*Extract from:*

# UNITED NATIONS JURIDICAL YEARBOOK

## 2007

Part Two. Legal activities of the United Nations and related intergovernmental organizations

Chapter VI. Selected legal opinions of the Secretariat of the United Nations and related intergovernmental organizations

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# Chapter VI

# SELECTED LEGAL OPINIONS OF THE SECRETARIATS OF THE UNITED NATIONS AND RELATED INTERGOVERNMENTAL ORGANIZATIONS*

## A. Legal opinions of the Secretariat of the United Nations

(Issued or prepared by the Office of Legal Affairs)

## 1. Privileges and immunities

### (*a*) Note to the Secretary-General regarding the Staff Council resolution 42/24 proposing to hire Counsel and explore the possibility of bringing a legal action in the United States of America Federal Courts

Exclusive responsibility of the Secretary-General to decide investments of United Nations Joint Staff Pension Fund (UNJSPF) assets—Exercise of fiduciary responsibility delegated to the Investment Management Service and to outside investment managers—Same status, privileges and immunities granted to UNJSPF, a subsidiary organ of the General Assembly, as to the United Nations—Immunity from legal process for the Secretary-General and other officials regarding the management of UNJSPF assets

20 February 2007

Background:

The Under-Secretary-General for Management has asked me to brief you on the legal aspects of the above-referenced matter, which arises from Staff Council resolution 42/24, which I understand was adopted on 15 February 2007. Under that resolution, the Staff Council has decided, "to explore the possibility of taking immediate legal action in United States Federal Courts, or elsewhere, in order to prevent the Secretary-General, in his capacity as fiduciary of the Pension Fund investments, from undertaking the indexation of the Pension Fund investments and outsourcing the management of such investments at this time." The resolution further authorizes the Staff Committee to hire external legal counsel to explore such legal options and measures, and has allocated $250,000 from the Staff Council's reserve fund to that end.

* This chapter contains legal opinions and other similar memoranda and documents.

### Responsibility for investment of the assets of the Pension Fund:

Article 19 of the Regulations of the United Nations Joint Staff Pension Fund, adopted by the General Assembly, provides that the "investment of the assets of the Fund shall be decided upon by the Secretary-General after consultation with an Investments Committee and in light of observations and suggestions made from time to time by the Board [of the Fund] on the investments policy." The General Assembly has confirmed that the Secretary-General acts alone as "a fiduciary . . . for the interests of the participants and beneficiaries of the United Nations Joint Staff Pension Fund under the Regulations and Rules of the Fund" (General Assembly resolution 35/216 B, of 17 December 1980). However, in exercising such fiduciary responsibility, the Secretary-General must consult with the Investments Committee and receive observations and suggestions from the Board of the Fund on investment policy. In addition, the General Assembly has "established" the following criteria for the investment of the assets of the Fund: (i) safety, (ii) profitability, (iii) liquidity, (iv) convertibility, and (v) conformity with the Regulations and Rules of the Pension Fund (General Assembly resolution 49/224, Part VIII, of 23 December 1994).

Based on the foregoing, it is the Secretary-General's sole responsibility to decide on the investment of the assets of the Fund, subject to his obligation, under article 19 of the Regulations of the Pension Fund, to consult with the Investments Committee, and to receive observations and suggestions from the Board of the Fund from time to time on such policy. In exercising such responsibility, the Secretary-General should abide by the established criteria for investment of the assets of the Fund, and he should ensure, as a fiduciary, that his investment decisions are made for the interests of the participants and beneficiaries of the Pension Fund under the Regulations and Rules of the Fund.

The Secretary-General is not expected to act without support, and historically has delegated day-to-day responsibility for investment of the assets of the Fund to a Representative of the Secretary-General for Investment of the Assets of the Fund, who, in turn, is supported by the staff of the Investment Management Service. While the Representative of the Secretary-General and the staff of the Investment Management Service make most decisions on the disposition of investments, for many years, they have also delegated to outside investment managers responsibility for certain portions of the portfolio of the investments of the Fund, based on consultations with the Investments Committee and the observations and suggestions of the Board. In particular, such use of outside investment managers only has occurred thus far for the Fund's small capitalized equities investments portfolio, where the transactions are so numerous and the overall investments are so modest that the resources of the Investment Management Service are inadequate to appropriately manage such portfolio of investments.

### Immunity of the Secretary-General and the Pension Fund from suit in the United States courts:

The Fund has been established as a subsidiary body of the General Assembly in accordance with Article 22 of the Charter of the United Nations and, therefore, is an integral part of the United Nations. Moreover, pursuant to article 18 of the Regulations of the Fund, the assets of the Fund "shall be acquired, deposited and held in the name of the United Nations, separately from the assets of the United Nations, on behalf of the partici-

pants and beneficiaries of the Fund." Accordingly, the Fund and its assets enjoy the same status, privileges and immunities as does the Organization.

In this regard, article II, section 2 of the 1946 Convention on the Privileges and Immunities of the United Nations,* to which the United States of America is a party, provides that the "United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process." Further, article V, section 18 (a) of the Convention provides that "officials of the United Nations shall be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity." Article V, section 19 of the Convention also provides that, in addition to such functional immunity under section 18, the Secretary-General and all officials at the level of Assistant Secretary-General and above "shall be accorded in respect of themselves, their spouses and minor children, the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law." Overall, the courts of the United States have upheld the immunity of the Organization, including the Pension Fund, from legal process. The courts have similarly upheld the immunity of the Organization's officials and of the Secretary-General from legal process.

It should also be noted that, under article VIII, section 29 of the Convention, the Organization must provide "appropriate modes of settlement" in any case of "disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General." Any attempt by the Staff Council to institute a legal action against the Secretary-General or any other United Nations official involved with decisions on the investment of the assets of the Fund will result in the Organization's assertion of the immunities from legal process, as described above. In such case, the Staff Council may seek an "appropriate mode of settlement" of its dispute with the Secretary-General. If the Staff Council is unable to resolve its concerns satisfactorily through their representatives to the Board of the Pension Fund, then any settlement of this dispute should be pursued through informal consultations between the Secretary-General and the Staff Council.

Conclusion:

Based on the foregoing, the United States courts, or any other courts of the Member States, would not have jurisdiction to hear an action brought by the Staff Council against the Secretary-General, the Organization, the Pension Fund, or any officials thereof concerning the decisions taken by the Secretary-General, and his representatives, with respect to investment of the assets of the Pension Fund.

* United Nations, *Treaty Series,* vol. 1, p. 15, and vol. 90, p. 327 (corrigendum to vol. 1).

### (*b*) Interoffice memorandum to the Officer in Charge, Policy Support Unit, Human Resources Policy Service, Division for Organizational Development, Office of Human Resources Management (OHRM) regarding liability for income tax in the United States (US) for United Nations staff members with permanent residence in the US

Potential tax liability of United Nations staff under US income tax law—Waiver of privileges and immunities upon acquiring permanent residence in the US—Current status of United Nations staff member without G-4 visa nor permanent residence

12 March 2007

1. I refer to your memorandum of 9 March 2007 concerning the potential tax liabilities of [Name], Assistant Secretary-General and New York Pandemic Influenza Coordinator, concerning her United Nations income for the years 2006 and 2007. You note in your memorandum that, following her departure from the employ of UNFPA on 31 October 2005, [Name] filed form 1–508 on the Waiver of Rights, Privileges, Exemptions and Immunities (the "Waiver") with the United States authorities, as part of her application for permanent resident status in that country. You also note that, subsequently, on 8 May 2006, [Name] was granted an appointment by the United Nations for an initial six months period which was then extended for another six months until 7 May 2007. You inform us that at the time of [Name]'s recruitment, OHRM did not request that she adjust to G-4 status, "as the process of her application for legal residence was already in an advanced stage". In this regard, while we are not aware of the current immigration status of [Name] which forms the legal basis for her presence in the United States and for her employment by the Organization, we understand that no final ruling has been made by United States authorities on her application for permanent residence, and that therefore, she does not currently have permanent residence status in the United States. You seek guidance from this Office as to whether, under the circumstances described above, [Name] is liable for taxation in the United States for her United Nations income and emoluments earned after her filing of the Waiver.

2. As an initial matter, we consider that the resolution of the issues described below require interpretation of relevant United States legislation, as well as, possibly, policy decisions to be made by regulatory authorities of the United States. As such, we recommend that the Organization seek the clarification of this matter with the United States Mission to the United Nations, before a final answer is provided to [Name]. The resolution of the related question of whether the Organization should report to the Internal Revenue Service the United Nations earnings of [Name], should also be deferred until a response to the queries described above is received from the United States Mission to the United Nations.

3. Notwithstanding the above, with a view to assist OHRM in its response to the queries of [Name], we provide the following observations.

4. At the outset, we note that, as this Office opined in a memorandum of 26 June 1995, a copy of which was attached to your 9 March 2007 request, the tax liabilities in the United States of staff members who are citizens or permanent residents of that country are set out in the applicable provisions of the Convention on the Privileges and Immunities

of the United Nations* (the "Convention"), and in the reservations entered by the United States, upon its accession to the Convention. In particular, article V, section 18(b) of the Convention provides as follows:

"18. Officials of the United Nations shall:

(*b*) be exempt from taxation on the salaries and emoluments paid to them by the United Nations".

5. In acceding to the Convention, the United States entered several reservations, including the following:

"Paragraph (b) of section 18 regarding immunity from taxation and paragraph (c) of section 18 regarding immunity from national service obligations shall not apply with respect to United States nationals and aliens admitted for permanent residence."

6. It follows that in accordance with the terms under which the United States acceded to the Convention, the United States has authority to impose tax liability on the United Nations salary and emoluments earned by staff members who are United States nationals or permanent residents only. On the understanding that [Name] is currently neither a United States citizen, nor a permanent resident, we consider that she is exempt from taxation by the United States on her United Nations salary and emoluments.

7. Notwithstanding the foregoing, a question may be raised as to whether [Name] has voluntarily exposed her United Nations salary and emoluments to tax liability in the United States, through the filing of her Waiver. At the outset, we have reservations about the validity of the Waiver filed by [Name]. As the Waiver form itself indicates, the only persons eligible to file the Waiver are those whose occupation groups would entitle them to A, G or E visa status. In this regard, [Name] indicated, in a 7 March 2007 memorandum to OHRM, that she filed the Waiver "at a time when [she] was not in the employ of the UN". It follows that unless [Name] can demonstrate that at the time of her filing of the Waiver, she had an occupation falling under one of the categories described in the Waiver form, she would be considered ineligible for filing the Waiver, whose validity could, therefore, be disputed by [Name] or by the Organization. However, as [Name] has already applied for permanent residence, and as her current occupation as a United Nations staff member falls within one of the groups requiring her to file the Waiver as a condition of being granted permanent resident status, it is possible that United States authorities would consider the Waiver to be valid, and seek to impose taxation on her United Nations salary and emoluments.

8. As noted in paragraph 2 above, as the resolution of the issues described above require interpretation of United States law, and depend on possible policy decisions to be undertaken by United States regulatory authorities, they fall outside the competence of this Office, and we recommend that the United States Mission to the United Nations be consulted to provide clarification.

9. In addition to the above, we note that any acquisition and maintenance of permanent residence status by [Name] would have to be in compliance with the established policy of the Organization pertaining to this matter, as set out in the applicable administrative issuances, including ST/AI/2000/19 of 18 December 2000 on the "Visa status of non-United States staff members serving in the United States, members of their household and their household employees, and staff members seeking or holding permanent resident

* United Nations, *Treaty Series,* vol. 1, p. 15, and vol. 90, p. 327 (corrigendum to vol. 1).

status in tie United States". We, therefore, recommend that OHRM take necessary action as appropriate, to ensure that the immigration status of [Name] remain consistent with such policy. In particular, we wish to raise the following two considerations.

10. First, as noted in section 1.1 of ST/AI/2000/19, "[s]taff members other than United States citizens and permanent residents whose duty station is in the United States and who are considered international recruits in accordance with the Staff Regulations and Rules . . . are required by the United States to obtain G-4 visa status on appointment and to relinquish any other visa status in the United States they held previously". From the information which has been provided to us, we understand that, while [Name] is currently neither a United States citizen, nor a permanent resident, she does not have G-4 status. As such, her current status maybe inconsistent with United States law. In this regard, we understand from your memorandum of 9 March 2007 that "[a]t the time of recruitment on 8 May 2006, OHRM did not request that she adjust to G-4 status, as the process of her application for legal residence was already in an advanced stage". With respect to this matter, we would recommend that OHRM take appropriate action to ensure that [Name]'s status remains consistent with applicable United States law, and with applicable United Nations administrative issuances.

11. Second, we note that, pursuant to section 5.6 of ST/AI/2000/19, the policy of the Organization is to not allow staff members to acquire or maintain permanent resident status in the United States, unless such staff members fall under the following categories of exceptions, as enumerated in section 5.7 of ST/AI/2000/19:

"(*a*) Stateless persons;

(*b*) Newly appointed staff members who have applied for citizenship by naturalization, when such citizenship will be granted imminently;

(*c*) General Service and related categories staff previously authorized to retain permanent resident status, on promotion to the Professional category;

(*d*) Staff members in the General Service and related categories;

(*e*) Staff members appointed to serve outside the United States either under the 200 series of the Staff Rules as technical assistance project personnel, or under an appointment of limited duration governed by the 300 series of the Staff Rules;

(*f*) Staff members appointed for less than one year; however if their appointments are extended beyond one year, that extension is subject to obtaining a G-4 visa."

12. In this regard, we note that, [Name]'s current appointment with the Organization is set to expire in 7 May 2007, one year after her initial appointment. Therefore, she currently falls within the exception set out in section 5.7(f). However, in the event that [Name] does not fall within any of the other categories of exceptions set out in section 5.7, any extension of her appointment would be subject to [Name] obtaining a G-4 visa. We recommend that OHRM advise [Name] accordingly.

### (*c*) Note verbale to the Permanent Representative of Austria to the United Nations, regarding the arrest of a member of one delegation to a meeting of the Committee on the Peaceful Uses of Outer Space, held in Austria from 6 to 15 June 2007

Privileges and immunities of members of State delegation to a United Nations meeting—Notion of official duty—Immunity from personal arrest or detention—Duty of Member State to waive the immunity of its representative in any case where it would impede the course of justice

19 June 2007

The Legal Counsel of the United Nations presents his compliments to the Permanent Representative of Austria to the United Nations and has the honour to refer to the case concerning a representative of [State], [Name], to the fiftieth Meeting of the Committee on the Peaceful Uses of Outer Space, held from 6 to 15 June 2007 at the United Nations Office in Vienna, Vienna International Centre, Austria.

The United Nations Office in Vienna was informed by the Ministry of International and European Affairs of Austria by an email dated 15 June 2007 that "[Name] [ . . . ] entered Austria on Sunday, June 10th [2007] through Vienna Airport in Schwechat (according to his companion, they spent the day sight-seeing and shopping). On June 11th, both [[Name] and his companion] then travelled to Salzburg by train where [Name] was caught *in flagranti* upon committing delicts indictable according to Austrian penal laws (StGB ,§§ 256 und 319, 'Geheimer Nachrichtendienst zum Nachteil Österreichs' and 'Militärischer Nachrichtendienst für einen fremden Staat')".

The Ministry has requested the United Nations for "a statement, whether [it] considers the described incident as being committed by [Name] while exercising his functions and during the journey to and from the place of meeting" and noted that "[i]n case of affirmation, immunity would apply, [Name] would then be asked to leave the country. The United Nations would be requested to confirm that future nominations of [Name] as members of delegations to United Nations conferences would not be accepted." The Ministry also provided a copy of a Note Verbale of 15 June 2007 by the Embassy of [State] to Austria taking issue with the facts as alleged above.

The Legal Counsel wishes to offer the following in response to the Ministry's request.

At the outset, the United Nations Office in Vienna has confirmed that [Name] was on the list of representatives of [State] to the fiftieth Meeting of the Committee on the Peaceful Uses of Outer Space held from 6 to 15 June 2007, and that he was personally issued with a United Nations pass for the meeting in the morning of 11 June 2007.

Pursuant to the 1995 Agreement between the United Nations and the Government of Austria regarding the Seat of the United Nations in Vienna (hereinafter the "Seat Agreement"),[*] [Name] enjoys as a governmental representative to a United Nations conference in Vienna, the privileges and immunities set forth in article IV, section 11 of the 1946 Convention on the Privileges and Immunities of the United Nations.[**]

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[*] United Nations, *Treaty Series,* vol. 2023, p. 253.

[**] United Nations, *Treaty Series,* vol. 1, p. 15, and vol. 90, p. 327 (corrigendum to vol. 1).

Article XI, section 33 of the Seat Agreement stipulates that "[r]epresentatives of States and of intergovernmental organizations to meetings of, or convened by, the United Nations and those who have official business with the United Nations in Vienna, shall, while exercising their functions and during their journeys to and from Austria, enjoy the privileges and immunities provided in article IV of the [1946 Convention on the Privileges and Immunities of the United Nations (hereinafter the "General Convention")]".

Article IV, section 11 of the General Convention provides in relevant part that "[R]epresentatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, shall, while exercising their functions and during their journey to and from the place of meeting, enjoy the following privileges and immunities: (a) immunity from personal arrest or detention and from seizure of their personal baggage, and, in respect of words spoken or written and all acts done by them in their capacity as representatives, immunity from legal process of every kind; . . .".

In this connection, it is recalled that pursuant to section 14 of the General Convention "[p]rivileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connection with the United Nations. Consequently a Member not only has the right but is under a duty to waive the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded."

The Legal Counsel of the United Nations has previously held that the phrase "while exercising their functions and during their journey to and from the place of meeting" must be broadly interpreted in order to avoid results clearly not intended by the drafters of the General Convention. This interpretation was contained in a legal opinion provided by the Legal Counsel in 1961 and which was reproduced in a study entitled "the practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities" prepared by the Secretariat and published in the 1967 Yearbook of the International Law Commission (vol. II, p. 176).* In relevant part, the opinion noted that:

> "Nevertheless, I have no hesitation in believing that it was the 'broad' interpretation that was intended by the authors of the [General] Convention. This must follow from the fact that the expression 'while exercising their functions' is contained in the opening paragraph and qualified each and all of the privileges and immunities provided in the sub-paragraphs, (a) through (g), that follow.
>
> A glance at those sub-paragraphs will clearly show that the privileges and immunities provided by any of them would become meaningless if it is applicable only when the representative is 'actually doing something as a part of his functions', 'e.g., is present in the room or building where the meeting . . . is being held'. Such an interpretation would lead to the absurd conclusion that, a representative, immediately after having performed an official function, or after having left the meeting room may, under paragraph (a) for example, be arrested, or detained, or have his personal baggage seized. By the same narrow interpretation, he may, the moment he left the meeting room, have his papers confiscated, or his right to use codes suspended, or his courier seized, or be conscripted into national service, etc. Should such a narrow interpretation prevail, the basic purpose of

* *Yearbook of the International Law Commission, 1967*, vol. II (United Nations Publication, Sales No. E.68.V.2).

the Convention, which is to assure the representatives the independent exercise of their functions, would clearly be totally defeated.

The broader interpretation is also borne out by the fact that the phrase 'while exercising their functions' is immediately accompanied and complemented by the phrase "and during their journey to and from the place of meeting'. In other words, 'while exercising' means during the entire period of presence in the State (not city) for reasons of the conference in question. This is logical because the 'journey' necessarily is that to and from the State, not the conference hall. Only this interpretation avoids absurdity and only this is consistent with the immediately following reference in sub-section (a) to 'personal baggage'. Therefore, in accordance with the general principle that a treaty must be interpreted to effectuate its purpose and not to lead to absurdity, it seems to me, without, reference to other criteria of interpretation, that only the 'broad interpretation' should have been intended by the phrase in question."

The facts as known to us—which are contested—do not appear to warrant a change in the above position. Thus, in our view, the immunity provisions appear to apply. That being the case, section 14 of the General Convention quoted above also applies.

### (*d*) Interoffice memorandum to the Officer-in-Charge, Travel and Transport Section, Office of Central Support Services, regarding media travelling with the Secretary-General

Privileges and immunities of United Nations officials travelling for official business—Journalists travelling with the Secretary-General or the Security Council "as part of official United Nations delegations" remain independent of the Organization—Journalists' travel cannot be considered as "official travel" with the pertaining privileges and immunities

23 July 2007

1. This is with reference to your memorandum dated 29 June 2007 addressed to [Name] of this Office by which you informed us that the Department of Management has recently been instructed by the Chef de Cabinet that "the media traveling with the Secretary-General and the Security Council are to be extended the same services as United Nations staff travelling with the Secretary-General and the Security Council". We note that the Chef de Cabinet in his Note of 22 June 2007 stipulates that "[j]ournalists will be responsible for the full cost of commercial flights and hotels which the travel office will book".

2. In this regard you seek our advice as to whether the travel of these journalists can be considered official travel on behalf of the Organization and whether the Travel and Transportation Section could approach Consulates and Embassies by way of a Note Verbale to seek their assistance in issuing these visas.

3. Pursuant to article VII, section 26, of the 1946 Convention on the Privileges and Immunities of the United Nations (hereinafter the "General Convention")[*] facilities for speedy travel and processing of visa applications are to be accorded to "experts and other persons who [ . . . ] have a certificate that they are travelling on the business of the United Nations".

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[*] United Nations, *Treaty Series,* vol. 1, p. 15, and vol. 90, p. 327 (corrigendum to vol. 1).

4. While journalists may be travelling together with the Secretary-General or the Security Council "as part of official United Nations delegations" and be listed as "official travelling press", they are completely independent of the United Nations. The United Nations is not responsible for the journalists and their actions, and all flight and hotel costs are to be borne by the journalists themselves.

5. For the purposes of the General Convention, journalists cannot be considered "experts on mission" for the United Nations. Nor can they be considered as falling within the category of "other persons who [ . . . ] are travelling on the business of the United Nations". Thus, the travel by these journalists should not be considered as "official travel".

6. However, we see no legal impediment for the Travel and Transportation Section to write to Consulates, informing them that the journalists in question would be part of the Secretary-General or the Security Council's delegation, and asking for assistance in the processing of their visa applications.

### (*e*) Interoffice memorandum to the Officer-in-Charge, Legal Support Office, United Nations Development Programme (UNDP), regarding privileges and immunities of United Nations Volunteers

Privileges and immunities of United Nations officials—United Nations Volunteers (UNV) covered under the Standard Basic Assistance Agreement (SBAA) with UNDP, as persons performing services—Under SBAA, these persons are granted the same privileges and immunities as accorded to officials of the United Nations—UNVs considered by the Organization, and generally by the Member States, as international civil servants—UNVs working for the Office of the High Commissioner for Human Rights on a UNDP project are covered by the SBAA with UNDP—Privileges and immunities of UNVs working strictly for OHCHR projects derive from the Agreement concluded by OHCHR with the Government concerned

25 July 2007

1. This is with reference to your memorandum of 15 May 2007, and further to our memorandum of 28 February 2007, seeking advice on the scope of the privileges and immunities of United Nations Volunteers (UNV) when they are working with Governments outside a UNDP project. Subsequent to your memorandum, we received a clarification from your Office that the immediate issue at hand pertains to whether internationally recruited United Nations Volunteers working for the Office of the High Commissioner for Human Rights (OHCHR) would be covered by Standard Basic Assistance Agreements (SBAAs). In this connection, we note that UNDP administers United Nations Volunteers, and all administrative issues, including the payment of their allowances and the issuance of contracts are dealt with by the UNDP Country Office.

2. From your memorandum, we further note the UNV's view on the matter and in particular their argument that Volunteers are covered under the SBAA as persons performing services, "irrespective of the project which they are working on" since they hold contracts with UNV and support UNV's mandate of promoting volunteerism in the activities of the United Nations.

3. In a legal opinion on the status of members of United Nations volunteers (published in the 1991 *United Nations Juridical Yearbook*),* it is observed that, under the SBAA, the Government agrees to grant these persons the same privileges and immunities as are accorded to officials of the United Nations. In another legal opinion included in the 1998 *United Nations Juridical Yearbook,* it is observed that "from the inception of the concept of volunteers, these individuals have been considered by the Organization, and generally recognized by the Member States, as international civil servants".** The latter legal opinion further states that "[t]he assignment of United Nations Volunteers is governed solely by the United Nations system and the scope of their activity is confined to projects assisted by the United Nations system".

4. Article I (1) of the SBAA provides as follows:

> "This Agreement embodies the basic conditions under which the UNDP and its Executing Agencies shall assist the Government in carrying out its development projects, and under which such UNDP assisted projects shall be executed. It shall apply to all such UNDP assistance and to such Project Documents or other instruments . . . as the Parties may conclude to define the particulars of such assistance and the respective responsibilities of the Parties and the Executing Agency hereunder in more detail in regard to such projects".

5. Furthermore, article IX (4) (a) of the SBAA stipulates that "[e]xcept as the Parties may otherwise agree in Project Documents relating to specific projects, the Government shall grant all persons, other than Government nationals employed locally, performing services on behalf of UNDP, a Specialized Agency or the International Atomic Energy Agency (IAEA) who are not covered by paragraphs 1 and 2 above the same privileges and immunities as officials of the United Nations, the Specialized Agency concerned or the IAEA under sections 18, 19 or 18 respectively of the Convention on the Privileges and Immunities of the United Nations or of the Specialized Agencies, or of the Agreement on the Privileges and Immunities of the IAEA". ***

6. In accordance with article IX (5) of the SBAA, "[t]he expression 'persons performing services' as used in articles IX, X, and XIII of this Agreement includes operational experts, *volunteers,* consultants, and juridical as well as natural persons and their employees"(emphasis added).

7. From the provisions referred to above, it is our understanding that for internationally recruited Volunteers to be considered "persons performing services" and thus be entitled to the same privileges, immunities and facilities as enjoyed by United Nations staff under the SBAA, such volunteers are to be assigned *to work on UNDP projects or those carried out by UNDP Executing Agencies.* Accordingly, if international United Nations Volunteers are working for OHCHR on a UNDP project, or when OHCHR is acting as an Executing Agency for UNDP, then such volunteers will be covered by the SBAA and thus be entitled to the privileges, immunities and facilities enjoyed by United Nations staff.

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* *United Nations Juridical Yearbook, 1991* (United Nations publication, Sales No. E.95.V.19), chapter VI. A.

** *United Nations Juridical Yearbook, 1998* (United Nations publication, Sales No. E.03.V.5), chapter VI. A.

*** United Nations, *Treaty Series,* vol. 374, p. 148.

8. However, in situations when United Nations Volunteers are working strictly for OHCHR projects, under the latter's mandate and pursuant to an Agreement between OHCHR and the Government, one can hardly argue that such United Nations Volunteers are eligible to fall within the category of "persons performing services" under the SBAA. In this context, their privileges and immunities would derive from the Agreement concluded by OHCHR with the Government concerned. In cases when United Nations Volunteers are assigned to work for a United Nations peace-building or peacekeeping mission, they would be entitled to the same scope of the privileges and immunities as are enjoyed by United Nations officials, by virtue of the Status of Mission Agreement or Status of Force Agreement concluded by the United Nations with the receiving State.

9. In the context of the issues under discussion, we would also like to caution that there might be a number of countries with whom UNDP has concluded SBAAs, which do not contain the standard provisions on Volunteers. It is also understood that except as the parties may otherwise agree in projects, United Nations Volunteers who are nationals of the host country do not enjoy any privileges and immunities under the SBAA. In this connection, we recall our advice to your Office in our 28 February 2007 memorandum that UNDP/UNV should consider concluding agreements with host countries by way of an exchange of letters extending *mutatis mutandis* the coverage of the UNDP SBAA to United Nations Volunteers who are assigned to work directly with Governments outside a UNDP project.

### (*f*) Interoffice memorandum to the Director, Division for Organizational Development, Office of Human Resources Management, regarding the tax liability issues concerning Economic Commission for Africa (ECA) staff members with United States permanent resident status

United Nations tax reimbursement programme—Liability of staff members with permanent resident status in the United States(US) to pay income taxes—Under US law, staff member wishing to become permanent resident must file a waiver of their exemption from income tax—Categories of staff members allowed to acquire or retain US permanent resident status—Such staff member must obtain prior authorization from OHRM to file the waiver—Organization obligated to reimburse taxes imposed on staff member incomes by applicable national law in certain cases in accordance with 3.3 (f) of the Staff Regulations—Inconsistency between US law and United Nations policy—Only permanent residents who filed the waiver are required to pay taxes under US law—Staff members with US permanent resident status but who did not file the waiver failed to comply with US law—Permanent residents who did file a waiver but do not fall under 3.3 (f) of the Staff Regulations violated United Nations policy, but are to be reimbursed for income tax payments—Such staff must renounce immediately their permanent resident status—Having violated the United Nations policy and caused financial liability for the Organization, appropriate action may be taken against them

1 August 2007

1. I refer to your memoranda, various follow-up e-mail messages and telephone discussions concerning certain staff members of ECA who have acquired or have retained permanent resident status in the United States in a manner inconsistent with the proce-

dures and policies of the United Nations and the laws and regulations of the United States. You seek the advice of this Office with respect to the following issues raised by their situation: (i) the liability of such staff members to pay United States income taxes in respect of salary and emoluments they receive from the United Nations; (ii) the Organization's responsibility to reimburse any such income taxes paid by them; and, (iii) future action to be taken by the Organization regarding this matter.

2. Set forth below is our advice concerning each of the issues you have raised, as well as a discussion of the application of our advice to the circumstances of the specific staff members you have referred to in your queries regarding this matter.

### I. Liability to pay United States income taxes in respect of official salary and emoluments

3. As you are aware, under the laws of the United States, staff members of the United Nations who wish to obtain or retain permanent resident status in the United States are required, as a condition for obtaining or retaining such status, to execute and file with United States authorities a waiver (the "Waiver"), within the time frame prescribed by applicable United States legislation.[1] This Waiver establishes the basis under United States law for the tax obligations in the United States for such staff members. Thus, United Nations staff members with permanent resident status in the United States become liable for tax payments in the United States as and from the date of their filing of the Waiver.

4. Nevertheless, as further elaborated below, it is possible that the United States may impose tax liability on the United Nations income of staff members who did not file the Waiver and should therefore be exempt from such liability, on the basis that they were

[1] While article II, section 18 (b), of the Convention on the Privileges and Immunities of the United Nations (1 UNTS 15 (1946)) provides that officials of the Organization "shall be exempt from taxation on the salaries and emoluments paid to them by the United Nations, the United States entered a reservation to this provision when it acceded to the Convention in 1970. Thus, the United States does not recognize such exemption from taxation "with respect to United States nationals and aliens admitted for permanent residence" (see 21 UST 1418, 1442). Such reservation is reflected in the United States Internal Revenue Code (the "Code") and the accompanying regulations promulgated by the United States Department of Treasury. The Code provides, in pertinent part, that the "[w]ages, fees, or salaries of any employee of . . . an international organization . . . received as compensation for official services rendered to such . . . international organization shall . . . be exempt from taxation . . . if such, employee is not a citizen of the United States, or is a citizen of the Republic of the Philippines (whether or not a citizen of the United States)" (see 26 USC § 893 (a)(1)). Further, Treasury Regulations section 1.893-1 (b)(1) makes clear that the exemption from taxation conferred on employees of international organizations under section 893(a) of the Code applies, "[e]xcept to the extent that the exemption is limited by the execution of the waiver provided for in section 247 (b) of the 'Immigration and Nationality Act'" (see 26 CFR § 1.893–1 (b)(1)). In particular, that Treasury Regulation further provides that, "[a]n officer or employee of an international organization who executes and files with the Attorney General the waiver provided for in section 247 (b) of the Immigration and Nationality Act (8 USC § 1257 (b)) (the "Waiver") thereby waives the exemption conferred by section 893 of the Code. As a consequence, *that exemption does not apply to income received by that individual after the date of filing of the Waiver*" (*see* 26 CFR § 1.893-1 (b)(5), emphasis added). Section 247 (b) of the Immigration and Nationality Act (8 USC § 1257 (b)), in turn, requires an employee of an international organization seeking permanent resident status in the United States to file the Waiver within 10 days after being notified by the United States Government of its intention to grant such status.

required under United States law to file the Waiver as a condition of acquiring or retaining their permanent resident status whilst in the employ of the United Nations.

### II. United Nations policies on acquiring and retaining United States permanent resident status and on reimbursement of taxes paid by staff members

5. The United Nations policy regarding the acquisition and retention of permanent resident status in the United States by staff members is set out in ST/AI/2000/19 of 18 December 2000 ("the AI").[*] Section 5.2 of the AI states that, in accordance with United States law, staff members may not hold United States permanent resident status, unless they execute and file the Waiver. Further, section 5.3 of the AI requires that staff members who wish to file the Waiver must obtain prior authorization to do so from OHRM. Finally, section 5.6 of the AI stipulates that, with the exception of categories of staff members enumerated in section 5.7 of the AI, staff members may not file the Waiver, and are required to renounce their permanent resident status in the United States, and revert to G-4 visa status.[2]

6. With respect to the obligation of the Organization to reimburse staff members for taxes paid in respect of United Nations income, Staff Regulation 3.3 (f) states as follows:

> "Where a staff member *is subject* both to staff assessment under this plan and to national income taxation in respect of the salaries and emoluments paid to him or her by the United Nations, the Secretary-General is authorized to refund to him or her, the amount of staff assessment collected from him . . ." (emphasis added).

7. While the jurisprudence of the Administrative Tribunal concerning Staff Regulation 3.3 (f) establishes that the Organization is in fact obligated to reimburse tax payments by staff members on their United Nations income, this jurisprudence is based on cases dealing with staff members *required* to pay taxes under applicable law (see Judgement No. 88 *Davidson,* (1963); Judgement No. 237 *Powell,* (1978)). By contrast, the Tribunal has not ruled on the obligation of the Organization to reimburse staff members in instances where a staff member has paid taxes despite having no legal requirement to do so. In such cases, it is not certain whether the staff member has been *subject* to taxation within the meaning of Staff Regulation 3.3 (f).

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[*] Administrative instructions describe instructions and procedures for the implementation of the Financial Regulations and Rules, Staff Regulations and Rules or Secretary-General's bulletins and are promulgated and signed by the Under-Secretary-General for Administration and Management or by other officials to whom the Secretary-General has delegated specific authority (see ST/SGB/1997/1).

[2] The exempt categories set out in section 5.7 are as follows:

(*a*) Stateless persons;

(*b*) Newly appointed staff members who have applied for citizenship by naturalization, when such citizenship will be granted imminently;

(*c*) General Service and related categories staff previously authorized to retain permanent resident status, on promotion to the Professional category;

(*d*) Staff members in the General Service and related categories;

(*e*) Staff members appointed to serve outside the United States either under the 200 series of the Staff Rules as technical assistance project personnel, or under an appointment of limited duration governed by the 300 series of the Staff Rules;

(*f*) Staff members appointed for less than one year, however if their appointments are extended beyond one year, that extension is subject to obtaining a G-4 visa.

### III. Future action to be taken by OHRM

8. In view of the foregoing, OHRM may wish to adopt a two-stage approach in rectifying the inconsistencies with United States law and United Nations policy, and in dealing with the financial implications of such inconsistencies. In particular, we recommend that OHRM take appropriate steps to ensure that the status of the staff members concerned are brought into compliance with all applicable United States laws and United Nations administrative issuances, including those referred to above.

9. Once such a first-stage has been achieved, the Organization may wish to review the circumstances of each of the staff members concerned, in particular, concerning the respective responsibilities of the Organization and such staff members with respect to the inconsistencies of their circumstances with United States laws and United Nations policies. Thus, OHRM may wish to decide on what action to take, based on its determinations as a result of its review of each individual case. Actions to be taken by OHRM could include, but are not limited to, reimbursing tax payments made by such staff members, providing financial compensation to them in lieu of tax reimbursement, seeking recovery of reimbursements already made, or refraining from any further action, as appropriate. In determining how to proceed, OHRM may wish to take into account the jurisprudence of the Tribunal. For example, in cases of tax liabilities incurred as a result of errors by both the staff member and the Administration, the Tribunal has held that the staff member in question is to be liable for taxes erroneously paid in view of his/her duty to know the law, but that the he/she would be entitled to compensation to the extent that the ignorance of the law resulted from the acts or omissions of the Administration (*see*, e.g., Judgement No. 1185, *Van Leeuwen* (2003)).

### IV. ECA staff members with United States permanent resident status

10. Based on the foregoing general approach, the following reviews the cases of the ECA staff members with United States permanent resident status which you referred to this Office for review. The staff members are grouped into three categories, based on their eligibility to file the Waiver, and on whether they have in fact filed the Waiver.

#### *A. Staff members who satisfy the conditions set out in section 5.7 of ST/AI/2000/19 but who have not signed the Waiver*

11. The status of staff members who fall under one of the categories set out in section 5.7 of the AI, but who have not signed the Waiver, raises issues concerning their United States immigration status, their liability to pay United States income taxation in respect of their United Nations income, and the Organization's tax reimbursement obligations, if any, towards them.

12. With respect to their immigration status in the United States, staff members in this category are not in compliance with United States immigration law because of their failure to file the Waiver. Therefore, as an initial step, OHRM should take action to ensure that such staff members comply with all applicable requirements governing their United States permanent resident status. As the staff members in this category are eligible to retain United States permanent resident status under section 5.7 of the AI, we concur

with OHRM's proposal to give such staff members the option to now execute and file the Waiver in order to retain their United States permanent resident status, or to formally give up such status and revert to G-4 visa status.[3]

13. As regards the tax liabilities of such staff members in the United States, and the Organization's duty to reimburse them for taxes paid, United States law provides that these staff members are exempt from income taxes until such time as they file the Waiver. As such, it not clear whether the Organization is required, pursuant to the provisions of Staff Regulation 3.3 (f), to reimburse staff members in this category for United States income taxes they have paid on their United Nations income. As discussed in paragraph 4 above, however, it is conceivable that the United States authorities would seek to impose tax liability on such staff members, on the grounds that they were legally required to file the Waiver and make themselves subject to taxation within thirty (30) days after joining the service of the Organization. If the United States authorities were to make such a determination, thereby creating a legal requirement for staff members in this category to pay United States income taxes in respect of their United Nations income, the Organization would then be obligated to reimburse them for any tax liability so imposed.

14. In this regard, we note that the circumstances of staff members falling under this category vary in terms of whether they have in fact paid taxes, and whether they have been reimbursed by the Organization. In particular, we understand that some staff members in this category have paid United States income taxes and were reimbursed by the Organization, while others in this category may not have received reimbursement for taxes paid by them, and others may not have paid taxes in the first place. In view of this variance, and in view of the uncertainty concerning whether the Organization is obliged to reimburse staff members in this category, as discussed in paragraph 13 above, OHRM may wish to adopt a case-by-case analysis with respect to the circumstances concerning staff members in this category. Such analysis would permit OHRM to determine the respective responsibilities of the Organization and the staff members concerned, and the circumstances leading to the failure of such staff members to file the Waiver, even though they were required to do so under United Nations policy and United States law.

15. Based on its determinations with regard to the respective responsibilities of the Organization and the staff members in question, OHRM would be able to decide on the appropriate course of action. For example, in the case of staff members who have been reimbursed by the Organization for United States income taxes paid by them in the absence of a Waiver, OHRM may decide either to take no further action or to seek recovery of such tax reimbursements, to the extent that such recovery is not time barred in accordance with the procedures set out in ST/AI/2000/11, of 12 October 2000, entitled "Recovery of overpayments made to staff members." In the case of staff members in this category who may have paid United States income taxes on their United Nations income who have not been reimbursed by the United Nations, or in the case of staff members who

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[3] In this regard, it should be noted that, while the granting such staff members the option to execute and file the Waiver is consistent with United Nations policy, this course of action may not be available to such staff members, since they might, in any case, be ineligible to retain United States permanent resident status while serving in ECA and, thus, residing outside the United States, or because it is conceivable that their failure to have executed and filed the Waiver in a timely manner has already resulted in the forfeiture of their United States permanent resident status.

are retroactively imposed tax obligations by United States authorities (please see paragraph 16 below), OHRM would have to decide whether to now provide such reimbursement, to pay compensation in lieu of reimbursement for having failed to properly instruct such staff members on their obligations concerning the filing of the Waiver, or to take no further action.

16. As any tax on United Nations income paid by staff members in this category relates to income that is exempt from taxation, the Organization could conceivably contact the United States tax authorities, or request the staff members in question to do so, in order to seek refunds in respect of such taxes. To the extent that any refunds so obtained would relate to tax payments already reimbursed by the Organization, staff members receiving such refunds would be required to reimburse such refunds to the Organization. However, the United States Government might not agree to provide such refunds on the basis that the staff members concerned were required to file the Waiver upon joining the Organization or after having acquired permanent resident status whilst in the employ of the Organization. Instead, the United States Government may impose measures which would retroactively make such staff members legally liable for taxation on their United Nations income, for the period in which they were in the employ of the United Nations and had United States permanent resident status.

17. In addition, because such staff members have not complied with United States immigration law, any contact with the United States authorities regarding this matter could, possibly, expose such staff members to penalties under United States law. Accordingly, the Administration should ensure that staff members who may have failed to comply with United States laws as a result of advice provided to them by the Administration, should not be penalized for such lack of compliance.

*B. Staff members who do not satisfy the conditions set out in section 5.7 of* ST/AI/2000/19 *but who have signed the Waiver*

18. The status of staff members who do not fall within the categories set out in section 5.7 of the AI, but who have signed the Waiver, raises issues concerning their compliance with the established policy of the United Nations with respect to the acquisition and retention of permanent resident status by staff members, their tax liabilities under United States law, and the Organization's tax reimbursement obligations, if any, towards them.

19. As an initial matter, OHRM should ensure that staff members in this category conform to established policy of the United Nations, as set out in section 5.7 of the AI, requiring them to cede their United States permanent resident status while in the service of the Organization. Thus, we concur with OHRM's proposed course of action to request such staff members to renounce their United States permanent resident status and revert to G-4 visa status.

20. With respect to tax liabilities under United States law, staff members who have executed and filed the Waiver are not exempt from United States income taxes in respect of their United Nations income, regardless of whether such staff members were authorized to file such Waiver in accordance with the policies of the United Nations. It follows that, since staff members in this category were obligated to pay such United States income taxes, under Staff Regulation 3.3(f), the Organization is required to reimburse them for any such United States income taxes paid. Accordingly, the Organization should provide such

reimbursement in the cases in which this has not already been done. However, given that the filing of the Waiver by such staff members constituted a violation of a United Nations policy, leading to financial liability for the Organization, OHRM might wish to investigate the circumstances under which those staff members executed and filed the Waiver, and take any appropriate action.

21. Additionally, we note that even if staff members in this category were to immediately comply with the request to renounce their United States permanent resident status, they would remain liable for taxation in respect of their United Nations income, to the extent that such income was generated during a period prior to such renunciation. Thus, the Organization would be obliged to reimburse such staff members for United States income taxes that they paid on their United Nations income corresponding to the period prior to their renunciation of their United States permanent resident status.

*C. Staff members who do not satisfy the conditions set out in section 5.7 of ST/AI/2000/19 and who have not signed the Waiver*

22. The status of staff members who do not fall within the categories set out in section 5.7 of the AI, and who have not signed the Waiver, raises issues concerning their United States immigration status, their compliance with the established policy of the United Nations with respect to the acquisition and retention of permanent resident status by staff members, their United States income tax liabilities, and the Organization's tax reimbursement obligations, if any, towards such staff members.

23. With respect to their immigration status in the United States, staff members in this category have not complied with United States immigration laws because of their failure to file the Waiver. In addition, they have not conformed with the established policy of the United Nations, as set out in section 5.7 of the AI, requiring them to cede United States permanent resident status while in the service of the Organization. Accordingly, we concur with OHRM's proposed course of action to request such staff members to renounce their United States permanent resident status and revert to G-4 visa status.

24. With respect to the issues of the liability of such staff members to pay United States income taxes in respect of their United Nations income, and the obligation, if any, of the Organization to reimburse any tax payments made by such staff members, we note that the status of staff members falling under this category are identical to the status of staff members discussed in section IV.A above. It follows that the analysis provided in paragraphs 13 to 17 is applicable to this category of staff members as well.

25. Finally, we recommend that before taking any action with respect to the staff members specified in OHRM's request, OHRM consult, at the working level, with [Name] of this Office.

### (*g*) Interoffice memorandum to the Assistant Secretary-General for Human Resources, regarding waiving of immunity from legal process of officials of the Organization, other than Secretariat Officials and Experts on Mission

Privileges and immunities of United Nations officials—Sources of immunity from legal process of United Nations officials, other than Secretariat officials and

EXPERTS ON MISSION—WAIVER OF SUCH IMMUNITY—COMMUNICATION OF WAIVER TO THE GENERAL ASSEMBLY

14 August 2007

1. Reference is made to our correspondence on the above-mentioned subject, and in particular to [Name A]'s memorandum of 23 July 2007.

2. We have reviewed our files and have identified only two examples where the Secretary-General has waived the immunity from legal process of Officials of the Organization other than Secretariat Officials, and Experts on Mission, for inclusion in the report to the General Assembly being compiled by the Office of Human Resources Management (OHRM). The following paragraphs are offered for inclusion in the report.

### PRIVILEGES AND IMMUNITIES APPLICABLE TO OFFICIALS OF THE ORGANIZATION OTHER THAN SECRETARIAT OFFICIALS, AND EXPERTS ON MISSION

The basic documents regulating the scope of the privileges and immunities of officials of the Organization are the Charter of the United Nations (Article 105), the 1946 Convention on the Privileges and Immunities of the United Nations (articles V and VII),[*] headquarters agreements with host States and, where applicable, the 1961 Vienna Convention on Diplomatic Relations.[**] Certain Member States hosting Offices of the United Nations have adopted national laws and regulations which can also be considered as a source of privileges and immunities for officials of the Organization.

Article 105, paragraph 1 of the United Nations Charter provides that "[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes". In order to give effect to Article 105 of the United Nations Charter, the General Assembly of the United Nations adopted the Convention on the Privileges and Immunities of the United Nations (hereinafter, "the General Convention") on 13 February 1946. Of particular relevance are sections 20 and 21 of the General Convention to which 153 Member States are Parties and are thus bound thereto. The sections read as follows:

> "*Section 20.* Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any officials in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. In the case of the Secretary-General, the Security Council shall have the right to waive immunity.
>
> *Section 21.* The United Nations shall co-operate at all times with the appropriate authorities of Members to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the privileges, immunities and facilities mentioned in this article."

Pursuant to General Assembly resolution 3188 (XXVIII) of 18 December 1973, members of the Joint Inspection Unit (JIU) and the Chairman of the Advisory Committee

[*] United Nations, *Treaty Series,* vol. 1, p. 15, and vol. 90, p. 327 (corrigendum to vol. 1).

[**] United Nations, *Treaty Series,* vol. 500, p. 95.

on Administrative and Budgetary Questions (ACABQ) were granted the privileges and immunities referred to in articles V and VII of the 1946 Convention.

By its resolution 56/280 of 27 March 2002, the General Assembly adopted the Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission (hereinafter "the Regulations"). These Regulations were promulgated by the Secretary-General in his Bulletin ST/SGB/2002/9 of 18 June 2002.*

Regulation 1 (e) provides as follows:

> "The privileges and immunities enjoyed by the United Nations by virtue of Article 105 of its Charter are conferred in the interests of the Organization. These privileges and immunities furnish no excuse to those who are covered by them to fail to observe the laws and police regulations of the State in which they are located; nor do they furnish an excuse for non-performance of their private obligations. In any case where an issue arises regarding the application of these privileges and immunities, an official or an expert on mission shall immediately report the matter to the Secretary-General, who alone may decide whether such privileges and immunities exist and whether they shall be waived, in accordance with the relevant instruments. The Secretary-General should inform and may take into account the views of the legislative bodies that appointed the officials or experts on mission".

On 17 November 2006, the Under-Secretary-General for Legal Affairs, the Legal Counsel, made a statement in the Fifth Committee replying to questions posed by the Bureau of the Fifth Committee pertaining to the waivers of immunity from legal process by the Secretary-General with regard to the two cases noted below. In the course thereof, the Legal Counsel provided a legal analysis of the relationship between the General Convention and the Regulations adopted by the General Assembly (see A/C.5/61/SR.22).

### Cases of waiver of immunity of officials of the Organization other than Secretariat officials, and Experts on Mission

The Office of Legal Affairs has identified two cases where the Secretary-General has waived the immunity from legal process of Officials of the Organization other than Secretariat Officials, and Experts on Mission. As noted above, the Legal Counsel replied to questions posed by the Bureau of the Fifth Committee on these two cases during the meeting of the Fifth Committee held on 17 November 2006 (seeA/C.5/61/SR.22).

On 7 November 2005, the Secretary-General waived the immunity from legal process of a JIU Inspector at the request of the competent Swiss law enforcement authorities. The reasons for the waiver were grave allegations of a criminal nature which were being investigated by the Swiss law enforcement authorities. In view of the extreme seriousness and sensitivity of those allegations, the request had been conveyed to the United Nations on a strictly confidential basis. On 3 March 2006, the Legal Counsel had addressed a confidential communication to the President of JIU requesting the latter to transmit to the Inspec-

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* Secretary-General's bulletins are approved and signed by the Secretary-General. Bulletins are issued with respect to the following matters: promulgation of rules for the implementation of regulations, resolutions and decisions adopted by the General Assembly; promulgation of regulations and rules, as required, for the implementation of resolutions and decisions adopted by the Security Council; organization of the Secretariat; the establishment of specially funded programmes; or any other important decision of policy as decided by the Secretary-General (see ST/SGB/1997/1).

tor concerned a confidential letter explaining, on behalf of the Secretary-General, the reasons why the decision to waive had not been brought to the General Assembly's attention. The Office of Legal Affairs had never received a reaction to those communications.

On 1 September 2005, the Secretary-General waived the immunity from legal process of the then serving Chairman of the ACABQ at the request of the United States Mission to the United Nations. The reasons for the waiver were serious United States federal criminal charges against [Name 2] relating to money-laundering in violation of United States laws. On 9 September 2005, the Secretary-General had addressed a letter to the President of the General Assembly informing him of the United States request, the applicable legal provisions and the reasons for the waiver and indicating that, in accordance with the Organization's existing procedures in cases of arrest or detention of United Nations officials, the assistance of the competent United States authorities had been requested with a view to facilitating a visit by a United Nations representative to [Name 2]. No reaction had ever been received to that letter.

### (*h*) Interoffice memorandum to the Assistant Secretary-General and Controller, regarding the agreement with the New York State Department of Health for exemption of the United Nations from surcharges under the New York Health Care Reform Act

Immunity and privileges of the United Nations Organization—Exemption from direct taxation, including relating to health care surcharges within the New York State health scheme—United Nations acting as a self-insurer for its employees and their qualified dependents—Conclusion of agreement between the United Nations and the State of New York, Department of Health

16 August 2007

1. I refer to the e-mail message forwarded to this Office on 20 April 2007, from the Chief, Benefits Unit, Health & Life Insurance Section, Insurance and Disbursement Service, Accounts Division, Office of Programme Planning, Budget and Accounts (OPPBA), requesting advice on two notices received from the New York State Department of Health (NYSDOH), dated 13 March 2007, and 10 November 2006. Pursuant to such notices, NYSDOH seeks payment from the Organization of $[sum] in surcharges imposed under the New York State Health Care Act of 2000, as amended (codified at New York Public Health Law §§ 2807-j, 2807-s and 2807-t).

2. You may recall some of the background of this matter. On 8 November 2002, the Legal Counsel wrote to Commissioner of NYSDOH, as well as the New York State Attorney General, and the United States Mission, seeking an exemption from any payment by the United Nations of surcharges imposed under the New York State Health Care Act of 2000, as amended (HCRA Surcharges) on the basis of article II, section 7(b), of the Convention on the Privileges and Immunities of the United Nations.* The rationale was that two of the largest health insurance schemes of the United Nations were self-insurance plans, for which [Insurance Companies 1 and 2] were merely providing claims and related administrative services, under "Administrative Services Only" contracts. Accordingly, imposition

* United Nations, *Treaty Series,* vol. 1, p. 15, and vol. 90, p. 327 (corrigendum to vol. 1).

of HCRA Surcharges, which fund New York State medical education and health insurance programmes for children and other persons of need, were direct taxes on the insurance benefits which the Organization itself was directly funding through group health insurance premiums imposed on staff members, and held in accounts as assets denominated to the United Nations. Both at that time and previously,[1] this Office had communicated through the United States Mission a request that the United States Government take all necessary and appropriate action to assert and maintain the Organization's exemption from taxation in respect of this matter. However, neither the United States Mission nor the United States Government has assisted the United Nations in this matter, informally suggesting that the Organization should work this out directly with the State of New York.

3. After many discussions between representatives of this Office and of NYSDOH, on 21 August 2003, [Name], Director, Bureau of Financial Management and Information Support, NYSDOH, responded to the Legal Counsel's letter, dated 8 November 2002, addressed to the Commissioner, NYSDOH. In his letter of 21 August 2003, [Name] stated that, "upon due consideration, the Department is prepared to adopt a position that at this time it will not contest, on a prospective basis, the United Nations' assertion that HCRA Surcharges are 'direct taxes' from which the United Nations is exempt insofar as it is acting as a self-insurer for its employees and their qualified dependents." [Name]'s letter added that, "the Department's proposed position would apply only prospectively to future [HCRA] surcharges and covered lives assessment payments and liability arising subsequent to April 1, 2003," and that, accordingly, NYSDOH would not refund or forgive any HCRA Surcharges previously made or arising prior to that date. [Name] sought to memorialize the Organization's agreement to such proposed position of NYSDOH by having the legal counsel countersign the letter.

4. This Office presented NYSDOH proposal to OPPBA only a few days after receiving [Name]'s letter. However, OPPBA requested that, instead of accepting the proposal of NYSDOH, this Office should explore the possibility of challenging the NYSDOH position with respect to the non-application of the exemption from HCRA Surcharges retroactively. That is, OPPBA sought a refund of any HCRA Surcharges that had been previously assessed against health care insurance benefit payments made by the United Nations. For the next several months, this Office again sought to obtain the agreement of NYSDOH to both exempt the Organization from NYSDOH surcharges on a prospective and retroactive basis. In the meantime, this Office, together with OPPBA, convinced [Insurance Company 1] to voluntarily agree to cease making payments to NYSDOH in respect of HCRA Surcharges assessed against health care benefit payments administered by [Insurance Company 1]. [Insurance Company 2], however, refused to do so without an indemnification from the Organization, and this Office sought authority from your predecessor to provide [Insurance Company 2] with such an indemnity, but did not receive a reply, After many further discussions with NYSDOH, it was clear that NYSDOH would not agree to apply the exemption on a retroactive basis, and that the only way the Organization could achieve such a result would be to engage in costly and potentially risky litigation with the State of

[1] On 11 March 1997, this Office first wrote to the United States Mission seeking the assistance of the United States Government in asserting and maintaining the Organization's exemption from taxation in respect of HCRA surcharges.

New York, in which case the Organization's right to an exemption even on a prospective basis might be denied.

5. Accordingly, in July 2004, NYSDOH informed this Office that, in principle, it would agree to a form of agreement providing that: (i) NYSDOH would recognize the Organization's exemption from HCRA Surcharges as and from the date that the agreement was concluded (the "Effective Date"); (ii) NYSDOH would not seek payment from the Organization for any assessed and unpaid HCRA Surcharges arising prior to the Effective Date; but (iii) NYSDOH would not be liable for any refund or claim of payment for HCRA Surcharges actually paid prior to the Effective Date of such an agreement. For such purposes, this Office prepared an agreement in the form attached hereto, and sent it to NYSDOH for final approval of such form of agreement. Nearly six months went by before NYSDOH informed this Office, on 6 December 2004, that the proposed agreement resolving the Organization's exemption from HCRA Surcharges "remain[ed] under active review by the State of New York." Representatives from [Name]'s office informally advised representatives of this Office that the political climate in Albany was not at that time conducive to concluding the proposed agreement.

6. After receiving that informal communication referred to above, this Office again contacted NYSDOH, reminding [Name] and his staff of the prior discussions and negotiations concerning this matter, and requesting to know whether NYSDOH could now agree to conclude an agreement concerning the exemption of the United Nations from HCRA Surcharges in the form discussed in paragraph 5, above. Just recently, [Name] informed this Office that the Commissioner of NYSDOH was now prepared to conclude an agreement with the United Nations along these lines. Doing so would have the effect of resolving the NYSDOH notification concerning payment of some $[Sum] in HCRA Surcharges withheld by [Insurance Company 1], and would enable the Organization to require both [Insurance Companies 1 and 2] to discontinue making any such HCRA Surcharges payments from now on. This would represent substantial savings to the Organization's health care benefits plans.

7. Accordingly, if you are prepared to accept the position that NYSDOH has agreed to concerning the Organization's exemption from HCRA Surcharges, please sign and return to this Office two (2) copies of the enclosed form of agreement that NYSDOH is prepared to conclude, and this Office will transmit the copies to [Name] for counter-signature by the appropriate official of NYSDOH.

### Agreement by and between the United Nations and the State of New York, Department of Health

This Agreement is made by and between the United Nations, an international intergovernmental organization established by its Member States pursuant to the Charter of the United Nations, signed in San Francisco on 26 June 1945 and having its Headquarters in New York, New York 10017, and the State of New York, Department of Health, having its headquarters at Corning Tower, the Governor Nelson A. Rockefeller Empire State Plaza, Albany, New York 12237 ("Department"). The United Nations and the Department are each referred to in this Agreement individually as, a "Party," and collectively as the "Parties."

Witnesseth

Whereas, pursuant to the New York Public Health Law §§ 2807-j, 2807-s and 2807-t, the State of New York imposes certain surcharges on patient services payments as well as assessments on "covered lives" by various payers of health-care benefits and providers of health-care insurance benefits within New York State;

Whereas, the United Nations represents that is a self-insurer with respect to certain health-care benefits payable in respect of a large number of United Nations staff members, together with their qualified beneficiaries and dependents and, further, that the United Nations employs health insurance providers qualified to do business in New York State to provide administrative services only in respect of the United Nations' self-insured health plans (hereafter referred to as, "ASO Providers");

Whereas, the United Nations maintains that, pursuant to article II, section 7 (b), of the Convention on the Privileges and Immunities of the United Nations, a multilateral treaty adopted by the General Assembly of the United Nations in 1946 (1UNTS 15) and acceded to by the United States of America in 1970 (21 UST 1418, TIAS No. 6900), and pursuant to the International Organizations Immunities Act (codified at 22 USC §§ 288a, et seq., and at 26 USC §§ 892, 893, and 7701), the United Nations is exempt from direct taxes;

Whereas, the United Nations maintains, but the State of New York does not concede, that the exemption from taxation to which the United Nations is entitled under international and United States law includes exemption from payment of any surcharges and assessments under the HCRA with respect to health-care benefits paid by the United Nations under its self-insured health-care benefit plans; and,

Whereas, subject to and in accordance with the terms and conditions of this Agreement, the State of New York nevertheless adopted the position that it will not contest the United Nations' assertion that HCRA Surcharges are "direct taxes" from which the United Nations is exempt insofar as the United Nations is acting as self-insurer for health-care benefits payable in respect of United Nations staff members, together with their qualified beneficiaries and dependents;

Now therefore, the Parties agree as follows"

1. *Recognition of Exemption:* As and from the Effective Date of this Agreement, and with regard to any and all unpaid surcharges and assessments attributable to periods prior to the Effective Date of this Agreement, the Department shall not contest the United Nations' claim of exemption with respect to surcharge and covered lives assessment payments and liabilities that relate to health-care benefits paid for by the United Nations pursuant to the terms of the United Nations' self-insured heath-care plans maintained in respect of United Nations staff members, together with their qualified beneficiaries and dependents.

2. *No Right to Refund or to Forgiveness of Certain Payments:* The Parties acknowledge and agree that nothing in this Agreement or otherwise gives the United Nations any right to claim or to obtain any refund from the State of New York in respect of any surcharge or covered lives assessments or payments already made under any circumstances.

3. *Non-Applicability to Indemnity Insurance Purchased by the United Nations:* The United Nations acknowledges and agrees that it cannot claim, and that the State of New York will not concede, any exemption from any surcharge or covered lives assessments or payments made in respect of or arising from any health-care benefits payable from

any health insurance purchased by the United Nations and, consequently, not constituting a self-insured plan maintained by the United Nations. The United Nations further acknowledges and agrees that such insurance coverage arrangements remain fully subject to surcharge and covered lives assessment obligations.

4. *Cooperation:* The Parties shall reasonably cooperate with one another in order to ensure the effective operation of this Agreement. Without limiting the generality of the foregoing, the Parties shall share reasonably necessary information with one another (*e.g.*, regarding the self-insured nature of the United Nations' health insurance plans, the identity and terms of service of the United Nations' ASO Providers) and shall provide reasonably necessary information to third parties (*e.g.*, notices by the Department) to enable the United Nations to realize those exemptions from surcharge and covered lives assessments agreed to by the Department in accordance with the terms of this Agreement.

5. *Notices:* Any notices or communications sent by the Parties pursuant to this Agreement shall be sent via first-class mail, postage pre-paid to the following addresses:

a. If to the Department, addressed to the Director, Bureau of Financial Management, Information and Support, State of New York, Department of Health, [ . . . ]; and,

b. If to the United Nations, addressed to the Chief, Insurance Claims and Compensation Section, Accounts Division, Office of Programme Planning, Budget and Accounts, [ . . . ].

6. *Resolution of Disputes:* The Parties shall use their reasonable efforts to amicably resolve any dispute, controversy, or claim arising out of this Agreement. Unless otherwise settled by the Parties, any dispute, controversy, or claim between the Parties arising out of this Agreement, or the breach, termination, or invalidity thereof, shall be referred by either Party to arbitration in accordance with the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules then obtaining. The arbitral tribunal shall have no authority to award punitive damages. In addition, unless otherwise expressly provided in this Agreement, the arbitral tribunal shall have no authority to award interest in excess of the London Inter-Bank Offered Rate uttered ("LIBOR") then prevailing, and any such interest shall be simple interest only. The parties shall be bound by any arbitration award rendered as a result of such arbitration as the final adjudication of any such dispute, controversy, or claim.

7. *Privileges and Immunities of the United Nations:* Nothing in or relating to this Agreement shall be deemed a waiver, express or implied, of any of the privileges and immunities of the United Nations.

### (*i*) Interoffice memorandum to the Director, Facilities and Commercial Services Division, regarding the organizational shipments using the United Nations pouch

Privileges and immunities of United Nations diplomatic pouch service—United Nations correspondence granted the same immunities and privileges as diplomatic couriers and bags—Broad interpretation of the terms "articles for official use" allowed by States in their diplomatic bags—Restrictions imposed by the United Nations on the content of its pouch—Usual practice to allow critical goods in

POUCH TO PEACEKEEPING MISSIONS WITH NO REGULAR MAIL SERVICE—NEED TO REVIEW THE RULES AND TO ALIGN THEM WITHIN THE UNITED NATIONS SYSTEM

17 October 2007

1. This is with reference to your memorandum dated 3 April, and the follow-up emails from [Name A] of 14 September and 16 October 2007, requesting our advice regarding the shipment of critical goods using the United Nations pouch and whether the current practice is in compliance with the 1946 Convention on the Privileges and Immunities of the United Nations (hereinafter the "General Convention").* In particular, [Name A] requested to know whether DVDs from companies such as Amazon may be included in the pouch shipments to peacekeeping missions with no regular mail service.

2. We note that the United Nations pouch is currently being used to supply Peacekeeping Missions and Offices away from Headquarters with critical goods urgently needed in the field, since often, such goods cannot be delivered using regular mail and forwarding services. We further note that this practice has been a part of standard operations of the United Nations at Headquarters, Offices Away from Headquarters, and in the field for many years and instrumental in ensuring the supply of critical goods and that it is considered to be in compliance with the Organization's policy on the matter set out in Administrative Instruction ST/AI/368 of 10 January 1991, entitled "Instructions Governing United Nations Diplomatic Pouch Service".**

3. In this connection, the Procurement Task Force (PTF), in its Report dated 2 February 2007 on [Company] and the United Nations Pouch Unit, recommended that "ST/AI/368 be reviewed and updated to more clearly delineate the manner in which goods can be shipped by a Department to another United Nations entity, and that Staff in the Missions and at Headquarters with any involvement in international transportation of items be trained on the proper uses of the Diplomatic Pouch" (page 43, paragraph 211 of the Report). It is in light of the above PTF recommendations that you are seeking our advice on language which will more clearly address this issue.

4. It will be recalled that article III, section 10, of the General Convention provides that "[t]he United Nations shall have the right to [ . . . ] despatch and receive its correspondence by courier or in bags, which shall have the same immunities and privileges as diplomatic couriers and bags." Based on this provision, the United Nations has established its diplomatic pouch service, the main purpose of which is to provide a secure means of transmitting and receiving the Organization's correspondence.

5. The legal status of diplomatic couriers and bags is codified in the 1961 Vienna Convention on Diplomatic Relations.*** article 27(4) of the 1961 Vienna Convention unequivocally stipulates that the diplomatic bag "may contain only diplomatic documents or articles intended for *official use*" (emphasis added).

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* United Nations, *Treaty Series,* vol. 1, p. 15, and vol. 90, p. 327 (corrigendum to vol. 1).

** For information on Administrative Instructions, see note under 1 (*f*), above.

*** United Nations, *Treaty Series,* vol. 500, p. 95.

6. States attach high importance to the inviolability of their diplomatic bags, particularly due to the vulnerability of wireless, telephone and other types of communication. However, it appears to be standard practice for States to use their diplomatic bags to send a wide range of items for the official use. For example, large items such as photocopying machines, cipher equipment, computers, and building materials (including for use in the construction of new embassy premises to reduce the likelihood of listening devices), as well as coins, currency notes, medals, films, books, food, drink and clothing have been sent by States using the diplomatic pouch. Thus, it appears that the words "articles for official use" is interpreted by each State according to its internal regulations. Some States seem to allow personal correspondence, medical supplies and luxury items for personal use not available in the receiving State to be sent through the diplomatic pouch.[1]

7. With regard to the practice within the United Nations, we note that ST/AI/368, in particular, paragraphs 3 to 5, places restrictions on the contents of the diplomatic pouch. In addition, this Office has on several occasions provided advice as to whether a specific item may be included in the diplomatic pouch.

8. In this connection, a Note from [Name B], then Director, Building and Commercial Services Division, Office of Central Support Services, to [Name C], then Director, General Legal Division, Office of Legal Affairs, dated 24 January 1996, and the reply from [Name D] of 30 January 1996 [ . . . ], addressed the need to revise ST/AI/368 to bring it in line with the current needs of the Organization. In addition, the issue at hand was related to the fact that the United Nations Development Programme (UNDP) has its own rules on the matter, as regulated by Chapter 6.4 of the UNDP General Administration Manual (hereinafter the "UNDP Manual") entitled "United Nations Diplomatic Pouch and UNDP Valise" [ . . . ] which differs from ST/AI/368.

9. Chapter 6.4.2 of the UNDP Manual stipulates that "items for personal use such as food, clothing, gifts, etc. are not accepted for inclusion in the pouch". However, Chapter 6.4.2.1 provides that all UNDP international staff members may, in reasonable amounts, have the following items sent via pouch for country offices: "first class correspondence, professional and technical magazines and journals, prescription medicines and eyeglasses (only when certified by the United Nations Medical Director), film for developing, one/two CD-ROMs per month [and] accredited correspondence courses". In addition, those stationed in country offices with "exception status" may receive by pouch, a reasonable amount of CD-ROMs, DVDs, VCDs, audio cassettes, newspapers, magazines and job-related books.

10. The Note of 30 January 1996 referred to above advised that there was "no legal objection to the decision that United Nations staff in hardship areas with no reliable mail service should be allowed to use the United Nations Pouch for limited shipments of audio and video cassettes, as is currently permitted to UNDP staff serving in [certain] duty stations". However, the UNDP Manual appears to allow the shipment of personal items in the pouch even in circumstances where mail service is available or reliable. It should be noted that there is a discrepancy in the UNDP manual with regard to the list of items which country offices are allowed to receive pursuant to Chapter 6.4.2.1, "Personal Mail to Country Office Staff, UNDP Staff Members", and Chapter 6.4.6, "Exception Status".

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[1] E. Denza, Diplomatic Law—Commentary on the Vienna Convention on Diplomatic Relations, pp. 185, 189 and 193.

11. As the right to send correspondence by a diplomatic pouch of the Secretariat as well as of the Programmes and Funds is derived from section 10 of the General Convention, the guidelines governing its use amongst the Secretariat and the Programmes and Funds should be aligned. In this regard, provisions contained in the UNDP Manual may be considered for inclusion in a revised ST/AI/368. As outlined above, there are no legal impediments to limited shipments of CDs and DVDs for personal use, however, any revised guidelines should make clear that they should be sent via the pouch only in exceptional circumstances, where mail service is not available.

12. We will be happy to be consulted on a revision of the ST/AI/368. However, as any such revision has the potential of affecting the welfare of staff stationed in the field, we would recommend that the Office of Human Resources Management be consulted as well.

### (*j*) Note to the Secretary-General, regarding the placement under house arrest of a Special Rapporteur and a Special Representative of the Secretary-General (SRSG)

Privileges and immunities granted to a Special Rapporteur and a Special Representative of the Secretary-General—Special Rapporteur entitled to immunity from personal arrest and detention, and immunity from legal process of every kind in respect of words spoken or written and acts done in the course of the performance of her mission—Exclusive authority of the Secretary-General to establish whether privileges and immunities apply—Obligation for the State to consult the Secretary-General prior to any arrest, detention or similar action being taken against a Special Rapporteur or Special Representative of the Secretary General

9 November 2007

1. The Office of the United Nations High Commissioner for Human Rights (OHCHR) has informed us that [Name A], Special Rapporteur on [Human Right A] has been placed under house arrest by the Government of [State 1][*] for 90 days on 3 November 2007. A similar order has been issued for [Name B], Special Representative of the Secretary-General (SRSG) on [Issue]. [Name B] is currently in London. In your statement of 5 November 2007, you expressed strong dismay at the detention of hundreds of human rights and opposition activists, including the Special Rapporteur.

2. [Name A], as Special Rapporteur, enjoys privileges and immunities as are necessary for the independent exercise of her functions as specified in article VI of the 1946 Convention on the Privileges and Immunities of the United Nations (General Convention),[**] to which [State 1] is a party. This includes immunity from personal arrest and detention, and immunity from legal process of every kind in respect of words spoken or written and acts done by her in the course of the performance of her mission. In addition, she is to be accorded facilities for speedy travel. This has been confirmed by the International Court of Justice in its advisory opinions of 15 December 1989 in the so-called "Mazilu case" and

[*] Country of origin of the Special Rapporteur and SRSG.

[**] United Nations, *Treaty Series*, vol. 1, p. 15, and vol. 90, p. 327 (corrigendum to vol. 1).

of 29 April 1999 in the so-called "Cumaraswamy case" (both Special Rapporteurs of the Human Rights Commission). [Name B] as an SRSG is entitled to diplomatic privileges and immunities under the same Convention.

3. Consistent with the position taken by the Organization in similar cases in the past, it is my firm belief that the legal position with respect to the privileges and immunities enjoyed by [Names A and B] ought to be communicated to the Government through the Permanent Representative without delay. Most recently, this has been done with regard to [Name C], Special Rapporteur on [Human Right B] who had been arrested in [State 2]. We will inform the Government that, under the General Convention, the Secretary-General has the sole authority and duty to establish whether privileges and immunities apply. Accordingly, the Secretary-General must be consulted prior to any arrests, detention or similar action being taken in this case.

4. We understand from OHCHR that [Name A] in her capacity as the Special Rapporteur is due to undertake a mission to [State 3] starting 18 November 2007. Therefore, in all likelihood she will be prohibited from traveling to [State 3] in the performance of her official functions. Accordingly, it is our intention to inform the Government of [State 1] of the legal status enjoyed by [Name A] as Special Rapporteur and to remind the Government of its obligation under the General Convention. In particular, we would request the Government to ensure that [Name A] be allowed to carry out her mission to [State 3 ] as Special Rapporteur as planned on 18 November 2007.

5. Given the urgency of the situation, we would appreciate your immediate attention to the matter and seek your approval to the course of action described above

## 2. Procedural and institutional issues

### (*a*) Note to the High Commissioner for Human Rights, regarding the oversight role of the Human Rights Council over the work of the Office of the High Commissioner for Human Rights (OHCHR)

Relationship between the Human Rights Council (HRC) and OHCHR—HRC not viewed as a "relevant" intergovernmental organ within the meaning of article 48 of regulation ST/SGB/2000/8 with respect to the OHCHR planning, programming and budgeting process—Mandate of HRC limited to the provision of operational guidance on human rights—Responsibilities regarding programme planning and budgeting of OHCHR belong exclusively to the Secretary-General and the General Assembly—No legal basis for the HRC to request that the OHCHR strategic framework or annual report be submitted for its consideration

11 June 2007

1. I refer to the meeting of 1 May 2007 I had with the Deputy High Commissioner, during which she sought our advice and comments with respect to attempts by members of the Human Rights Council (HRC) to establish an oversight role for the Council over the work of the Office of the High Commissioner for Human Rights (OHCHR). In particular, she asked whether it would be advisable from a legal point of view to submit the strategic framework for Programme 19 (human rights) to the HRC for review. Reference is also made to her e-mail message of 24 May 2007 to the Assistant Secretary-General

for Legal Affairs, in which she reiterated the request for advice on the above issue and informed us that during the organizational session for the Fifth HRC session, the same HRC members have unexpectedly requested that the High Commissioner submit her Annual Report on the implementation of activities and use of funds to the HCR for consideration. I also refer to our meeting of 29 May 2007, where, among other issues, we briefly discussed this matter.

### a) Relationship between the Human Rights Council and the Office of the High Commissioner for Human Rights

*Applicable law*

2. The post of the High Commissioner for Human Rights was established by General Assembly resolution 48/141 of 20 December 1993, by which, in its operative paragraph 4, the Assembly:

> "Decides that the High Commissioner for Human Rights shall be the United Nations official with principal responsibility for United Nations human rights activities under the direction and authority of the Secretary-General; within the framework of the overall competence, authority and decisions of the General Assembly, the Economic and Social Council and the Commission on Human Rights".

3. In operative paragraph 7 of that resolution, the General Assembly requested the Secretary-General "to provide appropriate staff and resources, within the existing and future regular budgets of the United Nations, to enable the High Commissioner to fulfil his/her mandate, without diverting resources from the development programmes and activities of the United Nations".

4. General Assembly resolution 60/251 of 15 March 2006, by which the HRC was established, mandated the HRC in operative paragraph 5 (g) to:

> "Assume the role and responsibilities of the Commission on Human Rights relating to the work of the Office of the United Nations High Commissioner for Human Rights, as decided by the General Assembly in its resolution 48/141 of 20 December 1993".

*Analysis and advice*

5. The specific role and responsibilities of the organs mentioned in the General Assembly resolution 48/141 are defined in accordance with their functions and responsibilities within the Organization. Accordingly, it is for the General Assembly to exercise legislative and financial authority; for the Economic and Social Council, through the Commission on Human Rights, to exercise operational guidance; and for the Secretary-General to exercise "direction and authority", as well as to provide the appropriate staff and resources.

6. The establishment of the HRC did not change the relationship between the High Commissioner, OHCHR and these intergovernmental organs responsible for decision and policy-making for the promotion and protection of human rights in the United Nations system, except that the operational guidance previously provided by the Commission on Human Rights is now provided by the HRC. In this respect, we note that, pursuant to operative paragraph 5 (g) of resolution 60/251, the HRC cannot have greater authority over OHCHR than the Commission had.

7. Furthermore, consistent with this distribution of responsibilities, the Commission had never exercised specific responsibilities on the programme planning and budgeting of OHCHR, which are, in fact, part of the powers of the Secretary-General, as the Chief Administrative Officer of the Organization, and of the General Assembly, as its "governing body".

8. In the absence of a specific General Assembly resolution conferring upon the HRC any such responsibilities, therefore, the decision by the HRC to assume such powers would be *ultra vires* and outside its mandate. In our view, attempts by members of the HRC to assume those responsibilities should be resisted.

### b) Strategic framework of OHCHR

#### *Background*

9. The Assembly has affirmed in operative paragraph 7 of its resolution 58/269 of 23 December 2003 that the strategic framework "shall constitute the principal policy directive of the United Nations and shall serve as the basis for programme planning, budgeting, monitoring and evaluation".

10. The strategic framework is currently submitted by the Secretary-General to the General Assembly on a trial basis, subject to the review by the General Assembly of its format, content and duration, which will take place in the next 62nd session. The Secretary-General prepares the framework in accordance with the "Regulations and Rules Governing Programme Planning, the Programme Aspects of the Budget, the Monitoring of Implementation and the Methods of Evaluation" (ST/SGB/2000/8 of 19 April 2000), issued pursuant to General Assembly resolutions 53/207 of 18 December 1998, 54/236 of 23 December 1999 and decision 54/474 of 7 April 2000.

11. The strategic framework is an integral part of the general policy-making and integrated management process, which includes the planning, programming and budgeting process. As such, it shall be governed by the principles stated in Regulation 3.1 (b) and (c), entitled "Planning programming and budgeting process", of ST/SGB/2000/8, including "full respect" for the "prerogatives of the principal organs of the United Nations with respect to the planning, programming and budgeting process" and for the "authority and prerogatives of the Secretary-General as the Chief Administrative Officer of the Organization".

#### *Analysis and advice*

12. In her e-mail message to the Assistant Secretary-General for Legal Affairs, the Deputy High Commissioner mentioned that the idea of submitting the strategic framework to the HRC for review would not be considered to be granting an "oversight" role, and that doing so might meet some of the demands from certain Council members giving them the opportunity to have "their say" in programmatic aspects of the OHCHR's work. Moreover, she mentioned that the strategic framework would be provided only on a voluntary basis.

13. The Deputy High Commissioner further mentioned that the Controller has indicated to her that intergovernmental bodies "routinely review the [strategic framework] for Secretariat programmes in areas of their competence" and that, therefore, you may wish

to consider submitting the OHCHR strategic framework to the HRC, "which is the intergovernmental body on human rights issues". The Controller's advice seems to be premised on Regulation 4.8 of ST/SGB/2000/8, requiring that the "relevant sectoral, functional and regional intergovernmental bodies" review the submissions "prior to their review by the Committee for Programme and Coordination, the Economic and Social Council and the General Assembly".

14. From a legal point of view, we wish to clarify that we do not consider the HRC to be a "relevant" intergovernmental organ within the meaning of the Regulation and with respect to the OHCHR planning, programming and budgeting process, nor has the Commission on Human Rights ever been considered a "relevant organ" for these purposes, either. As requested by operative paragraph 5 (g) of resolution 60/251, the HRC is to assume the role and responsibilities of the Commission *vis-à-vis* the work of OHCHR. As indicated in paragraph 7 above, the Commission did not exercise any function in this respect.

15. In our opinion, providing the HRC with the strategic framework, even if done on a voluntary basis, could establish a precedent which in time would create the perception that OHCHR is under an obligation to submit it, and the Council is mandated to review it. In addition, your Office might face criticism from non-members of the HRC because of the fact that those States would not have the opportunity to comment on it prior to its formal submission to the Committee for Programme and Coordination and the General Assembly.

16. In light of the above, while it would ultimately be for your Office to decide whether you would wish to take such an initiative, we would advise caution in pursuing it and that the above risks be carefully evaluated.

### c) Annual report on the implementation of activities and use of funds by the High Commissioner

*Background*

17. We finally note that there has been a request from some HRC members that the High Commissioner's Annual Report on the implementation of activities and use of funds should be submitted to the Council for consideration.

18. We note that this report is not mandated by any legislative organ, but is prepared at the initiative of the High Commissioner as an OHCHR publication. We also note that this publication is addressed to donors and the general public, with a view to providing accurate and consolidated data about the use of voluntary contributions, as well as transparent information on achievements and impact of the work of OHCHR.

*Analysis and advice*

19. In our view, as is the case with respect to all other OHCHR publications, there is no rule or mandate which would serve as the legal basis for the HRC to request that this report be submitted for its consideration.

### (*b*) Interoffice memorandum to the Assistant Secretary-General and Controller, regarding the proposal to suspend vendors identified in the fifth and final report of the Independent Inquiry Committee (IIC) into the United Nations Oil for Food Programme, from the United Nations Vendor Database

United Nations procurement rules and regulations—Removal or suspension from the Vendor Database of vendors having engaged in criminal activity, abusive, unethical or unprofessional conduct—Necessity to have substantial and documented evidence of such corrupt practices—Information contained in the IIC report not viewed as evidence as such but rather as a basis for further investigation

27 July 2007

1. I refer to the memorandum, dated 18 April 2007, from the Chief, Procurement Service (PS), and to the follow-up discussions and meetings on this matter, seeking the Office of Legal Affairs' advice on the recommendation by the Vendor Review Committee (VRC) of PS to suspend 103 vendors registered in the United Nations Vendor Database that were identified in the Fifth and Final Report of the Independent Inquiry Committee into the United Nations Oil for Food Programme (IIC Report) as having made either actual or projected illicit payments to the Government of Iraq.

2. The basis for suspending the 103 vendors in question is set forth in section 7.12.2 (1)(a) of the Procurement Manual, namely that there is "substantial and documented evidence" that a vendor "has failed to adhere to the terms and conditions of a contract with the United Nations, so serious as to justify suspension or removal from the [United Nations] Vendor Database," including a vendor's having engaged in "criminal activity (e.g., fraud)" or "abusive, unethical or unprofessional conduct, including corrupt practices and submission of false information," or "any documented or compelling proof of misconduct, which can negatively affect the interests of the United Nations and which would reasonably impair the Vendor's ability to perform a contract."

3. We have analyzed the basis for the conclusions set forth in the IIC Report, the rules governing suspension of vendors from the United Nations Vendor Database, and the actions taken by PS thus far. In this regard, we note that PS sent letters to those 103 companies seeking their explanation for why they were identified in the IIC Report as having made illicit payments to the Government of Iraq. According to the VRC, many but not all of the companies responded to PS, and only eight companies admitted to having made such illicit payments. The VRC then decided that if the IIC Report had identified a vendor as having made "actual" or "projected" illicit payments to the Government of Iraq, that itself was a sufficient basis to bar it from conducting future business with the Organization.

4. The IIC Report documents much evidence that the Government of Iraq manipulated the Programme and obtained illicit payments in the form of both oil surcharges and kickbacks on humanitarian contracts. However, as the IIC Report itself indicates throughout, the Report did not establish, by means of "substantial and documented evidence," that particular vendors engaged in corrupt practices or that the IIC Report provided documented or compelling proof that particular companies had engaged in misconduct. Indeed, last month, the Secretary-General's Spokesperson publicly stated that the findings set forth in

the IIC Report cannot serve as binding judicial determinations of fact or law, but rather would enable the United Nations and national authorities to further investigate and, as a result of such investigations, take appropriate action against the individuals or entities under their jurisdiction. Thus, in our view, the VRC's sole reliance on the findings of the IIC Report could be challenged on the ground that it does not meet the test of having "substantial and documented evidence" with respect to each of the companies concerned, as is required by section 7.12.2 (1)(a) of the Procurement Manual for suspension of a vendor.

5. Therefore, following this course of action could expose the Organization to claims. We fully share the view of the VCR that effective corrective action should be taken against wrongdoers. I am sure that you will want to be satisfied that any such action would occur on firm grounds. Accordingly, as PS has already begun to do by inviting each of the 103 companies to comment on the findings of the IIC Report, PS may wish to follow the procedures set forth in section 7.12.2(1)(a) of the Procurement Manual and consider how best to gather "substantial and documented evidence" with respect to each of the 103 vendors about their allegedly having made illicit payments to the Government of Iraq before taking a final decision.

### (*c*) Interoffice memorandum to the Director, Accounts Division, Office of Programme, Planning, Budget and Accounts / Department of Management (OPPBA/DM), regarding the tax return information requested by the Procurement Task Force, Office of Internal Oversight Services (OIOS)

Mandate of OIOS—Broad right to access records and information pertinent to an investigation of violations of United Nations Staff Rules and Regulations—Due process and individual rights must be respected during such investigation—Procedure of reimbursement of income taxes of United States citizens or permanent residents—Obligation for the staff member to provide OPPBA with a written consent for the Internal Revenue Service to disclose information from the staff member's official tax return—Disclosure exclusively for the purpose of the administration of the tax reimbursement programme by OPPBA—Further disclosure by OPPBA for use unrelated to tax reimbursement deemed to be inappropriate in view of the possible violation of United States law—Tax related information may only be disclosed by OPPBA to OIOS for investigations on alleged misconduct concerning the tax reimbursement programme—OIOS must obtain consent of staff member for disclosure of this tax information during investigations not related to the tax reimbursement programme—Duty of staff members to cooperate with OIOS—Refusal to provide a copy of tax return required by OIOS would be a violation of the staff member's obligations under the Staff Rules and Regulations

31 July 2007

1. This responds to your memorandum of 3 July 2007, a copy of which was only received on 18 July 2007, concerning the above-referenced matter. Your memorandum stated that, in connection with an ongoing investigation into questions of compliance with the Staff Regulations and Rules, but one that, we understand, does not relate to the administration of the Organization's tax reimbursement programme, the Procurement Task Force (PTF) of OIOS has requested that OPPBA provide the PTF with copies of tax returns

submitted to OPPBA in 2005 by two staff members in connection with their requests for tax reimbursement. You sought our views as to whether OPPBA could provide copies of such tax returns to PTF.

2. The mandate of OIOS includes a broad right to access records and information pertinent to an OIOS investigation. Thus, in paragraph 5 (c)(iv) of its resolution 48/218 B, of 29 July 1994, the General Assembly provides that OIOS, "shall investigate reports of violations of United Nations staff regulations, rules and pertinent administrative issuances and transmit to the Secretary-General the results of such investigations together with appropriate recommendations to guide the Secretary-General in deciding on jurisdictional or disciplinary action to be taken." Part II, paragraph 4 of the Secretary-General's bulletin concerning the establishment and mandate of OIOS, ST/SGB/273, of 7 September 1994,[*] provides that OIOS, "shall have the right to direct and prompt access to all persons engaged in activities under the authority of the Organization, and shall receive their full cooperation." Additionally, OIOS "shall have the right of access to all records, documents or other materials, assets and premises and to obtain such information and explanations as they consider necessary to fulfil their responsibilities." However, the broad right of OIOS to obtain information and records pertinent to an investigation is not unlimited, in paragraph 7 of its resolution 48/219 B, the General Assembly requested that the Secretary ensure, *inter alia,* that "procedures are in place that protect individual rights, the anonymity of staff members, due process for all parties concerned and fairness during any investigation." In paragraph 18(a) of ST/SGB/273, the Secretary-General required that OIOS "investigations shall respect the individual rights of staff members and be conducted with strict regard for fairness and due process for all concerned following the staff and financial regulations, rules and administrative instructions."

3. Staff Regulation 3.3(f) authorizes the Secretary-General to refund the amount of income taxes that staff members may be required to pay to the tax authorities of a Member State in cases in which, notwithstanding article V, section 18 (b) of the Convention on the Privileges and Immunities of the United Nations (General Convention),[**] the Member State concerned has imposed income taxes in respect of a staff member's official United Nations salaries and emoluments. Normally, such income tax reimbursement is payable in respect of staff members either who are citizens of the United States of America or who have otherwise been authorized to retain their status as permanent residents of the United States of America and have signed the Waiver of Privileges and Immunities of the United Nations, as prescribed under section 247 (b) of the United States Immigration and Nationality Act (see Administrative Instruction ST/AI/1998/1, of 28 January 1998,[***] entitled, "Payment of Income Taxes to the United States Tax Authorities"). The procedures for obtaining "tax reimbursement or advances to pay estimated taxes are announced on a yearly basis by the Controller in an information circular" (see *ibid*., section 3).

[*] For information on Secretary-General's Bulletins, see note under 1 (*g*) above.

[**] United Nations, *Treaty Series,* vol. 1, p. 15, and vol. 90, p. 327 (corrigendum to vol. 1).

[***] For information on Administrative Instructions, see note under 1 (*f*), above.

4. Information circular, ST/IC/2005/9, of 30 January 2006,[*] entitled, "Payment of 2005 income taxes" ("Circular") is the information circular applicable to the reimbursement of income taxes for the tax year 2005. Paragraph 5 of the Circular provides that, in order to obtain tax reimbursement or advances for payment of estimated taxes in accordance with Staff Regulation 3.3 (f), a staff member "must submit to the Income Tax Unit" of OPPBA, *inter alia,* both a written "consent for the Internal Revenue Service (IRS) to disclose certain tax return information to the United Nations (United Nations form F.243)," as well as "true, complete and signed copies of the relevant income tax returns and supporting information for the tax year for which reimbursement is requested, including a copy of the statement of taxable earnings" issued by the United Nations. These requirements have not varied in corresponding information circulars issued in respect of tax reimbursement procedures for the many preceding tax years and for the following tax year, 2007. Thus, staff members who are United States nationals or permanent residents must submit copies of their tax returns to OPPBA in order to obtain reimbursement for the United States income tax liabilities in accordance with Staff Regulation 3.3 (f). Moreover, so that OPPBA can verify that the copy of the tax return submitted by the staff member actually corresponds to the information submitted by the staff member to the United States Internal Revenue Service on the staff member's official tax return, the staff member must also provide OPPBA with a written consent for the IRS to disclose information from the staff member's official tax return.

5. The Circular prescribes that the staff member's written consent must be given on Form F.243, which begins with the following advice to the staff member:

> "Information contained in United States federal income tax returns is confidential and, except as authorized by the Internal Revenue Code, may not be disclosed to any person. Taxpayers may authorize the Internal Revenue Service to release this confidential tax return information to persons otherwise not entitled to receive such information.
>
> "The purpose of this consent is to authorize the Internal Revenue Service to disclose certain confidential tax information to the United Nations to assist the United Nations in verifying the United States income taxes you paid on your earnings from the United Nations. The United Nations will use this information in connection with its programme of reimbursing income taxes paid on United Nations emoluments, pursuant to staff regulation 3.3 (f). The Internal Revenue Service has no involvement in such verification aside from processing any consents received from taxpayers and disclosing information in accordance with the terms of such consents. The United Nations will pay the fees incurred in processing the present consent." (ST/IC/2006/9, p. 35 (Form F.243, of January, 2006), emphasis added.)

Thus, Form F.243, which we understand has not changed in substance in several years, specifically places staff members on notice that their tax return information is "confidential" under United States law and that the Organization will only use the information from their tax returns "in connection with its programme of reimbursing income taxes paid on United Nations emoluments, pursuant to staff regulation 3.3 (f)." Staff members, therefore, could reasonably have an expectation that the Organization will maintain the

[*] Information circulars are issued by the Under-Secretary-General for Administration and Management or by such other officials to whom the Under-Secretary-General has delegated specific authority. They contain general information on, or explanation of, established rules, policies and procedures, as well as isolated announcements of one-time or temporary interest (See ST/SGB/1997/2).

privacy of their tax return information in accordance with United States law when they give their consent to the IRS to provide such tax return information to the United Nations for purposes of tax reimbursement under Staff Regulation 3.3 (f).

6. The requirement for staff members to provide written consent to the IRS to disclose information from the staff members' tax return derives from the provision of the United States Income Tax Code ("Code") prohibiting the IRS and others,[1] including other United States Government officials and people outside of the United States Government (e.g., tax preparers), who have access to information contained in a tax payer's official tax return from disclosing that information either without the taxpayer's consent or for the specific reasons set forth in the Code, such as in response to a Grand Jury *subpoena* (see 26 USC § 6103). Indeed, a violation of the privacy protections set forth in section 6103 of the Code could subject not only United States federal employees, but also other persons who have received such tax return information, to civil and criminal penalties for disclosing tax return information (see 26 USC § 7213). While it is not within the expertise of this Office to comment on the criminal laws and procedures of the United States, section 7213 (a)(3) of the Code specifically provides that, "it shall be unlawful for any person to whom any return or return information (as defined in section 6103 (b) [of the Code]) is disclosed in a manner unauthorized by this title thereafter willfully *to print or publish* in any manner not provided by law any such return or return information" (emphasis added). Thus, it is conceivable that, because return information is disclosed by the IRS to OPPBA only because the staff member has consented to such disclosure, on the basis of Form F.243, for purposes of the Organization's administration of the tax reimbursement programme, OPPBA's mere printing of a copy of that return and provision thereof to the PTF for a use that is unrelated to the United Nations's administration of the tax reimbursement programme might be considered to be "unlawful" under section 7213 (a)(3) of the Code. If that were to be the case, section 7213 (a)(3) of the Code provides that, "any violation of this paragraph shall be a felony punishable by a fine in any amount not exceeding $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution."

7. Since, as we understand, OIOS's investigation in this case does not involve the administration of the United Nations tax reimbursement programme, it would be inappropriate for OPPBA to provide such taxpayer return information to OIOS in response to the request from PTF without the written consent of the two staff members concerned. Because of the possible violation of United States law that OPPBA officials conceivably could be said to have committed if they were to disclose such tax return information to OIOS *for purposes other than the administration of the Organization's tax reimbursement programme,* and in light of the confidentiality requirement set forth in the Information Circular, OPPBA should not provide such information to OIOS unless the staff member has consented to the disclosure of the tax return information or unless OIOS requires such information specifically to investigate alleged misconduct concerning the United Nations's tax reimbursement programme.

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[1] The United States Supreme Court has confirmed that "section 6103 of the Internal Revenue Code . . . lays down a general rule that 'returns' and 'return information' as defined therein shall be confidential" and that, when the provision was revised as part of the 1976 amendments of the Code, "one of the major purposes in revising § 6103 was to tighten the restrictions on the use of return information *by entities other than the [IRS].*" *Church of Scientology of Calif, v. Menial Revenue Service,* 484 U.S. 9, at 10 and 16, 108 S.Ct 271, 93 L.Ed.2d 228 (1987) (emphasis added).

8. Thus, in connection with OIOS's broad right to obtain information relevant to its investigations, if OIOS were investigating allegations of misconduct involving the administration of the Organization's tax reimbursement programme, then there would be no doubt that OIOS could and should have access to the taxpayer returns provided to OPPBA. However, to the extent that such taxpayer return information is germane to an OIOS investigation but does not concern the proper administration of the United Nations tax reimbursement programme, OIOS should specifically obtain the consent of a staff member concerned to the disclosure by OPPBA of such tax return information to OIOS. In this regard, pursuant to Staff Regulation 1.2 (r) and other applicable Staff Rules and pertinent administrative issuances, staff members have a duty to cooperate with OIOS and other United Nations authorities in connection with any investigations into alleged misconduct or other violations of the Organization's regulations and rules. Accordingly, a staff member's refusal to provide OIOS with a copy of such staff member's tax return, if required by OIOS to investigate possible misconduct, waste, or abuse, would be a violation of the staff member's obligations under the Staff Regulations and Rules.

### (*d*) Interoffice memorandum to the Officer-in-Charge, Investments Management Service, United Nations Joint Staff Pension Fund (UNJSPF), regarding the Compliance Policy for the activities of the investment management service, UNJSPF

Status of proposals under the Compliance Policy to establish new standards and rules governing investment management activities in so far as they do not merely reiterate established standards—Absence of legal basis for the proposed standards of conduct and operational guidelines—Possibility for staff to successfully challenge their validity if charged with failure to comply with them—New norms and policies must be established in an appropriate manner: for example to be promulgated in a new Administrative Instruction*

13 August 2007

1. I refer to your memorandum of 26 July 2007, which this Office received on 2 August 2007, requesting comments on a draft "compliance policy" for the activities of the Investment Management Service (IMS), of the United Nations Joint Staff Pension Fund (Fund or UNJSPF). You stated that the draft Compliance Policy takes into account comments received from the Office of Internal Oversight Service (OIOS), OHRM and the Ethics Office, and reflects the observations of the Investments Committee, which discussed the draft Compliance Policy at its meeting in July 2007. You requested that we review the draft Compliance Policy "from a legal perspective" and that we provide any comments by 17 August 2007.

2. Your memorandum states that the "objectives of the Compliance Policy are to set out in one easily communicable paper the principles, standards, objectives and responsibilities of the office, in order to ensure clarity and transparency for the compliance function, and offer a single point of reference collecting all relevant papers that *govern the conduct of IMS staff members*" (emphasis added). It further indicates that the "responsibilities of the

* For information on Administrative Instructions, see note under 1 (*f*), above.

Compliance office of IMS consist in assisting senior management in effectively managing the compliance risk faced by the Fund, defined according to best practice as the risk of legal or regulatory sanctions, material financial loss or loss to reputation, [that] the Fund may suffer as a result of its failure to comply with laws, regulations, rules, related self-regulatory standards and codes of conduct applicable to its activities."

3. Based on the foregoing, and based on our review of the draft Compliance Policy, we understand that the proposed Compliance Policy would cover both operational aspects of the activities of IMS and standards of conduct for staff members serving in IMS. On the one hand, we recognize the value in creating a reference guide that would summarize *established* regulations, rules, policies and practices governing the activities and operations relating to investment of the assets of the Fund and the conduct of staff members carrying out activities relating thereto. On the other hand, we are concerned that those aspects of the proposed Compliance Policy that seek to establish new standards and rules governing such activities may not have the legal status that is desired.

4. For example, part V, section B (2), of the "Compliance Policy" provides that "in carrying out the investment operations of the IMS, staff members are required [,*inter alia,*] to adhere to the 'Code of Ethics and Standards of Professional Conduct' promoted by the Chartered Financial Analyst Institute (Annex C), regarded as a best practice in the investment services industry, as amended by notes and observations of the Compliance Office, in order to harmonize its guidance with the United Nations Staff Regulations and Rules, and the Standards of Conduct of the International Civil Service." Indeed, under the draft Compliance Policy, IMS staff members would be required to periodically "acknowledge" in writing their commitment to comply with the "Code of Ethics and Standards of Professional Conduct" of the Chartered Financial Analyst Institute (*see* draft Compliance Policy, Annex E). Likewise, we note that part IV, section A, of the "Compliance Policy" provides that compliance standards for IMS would include, "Guidelines and principles developed by international bodies and organizations, such as the Basel Committee on Banking Supervision or the Organization for Economic Co-operation and Development, providing frameworks in relation to issues such as corporate governance or corporate responsibility, as applicable to the Fund."

5. We are not aware of any resolutions or decisions of the General Assembly, any Regulations or Administrative Rules of the Fund, or any bulletin of the Secretary-General or other administrative issuance that has prescribed the "Code of Ethics and Standards of Professional Conduct" of the Chartered Financial Analyst Institute as a standard of conduct for staff members, or that has prescribed guidelines and principles developed by other international bodies and organizations as standards for the operations of IMS. Thus, establishing such standards of conduct or operational guidelines for the activities of IMS and its staff by means of the promulgation of the draft Compliance Policy may not have the desired effect of creating a legal basis for application of such standards or guidelines. This could lead to successful challenges by staff of IMS if they were to be charged with misconduct or unsatisfactory performance deriving from their alleged failure to comply with such standards of conduct or operational guidelines.

6. Pursuant to article 4 (c) of the Regulations of UNJSPF, "the administration of the Fund shall be in accordance with these Regulations and with the Administrative Rules consistent therewith which shall be made by the Board and reported to the General

Assembly and the member organizations" of the Fund. Article 19 of the Regulations of the Fund provides that, "the investment of the assets of the Fund shall be decided upon by the Secretary-General after consultation with an Investments Committee and in the light of observations and suggestions made from time to time by the Board on the investments policy." In addition to the foregoing, the General Assembly has promulgated resolutions concerning the four criteria for the investment of the assets of the Fund: safety, profitability, liquidity and convertibility.[1] The Secretary-General has appointed a Representative for the Investment of the Assets of the Fund as well as staff members of the Investment Management Service to assist him in carrying out his responsibilities under article 19 of the Regulations of UNJSPF for investment of the assets of the Fund. In accordance with Article 101 of the Charter of the United Nations, such staff members are subject to the United Nations Staff Regulations and Rules, the relevant resolutions and decisions of the General Assembly, and the administrative issuances promulgated in accordance with the ST/SGB/1997/1 of 28 May 1997 entitled "Procedures for the Promulgation of Administrative Issuances".[33]

7. Accordingly, to the extent that the draft Compliance Policy reiterates and summarizes established regulations, rules, administrative issuances and policies and procedures that are applicable to the activities of the Investment Management Service, the draft Compliance Policy may be a useful reference guide. Thus, for example, those matters addressed by the "Compliance Procedures Manual" of the draft Compliance Policy appear to summarize established policies and procedures concerning the investment activities of IMS. If these policies and procedures have already been vetted by the Secretary-General with the advice of the Investments Committee and, as appropriate, with the observations of the Board, in accordance with article 19 of the Regulations of UNJSPF, summarizing such established policies and procedures in the draft Compliance Manual would serve such purpose. Similarly, the draft Compliance Policy's reference to the "Status, Basic Rights and Duties of United Nations Staff Members," ST/SGB/2002/13, of 1 November 2002 (see draft Compliance Policy, Annex A), to the requirements for filing "Financial Disclosure and Declaration of Interest Statements," in accordance with ST/SGB/2006/6, of 10 April 2006, or to any other established regulations, rules or policies and procedures would similarly serve such purpose. We would caution, however, that the reproduction of the texts of any such materials, for example the so-called code of conduct for staff members set forth in Annex A of the draft Compliance Policy, should be carefully reviewed to ensure that the reproduced material is faithful to the original. In case of any doubt, the original materials could be included.

8. However, the draft Compliance Policy also appears to establish new norms of conduct for staff of IMS. These include the statement that staff members of IMS should adhere to the "Code of Ethics and Standards of Professional Conduct" of the Chartered Financial Analyst Institute or the requirement that they adhere to the "Guidelines and procedures on offers of gifts and hospitality," as set forth in Annex D of the draft Compliance

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[1] See, e.g., General Assembly resolution 33/121 of 19 December 1978. The General Assembly has reaffirmed these criteria on numerous occasions. See General Assembly resolutions 34/222 of 20 December 1979, 35/216 of 17 December 1980, 36/119 of 10 December 1981. More recently, the General Assembly referred to these criteria as being "established" criteria. See General Assembly resolution 49/224, part VIII, of 23 December 1994.

[*] For information on Secretary-General's Bulletins, see note under 1 (*g*), above.

Policy. Moreover, the draft Compliance Policy also appears to establish new policies governing the operations of IMS activities concerning the investment of the assets of the Fund, including references to guidelines and principles developed by other international bodies and organizations. If these norms of conduct or policies and guidelines are to become effective for the staff of IMS, then they should be promulgated in an appropriate manner and not in a proposed Compliance Policy that seeks to serve as "a single point of reference collecting all relevant papers that govern the conduct of IMS staff members." Thus, for example, an administrative issuance, promulgated in accordance with ST/SGB/1997/1, may have to be circulated in order to establish the "Code of Ethics and Standards of Professional Conduct" of the Chartered Financial Analyst Institute as an appropriate set of standards for investment activities, in doing so, the Secretary-General may have to consult with the Investments Committee and receive observations and suggestions from the Board in accordance with article 19 of the Regulations of the Fund.

9. Finally, we note that the Compliance Policy makes passing reference in various provisions to the need for compliance with laws, regulations, and rules. Any reference to any such laws, regulations and rules should, of course, be made within the context of the status and the privileges and immunities of the United Nations and the regulatory framework governing the Fund, as described in paragraph 6, above, in addition, we note that there is no reference to the United States Employee Retirement Income Security Act of 1974 (ERISA), under which the Fund has established itself as a "qualified" pension plan for purposes of favorable tax treatment for the participants and beneficiaries of the Fund. While this Office has previously advised that the Fund does not fall under the regulatory framework of ERISA from a procedural perspective (e.g., it is not subject to regulation and sanctions by the United States Department of Labor), this Office has also advised that, as much as possible and within the context of the status and the privileges and immunities of the United Nations and the regulatory framework governing the Fund, the Fund should adhere to the substantive aspects of ERISA, particularly those relating to the fiduciary duties owed to the participants and beneficiaries of the Fund.[2] To the extent that you may desire that the draft Compliance Policy appropriately reflects or references such substantive and relevant aspects of ERISA within such context, you may wish to request this Office to seek the review and advice of outside counsel retained by the Fund for questions relating to the legal aspects of the Fund's investments.

### (*e*) Interoffice memorandum to the Chief, Procurement Service (PS), regarding the request for advice on the legality of monitoring telephone conversations between procurement staff and vendors

Right to privacy of United Nations staff members in the context of telephone conversations—Legality of monitoring telephone conversations of staff members—Under the current United Nations framework, monitoring of staff members' telephone conversations permitted only under certain circumstances and for so long as reasonably necessary to ascertain whether suspected misconduct

[2] The General Assembly has confirmed that the Secretary-General acts as "a fiduciary . . . for the interests of participants and beneficiaries of the United Nations Joint Staff Pension Fund under the Regulations and Rules of the Fund" (see General Assembly resolution 35/216 B of 17 December 1980).

has occurred—ILO recommendations regarding protection of workers' personal data—Survey of national jurisdictions reveals two contrasting approaches represented by the United States (US) and the European Union (EU)

14 November 2007

1. I refer to your memorandum of 15 August 2007, by which you sought advice of the Office of Legal Affairs (OLA) on the legality of monitoring telephone conversations between vendors and United Nations procurement officers. We understand that such proposal has been recently advocated as an internal control measure. In a telephone conversation with the Procurement Service (PS) held subsequent to the receipt of your memorandum, OLA was further informed that PS was seeking our advice on the legality of both (a) undisclosed and (b) disclosed monitoring of such telephone conversations. Finally, we understand that such monitoring is envisioned at the Headquarters in New York as well as at other United Nations duty stations and peacekeeping operations.

2. In rendering our advice, we have examined both the United Nations legal regime as well as that of the International Labour Office and of various jurisdictions around the world. We have concluded that, under the current United Nations framework, the investigation and monitoring of staff members' telephone conversations is permitted only under certain circumstances and can continue only for so long as is reasonably necessary to ascertain whether suspected misconduct had occurred. Our research of various jurisdictions worldwide has revealed two contrasting approaches *vis-à-vis* the monitoring of employees' telephone calls. The first, represented by the United States (US) position, generally permits the employer to monitor an employee's telephone conversation "in the ordinary course of business" or with the employee's consent. The second, represented by the European Union (EU), is much more protective of the workplace privacy of employees, and allows such monitoring only if it is previously disclosed and with the employees' consent.

## Analysis

### A. Monitoring telephone calls under the current United Nations legal framework

3. The Secretary-General's bulletin on "Use of information and communication technology (ICT) resources and data" (ST/SGB/2004/15)[*] concerns the proper use of information technology and related resources and data and addresses, *inter alia,* the monitoring and investigation of ICT data. Section 1 of the bulletin defines "ICT data" as "any data or information, regardless of its form or medium, which is or has been electronically generated by, transmitted via, received by, processed by, or represented in an ICT resource." ICT resource is defined as "any tangible or intangible asset capable of generating, transmitting, receiving, processing, or representing data in electronic form, where the asset is owned, licensed, operated, managed, or made available by, or otherwise used by, the United Nations." According to the Commentary annexed to the bulletin, ICT data covers telephone conversations and telephone logs.

4. Under section 7 of ST/SGB/2004/15, the use of ICT resources and ICT data is subject to monitoring and investigation. However, such monitoring and investigation may be conducted only by the Information Technology Services Division (ITSD), corresponding offices away from Headquarters as designated by the Department of Management, or the

[*] For information on Secretary-General's Bulletins, see note under 1 (*e*), above.

Office of Internal Oversight Services (OIOS). Moreover, such monitoring and investigation must be conducted in accordance with certain procedures and requirements, such as proper authorization. (See section 8 and section 9 of the bulletin.) In addition, staff members and their supervisors must be informed immediately preceding access to their ICT resources or ICT data, and monitoring or investigation may continue for only so long as is reasonably necessary to ascertain whether the suspected misconduct has occurred. (See section 8.5 (a) and section 8.5 (f).)

5. It follows from the foregoing that, in the absence of a reasonable suspicion that misconduct had occurred, the continuous monitoring of staff members' telephone calls for indefinite periods would not be permissible under the present United Nations legal regime.

### B. The International Labour Office

6. The International Labour Office (ILO) is the International Labour Organization's secretariat, research body and publishing house. In 1997, the ILO published a code of practice on the "Protection of Workers' Personal Data." The code has no binding force and is intended to serve as a guide in the development of legislation, regulations, work rules and policies. It was adopted by a Meeting of Experts on Workers' Privacy of the ILO. The meeting was composed of 24 experts, eight of whom were appointed following consultation with governments (including India, South Africa, the Netherlands, Australia, Uruguay, Canada, Norway and Germany) and eight each following consultations with the Employers' and Workers' Groups of the Governing Body.

7. According to section 6.14 (1) of the above-mentioned code, "if workers are monitored they should be informed in advance of the reasons for monitoring, the time schedule, the methods and techniques used and the data to be collected, and the employer must minimize the intrusion on the privacy of workers." Secret monitoring should be permitted only if it is in conformity with national legislation, or if there is suspicion on reasonable grounds of criminal activity or other serious wrongdoing (See section 6.14 (2).) Finally, "continuous monitoring should be permitted only if required for health and safety or the protection of property." (Section 6.14 (3).)

8. As stated above, the ILO code of practice is not legally binding and does not replace national laws, regulations, international labour standards or other accepted standards. However, it sets forth recommendations for the development of national legislation, work rules, policies and practical measures dealing with workplace monitoring.

### C. The United States position

9. Both US federal and state laws prohibit, with some exceptions, intercepting telephone conversations. The federal law, Title III of the Omnibus Crime Control and Safe Streets Act of 1986 (also known as the Wiretap Act) – which was amended in 1986 to cover electronic communications and in 1994 to encompass cordless telephones – prohibits intentionally intercepting any wire, oral or electronic communications or using or disclosing a communication's contents when a person knows that the communication was intercepted. (See 18 USC Section 2511.) However, Title III provides two exceptions, namely, the "business extension exemption," and the "consent" exception.

*(1) The "Business Extension Exemption"*

10. The "business extension exemption" permits undisclosed phone-call monitoring when the equipment used to listen in falls outside the statute's definition of a "device" used to intercept communications. Specifically, any telephone equipment furnished to a company by a communications service provider that is used "in the ordinary course of its business" does not constitute an intercepting "device" within the meaning of the statute.[1] (See USC Section 2510(5)(a)). Since no device is involved in monitoring or recording phone calls in such situations, the statute does not apply.

11. Many federal courts have held that use of standard extension telephones, furnished directly by telephone service providers to a company, falls within the exception. Moreover, if the telephone conversation of an employee pertains to business matters, the business extension exemption generally applies. Finally, many courts have held that non-business-related phone calls can be monitored only to the extent necessary to ascertain their personal nature. Hence, if an employer eavesdrops on a private phone call and overhears personal, private details about an employee's life, and a reasonable person would find that the disclosure of such information is offensive or embarrassing, the employer would be at risk in an invasion of privacy lawsuit. In the US, however, tortious invasion of privacy applies narrowly in the employer-employee relationship.

12. Nevertheless, relying on the "business extension exemption" poses certain risks since its application relies on the following imprecise determinations: whether the call uses a regulated device, whether the call is personal and, if so, whether the monitoring of the call ceased early enough.

*(2) The consent exception*

13. According to Title III, it is not unlawful to intercept telephone communications if one of the parties to the communications has given prior consent. (See 18 USC Section 2511 (2)(d)). Hence, under federal law, employers can lawfully monitor their employees' calls with the latter's prior consent. Consent has been found where an employer had notified its workers that it reserved the right to monitor calls, such as through employee handbooks or signed acknowledgements. Although most state wiretapping laws (including New York) apply the federal "one-party" consent, twelve states also require third parties (such as customers or clients) to consent in order to preclude application of their wiretap laws. Consent of third parties has been found where a verbal announcement has been provided at the beginning of incoming calls notifying such parties of the monitoring policy and of the

[1] Some US circuit courts have held that an employer violates the Wiretap Act when it uses non-standard telephone monitoring equipment, i.e., equipment that is neither obtained nor installed by a standard service provider. For example, one court ruled that a reel to reel tape recorder that continuously recorded seven phone lines did not qualify for the exclusion, since it did not further the plant's communication system. Another court ruled that a recorder purchased at [Company] which connected to an extension phone line and automatically recorded all conversations was the device that intercepted the phone calls (as opposed to the extension phone), and that the recorder did not qualify as telephone equipment for purposes of the exclusion. However, courts have held that "recorders that are highly specialized, expensive hardware designed to add monitoring functions to a commercial telephone system," are. distinguishable from "off-the-shelf recording devices available at retail outlets and useful for other stand-alone recording applications," and that such specialized recorders fall within the telephone equipment exception to the Wiretap Act.

purpose for the monitoring policy, or where employees have recited a similar announcement of the monitoring policy when making outbound calls to third parties.

### *(3) Summary of the United States position*

14. In summary, federal US law allows undisclosed monitoring for business-related telephone calls. However, when an employer realizes that the call is personal, it is obliged to stop monitoring the call. In light of the uncertainties concerning what constitutes a personal call, employers wishing to monitor telephone calls can better protect themselves from legal challenges if they pursue the second main exception to Title III: consent. While most state wiretapping laws (including New York) apply the federal "one-party" consent, twelve states also require third parties (such as customers or clients) to consent in order to preclude application of their wiretap laws.

## D. The European Union position

15. In contrast to the legal regime in the US, the European Union provides significant protection for personal data in the workplace. The European Court of Human Rights (ECHR) recently held in *Copland* v. *United Kingdom* (62617/00 [2007] ECHR 253 (3 April 2007) that an employee's privacy, as safeguarded by article 8 of the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms (the "European Convention"),[*] was breached by the employer's monitoring of the employee's telephone, e-mail and internet usage at the place of work. Moreover, the European Union's legislation mandates broad protection for employees' personal data.

### *(1) Article 8 of the European Convention*

16. Article 8 of the European Convention provides that "Everyone has the right to respect for his private and family life, his home and his correspondence." *In Copland* v. *United Kingdom,* the European Court of Human Rights held that an employer's undisclosed monitoring of an employee's telephone conversations and e-mail to ascertain whether the employee was making improper use of the work facilities for personal purposes breached article 8 of the European Convention. The Court concluded that "telephone calls from business premises are *prima facie* covered by notions of 'private life' and 'correspondence.'" Under the Court's ruling, business telephone calls affect "private life" and may contain "personal information" protected by human rights and, presumably data protection law.

17. Significantly, the Court held that, even if the telephone monitoring were limited to "the date and length of telephone conversations" and "the numbers dialled," the monitoring would still give rise to a cause of action under article 8. Moreover, the Court concluded that, in the absence of any warning to the employee that her telephone calls could be monitored, the employee had a "reasonable expectation" that they would not be.

18. According to the Court, even in the absence of applicable national data protection law, article 8 presumes that workplace communications will not be monitored. The Court emphasized that article 8 requires that monitoring must be "in accordance with the law," and that "the law must be sufficiently clear in its terms to give individuals an adequate

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[*] United Nations, *Treaty Series,* vol. 213, p. 221.

indication as to the circumstances in which and the conditions on which authorities are empowered to resort to any such measures."

19. The Court also held that, in the case of public authorities, the law must be "necessary in a democratic society, in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." In addition, the law must be proportional, meaning that no other less intrusive measures could achieve the same goal.

### *(2) Recommendation No. R (89) 2 of the Council of Europe*

20. The Council of Europe adopted Recommendation No. R(89)2 (the "Recommendation") in order to adapt the provisions of the European Convention to the employment sector. Accordingly, it recommended that the governments of member States ensure that the principles contained in the Recommendation be reflected in the application of domestic legislation on data protection to the employment sector, as well as in other branches of the law bearing on the use of personal data for employment purposes.

21. According to article 3 (1) of the Recommendation, "employers should, in advance, fully inform or consult their employees or the representatives of the latter about the introduction or adaptation of automated systems for the collection and use of personal data of employees. *This principle also applies to the introduction or adaptation of technical devices designed to monitor the movements or productivity of employees.*" (Emphasis added). Moreover, article 3 (2) stipulates that "the agreement of employees or their representatives should be sought before the introduction or adaptation of such systems or devices where the consultation procedure referred to in paragraph 3.1 reveals a possibility of infringement of employees' right to respect for privacy and human dignity unless domestic law or practice provides other appropriate safeguards."

22. Some member States, including Belgium, have adopted the Recommendation by legislating that the individual consent of the employee is required before the introduction or adaptation of automated systems for the collection of personal data. Such consent could be obtained, for example, through the execution of an *ad hoc* agreement or by modifying the employment contract.

### *(3) European Union Directive 95/46*

23. Directive 95/46 EC (the "Directive") on the protection of individuals with regard to the processing of personal data and on the free movement of such data aims to protect the right to privacy with respect to the processing of personal data and specifies minimum requirements for national legislations on data protection. The Directive contains provisions on fair and lawful data processing and sets forth the criteria for making data processing legitimate. "Data processing" is defined as "any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction."

24. According to article 7 of the Directive, personal data may be processed only if: (1) unambiguous consent has been provided, (2) the processing is necessary for the

performance of a contract to which the data subject is party, (3) processing is necessary for compliance with a legal obligation to which the controller is subject, (4) processing is necessary in order to protect the vital interests of the data subject, (5) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed, or (6) processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject.

25. The Working Party on the Protection of Individuals with regard to the Processing of Personal Data set up by article 29 of the Directive has provided guidance on how internal whistleblowing schemes can be implemented in compliance with the EU data protection rules set forth in the Directive. (This guidance is set out in the Opinion 1/2006 on the application of EU data protection rules to internal whistleblowing schemes in the fields of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crimes). According to the foregoing Opinion, for a whistleblowing scheme to be lawful, the processing of personal data needs to be legitimate and satisfy one of the grounds set out in article 7 of the Directive. Two grounds would be relevant: either (a) the establishment of a whistleblowing system in compliance with a legal obligation, or (b) the establishment of such system for the purposes of a legitimate interest pursued by the controller or by the third party to whom the data are disclosed. The Working Party has stressed the importance of striking a balance between the right to privacy and the interests pursued by whistleblowing schemes.

### *(4) National legislation within the EU*

26. In some of the EU member States the right to privacy is incorporated in the constitution (e.g., Belgium, Finland, Germany, Greece) or implied from a certain constitutional right (e.g., Austria, Ireland and Norway). In the case of France, such right is incorporated in the Civil Code; in the case of the United Kingdom, in the Human Rights Act. Moreover, all EU member States are parties to the European Convention. While EU states have implemented the Directive, specific legislation concerning data protection in the workplace has not been promulgated in all national jurisdictions, and general privacy and secrecy provisions cover workers' privacy as well.

### *(5) Summary of the EU position*

27. The European Union takes a more protective approach *vis-à-vis* employees' privacy rights than does the US. Under the existing EU legal regime, undisclosed monitoring of employees' telephone calls would violate article 8 of the European Convention from the perspective of both the employee and the third party to the communication. Thus, employers are first obliged to disclose to their employees the potential surveillance of telephone calls. Second, employees and third parties to telephone communications must also provide their consent to such surveillance. Third, such surveillance needs to fulfil the requirement of proportionality, meaning that no other less intrusive measures could achieve the same goal.

### E. Conclusion

28. Under the current UN legal regime, the monitoring of staff members' telephone conversations requires proper authorization, and is permitted only when misconduct is suspected and for so long as is reasonably necessary to ascertain whether such suspected misconduct had occurred.

29. Our research of various jurisdictions has revealed two disparate positions *vis-à-vis* an employer's right to monitor the telephone calls of employees. The first is exemplified by the US position, and generally permits the employer to monitor an employee's telephone conversation "in the ordinary course of business" or with the employee's consent. As explained in paragraphs 10–12 above, if such monitoring is conducted "in the ordinary course of business," and if the conversation pertains to business matters, employers are permitted to conduct phone monitoring secretly. However, non-business-related phone calls can be monitored only to the extent necessary to ascertain their personal nature. US federal law also allows phone monitoring if the employee has given prior consent. Although most US states require only one party's consent, twelve states require all parties to a communication to consent in order to preclude application of their wiretap laws.

30. The EU position on this matter is more protective of the employees' right to privacy. Accordingly, undisclosed monitoring of employees' phone calls akin to the "business extension exemption" in the US is not permitted. Monitoring of employees' phone calls must be disclosed, and employees as well as third parties to the phone conversations must provide their consent.

31. As explained above, the current United Nations legal regime does not permit the monitoring of staff members' telephone calls except in very limited circumstances. Consequently, should it be decided, as a matter of policy, to institute such phone monitoring within the Organization, it would be necessary to promulgate a Secretary-General's bulletin that clearly sets forth all policy parameters and detailed modalities of such monitoring.

32. Accordingly, such bulletin should seek to establish a regime whereby the right of staff members, including that to the privacy of their personal data, and the duty to protect the assets and good name of the Organization are balanced. Crucial importance should be given to the following:

– explaining to staff why communications will be monitored;

– obtaining express written consent to the interception from each staff member; or, in the alternative, promulgating such bulletin after obtaining "collective consent" through staff-management consultations; and

– obtaining the consent of third parties to the telephone conversations.

33. While the practical implementation of these recommendations may be challenging, it is imperative that the steps to obtain employee and third-party consent be taken in order to protect the Organization from legal challenges and potential claims.

## (*f*) Interoffice memorandum to the Secretary of the Human Rights Council, Office of the High Commissioner for Human Rights (OHCRH), regarding possible right of non-members of the Human Rights Council to raise points of order

Rules of procedures of the Human Rights Council (HRC)—General application of the rules of procedure established for Committees of the General Assembly—General United Nations practice to reserve procedural motions concerning conduct of business to full members of an organ, including the right to raise a procedural point of order—Rule 113 of the General Assembly rules of procedure—General right of non-member States of an organ to raise a non-procedural point of order or to make comments on a procedural matter—Specific right of States non-members of HRC to raise points of order, but not to challenge a ruling by the presiding officer

19 November 2007

1. I refer to your memorandum of 5 November 2007, whereby you seek the advice of this Office on whether non-members of the Human Rights Council (HRC) should have the right to raise points of order, "now that the HRC is a subsidiary body of the General Assembly". You indicated that this matter would be considered at the resumed Sixth session of the HRC, which is to be held from 10 to 14 December 2007.

### Background

2. In your memorandum, you refer to a letter dated 26 September 2007 from the Permanent Representative of [State], on behalf of the [Regional] Group, to the HRC President requesting clarification of the "the right of non-members of the Council to make a 'Point of Order' during its deliberations." In his letter, the Permanent Representative of [State] notes that this matter was referred to in "the discussion that took place in the Council's meetings of 20/9/2007".

3. You also refer to the practice of the former Commission on Human Rights, as reflected in the Note by the Secretariat entitled "Main rules and practices followed by the Commission on Human Rights in the organization of its work and the conduct of its business" of 7 February 2002 (E/CN.4/2002/16). That Note states that "the Commission shall continue to apply the ruling made by the Chairperson of its fifty-fifth session giving the observer for Palestine the right to raise points of order 'relating to the Palestinian and Middle East issues', provided that the right to raise such a point of order shall not include the right to challenge a decision by the presiding officer" (para. 33).

4. With regard to Member States not members of the Commission, the Note states that "the right to raise points of order was also extended to representatives of State Members of the United Nations not members of the Commission on Human Rights but participating in its work in an observer capacity" (para. 34).

### Applicable rule and decision

5. The HRC rules of procedure, adopted by resolution 5/1 of 18 June 2007, entitled "Institution-building of the Human Rights Council", are silent on this matter. In that context, rule 1 of the HRC rules of procedure states that "[t]he Council shall apply the rules

of procedure established for Committees of the General Assembly, as applicable, unless subsequently otherwise decided by the Assembly or the Council".

6. The relevant rule in the General Assembly rules of procedure is rule 113, which reads as follows:

> "During the discussion of any matter, a representative may rise to a point of order, and the point of order shall be immediately decided by the Chairman in accordance with the rules of procedure. A representative may appeal against the ruling of the Chairman. The appeal shall be immediately put to the vote, and the Chairman's ruling shall stand unless overruled by a majority of the members present and voting. A representative rising to a point of order may not speak on the substance of the matter under discussion."

7. However, by operative paragraph 11 of its resolution 60/251 of 3 April 2006, establishing the HRC, the General Assembly provided that the participation of and consultation with "observers, including States that are not members of the Council [ . . . ] shall be based on arrangements [ . . . ] and practices observed by the Commission on Human Rights".

### Analysis

8. In accordance with United Nations practice, procedural motions which concern conduct of business are reserved for full members of the organ. Points of order raised under rule 113 are procedural motions, as by definition, they are questions relating to conduct of business which require a ruling by the presiding officer and are subject to possible appeal. Accordingly, the right to raise a point of order should be reserved solely for full members of the HRC.

9. However, as explained in paragraph 79 of annex V to the General Assembly rules of procedure, United Nations practice also provides for representatives, as a means of obtaining the floor, to make a "point of order" when requesting for information or clarification or to make remarks relating to material arrangements including, but not limited to seating arrangements, interpretation system, the temperature in the room, documents, or translations. These are not procedural "points of order" as defined by rule 113. However, they may be raised by non-members and addressed by the presiding officer without requiring a ruling. Statements or comments on procedural matters made by non-members are also considered to fall outside the purview of rule 113 and therefore permissible. Beyond that, the Note by the Secretariat E/CN.4/2002/16 (see, paragraph 4 above) makes it clear that even in the case of rule 113, Member States of the Organization not members of the Commission are entitled to raise points of order, but not including the right to challenge a ruling by the presiding officer.

10. In the specific case of Palestine, General Assembly resolution 52/250 of 13 July 1998, entitled "Participation of Palestine in the work of the United Nations", granted Palestine the "right to raise points of order related to the proceedings on Palestinian and Middle East issues, provided that the right to raise such a point of order shall not include the right to challenge the decision of the presiding officer". The Secretary-General further clarified that Palestine did not have the right to raise points of order in connection with the actual conduct of voting. (See A/52/1002 of 4 August 1998.) The ruling of the President of the Commission of Human Rights contained in document E/CN.4/2002/16 reflected both General Assembly resolution 52/250 and the advice provided by this Office on 1, 6, and 14 April 1999.

11. We note that in this regard the intention of the Assembly was to expand the rights of Palestine, not to grant them rights in excess of those enjoyed by Member States which are non-members of organs with limited membership.

12. We would also draw your attention to General Assembly resolution 58/314 of 1 July 2004, entitled "Participation of the Holy See in the work of the United Nations", and the subsequent Note of the Secretary-General contained in document A/58/871 of 16 August 2004, which grants the Holy See the right to raise points of order "relating to any proceedings involving the Holy See." Similar to the case of Palestine, this right does not allow the Holy See to challenge the decision of the presiding officer or raise a point of order in connection with the actual conduct of voting.

ADVICE

13. Palestine and the Holy See, by virtue of resolutions 52/250 and 58/314 quoted above, are entitled to raise points of order under rule 113 in the HRC. Pursuant to those resolutions, these entities are not permitted to challenge the decision of the presiding officer or to raise points of order in connection with the actual conduct of voting.

14. With respect to Member States which are non-members of the HRC pursuant to resolution 60/251, they may raise points of order under rule 113 but not make other procedural motions, including appealing the ruling of the presiding officer.

## 3. Procurement

### (*a*) Interoffice memorandum to the Assistant Secretary-General and Controller, regarding the participation by non-United Nations officials in evaluations for procurement exercises undertaken by the United Nations

PROCUREMENT RULES AND REGULATIONS WITHIN THE UNITED NATIONS SYSTEM—PROCUREMENT EXERCISES PURSUANT TO DEVELOPMENT OR TECHNICAL ASSISTANCE PROJECTS—ONLY UNITED NATIONS OFFICIALS ENTITLED TO PERFORM PROCUREMENT FUNCTIONS—GENERAL ASSEMBLY MAY AUTHORIZE COOPERATION WITH GOVERNMENTS IN RESPECT OF PROCUREMENT ACTIVITIES, INCLUDING IN CARRYING OUT COMMON PROCUREMENT ACTIONS

15 March 2007

1. I refer to your note, dated 29 January 2007, and received on 7 February 2007, addressed to the Chair, Headquarters Committee on Contracts (HCC), and to the Chief, Procurement Service . . . Your note concerned a case considered by HCC in which a representative from a beneficiary Government of a project managed by the Department of Economic and Social Affairs (DESA) participated in the technical evaluation of a procurement exercise undertaken by DESA under that project. In your note, you requested this Office to review whether or not non-United Nations staff, in particular counterpart officials from beneficiary countries, should continue to participate in evaluations of procurement exercises undertaken by the United Nations.

2. As an initial matter, I understand that it has long been the practice to involve officials of either donor or beneficiary Governments, or both, in procurement exercises undertaken pursuant to development or technical assistance projects. In this regard, I

further understand that the involvement of such Government officials in procurement processes in respect of such projects has been considered necessary in order to ensure that the donor or beneficiary Governments would be satisfied with the use of technical assistance resources managed by the Organization. However such practice has evolved, it is not clear from the information provided with your Note whether or not the involvement of such Government officials in such procurement processes has been consistent with the Financial Regulations and Rules and the procurement policies and practices of the Organization relating to cooperation with other entities, including Governments, for common procurement activities.

3. In this regard, Financial Rule 105.11 provides that, "Management and other support services may be provided to Governments, specialized agencies and other international and intergovernmental organizations or in support of activities financed from trust funds or special accounts on a reimbursable, reciprocal or other basis *consistent with the policies, aims and activities of the United Nations,* with the approval of the Under-Secretary-General for Management" (emphasis added). Pursuant to that Financial Rule, any management support provided to donor or recipient Governments in respect of development or technical assistance projects must be performed in a manner consistent with the policies of the Organization.

4. In this regard, Financial Rule 105.13 (a) provides that the "Under-Secretary-General for Management is responsible for the procurement functions of the United Nations, shall establish all United Nations procurement systems *and shall designate the officials responsible for performing procurement functions*" (emphasis added). Thus, normally, only United Nations officials could be authorized, in accordance with the Financial Regulations and Rules, to perform "procurement functions," which include evaluations of bids or proposals submitted by prospective vendors of goods or services to be procured by the Organization. This principle is also reflected in the Procurement Manual. Thus, section 11.6.2 (1) of the Procurement Manual (Rev.3, August 2006), states that, "[p]rior to recommendation for contract award, it is the joint responsibility of the Procurement Officer, the requisitioning office, and programme managers (Source Selection Committee) to ensure that the Submission of the Selected Vendor fulfils all [of] the requirements of the Solicitation Document." Thus, the provisions of the Financial Regulations and Rules, as well as the Procurement Manual, concerning evaluations of bids or proposals submitted by prospective vendors of goods or services to be procured by the Organization appear to contemplate that only officials of the Organization would be involved in the evaluation of such submissions by vendors.

5. It should be noted, however, that Financial Rule 105.17 provides that the United Nations "may cooperate with other organizations of the United Nations System, provided that the regulations and rules of those organizations are consistent with those of the United Nations" and "may, as appropriate, enter into agreements for such purposes." That Rule also provides that the United Nations, "may, to the extent authorized by the General Assembly, cooperate with a Government, nongovernmental organization or other public international organization in respect of procurement activities and, as appropriate, enter into agreements for such purposes." The Rule also states that, "[s]uch cooperation may include *carrying out common procurement actions together* or the United Nations['] entering into a contract relying on a procurement decision of another United Nations organiza-

tion or requesting another United Nations organization to carry out procurement activities on behalf of the United Nations" (emphasis added).

6. Based on the foregoing, while the rules governing the performance of procurement functions provide that only United Nations staff members are to be involved in the evaluation of vendor submissions, the cooperation with officials of donor or beneficiary Governments in carrying out procurement activities, including evaluations, is specifically permitted under the Financial Regulations and Rules. However, any such cooperation between United Nations staff members and officials of donor or beneficiary Governments must be authorized by the General Assembly and may be subject to an appropriate agreement with such Government.

7. Accordingly, in order to determine whether the cooperation that took place with the beneficiary Government, which was involved in the DESA procurement exercise referred to in your note, was consistent with Financial Rule 105.17, it would be necessary to review the General Assembly mandate underlying the development or technical assistance project at issue, as well as the management services agreement between the Organization and the donor or beneficiary Government(s) involved.

### (*b*) Interoffice memorandum to the Chief, Procurement Service, regarding the procurement authority of the United Nations Joint Staff Pension Fund (UNJSPF) for the approval of a new contract for banking services

Respective roles, responsibility and accountability for procurement of the Procurement Service and UNJSPF—UNJSPF is a subsidiary body of the General Assembly as well as an inter-agency body—Established practice of UNJSPF to utilize procurement services of the United Nations and to adhere to its financial rules and regulations—Responsibility of the UNJSPF Board to decide the responsibility of the UNJSPF Chief Executive Officer with respect to procurement activities—Such activities should be undertaken through the normal United Nations procurement machinery except in exceptional circumstances

5 July 2007

1. This responds to your memorandum of 22 May 2007, requesting advice in connection with procurement authority for the approval of a new contract with [Bank] for banking services for the United Nations Joint Staff Pension Fund (UNJSPF or the "Fund"). Your memorandum stated that, in the past, both the Procurement Service and the Fund have signed such banking agreements, including the contract with [Bank], which is now in the process of being extended. Your memorandum also stated that UNJSPF has informed you that it will be a "full-fledged party in all the process, including *post-facto* regularization and future bidding out of the services." Your memorandum asserted that "UNJSPF was granted direct procurement authority by the General Assembly in its resolution 51/217 paragraphs 111 and 112." Thus, you concluded that the Procurement Service has no authority over the UNJSPF's procurement delegation so that any recommendation made by the Procurement Service or the Headquarters Committee on Contracts (HCC) would have to be submitted to the Chief Executive Officer (CEO) of UNJSPF. In order to prevent any uncertainty with respect to the delineation between the Procurement Service and UNJSPF

regarding their respective roles, responsibility and accountability for procurement, you have asked this Office to clarify the appropriate procedure to follow.

2. UNJSPF was established as a subsidiary organ of the General Assembly. However, it is also an inter-agency body administered by the Board of UNJSPF, which reports to the General Assembly. The operation and the administration of the Fund are governed by the Regulations of UNJSPF, promulgated by the General Assembly. The Secretary of the Board, who also serves as the Chief Executive Officer of the Fund (see Art. 7 of the Regulations of UNJSPF), acts under the authority of, and reports to, the Board of UNJSPF.

3. The procurement activities of the Fund fall within the administrative responsibilities of the Chief Executive Officer within the meaning of article 7 of the Regulations of UNJSPF. However, it has been the long-standing practice of the Fund to utilize the procurement services of the United Nations and to adhere to the United Nations Financial Regulations and Rules, subject to any decisions made by the Assembly in respect of the Fund. Thus, in Part V, paragraph 4 of its resolution 51/217, dated 18 December 1996, the General Assembly,

> "request[ed] the Secretary-General to continue to make available to the Fund the United Nations machinery for contracting and procurement, as recommended by the United Nations Joint Staff Pension Board in paragraph 111 of its report [A/51/9]."

In paragraph 111 of the report cited by the General Assembly in that resolution, the UNJSPF Board stated that it had decided to recommend that the General Assembly request the Secretary-General to,

> "continue to make available to the Fund the United Nations machinery for contracting and procurement (i.e., the services of the United Nations Purchase and Transportation Division (United Nations/PTD) and the Headquarters Committee on Contracts). Under this arrangement, reviews and recommendations with respect to the Fund's contracting and procurement actions, made by United Nations/PTD or the Headquarters Committee on Contracts, would be submitted directly to the Secretary for decision."

In addition, in paragraph 112 of its report (A/51/9), the Board also stated that it had,

> "agreed to authorize the Secretary to continue to act on his own authority in the following special situations (which the Board expected to be quite rare):
>
> "(a) United Nations/PTD could not complete the process within the required timeframe;
>
> "(b) The Secretary was unable to accept a particular recommendation made by the United Nations/OTD or by the Headquarters' Committee on Contracts; or
>
> "(c) United Nations/PTD informed the Secretary that a particular contract or procurement could not be carried out by that Office."

4. In its resolution 51/217, the General Assembly had to refer to paragraph 111 of the Board's report on the question of the CEO's procurement authority, since it was fulfilling the Board's request that the General Assembly request the Secretary-General to make the United Nations' procurement "machinery" available to the CEO of the Fund. In that resolution, the General Assembly did not have to refer to the following paragraph 112 of the Board's report, in which, within its authority under article 7 of the Fund's Regulations, the Board authorized the CEO to deviate from the normal United Nations procurement practices in the exceptional circumstances described in that paragraph. Thus, it seems

clear that, as stated in Part V, para. 4, of its resolution 51/217, in recommending that the Secretary-General continue to make the United Nations procurement "machinery" available to the CEO of the Fund, the General Assembly took no issue with, and took into account, that the Board had also authorized the CEO to act on his own authority (i.e., outside of the United Nations procurement machinery) only in the special circumstances described in paragraph 112 of the Board's report, which the Board "expected to be quite rare." Paragraph 112 of the Board's report further requires the CEO to report any cases to the Board in which the CEO exercises such authority to conduct procurement activities outside of the United Nations Procurement Service "machinery."

5. Article 2 of the Regulations of the Fund authorizes the Board of UNJSPF to interpret the Regulations of the Fund. Thus, it is ultimately the role of the Board of UNJSPF to decide what the responsibility of the CEO should be with respect to procurement activities undertaken for the Fund under the Regulations of UNJSPF. As discussed above, the Board has taken a decision that such procurement activities should be undertaken by the CEO through the normal United Nations procurement machinery, except in the exceptional circumstances set forth in paragraph 112 of the Board's report. Thus, the statement in your memorandum that "UNJSPF was granted direct procurement authority by the General Assembly," does not appear to accurately reflect the decision of the Board and observed by the General Assembly concerning how procurement activities for the Fund should be conducted. Rather, the normal United Nations procurement processes are to be used for the procurement requirements of the Fund (e.g., the assistance of the Procurement Service in identifying sources of supply, and the services of the Headquarters Committee on Contracts in reviewing procurement activities), except that the final decision on the Fund's procurement activities is to be taken by the CEO of the Fund, rather than by the United Nations' Chief Procurement Officer. Any deviations from the foregoing practice made by the CEO of the Fund must be consistent with the circumstances described in paragraph 112 of the Board's report and must be specifically brought to the attention of the Board by the CEO.

## 4. Other issues relating to peacekeeping operations

### (*a*) Note to the Under-Secretary-General for Peacekeeping Operations, regarding the provisional arrangements for the administration of United Nations Interim Administration Mission in Kosovo (UNMIK) travel documents during the post-status period and beyond the completion of UNMIK's mandate

Transition between UNMIK and the new authorities in Kosovo—Travel documents issued by the new Kosovo authority considered preferable—Extending the validity of the existing UNMIK travel document viewed only as the solution of last resort

15 February 2007

1. I refer to the Special Representative of the Secretary-General's code cable of 25 January 2007 regarding the need for an interim arrangement for travel documents to cover the immediate post-UNMIK period until the new Kosovo authority is able to issue its own

European Union-compliant travel document. While acknowledging that the issuance of travel documents in the post-UNMIK period by the future authorities of Kosovo would be the preferred option, the most realistic one, in UNMIK's view, seems to be extending the validity of the existing UNMIK Travel Document. An interim solution of issuing temporary travel documents is also proposed in paragraph 4 of the code cable.

2. With the completion of UNMIK's mandate, the UNMIK issued Travel Document will cease to have legal validity. Under the current Settlement proposal, this should occur at the conclusion of the 120-day transition period that starts from the entry into force of the Settlement. While it should be possible to secure extension of the recognition of the Travel Document beyond UNMIK's existence, we would not recommend this as the primary or sole solution. In the choice between using travel documents issued by the new Kosovo authority or travel documents of a "defunct" UNMIK, we should opt for the former, within whose power and authority the issuance of travel documents would rightfully fall in the post-UNMIK period. We are not convinced that, at this point in time, it can already be assumed with certainty that 8 more months, after the 4 month transition period (the starting date of which is yet to be determined) would be required in order for the new authorities to issue secure, European Union-compliant, travel documents. All efforts should, therefore, be made to put in place as early as practically possible, the necessary arrangements for the production of travel documents, or at least temporary ones. Extending UNMIK's Travel Documents should be a solution of last resort. We should note here that negotiations with relevant States to secure their recognition of the new (or revised) travel documents will be required for all of the options suggested.

3. For the foregoing reasons, we recommend that the Department of Peacekeeping Operations (DPKO) and UNMIK first pursue the interim solution suggested in paragraph 4 of the code cable.

4. Finally, we recommend that a decision on whether to extend UNMIK's travel documents beyond UNMIK's mandate and, if so, under what conditions and for how long, should be deferred until it becomes clear that this is the only viable option.

5. This Office stands ready to discuss with DPKO and UNMIK the foregoing recommendation and suggestions in greater detail and to explore alternative solutions as necessary.

### (*b*) Note to the Assistant Secretary-General for Peacekeeping Operations, regarding the authority of United Nations Peacekeeping Force in Cyprus (UNFICYP) in the buffer zone

Authority and competence of UNFICYP in the buffer zone—UNFICYP's mandate in the buffer zone to prevent a recurrence of fighting—Buffer zone viewed as a sensitive area where any activities therein, including civilian activities such as farming, may give rise to security concerns—UNFFICYP's mandate to preserve international peace and security to be interpreted in such a way as to contribute to law and order and encourage a return to normal conditions of civilian life—UNFICYP's authority to carry out its mandate in the buffer zone with regard to both military and civilian activities—UNFICYP's authority not diminished by the

FACT THAT UNFICYP REGULARLY SOUGHT TO ENFORCE ITS AUTHORITY THROUGH MEANS OF COOPERATION WITH THE TWO RESPECTIVE COMMUNITIES

17 August 2007

1. This is in reference to your note to the Assistant Secretary-General for legal affairs of 13 April 2007 concerning UNFICYP's authority in the buffer zone. We note that the Office of Legal Affairs (OLA) had subsequently been requested to delay its reply pending receipt of the legal position of the European Commission. We wish to thank you for providing us with a copy of the draft European Commission opinion, which we received on 12 July.

2. In your note of 13 April you request our advice with respect to the status and the extent of UNFICYP's authority in the buffer zone. You attach for our information copies of a letter from the Permanent Representative of Cyprus to the United Nations of 9 March 2007, and a cable from UNFICYP of 26 March 2007. You note that the question of authority in the buffer zone has acquired particular relevance with the increase in civilian activities such as construction and farming, which has caused incidents not only between Greek Cypriot farmers and the Turkish forces, but also between the farmers and UNFICYP. You note that legal clarity with respect to UNFICYP's authority in the buffer zone would greatly assist the Mission in forming an appropriate position in relevant discussions with the parties, and would be essential should it be necessary to call on the Security Council to express itself on the issue. You state that in UNFICYP's view, the responsibility for maintaining security in the buffer zone rests solely with the Mission and, therefore, it retains the right to react and prevent activities which could affect the security and the *status quo*.

3. Pursuant to Security Council resolution 186 (1964) of 4 March 1964, paragraph 5, as extended most recently by resolution 1758 (2007) of 15 June 2007, UNFICYP has a mandate "in the interest of preserving international peace and security, to use its best efforts to prevent a recurrence of fighting and, as necessary, to contribute to the maintenance of law and order and a return to normal conditions". In our view, this is a wide mandate, which should be interpreted broadly, having regard to the facts on the ground.

4. However, while the "prevent[ion] of the recurrence of fighting" is UNFICYP's primary mandate, UNFICYP also has a mandate to contribute to the "maintenance of law and order" and "a return to normal conditions". As such, UNFICYP's security mandate should, where possible, be interpreted in such a way as "to contribute to law and order", and encourage a "return to normal conditions" of civilian life.

5. The status of UNFICYP, including within the buffer zone, is addressed in the Exchange of Letters Constituting an Agreement between the United Nations and the Government of the Republic of Cyprus concerning the Status of the United Nations Peacekeeping Force in Cyprus of 31 March 1964 ("the SOFA"). Pursuant to the SOFA, UNFICYP has an "international status" in accordance with Security Council resolution 186 (1964), and enjoys the status, privileges and immunities of the Organization in accordance with the Convention on the Privileges and Immunities of the United Nations.*

6. The "buffer-zone" is the area between the cease-fire lines of the National Guard and the Turkish forces, which came into effect following the hostilities of July and August 1974. Having regard to Security Council resolution 353 of 20 July 1974, the Foreign Minis-

* United Nations, *Treaty Series,* vol. 1, p. 15, and vol. 90, p. 327 (corrigendum to vol. 1).

ters of Greece, Turkey and the United Kingdom issued a Declaration on 30 July 1974, which concluded that a number of measures should be put into immediate effect, including that a "security zone . . . to be determined by representatives of Greece, Turkey and the United Kingdom in consultation with UNFICYP should be established at the limit of the areas occupied by the Turkish armed forces . . . This zone should be entered by no forces other than those of UNFICYP, which should supervise the prohibition of entry . . .". We note from various reports of the Secretary-General that the total area between the lines covers about 3 per cent of the land area of Cyprus and contains some of the island's most valuable agricultural land.

7. The Aide-Mémoire of 23 March 1989, (we understand that as of 30 March 1989, most of its provisions had been notified and accepted by both sides), sets out arrangements to be followed by UNFICYP to supervise the cease-fire. The Aide-Mémoire clearly identifies: (i) "the United Nations Protected Area" in which UNFICYP exercises exclusive control; (ii) areas for civilian activities, "which are freely accessible and policed by local civilian police forces"; and (iii) other areas where "no civilian movement or activities are permitted unless specifically authorized by UNFICYP". With respect to the latter, it is stated that

> "the responsibility for the maintenance of law and order in these areas lies with UNFICYP. If necessary, UNFICYP calls upon the police forces of the two communities for assistance. In deciding which movements and activities to authorize, UNFICYP is guided by the principle that no movement or activity should jeopardize the security of either side, the buffer zone itself or the safety of the individuals. In Nicosia, in view of the security implications, such authorization is only given with the concurrence of both sides".

Although we note that the Aide-Mémoire does not have the status of a formal agreement, it has been the basis for UNFICYP's activities for the last 19 years, and the principles contained therein appear to be supported by relevant practice.

8. The practice concerning UNFICYP's authority in the buffer zone is documented in the Reports of the Secretary-General on the United Nations Operation in Cyprus to the Security Council. In S/12253 of 9 December 1976, the Secretary-General observed:

> "It is an essential element of the cease-fire that neither side can exercise authority or jurisdiction beyond its own forward military lines or make any military moves beyond those lines. It follows that, in the area between the lines, the status quo (including innocent civilian activities and exercise of property rights) is maintained, without prejudice to an eventual political settlement concerning the disposition of the area. UNFICYP discharges certain responsibilities in relation to the cease-fire, as well as humanitarian and normalization functions, with a view to safeguarding the legitimate security requirements of both sides, while giving due regard to humanitarian considerations".

We note that in the subsequent Security Council debate, the then Foreign Minister of Cyprus expressed his Government's acceptance of the Secretary-General's position (S/PV 1979 of 14 December 1976).

9. Subsequent reports suggest that UNFICYP has ultimate authority in the buffer zone in so far as any activities therein may give rise to security concerns. In S/15812 of 1 June 1983, the Secretary-General notes that UNFICYP has continued to monitor agricultural activity carefully, noting "sensitive areas", the "requirement for escorts", that farming is only permitted in certain areas, and that "UNFICYP would not permit any activity in

the buffer zone which might destabilize the situation or lead to any escalation of tensions". In S/20663 of 31 May 1989, the Secretary-General refers to a number of incidents, including demonstrations by Greek and Turkish Cypriot women's groups in the buffer zone and over-flights by civilian aircraft, which UNFICYP either protested or intervened with the Government to ensure respect for the buffer zone. The Report also refers to UNFICYP's work to facilitate economic and other civilian activities in the buffer zone, especially farming, and the provision of good offices as necessary with respect to the supply of utilities between the communities.

10. In S/2002/1243 of 15 November 2002, the Secretary-General records that UNFICYP declined to give permission to Turkish Cypriot authorities to construct a new road on security grounds, and that UNFICYP granted permission for Turkish Cypriots to sink a bore well near the village of Pyla. He also notes UNFICYP's support of certain civilian activities in the buffer zone, including the opening of a street, the de-silting of a dam, and the repair of infrastructure. In S/2004/756 of 24 September 2004, the Secretary-General notes that UNFICYP has negotiated agreements by the respective sides to maximize opportunities for "civil" use of the buffer zone, including with respect to roads and economic enterprises.

11. In S/2006/931 of 1 December 2006, the Secretary-General observes that since the lifting in 2003 of the restrictions on movement across the ceasefire lines, there has been "an increasing number of civilians farming and/or an increase in the construction of buildings in the buffer zone, which is in contravention of the procedures established by UNFICYP to safeguard the stability of and security within the buffer zone", and that "continuing challenges in the buffer zone have the potential to destabilize a still delicate security situation". In this report, the Secretary-General notes UNFICYP's authorization of 13 civilian construction projects, and describes a number of incidents involving tension between the communities arising as a result of disputes on farming and land ownership in the buffer zone, which required intensive discussion by UNFICYP to diffuse the situation, and led to UNFICYP tightening its procedures for issuing farming permits in order to safeguard property rights and maintain security. Further, in S/2007/328 of 4 June 2007, the Secretary-General refers to the growing number of civilians seeking to construct or otherwise develop land in the buffer zone outside of the procedures established by UNFICYP to safeguard the stability and security within the buffer zone, and that a significant part of the resources and energy of UNFICYP was increasingly geared towards addressing this development. He notes that to this end "UNFICYP continued discussions with the two sides on practical modalities to prevent unauthorized civilian activities in the buffer zone outside of the areas designated for civilian use".

12. As may be seen in the examples referred to above, civilian use of the buffer zone has been regulated by UNFICYP in as far as such civilian activities have impacted on security concerns. In our view, there is no basis to interpret UNFICYP's mandate as set forth in resolution 186 (1964) narrowly by excluding the authority of UNFICYP to prevent violence that may have its cause in civilian activities, as opposed to military activities. As also seen from the examples above, civilian use of the buffer zone has the potential to cause tensions between the respective communities as to land ownership and use, and may also impact on the security of UNFICYP, and its security activities in the buffer zone. UNFICYP's mandate "to prevent a recurrence of fighting" provides no basis for differentiating between security risks according to their origin. The fact that UNFICYP has regularly sought to

enforce its authority through means of cooperation with the two respective communities does not diminish UNFICYP's authority in this regard.

13. In his letter of 9 March 2007, the Permanent Representative of Cyprus takes the position that "UNFICYP assumes responsibility in the buffer zone with regard to issues of security . . . [and] is therefore not mandated with authorizing, or otherwise deciding on, civilian projects in this area". In our view, the extent of UNFICYP's authority in the buffer zone is that which is required for UNFICYP to carry out its mandate, and in particular to "prevent a recurrence of fighting". It is for UNFICYP to determine whether security is at risk in any given circumstances, and to prevent and react to any activities which threaten such security.

### (*c*) Note to the Under-Secretary-General for Peacekeeping Operations, regarding the transfer by the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) of members of the [rebel group] to the Congolese authorities

Clear policy of the Organization to guarantee moratorium on the death penalty—Necessity to include an unambiguous provision in this regard in the agreement for the transfer to national authorities of persons in custody of the Organization—Consultation with the Office of the High Commissioner for Human Rights (OHCHR) regarding other aspects of the agreement

6 September 2007

1. This is in reference to your note to the Under-Secretary-General for Legal Affairs, the Legal Counsel, dated 22 August 2007 and code cable CCX-495 of 16 August 2007 concerning the transfer of former members of [rebel group] from MONUC to the Government of the Democratic Republic of the Congo ("the Government"). Reference is also made to MONUC code cable of 31 August 2007. [. . .]

2. We note your endorsement of the Special Representative of the Secretary-General (SRSG)'s proposal to conclude a formal agreement with the Government concerning the transfer by reverting to the earlier text prepared by MONUC and agreed to by the Government (Attachment 4 to CCX-495). While we note the very real pressures on the Mission to resolve this issue without further delay, and the concerns as outlined in paragraph 3 of your Note, we nevertheless consider that paragraph 8 of the earlier draft agreement (Attachment 4) is too vague and imprecise with respect to the moratorium on the death penalty to provide any real guarantee that it will not be applied to any of the persons at hand. In light of the fundamental importance of the non-application of the death penalty and the clear policy of the Organization in this regard, we strongly urge MONUC to impress upon the Government to include a provision in the agreement which would guarantee its non-application in the present case.

3. We consider that the elements of an acceptable compromise solution to the impasse are already contained in the letters of the Minister of Foreign Affairs of 28 July 2007 and the Minister of Defence dated 13 August 2007, which are attached to CCX-495. In these letters the Government has indicated its willingness to consider commuting any death penalty imposed by the courts into a life sentence. In his letter of 28 July 2007, the Minister of Foreign Affairs suggests alternative wording for paragraph 8 of the draft

agreement to the effect that if the death penalty is imposed, it will be commuted to a life-sentence upon the decision of the President of the Republic. For his part, the Minister of Defence notes that this position is guaranteed by an obligation on the Prosecutor to apply for a reprieve by the President of the Republic, in conformity with the Decree on the Organization of the Judiciary No 299/79 of 20 August 1979. As this position is based on proposals made by the Government, we are inclined to believe that the Government would be amenable to agree to a provision to this effect in the agreement.

4. On the understanding that Decree No. 299/79 provides for the obligation to appeal for clemency, it is our view that paragraph 8 as set forth in the draft agreement in Attachment 4 should be revised along the following lines, taking language from the above-mentioned letters to ensure that any death penalty imposed will be commuted to a life sentence:

> "8. (i) Should legal proceedings be initiated against an element of [rebel group] or one of his dependents handed over by MONUC to the Government according to the present agreement, the Government guarantees that he shall benefit from a fair trial and fundamental judicial guarantees;
>
> (ii) In this respect, the Government reaffirms its will to maintain the moratorium on the death penalty applicable to all judicial sentences. Should death penalty be imposed, it would be commuted in life sentence following the application for a reprieve by the President of the Republic, in conformity with the Decree on the Organization of the Judiciary No 299/79 of 20 August 1979." *

5. Regarding your request for our views as to whether the SRSG should issue a public statement appealing to the authorities not to seek or carry out the death penalty, we consider that if the Government agrees to the inclusion of the language suggested above in the agreement concerning transfer, such a public statement may no longer be necessary. In any event, we are prepared to review any draft statement from a legal point of view.

6. Please note that we have consulted with the Office of the High Commissioner for Human Rights (OHCHR) on this issue. While concurring with our proposed language on the death penalty, OHCHR expressed concerns regarding other aspects of the Agreement. We trust that they will be addressed in the framework of the working group constituted in MONUC to develop modalities of transfer (MONUC's code cable CCX-536, para. 2).

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* Translated by the Secretariat. Original text in French reads as follows:

*« 8. (i) Dans le cas où des poursuites judiciaires seraient engagées contre un élément de la* [ . . . ] *ou un de ses dépendants remis par la MONUC au Gouvernement au terme du présent Arrangement, le Gouvernement s'engage a ce qu'il bénéficie d'un procès équitable et des garanties judiciaires fondamentales;*

*(ii) A ce propos, le Gouvernement réaffirme sa volonté de maintenir le moratoire sur la peine de mort applicable à toutes les condamnations judiciaires. Au cas où la peine de mort serait prononcée, elle sera commuée en servitude pénale à perpétuité suite au recours en grâce auprès du Président de la République conformément à l'Arrêté d'organisation judiciaire n° 299/79 du 20 août 1979. »*

### (*d*) Note to the Under-Secretary-General for Peacekeeping Operations, regarding the legal implications of the Madrid Accords and Algiers Agreement for Western Sahara

Legal implications of the Madrid Accords and the Algiers Agreement for Western Sahara—Registration of treaties with the United Nations Secretariat pursuant to Article 102 of the Charter of the United Nations—Spain could not unilaterally transfer its status as administering power over Western Sahara—The fact that an agreement is not registered with the United Nations does not alter its binding force upon the parties—International status of Western Sahara remains a Non-Self-Governing Territory

9 October 2007

1. This is with reference to your note of 30 August 2007 to which was attached code cable 2007-MIN-100 of 28 August 2007 from the United Nations Mission for the Referendum in Western Sahara (MINURSO) concerning the "Madrid Accords"[*] concluded between Spain, Morocco and Mauritania in 1975 and the "Algiers Agreement" concluded between Mauritania and Polisario in 1979. We note your view that the provisions of these two treaties could have an impact on the talks on Western Sahara recently resumed under the auspices of the Secretary-General after seven years of political impasse. In this connection, you would like "to learn . . . the legal significance of these two agreements, in the event the parties refer to them in the third round of negotiations or in other instances". In addition, in its code cable, MINURSO is seeking clarification as to whether the Madrid Agreement included "clauses, annexes and or maps".

2. The impact of the agreements on the international status of Western Sahara as a Non-Self-Governing Territory was discussed in a letter dated 29 January 2002 addressed by my predecessor [ . . . ], to the President of the Security Council. That letter was issued as a document of the Security Council S/2002/161 of 12 February 2002 [ . . . ]. As you will note, paragraphs 6 and 7 of the letter read as follows:

> "6. On 14 November 1975, a Declaration of Principles on Western Sahara was concluded in Madrid between Spain, Morocco and Mauritania ("the Madrid Agreement"), whereby the powers and responsibilities of Spain, as the administering Power of the Territory, were transferred to a temporary tripartite administration. The Madrid Agreement did not transfer sovereignty over the Territory, nor did it confer upon any of the signatories the status of an administering Power, a status which Spain alone could not have unilaterally transferred. The transfer of administrative authority over the Territory to Morocco and Mauritania in 1975 did not affect the international status of Western Sahara as a Non-Self-Governing Territory.
>
> 7. On 26 February 1976, Spain informed the Secretary-General that as of that date it had terminated its presence in Western Sahara and relinquished its responsibilities over the Territory, thus leaving it in fact under the administration of both Morocco and Mauritania in their respective controlled areas. Following the withdrawal of Mauritania from the Territory in 1979, upon the conclusion of the Mauritano-Sahraoui agreement of 19 August 1979 (S/13503, annex I), Morocco has administrated the Territory of Western Sahara alone. Morocco, however, is not listed as the administering

[*] Declaration on Principles of Western Sahara, United Nations, *Treaty Series,* vol. 988, p. 259.

Power of the Territory in the United Nations list of Non-Self-Governing Territories, and has, therefore, not transmitted information on the Territory in accordance with Article 73 (e) of the Charter of the United Nations."

4. As regards the 1975 Madrid Agreement, please be advised that it was registered with the United Nations Secretariat, pursuant to Article 102 of the Charter of the United Nations, by Morocco on 9 December 1975 under the title "Declaration of Principles on Western Sahara by Spain, Morocco and Mauritania". This Agreement is published under registration No. 14450 in volume 988 of the United Nations *Treaty Series* [ . . . ]. The Madrid Agreement does not include any additional clauses, annexes or maps.

5. The 1979 Algiers agreement between Mauritania and Polisario, otherwise known as the "Mauritano-Sahraoui agreement," was not submitted to, and would not be registrable by, the United Nations Secretariat under Article 102 of the Charter of the United Nations. This agreement was attached to a letter dated 18 August 1979 from the Permanent Representative of Mauritania addressed to the Secretary-General and published as both General Assembly and Security Council documents A/34/427 and S/13503, respectively [ . . . ].

6. As to the legal significance of the Agreements referred to above, please be advised that the Madrid Agreement is binding on the Parties, i.e. Spain, Morocco and Mauritania. However, we would like to confirm that the Madrid Agreement did not transfer sovereignty over Western Sahara, nor did it confer upon either Morocco or Mauritania the status of an administering Power, a status which Spain alone could not have unilaterally transferred. The transfer of administrative authority over the Territory to Morocco and Mauritania in 1975 did not affect the international status of Western Sahara, as a Non-Self-Governing Territory.

7. With regard to the Algiers agreement, kindly note that the fact that it was not registered with the United Nations should not be perceived as altering the binding nature of the agreement for its parties, i.e. Mauritania and Polisario. As in the case of the Madrid Agreement, the Algiers agreement cannot be interpreted as transferring sovereignty over the Territory of Western Sahara to Polisario or somehow affecting the international status of Western Sahara as a Non-Self-Governing Territory.

## 5. Treaty law

### Electronic message to the United Nations Mission in the Sudan, regarding the implications for the United Nations to sign a peace agreement as a witness

Signature as a witness by the Organization of a peace agreement between warring parties—Necessity to have draft agreement reviewed ahead of time by the Office of Legal Affairs, especially to have its view on the compliance of the provisions on justice and accountability with the principles and policies of the United Nations—Reservation to be made in case of blanket amnesty clause as the United Nations does not recognize amnesty for genocide, war crimes and crimes against humanity—No legal obligations entailed by signature as "witness" of a peace agreement, but gives the agreement a certain legitimacy

4 June 2007

This is in response to the query below on guidance for United Nations signature as a witness on a "possible protocol on item three", and the implications for the United Nations.

a. In negotiating, mediating or facilitating the negotiation of a peace agreement between the warring parties, the question of whether the United Nations should sign as a witness to the Agreement requires a review of the Agreement as a whole. For the Office of Legal Affairs properly to advise, it is essential that early drafts of the Agreement or the Protocol be shared with it ahead of time. In reviewing the draft Agreement and the provisions on Justice and accountability, in particular, this Office would advise on their conformity with long-standing principles and policies of the United Nations, such as amnesty or the relationship between international and national judicial and non-judicial accountability mechanisms.

b. If it is decided that the United Nations sign as a witness, the question would then be whether the signature should be accompanied with a reservation (if a number of clauses are unacceptable but it is politically important to be seen to be engaged in the process). Such "technique" was used in the Lomé Peace Agreement for Sierra Leone, when the blanket amnesty clause was unacceptable to the United Nations without a reservation that the "United Nations does not recognize amnesty for genocide, war crimes and crimes against humanity".

c. When signing the Agreement as a witness on behalf of the United Nations, the Special Representative of the Secretary-General would affix to his name and title the words "For the United Nations". We note that the Agreement on Comprehensive Solution between the Government of Uganda and the Lord Resistance Army of 2 May 2007, was witnessed by [Name], the United Nations Deputy Resident and Humanitarian Coordinator, Southern Sudan. The words "For the United Nations" were missing.

d. As for the legal implications of signature as a witness. Clearly, such a signature does not entail for the "witness" any legal obligations. The act of witnessing, however, is a reflection of the involvement in the negotiation of the State or the international organization, and an indication of a moral or political support for the principles contained therein. As far as the United Nations is concerned, a signature as a witness is a "stamp of legitimacy" of a kind, hence the importance of having the opportunity of vetting the content of the Agreement beforehand.

## 6. International humanitarian law

### Note to the Assistant Secretary-General for Political Affairs, regarding the usage of the term "civil war"

Definition of term "civil war" under international law—Notion of two warring factions within a State—"Non-international armed conflict" considered a more technical, legal, term for this notion—Legal implications of the determination of the existence of a civil war

30 January 2007

1. This is in reference to your notes of 25 October 2006 and 16 January 2007 in which you request our guidance on the future use of the term "civil war" in the context

of the [State] conflict. In particular, you note that it would be useful to understand the definition of "civil war" and its implications in international law, and whether the internal conflict in [State] falls under this definition.

2. The term "civil war" is generally understood to connote a notion of two warring factions within a State—of which one is a sovereign Government—fighting for the control of the political system or secession, each having effective control over parts of the State territory.

3. The more technical, legal, term is "non-international armed conflict" as referred to in Common article 3 of the Geneva Conventions of 12 August 1949[*] and the Additional Protocol relating to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts ("Additional Protocol II").[**] In the absence of a general definition of "non-international armed conflict" the International Committee of the Red Cross Commentary on Additional Protocol II observes:

> " . . . a non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other: the parties to the conflict are not sovereign States, but the government of a single State in conflict with one or more armed factions within its territory . . . The expression "armed conflict" gives an important indication in this respect since it introduces a material criterion: the existence of open hostilities between armed forces which are organized to a greater or lesser degree. Internal disturbances and tensions, characterized by isolated or sporadic acts of violence, do not therefore constitute armed conflict in a legal sense, even if the government is forced to resort to police forces or even to armed units for the purpose of restoring law and order. Within these limits, non-international armed conflict seems to be a situation in which hostilities break out between armed forces or organized armed groups within the territory of a single State. Insurgents fighting against the established order would normally seek to overthrow the government in power or alternatively to bring about secession so as to set up a new State".
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> ("Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949", International Committee of the Red Cross, Martinus Nijhoff Publishers, Geneva 1987, at pp 1319–1320).

4. A determination that a situation amounts to a "civil war" or a "non-international armed conflict" is significant because of the implications thereof under international law. First, such a determination implies that the Government has lost control of part of its territory, and that other States may have certain rights and responsibilities with regard to either or both parties. Second, such a recognition implies that a body of international law rules applies in the relationship between the Government forces and the opposing party in respect of the hostilities, rather than solely national law (for example, national criminal law). The international rules applicable during a non-international armed conflict are set forth in Common Article 3 of the Geneva Conventions and in Additional Protocol II. ([State] is bound by Common Article 3 of the Geneva Conventions, and while it is not party to Additional Protocol II, it is bound by the customary international law provisions of that Protocol).

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[*] United Nations, *Treaty Series*, vol. 75, p. 31, 85, 135 and 287.

[**] United Nations, *Treaty Series*, vol. 1125, p. 609.

5. While the situation in [State] may, legally speaking, satisfy some of the conditions for either or both terms, we suggest that the United Nations avoid making a general determination as to the precise nature of the conflict, and use instead the more neutral term "conflict".

## 7. Personnel questions

### (*a*) Interoffice memorandum to the Registrar, International Criminal Tribunal for Rwanda (ICTR), regarding the Agreement between the United Nations and the Government of Tanzania on the construction and use of the Detention Facilities in Arusha

Payment procedure of prison officers on loan from a Government—Important that direct payment to officers on loan does not imply that they are United Nations staff members—Usual practice to pay the Government for their services—Revision of draft agreement to enable the direct payment of officers by the Tribunal—Agreement must clearly reflect that the United Nations is not liable under the United Nations Staff Regulations and Rules or national laws

24 January 2007

1. I refer to your memorandum, dated 27 December 2006, addressed to the Legal Counsel, which was referred to me for response. You have requested advice as to whether article 5.3 of the draft agreement between the United Nations and the Government of Tanzania on the construction and use of the Detention Facilities in Arusha ("the draft agreement") could be revised to reflect the Tribunal's current practice of directly paying the prison officers on loan from the Government of the United Republic of Tanzania ("the Government") for their services provided by them in accordance with the draft agreement. I also refer to your discussions regarding this matter with the Legal Counsel during a meeting on 15 December 2006.

2. I note that my Office had previously raised concerns regarding the Tribunal's practice of directly paying the individual prison officers on loan from the Government for their services provided to the Tribunal. The concern raised was that such payments could be taken to imply that these prison officers are staff members of the Tribunal, and that they would therefore be entitled to rights and benefits under either the United Nations Staff Regulations and Rules or local labour and social security laws. To avoid such an implication, this Office had recommended in a memorandum, dated 25 March 2004, from the Director, General Legal Division, to the Chief, Division of Administrative Support, ICTR, that payments for the services of prison officers on loan should be made to the Government. Accordingly, article 5.3 of the draft agreement forwarded to us provides that "[p]ayment shall be made to the Headquarters of the Tanzanian Prison Services on a quarterly basis in arrears, upon receipt and verification of the invoices [ . . . ]."

3. From the information provided to us, I understand, however, that the Tribunal would prefer to continue its practice of directly paying the individual prison officers on loan from the Government for their services provided in accordance with the draft agreement. As the Tribunal's earlier draft provision on such payments had stated, these payments would amount to the Tribunal paying each prison officer supplied by the Gov-

ernment every month a fixed amount based on an established daily rate. I note that such payments are made through the Arusha branch of the local Standard Chartered Bank. I further understand that this current payment arrangement has been practical and "trouble-free" for the Tribunal, and that the Government has made clear its desire to continue this arrangement.

4. While the previously stated concerns of this Office about the Tribunal's practice of paying prison officers loaned by the Government directly for their services provided to the Tribunal remains, in light of the fact that the current payment arrangement appears to suit all parties, this Office has prepared a revised draft agreement accommodating this arrangement in a manner that best protects the legal interests of the Organization.

5. In this regard, and as it may be foreseen that the Tribunal and the Government may wish to adjust the daily rate at which the Tribunal is paying the prison officers on loan from the Government for their services provided under the draft agreement in the future, the daily rate should be specified in an annex to the agreement and not in the text of the agreement itself, so that the annex can be updated or replaced at any time by means of an amendment, in accordance with article XIX of the draft agreement.

6. In light of the foregoing, we suggest that article 5.3 of the draft agreement forwarded to us on 27 December 2006 be deleted, and that the wording of the first two paragraphs of article V be revised to read as follows:

> "5.1 The Tribunal shall be responsible for the costs and obligations expressly set forth in this Agreement relating to the provision of the Services provided by the Government. Except for the payment obligations set forth in article 5.2, below, the Tribunal shall not be liable to pay the salaries, overtime, insurance, benefits, or other related emoluments or benefit payments relating to the Services provided by the Prison Officers under this Agreement. For avoidance of doubt, the payment obligations assumed by the Tribunal in accordance with article 5.2, below, shall constitute the total liability of the Tribunal and of the United Nations to reimburse the Government for the salaries, overtime, insurance benefits, or other related emoluments or benefit payments payable by the Government to the Prison Officers.
>
> 5.2 The Tribunal shall pay a daily amount to the Prison Officers individually for the Services provided by them in accordance with this Agreement. Such payment shall be made by the Tribunal to the Prison Officers individually at the daily rate set forth in Annex I to this Agreement and the total daily amount per Prison Officer shall be multiplied by the number of days worked in a month and shall be paid by the Tribunal to the Prison Officer concerned on the last business day of each month. The Tribunal and the Government may amend or otherwise update or replace Annex I at any time by means of an amendment to this Agreement, in accordance with article XIX, below, provided that any new daily rate set forth in such revised Annex I shall not be effective until the first day of the month following the effective date of any such amendment."

7. In order to address this Office's concern that the direct payment of prison officers on loan from the Government for their services provided under the draft agreement could give rise to the implication that they are staff members of the Tribunal, article 4.7 of the draft agreement should be revised to read as follows:

> "4.7 Nothing in this agreement, in particular not article 5.2, below, shall be construed to mean that Prison Officers are staff members of the Tribunal. They shall, however, be subject to the authority of the Registrar of the Tribunal and shall perform their duties

under the direction and control of the Commanding Officer of the Detention Facilities, in accordance with the Detention Rules."

8. Finally, in order to ensure that neither the Tribunal nor the Organization as a whole would be required to answer to any employment-related claims, including claims about payments of salary and emoluments, by such prison officers, the indemnity provision has been revised to make clear that the Government is responsible for defending the Tribunal and the Organization from such claims. Accordingly, article 6.3 should be revised to read as follows:

"6.3 The Government shall indemnify, hold and save harmless and defend, at its own expense, the Tribunal, its officials, agents, servants and employees from and against all demands, claims, suits and liability of any nature or kind related to the use of the Detention Facilities by the Tribunal, such demands, claims, suits and liability, including but not limited to any employment-related claims brought by any Prison Officers (including but not limited to claims regarding the payment obligations set forth in article 5.2, above), and any claim brought by any third party professing ownership of, or any other rights of whatever nature, in any or all parts of the Detention Facilities."

## (*b*) Interoffice memorandum to the Assistant Secretary-General, Office of Human Resources Management, regarding the Congressional inquiry on the former Secretary-General's retirement allowance and other separation or termination benefits

Former Secretary-General's retirement package and pension benefits—Secretary-General is not a staff member—Secretary-General's salary and retirement allowance decided by the General Assembly in resolutions available to the public—The former Secretary-General entitled to additional pension benefits in his quality of retired staff member of the Organization—United Nations Joint Staff Pension Fund (UNJSPF) pension benefits considered confidential information and can be disclosed only following beneficiary's written consent

20 February 2007

1. I refer to your note to the Legal Counsel, dated 13 February 2007, asking for advice regarding the request of the United States Mission to the United Nations (USUN) to be provided with information on former Secretary-General Annan's retirement package, as well as any pension benefits he may be entitled to from the United Nations Joint Staff Pension Fund (UNJSPF). You specifically requested our advice whether the Organization may release such information, and whether the former Secretary-General's prior permission should be sought before any action is taken. In this regard, we understand that the USUN's request is based on a congressional inquiry of the Government of the United States. Your request has been forwarded to me for response.

### The Secretary-General's retirement allowance

2. I note that the salary and retirement allowance of the Secretary-General are approved by the General Assembly on the basis of a recommendation of the Advisory Committee on Administrative and Budgetary Questions (ACABQ). In this regard, resolution 11 (I) of 24 January 1946, set out the terms of appointment of the first Secretary-

General. In resolution 13 (I) of 13 February 1946, the General Assembly decided that the Secretary-General will be entitled to a retirement allowance. By General Assembly resolution 45/251 of 21 December 1990, the retirement allowance of the Secretary-General was set at an amount equivalent to fifty percent of the recommended net remuneration (net base salary plus post adjustment) and it was decided that such remuneration would be adjusted by the application of the same procedure and percentage used for adjusting the scale of pensionable remuneration for staff in the Professional and higher categories. The last adjustment to the Secretary-General's salary and retirement allowance was made in resolution 57/310 of 18 June 2003. In that resolution, the General Assembly concurred with the ACABQ's recommendation that, effective as of 1 January 2003, the Secretary-General's annual net remuneration be increased to US$ 275,420 and that his retirement allowance be increased to US$ 137,710 (see paragraph 1 of General Assembly resolution 57/310, referring to paragraph 9 of A/57/7/Add.25; see also paragraphs 4 to 8 of A/57/7/Add.25). I further note that the Secretary-General's salary is not subject to deduction from pension since the Secretary-General's retirement allowance, unlike the pension of staff members, is paid directly from annual budget appropriations.

3. In light of the above, and given the fact that the exact amount of the Secretary-General's salary and retirement allowance have been set out in General Assembly resolutions which are available to the public, I am of the view that there is no legal objection to providing this information to USUN without seeking prior permission of the former Secretary-General. As a courtesy, however, you may wish to notify the former Secretary-General of the above-mentioned request of the USUN and the congressional inquiry.

### Former Secretary-General's UNJSPF entitlements

4. I note that prior to his appointment as Secretary-General, [name]was a staff member of the Organization for a substantive number of years during which he contributed to the UNJSPF. He is, therefore, entitled to receive a pension benefit from the UNJSPF, acquired through his service as a staff member. If necessary, you may wish to confirm this directly with the UNJSPF.

5. I wish to note that, information regarding a staff member's or former staff member's UNJSPF pension benefits is treated as confidential information. In this regard, Rule B.4 of the Administrative Rules of the UNJSPF stipulates that "[i]nformation provided by or in respect of a participant or beneficiary under the Regulations or these Rules *shall not be disclosed without written consent or authorization by the participant or beneficiary concerned,* except in response to a court order or a request from a judicial or civil authority in the context of divorce or family maintenance obligations" (emphasis added). It is apparent from this Rule that the Organization is not in a position to provide the USUN with any information regarding the amount of pension benefits the former Secretary-General may be entitled to as a former staff member of the Organization without having received his prior written consent.

### (*c*) Interoffice memorandum to the Director, Accounts Division, Office of Programme Planning, Budget and Accounts (OPPBA)/Department of Management, regarding the taxation of [State] staff member and the request for tax reimbursement

Reimbursement of income taxes paid by staff members to national State—Only compulsory contributions on official salaries to be reimbursed by the Organization—2 per cent contribution to obtain normal consular services viewed as a compulsory assessment—Need to have a staff member willing to be identified for the Organization to make reimbursement—Reimbursement by the Organization is charged from the State's account under the Tax Equalization Fund

10 August 2007

1. This responds to your memorandum of 16 March 2007, requesting our advice on the request by a [State] staff member, [Name], for reimbursement of income taxes, in accordance with Staff Regulation 3.3 (f). [Name] seeks such reimbursement in respect of what he claims to be compulsory contributions that he made to the Government of [State] as a percentage of his official United Nations salary and emoluments. In addition, you have requested clarification as to how cases of other staff members of [State] nationality who, like [Name], claim to be subject to a compulsory contribution on their official salaries and emoluments by the Government of [State] should be resolved under Staff Regulation 3.3 (f).

2. I note that you have referred to my earlier memorandum, dated 10 August 2006, addressed to the Chief, Legal Affairs Section, Office of the United Nations High Commissioner for Refugees (UNHCR), concerning this question generally. Citing prior exchanges of correspondence on this issue, that memorandum stated that, in March 1999, the Secretariat had exchanged Notes Verbales with the Government of [State] regarding the Government's assurances that amounts that staff members of [State] nationality had contributed to the Government of [State] in respect of their official United Nations emoluments were voluntary payments and not taxes. My earlier memorandum of 10 August 2006 noted that, in 1999, UNHCR had alleged that, notwithstanding the Government's assurances, the contributions in fact were compulsory and, thus, operated as a tax on the official emoluments of staff members of [State] nationality. The memorandum also stated that, at that time, this Office had "advised that only if a staff member is willing to be identified and to send a written statement alleging that the 2 per cent contribution is compulsory in the sense that it must be paid in order to obtain normal consular services, we were willing to take the matter up again with the Government and, if it appears that this 2 per cent contribution is a compulsory assessment, the Secretary-General would be authorized to consider making a refund" under Staff Regulation 3.3 (f). Thus, my memorandum of 10 August 2006 concluded that the Organization would be "unable to again take this matter up with the Government unless one or more of the staff members are willing to be identified."

3. By your memorandum of 16 March 2007, you forwarded a memorandum, dated 28 February 2007, from the Deputy Chief, Human Resource Management Service (HRMS), United Nations Office in Geneva (UNOG), seeking authorization from you "for settling the claim for refund of national income taxes that [Name] . . . has paid to the Government of [State]." The memorandum of 28 February 2007 also provided you a "clearance certificate [Name] obtained from the Embassy of the State of [ . . . ] regarding the payments

made by him from April 1998 to September 2006 for the purpose of paying the national income tax." [Name] has provided Human Resources Management Service, UNOG, with a signed written statement, dated 14 February 2007, submitting "copies of supporting documentation of my tax payments to the Embassy of [State] in Geneva from my United Nations income covering the period from April 1998 to September 2006 and amounting to 15,335.03 Swiss Francs." Those supporting documents consist of a certification from the [State] Embassy in Geneva that [Name] indeed made such payments.

4. As this Office has previously advised (see, e.g., memorandum of 26 September 2001, from the Director, General Legal Division, to OHRM, which was cited in your memorandum), [State] is not a party to the Convention on the Privileges and Immunities of the United Nations ("General Convention"),[*] which provides in article V, section 18 (b), that officials of the United Nations shall "be exempt from taxation on the salaries and emoluments paid to them by the United Nations." We note, however, that, in article VII, paragraph (1) (b), of the Agreement between the United Nations and the Government of [State] Relating to the Establishment in [State] of a United Nations Integrated Office" . . . ("[State] Agreement"), the Government of [State] has agreed that "Officials of the United Nations shall be exempt from taxation on the salaries and emoluments paid to them by the United Nations."[1] In addition to whatever obligation may be incumbent on the Government of [State] pursuant to the General Convention and the [State] Agreement with respect to exemption of staff members from national taxation in respect of their official salary and emoluments, this Office has previously made clear that if a staff member is, in fact, subject to taxation in respect of such salary and emoluments, the staff member is entitled to tax reimbursement in accordance with Staff Regulation 3.3 (f). Moreover, to the extent that the Organization is obliged to reimburse such staff members in respect of any such taxes paid on their official salary and emoluments, the amount of such reimbursement may be charged to the Tax Equalization Fund in accordance with Staff Regulation 3.3 (f) and Financial Regulations 4.10 through 4.12.

5. In view of the position previously taken by the Government of [State] that payments made by staff members of [State] nationality are voluntary contributions and not taxes, this Office has advised, as noted above, that such staff members should be willing to identify themselves and provide documentation of the payments made before reimbursement could be made from the Tax Equalization Fund in accordance with Staff Regulation 3.3 (f). In this case, [Name] has provided a written certification identifying himself as having paid taxes to the Government of [State] in respect of his United Nations salary and emoluments. Accordingly, as advised in my memorandum of 10 August 2006, you may wish to send a Note Verbale to the Government of [State], stating that [Name] has identified himself and obtained certification of payment from the Embassy of [State] in Geneva of amounts said to be taxes imposed in respect of his official United Nations salary and emoluments. Such Note Verbale could also advise that, unless the Government were will-

[*] United Nations, *Treaty Series*, vol. 1, p. 15, and vol. 90, p. 327 (corrigendum to vol. 1).

[1] For purposes of the [State] Agreement, the term "Officials of the United Nations" is defined in article I(h) as, "the Head of the United Nations Integrated Office, the Representative of the United Nations Agencies, Programmes and Funds, all members of their staff and any other staff members of the United Nations system, irrespective of nationality, employed under the Staff Regulations and Rules of the United Nations, with the exception of persons who are recruited locally and assigned to hourly rates, as provided for in United Nations General Assembly resolution 76(1) of 7 December 1946."

ing to effect a reimbursement of the amounts paid by [Name], the Organization would be obliged to provide tax to him in accordance with Staff Regulation 3.3 (f) and to charge such reimbursement to the account of [State] under the Tax Equalization Fund in accordance with Financial Regulations 4.10 through 4.12.[2] For these purposes, we enclose a draft of such a Note Verbale. Accordingly, unless the Government would be willing to effect a resolution of [Name]'s claim for reimbursement in an appropriate timeframe *(e.g.,* before the latest time when you would be required to charge the Tax Equalization Fund in the current fiscal period), then it would appear that [Name] would be entitled to reimbursement under the Tax Equalization Fund of the amounts he has claimed he was required to pay to the Government of [State] in respect of his official salary and emoluments.

6. With respect to other staff members of [State] nationality who may claim for reimbursement for amounts paid by them to the Government of [State] in respect of their official salary and emoluments, we would suggest that OPPBA follow the advice set forth in my earlier memorandum of 10 August 2006. That is, to the extent that any such other staff members are willing to be identified as having paid taxes to the Government of [State] in respect of their United Nations salary and emoluments, and to the extent that the Government of [State] is unwilling or unable to effect a resolution of their claims for reimbursement, the Organization would be required to reimburse such staff members for such amounts paid and charge such reimbursements to the Tax Equalization Fund. In this regard, the draft Note Verbale contains a statement along these lines.

### Draft note verbale to the Government of [State]

The Secretariat of the United Nations presents its compliments to the Permanent Mission of [State] to the United Nations and has the honour to inform the Mission that a United Nations staff member, [Name], has claimed reimbursement from the United Nations in respect of amounts that he claims are taxes imposed by, and paid by him to, the Government of [State] in respect of his official United Nations salary and emoluments. In this regard, [Name] has provided the United Nations with a certificate given to him by the Embassy of [State] in Geneva concerning amounts he paid from the period April 1998 to September 2006, amounting to 15,335.03 Swiss Francs. Copies are enclosed for ease of reference.[*]

Article V, section 18(b), of the Convention on the Privileges and Immunities of the United Nations provides that officials of the United Nations shall "be exempt from taxation on the salaries and emoluments paid to them by the United Nations." Although [State] has not acceded to the Convention, in article VII, paragraph (1)(b), of the Agreement Between the United Nations and the Government of [State] Relating to the Establishment in [State] of a United Nations Integrated Office" [ . . . ], the Government of [State] has agreed that "Officials of the United Nations shall be exempt from taxation on the salaries and emoluments paid to them by the United Nations." Under United Nations Staff Regulation 3.3(f),

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[2] Likewise, in the memorandum of 26 September 2001, this Office suggested that, before proceeding with reimbursement, the Government of [State] should be further reminded of the Organization's policies on tax reimbursement and use of the Tax Equalization Fund so that the Government could have the opportunity to reimburse any staff members concerned before being charged under the Tax Equalization Fund.

[*] Not reproduced herein.

any staff member who has paid national taxes in respect of such staff members official salary and emoluments is entitled to reimbursement from the Organization for all such amounts paid. Under Staff Regulation 3.3 (f) and pursuant to United Nations Financial Regulations 4.10 through 4.12, any such reimbursements are charged to the account of the Member State concerned under the Tax Equalization Fund.

Unless the Government of [State] is willing and can make separate provisions for reimbursing [Name] in respect of the amounts for which he claims reimbursement before . . . 2007, the latest time when the Organization will have to effect charges to the Tax Equalization Fund in the current fiscal period, the United Nations must effect such reimbursement and charge it to the account of [State] under the Tax Equalization Fund. Similarly, should any other staff members of [State] nationality come forward, as in the case of [Name], and claim reimbursement for amounts required to be paid by them in respect of their official salary and emoluments to the Government of [State], the Organization will also have to effect reimbursement of the amounts paid and charge such reimbursements to the account of [State] under the Tax Equalization Fund, unless the Government of [State] is willing and can make provisions to separately reimburse such staff members for such amounts.

### (*d*) Interoffice memorandum to the Director, Operational Services Division, Office of Human Resources Management (OHRM), regarding the request for employment and wage data from the New York State Department of Labor

Privileges and immunities of the United Nations—Exemption of employment-related contributions under the New York State unemployment insurance law—Change of staff member immigration status within the United States—ST/AI/2000/19—Staff member must request permission to sign the waiver of rights, privileges and immunities as United Nations staff to acquire permanent resident status in the United States—Such change of status involves losing international benefits and possible reimbursement of those benefits received after the change

7 November 2007

1. I refer to your memorandum, dated 3 October 2007, regarding a request for employment and wage data ("Request") from the New York State Department of Labor addressed to the United Nations in respect of [Name], a former staff member of the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC), requesting our advice with regard to the appropriate response to such Request. You informed us that [Name], a Russian national, joined UNMOVIC on 28 September 2000, on a fixed-term appointment, and that his last day with the Organization was 10 July 2007. His final separation Personnel Action has not been processed, since he has still to submit some pending administrative documents to OHRM. You also informed us that the UNMOVIC Executive Office has notified OHRM that [Name] had not renewed his G-4 visa since March 2006. In reply to a request for clarification from UNMOVIC as to his status since March 2006 [Name] stated in an e-mail message dated 18 September 2007 that he received his United States Permanent Resident Card, "since 05/08/06", presumably 8 May 2006. Based on the foregoing, you have requested an opinion as to whether OHRM would be obliged to report the information requested to the Department of Labor and what information, if any,

should be provided to these authorities. Moreover, given that [Name] did not inform the Organization that he had taken steps to acquire permanent resident status in the United States, you sought our advice on any other actions to be taken in this regard, including any tax implications resulting from [Name]'s change of immigration status.

2. Apparently, [Name] has filed a claim for unemployment insurance benefits with the Department of Labor, and the Department does not have a record of all wages paid by the United Nations to him during the period from 1 April 2006 to 30 June 2007. Accordingly, the Department of Labor has issued the standard Request to UNMOVIC. Neither the United Nations, nor its subsidiary organs, such as UNMOVIC, are subject to the unemployment compensation schemes of the Member States. Consequently, you will find enclosed a letter sent by this Office to the Department of Labor asserting the privileges and immunities of the Organization in respect of this matter, and enclosing a copy of the letter of the Department of Labor, dated 4 October 1946, confirming that "the United Nations is not a an employer liable for contributions" under the New York State Unemployment Insurance Law.[*]

3. With respect to [Name]'s change to United States permanent residence status, you may recall that pursuant to Staff Rule 104.4 (c) and to section 5.1 of the Administrative Instruction ST/AI/2000/19, entitled "Visa Status of Non-United States Staff Members Serving in the United States, Members of their Household and their Household Employees, and Staff Members Seeking or Holding Permanent Resident Status in the United States", staff members intending to acquire permanent resident status in the United States must notify the Administration in writing prior to applying for a change of status. Section 5.6 of ST/AI/2000/19 stipulates that staff members who have permanent resident status in the United States are required to renounce such status and to change to G-4 visa status upon appointment, and staff members who seek to change to permanent resident will not be granted permission to sign the waiver required to acquire or retain permanent resident status. Section 5.7 of ST/AI/2000/19[**] provides some exceptions to the general rule of section 5.6, *inter alia,* for staff members appointed to serve outside the United States under the 200 and 300 series of the Staff Rules and for staff members appointed for less than one year. However, if their appointments are extended beyond one year, that extension is subject to obtaining a G-4 visa. In any case, [Name] would first have had to require permission before signing the waiver, and there does not appear to be any record that [Name] sought such prior authorization before changing to United States permanent residence status.

4. With respect to the tax implications of [Name]'s change to United States permanent residence status, United States law provides that United Nations staff members who become United States permanent residents must sign a waiver of the rights, privileges, exemptions and immunities which would accrue to them as staff members of the United Nations. Section 5.3 of ST/AI/2000/19 requires that staff members must first request permission from OHRM to sign such a waiver. Staff members having signed the waiver become liable for payment of United States taxes on emoluments earned from the United Nations as of the date of their signing the waiver. Such taxes are subject to reimbursement by the Organization pursuant to Staff Regulation 3.3 (f). This Office was not informed as

[*] Not reproduced herein.

[**] For information on Administrative Instructions, see note under 1 (f) above.

to whether [Name] actually signed a waiver and/or requested reimbursement of United States taxes. In the absence of a specific request of [Name] in this regard, no further action would be required at this stage.

5. Pursuant to section 5.5 of ST/AI/2000/19, staff members who sign a waiver in order to acquire United States permanent resident status lose any entitlements they would otherwise have had to international benefits under the Staff Regulations and Rules by virtue of serving at a duty station outside the country of their nationality (e.g., home leave, education grant, repatriation grant, etc.), but only from the date on which they are granted United States permanent resident status, as shown on their alien registration card, and not from the date on which they sign the waiver. Thus, regardless of whether [Name] signed the waiver, if he became a United States permanent resident, he will have lost any entitlement to international benefits from the date, shown on his alien registration card, that he had become a United States permanent resident. The Organization may be in a position to recover any international benefits accorded to [Name] because of his change of status.

### Annex

Dear Commissioner,

I refer to your request for employment and wage data ("Request") addressed to the United Nations in respect of [Name], a former United Nations staff member, serving with the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC).

The United Nations is an international inter-governmental organization established pursuant to the Charter of the United Nations ("Charter"), a multilateral treaty signed on 26 June 1945. The Charter was ratified by the United States of America on 8 August 1945 and came into force for the United States of America on 24 October 1945. (United Nations Charter, 59 Stat. 1031 (1945), reprinted in 1945 *United States Code,* Cong. & Admin. News, 961 *et seq.*)

As an international organization, the United Nations is subject to its internal Staff Regulations and Rules and has been accorded certain privileges and immunities which are necessary for the fulfillment of the purposes of the Organization. Paragraph 1 of Article 101 of the Charter provides that "[t]he staff [of the Organization] shall be appointed by the Secretary-General under regulations established by the General Assembly". Article 105 of the Charter provides the general basis for the privileges and immunities of the United Nations. Paragraph 1 of Article 105 of the Charter provides that "[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes." Paragraph 3 of Article 105 provides that the "General Assembly may make recommendations with a view to determining the details of the application of paragraph 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose."

In order to give effect to Article 105 of the United Nations Charter, the General Assembly of the United Nations adopted the Convention on the Privileges and Immunities of the United Nations ("Convention") on 13 February 1946.[*] The United States became a party to the Convention on 29 April 1970 (21 UST 1418, [1970] TIAS No. 6900). Prior to becoming a party to the Convention, the United States of America enacted the Interna-

[*] United Nations, *Treaty Series*, vol. 1, p. 15, and vol. 90, p. 327 (corrigendum to vol. 1).

tional Organizations Immunities Act ("IOIA"), Pub. L. No. 79–291, 59 Stat. 669 (codified at 22 U.S.C. 288 *et seq.*), in 1945 in order to give effect to Article 105 of the Charter. For the purposes of the IOIA, the President of the United States of America designated the United Nations as an "international organization." (Exec. Order, No. 9,698, 11 Fed. Reg. 1.809 (1946), reprinted in 22 *U.S.C.* 288a.)

Article II, section 2 of the Convention of the Privileges and Immunities of the United Nations, ("General Convention") to which the United States is a party (21 UST 1418; [1970] TIAS 6900; 1 UNTS 15 (1946)), states: "[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as it has expressly waived its immunity."

In addition, article II, section 4 of the General Convention provides that, "[t]he archives of the United Nations, and in general all documents belonging to it or held by it, shall be inviolable wherever located." The United Nations also enjoys immunity under the United States International Organizations Immunities Act (22 USC Section 288, *et seq.*).

It appears from the Request that [Name] filed a claim for unemployment insurance benefits, and that your Department seeks a record of all wages paid by the United Nations to him during the period from 1 April 2006 to 30 June 2007. The United Nations is maintaining and is not waiving its privileges and immunities in respect of this matter. Please also note that as determined by your Department, in the enclosed letter of 4 October 1946, "the United Nations is not an employer liable for contributions" under the New York State Unemployment Insurance Law.

For the reasons stated above, I am, therefore, returning the Request to you.

### (*e*) Interoffice memorandum to the Officer-in-Charge, Policy Support Unit, Human Resources Policy Service, Division for Organizational Development, Office of Human Resources Management, regarding the permission for staff to participate in staff credit union related activities

Status of various staff credit unions unclear in respective national legislation and *vis-à-vis* the Organization—Service on the boards/commission of staff credit unions considered to be an outside activity and is performed in personal capacity—Voluntary service in such board/commissions not viewed as employment, occupation or social and charitable activity—Such service considered to be an outside activity related to the United Nations, and thus requiring prior approval

November 2007

1. I refer to your memorandum dated 28 May 2007, and subsequent discussions with this Office on the above-mentioned subject. You informed us that you received a request from the Operational Services Division of OHRM asking whether staff members who serve as volunteers on boards/committees of the United Nations Federal Credit Union (UNFCU) in New York and similar institutions such as the International Civil Servants Mutual Association (ICSMA, also referred to as MEC) in Geneva, the United Nations Staff Savings & Credit Association (UNSSCA) in Addis Ababa and the Staff Mutual Assistance Fund (MAF) in Bangkok (hereinafter referred to as "staff credit unions") are required to seek prior approval from the Administration.

## I. Background

2. We understand that the practice has been not to require prior approval for participation in boards/committees of UNFCU. However, you were informed that when Office of Internal Oversight Services (OIOS) staff members raised similar questions with regard to participation in committees/boards with ICSMA in Geneva, they were advised by the OIOS Executive Office, allegedly based on advice by the Office of Legal Affairs (OLA), that such activities would require prior approval as an outside activity.

3. We were unable to locate any advice by OLA on the issue of requesting approval to engage in activities of staff credit unions. [Name A], the staff member who referred to such advice in an e-mail message attached to your memorandum, informed us orally that he has not seen such an opinion personally. [Name A] also mentioned the existence of a 1998 letter from [Name B], then Assistant Secretary-General, OHRM, to UNFCU, informing it that staff members involved in UNFCU activities would not require permission from the Administration. We understand that OHRM has not been able to find this letter. This Office does not have a copy of the letter, either. [Name A] informed us that he requested UNFCU to retrieve such a letter, apparently without success.

4. [Name C], Executive Officer, OIOS, provided us with an e-mail message dated 3 March 2007, from [Name D], Special Assistant to the Director, Division of Administration, United Nations Office in Geneva (UNOG), stating that "the functions performed by the directors of the Board [of ICSMA] are not considered to be an outside activity and therefore do not require the prior approval of the Secretary-General." As far as we are aware, OLA was not consulted by UNOG on this matter.

5. We understand that members of boards/committees of staff credit unions are not compensated for their activities but they may get their travel expenses reimbursed if they have to travel in connection with staff credit unions' activities. We note that the status of staff credit unions *vis-à-vis* the United Nations and the concerned Host Countries is the subject of on-going correspondence between our offices and the Controller's Office.[1] Set out below is a summary description of each staff credit union, as we understand it.

6. UNFCU is a not-for-profit federal credit union established under the laws of the United States and chartered and supervised by the National Credit Union Administration. It has a legal personality entirely separate from that of the Organization, to which it is tied by the definition of the members it serves (although there are other means of co-operation with the Organization, e.g. lease of United Nations premises, use of United Nations Inter-Office mail, etc.).

7. The status of ICSMA is not clear. A United Nations trust fund for ICSMA was established, and we understand that the Director-General, UNOG, was delegated the full administrative responsibility for authorization and issuance of allotments and administration of earned programme support resources in respect of ICSMA. We understand that ICSMA is governed by a seven-member Board of Directors composed of four directors elected by ICSMA members, two directors elected by ICSMA members from a list of persons designated by the UNOG Director-General, and one director elected by ICSMA members from a list of persons designated by the president of UNOG Staff Council. Employees

[1] See, in particular, a memorandum [ . . . ] dated 18 September 1987, and my memorandum [ . . . ] dated 8 January 2007 [ . . . ].

of ICSMA have been granted United Nations fixed-term appointments limited to service to ICSMA. We understand that the Swiss authorities acknowledged the status of ICSMA as a United Nations trust fund as from 1 January 1989. We are unaware as to whether the institutional status of ICSMA under Swiss law was further clarified later.

8. The status of UNSSCA is not clear and is the subject of on-going discussions. UNSSCA is governed by an eleven-member Board of Directors composed of nine directors elected from UNSSCA members, one director appointed by the Economic Commission for Africa (ECA) Executive Secretary (who is the Honorary President of UNSSCA), and the president of ECA Staff Union Committee. Also, ECA allows its staff members time off from official duties to serve in the various boards/committees of UNSSCA. Neither UNSSCA nor its employees, who are not United Nations staff members, have been given formal recognition by the Ethiopian Government. UNSSCA concluded on 6 May 2003 a Memorandum of understanding (MOU) with ECA, providing, *inter alia,* that "UNSSCA shall continue to exist under the sponsorship and umbrella of ECA but shall be guided in the conduct of its administrative and day-to-day activities and operations by its own rules and regulations." OLA was not consulted on this MOU. In a memorandum dated 8 January 2007 addressed to the Office of Programme Planning, Budget and Accounts and OHRM, this Office advised that it would be preferable for UNSSCA to be established by its members as a banking institution incorporated under the laws of the Host Country, in particular, in so doing, the issues of the privileges and immunities of the Organization, compliance with applicable laws, oversight, bankruptcy and liability would be addressed. It is not clear to us what action, if any, is being taken to clarify the status of UNSSCA.

9. The status of MAF is not clear either. The United Nations *ad hoc* Task Force that reviewed the matter of staff credit unions in 1987 indicated that Thailand had credit co-operatives governed by the Credit Co-operative Act of 1968, and regularizing MAF under that Act would clarify its legal status and its relationship *vis-à-vis* the laws of the Host Country. Therefore, the Task Force "concluded that any regularization of MAF should be undertaken within the framework of the Thai Credit Co-operative Act." In a memorandum of 25 August 1988 from the Officer-in-Charge, Department of Administration and Management (DAM), to the Economic and Social Commission for Asia and the Pacific (ESCAP) Executive Secretary, the Under-Secretary-General, DAM, adopted the recommendation of the Task Force above, and informed the Executive Secretary accordingly, and suggested that ESCAP approach the Thai authorities to resolve the difficulties identified by ESCAP relating to the implementation of the recommended action. There is no further record in the OLA files as to what action, if any, was taken by ESCAP to "regularize" MAF within the framework of the Thai Credit Co-operative Act. It is, therefore, not clear to us what status MAF has under Thai law.

## II. Analysis

10. As we understand, the mandate of staff credit unions is the provision of private financial services to staff members and retired staff members of the United Nations and other international organizations related to the United Nations, and their families. However, as discussed above, each staff credit union appears to be operating under different rules, and has different status, if any, under the laws of the concerned Host Countries. Staff credit unions' activities are not United Nations' official activities in pursuit of its official

mandates. In our view, the establishment of a trust fund for ICSMA and the provision of United Nations fixed-term appointments to ICSMA employees do not change the fact that ICSMA's activities are not United Nations' official activities. Thus, we consider that the involvement of staff members who choose to serve on the boards/committees of staff credit unions would not be official activities, but outside activities.[2] The issue, therefore, is whether such volunteer activities require prior authorization of the Secretary-General, according to applicable administrative rules.

11. Staff Regulation 1.2 (o) and (p) provide as follows:

"*Outside employment and activities*

(o) Staff members shall not engage in any outside occupation or employment, whether remunerated or not, without the approval of the Secretary-General.

(p) The Secretary-General may authorize staff members to engage in an outside occupation or employment, whether remunerated or not, if:

(i) The outside occupation or employment does not conflict with the staff member's official functions or the status of an international civil servant;

(ii) The outside occupation or employment is not against the interest of the United Nations; and

(iii) The outside occupation or employment is permitted by local law at the duty station or where the occupation or employment occurs."

12. Further elaboration of the above provisions, as well as the procedure for submitting requests for authorization to engage in outside activities are set out in Secretary-General's bulletin ST/SGB/2002/13 of 1 November 2002, entitled "Status, basic rights and duties of United Nations staff members", Administrative Instruction ST/AI/2000/13 of 25 October 2000, entitled "Outside Activities" and Information Circular ST/IC/2006/30 of 16 August 2006, entitled "Outside Activities".[*]

13. We consider that serving on a board/committee of a staff credit union does not constitute an "employment" or "occupation". The word "employment" is defined in the commentary to Staff Regulation 12 (o) (see ST/SGB/2002/13), as a legal relationship pursuant to which one person is providing work and skill at the control and direction of another. The word "occupation" is defined in the commentary to Staff Regulation 1.2 (o) (see ST/SGB/2002/13) as including the exercise of a profession, whether as an employee or an independent contractor.

14. Section 5.1 of ST/AI/2000/13 defines "social and charitable activities" as "private non-remunerated activities for social or charitable purposes which have no relation to the staff member's official functions or to the Organization". Serving on a board/committee of

[2] This memorandum does not address the question of the status of employees of staff credit unions who have been provided with United Nations fixed-term appointments, such as ICSMA employees. This memorandum also does not address the issue of one ECA staff member who is apparently appointed to the Board of Directors of UNSSCA by the Executive Secretary of ECA and two UNOG staff members who are elected to ICSMA Board of Directors from a list of persons designated by UNOG Director-General, as they are serving on staff credit unions Boards of Directors in their official capacity.

[*] For information on Secretary-General's Bulletins, on Administrative Instructions, and on Information Circulars, see, respectively, notes under 1 (*g*), (*f*), and 2 (*c*), above.

a staff credit union would not, in our view, be qualified as a "social or charitable activity", in view of the functions of the boards/committees,[3] and the nature of the relationship between the staff credit unions and the United Nations, by virtue of their members/owners.

15. It appears that serving on a board/committee of a staff credit union may be considered "an activity related to the United Nations", akin to the activities listed in section 4 of ST/AI/2000/13, since boards/committees serve staff credit unions whose members/owners are staff of the United Nations and other organizations in the United Nations system. Section 4.2 of ST/AI/2000/13 provides that:

> "Outside activities that are of benefit to the Organization or the achievement of its goals and/or contribute to the development of professional skills of staff members are usually not only permitted but encouraged, provided staff members exercise the utmost discretion with regard to all matters of official business and avoid any public statement that may adversely reflect on their status, or on the integrity, independence and impartiality that are required by that status."

We note that activities under section 4 of ST/AI/2000/13 require prior approval.

16. In addition, ST/IC/2006/30 provides in paragraph 11 as follows:

> "Participation in boards, panels, committees, expert groups or similar bodies that are external to the Organization constitutes an outside activity that requires the prior approval of the Secretary-General. If, after approval has been granted, it appears that the staff member's participation would involve the consideration of the granting of an honour, gift or remuneration to a United Nations official, the staff member should withdraw from the body concerned since his or her participation would create at least the appearance of a conflict of interest."

We note that paragraph 11 of ST/IC/2006/30 expressly requires prior approval.

17. In view of the above, if a staff credit union is "external to the Organization", as it is clearly the case with UNFCU, serving on its boards/committees requires prior authorization. Even in case a staff credit union is not deemed to be "external to the Organization" (which may be the case in respect of ICSMA), serving on its boards/committees appears to be an outside activity related to the United Nations (see paragraph 15 of this memorandum) which requires prior authorization.

18. In this regard, this Office has consistently advised that the Organization should take steps to insulate itself from liability related to staff credit unions' activities. As explained in our memorandum of 18 September 1987, staff credit unions which are not incorporated under the laws of a Host Country raise issues related to the privileges and immunities of the Organization, compliance with applicable laws, including oversight, bankruptcy and liability to the Organization. For example, there is a risk that claimants bringing lawsuits against staff credit unions allege that the United Nations should be jointly held liable for the actions of such credit unions and/or their officials because the United Nations allows its staff members to serve on boards/committees of such staff credit unions. Such claimants could also allege that the Organization somehow condones the activities of staff credit unions, for example by allowing credit unions to operate within United Nations

[3] It appears that the function of boards/committees of staff credit unions is to provide operational and managerial direction and/or guidance to the staff credit unions.

premises, by giving the status of United Nations staff members to employees of a credit union, by allowing a head of office to serve as the honorary president of a credit union *ex officio,* or by allowing staff members some time off from their regular duties to serve in the various boards/committees of a credit union. In view of the foregoing, requiring staff members to request permission to serve on boards/committees of staff credit unions could be a step to insulate the Organization from liability related to staff credit unions' activities, and would be an occasion for the Administration to inform staff that credit unions' activities are not official functions and that staff members involved with credit unions are solely acting in their private capacity.

19. In view of the above, we consider that serving on a board/committee requires prior approval from the Administration. However, the above-cited rules of the Organization do not preclude granting such authorizations provided that the requirements and conditions set out in those rules are satisfied.

## 8. Miscellaneous

### (*a*) Note to the Chef de Cabinet, Executive Office of the Secretary-General, on the death penalty under international law and the position of the United Nations Secretariat

Question of death penalty under international law—Restrictions and/or prohibition applies to parties of certain regional and universal conventions—Position of the United Nations Secretariat that United Nations-based Tribunals shall not be empowered to impose the death penalty—The United Nations Secretariat has refused to lend its assistance to courts and tribunals empowered to impose the death penalty

2 January 2007

1. At your request, we set out below the legal aspects of the question of the death penalty under international law, and the long-standing position of the United Nations Secretariat in a decade-long engagement in establishing judicial accountability mechanisms. Limited to the legal aspects only, this note does not address the numerous attempts made throughout the years in various inter-governmental organs to abolish capital punishment, nor the desirability of so doing.

2. The International Covenant on Civil and Political Rights, 1966,[*] recognizes the right to life and prohibits its arbitrary deprivation article 6. While not imposing an obligation to abolish the death penalty, it endeavours to limit its use, in those countries that still recognize it, to the most serious crimes in accordance with the law in force at the time of the commission of the crime, and pursuant to a final judgment by a competent court. Death penalty under the Covenant is prohibited for crimes committed by persons below eighteen years of age, and its execution is prohibited against pregnant women article 6 (4).

3. The Second Optional Protocol to the International Covenant Aiming at the Abolition of Death Penalty, 1989,[**] prohibits the execution of the death penalty within the

[*] United Nations, *Treaty Series*, vol. 999, p. 171.

[**] United Nations, *Treaty Series*, vol. 1642, p. 414.

jurisdiction of the States Parties to the Protocol, and enjoins them to take all necessary measures to abolish the death penalty within their jurisdiction. The Second Protocol, in force since 1991, presently has 60 States parties.

4. Furthermore, Protocol 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms[*] abolishes the death penalty and prohibits its execution in all circumstances, including in respect of acts committed in time of war.

5. With few exceptions international humanitarian law does not prohibit the imposition of the death penalty but only limits its use. The death penalty is recognized, within limitations, under the Third Geneva Convention, against Prisoners of war for offences punishable by death under the laws of the detaining power article 100; it is recognized also under the Fourth Geneva Convention, against protected persons in occupied territory when the person is guilty of espionage or of serious acts of sabotage against the Occupying Power article 68. The death penalty is prohibited, however, against persons under the age of 18 (at the time of the offence), and cannot be carried out on pregnant women or mothers with young children article 76 (3) of Additional protocol I, and article 6 (4) of Additional Protocol II).

6. Quite apart from its legality or otherwise under international law, the United Nations Secretariat has adopted the position that United Nations-based tribunals shall not be empowered to impose the death penalty on any convicted person, regardless of the seriousness of the crime of which he is accused. This position, first articulated in the Secretary-General's report on the establishment of the ad-hoc Tribunal for the former Yugoslavia, was maintained throughout the years with regard to the ad-hoc International Tribunal for Rwanda, established by Security Council chapter-VII resolution, as well as with regard to courts and tribunals established by agreement with the Secretariat (the Special Court for Sierra Leone), or by national law (the Extraordinary Chambers for Cambodia). The Secretariat has, furthermore, refused to lend its assistance to national courts and tribunals, including the Iraqi Special Tribunal, empowered to hand down sentence of capital punishment.

7. In conclusion, with the exception of persons below 18 years of age and pregnant women, the death penalty is not prohibited under customary international law. Its use, however, is limited under the 1966 Covenant. It is completely prohibited under the Second Protocol to the Covenant and Protocol 13 of the European Convention but only for the Parties bound by these instruments. In the practice of establishing United Nations-based tribunals, however, it has been the long-standing position of the Secretariat not to empower any of these tribunals to hand down capital punishment, or otherwise to cooperate with any court or tribunal similarly empowered, regardless of the gravity of the crime.

[ . . . ]

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[*] United Nations, *Treaty Series*, vol. 2246, p. 110.

### (*b*) Interoffice memorandum to the Legal Adviser, Office of the High Commissioner for Human Rights (OHCHR), regarding the proposed memorandum of understanding between the Swiss Confederation and the United Nations concerning the transfer to the United Nations of responsibility for the operation and maintenance of the Universal Human Rights Index (UHRI)

Intellectual property rights—Question of licensing intellectual property rights, including software licensing, in the context of the UHRI transfer to the United Nations—Some software may be developed by third parties, who may retain copyright or other intellectual property right—Terms of such license most likely inconsistent with privileges and immunities of the United Nations and its financial regulations, including procurement policies—Agreement between the United Nations and the Government must address the right to use all relevant aspects of intellectual property to be found in the UHRI—Not appropriate for the Government to "license" to the United Nations the use of United Nations documentation—Internal regulatons address rules and policies governing United Nations internet publishing—Standard conditions and final clauses should be included in an agreement between the United Nations and a Government

16 March 2007

1. I refer to your note, dated 18 January 2007, addressed to the Assistant Secretary-General for Legal Affairs, concerning a proposed memorandum of understanding between the Swiss Confederation and the United Nations concerning the transfer to the United Nations of responsibility for the operation and maintenance of the Universal Human Rights Index (MOU). By your Note, you forwarded, for review by this Office, a draft text of a proposed MOU that had been prepared by the Government of the Swiss Confederation ("Government"), acting through the Federal Department of Foreign Affairs (FDFA). You requested this Office's review of the Government's draft of such proposed MOU, particularly with respect to the issue of software licensing.

Background

2. The Government's draft of the proposed MOU indicates that the Universal Human Rights Index (UHRI) was developed "under the auspices of the University of Berne". Your Note stated that the Index, which was developed with input from OHCHR, is a compilation of approximately 1,000 "United Nations documents", intended to serve as "a working tool for the Human Rights Council, governments, international organisations and civil society", and consists of "a web database with search capacity providing instant access for all countries to the recent observations and recommendations of the following main international expert bodies: the seven Treaty Bodies monitoring the implementation of core international human rights treaties; the Special Procedures of the Commission / the Human Rights Council". You stated that, in addition to the involvement of the University of Berne in the development of the Universal Human Rights Index (UHRI), software for the operation of the Index had been "developed by lexUM, a software company associated with the University of Montreal".

3. Your note stated that, under the arrangements worked out in principle with the Government, OHCHR had planned to take over responsibility for the operation and main-

tenance of the Index as and from 1 January 2007, for purposes of updating the content of the Index and "to ensure the effective operation of the UHRI management interface and website". In addition, both the Government's draft of the proposed MOU, as well as your note, indicated that the FDFA had agreed to provide financial and human resources support and assistance in order to enable OHCHR to take over responsibility for the operation and maintenance of the UHRI. I note that, under the Government's draft of the proposed MOU, the Government would only transfer to the United Nations the right to operate and maintain the UHRI for a period of three years, subject to further agreements extending that period. Accordingly, OHCHR and FDFA have considered that an agreement should be concluded between the United Nations and the Government, in order to effect the transfer of responsibility from the Government to the United Nations for the operation and maintenance of the UHRI, and in order to establish terms and conditions for the support to be provided by the Government and the cooperation to be exercised between the parties for such purposes.

### Analysis

4. We have reviewed the Government's draft of the MOU and have concluded that it does not sufficiently address certain important issues concerning, e.g., software licensing, and other matters, as further elaborated below. Accordingly, this Office has prepared a revised draft of the proposed MOU, a copy of which is enclosed herewith.*

#### *(a) Licensing and disposition of intellectual property rights in and to the UHRI*

5. As your note mentions, the issue of the licensing of intellectual property rights, including software licensing, has not been addressed in the Government's draft of the proposed MOU in a manner that is acceptable to the Organization. Under the Government's draft of the proposed MOU, the FDFA would "provide [ ] the OHCHR with a software license in which the UHRI is integrated," and "OHCHR will use this license pursuant to the terms of the General Public License (http://www.gnu.org/licenses/gpl.html). In this regard, it should be noted that the General Public License is a form of agreement that has been promulgated by the Free Software Foundation, a not-for-profit organization based in Boston, Massachusetts, USA, for purposes of the licensing of rights for the free use of software.

6. As an initial matter, your note had indicated that some of the software required for the operation of the UHRI was developed by third parties, including the University of Berne and lexUM, which appears to be operated by the Faculty of Law at the University of Montreal. Thus, it is not clear that any license to use such software could be transferred from any such third parties by the Government to the United Nations by means of the Free Software Foundation's General Public License. In this connection, the General Public License specifically provides that if a third party, such as a private concern, maintains copyright or other intellectual property rights in any software being licensed under the General Public License, the licensee's use of the software may be subject to a further license from such third party, notwithstanding the licensee's having been given rights under the General Public License. In such case, despite being given a right by the Government under

* Not reproduced herein.

the General Public License, the United Nations, nonetheless, could be subject to software licenses conferred by a third party, such as the universities. The terms of such license are most likely inconsistent with the privileges and immunities of the Organization. Likewise, the terms by which the Organization may become subject to any such third party licenses may also be inconsistent with the Organization's financial regulations, rules, policies and practices, including its procurement policies. Thus, the General Public License is not an appropriate form of agreement for the United Nations to receive rights in and to the use of any intellectual property in the UHRI that may be susceptible to licensing.

7. In addition to the foregoing, it should be noted that the UHRI does not appear to consist only of software, but rather it appears to be comprised of a mixture of software, Internet protocols, and electronic information, or content. Thus, the UHRI consists of many different aspects of intellectual property, the licensing and disposition of the rights to transfer and the use of which cannot be addressed merely by the form of a software license, i.e., the General Public License, proposed by the Government in its draft of the proposed MOU. Thus, under the terms of any agreement between the United Nations and the Government, the license provided to the United Nations by the Government for the operation and maintenance of the UHRI must address the United Nations's right to use all relevant aspects of intellectual property to be found in the UHRI. This would include not only the right to use any imbedded software programme, routine, sub-routine, source or object code, or any other elements relating thereto, but also the right to use and display, in any form whatsoever, whether electronic or otherwise, all content contained in the UHRI.

8. Moreover, such an agreement must allocate among those aspects of the intellectual property rights comprising the UHRI that the Government is in the position to actually license to the United Nations and those which it is not. In this regard, to the extent that some, if not all, of the content of the UHRI consists of United Nations documents, it is not appropriate for the Government of the Swiss Confederation to "license" to the United Nations the right to use such United Nations documentation. Additionally, at the time when the Government transfers to the United Nations the intellectual property rights in and to the UHRI under the proposed MOU, the Government may not possess the right to transfer such intellectual property rights. This might be the case, for example, if the UHRI contains certain intellectual property rights (e.g., software routines or certain content) for which the Government either is unaware that a license is required to be obtained or for which ownership may be in dispute. Indeed, this might be the case with respect to third party intellectual property rights, such as those of lexUM in such circumstances, the Government would have to procure for the United Nations the right to use any such intellectual property rights, even though the Government has already transferred responsibility for the operation and maintenance of the UHRI to the United Nations. Thus, the proposed MOU between the Government and the United Nations must allocate among those intellectual property rights that are susceptible of being licensed to the United Nations by the Government and those which are not subject to such a license, as well as those intellectual property rights for which the Government may be required to obtain a license, whether upon the effective date of the proposed MOU, or sometime later.

### *(b) United Nations policies on internet publishing*

9. Under the Government's draft of the proposed MOU, not only would the Organization's right to use the UHRI be governed by the General Public License, but also, under the provisions of the General Public License, the rights of individuals and entities who might access the UHRI through a United Nations-hosted website would also be governed by that General Public License. To the extent that the UHRI would be made available as a public information resource through a United Nations-hosted website, the terms of use by the public cannot be determined by reference to the General Public License. Instead, the applicable rules and policies governing the public's use of United Nations Internet publications are set forth in the provisions of United Nations Administrative Instruction, ST/AI/2001/5, dated 22 August 2001, entitled, "United Nations Internet publishing".[*] That Administrative Instruction provides the specific terms and conditions for public use of United Nations Internet resources, and those terms and conditions differ in many respects from the General Public License.

10. Moreover, to the extent that the UHRI is an Internet-based system, the manner in which it is presented on the Internet, the modes of public access to such Internet-based system, and all other aspects of the operation of such system must conform to the provisions of, as well as the detailed procedures, set forth in the Administrative Instruction. In this regard, the OHCHR may wish to coordinate with the Department of Public Information concerning such policies and procedures.

### *(c) Standard conditions of the proposed MOU*

11. In addition to the foregoing concerns, the Government's draft of the proposed MOU does not contain various standard terms that are normally set forth in agreements between the Organization and Governments. Among these are those conditions regarding the resolution of third party liabilities, indemnification between the parties, privileges and immunities of the parties, resolution of disputes, and various final clauses. In addition, the Government's draft of the proposed MOU does not sufficiently elaborate on the procedures for the contribution of financial and human resources by the Government to the United Nations, as well as any accounting by the United Nations therefore, as well as the procedures necessary for cooperation between the Government and the United Nations.

### Revised draft of the proposed MOU

12. Based on the foregoing concerns, this Office has prepared a revised draft of the proposed MOU . . . Please review the draft to ensure that it addresses all of OHCHR's concerns about the proposed transfer of responsibility for the operation and maintenance of the UHRI, as well as the concerns described above. Should you require any further assistance in this matter, in particular regarding any questions you may have about the revised draft of the MOU or with respect to negotiating and concluding the proposed MOU with the Government, please contact the Director, General Legal Division, of this Office.

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[*] For information on Administrative Instructions, see note under 1 (*f*), above.

### (*c*) Note to the Under-Secretary-General for Political Affairs, regarding the Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement(LRA/M)

"Nationalization" of accountability and reconciliation mechanisms—Formal and non-formal institutions and measures for ensuring justice and reconciliation—United Nations principled position that a truth and reconciliation commission and a tribunal are two distinct, albeit complementary, accountability mechanisms operating independently of each other—A reconciliation process could not exempt anyone alleged to have committed serious violations of international humanitarian law or human rights from criminal responsibility—United Nations position on the non-applicability of the death penalty in any of the United Nations-based or assisted tribunals—Granting of amnesty for genocide, crimes against humanity or war crimes could preclude any United Nations cooperation with any eventual judicial mechanism, national or international, before which persons accused of such crimes would be prosecuted

15 November 2007

1. This is in reference to your note of 2 July 2007 to the High Commissioner for Human Rights and the Under-Secretary-General for Legal Affairs, the Legal Counsel, requesting, on behalf of the Special Envoy of the Secretary-General, our comments on the Agreement on Accountability and Reconciliation signed between the Parties on 29 June 2007 ("the Agreement"), and the way forward. Reference is also made to the High Commissioner's Note to you of 17 July 2007 on the same matter, a copy of which was forwarded to this Office. Reference is finally made to a series of meetings which has taken place since between [Legal officers A and B] of this Office and members of the Department of Political Affairs (DPA)'s Africa I Division, where our legal analysis was shared with them informally. Valuable information was provided to enable us to consider the question of accountability and reconciliation in Northern Uganda in all its aspects. We set out below our comments, both general and specific, on the Agreement and its implications, in particular, on the pending warrants of arrest issued by the International Criminal Court (ICC).

#### 1. General comments

2. The Agreement on Accountability and Reconciliation ("the Agreement") is a framework Agreement whose practical implementation depends on future mechanisms to be developed in an implementing protocol annexed to the Agreement (para. 15.1). To ensure that in implementing the Agreement, the annex does not deviate from it in any significant way, paragraph 14.2 of the Agreement provides that the Parties: "Ensure that any accountability and reconciliation issues arising in any other agreement between themselves are consistent and integrated with the provisions of this Agreement".

3. The basic principle underlying the Agreement is the so-called "nationalization" of all accountability and reconciliation mechanisms under the Uganda Constitution. Accordingly, paragraph 2.1 of the Agreement provides that: "The Parties shall promote *national legal arrangements* consisting of formal and non-formal institutions and measures for ensuring justice and reconciliation with respect to the conflict"; paragraph 4.4 further stipulates that "[F]or purposes of this Agreement, accountability mechanisms *shall be implemented through the adapted legal framework in Uganda*" (emphasis added).

Under paragraph 5.1 of the Agreement, the Parties confirm that Ugandan national institutions and mechanisms are capable, albeit with modifications, of addressing the crimes and human rights violations committed during the conflict; and finally, para. 5.4 provides that "[I]nsofar as practicable, accountability and reconciliation processes shall be promoted *through existing national institutions and mechanisms* with necessary modifications" (emphasis added).

4. The transitional justice mechanisms envisaged under the Agreement include:

(i) the "formal courts" established under the Constitution;

(ii) "alternative justice mechanisms" not administered in the formal courts, i.e., traditional rituals of all kinds which according to para. 3.1 of the Agreement are "a central part of the framework for accountability and reconciliation"; and

(iii) appropriate reconciliation mechanisms, including truth-seeking or truth-telling processes to be developed (para. 7).

5. While the "internationalization" of the accountability process is expressly excluded, the Agreement makes two brief references to the ICC, none of which, however, mentions the pending arrest warrants against the remaining four LRA leaders. The third preambular paragraph of the Agreement provides that the Parties are

> "Committed to preventing impunity and promoting redress in accordance with the Constitution and international obligations and recalling, in this connection, the requirements of the Rome Statute of the International Criminal Court (ICC) and *in particular the principle of complementarity*" (emphasis added).

By paragraph 14.6 of the Agreement, the Government undertakes to "[a]ddress conscientiously the question of the ICC arrest warrants relating to the leaders of the LRA/M." While it is unclear in what manner the ICC arrest warrants would be "conscientiously addressed", we assume that surrender to the ICC is probably not what the Parties had in mind. It is more than likely, therefore, that while committing themselves to the principle of accountability, the Parties are seeking alternative accountability mechanisms meeting the same or similar standards of justice.

## II. Specific comments

### *A. Jurisdiction of the "formal courts"*

6. The subject matter jurisdiction of the Ugandan court system, otherwise referred to as "formal criminal and civil justice measures", is limited to those alleged to have committed serious crimes, or human rights violations (para. 4.1), in particular, to those "alleged to bear particular responsibility for the most serious crimes, especially crimes amounting to international crimes, during the course of the conflict" (para. 6.1). The choice of the forum for any one particular case shall depend, among other considerations, "on the nature and gravity of the offending conduct and the role of the alleged perpetrator in that conduct" (para. 4.3). The Agreement foresees, in addition, accountability 'across the board', namely, one applicable both to the LRA and to State actors. In respect of the latter, however, only "existing criminal justice processes" will apply, not the special justice processes (para. 4.1).

*B. Relationship between accountability and reconciliation procedures*

7. Determining the relationship between accountability and reconciliation processes, or among formal court proceedings, truth-telling and traditional accountability mechanisms will be crucial to the good-faith implementation of the Agreement. Paragraph 3.10 of the Agreement, under the title of "Finality and effect of proceedings", is an implicit recognition that appearance before "reconciliation proceedings"—i.e., Truth and Reconciliation Commission (TRC) or traditional accountability mechanisms—may exempt the individual concerned from a judicial accountability process. It provides that:

> "Where a person has already been subjected to proceedings or exempted from liability, for any crime or civil acts or omissions, or has been subjected to accountability *or* reconciliation proceedings for any conduct in the course of the conflict, that person shall not be subjected to any other proceedings with respect to that conduct" (emphasis added).

8. We would recall that a similar concept of relationship between a TRC and a Special Tribunal was advanced by the Government of [State] in the course of the negotiation on the establishment of a twin accountability-mechanism for [State]. The linkage between the two accountability mechanisms, rejected by the United Nations, is the main reason for the current stalemate in the negotiation process between the United Nations and the Government of [State]. It is the United Nations principled position that a TRC and a tribunal – of any kind – are two distinct, albeit complementary, accountability mechanisms operating independently of each other. If an accountability process is to be meaningful, a reconciliation process could not exempt any one alleged to have committed serious violations of international humanitarian law or human rights, from criminal responsibility.

*C. Standards of justice*

9. Elements of due process of law are scattered throughout the Agreement. They include: the right to a fair hearing and due process of law; a fair, speedy and public hearing before an independent and impartial court or tribunal (para. 3.3); guarantees for the safety and privacy of witnesses, and their protection from intimidation (3.4); and a right to represent himself or herself or be represented by a lawyer of his or her choice, or one assigned to him or her by the tribunal if he or she is unable to afford it.

10. The foregoing provisions are only some of the elements of due process of law and fair trial. It is assumed, however, that at the time of the establishment of any judicial accountability mechanism, the full range of international standards of justice and due process of law would apply.

*D. Penalties and sanctions*

11. Under paragraphs 6.3 and 6.4 of the Agreement, a regime of alternative penalties shall replace the existing penalties with respect to serious crimes and human rights violations committed by non-State actors (LRA presumably will be subject to a more lenient penalties and sanctions regime). Such alternative penalties, according to the Agreement, shall reflect the gravity of the crimes or violations, promote reconciliation and take into account individual admissions or cooperation with the proceedings.

12. While it is unclear what alternative penalties are proposed to replace the existing ones, these provisions have given rise to some concerns (expressed notably by [NGO])

that the penalties imposed would be too lenient in comparison to existing Ugandan Penal Code provisions, which include lengthy prison terms along with the death penalty for serious offences. To meet international standards of justice, the approach taken should be one where a term of imprisonment matches the gravity of the crime while taking into account mitigating factors. Given the United Nations position on the non-applicability of the death penalty in any of the United Nations-based or assisted tribunals, it is a condition for the United Nations cooperation in the establishment and operation of any judicial accountability mechanism in Northern Uganda, that the said mechanism cannot impose the death penalty.

### *E. Amnesty Act*

13. The Government of Uganda finally undertakes to introduce any amendments to the Amnesty Act or to the Ugandan Human Rights Act in order to bring it into conformity with the principles of this Agreement (para. 14.4). We note that the 2000 Ugandan Amnesty Act provides for a sweeping amnesty which is unlimited in time and unqualified in scope. Paragraph 3(2) of the Amnesty Act provides that: "A person referred to under subsection (1) shall not be prosecuted or subjected to any form of punishment for the participation in the war or rebellion for any crime committed in the war or armed rebellion". The amnesty is thus applicable to any person, including LRA leaders indicted by the ICC, and to crimes which were, or are being committed with no limitation in scope or time. In 2006 an amendment was introduced to the Amnesty Act which provided that "a person shall not be eligible for grant of amnesty if he or she is declared not eligible by the Minister [for Internal Affairs] by statutory instrument made with the approval of Parliament". Whatever further amendments may be contemplated, we should underscore the long-established United Nations position that there is no amnesty for genocide, crimes against humanity and war crimes, as well as for other serious violations of human rights and international humanitarian law. We should also add that amnesty for any of these crimes, if granted, would preclude any United Nations cooperation with any eventual judicial accountability mechanism—national or internationalized—before which persons accused for these crimes would have been brought to justice.

## III. THE WAY FORWARD

14. In his request, the Special Envoy sought our advice on the way forward, which with the up-coming resumption of the talks, has become acute. The way forward is primarily a question for the Parties to determine in the implementing Annex. It is, at the same time also, a question of the United Nations role in assisting the Parties both in devising the legal framework for transitional justice mechanism and in addressing, "conscientiously" in the language of the Agreement, the pending ICC arrest warrants. But while the former is within the purview of OHCHR, the latter would require a coordinated approach by the Secretariat, OHCHR, the ICC and, depending on the preferred solution, the agreement of Members of the Security Council, as well.

15. The position of the ICC is clear. The arrest warrants issued against the LRA leaders should be respected, and Uganda should comply with its international obligation to arrest the LRA leaders and surrender them to the Court, notwithstanding the conclusion

of the Agreement on Accountability and Reconciliation. For the ICC to cease all investigations and prosecutions, any of the following scenarios must materialize:

(i) The Security Council uses its authority under article 16 of the Rome Statute and requests the ICC, by means of a Chapter VII resolution, that no investigation or prosecution be commenced or proceeded with under the Statute for a period of 12 months; "that request" according to article 12, "may be renewed by the Council under the same conditions".

(ii) Uganda challenges the admissibility of the case before the Court under articles 17 and 19 of the Statute. Article 17 (a) of the Statute provides that the Court shall determine the admissibility of the case where:

> "the case is *being investigated or prosecuted* by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out investigations or prosecutions" (emphasis added).

Under article 19 (1)(b) of the Statute, a State may challenge the admissibility of the case on the grounds "that it is *investigating or prosecuting* the case or has investigated or prosecuted" it (emphasis added).

16. While a challenge to the admissibility of a case under articles 17 and 19 of the Statute has not yet been tested by the Court, it is the general assumption that Uganda will have to prove not only its ability and willingness to prosecute the LRA leaders in its national court system in a credible judicial process and in full respect of international standards of justice, but that it is actually investigating and prosecuting the four LRA leaders against whom an arrest warrant was issued, and for the same charges. The ultimate decision would obviously be for Judges of the Court to make.

17. The role which could, or should be played by the United Nations Secretariat in assisting the Parties would ultimately depend on the "complementarity package" agreed to by all stake-holders and approved by the ICC. If the option of article 16 of the Statute materializes and a chapter VII resolution is adopted, Uganda would be relieved, for 12 months at least, of its obligation to surrender the LRA leaders in the event that they come into its custody. In an ideal situation, such Chapter VII resolution would have conditioned Uganda's exemption from its obligation on the development within a given time-frame of a credible alternative judicial accountability mechanism. If, on the other hand, Uganda is to succeed in challenging the admissibility of the case, it will be required to convince ICC Judges that a credible judicial accountability mechanism has already been put in place which is investigating and prosecuting crimes attributed to the LRA leaders.

18. While the United Nations cannot be seen as undermining in any way the activities and authority of the ICC, the validity of its arrest warrants or the treaty obligations of Uganda, this Office will be prepared to advise the Special Envoy of the Secretary-General on the legal aspects of the notion of "complementarity" under the Rome Statute.

19. In your note of 8 November addressed to the Legal Counsel, you request that this Office make available two legal officers to accompany the Special Envoy on his upcoming visit to the region to advise him on the sensitive issues of accountability and reconciliation currently under discussion between the parties. I am pleased to confirm that we are prepared to release [Legal officers A and B], to travel with the Special Envoy and advise him as requested.

### (*d*) Interoffice memorandum to the Chief, Monitoring, Database and Information Branch, Office of Disarmament Affairs (ODA), regarding the Disarmament Digest

Intellectual property rights—Permission of the Publications Board needed to continue the distribution of the Disarmament Digest outside the Organization—Information available on a website without charge cannot necessarily be reproduced and redistributed without obtaining permission to do so from the copyright holder—Copyrighted material can be used only with copyright holder's permission or within the limits of "fair use"—Mere acknowledgment of sources of copyrighted material not equivalent to obtaining permission to use it—Each extract of the digest potentially gives rise to separate infringement claims that must be defended on the basis of the doctrine of "fair use"

6 December 2007

1. This refers to the memorandum, dated 8 November 2007, ("ODA Memorandum"), regarding a daily Disarmament Digest ("Digest") compiled by ODA, and consisting of news wire and similar information about disarmament matters. By that memorandum, ODA requested legal advice as to whether linking the Digest to non-United Nations websites may damage the reputation and neutrality of the Organization or infringe copyrights or other intellectual property rights of the information providers.

2. The ODA Memorandum explains that the Digest compiles "relevant open source material mainly from public websites not requiring paid subscriptions". The format of the Digest consists of a title, a brief three or four-line summary of an article, and a hyperlink to the relevant website where the item is available in full. The sources of materials extracted from such websites include commercial news agencies, newspapers, magazines, weblogs, universities, think-tanks, foreign and defense ministries, and international organizations. The Digest is circulated by e-mail to over one hundred individuals within the Organizations and to another one hundred entities and individuals such as former staff members, academics, foreign ministries and non-governmental organizations outside the Organization. ODA does not know where else the Digest might be disseminated thereafter, but is confident that it is further distributed. A number of outside organizations and individuals have recently approached ODA about including them in the Digest mailing list, which would substantially expand the distribution of the Digest outside the United Nations.

3. Regarding the issue of linking the Digest to non-United Nations websites, Administrative Instruction ST/AI/2001/5, of 22 August 2001,[*] entitled "United Nations Internet Publishing", provides as follows in paragraph 3.6:

> "Generally, links from United Nations web sites to external web sites should be avoided. Exceptions to the general policy may be warranted to highlight external web sites that provide information regarding the activities of other non-United Nations system intergovernmental or non-governmental organizations that operate programmes or conduct activities consistent with the policies, aims and activities of the Organization or external web sites that contain information or non-commercialized products (such as downloadable software) that facilitate the use of United Nations web sites. Exceptions to the general policy may be made upon a decision of the Publications Board, through its Working

[*] For information on Administrative Instructions, see note under 1 (*f*), above.

Group on Internet Matters, with advice, as appropriate, from the Office of Legal Affairs, that the proposed link to an external web site would further the policies, aims and purposes of the Organization and would not operate as, or potentially be seen to operate as, an endorsement of the activities or policies of the operator of the external web site."

4. We understand that ODA needs to be aware of all type of information concerning disarmament issues, including from sources which operate programmes or conduct activities not consistent with the policies, aims and activities of the Organization. However, sharing such information with individuals or entities outside of the Secretariat, such as distributing the Digest to third parties, may potentially be seen to operate as an endorsement of the activities or policies of the operator of the external web site, in these circumstances, should ODA intend to continue to distribute the Digest outside the Secretariat, it would have to request permission of the Publications Board to do so. Thus, in light of the foregoing provisions of the Administrative Instruction on Internet Publishing, ODA could seek a general authorization from the Publications Board not only to continue to link to external web sites for information from which the Digest's extracts are derived but also to distribute such materials outside the Secretariat. Moreover, any distribution of the Digest materials outside the United Nations must address the copyright concerns discussed below.

5. Regarding the copyright issues raised by ODA's compilation and distribution of the Digest, it should be highlighted that simply because information is available from a web site without charge, it cannot be assumed that such information is "open source material" that can be reproduced and redistributed without the need to obtain permission to do so from the copyright holder as suggested in the ODA Memorandum. Indeed, the articles listed in the issue of the Digest attached to the ODA Memorandum all appear to be copyrighted, and their use by the United Nations, therefore, would be subject to copyright laws and to the terms of use of the copyright owners. Copyrighted materials may only be used with owner's permission or, without such permission, if such use amounts to "fair use" within the meaning of the copyright laws. In the United States, for example, section 107 of the Copyright Act contains a list of the various purposes for which the reproduction of a particular work may be considered "fair use", such as criticism, comment, news reporting, teaching, scholarship, and research. Section 107 also sets out four factors to be considered in determining whether or not "fair use" of copyrighted material has been made:

i. The purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes;

ii. The nature of the copyrighted work;

iii. Amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

iv. The effect of the use upon the potential market for or value of the copyrighted work.

6. Unless the Organization has permission to use copyrighted materials in the Digest or, otherwise, unless the use of such materials in the Digest constitutes "fair use" within the meaning of the copyright laws, the reproduction and distribution of copyrighted materials in the Digest without permission could give rise to claims of copyright infringement against the United Nations. In this regard, the distinction between "fair use" and infringement of copyrighted material is a matter of degree. There is no specific number of words, lines or notes that may safely be taken without permission under the doctrine

of "fair use", and therefore each extract of the Digest potentially gives rise to a separate infringement claim that must be defended on the basis that such Digest extract amounted to fair use of the copyrighted materials on the basis of the factors enumerated in section 107 of the US Copyright Act. Such an intensely fact-bound inquiry could result in long and expensive proceedings in each case in order to defend against any infringement claims. Moreover, merely acknowledging the source of the copyrighted material does not substitute for obtaining permission from the copyright owner to use the material in question.

7. Web sites, including the United Nations web site, often disclose the terms of use of their copyrighted materials. For example, [News Agency]'s web site, a news agency often listed in the issue of the Digest attached to the ODA Memorandum, stipulates as follows: "All rights reserved. Users may download and print extracts of content from this web site for their own personal and non-commercial use only. Republication or redistribution of [News Agency] content, including by framing or similar means, is expressly prohibited without the prior written consent of [NewsAgency] [ . . . ]."

8. In these circumstances, this Office is not in a position to confirm that the distribution of the Digest, in its present form, within or outside the United Nations is not infringing title copyright of the producers of the extracted materials. However, we can confidently predict that ODA's distributing the Digest outside the United Nations would significantly increase the likeliness of having claims for copyright infringement brought against the Organization. The safest course of action for dealing with copyrighted material is always to request permission from the owner of the material before using it. You may wish to liaise with the Department of Public Information, which entertains relations with the press and news agencies, to discuss how to obtain appropriate licenses to compile and distribute the Digest materials

## B. Legal opinions of the secretariats of intergovernmental organizations related to the United Nations

### 1. International Labour Organization

(Submitted by the Legal Adviser of the International Labour Conference)

#### Opinion concerning the impact of a proposed amendment to the text on the obligations of flag States and members' ability to regulate the activities of foreign vessels[*]

Obligations of the flag State under the proposed convention on the work in the fishing sector[**] —Proposed convention imposed obligations only on the flag State—Port State may exercise jurisdiction but may not do so in a discriminatory manner—Compliance with standards of proposed convention could possibly be regulated by coastal State in accordance with article 62 (4) of the United Nations Convention on the Law of the Sea (UNCLOS)—Different schools of

[*] Provisional Record No. 12, ninety-sixth session: Fourth item on the agenda: Work in the fishing sector, Report of the Committee on the Fishing Sector, ILC96-PR12–205-En.doc.

[**] The text of the Convention as adopted is reproduced in this publication, chapter IV. B.

THOUGHT REGARDING HOW FAR PORT STATE JURISDICTION OVER FOREIGN VESSELS EXTENDS WHEN NOT BASED ON SPECIFIC TREATY PROVISIONS

In response to a request for clarification, the representative of the Legal Adviser recalled that, during the Government group meeting, three questions had been asked by the Government member of [State] in connection with the issues addressed by the proposed new articles.

As to the first question, whether there were any provisions in the Convention that required to be enforced or applied by a State party other than in its capacity as a flag State, he explained that no such provisions existed. Under article 40, ensuring compliance with the Convention was an obligation of the flag State. In its capacity as a port State a member could exercise jurisdiction as provided in paragraph 2 of article 43 but this was not an obligation, as followed from the word "may" in that provision. article 44 merely sought to ensure that members did not exercise their jurisdiction in a discriminatory manner.

The second question asked had been whether the Convention contained provisions that a member could in its discretion enforce or apply other than in its capacity as a flag State. The relevant provisions were again paragraphs 2–5 of article 43 concerning port State control, which were based on similar provisions contained in the Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147). The Maritime Labour Convention, 2006, and several conventions of the International Maritime Organization also contained provisions on port State control. As to the possibility for a Member to ensure compliance with the standards of this Convention in its exclusive economic zone, the Office had consulted the United Nations Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea, among other things on the compatibility of paragraph 53 of the proposed recommendation (which was similar to the first new article proposed in the amendment) with UNCLOS.[*] The advice received was, in essence, that the matters dealt with by the proposed fishing convention could possibly qualify as matters that can be regulated by the coastal State in accordance with article 62 (4) of UNCLOS, since the list contained in that provision was not exhaustive.

In response to the third question, the representative of the Legal Adviser stated that there were no provisions in the proposed convention that could have the effect of limiting what a member may do in regulating the activities of foreign vessels. While International Labour Organization Conventions never prevented members from adopting higher standards nationally, it was important to bear in mind that there were different schools of thought on the question of how far port State jurisdiction over foreign vessels goes when it is not based on specific treaty provisions.

[*] United Nations, *Treaty Series*, vol. 1833, p. 3.

## 2. World Meteorological Organization*

### Information note on the procedures for amending the World Meteorological Organization (WMO) Convention**

Procedure to amend the Convention establishing WMO—Different procedures for an amendment creating a new obligation for member States and for an amendment not creating such obligation—Power to propose amendments—Qualified majority—Quorum of member States—Entry into force of amendments

Regulatory framework

1. Article 28 in part XV of the Convention reads as follows:

(a) The text of any proposed amendment to the present Convention shall be communicated by the Secretary-General to Members of the Organization at least six months in advance of its consideration by Congress;

(b) Amendments to the present Convention involving new obligations for Members shall require approval by Congress, in accordance with the provisions of Article 11 of the present Convention, by a two-thirds majority vote, and shall come into force on acceptance by two thirds of the Members which are States for each such Member accepting the amendment, and thereafter for each remaining such Member on acceptance by it. Such amendments shall come into force for any Member not responsible for its own international relations upon the acceptance on behalf of such a Member by the Member responsible for the conduct of its international relations;

(c) Other amendments shall come into force upon approval by two-thirds of the Members which are States.

2. This article corresponds to the original text adopted by the Washington Conference in 1947. However, its meaning and operation has been refined and elaborated upon in the almost 60 years of history of the Organization by a number of interpretative agreements reached by Congress or through constitutional practice. Table I at the end of this appendix*** contains, in summary form, the list of amendments to the Convention adopted to date. Table II enumerates the decisions and resolutions relating to the procedure for amending the Convention adopted by Congress.

Types of amendments

3. Article 28 of the Convention distinguishes two types of amendments by their impact on the contracting parties:

– Those creating new obligations for members, and

– Those considered not to create any such obligation,

and accordingly provides for two different procedures for their adoption. Likewise, the consequences of each type of amendment differ. However, the power to propose both types of amendments and the procedure for referring them to Congress is the same.

* Note prepared by the Secretariat for the XV session of the Word Meteorological Congress.

** United Nations, *Treaty Series*, vol. 7, p. 144.

*** Not reproduced herein.

4. In the absence of a definition or clear criteria as to whether a proposed amendment creates new obligations, practice has it that the determination rests with Congress at the time it adopts the amendment.

5. However, on one occasion, at the time of the adoption of the first amendments to the Convention in 1959, namely an amendment to article 10 (2) (a), Congress could not agree on whether the amendment was being approved under paragraph (b) or (c) of article 28 of the Convention. Congress accordingly requested the Secretary-General to transmit to Member States the text of the amendment asking them to indicate under what provision of article 28 they wished to accept the amendment.[1]

6. At the same session, Congress approved another amendment to the Convention, concerning an increase in the membership of the Executive Council, which it considered to fall under article 28 (c). It fixed accordingly a date for its entry into force.

7. Due to the apparent contradiction between these two courses of action, an in-depth study of article 28 was requested for the next session of Congress. It was also put on record that neither of the procedures followed with respect to the adoption of the amendments to article 10 (2) (a) and to article 13 (c) should be considered as setting a precedent pending a determination on the interpretation of article 28.[2]

8. Since then, all amendments subsequently proposed to the Convention have been expressly considered prior to their adoption as not creating any new obligations for Members and have been adopted under article 28 (c).

### Power to propose amendments and procedure for their referral to Congress

9. Paragraph (a) of article 28 of the Convention is silent on who has authority to propose an amendment to the Convention. When the matter was first raised, Third Congress agreed by its Resolution 4 (Cg-III) that only member States, as the contracting parties, had the right to propose amendments to the Convention. By the same Resolution, Congress instructed the Executive Council to keep under continuous review the Convention between sessions of Congress and to submit to Congress any proposed amendment to the Convention, for its consideration, thereby recognizing that the Executive Council too enjoyed the power to propose amendments to the Convention.[3]

10. Article 28 (a) provides for a six-month time limit ahead of Congress for proposed amendments to be considered receivable. In practice, this means that any amendment proposed by a member has to reach the Secretariat more than six months before Congress in order to allow for the processing, translation and dispatch of the proposed amendment within the statutory time limit.

11. Regarding the amendments submitted by the Executive Council, Third Congress called on the Secretariat to make sure that any proposal made to Fourth Congress by the Executive Council be communicated to members at least nine months ahead of Congress so that member States would have sufficient time to submit counter-proposals to the amendment within the six-month time limit provided for in article 28 (a) of the

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[1] Cg-III, Abridged report with resolutions, General Summary, §3.1.3 (WMO-No. 88 RC. 17).

[2] *Ibid.*

[3] *Ibid.*, General Summary, §3.1.1 to 3.1.3.

Convention.[4] This time limit, set specifically for Fourth Congress, has not been extended to amendments proposed by the Executive Council to subsequent meetings of Congress, nor has it been expressly abandoned.

12. In practice, amendments proposed by the Executive Council have been communicated to member States before the six-month time limit provided for in article 28 (a) of the Convention, but not necessarily nine months ahead of Congress.

13. Subsequently, in the interpretation of article 28 of the Convention agreed upon by Sixth Congress in 1971, it was considered that counter-proposals to a proposed amendment, or modifications to it, would be receivable even if they were made after the six-month time limit, provided that the proposed modification would not result in a change in the basic intent of the draft amendment or in the introduction of a subject not covered by the proposed amendment. Any proposal that would not meet these two requirements would need to be presented as a separate amendment in accordance with the provisions of article 28 (a) six months ahead of the ensuing Congress.[5]

### Amendments creating new obligations

14. Under the provisions of article 28 (b), an amendment creating new obligations for members needs to be approved by a two-third majority vote, and be accepted by two thirds of the members.

15. As with other decisions made by Congress, the quorum of presence required under article 12 of the Convention (the majority of members which are States) needs to be attained for the amendment to be put to a vote.

16. In accordance with the interpretation given to article 28 by Third Congress, the two-third majority should be of members which are States present at Congress. For the calculation of the two thirds, only votes cast for and against (i.e. excluding abstentions) are counted, as confirmed by Sixth Congress in 1971.[6]

17. Upon approval of an amendment by Congress under the above conditions, it shall be open for acceptance by Member States. Such acceptance is to be notified, by analogy with the provisions governing ratification or acceptance of the Convention, to the Depositary, i.e. the Government of the United States of America, in accordance with the provisions in part XIX of the Convention.

18. According to the letter of article 28 (b) of the Convention, the amendment will come into force in respect of members having accepted it on receipt by the Depositary of the acceptance by the member State bringing the total number of acceptances to two-thirds of the members which are States (or 121 out of a total of 181 as at 31 August 2005). Thereafter, the amendment comes into force for each member accepting it on receipt of its acceptance by the Depositary.

19. This procedure has never been resorted to in practice, as it was feared that it would lead to a situation where two texts of the Convention would co-exist. For instance, if amendments to the composition of the Executive Council were to be adopted under

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[4] Cg-III, Proceedings, paragraph 21.1 (WMO, No. 89, RC.18).

[5] Cg-VI, Abridged report with resolutions, General Summary, §5.1.2 (WMO-No. 292).

[6] *Ibid*., General Summary, §5.1.2 (b).

article 28 (b), a situation could arise where the Executive Council would have a different composition *vis-à-vis* different members, depending on whether and when they accepted the amendment. This explains some proposals aimed at making amendments under article 28 (b) binding on all members after their entry into force or at merging the amendment procedures set out in article 28 (b) and in article 28 (c) into a single procedure. However, such proposals were in the end not deemed advisable as it was considered that an amendment creating obligations should not be imposed on members which have not accepted it formally.[7]

### Amendments not creating obligations

20. Under article 28 (c) of the Convention, a proposed amendment that does not create new obligations requires a simple approval procedure by a majority of two thirds of the members.

21. In accordance with the interpretation agreed upon at Third Congress, such majority is of members which are States.[8] This interpretation, together with the provisions of articles 11 (b)—voting—and 12—quorum—of the Convention are to the effect that three conditions are to be met for an amendment to be formally adopted:

- First, that at least a majority of the members which are States are present at the meeting of Congress at which the amendment is to be decided upon;
- Second, that the amendment is supported by at least two thirds of the total of votes cast for and against (excluding abstentions) of the member States present at Congress; and
- Third, that the members voting for the amendment represent at least two thirds of WMO members which are States.

22. In practice, these three stages tend to be ascertained at the same time, i.e. that no amendment is put for decision unless two thirds of member States are present. In fact, a number of amendments have been approved even without an actual vote where the presiding officer was satisfied that all three conditions were clearly met and no objection was raised.[9]

23. In the event that an amendment under article 28 (c) is approved by a two-thirds majority vote of the members present, but fails to receive the approval of two thirds of all the members which are States, Sixth Congress decided that the amendment could be referred to next Congress for a new vote if Congress so decided.[10] This interpretation was agreed in order to overcome the difficulties faced during Third Congress referred to in paragraph 5 above. Indeed, the amendment to article 10 (2) (a) was then approved by two thirds of the members present at Congress, but fell short of the number of member States required. This gave rise to a dispute as to whether the amendment involved new obligations. When Congress decided to ask all member States to notify the Depositary of their

[7] Cg-VI, Abridged report with resolutions, General Summary, §5.1.4.

[8] *Ibid*., General Summary, §5.1.2 (c).

[9] See Cg-VII, Proceedings, §22 (WMO-No. 428); Cg-IX, Proceedings, §12, 27 and 38 (WMO-No. 645) and Cg-XIV, Proceedings, §21 (WMO-No. 972).

[10] Cg-VI, Abridged report with resolutions, General Summary, §5.1.2 (c).

approval, indicating whether it was under article paragraph (b) or (c) of article 28, it was understood that the amendment would be considered adopted as soon as the Depositary would have received confirmation by two-thirds of member States that they had approved it under article 28 (c).[11]

24. The interpretation agreed by Sixth Congress was put in practice during Seventh Congress in 1975 when a proposal to increase the membership of the Executive Council was approved by a two-thirds majority vote, but the votes cast for did not account for two-thirds of all WMO member States [12]. The proposal to increase the number of members of the Executive Council was eventually adopted by Eighth Congress in 1979.

25. Concerning the voting procedure, Third Congress[13] agreed that the adoption by a postal vote of amendments to the Convention even when they do not involve new obligations was not permissible or desirable, an interpretation that was confirmed by Sixth Congress[14]. It was, however, exceptionally set aside by Ninth Congress in 1983. Congress then requested the Executive Council to organize the approval of proposed amendments to article 3 and 34 of the Convention by a postal ballot (so as to enable the United Nations Council for Namibia to become a member of the Organization)[15]. Unlike the procedure concerning elections by correspondence, where there is a time limit under the General Regulations for the receipt of ballot papers, no time limit is foreseen or was fixed for this approval of the amendments by correspondence. Eventually, these amendments did not receive the majority required for their adoption, but Namibia became a member of WMO as an independent State in 1991.

26. As regards the date of entry into force of an amendment adopted under article 28 (c), Third Congress considered that upon receipt of the necessary approval, an amendment entailing no new obligations enters into force immediately, unless Congress fixes upon approval of the amendment a different date for its entry into force[16]. Congress has fixed in the relevant resolution a date for the entry into force of amendments in all but three cases, two relating to purely linguistic or terminological amendments[17] and one because of the circumstances referred to in paragraphs 5 and 23 above[18].

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[11] Cg-III, Proceedings, §68 (WMO, No. 89, RC.18).

[12] Cg-VII, Abridged report with resolutions, General Summary, §10.1.6 (WMO-No. 416).

[13] Cg-III, Abridged report with resolutions, General Summary, §3.1.1.4.

[14] Cg-VI, Abridged report with resolutions, General Summary, §5.1.3.

[15] Cg-IX, Abridged report with resolutions, General Summary, §10.1.9 to 10.1.11 (WMO-No. 615).

[16] Cg-III, Abridged report with resolutions, General Summary, paragraph 3.1.1.3 and Resolution 3.

[17] Cg-V, Abridged report with resolutions, Resolution 2 (Cg-V) (WMO-No. 213 RC. 28); Cg-XIV, Abridged final report with resolutions, Resolution 41 (Cg-XIV) (WMO-No. 960).

[18] Cg-III, Abridged report with resolutions, General Summary, Resolution 1.