*Extract from:*

# UNITED NATIONS JURIDICAL YEARBOOK

## 2008

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

Chapter VI. Selected legal opinions of the Secretariats 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 verbale to the Permanent Representative of a Member State to the United Nations on the question of taxation of salaries and emoluments paid to locally recruited officials of the United Nations system

Privileges and immunities granted to United Nations officials—Convention on the Privileges and Immunities of the United Nations, 1946[2]—General Assembly resolution 78 (1) of 7 December 1946—United Nations officials exempted from taxation on their salaries regardless of their nationality—Equality of treatment for all officials of the Organization to whom such immunity is granted—Only staff recruited locally and assigned to hourly rates may be subject to taxation—Direct assessment imposed on salaries of United Nations officials viewed as comparable to national income taxes—Social security and social insurance fees deemed to constitute taxation

The Legal Counsel of the United Nations . . . has the honour to refer to a question of taxation of salaries and emoluments paid to locally recruited officials of the United Nations system organizations operating in that country and the payment of social insurance fees by such officials.

The Legal Counsel has been informed of a note verbale from the Protocol Department of the Ministry of Foreign Affairs of the [State] No. [ . . . ], dated 28 January 2008, addressed to all diplomatic missions accredited in the [State]. The Legal Counsel notes that the Ministry requests "all national employees [...] be accredited in the Protocol Department of the Ministry of Foreign Affairs [and] to pay completely and timely all state payments". It continues by stipulating that "[p]ersons acting in diplomatic representations [. . .] denying to pay tax and social insurance fee should be punished".

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

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

While it is not clear from the wording of the above-referenced note verbale that it was the Government's intention to include United Nations officials as "staff and employees of diplomatic missions accredited in [State]", the Legal Counsel is informed that the Chief of the Protocol Department of the Ministry of Foreign Affairs confirmed to the Resident Coordinator of the United Nations that the note verbale was intended to apply to United Nations staff members.

In this connection, the Legal Counsel wishes to clarify the relevant provisions of the applicable legal instruments as follows.

Under article II, section 7 (a) of the 1946 Convention on the Privileges and Immunities of the United Nations (the General Convention), to which the [State] is a party without any reservation, "[t]he United Nations, its assets, income and other property shall be exempt from all direct taxes." Furthermore, pursuant to article V, section 18 (1) (b) of the General Convention, "officials of the United Nations shall be exempt from taxation on salaries and emoluments paid to them by the United Nations." The same provision is also included in article VII (1) (b) of the 1992 Agreement between the United Nations and the Government relating to the Establishment of a United Nations Interim Office and article XIII (1) (b) of the 2002 Basic Cooperation Agreement between the United Nations (United Nations Children's Fund) and the Government. In addition, article IX (1) of the 2001 Basic Assistance Agreement between the United Nations (United Nations Development Programme (UNDP)) and the Government confirms the applicability of the General Convention, *inter alia*, to UNDP officials.

It should be noted in this regard that the General Assembly in its resolution 76 (I) of 7 December 1946 approved "the granting of privileges and immunities referred to in article V . . . to all members of the staff of the United Nations, with the exception of those who are recruited locally *and* are assigned to hourly rates" (emphasis added). Therefore, all staff members of the United Nations, regardless of nationality, residence, place of recruitment or rank, are considered officials with the exception of those who are *both* recruited locally *and* assigned to hourly rates. This exception, therefore, only applies to individuals who meet *both* criteria. This is reflected in article I (g) of the 1992 Agreement which stipulates that "Officials of the Office" means "all members of its staff, irrespective of nationality, employed under the Staff Rules and Regulations of the United Nations with the exception of those who are recruited locally *and* assigned to hourly rates as provided for in General Assembly resolution 76 (I) of 7 December 1946" (emphasis added). Accordingly, locally recruited staff members who are not assigned to hourly rates are entitled to exemption from taxation.

In addition, the Legal Counsel wishes to highlight that the bilateral Agreements referred to above deal with the privileges and immunities of all officials, including locally recruited officials, separately from those accorded to "persons recruited locally and assigned to hourly rates". The latter only enjoy immunity from legal process in respect of words spoken or written and any act performed by these individuals in their official capacity.

As a party to the General Convention, the [State] is not entitled to make use of United Nations salaries and emoluments for any tax purposes. In place of national taxation, and to avoid the double taxation of United Nations officials, the General Assembly, in 1948, adopted a Staff Assessment Plan designed "to impose a direct assessment on

United Nations staff members which is comparable to national income taxes" (General Assembly resolution 239 (III) A of 18 November 1948). The total funds collected from this assessment are distributed among Member States, including the [State], in proportion to their contributions to the assessed budget of the United Nations. National taxation would, therefore, impose a double taxation burden on officials of the United Nations and would increase the financial burden of the Organization and its Member States.

Another rationale of the immunity from taxation of salaries and emoluments paid by the United Nations is to achieve equality of treatment for all officials of the Organization and that no Member States should derive any national financial advantage from the presence on its territory of staff of international organizations who receive salaries and emoluments from the funds of these organizations. These principles were clearly enunciated by the General Assembly in resolution 78 (I) of 7 December 1946 as follows: "In order to achieve full application of the principles of equality among Members and equality among personnel of the United Nations, Members which have not yet completely exempted from taxation, salaries and allowances paid out of the budget of the Organization are requested to take early action in that matter."

With regard to the payment of social security and social insurance fees, the United Nations has consistently taken the view that the Organization and its officials are exempt from such payments as they constitute taxation within section 18 (b) of the General Convention. The Legal Counsel wishes to reiterate that all officials of the Organization receive medical insurance and disability coverage and that a United Nations Joint Staff Pension Fund has been established to which the Organization and its officials contribute.

With regard to informing the Ministry of the names of United Nations officials, the Legal Counsel recalls that pursuant to article XVI of the 1992 Agreement, article II (4) (b) of the 2001 Standard Basic Assistance Agreement and article V (2) of the 2002 Basic Cooperation Agreement, the United Nations notifies the names and categories of its officials, experts on mission and persons performing services and any changes in their status to the Ministry of Foreign Affairs.

Finally, under section 34 of the General Convention, the [State] has an obligation to be "in a position under its own law to give effect to the terms of this Convention". Moreover, any interpretation of the provisions of the General Convention must be carried out within the spirit of the underlying principles of the Charter of the United Nations, and in particular, paragraph 1, Article 105 thereof, which provides that the Organization shall enjoy such privileges and immunities as are necessary for the fulfilment of its purposes. Measures which might increase the financial or other burdens of the Organization have to be viewed as being inconsistent with this provision.

The Legal Counsel respectfully requests the competent authorities of [State] to take the necessary steps to resolve this matter expeditiously in order to ensure full compliance with the obligations of the Government under the applicable legal instruments.

27 February 2008

## (*b*) Note to the Department of Peacekeeping Operations regarding criminal proceedings in relation to violent protest by former individual contractors of a United Nations Mission

CONVENTION ON THE SAFETY OF UNITED NATIONS AND ASSOCIATED PERSONNEL, 1994[*] — CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS, 1946[**] —WAIVER OF IMMUNITY FOR UNITED NATIONS MISSION PERSONNEL TO ALLOW THEIR TESTIMONY IN CRIMINAL PROCEEDINGS IN A NATIONAL COURT—SECRETARY-GENERAL'S RIGHT AND DUTY TO WAIVE IMMUNITY IN CASES WHERE IMMUNITY WOULD IMPEDE THE COURSE OF JUSTICE—EVIDENCE OR TESTIMONY SHOULD NOT PREJUDICE THE INTERESTS OF THE UNITED NATIONS—CRITERIA TO CONSIDER IN DETERMINING IF THE INTERESTS OF THE UNITED NATIONS WOULD BE PREJUDICED—DISCLOSURE OF INTERNAL UNITED NATIONS DOCUMENTS/MATERIALS

1. This refers to your note dated . . . concerning the request of the [Mission] for guidance on the extent of its co-operation with the [State] National Police and the prosecution in connection with charges that have been brought against 16 former [Mission] individual contractors following the incident on [date], when [the Mission] transport personnel were violently attacked and suffered injuries as well as property losses, and when [the Mission] vehicles and other property were also damaged or lost. We note that following the incident, 16 former individual contractors have been charged with "arson, criminal mischief and aggravated assault", and are due to be tried at an unspecified date.

2. We recall that this matter was initially brought to the attention of the Office of Legal Affairs (OLA) by the note of [the Assistant Secretary-General for Peacekeeping Operations] of [date] and that, following our request sent by email on [date], the [Mission] provided, on [date], more details with respect to the case, including, in particular, the names, type and functional positions of [the Mission] personnel who may be required to testify in the criminal proceedings, as well as the nature of the evidence they would provide.

3. The [Mission] has provided a list of eleven members of [the Mission], comprising nine United Nations staff members, one United Nations volunteer and one consultant who would testify as prosecution witnesses during the trial. We also note that a twelfth [Mission] member – from the [State 2] military contingent – may be called to testify but has yet to be identified. We further note that the evidence to be given by the [Mission] witnesses will include confirmation concerning the ownership of the vehicles and other property damaged or lost, confirmation concerning bodily injuries sustained, identification of the attackers, and eye witness accounts of how the attacks occurred.

4. The [Mission] has also provided a copy of a note verbale that it sent to the [State] authorities reporting the attack and asking them to prosecute the offenders in accordance with the "Agreement between [State] and the United Nations concerning the Status of the United Nations Mission in [State]", dated [ . . . ], (the SOFA) and consistent with the 1994 Convention on the Safety of United Nations and Associated Personnel, as referred to in the SOFA.

5. Pursuant to the SOFA, the members of the [Mission] who might be called upon to testify in the trial of the 16 suspects in this case enjoy privileges and immunities, and are,

[*] United Nations, *Treaty Series*, vol. 2051, p. 363.

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

in particular, "immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity" (SOFA, paragraph 50). However, under article V, section 20 of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946, to which [State] acceded on [date], "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 official 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'". Moreover, "the United Nations shall cooperate 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." (Article V, section 21 of the Convention; see also article VI, section 23, applicable to the [Mission] consultant as an expert on mission).

6. In this case, [the Mission] has determined that the prosecution of the suspects is necessary, and that it may deter other similar attacks on the Mission's personnel and property. Accordingly [the Mission] proposes to voluntarily make available the 11 and possibly 12 of its members as witnesses. Here, where the United Nations itself has called for the prosecution of the accused persons, and a successful prosecution may depend on the United Nations allowing its personnel to provide evidence, the Organization should be willing to lift the immunity of such personnel to enable them to testify, as appropriate. In considering whether a request for a waiver should be granted, and if so, whether any conditions should be applied to the waiver, the Secretary-General considers whether the evidence or testimony to be provided by the witness would prejudice the interests of the United Nations; specifically whether such evidence or testimony would: (i) endanger the safety or security of current or former personnel of the United Nations or otherwise prejudice the security or proper conduct of any operation or activity of the United Nations; (ii) violate a duty of confidentiality which the United Nations owes to a third party; or (iii) compromise the confidentiality which is necessary for the effective operation of the internal decision-making processes of the United Nations, or of future United Nations peacekeeping operations.

7. While OLA is unaware of any consideration that would be prejudicial to the interests of the United Nations if the immunity of the [Mission] personnel in this case were waived to allow them to give evidence in the trial of the 16 accused persons, it is for the Department of Peacekeeping Operations and [the Mission] to consider the criteria indicated above. Assuming that your Department and [the Mission] see no impediment based on those criteria, the immunity of the following 11 members of [the Mission], as identified by [the Mission], is hereby waived by the Secretary-General solely for the purpose of their appearance as witnesses for the prosecution before the [State] court in connection with the above mentioned case: [11 names and respective positions]. While, in principle, the immunity of the twelfth possible witness could be waived, we have not addressed the issue since such witness has not been specifically identified.

8. We note that [the Mission] proposes to disclose the following [Mission] documents and materials to the court in support of the prosecution: Special Investigations Unit report; video footage of attack from [Mission] security cameras; damage discrepancy reports for [Mission] vehicles No. 638, 790 and 2143; medical reports of injured [Mission]

personnel; and [Mission] asset tracking documents. It appears to us that all these documents/materials are internal United Nations documents/materials which should normally not be disclosed to persons outside the Organization. However, we assume that the Department of Peacekeeping Operations sees no policy or operational considerations that based on the above-mentioned criteria would prevent or limit the disclosure of such documents. On that understanding, we suggest that such documents/materials be voluntarily disclosed to the court exclusively for the purpose of the trial of the 16 accused persons, but without prejudice to the privileges and immunities of the United Nations and the inviolability of its archives.

12 May 2008

### (*c*) Note verbale to the Permanent Representative of a Member State to the United Nations regarding a civil suit instituted in the Conciliation and Arbitration Board

Convention on the Privileges and Immunities of the United Nations, 1946* — Privileges and immunities of United Nations officials for words spoken or written and acts performed in their official capacity—Immunity from every form of legal process except in cases where the Secretary-General waives the immunity—Waiver of immunity must be express—No waiver of immunity shall extend to any measure of execution—Responsibility of the Secretary-General to assess whether officials acted within the scope of their functions

The Legal Counsel of the United Nations . . . has the honour to refer to the civil suit instituted in the Conciliation and Arbitration Board, by [Name A] (File No. . . .) against [Names B, C and D], the United Nations, the United Nations Development Programme (UNDP), the United Nations Population Fund (UNFPA) and the Country Support Team of the United Nations Development Fund for [region]. In this regard, the Legal Counsel has the honour to inform the Permanent Representative that [Name B] is the Director of the [regional] Division at UNFPA Headquarters in New York and [Name C] is the Officer-in-Charge of the UNFPA Country Support Team in [State]. They are both officials of the United Nations. [Name D] is the former Director of the UNFPA Country Support Team in [State] and she is a former official of the United Nations.

The Legal Counsel wishes to recall that both UNDP and UNFPA are an integral part of the United Nations. Thus, UNDP and UNFPA, as well as its officials, enjoy the privileges and immunities provided for in the Convention on the Privileges and Immunities of the United Nations (hereinafter referred to as the General Convention) adopted by the General Assembly of the United Nations on 13 February 1946, to which [State] has been a party since [date]. Pursuant to article II, section 2 of the General Convention, "[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 in any particular case, it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution".

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

Under article II, section 2 of the General Convention, waiver of immunity by the United Nations must be express. The United Nations, including UNDP and UNFPA, has not waived its privileges and immunities in this case.

Pursuant to article V, section 18 (a) of the General Convention, officials of the United Nations, including UNFPA officials, shall "be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity". Thus, [Names B, C and D] enjoy immunity from legal process in the present case as it relates to work performed in the course of their official functions.

[Name A] is not devoid of a remedy to address her labour-related grievances. The Organization's position in these types of employment cases is for it to maintain its immunity while offering alternative means of dispute settlement in accordance with of the General Convention. In this respect, [Name A's] contract of employment with UNDP and subsequently with UNFPA set out the means of dispute settlement.

In accordance with article II, section 2, and article V, section 18 (a) of the Convention, the Legal Counsel hereby returns the notification of the lawsuit instituted by [Name A]. The Legal Counsel is confident that the competent [State] authorities will ensure full respect of its privileges and immunities in accordance with the obligations of [State] under international law.

The Legal Counsel also wishes to recall that the International Court of Justice confirmed in its Advisory Opinion on the difference relating to immunity from legal process of a Special Rapporteur on Human Rights of 29 April 1999 (the so-called "Cumaraswamy case")[*] that "the Secretary-General, as the chief administrative officer of the Organization, has the primary responsibility to safeguard the interests of the Organization; to that end, it is up to him to assess whether its agents acted within the scope of their functions and, where he so concludes, to protect these agents, including experts on mission, by asserting their immunity. This means that the Secretary-General has the authority and responsibility to inform the Government of a Member State of his finding and, where appropriate, to request it to act accordingly and, in particular, to request it to bring his finding to the knowledge of the local courts if acts of an agent have given or may give rise to court proceedings."

The Court further opined that "[w]hen national courts are seized of a case in which the immunity of a United Nations agent is in issue, they should immediately be notified of any finding by the Secretary-General concerning that finding".

The Court also stated that "[a]ccording to a well-established rule of international law, the conduct of any organ of a State [whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinated position in the organization of the State] must be regarded as an act of that State."

Pursuant to section 34 of the General Convention, the Government of [State] undertook an obligation to be "in a position under its own law to give effect to the terms of this Convention". Moreover, any interpretation of the provisions of the General Convention [must] be carried out within the spirit of the underlying principles of the Charter of the

[*] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 62.

United Nations, and in particular Article 105 (1) thereof, which provides that "[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes".

For the foregoing reasons the Legal Counsel respectfully requests the Government of [State] to promptly take all necessary steps to ensure full respect for the privileges and immunities of the United Nations, including UNDP and UNFPA, and its officials, in accordance with its obligations under international law.

23 May 2008

### (*d*) Interoffice memorandum to the Secretary to the Commission and Officer-in-Charge of the General Services Section, Economic Commission for Africa (ECA), regarding new Directive on Value Added Tax in Member State

THE UNITED NATIONS IS NOT EXEMPT FROM THE PAYMENT OF VALUE ADDED TAX (VAT) UNDER THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS, 1946[*] — ENTITLEMENT TO "RETURN" OR "REMISSION" OF VAT—IN ACCORDANCE WITH ARTICLE 105 OF THE CHARTER OF THE UNITED NATIONS, THE ORGANIZATIONS SHALL ENJOY SUCH PRIVILEGES AND IMMUNITIES AS ARE NECESSARY FOR THE FULFILMENT OF ITS PURPOSES—MEASURES WHICH IMPOSE FINANCIAL OR OTHER BURDENS ON THE ORGANIZATION MAY BE INCONSISTENT WITH THAT REQUIREMENT—NOT POSSIBLE UNDER RELEVANT RULES AND REGULATIONS OF THE ORGANIZATION TO PROVIDE ORIGINAL RECEIPTS AS SUPPORTING DOCUMENTS

1. This is with reference to your memorandum of 28 June 2008 to the Legal Counsel by which you have sought our advice on the new Directive No. [ . . . ] of [date] issued by the Government of [State] on the procedure for reimbursement of Value Added Tax (VAT) for goods and services paid by "Organizations enjoying Special Privileges". This includes the United Nations. We understand that the Directive went into effect as of [date]. We further understand from the discussions you have had with this Office that negotiations are ongoing with the Government.

2. We note that until now the United Nations was exempt from VAT in [State]. Thus, the implementation of the new Directive would have a serious impact on the budget of all United Nations agencies operating in [State]. Furthermore, the documentation process and modalities of implementation impose deadlines and requirements which the Organization may not be able to meet, such as the requirement to submit claims within a month and the requirement to submit original receipts. You have also raised other implications that the new Directive will have.

3. We suggest that ECA, along with all the United Nations agencies operating in [State], continue its discussions on a practical resolution of the matter. ECA may wish to highlight to the Government that the Organization has been operating in [State] for over fifty years and has thus far enjoyed exemption from the payment of VAT, which we would prefer to continue to be applied to the United Nations. Furthermore, ECA may also wish to inform the Government that a number of host countries have exempted the United Nations from the payment of VAT.

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

4. However, as VAT is an indirect tax, in accordance with article II, section 8 of the 1946 Convention on the Privileges and Immunities of the United Nations, the Organization is only entitled to "return" or "remission" of the amount paid. In this regard, the Agreement between the United Nations and [State] and the Basic Agreement between the United Nations (UNDP) and [State] do not touch upon this issue. However, we note that article VII, paragraph 6 of the 1994 Basic Cooperation Agreement between the United Nations (UNICEF) and [State] (copy attached)* provides that no "value added tax . . . shall be levied on the supplies, equipment and other materials intended for programmes of cooperation in accordance with the master plan of operations". For other supplies and equipment purchased locally, however, the Government's only obligation is for return or remission of the tax paid.

5. Accordingly, with the exception of goods which are purchased by UNICEF in accordance with the master plan of operations, the Organization does not have a right to be exempt from the payment of VAT. However, you may also wish to highlight that paragraph 1, Article 105 of the Charter of the United Nations provides that the Organization shall enjoy such privileges and immunities as are necessary for the fulfilment of its purposes. Measures which might increase the financial or other burdens of the Organization are to be viewed as being inconsistent with this provision. In this regard, the Report of the Committee on the San Francisco Conference responsible for the drafting of Article 105 of the Charter unequivocally pointed out that "if there is one principle certain it is that no Member State may hinder in any way the working of the Organization or take any measure the effect of which might be to increase its burdens financial or otherwise".

6. In terms of the procedures outlined in the new Directive, we note that there are a number of issues of concern. The first pertains to the requirement to fill out a tax fund application on a monthly basis for all purchases made during that month. ECA may wish to highlight the administrative burden of the new requirement and engage in discussions on administrative procedures which the Organization could agree to.

7. We further note that paragraph 4.5 of the new Directive provides that "[e]ach supporting document evidencing payment of tax . . . [is] required to . . . indicate the date on which it was prepared and issued in accordance with the requirements of the relevant tax law". It is not clear whether a new requirement is being added by referring to the "requirements of the relevant tax law". This should be clarified as the Organization should not directly be subject to the tax law of [State] and all requirements of the Organization should be clear from the arrangements agreed upon with the Government.

8. There appears to be a special procedure for tax refund claims related to construction work (paragraph 4.7). As there is a requirement to submit a letter from the Ministry of Finance and Economic Development authorizing the construction work, ECA may wish to request exemption from this requirement as the Organization's principal counterpart is the Ministry of Foreign Affairs.

9. The most worrisome provision in the new Directive is the requirement to submit original receipts as supporting documents (paragraph 4.6). Kindly inform the Government that it is not possible under the relevant rules and regulations of the Organization to provide the originals, and discuss other ways of providing supporting documents.

24 July 2008

* Not reproduced herein.

### (*e*) Interoffice memorandum to the Chief of the Field Procurement Service regarding Member State export controls on orders of communication technology products for use by United Nations Mission in the Sudan

EXPORT LICENCE FOR TECHNICAL AND COMMUNICATIONS EQUIPMENT TO BE EXPORTED FOR USE BY A UNITED NATIONS MISSION—CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS, 1946* —THE ORGANIZATION SHALL BE EXEMPT FROM CUSTOMS DUTIES AND PROHIBITIONS AND RESTRICTIONS ON IMPORTS AND EXPORTS IN RESPECT OF ARTICLES FOR OFFICIAL USE—IN PRACTICE, THE UNITED NATIONS ASKS VENDORS TO OBTAIN RELEVANT LICENCES FROM RELEVANT AUTHORITIES—ONLY WHEN SUCH LICENCES ARE DENIED, OR WHEN THEY ARE SUBJECTED TO RESTRICTIONS WHICH IMPINGE ON THE ORGANIZATION'S ABILITY TO CARRY OUT ITS ACTIVITIES, WOULD THE MEMBER STATE BE CONSIDERED TO HAVE FAILED TO COMPLY WITH THE CONVENTION—REQUIREMENT TO MAINTAIN INVENTORY CONTROLS AND TO REPORT TO GOVERNMENT ANY LOSS OR THEFT OF EQUIPMENT SUBJECT TO LICENCE

1. This responds to your memoranda, dated 16 May 2008 and 26 June 2008, addressed to this Office, seeking advice in connection with the above-referenced matter, and is further to the various discussions and exchanges of e-mail between our offices on this matter.

2. In the memorandum, dated 16 May 2008, you requested advice concerning a rider that the [State] [Department], proposed the United Nations to countersign for the export of [company] communications equipment that the Organization was purchasing for its missions in the Sudan. The rider was proposed by the [Department] as an addendum to the export license that [company] was requesting from the [State] Government, in accordance with the terms of the United Nation's contract with [company], in order to export such equipment for consignment to the United Nations for its official use in its missions in the Sudan. You expressed concerns that the proposed rider contained stricter terms than others that the [State] Government had previously proposed. In particular, you noted that the Procurement Division (PD) was of the view that provisions of the proposed rider requiring the Organization to maintain inventory controls over the items subject to the license and to provide reports to the [State] Government concerning lost or stolen items were too invasive and restrictive of the Organization's rights under the 1946 Convention on the Privileges and Immunities of the United Nations (General Convention) to export items for its official use without restrictions. You indicated that PD attempts to resolve the matter directly with officials of the [Department] had been unsuccessful and that, consequently, several orders for urgently needed [company] equipment had been placed on hold. Accordingly, you requested this Office to bring this matter to the attention of the [State] Government.

3. In your memorandum of 26 June 2008, you informed this Office that the proposed restrictions set forth in the rider were now also being proposed, not only for shipments of [company] communications equipment, but also for shipments of information technology products from [company 2] and shipments of other telecommunications products from [company 3] for the official use of the Organization in its missions in the Sudan. You noted that such proposed restrictions for the export of such products for the Organization's offi-

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

cial use were having an adverse impact on the United Nations' operations in the Sudan, and you requested that this Office assist in finding a timely resolution of this matter.

4. Article II, section 7 (b), of the 1946 General Convention to which [State] became a party in [year] [treaty references] provides, in pertinent part, that the "United Nations, its assets, income and other property shall be exempt from customs duties and prohibitions and restrictions on imports and exports in respect of articles imported or exported by the United Nations for its official use." In practice, in cases in which the Member States seek to monitor the Organization's importation or export of items, including those incorporating sensitive technologies, intended for the official use of the United Nations through import or export licenses, the Organization has asked vendors to obtain such licenses from the relevant authorities of the Member States. Only in cases in which such license for the importation or export of items intended for the official use of the Organization was denied, or in cases in which the licenses were subject to restrictions impinging on the Organization's ability to carry out its activities, would the Organization consider that the relevant Member State had failed to accord the applicable exemption provided for under article II, section 7 (b) of the Convention.

5. The question, therefore, is whether the requirements set forth in the riders that have been proposed by the [Department] to be appended to export licenses for communications and information technology products required by the Organization amount to restrictions on the export from the [State] and the importation of such items into the Sudan for the official use of the Organization. As this Office understands, United Nations missions routinely maintain property control procedures for telecommunications and information technology equipment. What is at issue, therefore, are the provisions of the proposed rider requiring the Organization to report lost or stolen equipment subject to the license to the [State] Government within specific timeframes following loss or theft. It is further noted that the [Department] has made clear to PD and informally to this Office that it will not change its position that the United Nations must countersign the proposed rider and further has asserted that, if the Organization disagreed with the position of the [Department] in this regard, the matter would have to be taken up by the United Nations with the [State's foreign ministry].

6. You have indicated that the operations of the United Nations in the Sudan cannot await such a resolution of this matter. Assuming that it is not possible for PD to find an alternative source to obtain comparable communications and information technology equipment that would not be subject to [State] Government export controls, and in view of the operational exigencies for obtaining the equipment in the Sudan without delay, it would seem that PD has no choice but to proceed with the procurement actions, including countersigning the riders proposed by the [Department] to the export licenses that the vendors will procure from the [State] Government. However, we further recommend that, when countersigning such riders, the appropriate officials of PD include the following statement:

> "Subject to and without any waiver of the privileges and immunities of the United Nations and its officials pursuant to the Convention on the Privileges and Immunities of the United Nations, to which the [State] became a party in [year] [treaty references]."

Copies of such licenses and accompanying riders should be provided to this Office so that appropriate follow-up can be made to the [State] Government, through the [Per-

manent Mission of State to the United Nations], and in the meantime, this Office intends to seek a resolution of this matter with the [State] Government, through the [Permanent Mission of State to the United Nations]. Moreover, should any such license for the export of the subject equipment to the Sudan for the Organization's official purposes be denied, this Office should be informed so that the matter can be brought to the attention of the [State] Government, through the [Permanent Mission of State to the United Nations].

7. In addition to the foregoing, the relevant departments and missions should maintain appropriate inventory control procedures for the equipment subject to such licenses and accompanying riders in accordance with established United Nations regulations, rules and operational policies and procedures. Any losses or thefts of such equipment should be duly recorded and records should be maintained, which records would be subject to the audit procedures of the Organization.

6 August 2008

### (*f*) Interoffice memorandum to the Director of the Accounts Division, Office of Programme Planning, Budget and Accounts (OPPBA), regarding the obligation to pay gross receipt tax charged by energy supplier companies

Obligation of the United Nations to pay gross receipt tax (GRT) on energy services— Itemization of GRT in invoices by energy suppliers—GRT is not a direct tax from which the Organization is exempt—Entitlement to seek remission or return from relevant authorities under the Convention on the Privileges and Immunities of the United Nations, 1946[*]

1. I refer to the e-mail message, dated 18 July 2008, from the Chief, Payroll and Disbursement Section, Accounts Division, OPPBA, addressed to you, a copy of which was provided to this Office. That e-mail message, a copy of which is enclosed for your ease of reference,[**] responded to follow-up inquiries made by this Office in connection with our earlier advice and correspondence concerning the above-referenced matter.

#### *(i) Background*

2. By its memorandum, dated 29 November 2007, Facilities Management Service (FMS) sought advice from the Office of Legal Affairs (OLA) regarding the United Nations' obligation to pay a "gross receipt tax" ("GRT") as part of payments against invoices for electrical power provided by energy supplier companies, in particular [company 1]. By its memorandum, dated 13 December 2007, addressed to the Chief, Accounts Payable Unit, OLA requested information regarding the total amount of GRT charges that may have been paid to date by the Organization to energy supplier companies, including [company 1]. Subsequently, OLA was informed that the GRT charges have been deducted by the Payroll and Disbursement Section from payments against recent invoices submitted by [company 1] and [company 2], resulting in a protest by [company 1] and an electricity disconnection notice from [company 2] because of underpayment by the Organization in respect of the amounts set forth in such invoices. We note that [company 2] provides

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

[**] Not reproduced herein.

electricity for the Secretary-General's residence . . . , while [company 1] supplies electricity to the United Nations Headquarters (UNHQ) premises.

3. As the Chief, Payroll and Disbursement Service, noted in the e-mail message of 18 July 2008, the Director, General Legal Division, OLA, advised, in a memorandum dated 28 November 2000 (copy enclosed),* that the GRT was an indirect tax from which the Organization was not exempt, but that nevertheless the Organization was entitled to seek the remission or return of the amount of duty or tax from the competent United States tax authorities when making important purchases of goods and services pursuant to Article II, Section 8, of the 1946 Convention on the Privileges and Immunities of the United Nations.** The memorandum concluded that OLA would attempt to initiate a procedure with the United States Government for the remission or return of the amount of GRT charged, and that pending the negotiation of such a procedure, the United Nations should continue to pay the GRT charges.

*(ii) Discussion with the United States Mission*

4. Following the recent request from FMS for assistance, OLA wrote to the United States Mission on 11 February 2008, seeking the agreement of the United States Government to provide a remission or reimbursement of GRT paid by the Organization to the energy suppliers. In that communication, OLA advised the United States Mission that the amount of GRT for which such remission or reimbursement was being sought totalled US$ 254,744.07, a figure that had been provided to OLA by FMS. However, based on subsequent communications from DM, it was clarified that this amount only refers to the GRT paid to [company 3], a former energy supplier company to the United Nations, over a period of four years, and does not include-payments made to [company 2], [company 1], or any other energy supplier company. Moreover, it is unclear whether the amount sought for remission or reimbursement of the GRT charges covers all United Nations premises in New York. The total amount of GRT paid by the Organization over the years, therefore, might be much higher.

5. In response to the request made by this Office, the United States Mission has asked: (i) whether the GRT is separately itemized on the energy suppliers invoices; (ii) how long the Organization has been paying such GRT charges and for what period the request for remission or reimbursement of the GRT charges relates; and (iii) whether any of the Permanent Missions of other Member States were also paying such GRT charges in respect of their energy suppliers invoices.

**a. Itemization of GRT in invoices**

6. In response to inquiries made by this Office in order to obtain answers to the first question raised by the United States Mission, in the e-mail message of 18 July 2008, the Chief, Payroll and Disbursement Section stated that FMS had determined that [company 2] has not been separately itemizing GRT charges in its invoices in a manner that would enable the Organization to readily determine the amount of the charges, but that [company 1] has been separately itemizing the charges. Energy suppliers to the United Nations should

* Not reproduced herein.

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

therefore all be requested to itemize the GRT charges in their future invoices in order to keep exact records of such charges. In the meantime, subject to receiving further clarifications from DM, we will inform the United States Mission that only [company 1] has been itemizing GRT charges.

**b. Assessment of amount of GRT paid by the United Nations over time**

7. Regarding the second question of the United States Mission, I note that in a letter, dated 30 August 2000 to FMS, [company 2] informed the Organization that the GRT charges were included in its invoices for many years but never displayed. OLA had previously requested OPPBA and FMS to review their files and to assess the total amount of GRT charges paid by the Organization. We understand from communications from FMS and the Payroll and Disbursement Section that they do not know when the United Nations was first charged the GRT, and that since financial records are only kept for a finite period, it may not be possible to find out from such records exactly how much GRT has been paid over time. FMS, therefore, proposed to review the available documentation and make some calculations of the total amount paid.

8. I further understand that, in order to complete its calculation of GRT charges paid, FMS may have to determine which GRT rates were applicable to which particular periods when invoices were paid, since the rate of GRT may have fluctuated over time, or may vary depending on the source of energy, *i.e.,* electricity or steam. As this matter involves the review of the relevant invoices, DM may wish to directly contact the energy supplier companies to the United Nations in order to request further information regarding the applicable rates for determining GRT and to request them to provide copies of relevant invoices, if they have not been retained by DM.

9. Based on the foregoing, this Office suggests that DM calculate the total amount of the claim for the remission or reimbursement of GRT charges previously paid, to the best of DM's knowledge, based on its records and any further information that it can obtain from the relevant energy providers, and that DM communicate such information to this Office.

10. Accordingly, apart from the first question raised by the United States Mission concerning separate itemization of GRT charges on invoices from the energy suppliers, the information provided to this Office has not answered the other two questions that the United States Mission has raised. Namely, it is still not clear for what length of time GRT charges have been paid and to what period the request for remission or reimbursement of the GRT charges relates. This information will be crucial for the further discussions with the United States Mission regarding the total amount claimed by the Organization for remission or reimbursement of GRT charges.

11. I also understand that the Organization does not have direct contracts with its energy supplier companies such as [company 2] and [company 1], but rather is relying on contractual arrangements between the United States General Services Administration and the energy supplier companies covering the delivery of electricity and steam to public entities. We would appreciate receiving further information on this arrangement, as this issue may come up during the course of the discussions with the United States Mission.

### c. Payment of GRT by Permanent Missions

12. Regarding the third question of the United States Mission, it remains unclear whether any of the Permanent Missions of Member States have also been paying such GRT charges in respect of their energy suppliers invoices. However, because this issue concerns the bilateral relationships between the United States Government and the affected Members States, we will convey to the United States Mission that it is in a better position than the United Nations to determine if there has been any remission or reimbursement of GRT charges by the United States Government to Permanent Missions of Member States.

#### *(iii) Conclusion*

13. Given the fact that the GRT is not a direct tax from which the Organization is exempt, in light of the electricity disconnection notice given in respect of the Secretary-General's premises, and in view of the essential nature of the services being provided by energy supplier companies and the information available to this Office, this Office reaffirms its previous advice (see para. 3 above) that the United Nations should pay the GRT charges, including any outstanding amount withheld from prior payments to the energy suppliers in respect of the GRT charges, pending the resolution with the United States Government of the Organization's request for remission or reimbursement of such GRT charges. We will therefore continue our dialogue with the United States Mission on this matter and report any further developments to you.

4 September 2008

## (*g*) Interoffice memorandum to the Director of the Programme Planning and Budget Division, Office of Programme Planning, Budget and Accounts (OPPBA), regarding the Lease Agreement between the United Nations and a Member State

Lease Agreement concerning lease of land—Entry into force of Lease Agreement—Exemption under the Agreement from any taxes, including value added tax (VAT), in connection with the land subject of the lease, and the premises and any improvements to be erected thereon—Exemption from any taxes, including VAT, in respect of any materials, equipment, supplies and other goods and services required for the construction of premises or other improvements—Effect of Directive issued by the Government concerning procedures for remission and reimbursement of indirect taxes on the terms of Lease Agreement

1. I refer to the e-mail message, dated 4 September 2008, addressed to this Office by the Office of Central Support Services, copy enclosed,[*] and concerning the above-referenced matter. As stated in that e-mail message, the Advisory Committee [on Administrative and Budgetary Questions (ACABQ)] seeks the advice of this Office with respect to three questions concerning the Lease Agreement between the United Nations and [State] concerning the leasing of land in [city]. According to the e-mail message, the Advisory Committee has raised the three questions in connection with the payment of value added

[*] Not reproduced herein.

tax (VAT) under the Lease Agreement. The questions raised by the Advisory Committee and the responses of this Office thereto are set forth below.

*Status of the Lease Agreement*

2. The Advisory Committee first seeks clarification as to whether the Lease Agreement is in force. The Lease Agreement entered into force on 24 January 2007, in accordance with Article XIV of the Agreement, when both parties signed and sealed the Agreement. The term of the lease is 99 years, commencing on 22 June 2005, until 21 June 2104.

*Payment of VAT under the Lease Agreement*

3. The Advisory Committee secondly seeks an interpretation from this Office as to whether the Organization must pay VAT upfront under the Lease Agreement and then seek remission of such VAT from the Government of [State] later. Article II, paragraph 1, of the Lease Agreement provides that the lease of the additional land is for the consideration of the payment by the United Nations of one [State currency] and "free of any other rent, charges, taxes, levies or other imposts . . . ." Article II, paragraph 5, of the Lease Agreement also states that, "[t]he land and the premises shall be exempt from any and all charges, levies, taxes and other imposts with the exception of charges for specific services rendered." In addition, Article XII, paragraph (a), of the Lease Agreement stipulates that all materials, equipment, supplies and other goods and services necessary for the purposes of, or relating to, the construction of the premises are exempt from all taxation imposed by the Government.

4. Based on the foregoing, the Lease Agreement fully exempts the Organization from the payment of any taxes, including VAT, in connection with the land that is the subject of the lease, the premises and any improvements to be erected thereon. In addition, the Lease Agreement exempts the Organization from any taxes, including VAT, in respect of any materials, equipment, supplies and other goods and services that are required for the construction of such premises or other improvements. Accordingly, because the Organization is exempt from such taxes, including VAT, the United Nations should not make upfront payments of any such taxes, including VAT.

*Effect of the Government of [State]'s edict on VAT and remission thereof*

5. The Advisory Committee thirdly seeks an interpretation from this Office as to whether Directive No. [ ], issued by the Government of [State] in 2008, is contradictory to the terms of the Lease Agreement. As explained in a memorandum, dated 24 July 2008, from this Office, copy enclosed,* the Directive No. [ ], issued by the Government of [State], provides for the procedures for remission and reimbursement of indirect taxes, such as VAT, in respect of goods and services paid by "Organizations enjoying Special Privileges," such as the United Nations. However, as noted above, the Lease Agreement fully exempts the Organization from payment of such taxes, including VAT, in respect of the land, the premises or other improvements thereon, and any materials, equipment, supplies and other goods and services that are required for the construction of such premises or other improvements. Accordingly, the Directive No. [ ] is not contradictory to the Lease Agree-

* Reproduced in section 1 (d) of this chapter.

ment, because no taxes should be paid under the Lease Agreement for which the Organization would need to seek remission or reimbursement under the procedures set forth in Directive No. [ ].

6. Thus, the Directive No. [ ] would only apply to the reimbursement or remission of taxes, including VAT, in accordance with Article II, Section 8, of the 1946 Convention on the Privileges and Immunities of the United Nations,* in cases in which the Organization pays taxes, including VAT, on goods and services procured by the United Nations in [State] outside of the scope of the Lease Agreement.

5 September 2008

## 2. Procedural and institutional issues

### (*a*) Memorandum to the Executive Secretary, Secretariat of the Basel Convention,** regarding the criteria for accreditation of representatives of Non-Governmental Organizations (NGOs) from [Province] of [State] to meetings of the Basel Convention

Accreditation procedure of organizations as observers in official meetings—General Assembly resolution 2758 (XXVI)—Substantive secretariats must ascertain the *bona fide* nature of the organizations by examining a copy of their registration in their headquarters country, in the case of NGOs as evidence of their non-profit status—Intergovernmental organs must consider the requests and take a formal decision, normally on a "non-objection basis"—Possibility for UNOG Director-General to refuse access to representatives of NGOs on safety and security grounds—ID cards and passes for United Nations premises issued by the Department of Safety and Security upon formal request of the substantive secretariat

1. I refer to your memorandum of 6 November 2007 seeking our guidance on the criteria for accreditation of representatives of NGOs and other observer delegations from [Province] of [State], in meetings of the Basel Convention.

#### I. Background

2. You inform us that at the sixth session of the Open-ended Working Group to the Basel Convention, held in Geneva from 3 to 7 September 2007, three NGO representatives bearing identification documents issued by purported authorities of [Province] of [State] were denied access to the meeting by the United Nations Office in Geneva (UNOG) security assigned to protect the premises where the meeting was taking place. When the Secretariat of the Basel Convention complained about it, UNOG security officers argued that in accordance with instructions issued by the Director-General "access badges to the Palais des Nations can only be issued upon presentation of a valid identification document issued *by a State recognized by the General Assembly*" (emphasis added). Apparently, UNOG security claims that such an instruction is based on the General Assembly resolu-

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

** United Nations, *Treaty Series*, vol. 1673, p. 57.

tion 2758 (XXVI) which determines that, for United Nations purposes, the representatives of the [State] are the only legitimate, representatives of [State] to the United Nations.

3. You also inform us that several members of the Working Group expressed concerns about the situation indicating that "admission of observers to meetings of the Convention was the prerogative of the Parties". In this respect, you draw our attention to article 15 (6) of the Basel Convention, which reads as follows:

> "[...] Any other body or agency, whether national or international, governmental or non-governmental, qualified in fields relating to hazardous wastes or other wastes which has informed the Secretariat of its wish to be represented as an observer at a meeting of the Conference of the Parties, may be admitted unless at least one third of the Parties present object. The admission and participation of observers shall be subject to the rules of procedure adopted by the Conference of the Parties."

4. Since a meeting of the Conference of the Parties is scheduled for June 2008, you would like to receive our guidance "on whether [Province] observers can be admitted to Basel Convention meetings and, if so, what form of identification might be accepted."

## II. Practice of the United Nations Secretariat

5. The issue of accreditation, presence and participation of observers in meetings of intergovernmental organs is to be determined and assessed by the organs themselves, in coordination with their substantive secretariats, within the framework of their relevant rules of procedure, decisions, policies and practices.

6. The normal practice of the Organization with respect to this question is for the entities wishing to participate as observers in the works of a particular organ to send an application or request to the substantive secretariats. Secretariats are to ensure that these entities are *bona fide* organizations relevant to that organ before submitting them to the consideration of the intergovernmental organs. Customarily, secretariats ascertain the *bona fide* nature of the organizations by examining a copy of their registration in their headquarters country, in the case of NGOs, as evidence of their non-profit status.

7. In the case of NGOs based in the [Province] of [State], since the adoption by the General Assembly of resolution 2758 (XXVI), the United Nations Secretariat considers that their headquarters country is the [State]. The Secretariat accordingly considers itself not to be in a position to proceed on the basis that an entity based in the [Province] of [State] is a *bona fide* organization, unless it is provided with documents issued by the authorities of the [State] certifying that that entity is incorporated or headquartered in that country. This is, in particular, the practice with respect to NGOs seeking consultative status with the Economic and Social Council.

8. Once the substantive secretariat has satisfied itself of the *bona fide* nature of the requesting organizations and that they have fulfilled all required criteria, it is for the intergovernmental organs to consider the requests and to take a formal decision, normally, on a "non-objection basis", accepting or not the presence and participation of these organizations in their meetings as observers.

9. The role of security is to assess threats and mitigate risks to ensure the safety and security of the participants in those meetings, including observers, and the United Nations property. In that respect, it is the judgment of the UNOG Director-General, as

the "Designated Official" in Geneva responsible for security, to assess the risks in any given situation and take the appropriate measures. That was, for example, the case of NGO representatives subject to requests for arrest or detention by Interpol who were denied access to a meeting of the former Commission on Human Rights at the Palais in Geneva by the UNOG Director-General in 2005.* That was a policy decision taken by the UNOG Director-General within the scope of his security responsibilities.

### III. Analysis and advice

10. In light of the practice, as described above, and in the absence of a security threat, the matter of whether "[Province] observers can be admitted to Basel Convention meetings and, if so, what form of identification might be accepted" should be examined in the light of the rules of procedure, decisions, policies and practices of the Basel Convention and the Organization at large. Please note that any organization holding activities within United Nations premises or under the auspices of the United Nations should follow the Organization's rules.

11. With respect to the first part of your question, we would presume that the Basel Secretariat follows the above-described practice of substantive secretariats to ascertain the *bona fide* nature of all entities which have informed it of their interest to be represented as observers, before submitting them to the consideration of the Conference of the Parties, or the relevant subsidiary organ of the Convention. This practice should also include the procedures outlined in paragraph 7 above with respect to NGOs based in the [Province] of [State], as we understand other environmental treaty bodies, whose secretariat is also provided by the United Nations Environment Programme, do. Thus, NGOs from the [Province] of [State] should be required to provide proof of registration issued by the authorities of the [State].

12. Thereafter, and pursuant to article 15 (6) of the Basel Convention, the Basel Secretariat should present the list which includes any organization "which has informed the Secretariat of its wish to be represented as an observer at a meeting of the Conference of the Parties" for the consideration of the Parties. Also pursuant to article 15 (6), any such organization "may be admitted unless at least one third of the Parties present object."

13. In light of the above, NGOs based in the [Province] of [State] competent in the subject matter of the Convention, can only be included in the list referred to above, if the above-described procedure has been successfully followed, in particular, they have provided proof of registration issued by the authorities of the [State]. In our view, this procedure should be applicable also to meetings of subsidiary organs of the Convention, such as the Open-ended Working Group.

14. Turning to the second part of your question regarding the identification required for legitimate representatives of accepted NGOs to enter United Nations premises, we would like to draw your attention to the Department of Safety and Security (DSS) Standard Operating Procedures on issuance of ID cards and passes. In accordance with these procedures, the substantive secretariat should make a formal request for passes, on the basis of the determination made by the intergovernmental organ, in the form of a "memo-

* Reproduced in the 2005 edition of this publication, United Nations publication, Sales No. E.08.V.1 (ISBN 978-92-1-133664-1), chapter VI A.

randum, on United Nations letterhead, signed by an authorized signatory". In order for DSS to issue the passes, the "requestor must present a valid form of photo identification, such as a passport or driver license." This procedure, which is acceptable from a legal point of view, is followed at Headquarters.

15. In our view, the above DSS Standard Operating Procedures is normally sufficient to grant ground passes and no additional condition is required. In any event, before any future meetings of the Basel Convention take place, we would suggest that you discuss any concern you may have on this particular issue in light of the opinion stated in this memorandum with UNOG security and consult with the Senior Legal Liaison Officer in UNOG, to avoid any misunderstandings.

4 February 2008

### (*b*) Interoffice memorandum to the Director of the Investment Management Service of the United Nations Joint Staff Pension Fund (UNJSPF) regarding procurement of a securities lending programme

In accordance with article 19 of the Fund's regulations, decisions concerning investment of the assets of the UNJSPF are vested exclusively in the Secretary-General, who has delegated such authority to the Representative of the Secretary-General for Investment of the Assets of the Fund—Legal obligation to consult with the UNJSPF Investments Committee, and to receive suggestions from the UNJSPF Board, regarding investment policies and decisions—In order to facilitate decision-making, recommendation that the "concurrence" of the Investments Committee and of the Board be obtained regarding the establishment of, or changes to, investment policies or practices

1. I refer to your e-mail message of 19 December 2007, by which you raised questions about my prior memorandum, dated 13 August 2007 (copy enclosed for ease of reference),[*] concerning the above-referenced matter. Specifically, you raised the question as to what was meant by the statement, set forth in paragraph 5 of my memorandum, reiterating what had been previously stated by the Director of the General Legal Division in her memorandum of 17 October 2006, concerning this matter (see copy enclosed).[**] Thus, I stated that, before issuing the request for proposal (RFP) for services relating to the operation of a securities lending programme for the United Nations Joint Staff Pension Fund (Fund), the Representative of the Secretary-General for the Investment of the Assets of the Fund should confirm to the Investment Management Service and the Procurement Service that he has "*consulted with and obtained the concurrence* of the Investments Committee and the Board" of the Fund "with respect to engaging in a securities lending programme" before committing to a procurement action (emphasis added). In your e-mail message, it was questioned whether the recommendation to consult with and to obtain the "concurrence" of the Investments Committee and the Board of the Fund conforms to the provisions of article 19 of the Fund's Regulations.

2. As this Office has explained on numerous occasions in advice addressed to the Representative of the Secretary-General for the Investment of the Assets of the Fund, as

[*] Not reproduced herein.

[**] Not reproduced herein.

well as addressed to the Director of the Investment Management Service 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". Thus, in accordance with article 19 of the Regulations of the Fund, decisions concerning the investment of the assets of the Fund are vested exclusively in the Secretary-General, who has delegated such authority to the Representative of the Secretary-General for Investment of the Assets of the Fund. Moreover, in exercising such decision-making authority, the Representative of the Secretary-General must "consult" with the Investments Committee regarding the establishment of, or modifications to, policies or practices regarding the investment of the assets of the Fund, including, for example, questions regarding the types and categories of investments, establishment of a securities lending programme, etc. In addition, the Representative of the Secretary-General must receive suggestions "from time to time" from the Board of the Fund on these investment policy matters.

3. While the Representative of the Secretary-General is legally obligated only to "consult" with the Investments Committee and to "receive suggestions" from the Board regarding investment policy and decisions, as a practical matter, the Representative of the Secretary-General is likely to have an easier time in exercising his decision-making authority under article 19 of the Regulations of the Fund if he receives the "concurrence" of the Investments Committee and of the Board regarding the establishment of, or changes to, investment policies for the Fund. The experience of the Fund in dealing with the question of how to manage the North American equities portfolio underscores the importance of obtaining concurrence among the bodies charged with reviewing the Fund's investment-policies. Such considerations, and not the legal provisions set forth in the Regulations of the Fund concerning the Secretary-General's primary authority over investment policy, are the basis of the recommendation set forth in paragraph 5 of my memorandum of 13 August 2007, concerning this matter. As noted, my advice merely reiterated the same recommendation of the Director of the General Legal Division, as set forth in her memorandum of 17 October 2006, concerning this matter.

4. I also note that it appears that both the Investments Committee and the Board, in fact, have concurred with the proposal of the Representative of the Secretary-General to engage in a securities lending programme. Thus, as reported in paragraphs 55 and 56 of the report of the fifty-fourth session of the Board of the UNJSPF regarding its session held in New York in July 2007 (JSPB/54/R.42, of 13 July 2007), the proposed securities lending programme was discussed by the Board, which also received the favourable comments on the proposed securities lending programme made by the Investments Committee. In its observations on the investments policies of the Representative of the Secretary-General, elements of the Board expressed reservations only concerning matters unrelated to a securities lending programme (see paragraphs 59 and 60 of the report). However, the Board endorsed the overall investment policies of the Representative of the Secretary-General (see paragraphs 62 of the report). Accordingly, it appears that, with respect to the proposed securities lending programme, the Representative of the Secretary-General has met his legal obligations under article 19 of the Regulations of the Fund to consult with the Investments Committee and to receive suggestions from the Board. Moreover, as stated in the

Board's Report, both the Investments Committee and the Board appear to have concurred with the proposal for the Fund to engage in a securities lending programme.

5. As discussed in both of the prior memoranda from this Office concerning this matter, as referred to previously, the Investment Management Service and the Procurement Service may wish to liaise with this Office, who is being assisted by outside counsel for the Fund's investment matters, to ensure that the elements of any procurement activities and any resulting contracts for services relating to a securities lending programme comply with the applicable legal requirements for such a programme, including ERISA compliance.

7 February 2008

### (*c*) Note to the Executive Office of the Secretary-General (EOSG) on policy considerations related to the filing of *amicus curiae* briefs

ESTABLISHMENT OF GUIDELINES FOR THE FILING BY UNITED NATIONS UNITS OF *AMICUS CURIAE* BRIEFS IN NATIONAL AND INTERNATIONAL COURTS—SUCH BRIEFS SHOULD FALL WITHIN THE MANDATE OF THE UNIT—BRIEFS SHOULD ONLY BE SUBMITTED IN CASES PUTTING AT STAKE THE INTERESTS OF THE UNITED NATIONS OR RELATING TO THE WORK OF THE UNITED NATIONS—BRIEFS SHOULD ADDRESS A NEW ISSUE OF GREAT IMPORTANCE IN THE AREA OF EXPERTISE OR EXPERIENCE OF THE UNIT—BRIEFS TO BE CLEARED BY EOSG IN ORDER TO GUARANTEE THE CONSISTENCY OF UNITED NATIONS POSITIONS AND POLICIES

1. This is in reference to your note dated 21 December 2007 requesting that the Office of Legal Affairs (OLA) prepare a background note to serve as the basis for initial discussions between EOSG and other relevant departments concerning the filing of *amicus curiae* briefs. You note that certain legal and political considerations may arise regarding the filing of *amicus* briefs, and also raise the issue as to what process, if any, should be adopted when a United Nations Secretariat official or unit wishes to file an *amicus* brief in the name of the United Nations. Please note from the outset that United Nations experts who are not Secretariat officials (e.g. Special Rapporteurs of the Human Rights Council) might not be subject to the authority of the Secretary-General in this regard.

2. In light of the relatively new, and increasingly growing, practice of the United Nations submitting *amicus* briefs before national and international courts, it is our view that it may be helpful if certain guidelines were established in respect of the preparation and submission of *amicus* briefs, which would apply across the United Nations system. Such guidelines would address issues such as (i) whether the submitting official or unit has a mandate which would allow it to submit an *amicus* brief; (ii) the kinds of cases in which the United Nations should present *amicus* briefs; (iii) the nature and content of *amicus* briefs; and (iv) the process for clearing an *amicus* brief prior to its submission.

3. While the mandate of a submitting Secretariat official or unit, the occasion in which an *amicus* brief should be submitted, and the appropriate nature of the *amicus* brief, may all be inter-connected in certain respects, our views as to each of these issues are set forth below:

(a) *mandate* – the *amicus* brief should clearly fall within the mandate of the particular official or unit. In this connection, we recall, for example, the High Commissioner for Human Rights' *amicus* brief setting forth relevant international jurisprudence with respect to the death penalty, or with respect to the work of human rights officers in the

field. In such cases, it was clear that the briefs were consistent with the mandate of the Office of the High Commissioner for Human Rights concerning human rights jurisprudence and advocacy.

(b) *the occasions on which the United Nations should submit* amicus *briefs – amicus* briefs should only be submitted in cases where the United Nations Secretariat has a clear interest in presenting its views to the court concerned, *i.e.,* in particular cases where the interests of the United Nations are at stake, or where the case at hand is directly related to the work of the United Nations in some aspect. For example, in 2006, OLA prepared an *amicus* brief for submission on behalf of the Organization in a case before the European Court of Human Rights (ECHR) in respect of specific questions addressed to the United Nations by the ECHR regarding role of the United Nations Interim Administration Mission in Kosovo; in that case, the United Nations had an interest in making submissions as it was one of the relevant actors in the case before the Court, and had particular knowledge with respect to the role of the United Nations in Kosovo.

(c) *the nature and content of the* amicus *brief* – if an *amicus* brief is to make a meaningful contribution to the deliberations of the court, it should address an issue which is new, innovative, of great importance, or topical in some regard, and one upon which the official or unit submitting the brief has particular expertise or experience (legal, factual, etc.). In this respect, we recall that when OLA submitted an *amicus* brief before the United States District Court, for the Southern District of New York, in September 2005 in relation to an action concerning the premises of the Palestine Mission, the *amicus* brief outlined the United Nations law concerning the applicability of the 1946 Headquarters Agreement,* the status of Palestine at the United Nations, and the importance of the functions of the Palestine Mission to the work of the United Nations. In other words, an *amicus* brief submitted by the United Nations Secretariat should concern matters which are within the particular purview, knowledge and expertise of the United Nations.

4. Regarding process, it is our view that *amicus* briefs in the name of the United Nations Secretariat, an official (*e.g.,* Secretary-General, Special Representative of the Secretary-General, High Commissioner for Human Rights, High Commissioner for Refugees), or unit should be sent to EOSG for clearance well ahead of the deadline for their submission to the relevant court. This is to ensure that the content of the briefs is consistent with general United Nations policy on the issue at hand; that it does not purport to waive the privileges and immunities of the United Nations or its staff; that it is legally correct; and that it is of a high quality. In this connection, we note that the EOSG may in turn wish to (i) request OLA to clear particular draft briefs for legal content and procedure, and with respect to privileges and immunities; and/or (ii) request the Department of Peacekeeping Operations or the Department of Political Affairs or other relevant departments, to examine draft briefs to ensure that their content does not raise policy issues which may negatively impact on the relationship between the United Nations and Member States, or does not prejudice United Nations operations in the field.

5. Another issue for policy consideration is whether all United Nations Secretariat officials and units should submit their *amicus* briefs to EOSG for clearance, or whether some could be considered more "autonomous" than others in this regard, and thus not

* United Nations, *Treaty Series*, vol. 11, p. 11.

need EOSG clearance; "self-regulating" as it were. That being said, in our view the criteria listed above should apply to all Secretariat officials and units.

16 April 2008

### (*d*) Interoffice memorandum to the Senior Legal Officer, United Nations Office in Vienna (UNOV), regarding the relationship between the United Nations Office on Drugs and Crime (UNODC) and the United Nations Interregional Crime and Justice Research Institute (UNICRI)

Legal relationship between UNODC and UNICRI—UNICRI is a United Nations entity forming part of the United Nations system—Administrative support to UNICRI provided by UNODC, on behalf of UNOV—Reimbursement to the Organization of the cost of such support by UNICRI—Responsibility of UNODC and UNICRI to agree and clarify the relevant terms and conditions for the provision of those services—UNICRI should carry out its activities in close collaboration and coordination with, *inter alia*, bodies within the United Nations system—UNODC not responsible or accountable for UNICRI activities—UNICRI and UNODC are legally separate entities, with distinct chains of accountability

1. I refer to your memorandum dated 27 February 2008 in which you seek legal advice on the scope and contents of the responsibility of the Executive Director of the United Nations Office of Drugs and Crime (UNODC) "in the interest of clarifying the responsibility and accountability for United Nations Interregional Crime and Justice Research Institute (UNICRI) activities within the Secretariat."

Background

2. By its resolution 1989/56 of 24 May 1989, the Economic and Social Council established UNICRI, and adopted its statute ("the Statute").

3. Pursuant to the Statute, UNICRI "and its work shall be governed by a Board of Trustees under the overall guidance of the Committee on Crime Prevention and Control" ("the Commission").[1] The seven members of the Board of Trustees, each of whom are nominated by the Secretary-General and endorsed by the Economic and Social Council, are appointed in their individual capacity. They shall be eligible for reappointment by the Commission with the endorsement of the Economic and Social Council for not more than one additional term.

4. In addition, "a representative of the Secretary-General, who shall normally be the Head of the Crime Prevention and Criminal Justice Branch of the Centre for Special Development and Humanitarian Affairs, a representative of the Administrator of the

[1] The Committee on Crime Prevention and Control was dissolved in 1991 further to paragraph 11 (a) of General Assembly resolution 46/152 of 18 December 1991. In the same resolution, paragraph 11 (b), a "commission on crime prevention and criminal justice as a new functional commission of the Economic and Social Council . . ." was created.

United Nations Development Programme, a representative of the host country, and the Director of the Institute shall serve as *ex officio* members of the Board."[2]

5. The role of the Board, under the guidance of the Commission, is to formulate principles, policies and guidelines for the activities of UNICRI, and on the basis of recommendations or reports submitted by the Director of UNICRI, approve work programmes and budget proposals of the Institute, evaluate the Institute's activities, make recommendations for the operation of the Institute, and periodically report to the Economic and Social Council through the Commission.

6. The Director of UNICRI is appointed by the Secretary-General after consultation with the Board of Trustees, and has the overall responsibility for the organization, direction, and administration of UNICRI in accordance with general directives issued by the Board of Trustees and within the terms of the authority delegated to him by the Secretary-General.

7. Under the Statute, as a United Nations entity and forming part of the United Nations system, UNICRI is subject to the United Nations Financial Rules, the United Nations Staff Rules, and all other administrative issuances of the Secretary-General, except as otherwise decided by the Secretary-General. The staff members of UNICRI are appointed by the Director of UNICRI in the name of the Secretary-General and limited to service with the Institute. The staff members are responsible to the Director in the exercise of their functions. The terms and conditions of service of the Director and the staff members are governed by the United Nations Staff Regulations.

## Analysis

8. You indicate that you would like to clarify the responsibility and accountability for the activities of UNICRI within the Secretariat since in your view there is no "formal organizational link between UNODC and UNICRI despite the fact that UNODC is responsible for the provision of support to UNICRI in terms of finance and personnel matters."

9. We note that under article VIII of the Statute, the Secretary-General provides UNICRI with the appropriate administrative and other support in accordance with the Financial Regulations and Rules of the United Nations further to the Economic and Social Council resolution 1989/56 of 24 May 1989. We understand that UNICRI reimburses the Organization the cost of such support as determined by the Controller of the United Nations in consultation with the Director of UNICRI.

10. The Secretary-General's bulletin entitled "Organization of the United Nations Office at Vienna" (ST/SGB/2004/5)[*] dated 15 March 2004 ("the UNOV Bulletin") at para-

[2] The Centre for Social Development and Humanitarian Affairs was dissolved when the Secretary-General established the Centre for International Crime Prevention in accordance with the reform programme contained in the Secretary-General's report "Renewing the United Nations: A programme for reform" (A/51/950), dated 14 July 1997.

[*] 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).

graph 2.1 states that the United Nations Office at Vienna (UNOV) "provides administrative and other support services to United Nations Secretariat units [and] administers joint and common services for other organizations of the United Nations system located in Vienna." Reading this Bulletin in conjunction with the Secretary-General's bulletin entitled "Organization of the United Nations Office on Drugs and Crime" (ST/SGB/2004/6) also dated 15 March 2004 ("the UNODC Bulletin"), the Director General of UNOV also serves as the Executive Director of UNODC. Under paragraph 3.2 of the UNODC Bulletin, the Executive Director "acts on behalf of the Secretary-General in fulfilling the responsibility that devolves upon him . . . under the terms of . . . resolutions of United Nations organs relating to international drug control or crime prevention." This function is devolved to the UNODC Director of the Division for Treaty Affairs who, on behalf of the Executive Director of UNODC, fulfils "the responsibilities devolving upon the Secretary-General under the drug control, crime prevention and terrorism conventions and instruments as well as relevant intergovernmental resolutions."

11. In light of the fact that UNICRI was established as a result of a resolution of a United Nations organ and taking into account the relevant provisions in both the UNOV and UNODC Bulletins, we would conclude that the provision of such administrative and other support services is carried out by UNODC, on behalf of UNOV. It is therefore for UNODC and UNICRI to agree and clarify the relevant terms and conditions under which the services are provided.

12. You further indicate that there is no formal relationship between UNODC and UNICRI, and that UNODC has no means of ensuring the effective coordination of UNICRI, which seems to be based on *ad hoc* contacts and consultations and on the membership of UNODC Director of the Division for Treaty Affairs on the UNICRI Board of Trustees.

13. We note that UNICRI, in pursuit of its objectives and functions as outlined under article II of the Statute, should carry out its activities in close collaboration and coordination with, *inter alia*, bodies within the United Nations system. Furthermore, we note that under the UNODC Bulletin, one of the core functions of the UNODC Director of the Division for Treaty Affairs is to "coordinate the activities of UNICRI and ensure cooperation with regional and affiliated criminal justice institutes."

14. In our opinion, while the above reflects a need for the coordination of activities in the field of crime, terrorism prevention, and criminal justice across the United Nations, it does not translate into UNODC being responsible and accountable for UNICRI activities. Indeed, UNICRI and UNODC are legally separate entities, with distinct chains of accountability. As a subsidiary organ of the Economic and Social Council and in accordance with its Statute, UNICRI is accountable to the Council, through the Board of Trustees and the Commission, for its activities. The fact that UNICRI and UNODC should coordinate activities in the field of criminal justice does not establish any accountability lines between them.

### Conclusion

15. In sum, for the reasons outlined above, it is our understanding that the Executive Director of UNODC is not responsible for the activities of UNICRI, but should coordinate with it activities in the field of criminal justice. Both organizations, UNODC and UNICRI,

should agree on the adequate mechanisms to ensure that the required coordination is done in an effective manner, without necessarily creating any responsibility and accountability links between them. Furthermore, it is for the Executive Director of UNODC, as delegated by the Executive Director of UNOV, under the terms and conditions agreed upon with UNICRI, to provide administrative and other support services as required by the Institute. We note that similar arrangements in relation to the appointment of the UNICRI Director and staff, as well as the provision of administrative and other support services, are in place with the other four research and training institutes, namely the United Nations Institute for Training and Research (UNITAR), United Nations Research Institute for Social Development (UNRISD), United Nations Institute for Disarmament Research (UNIDR), and the United Nations Research and Training Institute for the Advancement of Women (INSTRAW), all of whom fall under the umbrella of the Economic and Social Council.

21 April 2008

## (*e*) Note to the Assistant Secretary-General, Executive Director of the United Nations Institute for Training and Research (UNITAR), regarding the autonomy of UNITAR

UNITAR defined under its Statute as an autonomous institution within the framework of the United Nations—The responsibilities of the Secretary-General as the chief administrative officer apply also with respect to UNITAR—UNITAR has limited legal capacity—UNITAR staff is subject to the United Nations Staff Regulations and Rules—Secretary-General's bulletins and Administrative Instructions do not apply to UNITAR unless expressly indicated—Authority of Executive Director of UNITAR to appoint and promote staff—UNITAR staff members are considered to be officials of the United Nations within the meaning of Article 105 of the Charter—Executive Director's authority with respect to other human resources matters not clearly defined in the Statute—United Nations Financial Regulations and Rules apply to UNITAR, subject to any special rules issued by the Executive Director in agreement with the Secretary-General and after consultation with the Board of Trustees and the Advisory Committee on Administrative and Budgetary Questions of the United Nations—Expenses by UNITAR met from voluntary contributions—Executive Director authorized to accept contributions on behalf of the Institute—Controller required to provide the necessary financial and accounting functions—Capacity under the Statute to enter into contracts does not imply authority for all procurement matters—Requests for delegation of procurement authority to be directed to the Under-Secretary-General for Management —UNITAR subject to audits by the United Nations Board of Auditors and the Office of Internal Oversight Services

### *(i) Background*

1. The United Nations Institute for Training and Research ("UNITAR") was established by the Secretary-General, pursuant to General Assembly resolution 1934 (XVIII) of 11 December 1963. By paragraph 2 of that resolution, the General Assembly requested the Secretary-General to take the necessary steps to establish the Institute. In pursuance of

that authority, the Secretary-General approved the Statute of UNITAR ("Statute"), which was promulgated in 1965 and most recently amended in 1999.

2. Under the Statute, UNITAR is defined as an "autonomous institution within the framework of the United Nations",[1] established to perform the functions of training and research for the purpose of enhancing the effectiveness of the Organization. The Board of Trustees, whose members are appointed by the Secretary-General, formulates the principles and policies governing UNITAR activities and operations.[2] The Executive Director of UNITAR is appointed by the Secretary-General after consultations with the Board of Trustees.[3]

### *(ii) Legal status and authority*

3. As an "autonomous institution" established by the Secretary-General within the framework of the United Nations, UNITAR is an integral part of the United Nations and bound under the Charter of the United Nations and by the relevant decisions of its principal organs. In this context, the Secretary-General's responsibilities as the chief administrative officer of the United Nations to ensure overall compliance with General Assembly directives and a consistent interpretation of the Staff and Financial Regulations and Rules also apply with respect to UNITAR. Moreover, the United Nations Administrative Tribunal (UNAT) has held that UNITAR is part of the United Nations and that its staff members are staff members of the United Nations.[4]

4. It follows from its autonomous character that UNITAR undertakes its activities with a sufficient degree of autonomy and is not dependent on the regular United Nations budget. Moreover, UNITAR is liable for its activities and any liability arising from acts it has undertaken in the exercise of its functions shall be met by the Institute from its own resources and cannot constitute a liability on other funds of the United Nations.[5]

5. UNITAR does not have its own legal capacity. However, in order to facilitate the implementation of its functions, the Institute was provided under its Statute with the authority to enter into contracts with organizations, institutions or firms.[6] Thus, UNITAR has limited legal capacity, which is drawn on the legal personality of the United Nations.[7] UNITAR also enjoys the status, privileges and immunities of the Organization provided under the Charter of the United Nations and other international agree-

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[1] UNITAR Statute, article I.

[2] UNITAR Statute, article III, paragraphs l (a) and 2 (a) .

[3] UNITAR Statute, article IV, paragraph 2.

[4] UNAT Judgement No. 423, Isaacs (1988), in paragraph III, states that "In Judgement No. 390, Walter (1986), the Tribunal held that 'UNITAR has no legal status of its own'. It was established at the request of the General Assembly by the Secretary-General. The Statute defines UNITAR as 'an autonomous institution . . . within the framework of the UN. . .'. This indicates that UNITAR is part of the UN and, hence, that staff members of UNITAR are staff members of the UN."

[5] Opinion of the Legal Counsel of 15 May 1996 [reprinted in the 1996 edition of this publication, United Nations publications, Sales No. 01.V.10 (ISBN 92-1-133644-9), p. 448].

[6] UNITAR Statute, article X, paragraph 2.

[7] Opinion of the Legal Counsel of 15 May 1996, *supra* note 5.

ments, in particular, the 1946 Convention* on the Privileges and Immunities of the United Nations.[8]

*(iii) Human resources management*

**a. Applicability of United Nations Staff Regulations and Rules**

6. Article IV, paragraph 5, of the UNITAR Statute provides that the "terms and conditions of service of the staff shall be those provided by the Staff Regulations and Rules of the United Nations, subject to such arrangements for special rules or terms of appointment as may be approved by the Secretary-General on the recommendation of the Board". Based on this provision, UNITAR staff are clearly subject to the United Nations Staff Regulations and Rules.[9] This Office is not aware of any special rules or terms of appointment that have been approved by the Secretary-General.

7. This Office previously advised in 1986 that UNITAR staff are also subject to United Nations administrative instructions.[10] Secretary-General's bulletin** ST/SGB/1997/1, entitled "Procedures for the Promulgation of Administrative Issuances," was subsequently issued in 1997, stating in section 3.4 that "Secretary-General's bulletins shall not, unless otherwise stated therein, be applicable to separately administered organs and programmes of the United Nations." From this provision, this Office understands that Secretary-General's bulletins and Administrative Instructions would not apply to UNITAR, unless otherwise expressly indicated, at least starting from 1 June 1997 (the date of entry into force of ST/SGB/1997/1).[11] This would not preclude the use by the UNITAR Administration of Secretary-General's bulletins and administrative instructions as guidance in applying the United Nations Staff Regulations and Rules to UNITAR staff members.

**b. Authority to appoint and promote UNITAR staff and other personnel**

8. Under article IV, paragraph 3, of the UNITAR Statute, the staff of the Institute are appointed by the Executive Director and are responsible to him in the exercise of their functions. On this basis, the authority of the Executive Director to appoint and promote UNITAR staff is recognized as being independent in so far as the authority is not delegated, but derives directly from the Statute.[12] In the selection of senior officials of the Institute, however, the Executive Director is required to consult with the Secretary-General.

9. Personnel decisions are made by the Executive Director on the basis of his independent authority and, accordingly, appointments made by the Executive Director are

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

[8] UNITAR Statute, article X, paragraph 1.

[9] For example, the Legal Counsel advised that Staff Rule 104.10 (a) on the recruitment of a staff member's sibling also applies to UNITAR. Opinion of the Legal Counsel of 22 April 1996.

[10] Opinion of the Legal Counsel of 4 November 1986.

** For information on Secretary-General's bulletins, see note in section 2 (d) above.

[11] The impact of section 3.4 of ST/SGB/1997/1 on the legal authority of UN administrative issuances in respect of UNITAR staff was explained in a letter from the General Legal Division to UNITAR, dated 19 December 2005.

[12] Opinion of the Legal Counsel of 22 April 1996. See also memorandum from the Office of Human Resources Management to the Legal Counsel, dated 5 November 2007.

limited to service with UNITAR. Moreover, as UNITAR is funded through extra-budgetary resources, the appointment of UNITAR staff members is limited to UNITAR also for the reason that the duration of these appointments is limited to the availability of funds. Notwithstanding the limitation of their appointments to UNITAR, staff of the Institute are considered "officials of the United Nations within the meaning of Article 105 of the Charter of the United Nations and of other international agreements and United Nations resolutions defining the status of the officials of the Organization."[13]

10. Related to the authority to appoint and promote staff is the authority to establish review bodies to advise on the appointment and promotion of staff. This Office previously advised in 1982 that the establishment of a UNITAR Appointment and Promotion Board would be in accordance with staff rule 104.14. Likewise, this Office would consider that the establishment by the Executive Director of an advisory body similar to the central review bodies provided for in the current staff rule 104.14,[14] would be within the independent authority of the Executive Director to appoint and promote staff.

11. Finally, the UNITAR Statute also addresses the appointment of other individuals associated with the Institute. These include rotating staff who are appointed by the Executive Director and full-time senior fellows appointed by the Secretary-General. Additionally, the Executive Director may also arrange for consultants, fellows and experts, as well as appoint correspondents and establish advisory bodies of individual experts or representatives of organizations and institutions.[15]

**c. Authority of the Executive Director in respect of other human resources matters**

12. Aside from the authority to appoint and promote staff, which is discussed above, this Office considers that the scope of the Executive Director's authority with respect to other human resources matters is not clearly defined in the Statute.

13. Article IV, paragraph 1 of the UNITAR Statute provides that the Secretary-General "on the recommendation of the Board, shall determine the composition and level of the staff of the Institute, having regard to the responsibilities of the posts and the financial resources and level of programme activities of the Institute, as necessary, to enable the Institute to fulfill its mandate and carry out its programme activities effectively."[16] This authority of the Secretary-General with respect to classification of posts is distinct from the Executive Director's authority to appoint and promote UNITAR staff, which is dealt with separately under article IV, paragraph 3, of the Statute. On the basis of article IV, paragraph 1, this Office considers that the Secretary-General has the authority to classify posts in UNITAR, which is currently being exercised by OHRM. In this connection, we understand that UNITAR recently advised the Conditions of Service Section in OHRM, New York, that, in view of the establishment of a Human Resources Unit in UNITAR

[13] UNITAR Statute, article IV, paragraph 3.

[14] Opinion of the Legal Counsel, dated 25 October 1982.

[15] UNITAR Statute, article IV, paragraph 8, and article VI.

[16] UNITAR Statute, article IV, paragraph 1.

in May 2007, UNITAR is in a position to take over the classification process for all its posts.[17]

14. It is reported that in 1998, a decision was taken that the United Nations Office in Geneva (UNOG) Human Resources Management Service would cease to administer UNITAR staff members for benefits and entitlements purposes, transferring full responsibility and accountability in this respect to the UNITAR Executive Director.[18] This transfer of responsibility from UNOG to UNITAR was further expanded to include approval of consultancy contracts and all other personnel related actions in 2002.[19] However, a written record of the 1998 decision does not appear to exist, either in the Office of Human Resources Management (OHRM) in New York, UNOG[20] or in UNITAR. Therefore, this Office is not in a position to comment on the scope of the delegation of authority to UNITAR in other human resources matters, aside from appointment and promotion. However, we understand that UNOG is of the view that the UNITAR Statute makes it clear that UNITAR has responsibility, accountability and authority in human resources matters.[21]

15. Consequently, if UNITAR wishes to assume additional responsibility in human resources matters, it would be desirable to address this matter in an exchange of letters or a Memorandum of Understanding between UNITAR and OHRM/Department of Management (DM), in order to set out clearly the scope of authority delegated to the UNITAR Executive Director. Based on our informal contacts with OHRM, we understand that OHRM would be in a position to consider granting the authority to classify posts to the Executive Director of UNITAR, provided that the terms and conditions of the delegation are recorded in writing. To that end, we suggest that UNITAR consult OHRM/DM to initiate the preparation of an appropriate instrument, if the consultation has not yet commenced.

### *(iv) Budget, finance and administration*

#### a. Applicability of United Nations Financial Regulations and Rules

16. Article VIII, paragraph 1, of the UNITAR Statute provides that the United Nations Financial Regulations and Rules as well as the procedures of the United Nations shall apply to UNITAR financial operations. These are subject to any special rules and procedures that the "Executive Director, in agreement with the Secretary-General, may issue after consultations with the Board of Trustees and the Advisory Committee on Administrative and Budgetary Questions of the United Nations".[22] This Office is not aware of any special rules or terms on financial operations that have been issued by the Executive Director. The authority and responsibility to implement the United Nations Financial Regula-

[17] See Memorandum of the Director, Division for Organizational Development, OHRM, New York, of 5 November 2007, to the Legal Counsel, paragraph 10.

[18] Memorandum of the Chief, Human Resources Management Service, UNOG, of 2 August 2000, to the Executive Director of UNITAR.

[19] Memorandum of Chief, Human Resources Management Service, UNOG, of 19 September 2002, to the Executive Director of UNITAR.

[20] See Memorandum, *supra* note 17, paragraph 9.

[21] See *ibid.*

[22] UNITAR Statute, article VIII, paragraph 1.

tions and Rules are delegated to the Under-Secretary-General for Management (Financial Rule 101.1) who, in turn, has delegated authority for specified aspects of the Financial Regulations and Rules to the Controller of the United Nations and the Assistant Secretary-General/Office of Central Support Services (ASG/OCSS).[23]

17. The Institute is also subject to the decisions of the Board of Trustees which has the authority to formulate principles and policies governing UNITAR activities and operations as well as to establish the conditions for the utilization of funds and the receipt and disbursement of grants.[24]

### b. Funds and budget

18. The expenses of UNITAR are met from voluntary contributions made by Governments, inter-governmental organizations, foundations and other non-governmental sources, which are credited to a General Fund. Additionally, UNITAR expenses are also met from proceeds from the sale of capital assets and donations and grants made with no specified purpose which are credited to a Reserve Fund. The Executive Director is authorized to accept contributions on behalf of the Institute. The funds of the Institute are maintained in a special account established by the Secretary-General.[25]

19. The UNITAR Statute requires the Controller to provide the necessary financial and accounting functions for administering the funds of the Institute.[26] In this respect, article VIII, paragraph 11, of the UNITAR Statute states that:

> "The funds of the Institute shall be held and administered solely for the purposes of the Institute. The Controller of the United Nations shall perform all necessary financial and accounting functions for the Institute, including the custody of its funds, and shall prepare and certify the biennial accounts showing the status of the Institute's special account."

In practice, we understand that certain of these financial and accounting services are provided to UNITAR by UNOG.[27] The budget of the Institute is adopted by the Board of Trustees on the basis of proposals submitted by the Executive Director.[28] The Executive Director is tasked with executing the work programme of the Institute and making the expenditures envisaged in the budget, as approved by the Board.[29] In addition, article III, paragraph 2 (b), of the UNITAR Statute provides for the Board of Trustees to "establish conditions and procedures for: (i) the utilization of funds from the General Fund and the Reserve Fund for the functions of the Institute in accordance with the priorities established by the Board; [and] (ii) the receipt and disbursement of special purpose grants".

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[23] ST/AI/2004/1, "Delegation of authority under the Financial Regulations and Rules of the United Nations," 8 March 2004.

[24] UNITAR Statute, article III, paragraph 2. For example, the "Policies and procedures in connection with the establishment and management of special purpose grants" were set forth by the Board of Trustees in the document UNITAR 94/Rev.2, dated 25 February 1994.

[25] UNITAR Statute, article VIII, paragraphs 2-7 and 10.

[26] UNITAR Statute, article VIII, paragraph 11.

[27] Memorandum from the Controller to the Legal Counsel, dated 16 November 2007, paragraph 3, hereinafter "Controller's Memorandum of 16 November 2007".

[28] UNITAR Statute, article III, paragraph 2(c).

[29] UNITAR Statute, article V, paragraph 2(b).

### c. Contracts and procurement

20. As discussed above, article X of the UNITAR Statute envisages that the "Institute may, under the authority of the Executive Director, enter into contracts". However, the authority to enter into contracts is not necessarily the same as the authority for "all procurement matters", which is governed by the United Nations Financial Regulations and Rules to which UNITAR is bound. In this respect, financial rule 105.13(a) stipulates 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."

The Controller has indicated that "[w]hilst the authority of the Institute, its Board of Trustees and the Executive Director is derived from the UNITAR Statute, . . . UNITAR and the Executive Director continue to be bound by the United Nations Financial Regulations and Rules . . .".[30]

21. In the past, the UNOG Director of Administration delegated procurement authority to the Executive Director on a personal basis. However, the Controller has advised that "[d]ue to the change in administrative instructions governing the matter, according to which delegation can only be further delegated to staff under the supervision of the originator of the delegation, this authority was not delegated to the present Executive Director."[31] In addition, given that UNITAR is requesting a delegation of authority to enter into contracts for procurement up to US$ 100,000, which is an increase from the US$ 25,000 granted in 1997 to the previous Executive Director, the UNOG Director of Administration has advised the present Executive Director that requests relating to the delegation of procurement authority should be directed to the Under-Secretary-General for Management.[32] Therefore, in order to seek the delegation of authority in procurement matters, we would suggest that the Executive Director contact the Controller's Office directly.

### *(v) Audit matters*

22. Article VIII, paragraph 12, of the UNITAR Statute provides that funds administered by and for the Institute shall be subject to audit by the United Nations Board of Auditors. The Board of Auditors set out the results of its review of the operations and audit of the financial statements of UNITAR for the biennium ended 31 December 2005, in A/61/5/Add.4.

23. In addition, as discussed above, UNITAR is subject to the United Nations Financial Regulations and Rules. Financial regulation 5.15, which has been adopted by the General Assembly, provides that the Office of Internal Oversight Services shall conduct independent internal audits. This regulation is applicable to UNITAR and, as far as we can

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[30] See Controller's Memorandum of 16 November 2007 to the Legal Counsel, paragraph 2.

[31] See *ibid,* paragraph 3.

[32] Memorandum from the UNOG Director of Administration to UNITAR, dated 8 May 2007. As explained in paragraph 4 of the memorandum, the basis for this decision was due to the fact that delegation could only be made to staff under the supervision of the delegating official.

determine, has not been contested by its Board of Trustees.[33] We consider that any deviation from or waiver of financial regulation 5.15 requires the General Assembly's approval as the Financial Regulations are adopted by the General Assembly.

*(vi) Information communication technology (ICT)*

24. We understand that UNOG currently provides ICT support to UNITAR, but this support is limited to basic services such as telecommunication and data network. We further understand that UNITAR develops and maintains its own PC configurations, as well as hosts and supports its computer applications.[34] However, it appears that this arrangement could be further explored with the other relevant offices concerned with information technology, taking into account particular needs of UNITAR in ICT matters.

13 May 2008

## (*f*) Note to the Chef de Cabinet, Executive Office of the Secretary-General, on the establishment of a commission of inquiry into the assassination of Benazir Bhutto

ESTABLISHMENT OF COMMISSIONS OF INQUIRY UNDER THE AUSPICES OF THE UNITED NATIONS—SUCH COMMISSIONS ARE MECHANISMS OF INVESTIGATION OF CRIMES AND MAKE DETERMINATIONS OF FACT AND LAW—DISTINCTION BETWEEN COMMISSIONS OF INQUIRY AND FACT-FINDING MISSIONS, WHICH ARE LIMITED TO THE DETERMINATION OF FACTS—COMMISSIONS OF INQUIRY AND FACT-FINDING MISSIONS ARE ESTABLISHED BY THE SECURITY COUNCIL OR THE GENERAL ASSEMBLY, OR BY THE SECRETARY-GENERAL PURSUANT TO A MANDATE FROM EITHER ORGAN—COMMISSIONS MAY IN SOME CIRCUMSTANCES BE ESTABLISHED UNDER THE INHERENT POWERS OF THE SECRETARY-GENERAL AT THE REQUEST OF THE GOVERNMENT CONCERNED—IN THE ABSENCE OF A MANDATE FROM THE SECURITY COUNCIL OR THE GENERAL ASSEMBLY, THE SECRETARY-GENERAL IS UNDER NO OBLIGATION TO COMPLY WITH ANY GOVERNMENT'S REQUEST—COOPERATION OF THE GOVERNMENT NECESSARY FOR THE SUCCESSFUL CONDUCT OF THE INVESTIGATION AND THE IMPLEMENTATION OF THE RECOMMENDATIONS

1. The request of the Government of Pakistan for the Secretary-General to establish an international commission for the purpose of investigating the assassination of Benazir Bhutto, in order "to identify the culprits, perpetrators, organizers and financiers behind this heinous crime", has raised a number of concerns relating to the legal basis for the establishment of the commission, the Secretary-General's powers, the reporting lines of the commission and the confidentiality of its report, among others. This note sets out the background for the establishment of United Nations commissions of inquiry, their general characteristics, and the need for a mandate, in particular. . . .

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[33] See e.g. "Conclusions and Recommendations of the Forty-Fifth Session of the Board of Trustees", UNITAR/BOT/45/CR1/07/2007, paragraph 28, despite the Executive Director's statement that OIOS Auditors should consult the Chairman of the Board before engaging in audits. The Board then stated that it "*welcomes the services provided by OIOS and looks forward to the continuation of services in line with the established practice with other UN autonomous institutions*" (emphasis in the original).

[34] Memorandum from the Assistant Secretary-General and Chief Information Technology Officer to the Legal Counsel, dated 30 October 2007.

### A. Commissions of Inquiry

2. Commissions of inquiry have in recent United Nations practice developed into mechanisms for investigating serious violations of human rights and international humanitarian law committed on a massive scale in the context of an armed conflict. They are mandated to establish the facts, qualify the crimes, determine responsibilities, and make recommendations with the purpose of ensuring the accountability of those responsible for the crimes. The most notable examples of commissions of this kind are: the Commission for the former Yugoslavia (Security Council resolution 780 (1992)), for Rwanda (Security Council resolution 935 (1994)), and the 1995 Commission of Inquiry for Burundi (Security Council resolution 1012(1995)) (S/1996/682).

3. Commissions of inquiry may also be established to investigate human rights abuses in the context of internal disturbances not amounting to an armed conflict. They include: the commission of inquiry established to investigate the massacre of internally displaced persons in Harbel, Liberia, on 6 June 2003; the commission of inquiry set up in 2001 to investigate allegations of extra-judicial executions carried out in Togo in 1998 (E/CN.4/2001/134, E/CN.4/Sub.2/2003/3); the 2004 Commission of inquiry mandated to investigate violations of human rights and international humanitarian law committed in Côte d'Ivoire since 2002; and the 2006 Independent special commission of inquiry for Timor-Leste (S/2006/391, S/PV.5457, and Security Council resolution 1690 (2006)).

### B. Fact-finding missions

4. Fact-finding missions are established as an instrument of information-gathering to assist the United Nations in exercising its responsibilities in the area of international peace and security (see General Assembly resolution 46/59 of 9 December 1991). Fact-finding missions may also be established by the Secretary-General as part of his good-offices mandate and as a means of settlement of disputes.

5. Whereas commissions of inquiry make determinations of fact and law, the mandate of fact-finding missions is limited to determining the facts alone. The 1998 Panel on Algeria is an example of a fact-finding mission with the limited purpose of gathering information on the situation in a country, without the means or mandate to conduct a criminal investigation.

### C. Commissions conducting a criminal investigation

6. Another kind of commission of inquiry is that established to conduct a *criminal investigation* into a common crime. The single, and perhaps so far unique, example is the International Independent Investigation Commission (IIIC) established to investigate the Hariri assassination in Lebanon. The IIIC has also been unique in that for the first time a United Nations established commission has been mandated to investigate a common crime under national, Lebanese, law. We should note in this connection that the International Commission against Impunity in Guatemala (CICIG), established by agreement between the United Nations and the Government to investigate organized crime in that country, does not have a mandate to *investigate* as such, but only to *assist* the General Prosecutor in the conduct of his investigations and prosecutions into organized crimes.

### D. Legal basis for the establishment of commissions of inquiry

7. Commissions of inquiry and fact-finding missions are established either directly by the Security Council or the General Assembly, or by the Secretary-General pursuant to a mandate from either organ. They may also, in certain circumstances, be initiated under the inherent powers of the Secretary-General at the request of the Government concerned. In either case, the cooperation of the Government is a necessary condition for the successful conduct of an investigation and the implementation of its recommendations. The Government has to give access to its territory and to the sites of the investigation, guarantees of freedom of movement, unobstructed access to all sources of information and evidence, privileges and immunities, security arrangements, and protection of witnesses.

8. In the absence of a mandate from either organ, the Secretary-General is under no obligation to comply with any Government's request. In the exercise of his discretionary power, however, he may consider political, legal, financial or technical circumstances, and decide on the viability, propriety or desirability of establishing such a commission. In making his decision, the Secretary-General would also look at whether the matter is already before any of the United Nations deliberative bodies and give the most serious consideration to the views of such bodies on how the matter should be dealt with.

9. In the present case, while the Pakistani Government has indicated that it would not wish the Security Council to be in any way involved in the matter, failure to do so by the Secretary-General would be ill-advised. We note that the Security Council considered the attempted assassination and the assassination of Benazir Bhutto under the agenda item "Threats to international peace and security caused by terrorist acts" at its meetings of 22 October and 27 December 2007, respectively. Notably, Pakistan requested to participate in both meetings and was invited to do so, and did not object to the Security Council discussing the matter, including, in particular, issuing statements condemning the attack (S/PRST/2007/39, and S/PRST/2007/50, respectively).

10. While for the most part commissions of inquiry were established under a Security Council or a General Assembly mandate, there are examples of those established at the initiative of the Secretary-General or at the request of the State concerned. Their success or lack thereof is a lesson to be learned.

11. The 1997 Commission of Inquiry for the Congo was established without a mandate (and was not given access to the site of the investigation), and so was the 2000 Commission of Inquiry for Côte d'Ivoire (to investigate the killings in demonstrations held at the time of the presidential elections). The CICIG was established under a broad mandate of the General Assembly which was not explicit enough to address future difficulties relating to the funding and status of the Commission and its personnel. We should also add that in the recent case of Côte d'Ivoire, in the absence of a mandate by the Security Council to establish a commission of inquiry into the assassination attempt of Prime Minister Soro, the Secretary-General declined to establish such a commission at the request of the Government.

11 June 2008

### (*g*) Interoffice memorandum to the Director of the Legal Support Office, United Nations Development Programme (UNDP), regarding whether the UNDP Audit Advisory Committee can report to the UNDP Executive Board

UNDP Audit Advisory Committee established by the UNDP Administrator—Normally a body established by an entity first reports to that entity, unless otherwise decided—The Committee to report to the Administrator, which may then bring relevant information to the attention of the Executive Board

1. This is in response to your memorandum of 12 June 2008, requesting our comments on whether the UNDP Audit Advisory Committee (the "Committee") can formally report to the UNDP Executive Board. I note that the Committee was established by the UNDP Administrator and, pursuant to its Terms of Reference dated 8 February 2008 ("TOR"), the Committee essentially performs functions to assist and advise the Administrator "in fulfilling his/her responsibilities regarding financial management and reporting, internal and external audit matters, risk management arrangements, and systems of internal control and accountability". (See paragraph 1.) With respect to reporting by the Committee, the TOR provide:

> "22. The Committee shall prepare a report on its work for the previous year for presentation to the Administrator by 31 March of every year. The report will include recommendations with respect to changes to its mandate. The Committee will also prepare a report for the annual session of the Executive Board. Upon request, the Chairperson shall present this report."

2. It is our understanding that, normally, a body established by an entity first reports to the establishing entity, unless otherwise decided. In the present case, the Committee was established by the Administrator as an advisory body to assist him in matters relating to, *inter alia*, financial management, reporting and audit. The Committee's TOR are silent as to whether the Committee can report to the Executive Board. In light of the foregoing, it would appear appropriate that the Committee report first to the UNDP Administrator. It would then be up to the Administrator to bring the relevant information provided by the Committee to the attention of the Executive Board, as necessary and appropriate. In this respect, I note that the Committee's "Annual Report for the Calendar Year 2007", together with the Associate Administrator's response thereto, addressed to the Chairperson of the Committee, dated 3 June 2008, have been submitted to the 2008 Annual Session of the UNDP Executive Board currently taking place in Geneva.

3. While the third sentence of paragraph 22 of the TOR states that the Committee will prepare a report for the annual session of the Executive Board, it does not specify how this report will be presented to the Board, *i.e.*, whether the report will be submitted directly to the Board by the Committee or through the Administrator. While it would seem more appropriate that such a report be submitted by the Administrator, we would suggest that this issue be clarified, and any necessary revision to paragraph 22 of the TOR be made, in order to avoid any misunderstanding in the future.

20 June 2008

### (*h*) Note to Department of Political Affairs regarding the status of the International Conference on the Great Lakes Region (ICGLR)

Determination of the status of an entity for the purpose of granting that entity observer status in the General Assembly—General Assembly decision 49/426 of 19 December 1994—Definition of an international organization—Gradual process of institutionalization may lead to entities developing into international organizations—Member States' responsibility to determine the status of ICGLR for the purpose of granting observer status—Procedure for the granting of observer status in the General Assembly—Procedure initiated by a Member State requesting the inclusion of a corresponding item in the agenda of the General Assembly—Such inclusion to be decided by the General Assembly—Granting of observer status through a General Assembly resolution

1. This is with reference to your note to [the Legal Counsel] dated 2 June 2008, requesting our advice regarding the status of the International Conference on the Great Lakes Region (ICGLR) in connection with a possible request by the ICGLR for observer status in the General Assembly. Reference is also made to previous informal discussions between members of your Department and [a Legal Officer] of this Office on certain aspects of the question, in particular, the procedure for obtaining observer status in the General Assembly. . . .

2. In its decision 49/426 of 19 December 1994, the General Assembly decided that observer status "should in the future be confined to States and to those intergovernmental organizations whose activities cover matters of interest to the Assembly". The question of whether ICGLR is qualified for observer status in the General Assembly hinges, therefore, on its status as an intergovernmental or international organization.

A. Legal status of the International Conference on the Great Lakes Region

3. A number of international conventions use the laconic definition of "intergovernmental organization" to denote "international organization". This definition is used in article 2 (1)(i) of the 1969 Vienna Convention on the Law of Treaties,[*] article 1 (1)(1) of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character,[**] and article 2 (1)(i) of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.[***] This definition has been understood to mean an organization composed mainly of States and, in exceptional cases, of one or more international organizations, to the exclusion of non-governmental organizations.

4. More recently, in article 2 of the draft articles on the responsibility of international organizations, the International Law Commission (ILC) defined an international organization as "an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities". The commentary to Article 2 explains that, as in previous cases, this definition was considered

[*] United Nations, *Treaty Series*, vol. 1155, p. 331.

[**] A/CONF.67/16.

[***] A/CONF.129/15.

appropriate for the purposes of the draft articles and was not intended as a definition for all purposes.[1]

5. ICGLR is clearly a "Conference", that is, an association of States meeting regularly or frequently. Its first summit in Dar-es-Salaam was convened in 2004 following a number of Security Council resolutions and presidential statements calling for the convening of an international conference on peace, security, democracy and development in the Great Lakes Region.[2] The 2006 Pact on Security, Stability and Development in the Great Lakes Region (which entered into force on 21 June 2008) established the organs of the Conference (the Summit, the Regional Inter-Ministerial Committee and the Conference Secretariat). ICGLR is still considered by the United Nations as a conference or process.[3]

6. ICGLR was not established by a treaty, nor has any of the instruments under scrutiny established it as an international organization or otherwise endowed it with a distinct legal personality or treaty-making power. Nevertheless, the ICGLR/Conference Secretariat concluded a Memorandum of Understanding with the United Nations Economic Commission for Africa and has concluded a Headquarters Agreement with Burundi, by which, among other things, the Conference Secretariat was granted diplomatic status.

7. But while not yet an international organization, ICGLR may well develop into one through a gradual process of institutionalization, having a permanent Secretariat and other organs. In the practice of international organizations, there have been several examples of treaty bodies and other less structured mechanisms of international cooperation which became international organizations through the same process, *i.e.*, the Organization for Security and Cooperation in Europe and the Southern African Development Community. In most cases also, the transformation was formalized through a written agreement by the member States. For the purpose of granting observer status, however, it would be for the Member States of the United Nations and not for the Secretariat, to determine if ICGLR is an international organization.

### B. Formal procedures for granting observer status

8. Neither the United Nations Charter nor the Rules of Procedure of the General Assembly address the question of observers. In practice, the General Assembly has adopted resolutions granting observer status to various organizations and entities. As indicated above, in its decision 49/426 of 19 December 1994, the General Assembly decided that observer status would be confined to States and intergovernmental organizations whose activities cover matters of interest to the Assembly.

9. It is for the Member States to initiate the process of granting observer status to an intergovernmental organization. The first step is for a Member State or a group of Member States to request the inclusion of an appropriate item in the agenda of the General Assem-

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[1] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), pp. 38-39.

[2] Security Council resolutions 1291 (2000), 1304 (2000), 1457 (2003), and 1493 (2003), and Presidential Statements S/PRST/1994/59 and S/PRST/1997/22.

[3] See the report of the Secretary-General on the preparations for an International Conference on the Great Lakes Region (S/2006/46) and Security Council President's statement S/PRST/2006/57.

bly. The request must be accompanied by a memorandum explaining why the item should be inscribed on the agenda and why the organization should be given observer status.

10. The General Committee of the General Assembly then reviews the request and recommends to the General Assembly whether or not to include the item in the agenda. If the item is included, the next step is for a Member State to sponsor a draft resolution by which the General Assembly would decide that the intergovernmental organization concerned is invited to participate in the sessions and work of the General Assembly in the capacity of an observer. Ultimately, it would then be for the General Assembly to take a decision on the proposed resolution.

11. By virtue of paragraph 2 of General Assembly resolution 54/195, the Sixth Committee of the General Assembly considers all applications for observer status before they are considered in the plenary session. It is highly likely, therefore, that the legal status of the applicant organization – as an international organization – would be determined on that occasion.

15 August 2008

### (*i*) Interoffice memorandum to the Chief Executive Officer, United Nations Joint Staff Pension Fund (UNJSPF), regarding the legal status of the Special Tribunal for Lebanon in view of its application for membership to UNJSPF

Legal status of the Special Tribunal for Lebanon—Tribunal considered to be an international intergovernmental organization—Definition of international organizations in the draft articles of the International Law Commission on the responsibility of international organizations—Creation of the Tribunal through an international instrument governed by international law—International legal personality conferred on the Tribunal

1. I refer to a request dated 15 March 2008 from [Name], Chief of Legal Office, United Nations Joint Staff Pension Fund (UNJSPF), for a written explanation on the legal status of the Special Tribunal for Lebanon in relation to the Special Tribunal's application for membership of UNJSPF. I understand that the request has been revived in view of the upcoming General Assembly consideration of the UNJSPF Board's affirmative recommendation that the Special Tribunal be admitted to membership.

2. The opinion of the Office of Legal Affairs is that the Special Tribunal is an "international, intergovernmental organization" within the meaning of the Regulations of UNJSPF. The reasons for this view are set out below.

I. The Special Tribunal for Lebanon is an "international organization"

3. The International Law Commission's draft articles on the responsibility of international organizations define "international organization" as "an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members,

in addition to States, other entities". Thus, to be an international organization within the definition of the International Law Commission, an entity must: (a) be created by a treaty or other instrument governed by international law; and (b) have its own international legal personality.

*(a) The Special Tribunal for Lebanon was established under international law*

4. The process of the establishment of the Special Tribunal was rather complex and unique. The Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon (the Agreement)* provided that it would enter into force on the day after the Government notified the United Nations in writing that the legal requirements for entry into force had been complied with. When political deadlock in Lebanon prevented Parliament from completing the domestic legal requirements for entry into force, the Security Council decided to bring the provisions of the Agreement into force using its powers under Chapter VII of the United Nations Charter.

5. Whether the Special Tribunal is regarded as having been established by agreement between the United Nations and Lebanon, or by the Security Council acting under Chapter VII of the Charter, it is clear in either event that the Special Tribunal was created through an international instrument governed by international law.

*(b) The Special Tribunal for Lebanon has separate international legal personality*

6. Legal personality may be conferred expressly by the constitutive instrument of an organization, or it may be implied from the organization's functions, object and purpose. The Agreement expressly confers the Special Tribunal with the legal capacity to enter into contracts, to acquire and dispose of property, to institute legal proceedings, and to enter into agreements with States for the exercise of its functions and for its operation. It is clear that the Special Tribunal has legal personality, including on the international plane.

II. The "intergovernmental" requirement in the Regulations of UNJSPF

7. The fact that the Special Tribunal may be deemed as resulting from an agreement between a State and the United Nations does not preclude it from being an international, intergovernmental organization within the meaning of the UNJSPF Regulations.

24 November 2008

## (*j*) Interoffice memorandum to the Director of the Office for Economic and Social Council (ECOSOC) Support and Coordination, Department of Economic and Social Affairs (DESA), regarding amending financial regulations and rules of United Nations funds and programmes

Separate financial rules and regulations apply to United Nations Development Programme (UNDP), United Nations Populations Fund (UNFPA), United Nations Children's Fund (UNICEF) and World Food Programme (WFP)—United Nations

* Reproduced in the 2007 edition of this publication, United Nations publication, Sales No. E.10.V.1 (ISBN 978-92-1-133681-8), chapter II A.

FINANCIAL RULES AND REGULATIONS MAY, HOWEVER, APPLY TO UNDP, UNFPA AND UNICEF WITH REGARD TO MATTERS NOT SPECIFICALLY COVERED BY THEIR RESPECTIVE FINANCIAL REGULATIONS AND RULES—THE TERM "BUDGETING CYCLE" IS USED INTERCHANGEABLY WITH THE TERM "FINANCIAL PERIOD"—HARMONIZATION OF THE FINANCIAL RULES AND REGULATIONS OF THE UNITED NATIONS, UNDP, UNFPA, UNICEF AND WFP TO DEVELOP A COMMON SET OF FINANCIAL REGULATIONS AND RULES

1. I refer to your memorandum of 29 October 2008, seeking our urgent advice concerning the above-referenced matter. You stated that in accordance with General Assembly resolution 62/208 of 19 December 2007, entitled "Triennial comprehensive policy review of operational activities for development of the United Nations system", the Second Committee of the General Assembly is engaged in negotiations on a draft resolution on aligning the strategic planning cycles of the United Nations funds and programmes ("Strategic Planning Cycles") with the comprehensive policy review of United Nations operational activities for development ("Comprehensive Policy Review"). In this connection, you have provided, as background information, the report of the Secretary-General (A/63/207) of 1 August 2008, entitled "Implications of aligning the strategic planning cycles of the United Nations funds and programmes with the comprehensive policy review of operational activities for development", which, *inter alia*, provides options with regard to changing the Comprehensive Policy Review from a triennial to a quadrennial cycle and analyzes the implications of such a change on the planning process and cycle of the relevant United Nations funds and programmes, *i.e.,* the United Nations Development Programme (UNDP), United Nations Population Fund (UNFPA), United Nations Children's Fund (UNICEF) and World Food Programme (WFP). Your request has been referred to this Division for reply.[1]

2. You have stated that in order to align the Strategic Planning Cycles with the Comprehensive Policy Review, United Nations Funds and Programmes may have to amend their financial regulations and rules to adjust the periodicity of their budgeting cycles. In that connection, you have stated that the Secretariat has been requested to clarify the following two questions on which you seek legal advice:

> "1) in general, whether the financial regulations of United Nations funds and programmes are legally bound by the *Financial Regulations and Rules of the United Nations* (ST/SGB/2003/7)" and
>
> "2) in particular, whether their budgeting cycles could be adjusted regardless of article 1.2 of *Financial Regulations and Rules of the United Nations*, which stipulates that 'the financial period shall consist of two consecutive calendar years, the first of which shall be an even year'" (emphasis in the original).

We wish to note at the outset that the relationship between the above-referenced two questions and the proposal to align the Strategic Planning Cycles with the Comprehensive Policy Review is not entirely clear. Nevertheless, we provide advice regarding those two questions with respect to UNDP, UNFPA, UNICEF and WFP, because the Secretary-General's report (A/63/207) in response to the General Assembly's request in paragraph

[1] We understand that this is not the first time that the alignment of the Strategic Planning Cycles with the Comprehensive Policy Review is being considered by the General Assembly. See, *e.g.*, General Assembly resolution 32/197 of 20 December 1977, by which the General Assembly endorsed the conclusions and recommendations contained in the Annex thereto. See paragraphs 28 to 49 of the Annex to the resolution.

98 of its resolution 62/208 focuses on the alignment of the strategic planning cycles of those four entities, the Executive Boards of all of which report to ECOSOC (see A/63/207, paragraph 5).

*Applicability of the United Nations Financial Regulations and Rules to UNDP, UNFPA, UNICEF and WFP*

3. UNDP, UNFPA, UNICEF and WFP have their own financial regulations and rules, separate from the Financial Regulations and Rules of the United Nations ("United Nations FRR"), which govern their respective financial management and administration. The financial regulations of each of the four entities have been adopted by four respective governing bodies, *i.e.,* the Executive Board of UNDP/UNFPA in respect of the UNDP and UNFPA Financial Regulations, the Executive Board of UNICEF, and the Executive Board of WFP, in connection with their Financial Regulations, respectively. The Financial Rules of the four entities are promulgated by their Executive Heads. A brief summary of the authority concerning the Financial Regulations and Rules of the four entities is set out in the annex hereto,* including a copy of relevant provisions therefrom. In view of the foregoing, in general, the United Nations FRR do not apply to UNDP, UNFPA, UNICEF and WFP. However, in respect of UNDP, UNFPA and UNICEF, in regard to any matter not specifically covered by their respective Financial Regulations and Rules, the United Nations FRR shall apply, *mutatis mutandis*.

*Financial periods of UNDP, UNFPA, UNICEF and WFP*

4. With respect to the "budgeting cycles" of the four entities, referred to in your second question, we understand that the term "budgeting cycles" is used interchangeably with the term "financial period". As you have indicated, United Nations financial regulation 1.2 provides, *inter alia*, that "the financial period shall consist of two consecutive calendar years, the first of which shall be an even year". The term "financial period" is also defined in the Financial Regulations of UNDP, UNFPA, UNICEF and WFP, as described in paragraphs 5 to 8 below.

5. *UNDP.* UNDP financial regulation 2.04 provides that "[t]he financial period for the purpose of both the proposed utilization of resources and the incurring of and accounting for expenditures in respect of the biennial support budget shall consist of two consecutive calendar years (hereinafter referred to as a biennium), the first of which shall be an even year." In addition, UNDP financial regulation 12.03 provides that " . . . the financial period for the purpose of the proposed utilization of resources and of the entering into commitments shall be the duration of each UNDP programme activity", and financial regulation 26.05 provides that the term "financial period for the purpose of incurring and accounting for expenditures in respect of UNDP programme activities, including reimbursement of related agency support costs, shall consist of a single calendar year." Pursuant to UNDP financial regulation 1.02, amendments and exceptions to the UNDP Financial Regulations may be made only by the UNDP/UNFPA Executive Board, after review by the Advisory Committee on Administrative and Budgetary Questions (ACABQ).

* Not reproduced herein.

6. *UNFPA*. UNFPA financial regulation 6.4 provides that "[t]he financial period for the purpose of both the proposed utilization of resources and the incurring of and accounting for expenditures in respect of the biennial support budget shall consist of two consecutive calendar years (hereinafter referred to as a biennium), the first of which shall be an even year". In addition, UNFPA financial regulation 6.2 provides that " . . . the financial period for the purpose of the proposed utilization of resources shall be the duration of each project as specified in the project document" and UNFPA financial regulation 6.3 provides that "[t]he financial period for the purpose of incurring and accounting for expenditures in respect of programme activities, including reimbursement of related indirect costs, shall consist of a single calendar year". UNFPA financial rule 106.1 further provides that the financial period for the purposes of committing funds pursuant to financial regulation 6.2 shall not exceed the duration of the project length as specified in the project document. Pursuant to UNFPA financial regulation 1.2, amendments and exceptions to UNFPA Financial Regulations may be made only by the UNDP/UNFPA Executive Board. Pursuant to UNFPA financial rule 101.1 (b), the Executive Director may amend the UNFPA Financial Rules in accordance with UNFPA financial regulation 14.1 (a).

7. *UNICEF*. UNICEF financial regulation 6.4 provides that "[for the purpose of accounting for expenditures incurred in respect of the biennial budget, as provided for in article IX, the financial period shall consist of two consecutive calendar years, the first of which shall be an even year." In addition, UNICEF financial regulation 6.2 provides that " . . . the financial period for the purpose of the proposed utilization of resources and of the entering into commitments in respect of programme activities shall be the duration of each programme as provided for in article VIII", and UNICEF financial regulation 6.3 provides that "[t]he financial period for the purpose of accounting for expenditures incurred in respect of programme activities as provided for in article VIII shall consist of a single calendar year". Pursuant to UNICEF financial regulation 2.2, amendments to UNICEF Financial Regulations may be made only by the UNICEF Executive Board, after due consultations with the ACABQ.

8. *WFP*. WFP financial regulation 1.1 provides that the term "Financial period", for the purposes of the WFP Financial Regulations and Rules, "shall mean one calendar year starting on 1 January". WFP financial regulation 2.1 provides, *inter alia*, that the WFP Executive Board may, in exceptional circumstances, grant exemptions from these Financial Regulations. With respect to amendments to the Financial Regulations, pursuant to article VI.2(b)(vii) of the WFP General Regulations which provide the legal framework for WFP operations (and, as we understand, have been adopted by the General Assembly of the United Nations and the Food and Agriculture Organization of the United Nations (FAO) Conference), revisions to the WFP Financial Regulations may be made by the WFP Executive Board, in accordance with Article XIV of the WFP General Regulations. Article XIV.4 of the WFP General Regulations provides that "[i]n all matters relating to the financial administration of WFP, the Board shall draw on the advice of the [ACABQ] and the Finance Committee of FAO". Article XIV.5 of the WFP General Regulations provides that the Executive Board "shall, after receiving advice from the ACABQ and the FAO Finance Committee, establish Financial Regulations to govern the management of the WFP Fund."

9. As set out above, the term "financial period" has essentially an identical definition under United Nations financial regulation 1.2, UNDP financial regulation 2.04, UNFPA

financial regulation 6.4, and UNICEF financial regulation 6.4. However, under the WFP Financial Regulations, the term "financial period" does not correspond with the definition used in the United Nations FRR. We note that the definition of the term "financial period" under the Financial Regulations of UNDP, UNFPA, UNICEF and WFP may be amended by their respective Executive Boards, subject to the condition that: (i) in respect of UNDP and UNICEF, any such revisions would require review by and consultation with ACABQ, and (ii) in respect of WFP, it appears that such revisions would require consultations with the ACABQ and the FAO Finance Committee. Therefore, in response to your second question, it appears that the "budgeting cycles" of UNDP, UNFPA, UNICEF and WFP may be adjusted by their respective Executive Boards, notwithstanding United Nations financial regulation 1.2. However, any such changes would have to be made by their respective Executive Boards, and reported to ECOSOC and, in the case of UNDP and UNFPA, following consultations with the ACABQ and, as it appears, in the case of WFP, following consultations with the ACABQ and the FAO Finance Committee.

10. Finally, I should note that in accordance with paragraph 113 of General Assembly resolution 62/208, the exercise to harmonize the Financial Regulations and Rules of the United Nations, UNDP, UNFPA, UNICEF and WFP and develop a common set of financial regulations and rules is on-going, under the leadership of the respective Controllers/Comptrollers and the coordination by the United Nations Development Operations Coordination Office (DOCO). This Office is assisting the Secretariat, UNDP, UNFPA, UNICEF and WFP with the review and development of the draft harmonized financial regulations and rules.

3 November 2008

### (*k*) Interoffice memorandum to the Assistant Secretary-General, Controller, regarding delegated authority for the Registrar of the Special Tribunal for Lebanon to sign contracts on behalf of the Tribunal

Unless otherwise authorized by the General Assembly, United Nations trust funds shall be administered in accordance with the United Nations Financial Rules and Regulations—Prior to gaining financial independence, the Special tribunal for Lebanon must conduct all procurement activities in accordance with the United Nations Financial Rules and Regulations—The Controller may delegate authority to the Registrar of the Tribunal to procure goods and services—Once funds are transferred to the Tribunal, contracts concluded by the Registrar to be assigned to the Tribunal—The United Nations may still bear residual liability under contracts entered into on behalf of the united nations and subsequently assigned to the Tribunal

1. I refer to the e-mail of 5 December 2008, from [Name], Financial Management Officer, transmitting to my Office an e-mail correspondence on the question as to whether the Registrar of the Special Tribunal for Lebanon (STL), who is a United Nations staff member, may be "granted procurement authority to enter into long-term contracts on behalf of STL for the provision of certain services". We understand by this that you are seeking our advice on the question as to whether the Registrar may be authorized to enter

into agreements on behalf of STL, even though funding for such agreements is still being held in a United Nations trust fund.

2. While STL is an international, intergovernmental organization separate from the United Nations, I understand that it does not have, at present, financial independence, since all contributions for STL made by donor States are currently held in a trust fund administered by the United Nations. United Nations financial regulation 4.14 and financial rule 104.3 provide that, unless otherwise authorized by the General Assembly, trust funds shall be administered in accordance with the United Nations Financial Regulations. This Office is not aware that the General Assembly has authorized the administration of the trust fund for STL other than in accordance with the United Nations Financial Regulations and Rules. Accordingly, all procurement activities relating to STL, including contracts concluded by the United Nations on behalf of STL, are governed by the relevant regulations and rules of the United Nations, in particular the United Nations Financial Regulations and Rules.

3. I further understand that the donor States are in the process of agreeing to transfer all the funds contributed to STL from the United Nations trust fund to a STL account administered under the STL Financial Regulations and Rules. Upon transfer of such funds, STL will effectively attain financial independence from the United Nations. Pursuant to regulation 1.4 of the STL Financial Regulations and Rules, "[t]he Registrar is responsible and accountable to the Management Committee for the effective and efficient financial administration of the Tribunal."

4. In light of the foregoing, as long as the contributions for STL are held in a United Nations trust fund, the Organization (the Controller) may delegate authority to the Registrar of STL to procure goods and services on behalf of the United Nations for STL. Under such an arrangement, the Registrar would have to conduct all procurement activities in accordance with the United Nations Financial Regulations and Rules. In addition, all the contracts concluded by the Registrar would necessarily have to be concluded on behalf of the United Nations. Therefore, once the funds have been transferred from the United Nations trust fund to STL, contracts concluded by the Registrar for STL on behalf of the United Nations would have to be assigned to STL. This Office is prepared to work with STL to develop the appropriate legal arrangements for such assignment of contracts.

5. Upon transfer of the funds from the United Nations trust fund to an account of STL, the issue of delegating authority to the Registrar to conduct procurement activities on behalf of the United Nations would be moot since the funds will be governed by the STL Financial Regulations and Rules and will no longer fall under the authority of the United Nations. As mentioned in paragraph 3 above, the Registrar will have full authority over these funds and he will be responsible and accountable to the Management Committee for the effective and efficient administration of these funds.

6. Legal complications may arise if the Registrar enters into contracts on behalf of the United Nations for STL, because these contracts will have to be assigned to STL once it has attained financial independence, and the United Nations may still bear some residual liability under such contracts. Nevertheless, there is no possibility, from a legal point of view, to authorize the Registrar to procure goods and services under STL Financial Regulations and Rules and/or to conclude contracts on behalf of STL as long as the funds are held in a United Nations trust fund. In order to avoid the problem of having to assign contracts

to STL upon transfer of the funds, the Registrar could defer entering into such contracts until the funds have been transferred to an account of STL.

12 December 2008

## 3. Other issues relating to United Nations peacekeeping operations

### Note to the Under-Secretary-General for Peacekeeping Operations regarding the difference between the relocation and the repatriation of the personnel of the United Nations Mission in Ethiopia and Eritrea (UNMEE)

"Relocation" viewed as a temporary move to another location due to the security situation—"Repatriation" generally viewed in the United Nations context as a more permanent move back to a person's home country—Not within the authority of the Secretary-General to terminate or suspend the mandate of a mission, either legally or as a matter of substance—"Repatriation" viewed as implying the end of the mission—The move of peacekeeping personnel to other locations should be described as "relocation" to make it clear that the mission continues to exist—Termination of the Mission exclusively within the authority of the Security Council

1. This is in reference to your note of 22 February 2008 (received by our Office on 25 February) in which you request our urgent advice on the question as to the difference between the terms "relocation" and "repatriation", and the authority of the Secretary-General and the Security Council with respect to the two processes. You note that this issue has arisen in the context of having to move UNMEE peacekeeping personnel from an untenable situation in Eritrea pending a decision by the Security Council on the future of the Mission.

2. In our view the term "*relocation*" means a move to another location, which move may be temporary in nature. In the security context (see Field Security Handbook, paras. 5-16), "relocation" in the narrower sense means to relocate international staff (and spouses and eligible dependants) to alternative locations within the same country (para. 5.47 (b)); while, in the broader and more general and technical sense, it means to relocate international staff (and spouses and eligible dependants) to alternative locations in the country and/or to evacuate outside the country all non-essential international staff and their spouses and eligible dependants, as well as spouses and eligible dependants of essential international staff (paras. 5-16, heading (c), and para 5.47(b)&(c)).

3. The term "*repatriation*", as generally used in a United Nations context, particularly with respect to the appointment of staff members, means a move back to that person's home country, and connotes that the move is more permanent in nature. However, the term "repatriation" is referred to in article V, section 18 (f), of the 1946 Convention on the Privileges and Immunities of the United Nations ("the Convention"),[*] which provides "[O]fficials of the United Nations shall be given, together with their spouses and relatives dependent on them, the same repatriation facilities in time of international crisis as diplo-

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

matic envoys". Thus, in the Convention, it appears to be used in the sense of "evacuation" from the country.

4. As to the authority of the Secretary-General and the Security Council with respect to the two processes, the Secretary-General may take such measures as he considers necessary to ensure the safety and security of peacekeeping personnel. While the Secretary-General may of course repatriate individual United Nations staff within his authority under the United Nations Regulations and Rules, the Secretary-General does not have the authority to terminate or suspend the mandate of the Mission, either legally or as a matter of substance, contrary to the applicable decision of the Security Council. In its resolution 1798 (2008), the Security Council, "having considered the report of the Secretary-General of 23 January 2008 (S/2008/40)" (in which the Secretary-General stated in paragraph 45 "[i]n light of the restrictions on UNMEE operations, including the stoppage of fuel supplies to run the Mission, I recommend a one month technical roll over of the mandate of UNMEE"), decided in operative paragraph 1 "to extend the mandate of UNMEE for a period of six months, until 31 July 2008". If the Secretary-General were to decide to "repatriate" the members of UNMEE, this implies the end of the Mission and would appear to be inconsistent with the terms of Security Council resolution 1798 (2008).

5. As the mandate of UNMEE has not yet expired and the Security Council has not requested UNMEE to withdraw from Eritrea, it is our view that the Secretary-General should use the term "relocation" when describing the move of peacekeeping personnel including troops and staff members from Eritrea to other locations. The term "relocation", rather than "repatriation" makes it clear that UNMEE still exists, but that mission personnel are temporarily being moved to another location, in view of the current security situation jeopardizing the safety and security of UNMEE personnel.

6. With regard to the military contingents, from the draft special report of the Secretary-General to the Security Council on the relocation of UNMEE, we understand that the contingency plan had envisioned a relocation for a limited duration to Asmara and Assab but due to a lack of adequate facilities as well as logistical difficulties in further relocation within Ethiopia, the military personnel that have already regrouped in Asmara and Assab, would be relocated to their home countries, pending a final decision by the Security Council. We note that this relocation would not include some military personnel from the various troop contingents who are needed to secure contingent-owned equipment. While safety and security concerns as well as logistical issues might obligate this relocation, a return of troop contingents back to their home countries could give rise to concerns that this is indeed a repatriation of troops away from the mission. Hence it should be clear that these relocations, even though back to the home country, are temporary pending a final decision of the Security Council.

7. With regard to military observers (which number around 120 for UNMEE), we note that, according to the draft special report referred to above, only those military observers whose tours of duty are to be completed in the near future will be repatriated immediately, while the remainder of the observers will be reassigned. We also note that the Secretary-General has the authority to repatriate those personnel as they are considered "experts on mission" with contracts with the Organization. Therefore, in view of the operational limitations resulting from the current situation, it is within the authority of

the Secretary-General to repatriate those military observers as the Organization would no longer need their services.

3 March 2008

## 4. Personnel questions

### (*a*) Interoffice memorandum to the Legal Support Office, Bureau of Management, United Nations Development Programme (UNDP), regarding proposed changes to the Constitution of the UNDP/UNFPA/UNOPS Staff Association

Consistent practice of the Administration to limit review of statutes prepared by staff unions or associations solely to their electoral provisions—Staff associations are established for the purpose of affording representation to staff members only—Participation of non-staff personnel as associate members with observer status would not be in conformity with Staff Regulation 8.1 (b) and Staff Rule 108.1—Period of continuous administrative release of staff representatives limited to four years—Obligation of staff associations to afford equitable representation to all staff members cannot be subject to the payment of dues

1. I refer to your memorandum, dated 26 December 2007, seeking advice on the validity of certain proposed changes to the Constitution of the UNDP/UNFPA/UNOPS Staff Association ("Constitution"). You requested our views on (i) whether non-staff personnel may participate in the UNDP/UNFPA/UNOPS Staff Association ("Staff Association") as associate members with observer status; (ii) whether a staff representative may serve three consecutive terms on the Staff Council, which is the principal organ of the Staff Association; and (iii) whether the payment of membership dues may be established as a prerequisite for voting.

2. At the outset, we note that it has been the consistent practice of the Administration to limit its review of statutes prepared by staff unions or associations solely to their electoral provisions, which are approved by the Secretary-General when they are fully consistent with the requirements set out in staff regulation 8.1(b) and staff rule 108.1. We have not conducted a review of all the proposed changes in the Constitution and have confined our comments below to the three issues identified in your memorandum.[1]

3. With respect to the participation of non-staff personnel in the Staff Association, the Office of Legal Affairs (OLA) has previously advised that staff members may not continue as members of staff representatives bodies beyond the termination of their contracts, nor may consultants participate in elections for staff representatives bodies, on the grounds that such practices would be inconsistent with staff regulation 8.1(b) and staff rule 108.1 which apply only to staff members. For these same reasons, we consider that the participation of non-staff personnel in the Staff Association as associate members with observer status, as provided for in article 4(1) of the Constitution, would not be in conformity with staff regulation 8.1(b) and staff rule 108.1 because these provisions envisage

[1] We note, however, that it is incorrect to list the Secretary-General as a staff member in article 22 of the draft Constitution.

that staff representative bodies are established for the purpose of affording representation to staff members only.

4. On the issue of whether article 6(2)(d) of the Constitution may allow for a Staff Council member to serve three consecutive terms, it is recalled that a recommendation by management to impose term limits for staff representatives was reflected in the Secretary-General's report entitled "Reasonable time for staff representational activities" of 10 May 1996 (A/C.5/50/64). Following its consideration of this report, the General Assembly decided, in resolution 51/226 of 3 April 1997 on "Human resources management", to limit the period of continuous release of staff representatives to a maximum of four years. As staff representatives serving on the Staff Council are not on administrative release, there would be no legal basis to object to the proposed length of service for Staff Council members provided for in Article 6(2)(d).

5. As for limiting participation in and assistance by the Staff Association to "dues paying members", as set out in article 4(4) of the Constitution, OLA has consistently advised in the past that under staff regulation 8.1(b), staff representative bodies are required to "afford equitable representation to *all* staff members" (emphasis added) and this obligation cannot be subject to the payment of dues. In order to comply with staff regulation 8.1(b), the Staff Association must extend membership and related rights to all staff members irrespective of whether they pay membership dues.

4 June 2008

### (*b*) Interoffice memorandum regarding rights of staff representatives

Duties and obligations of staff members set out in article 1 of the Staff Regulations and chapter 1 of the 100 series of the Staff Rules—Duties and obligations apply to all staff members, regardless of status as staff representatives—The exercise of freedom of expression and association does not exempt staff representatives from observing the duties and obligations incumbent upon staff members—Staff representatives are not exempt from the obligations to report misconduct and to comply with confidentiality provisions applicable to investigations

1. I refer to your memorandum requesting advice on whether the members of a Staff Council and/or its chairperson enjoy "special rights" different from the rights enjoyed by other staff members, in particular with regard to freedom of speech and the obligation to report allegations of misconduct.

. . .

Analysis

4. At issue is whether staff representatives are exempt from the duties and obligations applicable to other staff members, including the obligations to report misconduct and to comply with the confidentiality provisions applicable to investigations.[1] In this connection, it

[1] The obligation to report misconduct is set out in staff regulation 1.2 (c) which stipulates that "[s] taff members must respond fully to requests for information from staff members and other officials of the Organization authorized to investigate possible misuse of funds, waste or abuse." The requirement to maintain confidentiality is provided for in paragraph 5.11.2 of the IOM/FOM 54/2005.

is also relevant to consider whether in exercising their freedom of expression or association, staff representatives are exempt from the normal duties and obligations of staff members.

*Whether staff representatives are exempt from staff duties and obligations*

5. The applicability of staff duties and obligations to staff representatives are expressly addressed in ST/AI/293 on "Facilities to be provided to staff representatives". Paragraph 2 of ST/AI/293 states that "[s]taff representatives shall have the *same rights, duties, obligations and privileges as other staff members* of the United Nations under the Staff Regulations and Rules" (emphasis added).

6. We also note that the duties and obligations of staff members are set out in article I of the Staff Regulations and chapter I of the 100 series of the Staff Rules. In the formulation of these provisions, there was considerable discussion about the appropriateness of creating special provisions applicable to staff representatives. Ultimately, at the initiative of the staff representatives, the Staff-Management Coordination Committee recommended that all references to the staff representatives in these provisions should be deleted and reviewed in the context of future amendments to article VIII of the Staff Regulations and chapter VIII of the 100 series of the Staff Rules, which address staff relations.[2] This recommendation was endorsed by the Secretary-General and reflected in his report (A/52/488/Add.l), which was adopted by the General Assembly in its resolution 52/252 of 8 September 1998.

7. To date, no further revisions have been made to article VIII of the Staff Regulations and chapter VIII of the 100 series of the Staff Rules to establish any special rights of staff representatives. Accordingly, there is no legal basis to assert that staff representatives are exempt from complying with the duties and obligations of staff members.

8. The applicability of duties and obligations to all staff members, regardless of their status as staff representatives has also been recognized by the United Nations Administrative Tribunal (UNAT). In Judgement No. 855, Lombardi (1997), UNAT stated that it "is quite aware that, in discharging their functions, staff representatives remain bound by the obligations incumbent on all staff members of international organizations." (*Lombardi*, paragraph III).

*Whether in exercising their freedom of expression or association, staff representatives are exempt from staff duties and obligations*

9. In support of the argument that it was inappropriate for the Office of the Inspector General to remind him of his obligation to report misconduct, the Chairman cited Judgment No. 911 of 30 June 1988 of the International Labour Organization Administrative Tribunal (ILOAT), which noted that "a staff association enjoys special rights that include broad freedom of speech and the right to take to task the administration of the organisation whose employees it represents." Furthermore, ILOAT has also declared that "[f]reedom of association means that there must be freedom of discussion and of debate." (ILOAT Judgment No. 274 of 12 April 1976). From these cases, the Chairman appeared to

[2] See paragraph 2 of A/52/488/Add.l ("Proposed United Nations Code of Conduct").

infer that in exercising their freedoms of expression and association, staff representatives are exempt from the normal duties and obligations incumbent on staff members.[3]

10. We do not agree that the case law of the ILOAT provides a basis for such an expansive interpretation of the implications of the freedom of expression and association, even when exercised by staff representatives. We note that Judgment No. 911, on which the Chairman relies, itself recognizes that there are limits to freedom of expression. It is important to view the quotation cited by the Chairman in its proper context; the relevant part of the decision states in full as follows:

> "According to precedent a staff association enjoys special rights that include broad freedom of speech and the right to take to task the administration of the organisation whose employees it represents. *Like any other freedom, however, freedom of speech has its bounds. A staff association may not resort in public to action that impairs the dignity of the international civil service*, save that the degree of discretion required of it is not as great as is expected of an individual staff member: both law and practice allow it wider freedom of speech and only gross abuse will be inadmissible."[4] (Emphasis added).

11. The principle that freedom of expression must respect certain bounds was reiterated in ILOAT Judgment No. 2227 of 16 July 2003, in which ILOAT recognized that actions to restrict such freedom are permissible "where there is gross abuse of the right to freedom of expression or lack of protection of the individual interests of persons affected by remarks that are ill intentioned, defamatory or which concern their private lives."[5] Moreover, in its Judgment No. 1061 of 29 January 1991, ILOAT examined a case in which a staff representative was dismissed after criticizing the treatment of Food and Agriculture Organization of the United Nations (FAO) staff in an unauthorized radio interview. ILOAT agreed that the radio interview by the staff representative violated the staff rule requiring staff members to obtain prior approval before issuing public statements to the press and held that "[s]taff representatives are not exempted from observance of the rules by reason of holding office in the Union."[6]

12. Similarly, UNAT has also recognized that where staff representatives "have overstepped the bounds of the legitimate exercise of freedom of association," the Administration may be entitled to "react strongly." (*Lombardi*, *ibid*, paragraph II). The *Lombardi* judgement concerned a staff representative who was subject to a written reprimand because a number of staff unions and associations based in Geneva sought to disrupt a salary survey conducted by the International Civil Service Commission by writing letters to local employers in Geneva urging them to refrain from participating in the survey. UNAT

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[3] While the case law of the ILO Administrative Tribunal is not binding on the United Nations, it has provided important guidance for the United Nations Administrative Tribunal. Accordingly, we have examined the case law of the ILO Administrative Tribunal in this section.

[4] ILOAT Judgment No. 911, paragraph 8.

[5] ILOAT Judgment No. 2227, paragraph 7. See also paragraph 3 of ILOAT Judgment No. 1061 of 29 January 1991 ("Freedom of speech must be protected particularly for officers of a staff association, so that they are not hampered in their task of representing the membership when in dispute with the Administration. But there are limits on such freedom. A staff representative's public statements must not impair the dignity of the international civil service: indeed he is under a special obligation not to abuse his rights by using expressions or resorting to behaviour incompatible with the decorum appropriate to his status both as an international civil servant and as an elected staff representative.")

[6] ILOAT Judgment No. 1061, *ibid*, paragraph 4.

ultimately found in favour of the staff member, on the grounds that it was inappropriate for the Organization to punish an individual for the collective actions of a number of staff associations. Nevertheless, UNAT recognized that staff representatives "remain bound by the obligations incumbent upon all staff members of international organizations" (*ibid*, paragraph III), even though the case involved the exercise by staff representatives of their freedom of association and expression.

13. In view of the foregoing, freedom of expression does not override the right of an individual to protection from defamation. Where allegations of corruption by senior . . . officials have been made, we consider that investigations to establish the veracity of such allegations are entirely appropriate and cannot be seen as incompatible with freedom of expression. Moreover, according to the ILOAT, the exercise of freedom of expression does not exempt staff representatives from observing the duties and obligations incumbent on staff members. Similarly, the UNAT has ruled that the exercise of freedom of association does not exempt staff representatives from observing staff duties and obligations. Accordingly, staff representatives are not exempt from the obligations to report misconduct and to comply with the confidentiality provisions applicable to investigations.

Conclusion

14. From our review of the applicable Staff Regulations and Rules and administrative issuances, as well as the case law of ILOAT and UNAT, we consider that staff representatives do not enjoy an exemption from the duties and obligations applicable to staff members either by virtue of their status as staff representatives or in connection with the exercise of their freedoms of expression and association. Accordingly, staff representatives are not exempt from the obligations to report misconduct and to comply with the confidentiality provisions applicable to investigations.

4 June 2008

## 5. Procurement

### (*a*) Interoffice memorandum to the Headquarters Committee on Contracts (HCC) regarding the implementation of its recommendation in connection with financial rule 105.15(c)

Procurement process—Serious procedural irregularities in procurement exercise—Recommendation by the HCC that all bids be cancelled and that Procurement Service be authorized to negotiate directly with three technically compliant vendors—Direct negotiation pursuant to Financial Rule 105.15(c) does not constitute another request for a best and final offer (BAFO)

1. I refer to your memorandum, dated 18 September 2007, requesting advice with regard to the Procurement Service's (PS) opinion concerning the implementation of a HCC recommendation, from its meeting HCC/07/48 that was held on 5 June 2007. I also refer to the follow-up discussions between you and members of this Office concerning this matter. The subject of this matter was a presentation of HCC concerning a proposed contract to [company 1] for the provision of consultancy services relating to the development of an Enterprise Risk Management Programme and Internal Control to the United Nations, in

support of the Office of Programme Planning, Budget and Accounts (OPPBA), in the total net amount of US$ [sum]. As set forth in paragraph 3.17 of the HCC minutes for that meeting, HCC recommended that the Controller reject all bids and authorize PS to negotiate a contract under financial rule 105.15. According to PS, however, such a recommendation was tantamount to authorizing PS to obtain yet another best and final offer ("BAFO") from proposers. PS notes that section 11.6.8 (2) of the Procurement Manual only allows one BAFO to be conducted during the course of any procurement exercise. Thus, the question is whether the HCC recommendation to reject all bids and to negotiate a contract directly with the three technically compliant vendors would result in more than one BAFO being undertaken in the procurement exercise.

2. As an initial matter, we note that, with respect to this procurement exercise, the issue is effectively moot, since the contract was re-bid by PS and was subsequently submitted to the HCC, the majority of which, at the HCC meeting of 8 August 2007, recommended that it be awarded to [company 2]. You have, nonetheless, requested legal advice concerning this issue for future reference. Although the legal issue in this case is not particularly complex, the factual background that raised this issue was rather convoluted:

3. According to the minutes of the HCC meeting held on 8 August 2007, as well as the minutes of the HCC meeting held on 5 June 2007, the case in question was initially submitted for the HCC review on 5 June 2007. As explained in the minutes of the HCC meeting of 5 June 2007, three vendors were found to be technically compliant: [company 2], [company 1] and [company 3]. The commercial evaluation of the three technically compliant proposals determined that the lowest bid came from [company 2] (US$ [sum]), followed by [company 1] (US$ [sum]) and [company 3] (US$ [sum]). [Company 2] received the highest overall combined, weighted-score (83.55 points). However, the estimated person-days proposed by [company 2] for the provision of the proposed consulting services, in the amount of 369 person-days, differed significantly from the person-days proposed by [company 1], 570, and [company 3], 607. PS and OPPBA stated that the commercial proposal from [company 2] was the lowest bid because of the firm's low estimate of person-days for the project. According to the minutes of the HCC meeting, of 5 June 2007, PS and OPPBA were of the view that the resources and level of input proposed by [company 1] and [company 3] were more in line with the size and scope of the project. Further, PS and OPPBA expressed their concern that there was a risk that [company 2] would seek to recover additional costs from the United Nations after commencing the services. In light of the foregoing considerations, PS and OPPBA concluded that it would not be in the best interest of the Organization to award the contract to [company 2].

4. For reasons that were unclear to the HCC (see minutes of HCC/07/48, of 5 June 2007, paragraph 3.13), and that are likewise unclear to this Office, PS approached both [company 1] and [company 3] for a BAFO instead of asking all three vendors, including [company 2], to refine their offers for completing the project. According to the post-BAFO revised scores for both the technical and the financial evaluation, even after the BAFO, [company 2] still retained the highest overall score of 83.55 points compared to 71.17 points for [company 1] and 70.33 points for [company 3]. PS also affirmed, upon request by HCC in its meeting of 5 June 2007, that the Organization could hold [company 2] to the proposed price. However, HCC was of the opinion that there were "serious procedural irregularities" in the procurement exercise (see *ibid*., paragraph 3.14) and that, accordingly, the requirement should have been re-bid. However, having been advised by PS that

urgent operational requirements made re-bidding not a feasible option, HCC instead recommended that all bids be cancelled and that, pursuant to financial rule 105.15 (c), PS be authorized to negotiate with the three technically compliant vendors.

5. As explained in annex II of the minutes of the HCC meeting of 8 August 2007, PS, however, issued a new request for proposal (RFP) to all five vendors that had submitted proposals in response to the previous RFP. It appears that during the course of the technical evaluation for the new RFP, the proposal submitted by [company 2] was considered to be too high a risk because of the insufficient level of staff resources that it had proposed. However, [company 2] still received the highest score. It is not clear from the records provided to this Office why [company 2] would still be evaluated with the highest score in the technical and commercial evaluation despite the significant concerns raised by PS. Since PS considered the results of the evaluation to be unrealistic, PS undertook a second combined evaluation and decided that [company 1]'s proposal was the most responsive to the requirements set forth in the solicitation documents and offered a best-value-for-money outcome.

6. In conjunction with OPPBA, PS sought the HCC recommendation to award the contract to [company 1]. According to the minutes of the HCC meeting of 8 August 2007, the HCC noted a number of serious concerns regarding the actions taken by PS. Specifically, a majority of the members of HCC stated that they did not support PS recommendation to award the contract to [company 1] in the amount of US$ [sum]. Rather, the majority recommended that the award be made to [company 2] in the amount of US$ [sum].

7. Your question is whether the HCC original recommendation to reject all bids and to negotiate a contract directly with the three technically compliant vendors could be seen as constituting a second BAFO. Section 11.6.8 (2) of the Procurement Manual provides that, "[i]n order to ensure the integrity and fairness of the process, the Procurement Officer shall not conduct more than one round of Best and Final Offers and shall ensure that the original price proposals and any other price/cost/financial related information obtained during the commercial evaluation of all proposals remain confidential." While a BAFO serves to refine the pricing in an existing solicitation, the recommendation from HCC to directly negotiate a contract under financial rule 105.15(c) concerns an exception to the regular formal solicitation process. Financial rule 105.15(c) provides that the Organization may reject bids or proposals for a particular procurement action, recording the reasons for such rejection in writing. In such cases, "the Under-Secretary-General for Management shall then determine whether to undertake a new solicitation, to directly negotiate a procurement contract pursuant to rule 105.16 or to terminate or suspend the procurement action." Pursuant to rule 105.16, which covers "exceptions to the use of formal methods of solicitation", the Under-Secretary-General for Management may determine for a particular procurement action that using formal methods of solicitation is not in the best interests of the United Nations, and, in such circumstances, may award a procurement contract, either on the basis of an informal method of solicitation or on the basis of a directly negotiated contract, to a qualified vendor. Such direct negotiations under financial rule 105.15(c), therefore, cannot be considered as constituting another BAFO.

15 January 2008

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

Suspension of vendors suspected of having engaged in corrupt practices—Immediate suspension of vendors having admitted that allegations are true—Suspension for six months of remaining vendors to allow for an investigation to confirm allegations—Allegations must be confirmed by substantial and documented evidence—Decision to suspend vendors to be taken by the Assistant Secretary-General, Controller—Action taken must be in accordance with procedures set forth in Procurement Manual—Role of the Vendor Review Committee, rather than the Office of Legal Affairs, to review evidence regarding alleged corrupt practices

1. I refer to your memorandum, dated 6 December 2007, and which I received on 14 December 2007, informing me of your policy decision to suspend the 115 companies registered in the United Nations Vendor Database that were also identified in the Fifth and Final Report of the Independent Inquiry Committee (IIC Report) into the United Nations Oil for Food Programme (Programme) as having engaged in corrupt practices with regard to the Programme. In that memorandum, you stated that eight (8) of those 115 companies would be immediately suspended because, in written responses to requests by the Procurement Service (PS) to explain the IIC allegations, those eight companies had admitted to PS that the IIC allegations were true. You also stated that the remaining 107 companies would be suspended for six months in order to allow this Office to conduct an investigation in order to confirm that the IIC allegations against those companies provided substantial and documented evidence of the companies' having engaged in misconduct so that the companies could be suspended or removed from the United Nations Vendor Database in accordance with the standards for suspension or removal set forth in the Procurement Manual. I also refer to your memorandum, dated 7 January 2008, and which I received on 21 January 2007, by which you sought the review of the text of a draft letter pursuant to which you would inform 107 of those companies of your decision to suspend them from the United Nations Vendor Database for six months pending such review.

2. As an initial matter, I note that the decision to suspend the 115 companies from the United Nations Vendor Database is a policy decision that, in accordance with the procedures for the removal or suspension of vendors set forth in subsection 7.12.2 of the Procurement Manual, is for you to make. As was previously stated in my memorandum of 27 July 2007, this Office agrees that appropriate action should be taken against companies in respect of whom, in accordance with the procedures set forth in the Procurement Manual for suspension or removal from the United Nations Vendor Database, the Vendor Review Committee (VRC) of PS has compiled substantial and documented evidence of misconduct. The only concerns that I had previously raised and that I wish to reiterate are that such procedures be followed so that the Organization can avoid criticism and potential claims for having acted arbitrarily.

3. With respect to the eight companies who admitted to PS that the IIC allegations were true, if the VRC and you are satisfied that such admissions constitute the substantial and documented evidence required under subsection 7.12.2 of the Procurement Manual

for the suspension or removal of those eight companies from the United Nations Vendor Database, then this Office considers this to have been resolved within your purview and has no further comments.

4. With respect to the remaining 107 companies, your memorandum, dated 7 December 2007, states that your decision to suspend those companies for six months "should give the Office of Legal Affairs the opportunity to confirm that the IIC Report evidence is substantiated and documented, and provide operational guidance to reinstate the suspect vendors if warranted." First, I note that sub-section 7.12.1 of the Procurement Manual provides that it is the role of the Vendor Review Committee of PS, and not of this Office, to "review all substantial and documented evidence . . . taking into account the criteria listed in 7.12.2" when deciding whether to suspend or remove companies from the United Nations Vendor Database. Accordingly, your proposal to enlist this Office to conduct such a review does not conform to the requirements of the Procurement Manual that the VRC conduct such review. Second, it would be inappropriate for this Office to conduct such a review, because if one of the companies were to assert a claim concerning its suspension or removal, it could present a conflict for this Office to defend the Organization with respect to a process in which it was directly responsible for the outcome being challenged.

5. With respect to the review of the IIC evidence, I recall that, in his note of 27 August 2007, the Chairman of the PTF asserted that the IIC in fact had made specific and individual findings of wrongdoing concerning the 115 companies registered in the United Nations Vendor Database and that those findings were based on actual records from banks, Government of Iraq ministries, or the companies themselves. If that is the case, the VRC should have no difficulty reviewing the specific evidence compiled by the IIC for each company, instead of simply relying on the summary findings set forth in the IIC Report, in order to establish the substantial and documented evidence warranting the companies' suspension or removal from the United Nations Vendor Database. I would imagine that the Chairman of the PTF could lend valuable assistance to PS and the VRC in carrying out such a review.

6. As I stated in my memorandum of 27 July 2007, such company-specific review of the IIC evidence is precisely the procedure that the VRC must follow under subsection 7.12.2 of the Procurement Manual when recommending the suspension or removal of the companies. In the proposed draft letter to the 107 companies that was attached to your memorandum of 7 January 2008, you state that the decision to suspend companies from the United Nations Vendor Database "for a minimum period of six months to allow the United Nations to conduct further due diligence with regard to (name of company's) participation in the Oil for Food Programme." This Office agrees with that formulation of your decision to suspend the vendors pending the VRC further review of the evidence compiled by the IIC. Consequently, this Office has no comments on the draft text.

25 January 2008

### (*c*) Interoffice memorandum to the Headquarters Committee on Contracts (HCC) regarding advice on financial rule 105.15(c)

Recommendation by HCC that all proposals in a procurement exercise be rejected pursuant to financial rule 105.15(c)—After such rejection, a new solicitation can

BE UNDERTAKEN, THE PROCUREMENT ACTION CAN BE SUSPENDED OR TERMINATED, OR A CONTRACT CAN BE NEGOTIATED DIRECTLY WITH THE PARTIES—THE UNITED NATIONS CANNOT SEEK TO OBTAIN A BEST AND FINAL OFFER (BAFO) ON A PROPOSAL THAT HAS ALREADY BEEN REJECTED

1. I refer to your memorandum of 20 February 2008, requesting advice with regard to the Procurement Service's (PS) use of requests for best and final offers (BAFOs).

2. You have indicated that from time to time, HCC will recommend, pursuant to United Nations financial rule 105.15(c), that the Controller reject all bids/proposals and either authorize the Procurement Service to directly negotiate a procurement contract pursuant to financial rule 105.16, or undertake a new solicitation. Thus, the question is whether it is appropriate for the United Nations to request proposers to submit BAFOs for their pricing proposals when a decision has been taken under financial rule 105.15 (c) to reject all bids or proposals and, in accordance with that rule, to directly negotiate a procurement contract.

3. Financial rule 105.15 (c) provides that "[t]he Under-Secretary-General for Management may, in the interest of the United Nations, reject bids or proposals for a particular procurement action, recording the reasons for rejection in writing." The Rule further provides that, after rejecting the bids or proposals, "[T]he Under-Secretary-General for Management shall then determine whether to undertake a new solicitation, to directly negotiate a procurement contract pursuant to rule 105.16 or to terminate or suspend the procurement action." Thus, if a decision has been taken to reject bids or proposals for a particular procurement action, three options are available under the rule. First, an entirely new solicitation exercise can be undertaken. Second, the entire procurement action can be suspended or terminated. Third, a procurement contract can be directly negotiated in accordance with financial rule 105.16. In case of the first two options, the procurement exercise is effectively ended, so the question of seeking BAFOs from vendors whose bids or proposals have been rejected is moot. Only in the case when the third option is exercised and efforts are undertaken to directly negotiate a procurement contract pursuant to financial rule 105.16 would the question arise as to whether it is appropriate to seek BAFOs from vendors with whom the Organization is negotiating.

4. In this regard, financial rule 105.16 (b) provides that, when a determination has been made that formal methods of solicitation of goods or services are not in the best interest of the Organization, including when bids or proposals have been rejected pursuant to financial rule 105.15(c), a procurement contract may be awarded, "either on the basis of an informal method of solicitation or on the basis of a directly negotiated contract, to a qualified vendor whose offer substantially conforms to the requirement at an acceptable price." In effect, if all bids or proposals have been rejected, the Organization may negotiate directly with one or more vendors to obtain the Organization's requirement at an acceptable price.

5. The question then is whether a BAFO can even be conducted in such circumstances. The use and procedures of BAFOs are described in section 11.6.8 of the Procurement Manual (November 2007, Rev. 04), which states, in relevant part, that:

> "(1) After establishing the competitive range of [the] most responsive proposers and opening the price proposals, the Procurement Officer may decide, as an exception, and upon clearance of the respective Section Chief or Chief of Procurement or (CPO), to engage in discussions with a sufficient number (no less than two) of technically qualified proposers

that have a reasonable chance for award, in order to obtain Best and Final Offers (BAFO). Sound professional judgement should be used in order to make this determination."

Thus, as set forth in the Procurement Manual, BAFOs which, as you know, only apply to proposals, also only apply to existing and still active proposals. It follows, therefore, that the United Nations cannot seek to obtain a BAFO on a proposal that has already been rejected. Instead, and in accordance with financial rule 105.15 (c) and 105.16 (b), in such a case, PS should be directly negotiating a procurement contract to obtain the Organization's requirement at an acceptable price.

19 March 2008

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

### 1. International Labour Organization[1]

#### Opinion concerning the participation by the representative of the United Nations Interim Administration Mission in Kosovo at the International Labour Conference[2]

Participation by the representative of the United Nations Interim Administration Mission in Kosovo (UNMIK) at the International Labour Conference—Representative also Minister of the Provisional Institutions of Self-Government of Kosovo—Accreditation signed by the Special Representative of the Secretary-General—No legal impediment to participation

The government delegate of Serbia raised a point of order asking that Mr. Nenad Rasic, listed as representative of United Nations Interim Administration Mission in Kosovo (UNMIK), be removed from the list of speakers, arguing that Mr. Nenad Rasic was Minister of Labour and Social Welfare of the Provisional Institutions of Self-Government in Kosovo and that, consequently, he could not represent the UNMIK administration. The Legal Adviser to the Conference, asked by the President of the Conference to address such point of order, gave the following opinion:

"Mr. Nenad Rasic has been regularly accredited as a member of the delegation of the United Nations Interim Administration Mission in Kosovo (UNMIK) to this 97th Session of the International Labour Conference. The accreditation has been signed by Mr. Joachim Rücker, Special Representative of the Secretary-General of the United Nations, and by the same letter, dated 14 May 2008, Mr. Rücker conveyed to the Director-General of the ILO and Secretary-General of this Conference the request for Mr. Rasic to take the floor in this plenary. This is the situation, so the Office does not see any legal impediment to Mr. Rasic taking the floor."

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[1] A number of Legal Opinions were rendered during the Conference on specific procedural issues and the interpretation of the Standing Orders as well as the possible effects of amendments to texts under discussion. Only one Legal Opinion has been selected for reproduction here. The others can be found in the records of the Conference.

[2] Provisional Record 17, Tenth meeting, Reports of the Chairperson of the Governing Body and the Director-General. Available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_094145.pdf.

## 2. United Nations Industrial Development Organization

### (*a*) Interoffice memorandum regarding United Nations Industrial Development Organization (UNIDO) Headquarters Agreement – Import privileges of staff members holding a [State] residency permit

Import privileges of staff member holding a resident permit—Interpretation of Headquarters Agreement—Functional privileges and immunities attached to UNIDO officials—Privileges and immunities apply to all staff who are not nationals of [State] or stateless persons resident in State—Residency status in [State] does not limit or reduce functional privileges and immunities enjoyed by UNIDO staff

1. This is with reference to your memorandum, dated [ . . . ], regarding the denial by the [Ministry of State] of import privileges to a non-[State national] staff member in the General Service category holding a [State] residency permit. According to your memorandum, this is the first such case, representing an apparent change in policy on the part of the [State] authorities.

2. You have requested our advice concerning the legitimacy of the foreign ministry's interpretation of the Headquarters Agreement and on further action in case their position contradicts the provisions of the Headquarters Agreement.

3. The legal question to be considered is whether a non-[State national] staff member in the General Service category holding an [State] residency permit enjoys import privileges under the Headquarters Agreement. In other words, does the Headquarters Agreement restrict the import privileges normally granted to non-[State national] staff members in the General Service category when they have residency status in [State]?

4. Section 37 of the Headquarters Agreement lists the functional privileges and immunities attached to officials of UNIDO. These include certain duty-free imports described in section 37, paragraph (o). In its introductory paragraph, section 37 states that "Officials of the UNIDO shall enjoy within and with respect to [State] the following privileges and immunities. . . . ". Section 37 therefore applies to officials of all ranks. It draws no distinction between staff members based on their residency or other status under national law.

5. Section 38 of the Headquarters Agreement stipulates that staff members of the rank of P-5 and above are granted diplomatic privileges and immunities, provided they are not [State] nationals or stateless persons resident in [State]. The diplomatic privileges and immunities are additional to the functional privileges and immunities listed in section 37. Although section 38 is not applicable to General Service staff members, it is noteworthy that it does not mention persons who are residents of [State] but only [State] nationals and stateless persons resident in [State].

6. Section 39 of the Headquarters Agreement provides, in paragraph (a), that [State] nationals and stateless persons resident in [State] enjoy only the privileges and immunities set out in the Convention on the Privileges and Immunities of the United Nations of

1946,* together with tax exemption on pensions and access to the Commissary. Except for stateless persons resident in [State], section 39, paragraph (a), does not refer to persons who are residents of [State]. As a consequence, section 39 does not, either by its terms or by implication, limit or reduce the functional privileges and immunities granted under section 37 to staff members who have residency status in [State].

7. In light of the above, this Office has consistently held the view that the privileges and immunities listed in section 37 of the Headquarters Agreement are granted in their entirety to all officials of UNIDO, including officials holding residency in [State], but excluding [State] nationals and stateless persons resident in [State].

8. Accordingly, there is no basis under the Headquarters Agreement for denying the import privileges specified in section 37, paragraph (o), to non-[State national] General Service staff members because they are residents of [State].

16 January 2008

### (*b*) Interoffice memorandum regarding limitations on earnings of UNIDO retirees re-employed by the Organization

Authority of Director-General to review and change the ceiling imposed on annual earnings of retirees re-employed by the Organization—Administrative instruction No. 9, addendum 2—The ceiling is not the product of a decision or recommendation by the International Civil Service Commission and hence is not a common system standard—Reservations expressed by the General Assembly and the Advisory Committee on Administrative and Budgetary Questions regarding the practice of re-employing retirees—Legal obligations under the 1985 Agreement between the United Nations and UNIDO—Need to consider, for any review of the ceiling, relevant statistics as well as relevant policy aspects including financial effects of a possible increase of the limit, succession planning, careers of current staff and needs of the Organization—a change should only be introduced for compelling policy reasons in the interests of the Organization, and should follow prior consultations with the United Nations

1. This memorandum is in response to the request of the Joint Advisory Committee (JAC) for a legal opinion concerning the limitation on earnings of retired former staff members. . . .

2. The question to be considered is whether the Director-General has the authority to review – and, presumably, to change – the limit or ceiling of US$ 22,000 imposed on the annual earnings of retirees who are re-employed by the Organization. This memorandum considers the rules establishing the limit, the policy objectives involved, and relevant provisions of the 1985 Agreement between the United Nations and UNIDO. In summary, my conclusions are that the Director-General could change the limit, but only for compelling policy reasons in the interests of UNIDO, and following prior consultations with the United Nations.

3. The Director-General's administrative instruction No. 9, addendum 2, dated 25 March 2002, contains the framework for the recruitment and management of consult-

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

ants and short-term experts by UNIDO. Paragraph 12 (a) of the administrative instruction limits the annual emoluments of retired former staff members in the following terms:

> "12. The Director, Human Resources Management Branch, will be responsible for all additional authorizations, as defined below.
>
> (a) The appointment of UNIDO or common system organizations' retirees. When approved, and following the spirit of General Assembly Decision 49/222B [*i.e.,* resolution A/RES/49/222B], former UNIDO or UN staff members in receipt of a pension benefit from the UNJSPF can only be hired for less than six months in any calendar year. *In addition, their earnings should not exceed US$ 22,000 during the same period.* UNIDO retirees cannot be engaged as consultants during the first three months following their separation from service." (Emphasis added).

4. The above rule is not the product of a decision or recommendation of the International Civil Service Commission and is hence not a common system standard. It is based instead on the policy followed by the United Nations, as the reference to General Assembly resolution 49/222B reveals. In resolution 37/237 of 21 December 1982, the General Assembly initially set a monetary limit of US$ 12,000 per calendar year on the emoluments of former staff members in receipt of a pension benefit from the United Nations Joint Staff Pension Fund (UNJSPF). In order to take into account inflation since 1982, the General Assembly decided in 1996 to raise that limit to US$ 22,000 per calendar year (except for language-service staff, for whom a higher limit was set). The General Assembly also decided that no pension-drawing retiree may be re-employed by the United Nations at a higher level than that reached at the time of separation, and that a retiree may not be paid at a level higher than a regular staff member carrying out the same function.

5. The restrictions determined by the General Assembly, including the monetary ceiling of US$ 22,000 per calendar year, have been promulgated most recently in Administrative Instruction ST/AI/2003/8.[*] In terms of section 6.2 of ST/AI/2003/8/Amend.1, effective 1 April 2006, "travel costs, daily subsistence allowance and other per diem payments" are not included in the emoluments subject to the limit of US$ 22,000 per calendar year.

6. In the United Nations, the monetary ceiling of US$ 22,000 on earnings of retired former staff members should be seen in the context of reservations regarding the practice of re-employing retirees, which have been expressed at regular intervals by the General Assembly and the Advisory Committee on Administrative and Budgetary Questions (ACABQ).

7. For example, in resolution 59/266, adopted on 23 December 2004, the General Assembly noted with concern the increased use of retired former staff members in substantive areas and in decision-making positions. The General Assembly also noted with concern that the lack of proper succession planning had a negative impact on the rejuvenation of the United Nations, and requested the Secretary-General to ensure that the employment of retired former staff had no adverse effects on the career planning and mobility of other staff. The General Assembly stressed that the hiring of retired former staff should be on an

[*] 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).

exceptional basis, and in this regard encouraged the Secretary-General to fill vacant posts at senior and decision-making levels through the established staff selection process.

8. In resolution 61/244, adopted on 22 December 2006, the General Assembly again noted with concern the continuous trend of hiring staff retirees for extended periods of time. The General Assembly further endorsed paragraph 84 of the report of the ACABQ (A/61/537, dated 26 October 2006), which states, *inter alia*, that the retention of retirees "clearly indicates continuing weaknesses in the advance planning, recruitment and staff placement processes".

9. As indicated above, the practice has been for UNIDO to follow the lead taken by the General Assembly with respect to the restrictions imposed on the re-employment of retired former staff members. Cooperation between the United Nations and UNIDO in the field of human resources is governed by article 16 (Personnel Arrangements) of the Agreement. Article 16, paragraph (a), of the Agreement stipulates that the United Nations and UNIDO agree:

> " . . . to develop, in the interests of uniform standards of international employment and to the extent feasible, common personnel standards, methods and arrangements designed to avoid unjustified differences in terms and conditions of employment, to avoid competition in recruitment of personnel, and to facilitate any mutually desirable and beneficial interchange of personnel. . . ."

10. Article 16, paragraph (b) (i), of the Agreement provides that the parties agree:

> "[t]o consult together from time to time concerning matters of mutual interest relating to the terms and conditions of employment of the officers and staff, with a view to securing as much uniformity in these matters as may be feasible".

11. In light of the above-quoted provisions of the Agreement, the United Nations and UNIDO have the following legal obligations:

(*a*) The obligation to develop, in the interests of uniform standards of international employment and to the extent feasible, common personnel standards, methods and arrangements (article 16, paragraph (a)). The restrictions on the employment of retired former staff members are an example of common personnel standards. A corollary to the foregoing obligation is that the parties should retain existing common personnel standards, methods and arrangements whenever it is practicable to do so. In other words, the United Nations and UNIDO should only depart from their common personnel standards, methods or arrangements for compelling policy reasons in the interests of the Organization. Such reasons could include, for example, that a party would experience operational difficulties unless it made a particular change.

(*b*) The obligation to consult together from time to time concerning matters of mutual interest relating to the terms and conditions of employment of their officers and staff, with the objective of securing as much uniformity in these matters as may be feasible (article 16, paragraph (b) (i)). The monetary ceiling of US$ 22,000 per calendar year is arguably a matter of mutual interest to the United Nations and UNIDO relating to the terms and conditions of employment of their "officers and staff". This is because the limit relates to the terms and conditions of current "officers and staff" in that they do not have a right or expectation to earn more than US$ 22,000 per calendar year if they are re-hired following retirement. In order to abide by the letter and spirit of article 16, paragraph (b) (i), UNIDO should consult with the United Nations before changing the limit. The consulta-

tions should presumably follow established mechanisms and the Director-General should bear in mind the results of the consultations when deciding what action, if any, to take with respect to the limit.

12. In the light of the above, I have concluded that:

(*a*) The Director-General has the authority to review or reassess the monetary ceiling of US$ 22,000 per calendar year on the earnings of retired former staff members. Amending this limit would be an important policy decision with wider implications for human resources management at UNIDO. Any review of the limit should therefore consider relevant statistics on the employment and remuneration of retirees, possible financial effects of increasing the limit, the consequences of such a change on succession planning and the careers of current staff, the needs of the Organization, and any other relevant policy aspects.

(*b*) The Director-General also has the authority to change the monetary ceiling of US$ 22,000 per calendar year. This authority is, however, circumscribed by the provisions of the 1985 Agreement between the United Nations and UNIDO. In order to comply with those provisions, a change should only be introduced (i) for compelling policy reasons in the interests of the Organization; and (ii) should follow prior consultations with the United Nations.

4 March 2008

### (*c*) Interoffice memorandum regarding Government clearance of UNIDO experts sent on mission to a Member State

Cancellation or postponement of mission travel due to new clearance procedure for international experts and missions—Counterpart agency for UNIDO projects—Interpretation of Basic Cooperation Agreement—Obligation under Agreement to issue visas promptly and without cost to experts and other persons performing services on behalf of UNIDO

1. This is with reference to your email, dated [ . . . ], requesting my advice concerning a new clearance procedure for international experts and missions sent to [State]. According to the email, all experts and missions now require clearance by the [State's] Ministry of Industry, although the ministry is not the counterpart agency for UNIDO projects, resulting in the cancellation or postponement of recent mission travel. In this connection, you have asked for my interpretation of article XI, paragraphs 1 (a) and (d), of the 1988 Basic Cooperation Agreement with the Republic of [State], as well as of article XI, paragraph 1 (b), concerning visas.

2. The relevant clauses of article XI read as follows:

"Article XI

Facilities for Implementation of UNIDO Assistance

1. The Government shall take any measures which may be necessary to exempt UNIDO, its experts and other persons performing services on its behalf from regulations or other legal provisions which may interfere with operations under this Agreement and shall grant them such other facilities as may be necessary for the speedy and efficient imple-

mentation of UNIDO assistance. It shall, in particular, grant them the following rights and facilities:

(a) Prompt clearance of experts and other persons performing services on behalf of UNIDO;

(b) Prompt issuance without cost of necessary visas, licenses or permits;

(c) . . .

(d) Free movement within or to or from the country to the extent necessary for proper execution of UNIDO assistance;

(e) . . . ."

3. From your email, it appears that the clearance of experts and missions by the Ministry of Industry will be in addition to approval by the counterpart agency. Under article XI, paragraph 1 (a), the Government must give prompt clearance of experts and missions. How the Government is to give such clearance is not specified in the agreement. Under article XI, paragraph 1(d), the Government must facilitate free movement of UNIDO experts and missions within or to or from the country to the extent necessary for proper execution of UNIDO assistance.

4. In my view, the Government is within its rights under the Basic Cooperation Agreement to require UNIDO to seek clearance of missions and experts from a particular ministry. The procedure of clearance by the Ministry of Industry does not in itself contravene the provisions of article XI, paragraphs 1 (a) or (d). . . .

5. In terms of article XI, paragraph 1(b), of the Basic Cooperation Agreement, the Government is obliged to issue visas promptly and without cost to experts and other persons performing services on behalf of UNIDO. If this is currently not the case, either in terms of promptness or cost, the matter should also be addressed at a diplomatic level. When visas are requested, UNIDO should indicate that they should be issued as soon as possible and without cost in accordance with the provisions of the Basic Cooperation Agreement. At any rate, UNIDO should decline to pay for visas for staff or experts sent to [State].

29 April 2008

### (*d*) Interoffice memorandum regarding the residency status of [Name]

Eligibility for international benefits in accordance with Staff Rule 103.07(b)—Residency status in a particular country is determined by competent national authorities in accordance with national law—Document issued by national authorities will normally be relied upon as conclusive evidence of the status it confers—Under staff rule 103.07 (b) 'permanent resident' means a non-national who acquires right to reside indefinitely in another country—Staff member whose residency permit is limited in time is not a permanent resident under the Staff Rules—Staff member who is a permanent resident would lose allowance or benefit only if the Director-General considers that the continuation of such allowance or benefit would be contrary to the purposes for which it was created

1. This is with reference to your interoffice memorandum dated [ . . . ], which we received on [ . . . ], in which you request urgent advice concerning the residency status of [Name], a [State] national who has been selected for a professional post in the Organization.

2. You write that [Name] indicated on his personal history form that he has applied for [State] citizenship. We understand that Human Resources Management requested [Name] to clarify his residency and visa status in [State] and that he submitted documents showing that he was granted a [residency permit] in 1998, which was extended in 2005 for a period of ten years, until 2015. You ask whether [the residency permit] dated [date] is to be considered as documentary evidence of his permanent residency status in [State] for the purposes of establishing his eligibility for international benefits in accordance with staff rule 103.07 (b).

3. An individual's residency status in a particular country is determined by the competent national authorities in accordance with national law. To ascertain a staff member's residency status in a particular case, UNIDO will normally rely on any document issued by the national authorities as conclusive evidence of the status it confers. In this instance your question is whether [the] residency permit, dated [date], is proof of [Name] permanent residency status in [State] for the purposes of staff rule 103.07 (b). Staff rule 103.04 (b) states:

> (b) A staff member who has acquired permanent resident status in any country other than that of his or her nationality may lose entitlement to non-resident's allowance, home leave, education grant, repatriation grant and payment of travel expenses upon separation from service for the staff member and his or her spouse and dependent children and removal of household effects, based upon place of home leave, if the Director-General considers that the continuation of such entitlement would be contrary to the purposes for which the allowance or benefit was created.

4. Under this rule "permanent resident" means a person who, as a non-national, acquires the right to reside indefinitely in another country; in other words, a person whose right to residency in that country is not temporary or limited in time. A staff member should accordingly be regarded as having acquired "permanent resident status" in a particular country for the purposes of staff rule 103.07 (b) if he or she becomes entitled to reside there on an indefinite basis.

5. It is noted that [Name] [State] residency title expires in 2015 and that he does not appear to enjoy the right to reside permanently or indefinitely in [State]. Accordingly, we believe that the [residency permit] should not be accepted as documentary evidence that he has acquired permanent resident status in [State] for the purposes of staff rule 103.07 (b).

6. I wish to make one or two additional observations regarding staff rule 103.07 (b) in so far as it relates to your query. The rule provides that a staff member who has acquired permanent resident status in any country other than that of his or her nationality may lose entitlement to specified allowances and benefits. Further, entitlement to those allowances and benefits may only be lost if the Director-General considers that the continuation of such entitlement would be contrary to the purposes for which the allowance or benefit was created. Even assuming that [Name] had acquired permanent resident status in [State], staff rule 103.07 (b) would not automatically deprive him of every allowance or benefit listed in the rule. Rather, the matter is left to the discretion of the Director-General, who should only withhold a particular allowance or benefit when he considers that its payment would be incompatible with the purposes for which the allowance or benefit was created.

3 November 2008