new judicial mechanisms set out in the report of the SG (Press Doc SG/A/1260). As of the date of this writing, no reports have yet been made public on the results of Mr. Lang's work.

(c) Credentials of Cote d'Ivoire. Towards the end of the session, the question of the credentials of the representatives of Cote d'Ivoire arose. The Credentials Committee had met on 18 November 2010 and at that time had approved the credentials of the then-representatives of Cote d'Ivoire that had been issued by the relevant authorities of the Government headed by President Gbagbo. In early December, however, following the results of the election held in the country, the Independent Electoral Commission, the African Union and ECOWAS recognized Mr. Ouattara as the President-elect and representative of the freely expressed voice of the Ivorian people as proclaimed by the Electoral Commission. Moreover the Security Council in its Chapter VII resolution 1962 of 20 December 2010 urged all the Ivorian parties and stakeholders to "respect the will of the people and the outcome of the election" in view of ECOWAS and the AU's recognition of Mr. Ouattara as President-elect.

According to its report submitted to the Assembly (A/65/583/Rev.1) The Committee met again on 22 December 2010 following the submission by the Secretary-General of an "updated version" of the credentials of the representatives of Cote d'Ivoire. It took note of the decision of the AU taken on 9 December 2010 to recognize the results proclaimed by the Independent Electoral Commission and Mr. Ourattara as President-elect. The Committee accepted the updated version of the credentials of Ivorian representatives dated 22 December. As the November report had not yet been taken up by the plenary of the Assembly, the Committee simply revised that report and indicated that its decision to accept the credentials of various representatives is to be understood as applying to the updated version of the credentials of Ivorian representatives.

In the last plenary meeting of the year that began on 23 December 2010, the report of the Credentials Committee was taken up. The recommended resolution, by

which the Assembly approved the report of the Committee, was adopted without a vote (resolution 65/237). Iran, however, expressed reservations to any part of the report containing information that might be construed as recognition of Israel. Nigeria and Namibia complained that they had attempted to take the floor before the adoption of the resolution but had not been recognized, prompting an apology on the part of the President of the Assembly who advised delegations wishing to speak to transmit their intention to the Secretariat (see A/65/PV.73).

The SG issued a statement on 24 December 2010, welcoming the decision of the GA to approve the Credentials Committee report, thereby accepting the credentials of the representatives of Cote d'Ivoire issued by Mr. Gervais, Minister for Foreign Affairs of President Ouattara. That decision, according to the SG statement, reflected the united position of the international community with respect to the legitimacy of the new Government led by President Ouattara (Press Release SG/SM/13331).

(d) Participation of the European Union in the work of the United Nations. This issue is not a separate agenda item but was considered on the last day of the sixty-fourth session (14 September 2010) under the item entitled "Strengthening of the United Nations system". At that time, EU members circulated a draft resolution (A/64/L.67) by which certain consequences of the entry into force of the Lisbon Treaty would be given effect in the UN, particularly in light of the Treaty's provisions relating to the EU's external representation. While the EU would maintain observer status and thus not vote nor hold office, in order for its representatives to participate effectively in various UN fora and to present the positions of the EU, it would be invited to speak in a timely manner, permitted to circulate documents, make proposals and amendments, raise points of order (but not challenge decisions of a presiding officer), exercise the right of reply, and be afforded seating arrangements adequate for the exercise of the foregoing.

In introducing the draft, Belgium indicated that consultations had been held and explanations given regarding why such changes were necessary and useful. Apparently, this assessment was not shared by others. Lesotho on behalf of the African Group, Suriname on behalf of the Caribbean Community and Nauru on behalf of certain Pacific Island members objected that neither sufficient time nor consultation had been given to this important matter and that consideration of the draft should be deferred to the next (sixty-fifth) session. Bolivia and Iran also objected, the former of the view that the draft would grant powers to the EU that the Charter reserved for Member States. Suriname moved under the rules of procedure (rule 74) that no action be taken on the draft resolution. The motion to take no action on the draft resolution was adopted by merely a five vote margin: 76 in favour, 71 against, with 26 abstentions. (See A/64/PV.122.)

At the current session, the item "Strengthening of the United Nations system" is on the agenda. So far, no draft resolution on EU participation in the work of the UN has been officially circulated. At the conclusion of the meeting on 24 December, the Assembly took note of those items that remained open for consideration, including that item. (See A/65/PV.73.) Presumably consultations are ongoing and the matter of

enhanced EU participation in the work of the Assembly should probably be considered still pending.

(2) Sixth (Legal) Committee (Note all 2010 GA resolutions referred to below were adopted on 6 December 2010 without objection)

(a) UNCITRAL

The UN Commission on International Trade Law (UNCITRAL) at its 2010 session was extraordinarily productive, finalizing and adopting three new international commercial law standards: the revised UNCITRAL Arbitration Rules; the Supplement on Secured Rights in Intellectual Property to the UNCITRAL Legislative Guide on Secured Transactions; and part three of the UNCITRAL Legislative Guide on Insolvency Law on the treatment of enterprise groups in insolvency. These three new standards were each the subject of separate GA resolutions, as mentioned below. In omnibus resolution 65/21, the Assembly commended UNCITRAL for this achievement and encouraged it to finalize its work on a revision of the UNICITRAL Model Law on Procurement of Goods, Construction and Services at its 2011 session. It welcomed the decision to take up new topics in the areas of settlement of commercial disputes, security interests and insolvency law and undertake work in the area of online dispute resolution. It welcomed a decision to hold colloquiums to facilitate identifying a road map for future work in the area of electronic commerce and to explore the legal and regulatory issues surrounding microfinance that fell within the Commission's mandate. Of special interest may be the GA welcoming progress made in an ongoing project on monitoring the implementation of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, requesting the Secretariat to pursue its efforts towards the preparation of a draft guide on the enactment of the Convention to promote uniform interpretation and application thereof.

As a general matter, the GA endorsed the UNCITRAL conviction that the implementation and effective use of modern private law standards on international trade are essential for advancing good governance, sustained economic development and the eradication of poverty and hunger and that the promotion of the rule of law in commercial relations should be an integral part of the broader agenda of the UN to promote the rule of law at the national and international levels.

Regarding the revised UNICTRAL Arbitration Rules, the GA noted that the revisions to the 1976 Rules were the subject of due deliberation and extensive consultations with Governments and "interested circles" and that they could be expected to contribute significantly to the establishment of a harmonized legal framework for the fair and efficient settlement of international commercial disputes (resolution 65/22). It also recommended the use of the revised Arbitration Rules in the settlement of disputes arising in the context of international commercial relations. A detailed analysis of the new revised Rules is not the subject of this review.

The GA recognized in resolution 65/23 that States would need guidance as to how the recommendations contained in the UNCITRAL Legislative Guide on Secured Transactions would apply in an intellectual property context and as to the adjustments that need to be made to their laws to avoid inconsistencies between secured transactions law and law relating to intellectual property. It also noted the importance of balancing the interests of all stakeholders, including grantors, whether they are owners, licensors or licensees of intellectual property, and secured creditors. It expressed its appreciation to intergovernmental and international NGOs active in the field of secured financing and intellectual property, in particular WIPO and the Hague Conference on Private International Law, for their participation in and support for the development of the Supplement on Secured Rights in Intellectual Property. The GA recommended that all States utilize the Supplement to assess the economic efficiency of their intellectual property financing and give favourable consideration to the Supplement when revising or adopting their relevant legislation.

In resolution 65/24, the GA noted that because the business of corporations is increasingly conducted, both domestically and internationally, through enterprise groups, the formation of such groups is a feature of the increasingly globalized world economy and thus significant to international trade and commerce. However, it said it was aware that very few States recognize an enterprise group as a legal entity, except in limited ways for specific purposes, and that very few, if any, have a comprehensive regime for the treatment of enterprise groups in insolvency. It noted that the existing UNCITRAL Legislative Guide on Insolvency Law did not address the treatment of enterprise groups in insolvency. It appreciated the support for and the participation of international and international NGOs in the field of insolvency law reform in the development of the additional part to the Legislative Guide addressing that treatment. It recommended that all States utilize the Legislative Guide to assess the economic efficiency of their insolvency law regimes and give favourable consideration to the Guide when revising or adopting legislation relevant to insolvency.

(b) International Law Commission (ILC) and related items

In the omnibus resolution 65/26, the Assembly drew the attention of Governments to the importance of having their views on specific issues identified in its report regarding "reservations to treaties" and "treaties over time" as well as on the articles and commentary on "responsibility of international organizations" adopted in first reading in 2009. It also invited them to submit any further observations on the entire set of draft Guide to Practice on Reservations to Treaties, with a view to finalizing the Guide at the ILC's next session. As for the future, the Assembly invited the ILC to give priority to consideration of the topics "Immunity of State officials from foreign criminal jurisdiction" and "The obligation to extradite or prosecute (aut dedere aut judicare)".

The Assembly continued to request comments from Governments on the following sets of draft articles previously adopted by the ILC, bearing in mind any recommendation of the Commission to elaborate a convention on the basis thereof: the 2001 articles on responsibility of States for internationally wrongful acts (resolution

65/19); the 2006 articles on diplomatic protection (resolution 65/27); and the 2001 articles on prevention of transboundary harm from hazardous activities and the 2006 principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (resolution 65/28).

(c) The rule of law at the national and international levels

The Assembly's resolution on rule of law (resolution 65/32) included the following new elements: deciding to convene a high-level meeting of the GA on the rule of law at the national and international levels during the high-level segment of its sixty-seventh (2012) session; and inviting Members to focus their comments at the next session on "Rule of law and transitional justice in conflict and post-conflict situations".

The SG's report on the item (A/65/318) may be of interest. It provides insights into emerging mechanisms and practices that promote the effective implementation of international law by Member States, including judicial and non-judicial mechanisms that ensure accountability, an important tool in the international community's response to impunity.

(d) The scope and application of the principle of universal jurisdiction

While resolution 65/33 is procedural and not substantive in nature (further comment is invited and consideration of the item will continue at the next Assembly session), the report of the SG (A/65/181) is instructive in providing perhaps the most recent survey of the wide and varied State practice and legislation on this subject. Its chapters cover: general observations; scope and application of universal jurisdiction on the basis of the relevant domestic legal rules, applicable international treaties, and judicial practice; and nature of the issue for discussion. Tables in the report cover: list of crimes mentioned in the comments by Governments, concerning which universal jurisdiction (including other bases of jurisdiction) is established by the codes; specific legislation relevant to the subject, based on information submitted by Governments; and relevant treaties which were referred to by Governments, including treaties containing aut dedere aut judicare provisions.

(e) Possible conventions on other topics

The Assembly decided by resolution 65/34 that the Ad Hoc Committee it had established in 1996 should, on an expedited basis, continue to elaborate the draft comprehensive convention on international terrorism and continue to discuss the item concerning the question of convening a high-level conference under the auspices of the UN.

Concerning the criminal accountability of UN officials and experts on mission, it may be recalled that in 2005 the report of a Group of Legal Experts included as an annex a "Draft convention on the criminal accountability of UN officials and experts on mission". At the sixty-fifth session, the Assembly decided by resolution 65/20 that

consideration of the report of the Group of Legal Experts, in particular its legal aspects, taking into account the views of Member States and information contained in the note by the Secretariat, should be continued during its sixty-seventh (2012) session in the framework of a working group of the Sixth Committee. The

(3) First (Disarmament and International Security) Committee (both resolutions adopted on 8 December 2010)

The Russian Federation and the United States co-sponsored a resolution entitled "Bilateral reductions of strategic nuclear arms and the new framework for strategic relations" which basically had the Assembly congratulate themselves for negotiating the New START treaty (resolution 65/61). The Assembly welcomed the signing of the Treaty and noted the growing expectations of the international community that progress will continue to be made on nuclear disarmament. It deeply appreciated the implementation of a 1993 Agreement between the two countries on the disposition of highly enriched uranium extracted from nuclear weapons. It also noted with approval that the two countries had stopped the production of fissile materials for use in nuclear weapons or other nuclear explosive devices and expressed support for the early commencement of international negotiations for the conclusion of a verifiable treaty to end the production of fissile materials for use in nuclear weapons or other nuclear explosive devices. This latter provision was subject to a separate vote, being adopted by a vote of 179 in favour, 1 against (Pakistan), with 1 abstention (Iran). The resolution as a whole was adopted without a vote.

Resolution 65/65 concerns the same issue: Treaty banning the production of fissile material for nuclear weapons or other nuclear explosive devices. The Assembly urged the Conference on Disarmament to agree early in 2011 on a programme of work that includes the immediate commencement of negotiations on a treaty banning the production of fissile materials for nuclear weapons or other nuclear explosive devices. It was adopted by a vote of 179 in favour, 1 against (Pakistan), with 2 abstentions (North Korea and Syria).

(4) Second (Economic and Financial) Committee

Concerning the Convention on Biological Diversity, the Assembly in its resolution 65/161 of 20 December 2010, adopted without a vote, noted the adoption of the following instruments at the 2010 Conference of the Parties to that Convention: the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization; the updated and revised Strategic Plan for Diversity for the period 2011-2020; Strategy for Resource Mobilization in Support of the Achievement of the Three Objectives of the Convention; and the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartegena Protocol on Biosafety.

(5) Third (Social, Humanitarian and Cultural) Committee (all 65th session resolutions adopted on 21 December 2010)

In resolution 65/182 on "Follow-up to the Second World Assembly on Aging", adopted without a vote, the Assembly decided to establish an open-ended working group for the purpose of strengthening the protection of the human rights of older persons by considering the existing international framework and identifying possible gaps and how best to address them, including by considering, as appropriate, the feasibility of further instruments and measures. It is interesting to note that the initial draft proposed in the Third Committee referred to the feasibility of "an international convention on the rights of older persons". The revised language does not require examination of the feasibility that option, but it of course does it exclude it either.

The Assembly in its resolution 65/203 on the use of mercenaries, welcomed the establishment of an open-ended working group of the Human Rights Council with the mandate of considering the possibility of elaborating an international regulatory framework, including the option of elaborating a legally binding instrument on the regulation, monitoring and oversight of the activities of private military and security companies. It recommended that all Members, including those confronted with the phenomenon of private military and security companies as contracting States, States of operations, home States or States whose nationals are employed to work for a private military and security company, contribute to the work of the working group. The resolution was adopted by a vote of 123 in favour, 52 against with 6 abstentions.

With regard to the death penalty, the Assembly's resolution 65/206 repeats language of previous GA resolutions calling upon States to establish a moratorium on executions with a view to abolishing the death penalty. What was new this session was that the Assembly was mindful that any miscarriage or failure of justice in the implementation of the death penalty was irreversible and irreparable and made an appeal to States to progressively restrict the use of the death penalty and reduce the number of offences for which it may be imposed. The resolution was adopted by a vote of 109 in favour, 38 against (including the United States, China, Japan and certain Caribbean, African and Asian States) with 36 abstentions.

Resolution 65/208 on extrajudicial, summary or arbitrary executions was adopted following an amendment adopted in plenary to the text recommended by the Third Committee, an unusual event as usually plenary decision-making follows that of a Main Committee, as the membership is the same. In this case, in the Third Committee a reference in the originally proposed text to "sexual orientation" had been deleted by a vote of 79 in favour, 70 against with 17 abstentions. In the plenary, the United States proposed an amendment to the text "Urges all States … to investigate promptly and thoroughly all killings, including those targeted at specific groups of persons such as … killings of persons belonging to national or ethnic, religious and linguistic minorities" by adding at that point the phrase "or because of their sexual orientation". The US amendment was adopted by a vote of 93 in favour, 55 against with 27 abstentions. The resolution as a whole was adopted by a vote of 122 to 1 (Saudi Arabia), with 62 abstentions.

By resolution 65/215, the Assembly reaffirmed without objection that persons affected by leprosy and their family members should be treated as individuals with dignity and are entitled to all human rights and fundamental freedoms under customary international law, relevant conventions and national constitutions and laws and took note with appreciation of the Principles and Guidelines for the elimination of discrimination against persons affected by leprosy and their family members.

Concerning strengthening crime prevention and criminal justice responses to violence against women, by resolution 65/228, the Assembly adopted without objection the guidelines in the updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice.

In this field, a major accomplishment was the adoption without objection of the Bangkok Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (resolution 65/229). The Assembly recognized that, in view of the great variety of legal, social, economic and geographical conditions in the world, not all of the rules can be applied equally in all places and at all times; and that they should, however, serve to stimulate a constant endeavour to overcome practical difficulties in their application, in the knowledge that they represent, as a whole, global aspirations amenable to the common goal of improving outcomes for women prisoners, their children and their communities. It invited States to take into consideration the specific needs and realities of women as prisoners when developing relevant legislation, procedures, policies and action plans and to draw, as appropriate, on the Bangkok Rules. In particular, the Assembly emphasized that, when sentencing or deciding on pretrial measures for a pregnant woman or a child's sole or primary caretaker, non-custodial measures should be preferred where possible and appropriate, with custodial sentences being considered when the offence is serious or violent.

By its resolution 65/230, the Assembly endorsed without objection the "Salvador Declaration on Comprehensive Strategies for Global Challenges: Crime Prevention and Criminal Justice Systems and Their Development in a Changing World" adopted by the Twelfth UN Congress on Crime Prevention and Criminal Justice. In line with that Declaration, the Assembly called for the establishment of expert groups to conduct a comprehensive study of the problem of cybercrime and to exchange information on the revision of existing UN standard minimum rules for the treatment of prisoners.

Contrary to the last Assembly session (resolution 64/254 of 26 February 2010), there has been thus far no resolution adopted under the item "Report of the Human Rights Council" concerning the so-called "Goldstone" Report of the UN Fact-Finding Mission on the Gaza Conflict (A/HRC/12/48). It did, however, adopt an omnibus resolution on the report of the Human Rights Council (resolution 65/195) by which the GA took note of the report of the Council and acknowledged the recommendations therein. The Human Rights Council had adopted resolution 15/6 of 29 September 2010 on the subject, but it contained no recommendations (see A/65/53/Add.1).

(6) Fourth (Special Political and Decolonization) Committee

The question of the Gaza conflict also arose in connection with the annual report of UNRWA for 2009, which was before the Fourth Committee during the Assembly's sixty-fifth session (A/65/13). The UNRWA report recalled that the SG had convened a Headquarters Board of Inquiry into certain incidents in the Gaza Strip during the conflict, seven of which related to UNRWA. Of those seven, the Board had concluded that in all but on those incidents, Israel had breached the inviolability of UN premises and/or failed to respect the immunity of the Agency's property and assets from interference, as is required by the 1946 General Convention on the Privileges and Immunities of the UN to which Israel is a party. It noted that such inviolability and immunity could not be overridden by demands of military expediency, and found Israel responsible for the deaths, injuries and property damage caused by its actions. Following the Board's report, the UN engaged an independent loss adjuster to value the losses suffered by the Organization in respect of those incidents for which the Board had found responsibility. The report includes in table form the details of the incidents relating to UNRWA for which the Board found Israel responsible, the number of deaths and injuries at the relevant UNRWA installation, and the nature and value of the Agency's losses determined by the loss adjuster. The total figure of the value of the losses was US$ 10,197,839.

The report states that the UN submitted to the Israeli Ministry of Foreign Affairs a claim for reimbursement for the losses that the UN had sustained in a number of incidents, including the incidents related to UNRWA as detailed in the report. The report indicates that in January 2010, Israel made a payment of US$ 10.5 million to the UN, of which the UN remitted $10.27 to the Agency.

In its resolution 65/100 of 10 December 2010 the Assembly deplored the extensive damage and destruction of Agency facilities in the Gaza Strip caused during the military operations, including to schools where civilians were sheltered and the Agency's main compound and warehouse, as reported in the summary by the SG of the Board's report (A/63/855) and in the "Goldstone Report". In that regard, it also deplored the breaches of the inviolability of UN premises, the failure to accord the property and assets of the Organization immunity from any form of interference and the failure to protect UN personnel, premises and property. The Assembly called upon Israel to abide by Articles 100, 104 and 105 of the UN Charter and the 1946 General Convention in order to ensure the safety of the personnel of the Agency, the protection of its institutions and the safeguarding of the security of its facilities in the Occupied Palestinian Territory, including East Jerusalem. The resolution was adopted by a vote of 169 in favour, 6 against, with 2 abstentions.

It did not, however, make any reference to the submission of the UN claim for reimbursement for losses in a number of incidents during the Gaza conflict, nor to the fact that that claim has now been settled.

(7) Fifth (Administrative and Budgetary) Committee

In 2007, the Assembly decided to establish a new, independent, transparent, professionalized, adequately resourced and decentralized system of administration of justice consistent with the relevant rules of international law and the principles of the rule of law and due process to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike, replacing a largely peer-review system that had functioned for more than 60 years. The new system is a fully professional system with a two-tiered formal adjudication mechanism: the UN Dispute Tribunal and the UN Appeals Tribunal, staffed by professional Judges and supported by Registries in Geneva, Nairobi and New York. It also includes an Office of Staff Legal Assistance. It became operational on 1 July 2009. The report submitted by the SG at the sixty-fifth system reviews the new system and provides data and information on its functioning (A/65/373). The SG concluded that the new system was a success and a significant improvement over the old system. In general, this report provides the first glimpse of how this new system is functioning according to the SG.

Nevertheless, the SG in his report noted that despite the many accomplishments of this successful reform, the experience of the first year demonstrated that there are some elements of the new system that need adjustment, strengthening or further consideration in order for the system to work optimally. From that diplomatic summary, the details of the report indicate serious concerns on the part of the SG on how the new system is working, including proposals that the GA remind the Tribunals of various points of principle and that the Statute be amended. The SG at one point indicates that the new Tribunals are interpreting the UN Staff Rules and Regulations "at times in novel ways". Some of the points of particular concern and proposals of the SG were as follows:

a) While the introduction of the new system was not intended to being with a clean slate and the decades of jurisprudence from the Administrative Tribunal provide an important source to be drawn from by the new Tribunals. Yet in the first year, the jurisprudence of the new Dispute Tribunal has reflected departures from that established jurisprudence. The SG recommended that the GA recognize the continued relevance and persuasive force of the earlier jurisprudence.

b) The former Administrative Tribunal had recognized the broad discretionary authority of the SG in personnel matters in three main areas (appointments/promotions, disciplinary matters and classification of posts), but the Dispute Tribunal appeared to be inclined towards substituting its own judgment for that of the SG even in areas wshere the intent of the GA had been made clear. Among the decisions quoted was one in which the Dispute Tribunal asserted that "it was not concerned with the role of the United Nations in international affairs" and "in its character as an employer the United Nations is simply a corporation". He recommended that the GA confirm that the exercise of judicial review by the two new Tribunals should be undertaken with full respect for the prerogatives of the GA and the role of the SG as the chief administrative officer of the Organization and for his prerogatives and responsibilities under the Charter.

c) Noting that Dispute Tribunal judgments decided by one-judge panels had resulted in divergent practices and possible forum shopping, the SG recalled his prior recommendation that three-judge panels be established in the Dispute Tribunal representing a diversity of legal traditions, noting it would facilitate the harmonization of proceedings. He further recommended the GA confirm that the development of jurisprudence of the two Tribunals should take into account the international character of the Organization and reflect the diversity of legal traditions.

d) Notwithstanding a provision of a GA resolution as to the limited powers of the Tribunals, the Dispute Tribunal has exercised powers that it considered inherent in the jurisdiction of all courts, in particular the authority to find and sanction contempt, even though there is no specific provision in the Statute authorizing it so exercise such authority. The SG recommended that the GA reaffirm that the two Tribunals shall not have any powers beyond those conferred in their respective Statutes and that the exercise of such powers shall be in accordance with the role of the SG under the Charter, which includes his authority to determine when staff members have engaged in misconduct and to impose appropriate disciplinary measures.

e) Noting that the rules of procedure of the Dispute Tribunal were too general concerning the disclosure of confidential documents, the SG suggested the GA consider amending the Statute of that Tribunal to recognize that where the production of confidential documents would undermine significant organizations interests, such as the security of staff members and the confidentiality of communications between the Organization and Member States, the SG may decline to produce such documents or portions thereof. The Tribunal may then draw appropriate and reasonable inferences from any such non-disclosure.

The Advisory Committee on Administrative and Budgetary Questions (ACABQ) in its report to the Fifth Committee (A/65/557) noted that the SG had referred to a number of judgments that seemed to affect his prerogative as chief administrative officer and, in certain cases, on decisions already taken by the GA. In that respect, the Committee noted that all elements of the new administration of justice must work in accordance with the Charter and the legal and regulatory framework approved by the Assembly. The Committee expected that the Tribunals will be guided accordingly.

By resolution 65/251 of 24 December 2010, adopted without a vote, the Assembly noted with appreciation the achievements made since the inception of the new system in both the disposal of the back-log and the addressing of new cases, despite the numerous difficulties faced during the implementation of the new system of administration of justice. It commended the efforts of all involved in managing the transition from the previous internal justice system and those involved in the implementation and functioning of the new system. The Assembly emphasized the importance of the principle of judicial independence in the system of administration of justice. With regard to the SG's suggestions and proposal, the Assembly deferred until its next session a review of the Statutes of the Tribunals in the light of experience gained, including on the efficiency of the overall functioning of the Tribunals, in particular regarding the number

of judges and the panels of the Dispute Tribunal. It requested the SG to submit information, bearing in mind the principle of judicial independence, on various matters including statistics on whether the judgments rendered found for the applicant or the respondent (SG). It also invited the Sixth (Legal) Committee to consider the legal aspects of the reports to be submitted by the SG, without prejudice to the role of the Fifth Committee as the Main Committee entrusted with responsibilities for administrative and budgetary matters.

Clearly the new system of administration of justice has raised important questions of law and policy with regard to internal justice, independence of the judiciary, Charter-based prerogatives and mandates of the SG and the Assembly, which will merit attention in the coming years.

By a letter dated 6 October 2010 (S/2010/560), the SG informed the Security Council that the Special Court for Sierra Leone would run out of funding that month and that the voluntary contributions necessary for the Court to complete its work could not be found. He referred to the Agreement between Sierra Leone and the Organization establishing the Special Court in which it is stated that should voluntary contributions be insufficient for the Court to implement its mandate, the SG and the Security Council should explore alternate means of financing the Special Court. The SG proposed that one way of addressing the shortfall would be for all of the costs of the Court to be provided by assessment while preserving the independent nature of the Court. The Council might wish to invite him to bring the matter to the attention of the General Assembly with a view to seeking the appropriation of funds for the Court. The President of the Council in a letter of the same date (S/2010/561) informed the SG that the members of the Council had no objection to the proposal with regard to supplementing voluntary contributions with the following understandings: a) it is not expected that there will be additional subventions for the Court; and b) the UN Secretariat, the Management Committee of the Court and its Registrar and other senior officials will intensify their efforts to fund the Court's activities through voluntary contributions.

Accordingly, the SG submitted a report to the Assembly entitled "Request for a subvention to the Special Court for Sierra Leone" (A/65/570). That report set out the overall level of resources required for the completion of Court's activities for the period from 1 November 2010 to 29 February 2012. The SG requested a subvention of up to US$17,916,560 from the Assembly. To the extent that voluntary contributions received exceeded the level currently anticipated, the relevant amounts sought from the Assembly as assessed contributions would be adjusted. The SG recalled that at the time of the establishment of the Special Court in 2000 and 2001, the then-Secretary General was of the view that the only realistic solution was for the Court to be financed from assessed contributions, as that would produce a viable and sustainable financial mechanism affording secure and continuous funding, but that the President of the Security Council at the time reiterated the support of the Council for its 2000 decision under which the Court would be funded through voluntary contributions. He also detailed the prior subvention by the Assembly to the Court in 2005.

The ACABQ recommended to the Fifth Committee (A/65/603) that, in view of the importance of the activities undertaken by the Special Court and bearing in mind the progress it has made towards the achievement of its mandate, the Assembly approve, as an exceptional measure, funding of up to US$12,239,344 covering the period indicated by the SG to supplement the voluntary financial resources of the Court so that it can complete its work. It stressed that the recommendation was made on the understanding that: a) any regular budget funds appropriated for the Court will be refunded to the UN at the time of the Court's liquidation should sufficient voluntary contributions be received; b) it is not expected that there will be additional subventions for the Court; and c) the UN Secretariat, the Management Committee, the Registrar and other senior officials of the Court will intensify their efforts to fund the activities of the Court through voluntary contributions.

The Assembly adopted resolution 65/259 entitled "Questions relating to the programme budget for the biennium 2010-2011" on 24 December 2010 by a vote of 142 in favour, 1 against, with 3 abstentions. Section XII thereof concerned the request for a subvention to the Special Court for Sierra Leone, according to which the Assembly endorsed the conclusions and recommendations of the ACABQ and authorized the SG, as an exceptional measure, to enter into commitments in an amount not to exceed US$9,882,594 to supplement the voluntary financial resources of the Special Court for the 2011 calendar year, on the understanding that: a) any regular budget funds appropriated for the Special Court will be refunded to the UN at the time of the Court's liquidation, should sufficient voluntary contributions be received; and b) the UN Secretariat, the Management Committee and the Registrar and other senior officials of the Special Court will intensify their efforts to fund the activities of the Court through voluntary contributions.

NOTE REGARDING SECURITY COUNCIL DECISIONS WITH LEGAL ASPECTS TAKEN DURING THE SAME TIME PERIOD:

This review has focused on legal highlights of the sixty-fifth session of the General Assembly, from mid-September to 24 December 2010. The reader should be aware that during that time the Security Council took decisions with legal aspects during this time frame as well, which are outside the scope of this review. However, they are noted below for your information and future reference:

Two decisions were taken concerning women and peace and security. A Presidential Statement was made on 26 October 2010 (S/PRST/2010/22). In addition, resolution 1960 (2010) of 16 December 2010 was adopted unanimously on the same subject, focusing on sexual violence in situations of armed conflict in particular against women and children. A Presidential Statement made on 22 November 2010 concerned the protection of civilians in armed conflict (S/PRST/2010/25) which included an up-dated Aide Memoire "For the consideration of issues pertaining to the protection of civilians in armed conflict". These resolutions build on prior resolutions that should be

consulted by the interested reader, in particular resolution 1894 (2009) of 11 November 2009.

Of major significance in the area of international criminal justice was the adoption by the Council on 22 December 2010 of resolution 1966 (2010) establishing an "International Residual Mechanism for Criminal Tribunals" to complete the remaining tasks of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). It was adopted under Chapter VII of the Charter, by a vote of 14 to none, with 1 abstention (Russian Federation).

The Council reaffirmed the need to establish an ad hoc mechanism to carry out a number of essential functions of the Tribunals, including the trial of fugitives who are among the most senior leaders suspected of being most responsible for crimes, after the closure of the Tribunals. It established the Mechanism with two branches: an ICTR Branch in Arusha, Tanzania, which will begin functioning on 1 July 2012 and the ICTY Branch in The Hague, the Netherlands, which will begin functioning on 1 July 2013. The ICTY and ICTR were requested to take all possible measures to expeditiously complete all their remaining work as provided by the resolution no later than 31 December 2014, to prepare their closure and to ensure a smooth transition to the Mechanism, including through advance teams in each of the Tribunals. The archives of the Tribunals will be co-located with the respective branches of the Mechanism. It further decided that the Mechanism will continue the jurisdiction, rights and obligations and essential functions of the Tribunals, as well as the contracts and international agreements concluded by the UN in relation to them. The Mechanism is to operate for an initial period of four years, be reviewed by the Council before the end that period and every two years thereafter, and will continue to operate for subsequent periods of two years following each review, unless the Council decides otherwise.

Attached to the resolution as Annex I is the Statute of the Mechanism, which provides that it shall continue the functions of ICTY and ICTR. These residual functions included the trial of fugitives, management of archives, protection of witnesses, supervision of enforcement of sentences, trial of contempt cases, referral of cases to national jurisdictions (and revocation) and review of judgments. The Mechanism will maintain the structure of the Tribunals but will have a single President, Prosecutor and Registrar common to both branches. To ensure that the Mechanism can be activated promptly from its "dormant" phase in case there is a need to conduct trials, it will not only be based on a roster of 25 judges elected by the GA, but also make use of rosters of additional staff to be recruited rapidly as may be required to perform its functions.

Annex II of the resolution contains transitional arrangements to determine the transfer of functions and competences from the Tribunals to the Mechanism. Those arrangements provide for the possibility of "double hatting" of the President, Judges, Prosecutor, Registrar and staff of the Mechanism, who may also hold the same office or be staff members of the Tribunals. A possible overlap is foreseen.

For example, if a notice of appeal against the ICTY Trial Chamber's judgment or sentence in the Karadzic case is filed prior to the commencement of the ICTY Branch of the Mechanism on 1 July 2013, the ICTY will have competence to conduct and complete all appellate proceedings, even though the Mechanism will have commenced operating on that date. Conversely, if the notice of appeal is filed after 1 July 2013, the ICTY Branch of the Mechanism will have the competence to conduct and complete all appellate proceedings. Another example is Mladic—if he is arrested more than 12 months prior to 1 July 2013, ICTY will have competence to conduct and complete the trial (presumably not any eventual appeal). If arrested 12 months or less of that date, ICTY only has jurisdiction to prepare the trial and the Residual Mechanism ICTY Branch has competence over him, including the trial.

No doubt all those interested in international criminal law and justice will wish to carefully study this resolution and its annexes. (Interested readers should also refer to the report on the 2010 activities of the Security Council's Informal Working Group on International Tribunals, which negotiated and submitted the Residual Mechanism resolution and annexes, document S/2010/684 of 31 December 2010.)

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