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

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Chapter VI

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

A. Legal opinions of the Secretariat of the United Nations

(Issued or prepared by the Office of Legal Affairs)

1. Privileges and immunities

(*a*) Note to the Assistant Secretary-General for Central Support Services, regarding request for a conference call with the Senate Committee on Homeland Security and Governmental Affairs

Long-standing policy of Organization not to provide formal testimony in parliamentary or congressional hearings—Informal briefings on specific, defined areas are allowed when considered in the best interest of both the Organization and the Member State—Single audit principle precludes any review by external, including Governmental, authority—External review, audit, inspection, monitoring, evaluation or investigation can only be conducted by bodies mandated by the General Assembly—Approval by Secretary-General to be sought prior to engaging in informal briefing—Information provided to be of technical nature and exclude any information on managerial practices

1. This is in response to your [date] email seeking guidance on how to respond to an email of the same date from [Name 1], Counsel, Senate Committee on Homeland Security and Governmental Affairs, requesting a conference call with the Under-Secretary-General for Management "to speak with the Committee about [Name 2]" and "the [Company] sole-source contract." I understand that [Name 1]'s request was forwarded to you due to your involvement with the contract in question.

Formal and informal testimony before Senate or Congressional hearings

2. It is not clear at this stage whether the request from the Senate Committee is for formal testimony from a United Nations official or informal information only. As you may know, the long-standing policy of the Organization in relation to invitations to give testimony before national parliamentary or congressional hearings is contained in the Secretary-General's memorandum of 8 August 1991 (copy attached).** You will note from

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

** Not reproduced herein.

that memorandum, which has been consistently applied to date, that it has not been the practice for Secretariat officials to provide formal testimony in such hearings except, on the rarest occasions, on matters of a purely technical nature and with the authorization of the Secretary-General.

3. Should the request not be for formal testimony, however, but for the provision of informal information only, the Organization's practice has been to allow informal briefings on specific, defined areas where it is considered to be both in the interests of the Organization and the Member State concerned.

Single audit principle

4. Whether in a formal or an informal setting, the nature of the information sought should be consistent with the "single audit" principle. Under that principle, any review by any external authority, including any Governmental authority, is precluded under regulation 7.6 of the Financial Regulations and Rules, which provides that "the Board of Auditors shall be completely independent and solely responsible for the conduct of audit." This principle was reaffirmed by the General Assembly in its resolution 59/272, which underscored the principle that any external review, audit, inspection, monitoring, evaluation or investigation can only be conducted by bodies mandated by the General Assembly. Consequently, to the extent that the information sought may be considered a review of managerial practices, whether by [Name 2] or other officials in the United Nations, the release of that information would be precluded under the "single audit" principle followed by the Organization.

Authorization by the Secretary-General

5. Although it is not clear whether the request for a United Nations official to participate in a conference call with the Senate Committee is on a formal or an informal basis, we would advise that any participation in a conference call with "the Committee" would require the approval of the Secretary-General on an exceptional basis. Further, should such approval be provided, the participation should be limited to information of a technical nature and exclude information that may be considered a review of managerial practices, whether by [Name 2] or other United Nations officials.

Privileges and immunities

6. As a final comment, the Organization would not ordinarily respond to requests of this nature unless they are made formally via the United States Mission. This is particularly important where, as in the present case, the request would impact on the privileges and immunities of the United Nations and its officials providing the requested information. Therefore, we would suggest that you respond to [Name 1] along the lines in the attached draft* requesting a more detailed letter of request be forwarded through the United States Mission. Should this elicit a formal, detailed letter of request through the United States Mission, we stand ready to advise further.

9 March 2009

* Not reproduced herein.

(*b*) Interoffice memorandum to the Director, Legal Support Office, United Nations Development Programme (UNDP), regarding privileges and immunities issues related to "Delivery as One" and United Nations Volunteers

"One UN" initiative to provide coordinated development assistance—Proposal to Governments to apply the Standard Basic Assistance Agreement (SBAA) *mutatis mutandis* to all organizations in the United Nations system participating in the One UN initiative—Status of United Nations volunteers—Volunteers engage under substantially equal terms and often serve under similar conditions as technical assistance experts but are not officials of the United Nations nor experts on mission—*Reparation for Injuries Suffered in the Service of the United Nations* case defines "agents" of the Organization in "the most liberal way" and does not address the question of privileges and immunities—Privileges and immunities of United Nations volunteers not considered to have become customary law

1. This is with reference to your emails concerning the extension of privileges and immunities enjoyed by UNDP under the Standard Basic Assistance Agreement (hereinafter SBAA) to other United Nations system organizations in the countries identified for the "Delivery as One" pilot as well as clarification on the privileges and immunities enjoyed by United Nations Volunteers.

Delivery as One /One UN

2. We understand that there is a proposal to conclude agreements, by way of an exchange of letters, extending the SBAA to all United Nations system organizations participating in the "Delivery as One" or the "One UN" pilots. More specifically, a United Nations letter would be sent to the Governments of the eight countries in which the One UN pilot is being implemented proposing to apply the SBAA *mutatis mutandis* to all United Nations system organizations participating in the One UN initiative and in particular, to accord the privileges, immunities and facilities enjoyed by UNDP, its personnel, property and assets under the SBAA to the other organizations and their personnel, property and assets.

3. We note that the One UN initiative was launched in 2007, based on a recommendation by the High-Level Panel on United Nations System-wide Coherence, to respond to challenges of a changing world and test how the United Nations family can provide development assistance in a more coordinated way. We also note that the Governments of the eight countries in which the pilot is taking place have agreed to work with the United Nations system to capitalize on the strengths and comparative advantages of the different members of the United Nations family. The One UN will operate under one leader, one budget, one programme and one office. The United Nations system organizations participating in the One UN varies from country to country and comprises United Nations Funds and Programmes; United Nations Specialized Agencies such as the International Labour Organization (ILO), the Food and Agricultural Organization of the United Nations (FAO), the United Nations Educational, Scientific and Cultural Organization (UNESCO); as well as the Joint United Nations Programme on HIV/AIDS (UNAIDS) which is administered by the World Health Organization (WHO).

4. Under the circumstances, we have no objection to concluding an agreement by way of an exchange of letters extending the applicability of the SBAA to all the United

Nations system organizations participating in the One UN. Once a draft letter has been prepared, please send it to the Office of Legal Affairs (OLA) for review.

Privileges and Immunities of United Nations Volunteers

5. Further to our memoranda of 28 February, 25 July[*] and 18 December 2007 on this matter, we note that the United Nations Volunteers Programme holds the view, in accordance with a legal opinion obtained from Professor [Name], that United Nations volunteers may be considered as United Nations officials or experts on mission. Thus, such individuals would enjoy privileges and immunities under the 1946 Convention on the Privileges and Immunities of the United Nations[**] (the General Convention) and that article IX, paragraph 4 (a), of the SBAA which grants to United Nations volunteers the same privileges and immunities as officials should be regarded as a declaratory act. Alternatively, they may be regarded as "agents" in the context referred to by the International Court of Justice (ICJ) in its Advisory Opinion of 11 April 1949 *Reparation for Injuries Suffered in the Service of the United Nations* (hereinafter the *Reparation* case). In Professor [Name]'s view, this would entitle United Nations volunteers to the same functional immunities as those laid down in the General Convention for United Nations officials and experts on mission. In addition, all United Nations volunteers enjoy privileges and immunities under the SBAA as "persons performing services on behalf of the UNDP" regardless of whom they perform work for. Lastly, Professor [Name] has put forward an argument that the uniformity of various SBAAs endowing United Nations volunteers with privileges and immunities indicates that certain standards may have evolved into general rules of customary international law.

6. As we have previously stated, including in the legal opinion published in the United Nations Juridical Yearbook of 1991,[***] while United Nations volunteers engage under substantially equal terms and often serve under similar conditions as technical assistance experts, they do not, strictly speaking, fall into the categories of persons granted privileges and immunities under the General Convention, in the sense of officials or experts on mission. We recall, in relation to the category of officials covered by the General Convention, that article V, section 17, provides that "[t]he Secretary-General will specify the category of officials to which the provision of this article and article VII shall apply. He shall submit these categories to the General Assembly." Pursuant to section 17, the Secretary-General proposed and the General Assembly approved in its resolution 76 (I) of 7 December 1946, "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 the hourly rate." Therefore, all staff members of the United Nations, regardless of nationality, residence, place of recruitment or rank, are considered as officials with the exception of those who are both recruited locally and assigned to hourly rates. In addition, the Secretary-General has also proposed other "officials" other than staff members of the United Nations, including presiding officers of United Nations organs performing func-

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[*] For the text of the memorandum, see *United Nations Juridical Yearbook, 2007* (United Nations Publication, Sales No. E.10.V.1 (ISBN 978–92–1-133681–8)), chapter VI, p. 404.

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

[***] *United Nations Juridical Yearbook 1991*, (United Nations Publications, Sales No. E.95.V.19 (ISBN 92–1-133499–3)), chapter VI, p. 305.

tions of the Organization on a full-time basis. Those officials' names are submitted to the relevant host country together with those of Secretariat officials who are staff members in accordance with section 17 of the General Convention. Accordingly, we are of the view that United Nations volunteers cannot be considered as officials of the United Nations.

7. With regard to the category of experts on mission, the Secretary-General's bulletin* ST/SGB/2002/9 of 18 June 2002 on Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission, in its introduction provides an explanation on who may be considered as experts on mission. Paragraph 5 states that "[e]xperts on mission may be retained by way of a contract known as a consultant contract, which sets out the terms of their appointment and the tasks that they must discharge. Other individuals may have the status of experts on mission, even though they do not sign a consultant contract, if they are designated by United Nations organs to carry out missions or functions for the United Nations (for example, rapporteurs of the Commission on Human Rights, rapporteurs and members of its Subcommission on the Promotion and Protection of Human Rights and members of the International Law Commission)." United Nations volunteers have not been considered to fall within the category of experts on mission for the United Nations.

8. Nevertheless, as previously advised, international United Nations volunteers enjoy, pursuant to the SBAA, the same privileges and immunities as United Nations officials as they fall within the category of "persons performing services on behalf of UNDP." In this regard, article I (1) of the SBAA provides the scope of application of the Agreement which provides that "[i]t shall apply to all such UNDP assistance and to such Project Documents or other instruments . . . as the Parties may conclude to define the particulars of such assistance and the respective responsibilities of the Parties and the Executing Agency hereunder in more general detail in regard to such projects."

9. With regard to the proposal that United Nations volunteers be considered as "agents" in the context of the *Reparation* Case, we note that the ICJ defined agents "in the most liberal way, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the Organization with carrying out, or helping to carry out, one of its functions—in short, any person through whom it acts." As the case did not pertain to privileges and immunities, the ICJ did not stipulate what privileges and immunities "agents" enjoyed. Moreover, the General Convention and other legal documents which confer privileges and immunities do not refer specifically to "agents." Nevertheless, agents, who are not officials or experts on mission, may still be covered by paragraph 1, Article 105 of the Charter of the United Nations 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 fulfillment of its purposes." However, this is a very general clause and it would not be advisable to depend on this for the privileges and immunities of United Nations volunteers.

10. On the question whether the privileges and immunities of United Nations volunteers have developed into general rules of customary international law binding upon all States, we recall that the ICJ, in its Judgment on the *North Sea Continental Shelf* cases of 20 February 1969, noted that, in order to be considered a new rule of customary international

* For information on Secretary-General's bulletins, see note under section 1 of chapter V A, above.

law, the provision concerned should have induced State practice that was "both extensive and virtually uniform" in such a way as to show "a general recognition that a rule of law or legal obligation is involved." Further, the acts concerned must be such "as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it." In our view, privileges and immunities enjoyed by United Nations volunteers have not become customary law particularly as there is no uniformity in how they are applied. Furthermore, privileges and immunities are accorded to individuals by host Governments and it is doubtful that all Member States hosting United Nations volunteers would agree that United Nations volunteers enjoyed privileges and immunities as a matter of customary law.

11. As per our previous advice, we maintain the view that the best way to proceed is to conclude agreements by way of an exchange of letters clarifying that all United Nations volunteers enjoy privileges and immunities in a particular country through the extension of the SBAA. In this regard, the conclusion of such agreements should not be regarded as a "reinterpretation" of the SBAA. To the contrary, the agreement acknowledges that the SBAA does not apply to the situation and requires a separate agreement specifically extending the scope of the SBAA to United Nations volunteers in such cases. Furthermore, we note that similar agreements to extend the SBAA will be concluded within the context of the One UN initiative, as noted above.

12. Lastly, in order to ensure proper coverage for national United Nations volunteers, who do not enjoy any privileges and immunities under the SBAA, the United Nations Volunteers Programme may wish to consider including in the proposed exchange of letters, privileges and immunities for national United Nations Volunteers as well.

15 December 2009

2. Procedural and institutional issues

(*a*) Note to the Under-Secretary-General for Internal Oversight Services regarding oversight authority over the United Nations Staff Union

Question of oversight authority of the Office of Internal Oversight (OIOS) over the United Nations Staff Union—Mandate of OIOS covers use of resources and staff of the Organization, and breaches of the Organization's rules, regulation and administrative issuances—Mandate covers staff representatives to the extent that they perform official functions of the Organization—OIOS should to every extent possible refrain from involvement in the internal operations and disputes within the Staff Union—Staff Union Statute provides mechanisms for settlement of internal disputes

1. I refer to your note dated 5 February 2009, copied to the Under-Secretary-General for Management, regarding the above matter. We understand that your note arises from a complaint contained in an email of [date], copied to you, from a staff representative of the United Nations Staff Joint Pension Fund, regarding alleged irregularities in the election process for the New York Staff Union. Within the context of the operational independence afforded to the Office of Internal Oversight (OIOS), pursuant to General Assembly resolution 48/281B, you seek the assistance of the Office of Legal Affairs (OLA) "in determining the OIOS oversight authority over the Staff Union."

2. In general, the mandate of OIOS pursuant to resolution 48/218B covers the use of the resources and staff of the Organization (paragraph 5 (c)) and breaches of the Organization's rules, regulations and relevant administrative issuances (paragraph 5 (c) (iv)). To the extent, therefore, that staff representatives are performing official functions of the Organization pursuant to staff rule 108.1, "Staff representative bodies," and ST/AI/293, "Facilities to be provided to Staff Representatives," the mandate of OIOS would extend over Staff Representatives performing such functions, just as it would over any other staff members performing their official functions.

3. We would note, however, that this matter involves an internal dispute regarding the alleged disenfranchisement of members of the United Nations Joint Staff Pension Fund in the Staff Union election, and as such, relates to internal processes of the Staff Union, rather than the use of United Nations resources or the application of the Staff Regulations and Rules. We consider that the Administration, including OIOS, should to every extent possible, refrain from involvement in the internal operations and disputes within the Staff Union. Accordingly, we consider that the matter should be dealt with through internal mechanisms under the Staff Union's Statute, which are designed to handle disputes of this nature, without the involvement of OIOS.

23 February 2009

(*b*) Note regarding the borrowing authority of the United Nations Development Programme (UNDP)

Under the Charter of the United Nations and the Financial Regulations, borrowing of money must have prior approval of the General Assembly, and any such borrowing must be effected under the terms and conditions established by the General Assembly

[. . .]

2. This Office has consistently advised that, pursuant to the Charter of the United Nations and the United Nations Financial Regulations, borrowing cannot be carried out without the prior approval of the General Assembly, and any such borrowing must be effected under the terms and conditions established by the General Assembly. Based on the information available in our files, I understand that, in fact, borrowing has always been carried out pursuant to express authorization of the General Assembly. For example, in respect of the borrowing authority of the UNDP Administrator, I refer to General Assembly resolution 31/165 of 21 December 1976 (copy attached),* by which the General Assembly authorized limited borrowing for the purpose of meeting short-term cash requirements for UNDP projects. In that resolution, the General Assembly authorized the UNDP Governing Council to grant to the UNDP Administrator the authority to borrow money until the end of 1977 and on a case-by-case basis. The General Assembly stipulated that, in order to borrow, the Administrator had to seek the prior approval of the Governing Council in each case, and the sources of the borrowing were limited to "voluntary-funded trust funds of organizations within the United Nations." In view of the foregoing, the prior approval of the General Assembly is required in order for UNDP to engage in borrowing.

* Not reproduced herein.

[. . .]

6 March 2009

(*c*) Note to the Under-Secretary-General, Department of General Assembly Affairs and Conference Management concerning the request by [State] for a supplementary item to be included in the agenda of the sixty-fourth session of the General Assembly

Request of Member State for inclusion of item in the agenda of the General Assembly pursuant to rule 14 of Rules of Procedure—The Secretariat does not interfere with a Member State's sovereign right to circulate document provided that it is not blatantly inflammatory or potentially libelous—Strong criticism of another Member State or United Nations staff member does not justify refusal to circulate document—Call for another Member State's dissolution constitutes direct attack against its sovereignty and territorial integrity in violation of the principles of the charter—Secretariat should not circulate document containing blatantly inflammatory and defamatory language against another Member State

1. This is in reference to your note dated 14 August 2009 to the Chef de Cabinet, copied to the Legal Counsel, to which a letter dated 4 August 2009 from the Permanent Representative of [State 1] to the United Nations and addressed to the Secretary-General was attached. In his letter, the Permanent Representative requests that a supplementary item be included in the agenda of the sixty-fourth session of the General Assembly and that his letter and its explanatory memorandum be circulated as documents of the General Assembly.

2. Pursuant to rule 14 of the Rules of Procedure of the General Assembly, "Any Member or principal organ of the United Nations or the Secretary-General may, at least thirty days before the date fixed for the opening of a regular session, request the inclusion of supplementary items in the agenda. Such items shall be placed on a supplementary list, which shall be communicated to Members at least twenty days before the opening of the session."

3. The letter from the Permanent Representative of [State 1] by which his Government requests a supplementary agenda item states, *inter alia*, that, "The [State 2] entity is essentially a mafia for money-laundering and the financing of wars and terrorism that is exempt from international law." Furthermore, the letter calls for the dissolution of [State 2] by stating that, "The . . . part [of State 2] should join [State 3], the . . . part should join [State 4] and the . . . and . . . parts should join [State 5]."

4. As far as this request is concerned, this Office has consistently maintained that Member States have the right to circulate any document they deem appropriate, including when requesting a supplementary agenda item. The Secretariat does not interfere with this sovereign right provided that the document is submitted by a duly accredited representative, that it does not exceed the page limitations established by the General Assembly and that it is not blatantly inflammatory or potentially libelous. The fact that a document contains a strong criticism of another Member State or a United Nations staff member does not justify the Secretariat's refusal to circulate the document. However, should a document contain potentially libelous, protected or confidential material or language, then this would provide a legitimate basis to approach the Member State that has sought the

circulation of the document with a request that it be withdrawn or revised in order to omit such material/language.

5. Thus, we recommended in the attached note* dated 27 March 2000, when advising on a request by the Permanent Mission of [State 6] for circulation of an official document at the fifty-sixth session of the Commission on Human Rights, that the Permanent Mission should be requested to re-submit its document without reference to confidential and internal OHCHR communications and should also be asked to remove references to the name of a particular OHCHR staff member in order to avoid a potentially libelous situation. We also advised that should the Permanent Mission refuse, the document could be circulated as requested but that OHCHR would be entitled to circulate its own document that presented its comments on the [State 6] document.

6. In the case of the [State 1] request, however, the content and defamatory language of the letter and its explanatory memorandum make it impossible for the Secretariat to circulate it as submitted.

7. Thus, the Permanent Representative should be informed that his letter and its explanatory memorandum contain blatantly inflammatory and defamatory language against another Member State. Furthermore, by calling for [State 2]'s dissolution, [State 1] is directly attacking that Member State's sovereignty and territorial integrity in violation of the principles of the Charter. Consequently, the Secretariat should not circulate the letter and explanatory memorandum as an official document of the 64th session for purposes of requesting a supplementary agenda item.

8. In a meeting which took place yesterday between the Chef de Cabinet and the Permanent Representative [of State 1] . . . , the Chef de Cabinet informed the Permanent Representative of the Secretariat's position along the lines of this note, and offered him the option of withdrawing the letter or drastically revising it in both content and style. The Permanent Representative agreed to relay the Secretariat's concerns to [his capital] and revert, and suggested that the problem between [State 1] and [State 2] might eventually be resolved bilaterally between the two States. It was agreed in the meeting that, in the meantime, no further action would be required.

21 August 2009

(*d*) Interoffice memorandum to the Assistant Secretary-General for Disaster Risk Reduction concerning a draft agreement with the Government of [State]

Conclusion of agreement by way of applying *mutatis mutandis* previously concluded agreement—Authority of Secretary-General to sign agreements on behalf of the organization has been delegated to Under Secretary-Generals within their respective mandates—United Nations International Strategy for Disaster Reduction (UNISDR) falls under authority of the Office for the Coordination of Humanitarian Affairs (OCHA)—Within discretion of Secretary-General to delegate further the authority to sign for the Organization—Otherwise requests for full powers from the Secretary-General must be made on a case-by-case basis

* Not reproduced herein.

1. This is with reference to an email from your Office by which was submitted a revised draft Agreement with the Government of [State] based on the discussions held with this Office.

2. We understand that the Government responded to the draft Agreement that had been cleared by this Office earlier this year stating that it was too lengthy. Accordingly, it is the view of the United Nations International Strategy for Disaster Reduction (UNISDR) that the Government may be more susceptible to concluding an agreement by way of an exchange of letters applying *mutatis mutandis* the 2006 Agreement between the United Nations and the Government of [State].

3. Please find attached* a marked-up text of the draft Agreement. In this regard, the United Nations Development Programme (UNDP), which is also negotiating a draft Office Agreement with the Government of [State], is very close to agreement on the text. The UNDP text is based on the 2006 Agreement as well and we hope that the Government would be amenable to concluding an Agreement in the manner proposed.

4. With regard to the question as to whether full powers can be obtained from the Secretary-General for you to sign all agreements pertaining to the activities of UNISDR, we recall that the Secretary-General of the United Nations, as the chief administrative officer of the Organization, has the authority to sign agreements on behalf of the United Nations. Such authority has been delegated for example to Under-Secretary-Generals who are Department Heads. Such Under-Secretary-Generals have delegated authority to sign agreements without obtaining in each case a formal instrument of full powers from the Secretary-General where such agreements concern exclusively their respective mandates and do not have implications for the Organization as a whole so long as the necessary internal approval processes have been fulfilled. As we had advised in our note dated 23 January 2009 (copy attached),* the UNISDR secretariat falls under the authority of the Office for the Coordination of Humanitarian Affairs (OCHA). Thus, it would ordinarily be [the Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator] who would sign the Agreement on behalf of the United Nations. However, it is within the discretion of the Secretary-General as to whether he wishes to delegate this authority further, to enable you to sign on behalf of the United Nations. Notwithstanding such delegated authority, agreements to be concluded by the United Nations should continue to be sent to the Office of Legal Affairs (OLA) for review and clearance.

5. Otherwise, requests for full powers from the Secretary-General, which are usually processed through this Office since the text requires prior OLA clearance, must be made on a case-by-case basis.

6. Please be advised that the clearance of the Controller is required in respect of the provisions of the draft Agreement which have financial implications for the United Nations.

29 September 2009

* Not reproduced herein.

(*e*) Interoffice memorandum to the Under-Secretary-General for Internal Oversight Offices and the Director of the Ethics Office regarding investigations conducted pursuant to the Secretary-General's Bulletin "Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits investigations" (ST/SGB/2005/21)

Operational independence of the Office of Internal Oversight (OIOS)—Hierarchy of norms—General Assembly resolutions take precedence over administrative issuances—OIOS may take a decision not to investigate a case referred to it by the Ethics Office—Section 2.2 of ST/SGB/2005/21 establishes burden of proof, not a secondary basis of referral of a case from the Ethics Office to OIOS

1. I refer to the memorandum of 23 March 2009 from the Under-Secretary-General for Internal Oversight, as well as to the memorandum of 27 March 2009 from the Director of the Ethics Office, seeking the advice of the Office of Legal Affairs (OLA) on cases referred by the Ethics Office to the Office for Internal Oversight Services (OIOS) for investigation, pursuant to Secretary-General's Bulletin* ST/SGB/2005/21 on "Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations."

A. Background and brief summary of the facts

2. On the basis of documentation and information made available to us, we understand the facts of the particular case that gave rise to the concerns raised in your memoranda as follows. The staff member in question (hereinafter the complainant) served in a field mission on a 300 series appointment of limited duration on an appointment which was set to expire on 31 October 2007. The complainant was advised by the mission's Personnel Section that he was eligible for consideration for a 100-series contract pending receipt of satisfactory performance appraisals for his four years of service. Near the end of the complainant's appointment, the Director of Administration for the mission concerned (DOA) who was both the first and second reporting officer of the complainant, completed the performance appraisals for two reporting periods. The appraisals of the complainant by the DOA indicated that the complainant only partially met performance expectations. The complainant's 300-series appointment expired on 31 October 2007 and he was not converted to a 100-series appointment. The DOA subsequently retired from the Organization on 30 November 2007.

3. During the course of his service, the complainant had reported various allegations of misconduct to OIOS and later to the Procurement Task Force (PTF). The PTF's investigation of those allegations was completed in July 2008 and it concluded that many of the complainant's allegations were substantiated. As a result, the PTF recommended, *inter alia*, that the Ethics Office undertake a preliminary review of alleged retaliation against the complainant pursuant to ST/SGB/2005/21.

4. In addition, following his separation from service, the complainant approached the Ethics Office in November 2007 alleging that he was the subject of retaliation stem-

* For information on the Secretary-General's bulletins, see note under section 1 of chapter V A, above.

ming from the facts set out in paragraph 2 above. In April 2008, the complainant filed an appeal with the Joint Appeals Board.

5. Based on the complainant's allegations to the Ethics Office in November 2007 and PTF's subsequent recommendation that this matter should be reviewed by the Ethics Office, a preliminary review of the matter was undertaken by the Ethics Office pursuant to section 5.2 of ST/SGB/2005/21.

6. During the course of its preliminary review, the Ethics Office discovered that the DOA had requested that the Department of Peacekeeping Operations (DPKO) undertake a fact-finding mission. That fact-finding mission took place in mid-2007 and made several findings in relation to the complainant's interpersonal skills and existing tensions with his other colleagues. The fact-finding mission also concluded that the complainant's performance appraisal had been delayed and recommended that it should be completed as soon as possible.

7. Following its preliminary review of the facts surrounding the case, the Ethics Office determined that a *prima facie* case of retaliation was present. In accordance with section 5.5 of ST/SGB/2005/21, the Ethics Office referred the matter in writing to OIOS for investigation.

8. After its review of the case, OIOS has indicated that "a proper and fair investigation cannot be concluded where a subject interview is not conducted given that OIOS has no authority to compel the cooperation of former staff members. In the absence of any staff member, also, there is no disciplinary action possible and no apparent purpose, therefore, in any investigation report issued to assist with determining possible disciplinary action."

9. Based on the above, OLA has been requested to advise on the investigative mandate of OIOS and, specifically in this particular case, whether OIOS (a) is not obliged to investigate the matter because no disciplinary action is possible in view of the DOA's retirement; (b) is not obliged to investigate the Organization on the question of whether "it would have taken the same alleged retaliatory action(s) absent the protected activity"; and (c) may decline to pursue the matter.

B. Analysis

(a) Legislative framework

10. According to paragraph 5 (a) of General Assembly resolution 48/218 B, the General Assembly decided that OIOS "shall exercise operational independence under the authority of the Secretary-General in the conduct of its duties and, in accordance with Article 97 of the Charter, have the authority to initiate, carry out and report on any action which it considers necessary to fulfill its responsibilities with regard to monitoring, internal audit, inspection and evaluation and investigations as set forth in the present resolution." These provisions establish the clear operational independence of OIOS, including in matters relating to investigations. Moreover, pursuant to paragraph 5 (c) (iii) of the same resolution, OIOS "shall investigate reports of violations of United Nations regulations, rules and pertinent administrative issuances and transmit to the Secretary-General the results of such investigations together with appropriate recommendations to guide the Secretary-General in deciding on jurisdictional or disciplinary action to be taken."

(b) The relationship between the operational independence of OIOS and section 5.5 of ST/SGB/2005/21

11. With regard to the administrative framework established for purposes of protecting individuals against retaliation for reporting misconduct, section 5.5 of ST/SGB/2005/21 provides that if the Ethics Office "finds that there is a credible case of retaliation or threat of retaliation, it will refer the matter in writing to OIOS for investigation and will immediately notify in writing the complainant that the matter has been so referred. OIOS will seek to complete its investigation and submit its report to the Ethics Office within 120 days." A plain reading of this section would seem to indicate that OIOS is required to investigate all cases of retaliation referred to it by the Ethics Office, and may be read, therefore, to run counter to the operational independence enjoyed by OIOS. In the hierarchy of legal norms, however, resolutions of the General Assembly take precedence over administrative issuances. Therefore, the provisions contained in Secretary-General bulletins, among others, cannot be interpreted in a manner that permits the creation of new obligations that are inconsistent with, or contrary to, decisions of the General Assembly.

12. In the present case, while section 5.5 of ST/SGB/2005/21 calls on OIOS to conduct an investigation if a case is referred to it by the Ethics Office, the operational independence of OIOS, as mandated by the General Assembly, essentially authorizes it to decide whether or not to investigate a matter. In this case, OIOS has taken the position that an *in absentia* investigation would serve no useful purpose since the DOA has retired from service and no disciplinary action would be possible in his case. As a result, OIOS, in light of, and pursuant to, its operational independence, has decided against investigating this case. In light of its mandate, as set forth above, this is a decision that OIOS may make.

(c) Obligation of OIOS to investigate pursuant to section 2.2 of ST/SGB/2005/21

13. With regard to the issue of whether OIOS is obliged to investigate "the Organization rather than individual instances of possible misconduct," I note that the Ethics Office has referred to section 2.2 of ST/SGB/2005/21, which provides that: "[t]he present bulletin is without prejudice to the legitimate application of regulations, rules and administrative procedures, including those governing evaluation of performances non-extension or termination of appointment. *However, the burden of proof rests with the Administration, which must prove by clear and convincing evidence that it would have taken the same action absent the protected activity . . .*." (Emphasis added). This provision establishes that the burden of proof in such cases rests with the Administration, which has to demonstrate that an administrative action would have been taken irrespective of the protected activity.

14. Based on the information provided, I note that the matter is the subject of an appeal that the complainant has lodged with the Joint Appeals Board (JAB) and that is currently under consideration by the JAB. During the JAB proceedings, the burden would therefore be on the Administration to demonstrate that the contested action would have been taken regardless of the protected activity.

15. Taken in this context, we consider that section 2.2 of ST/SGB/2005/21 only establishes which party has the burden of proof in a particular instance, and does not establish a secondary basis on which the Ethics Office may refer a matter to OIOS for investigation, including an investigation of the Organization. Indeed, to have OIOS establish through an investigation of the Organization that the same action would have been taken absent

the protected activity, would be duplicative in view of the review already being undertaken by the JAB. This could result in inconsistent findings that would only further complicate the matter.

5 June 2009

(*f*) Interoffice memorandum to the Under-Secretary General, Department of Field Support (DFS), with regard to a dispute between the United Nations Mission in the Democratic Republic of the Congo (MONUC) and the International Tribunal for Rwanda (ICTR) regarding service charges and indemnities

Provision of petroleum, oils and lubricants by ICTR to MONUC—Issue of payment of administrative fee or service charge falls within purview of Controller—Indemnity provisions not typically used in arrangements between United Nations entities—Division of responsibility for claims, demands, losses and liability between United Nations entities

1. This is in reference to your note addressed to the Legal Counsel, dated 11 June 2009 (received by OLA on 22 June 2009), referring to a Code Cable from MONUC, dated 29 April 2009. In that Code Cable, MONUC seeks guidance in connection with a proposed memorandum of understanding between MONUC and the ICTR for the provision of petroleum, oils and lubricants (POL) to MONUC for its activities in Kigali, Rwanda (MOU).[1] More specifically, MONUC seeks guidance on the following two issues:

I. Whether MONUC should pay an "administrative fee" or "service charge" in respect of the POL being provided by ICTR; and

II. The appropriate indemnity provisions to be included in the proposed MOU.

I. The administrative fee /service charge

2. In relation to the first issue, we understand that since 2004, ICTR has been providing POL services to MONUC in Kigali, on a cost reimburseable basis. Until August 2008, ICTR levied a 14% "administrative fee" in addition to the cost of the fuel supplied. After MONUC objected to the administrative fee, ICTR reduced the rate to 10% and called it a "service charge" rather than an administrative fee. We understand that MONUC has been paying these charges under protest. DFS is now seeking OLA's advice as to the appropriateness of the 10% service charge being levied by ICTR.

3. The issue of payment of administrative fees or service charges in arrangements of this nature falls within the purview of the Controller. As discussed with DFS, we recommend that the Controller's advice be sought in relation to this issue.

II. Indemnity provision

4. In relation to the second issue, we understand that ICTR wishes to include an indemnity provision in the MOU, whereby MONUC would,

[1] We note that MONUC had attached to the Code Cable two versions of the draft MOU. One version has been drafted by MONUC and the other by ICTR.

indemnify, hold and save harmless ICTR and its officials and employees from and against all suits, claims, demands and liability of any kind, including their costs and expenses, arising out of acts or omissions of ICTR staff, or losses or injuries sustained by agency members to whom services are provided under this MOU. (See paragraph 5 of the MOU drafted by ICTR).

However, MONUC has proposed the following, alternative, wording:

ICTR shall indemnify, save and hold harmless and shall defend, at its own cost and expenses, the United Nations, including MONUC, its officials, servants, employees and agents from and against any claims, suits, demands and liabilities of any nature, arising out of acts or omissions of ICTR personnel, employees, agents, officials, sub-contractors or losses or injuries sustained by agency members to whom services are provided under this MOU. (See paragraph 4 of the MOU drafted by MONUC).

5. We note that MONUC and ICTR are both United Nations entities. We further note that indemnity provisions along the lines of those proposed by ICTR and MONUC are not typically used in arrangements between United Nations entities. Accordingly, we would suggest that the relevant provisions in the draft MOU be reformulated as set out below. The revised text is based on previous documents dealing with similar arrangements between United Nations entities. We also consider that the revised wording represents an appropriate division of responsibility between the parties.

ICTR and MONUC shall each be responsible for handling and resolving all claims, demands, losses and liability of any nature or kind in respect of the death, injury, illness, or loss or damage to personal property, sustained by their respective officials, agents and employees, and loss of or damage to the Parties' respective property, arising from or in connection with the implementation of this MOU.

Each Party shall be responsible for handling and resolving all claims, demands, losses and liability of any nature or kind brought or asserted by third parties, based on, arising from, related to, or in connection with the implementation of this MOU to the extent that such claims, demands, losses or liability arise from or in connection with the acts or omissions of that Party, its officials agents or employees.

24 June 2009

(*g*) Note to the Assistant Secretary-General for Policy Coordination and Strategic Planning regarding the United Nations University accreditation process

Proposal that UNU offer graduate degree programmes at the Master's and PhD levels in partnership with other universities—UNU is an autonomous organ of the General Assembly—The General Assembly and Founding Committee of UNU did not intend for it to be a degree-granting university—Proposal to be referred to the General Assembly—General Assembly can interpret the UNU Charter as to comprise a mandate to offer graduate degrees, or amend the Charter as to include such a mandate—Necessary to amend article IX of UNU Charter to allow for fees to be charged from degree candidates—Advisory Committee on Administrative and Budgetary Questions (ACABQ) and the Controller should be consulted regarding financial implications of proposal—As UNU functions under joint sponsorship of the United Nations and UNESCO, UNESCO should be consulted

1. I refer to your note, dated 28 April 2009, seeking a legal opinion as to whether the proposal submitted by the Rector of the United Nations University (UNU) to the Secretary-General regarding UNU's plans for offering graduate degree programmes at the Master's and PhD levels, in partnership with other universities, is compliant with United Nations rules, regulations, and pertinent charters and statutes (the Proposal). We note that the UNU Council discussed the question of accreditation at its 55th session, which took place in Bonn, Germany in December 2008, and that, subject to the Secretary-General's approval, the Rector of UNU would like to submit a final proposal to the Council at its 56th session in December 2009, to approve the accreditation process. I also refer to the note of 4 May 2009 from the Director of the General Legal Division, OLA, informing you that the Proposal would require careful study by this Office and, therefore, it would take some time to provide the requested advice. Subsequently, at the request of UNU, staff of the Office of Legal Affairs (OLA) met with UNU staff on 2 June 2009 to discuss the Proposal. UNU also provided additional information and documentation to OLA on the Proposal.

2. Based on research into the background of the creation of UNU, including relevant records of the General Assembly and the Founding Committee of UNU, we have prepared our legal opinion on the Proposal, attached as an annex to this note. As you will note, the attached annex reviews the background on the establishment of the UNU, including the intent of the founders of UNU on granting of degrees, as well as the terms set forth in the UNU Charter and UNU Council decisions on this question. As that material amply demonstrates, the intent of the founders of UNU and the General Assembly was that the University would not be an institution that would grant advanced academic degrees. In addition, the wording of the UNU Charter does not, in our view, provide sufficient legal basis to implement the Proposal.

3. Therefore, since the Proposal appears to be a departure from the intent of the founders of UNU and of the Member States in the General Assembly, and in view of the status of UNU as an autonomous organ of the General Assembly (see article XI (1) of the Charter), we consider that the Proposal should be referred to the General Assembly for approval before it can be implemented. In doing so, the UNU Rector could request the General Assembly to interpret or agree to amend the Charter of the UNU in such a manner as would permit the granting of advanced degrees. If the Proposal were to be approved or endorsed by the General Assembly, it would be necessary for the Charter of UNU to be amended in accordance with article X thereof to include a specific reference to the granting of academic degrees.

4. Moreover, the Proposal entails financial implications for the University, because significantly more resources would be necessary for UNU to establish degree-granting programmes. Since the financial matters of the UNU are subject to the United Nations Financial Regulations and Rules pursuant to article IX of the Charter, and as the UNU budget proposals are subject to review by the Advisory Committee on Administrative and Budgetary Questions (ACABQ) before they are submitted to the General Assembly together with the report of the UNU Council (see article IX, paragraph 7 of the Charter), we consider that the ACABQ and the Controller should also be consulted on the Proposal.

5. Finally, as the UNU functions under the joint sponsorship of both the United Nations and the United Nations Educational, Scientific and Cultural Organization (UNESCO) pursuant to article I of the Charter of the UNU, we consider that UNESCO should also be consult-

ed regarding this Proposal. Thus, any submission to the General Assembly on the granting of advanced degrees should be made only after consultation with both the Secretary-General of the United Nations and the Executive Director of UNESCO. We are not aware whether UNESCO has been formally approached regarding this Proposal.

6. In view of the foregoing, we consider that it would not be appropriate to consider the options for accreditation of the UNU degree programme unless and until the General Assembly approved the Proposal.

10 July 2009

Annex

[. . .]

IV. Analysis and Recommendation

19. As the discussion on the history of the establishment of the UNU demonstrates, the General Assembly and the Founding Committee of the UNU did not intend for it to be a degree-granting university in the conventional sense of the term. The UNU Charter also does not call for the granting of degrees, and instead refers to the purpose of the University as being "engaged in post-graduate training." While the UNU Charter does not explicitly prohibit the granting of degrees by the UNU, the omission of the references to degrees in the background documents on the establishment of UNU are indicative of the intent of the Founding Committee and the General Assembly in this respect. We also consider that the current wording of article IV of the Charter of UNU (see paragraph 8 above), is not a sufficient basis for UNU to grant advanced degrees, in view of the intent of the Founding Committee of UNU and of the General Assembly. Therefore, the Proposal appears to constitute a departure from the intent of the Founding Committee of UNU and of the General Assembly, and entail broadening of the mandate of UNU.

20. Accordingly, and since UNU is an autonomous organ of the General Assembly (see article XI (1) of the Charter), the proposal for granting advanced degrees should be referred to the General Assembly for approval first. In doing so, UNU Rector could request that the General Assembly interpret the Charter of the UNU, in particular article IV, in such a manner as would permit the granting of advanced academic degrees. Article IV provides, *inter alia,* that the Council of UNU may adopt "such statutes as may be necessary for the application of the Charter" (see article IV (b)) and the establishment of research and training centres and programmes (article IV (c)). Therefore, it appears that article IV could be a starting point for the granting of such degrees if such a mandate were obtained from the General Assembly. Presumably, the scope of this article could be expanded further to include the possibility of a degree- granting institution as a whole, if the General Assembly so decides. Accordingly, if the General Assembly were to approve the proposal for granting advanced degrees and were the General Assembly to decide that the current wording of the Charter of the UNU is sufficient to implement the proposal, then no amendment of the Charter of the UNU would be required.

21. If, however, the proposal were to be approved or endorsed by the General Assembly, but the General Assembly were also to decide that the current wording of the Charter was not sufficient for UNU to grant advanced degrees, it would be necessary for the UNU

to amend its Charter, e.g., article IV, to include a specific reference to the granting of advanced academic degrees. Such a proposed amendment would then have to be submitted to the General Assembly for approval (see article X of the Charter).

22. The proposal for granting advanced academic degrees also entails financial implications for the University, as significantly more resources would be necessary to establish degree-granting programmes. Presumably, fees would be charged to degree candidates who would be enrolled in UNU advanced degree programmes. It does not appear that such fees would fall under "voluntary contributions" from "individuals" which may be accepted in accordance with article IX, paragraph 1(b) of the UNU Charter, or any other financial resources of the UNU, as provided for in article IX of the Charter. . . . Therefore, it appears that it would also be necessary to amend article IX of the Charter of the UNU, in order for the proposal to be implemented. Furthermore, pursuant to paragraph seven of article IX of the Charter of the UNU on "Finance and Budget," the Rector might submit the UNU's budget to the Advisory Committee on Administrative and Budgetary Questions (ACABQ). After receiving comments and recommendations from the ACABQ, the Rector must then submit the budget to the UNU Council for its approval. Finally, the budget must be transmitted to the General Assembly, together with the report of the Council. Given the role of the ACABQ in the procedure for the budget approval of the UNU, the ACABQ should be consulted regarding the financial implications of the proposal. In addition, the Controller of the United Nations should likewise be consulted with regard to such financial implications because the UNU is subject to the Financial Regulations and Rules of the United Nations, pursuant to paragraph six of article IX of the Charter of UNU.

23. Finally, as the UNU functions under the joint sponsorship of both the United Nations and UNESCO, in accordance with article I of the UNU Charter, UNESCO should also be consulted regarding the proposal for the granting of advanced academic degrees, as well as accreditation of the UNU. Moreover, any submission to the General Assembly on this subject should be made only after consultation with both the Secretary-General of the United Nations and the Executive Director of UNESCO. As far as we are aware, UNESCO has not been formally approached regarding the awarding of degrees and accreditation of the UNU.

24. Therefore, prior to proceeding with the accreditation process for UNU and for taking any measures aimed at the granting of advanced academic degrees, UNU must present this proposal before the General Assembly for approval, after consultation with the Secretary-General and with the Executive-Director of UNESCO.

25. In view of the foregoing, we consider that any consideration of the details of the proposal for the UNU accreditation process is premature until and unless the General Assembly has approved or endorsed the proposal for granting of advanced academic degrees. Once such approval or endorsement is obtained, steps could be taken to review the issues relating to the accreditation of UNU.

21 August 2009

(*h*) Note to the Under Secretary-General and Chef de Cabinet, Executive Office of the Secretary-General, concerning General Assembly resolution 63/301 on Honduras

Consequences for representation and accreditation of Member State following General Assembly resolution 63/301—Call by General Assembly not to recognize *de facto* authorities in State—Pending a decision by the General Assembly, on the recommendation of the Credentials Committee, the Secretariat shall act in a manner consistent with resolution—Should any Member State raise an Objection, it would be advised accordingly—Funds and Programmes should act along the same lines—In specialized agencies and the International Atomic Energy Agency the question of the State's credentials should be resolved through the intergovernmental process—In the Human Rights Council recommendation that only duly authorized representatives of the legitimate and constitutional government of the State participate in meetings—Permanent representative whose accreditation has been withdrawn by that government shall be barred from meetings—Nameplate of State to remain in conference room

1. Since the adoption of resolution 63/301 of 30 June 2009 entitled "Situation in Honduras: democracy breakdown" (copy attached),[*] questions have been raised with my Office as to how the United Nations and more broadly the United Nations system should handle the accreditation of representatives from Honduras to upcoming United Nations meetings, including the 64th session of the General Assembly. I therefore thought it useful to set out the legal position on this matter, which has been prepared in consultation with colleagues from the Department of Political Affairs (DPA) and Protocol and has also been shared with the Legal Advisers of the United Nations system. Should the need arise I am also available to address any specific questions on this issue in consultation with DPA and Protocol.

Summary of the advice provided below

— By General Assembly resolution 63/301 of 30 June 2009 the General Assembly demanded the immediate restoration of President Zelaya's Government and called upon Member States to recognize no Government other than that of Mr. Zelaya.

— Ultimately, it is for the Member States, acting through the inter-governmental process, to decide on how they wish to act in light of resolution 63/301. Accordingly any communication received from either President Zelaya's Government or the "*de facto*" authorities will be submitted to the Credentials Committee of the 64th session who will make a recommendation to the General Assembly on the accreditation of representatives from Honduras.

— However, until the General Assembly decides otherwise, the United Nations Secretariat should, with respect to United Nations meetings, act in a manner that is consistent with resolution 63/301, which means that only those delegates from Honduras who can formally confirm that they are the duly authorized representatives of President Zelaya's Government should be invited and allowed to participate in the work of the General Assembly and its subsidiary bodies.

[*] Not reproduced herein.

— Should any Member State object to or raise questions concerning the Secretariat's position, it should be advised, that pending a decision on the credentials of Honduras by the General Assembly, the Secretariat will be acting in a manner that is consistent with resolution 63/301.

— As far as the presence of Honduras at the meetings of the Human Rights Council (HRC) in Geneva is concerned, we would recommend that its Bureau when it meets tomorrow take a decision that only the accredited representatives of President Zelaya's Government be allowed to participate in HRC meetings.

— This decision should then be proposed orally by the HRC President to the meeting and formally adopted.

— As the Permanent Representative of Honduras has had his accreditation withdrawn as the representative of President Zelaya's Government he should, pursuant to the HRC decision, be barred from gaining access to HRC meetings.

— This would also be applicable to other members of the Honduras delegation unless they can formally confirm that they represent President Zelaya's Government.

General Assembly resolution 63/301 of 30 June 2009

2. The General Assembly, by operative paragraph 2 of resolution 63/301, demanded "the immediate and unconditional restoration of the legitimate and Constitutional Government of the President of the Republic of Honduras, Mr. José Manuel Zelaya Rosales, and of the legally constituted authority in Honduras" and also decided by paragraph 3 "to call firmly and unequivocally upon States to recognize no Government other than that of the Constitutional President, Mr. José Manuel Zelaya Rosales."

3. Ultimately, it is for the Member States, acting through the inter-governmental process, to decide on how they wish to act in light of resolution 63/301 when addressing questions concerning the accreditation and representation of Honduras at the General Assembly's 64th session. To that end, any formal communication that the United Nations Secretariat receives from either President Zelaya's Government or the current "*de facto* authorities" in Honduras concerning representatives to the 64th session of the General Assembly should, pursuant to rule 28 of the Rules of Procedure of the General Assembly, be placed before its Credentials Committee. The Credentials Committee will, after reviewing the matter, make a recommendation to the Assembly which will then take a decision on Honduras' credentials.

Composition of the Credentials Committee for the 64th session

4. As far as the composition of the Credentials Committee is concerned, in accordance with prior practice, the Office of Legal Affairs (OLA) consulted with the Member States from various regional groups and Tanzania and Zambia (Africa), China and the Philippines (Asia), the United States and Spain (WEOG), Russia (Eastern Europe) and Brazil and Jamaica (Latin America and the Caribbean), who have agreed to sit on the Credentials Committee for the 64th session. This choice has also been informally communicated to the Office of the President of the General Assembly, so that, in accordance with rule 28 of the Rules of Procedure, the President can propose the composition of the Credentials Committee to the General Assembly at the beginning of the 64th session.

Role of the Secretariat *vis-à-vis* General Assembly resolution 63/301 of 30 June 2009

5. As far as Honduras is concerned, until the General Assembly decides otherwise, the United Nations Secretariat should, with respect to United Nations meetings, act in a manner that is consistent with resolution 63/301, which means that only those delegates from Honduras who can formally confirm that they are the duly authorized representatives of President Zelaya's Government should be invited and allowed to participate in the work of the General Assembly and its subsidiary bodies. In addition, any facilities that the United Nations Secretariat grants to the representatives of Member States in order to facilitate their participation in the work of the General Assembly, including the issuing of badges and grounds passes, should only be provided to those representatives from Honduras who can formally confirm that they are the duly authorized representatives of President Zelaya's Government.

6. In that connection, DPA has informally informed OLA that they understand that the Government Ministries in Honduras are under the control of the "*de facto* authorities" in that country. Thus, DPA has advised that it would be prudent at this stage to place on hold any formal invitations to representatives from Honduras to attend United Nations meetings, unless it is clear that those attending are the duly authorized representatives of President Zelaya's Government.

7. Should the "*de facto* authorities" seek to attend United Nations meetings or request that correspondence be sent to them, they should be advised that the United Nations Secretariat will be acting in a manner that is consistent with resolution 63/301. Consequently, until the General Assembly decides otherwise, the Secretariat will only be in a position to liaise with those representatives from Honduras that can confirm that they are the duly authorized representatives of President Zelaya's Government.

Possibility of an objection in the General Assembly to the presence of a delegation from Honduras

8. Furthermore, should any Member State object or raise questions concerning the Secretariat's position, it should be advised that pending a decision on the credentials of Honduras by the General Assembly, the Secretariat will be acting in a manner that is consistent with resolution 63/301. Any Member State can also raise this issue formally within the General Assembly pursuant to rule 29 of the Rules of Procedure which provides that, "Any representative to whose admission a Member has made objection shall be seated provisionally with the same rights as other representatives until the Credentials Committee has reported and the General Assembly has given its decision." The Credentials Committee for the 64th session can then meet on an urgent basis and make its recommendation to the General Assembly.

United Nations Funds and Programmes and the United Nations specialized agencies and the International Atomic Energy Agency

9. We have also advised the Legal Advisers of the United Nations Funds and Programmes that they should act with regard to representatives from Honduras along the lines we set out above for the United Nations Secretariat.

10. As far as the United Nations specialized agencies and the International Atomic Energy Agency (IAEA) are concerned, we have advised that the question of Honduras' credentials should be resolved through the inter-governmental process. It is therefore for the member States of each agency and the IAEA, acting through their inter-governmental bodies and in accordance with their rules of procedure, to decide how they wish to act in light of resolution 63/301 when addressing questions concerning the accreditation and representation of Honduras and whether they wish to approve credentials received from either President Zelaya's Government or the current "*de facto* authorities."

11. However, pending a decision on the credentials of representatives from Honduras, we have recommended to the Legal Advisers of the specialized agencies and the IAEA that representatives from Honduras be dealt with in a manner that is consistent with resolution 63/301 and along the lines set out above.

Human Rights Council in Geneva

12. Finally, the HRC convened in Geneva today and the Office of the High Commissioner for Human Rights (OHCHR) Secretariat has been in touch with my office concerning the presence of Honduras at these meetings. While not a member of the HRC, Honduras has nevertheless participated as an observer in its previous meetings. OHCHR has informed us that the Permanent Representative of Honduras to the United Nations Office in Geneva (UNOG), [Name], has indicated his intention to represent Honduras.

13. However, we were informed today by representatives from OHCHR that [Name] has had his accreditation withdrawn by President Zelaya and that the Secretary-General had been informed of this by letter dated 20 August 2009 (copies of the relevant correspondence attached).*

14. We have therefore indicated to OHCHR that in our view, [Name] does not represent President Zelaya's Government. We have recommended that at tomorrow's Bureau meeting, immediately prior to the HRC meeting, the Bureau which comprises the President and the representatives of the various regional groups be informed of the above-mentioned letter to the Secretary-General and agree in line with resolution 63/301 that only the duly authorized representatives of President Zelaya's Government participate in the meetings of the HRC. This proposal can then be gaveled by the President of the HRC when the meeting begins and constitutes a formal decision of that body.

15. Consequently, [Name] can then be barred by United Nations security from gaining access should he try to enter the HRC Chamber. As far as the other representatives from Honduras are concerned, unless they can formally confirm that they are the duly authorized representatives of President Zelaya they should also be barred from gaining access to the HRC Chamber.

16. As a temporary measure and until the HRC has taken its decision, United Nations security should be given instructions to bar any representative from Honduras from gaining access to the HRC Chamber.

17. Finally, as this is a question of accreditation and representation, the nameplate of Honduras should remain in the conference room.

14 September 2009

* Not reproduced herein.

(*i*) Interoffice memorandum to the Assistant Secretary-General, Department of Field Support, regarding the legal status of military drivers provided by the Governments of India and Pakistan

Legal status of drivers provided to United Nations Military Observer Group in India and Pakistan (UNMOGIP) by the Governments of India and Pakistan in their respective territories—Drivers belong to their respective national defense forces and are not under managerial control of UNMOGIP—Recommendation that details of arrangement set out in agreements with the Governments concerned

1. This is in response to your memorandum, dated 30 October 2009, requesting our advice with regard to the legal status of military drivers provided to United Nations Military Observer Group in India and Pakistan (UNMOGIP) by the Governments of India and Pakistan. You also request our advice as to the extent to which UNMOGIP may exercise managerial control over the military drivers.

2. As noted in your memorandum, the Governments of India and Pakistan each provide military personnel to drive UNMOGIP vehicles in their respective territories. Although this practice has been in place for many years, it is not reflected in any written agreements with the Governments concerned.

3. As regards their legal status, the Indian and Pakistani military drivers are members of their respective national defence forces. As such, they are not subject to United Nations regulations and rules, nor is UNMOGIP entitled to exercise managerial control over them, save to the extent specifically agreed with their national Governments.

4. Accordingly, should it be decided that this practice is to continue, we recommend that the details of such arrangements be set out in an appropriate agreement with each of the Governments concerned. Such agreement should include provisions governing the parties' respective responsibilities in the event of vehicle accidents and resultant claims, as well practical measures to ensure that the driving skills of the Government-provided personnel are adequately monitored. In view of recent discussions on this issue, we also recommend that the security aspects of the continued use of the Government-provided drivers be coordinated with the Department of Safety and Security.

3 December 2009

3. Procurement

(*a*) Interoffice memorandum to the Chief, Procurement Operations Service, Procurement Division, concerning a request for reimbursement of value added tax (VAT) charges from the United Nations Interim Force in Lebanon (UNIFIL)

Obligation under contract to reimburse contractor for taxes from which the United Nations is not exempt—Convention on the Privileges and Immunities of the United Nations—Remission of indirect tax for important purchases for official use—VAT considered an indirect tax—"Important" purchase under section 8 of the Convention if it is reoccurring and involves a considerable quantity of goods or services—UNIFIL exempt from VAT under status-of-forces agreement—

CONTRACTOR NOT ENTITLED TO REIMBURSEMENT OF VAT—PROPOSAL TO REQUEST FROM NATIONAL AUTHORITIES A REFUND OF THE VAT PAID

1. I refer to your memorandum to the Director of the General Legal Division, seeking our advice on a claim from [Company] for the reimbursement of value added tax (VAT) under a contract concluded on 18 April 2007 (the Contract) between the United Nations and [Company] for the provision of food rations, bottled water and other services and equipment to the United Nations Interim Force in Lebanon (UNIFIL). I also refer to numerous e-mail messages from the Procurement Division, in February and March 2009, providing us with further information and clarifications regarding this matter.

2. From the information provided to us, I understand that [Company] requests UNIFIL to be reimbursed for VAT in the amount of [USD] paid to local suppliers for goods and services that were provided to UNIFIL under the above-mentioned Contract.

REIMBURSEMENT OF VAT UNDER THE CONTRACT

3. Article 6.4 of the Contract states that "(t)he contractor shall specify in its unit prices all taxes and other governmental levies that the contractor is required to charge to the United Nations. *The United Nations agrees to reimburse the contractor for such taxes for which the United Nations is not tax-exempt*, subject to the contractor providing the United Nations with evidence acceptable to the United Nations of the contractor's payment of such taxes to the appropriate taxing authority" (emphasis added). Accordingly, under the Contract, two conditions must be fulfilled in order for [Company] to be entitled to reimbursement of the VAT claimed under article 6.4. First, the VAT must be in the nature of a tax from which the United Nations is not exempt. Second, the contractor must provide proof that it has paid the VAT. The second issue can only arise if the first requirement is fulfilled. In our view, as discussed below, the VAT claimed by [Company] is a tax from which the United Nations is exempt.

REMISSION OF VAT UNDER THE 1946 CONVENTION

4. The 1946 Convention on the Privileges and Immunities of the United Nations* the Convention), to which Lebanon acceded on 10 March 1949 without reservation, provides in section 8 that "while the United Nations will not, as a general rule, claim exemption from excise duties and from taxes on the sale of movable and immovable property which form part of the price to be paid, *nevertheless when the United Nations is making important purchases for official use of property on which such duties and taxes have been charged or are chargeable, Members will, whenever possible, make appropriate administrative arrangements for the remission or return of the amount of duty or tax*" (emphasis added).

5. In United Nations practice, VAT is deemed to be an indirect tax within the meaning of section 8 of the Convention. The question whether a particular purchase is "important" within the meaning of section 8 of the Convention has usually been determined on the basis whether it is a reoccurring purchase or whether it involves a considerable quantity of goods or services. The provision of food rations and bottled water and other services and equipment by [Company] to UNIFIL is a reoccurring purchase and does involve a considerable quantity of goods and services. Therefore, these purchases fall, without a

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

doubt, within this category. Accordingly, UNIFIL, as a subsidiary organ of the United Nations, can also claim a remission or refund of VAT under the Convention in respect of purchases by UNIFIL.

Exemption of UNIFIL from VAT under the UNIFIL SOFA

6. In reality, however, it would not be necessary for UNIFIL to claim a remission or refund under the Convention since UNIFIL can avail itself of the Agreement between the United Nations and the Government of Lebanon on the Status of UNIFIL, dated 15 December 1995 (the UNIFIL SOFA), which provides a tax exemption regime specifically to that mission. Paragraph 20 of the UNIFIL SOFA provides that "[t]he Government undertakes to assist UNIFIL as far as possible in obtaining equipment, provisions, supplies and other goods and services from local sources required for its subsistence and operations. In making purchases on the local market, UNIFIL shall, on the basis of observations made and information provided by the Government in that respect, avoid any adverse effect on the local economy. *The Government shall exempt UNIFIL from any taxes or duties in respect of all official local purchases*" (emphasis added). Pursuant to this paragraph, UNIFIL is exempt from VAT on all local official purchases in Lebanon.

7. Accordingly, [Company] is not entitled to claim VAT reimbursement from the United Nations. Indeed such reimbursement would negate the United Nations exemption from VAT charges in Lebanon. We propose that UNIFIL inform [Company] of this position.

Assisting [Company] in obtaining VAT reimbursement from the Government

8. There remains the question whether the United Nations should assist the contractor to get a refund from the Government of Lebanon of the VAT it has paid. The Protocol of Amendment of Agreement between the United Nations and the Government of Lebanon on the Status of the United Nations Interim Force in Lebanon (Protocol of Amendment), amending the UNIFIL SOFA to ensure that, *inter alia*, "the necessary facilities and exemptions are conferred on contractors who perform services or supply equipment, provisions, supplies and other goods in support of UNIFIL," has not been signed by the Lebanese Government to date. Hence, there is currently no legal basis for contractors to directly request the Lebanese Government for VAT exemption.

9. However, in the absence of an exemption of UNIFIL contractors from VAT, the VAT levied by the Government on goods and services locally purchased by [Company] under the Contract could end up being passed on to the United Nations in the form of increased charges for such goods and services. This would have the effect of negating the United Nations' exemption from VAT with respect to such goods and services. We therefore recommend that the United Nations takes up this issue with the relevant Lebanese authorities. Thus, we propose that UNIFIL send a letter to the relevant authorities requesting a refund of the VAT paid, on the grounds that the goods and services purchased by [Company] were exclusively intended for the official use of UNIFIL and should therefore be deemed VAT-exempt. UNIFIL should provide any additional support required so that the VAT paid on these goods and services can be refunded to [Company]. We have

prepared the attached draft letter* from UNIFIL to the relevant Lebanese authorities for consideration by UNIFIL.

10. I would be grateful if you could keep my Office informed of any developments regarding this matter, in particular, whether the relevant authorities are amenable to our request. We also propose that UNIFIL inform [Company] about the efforts being undertaken by the Organization in this regard.

19 March 2009

(*b*) Interoffice memorandum to the Director, Procurement Division, and the Officer-in-Charge, Logistics and Support Division, regarding a contract for the supply of aviation and ground fuel and the provision of distribution and support services for the United Nations Mission in the Central African Republic and Chad

Pre-contractual mobilization by company providing fuel distribution and support services to United Nations mission—The United Nations cannot conclude separate memorandum of understanding providing for recognition of and protection for personnel prior to conclusion of contract—Mobilization work undertaken prior to conclusion of a written agreement done at risk of company—Insistence by the United Nations that company meet deadline may give rise to claims of quasi-contractual liability—Possibility to administratively arrange for personnel to be issued a letter identifying company as an international civilian contractor providing pre-contractual mobilisation services in the mission area

1. This Office is providing legal support to the Procurement Division (PD) and to the Department of Field Support (DFS) in their current negotiations with [Shipping Services Company], which is trading as [Company], for the conclusion of a proposed agreement (proposed contract) for the supply of aviation and ground fuel and the provision of related fuel distribution and support services for the United Nations Mission in the Central African Republic and Chad (MINURCAT). During the course of negotiations for the proposed contract, PD and DFS insisted that [Company] mobilize its operations in the mission area no later than 1 June 2009 because of MINURCAT's critical requirements that fuel supplies and related fuel distribution services be available by that time. We understand that, while the United Nations and [Company] originally contemplated a 90-day mobilisation period following contract award, MINURCAT's operational requirements have fixed the timeframe for mobilisation to be 1 June 2009, and [Company] has agreed in principle to meet that mobilisation deadline, "at least in part." However, because of other issues that are as yet to be resolved between them, the United Nations and [Company] are continuing to negotiate over the terms and conditions of the proposed contract.

2. During recent negotiations with [Company] concerning the terms and conditions of the proposed contract, [Company] stated that the company had already positioned certain of its personnel within the MINURCAT mission area in order to meet the 1 June 2009 mobilisation deadline. Subsequently, [Company]'s in-house attorney sent this Office a draft memorandum of understanding (MOU) that would require the Organization to

* Not reproduced herein.

obtain from governmental authorities in the MINURCAT mission area recognition of and protection for [Company] personnel in the mission area performing services for the mobilisation effort. Thus, under the terms of such draft MOU, the United Nations would inform the Governments of Chad and the Central African Republic about the identities of [Company] personnel undertaking pre-contractual, mobilisation services in the MINURCAT mission area. In addition, the draft MOU would further require the Organization to issue such [Company] personnel MINURCAT identification badges, as is done under the relevant Status of Forces Agreements (SOFAs) between the United Nations and Chad and the Central African Republic in respect of the personnel of established contractors providing services for MINURCAT. [Company] considers that such recognition would reduce the risks that its personnel face in the MINURCAT mission area in performing pre-contractual mobilisation services that are required in order to meet the United Nations 1 June 2009 mobilisation deadline.

3. In response to such request, this Office has informed [Company]'s in-house attorney that, although [Company]'s concerns about the risks its personnel face while performing pre-contractual mobilisation services in support of MINURCAT without a signed contract are understandable, the United Nations could not enter into a separate MOU or other agreement with [Company] for such purposes. Thus, in accordance with applicable United Nations regulations, rules and policies, only the proposed contract, if and when it is concluded, will constitute the entire agreement between the United Nations and [Company] on all aspects of their respective rights and obligations regarding the supply of aviation and ground fuel and the provision of related fuel distribution and support services for MINURCAT. At the same time, given [Company]'s concerns about the risks that its personnel face in performing pre-contractual mobilisation services in the mission area, this Office further informed [Company]'s in-house attorney that we would inform and consult with PD and DFS with a view to finding an administrative approach for the presence of [Company] personnel in Chad who are performing pre-contractual mobilisation services that are required in order to meet the United Nations 1 June 2009 mobilisation deadline.

Possible Administrative Arrangement

4. This Office understands that, notwithstanding the United Nations' insistence on maintaining the 1 June 2009 mobilisation deadline, PD and DFS have advised [Company] that any mobilization work that [Company] undertakes in order to meet that deadline is at its own risk, unless and until such time as the parties have entered into the proposed contract. While this Office supports the principle that potential contractors act at their own risk until a written agreement is concluded, the fact that PD and DFS have insisted that [Company] continue to meet the 1 June 2009 mobilisation deadline and the fact that [Company] is taking steps to meet the deadline, even before the proposed contract is concluded, could give rise to claims by [Company] of quasi-contractual liability on the part of the Organization (e.g., claims of promissory estoppel or other claims arising from a *de facto* contractual relationship), or even claims that the Organization owes [Company] and its personnel a duty of care, particularly if [Company] personnel are injured or die during the course of performing such pre-contractual mobilisation services for MINURCAT. This Office further notes that the Organization is exposed to greater risk, the longer it takes to conclude a contract with [Company].

5. Therefore, insofar as PD and DFS have required [Company] to perform pre-contractual mobilisation services in order to meet the 1 June 2009 deadline and to the extent that PD and DFS consider that [Company] personnel within the mission area are specifically performing such pre-contractual mobilisation services in connection with the proposed contract still under negotiation, then rather than entering into the MOU proposed by [Company], PD and DFS may wish to simply administratively arrange for [Company] personnel to be issued a letter. Such letter would state that [Company] is an international civilian contractor whose activities in the mission area are solely for the provision of pre-contractual mobilisation services in respect of a proposed contract expected to be concluded with the United Nations for the supply of fuel and related support services, exclusively in support of MINURCAT's operations. Such a letter could also state that all purchases, imports and exports made by [Company] for such pre-contractual mobilization services are exclusively for and directly in support of MINURCAT.

8 April 2009

(*c*) Interoffice memorandum to the Chairman of the Headquarters Committee on Contracts regarding accountability of the Committee with respect to procurement actions

Accountability of Headquarters Committee on Contracts (HCC) with respect to repeated endorsements of contracts exceeding amounts and duration originally authorized—Audit report finding that HCC had not discharged its functions as prescribed in the Procurement Manual—HCC is a body without decision-making authority and without fiduciary or oversight responsibility—Members of HCC are subject to Staff Rules—Distinction between financial loss suffered by the Organization resulting from inadvertent error, oversight or simple negligence, and gross negligence—Staff members, if found to have been grossly negligent, can be individually responsible for losses suffered by the Organization

1. I refer to your memorandum, dated 13 March 2009, concerning the responsibilities and duties of the Headquarters Committee on Contracts (HCC) with respect to procurement actions which are subject to the HCC review pursuant to rule 105.13 of the Financial Regulations and Rules of the United Nations. In particular, you requested advice on the accountability, financial or otherwise, of the members of the HCC flowing from the HCC recommendations on procurement actions in which the Committee renders advice to the Assistant Secretary-General for Central Support Services (ASG/OCSS).

Audit report AH/2007/513/05 by the Office of Internal Oversight Services

2. We understand from your memorandum that the issue of the HCC's accountability has been raised in connection with a recommendation made by the Office of Internal Oversight Services (OIOS) in its audit report AH/2007/513/05, dated 3 March 2009, entitled "Selected outsourced activities in the Information Technology Services Division (ITSD); control weaknesses in the procurement and management of certain outsourced activities in ITSD" (Audit Report). According to the relevant sections of the Audit Report, which you forwarded with your memorandum, OIOS has made a recommendation regarding the accountability of the members of the HCC in the context of OIOS' audit of two separate

information technology services contracts between the United Nations and contractors identified in the Audit Report as Company X and Company Y (IT Contracts).

3. Regarding the IT Contracts, the Audit Report states that the IT Contracts' terms were repeatedly extended, and the not-to-exceed (NTE) amounts provided for under these contracts were significantly increased.[1] The Audit Report also states that the requests for the term extensions and the increases in the NTE amounts for the IT Contracts were reviewed by the HCC on five separate occasions, and the HCC "repeatedly endorsed" these requests (see paragraphs 51–55, Audit Report). The Audit Report concludes that "the controls [established pursuant to the Procurement Manual, the Financial Regulations and Rules of the United Nations, the HCC, contract provisions] have proven to be ineffective because there has been no accountability for non-compliance" (*ibid,* paragraph 58). OIOS, therefore, recommends in relevant part, as follows:

> Recommendation 8
>
> (8) The Under-Secretary-General for Management . . . should determine accountability concerning the failure by . . . the Headquarters Committee on Contracts to properly discharge their *fiduciary and oversight responsibilities* by their repeated contract extensions beyond the option period and without the required performance evaluation of Company X and Company Y. *(Ibid,* paragraph 58, emphasis added.)

4. As explained in your memorandum, Management has not accepted the above-quoted OIOS recommendation. According to the Audit Report, Management stated that "this recommendation is also not accepted because HCC is an administrative body which is not responsible for performance evaluations of vendors, nor is it responsible for contract administration" (*ibid*., paragraph 59). OIOS did not accept Management's explanation for rejecting the OIOS recommendation and maintained its position that "by repeatedly recommending extension of contract durations . . . over a prolonged period beyond the contractual expiry dates, HCC did not properly discharge its functions as described in the Procurement Manual" (*ibid*, paragraph 63).

Rule 105.13 of the Financial Regulations and Rules

5. Rule 105.13 of the Financial Regulations and Rules of the United Nations defines the authority and responsibility for the procurement functions of the Organization, including the responsibilities of the HCC for procurement actions that are subject to its review. Rule 105.13 (a) of the Financial Regulations and Rules of the United Nations vests the Under-Secretary-General for Management[2] with authority for the establishment of the Organization's procurement system and with the authority to designate the officials responsible for performing procurement functions. Rule 105.13 (b) requires the Under-

[1] According to the Audit Report, the IT Contracts with Company X and Company Y were extended beyond their approved duration seven and five times, respectively, over a two-year period. In addition, the Audit Report states that the NTE amounts for the IT Contracts were increased by 185% and 525%, respectively, from the initial amounts recommended by the HCC and approved by the ASG/OCSS. (See Audit Report, paragraph 64.)

[2] Pursuant to ST/AI/2004/1 of 8 March 2004, authority and responsibility under 105.13 (a) have been delegated to the ASG/OCSS.

Secretary-General for Management[3] to establish review committees at Headquarters and other locations to advise the Under-Secretary-General for Management (or, in this case, her delegate, the ASG/OCSS) on procurement actions leading to the award or amendment of procurement contracts. Rule 105.13 (c) provides that where the advice of a review committee is required, the Under-Secretary-General for Management[4] (or, in this case, her delegate, the ASG/OCSS) must receive such advice before making his decision, which advice he can *accept or reject*.

6. Regarding the HCC's responsibilities, section 2.3.1 (b) of the Procurement Manual (Rev. 05) provides that the general role of the HCC is to "examine and provid[e] general advice" on procurement actions. Moreover, section 2.3. 1(c) of the Procurement Manual (Rev. 05) stipulates that "the HCC is not responsible for reviewing or providing advice on the adequacy or necessity of the requirement being met under the proposed procurement action, nor for substituting its opinion on how to conduct a particular procurement action."

7. Therefore, pursuant to rule 105.13 of the Financial Regulations and Rules and the relevant sections of the Procurement Manual (Rev. 05), the HCC has a general advisory role only. Thus, the HCC's primary responsibility is to propose recommendations on certain procurement actions. Such recommendations may then be accepted or rejected by the Under-Secretary-General for Management,[5] who alone exercises decision-making authority over procurement actions leading to the award or amendment of procurement contracts. Accordingly, the members of the HCC cannot be said to have any role in deciding on matters relating to such procurement actions.

Fiduciary responsibility

8. The Audit Report recommends that the Under-Secretary-General for Management determine the accountability of the HCC for its failure to properly discharge its fiduciary responsibilities. The OIOS recommendation would appear to be premised on the assumption that the members of the HCC have a fiduciary duty with respect to the procurement actions that are reviewed by the HCC. Moreover, OIOS considers that such fiduciary duty was not properly exercised by members of the HCC in connection with the HCC review of the IT Contracts and that such alleged improper discharge of such a duty has presumably led to financial losses to the Organization.

9. Any failure to properly discharge a fiduciary duty depends, of course, on whether a fiduciary relationship in fact exists between the members of the HCC and the Organization with respect to procurement actions that the HCC reviews. Only if such a fiduciary relationship exists can consideration then be given as to whether that duty was breached and whether such breach may have given rise to a quantifiable loss to the Organization.

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[3] Pursuant to ST/AI/2004/1, authority and responsibility under 105.13 (b) have been delegated to the ASG/OCSS in consultation with Controller.

[4] Pursuant to ST/AI/2004/1, authority and responsibility under 105.13 (c) have been delegated to the ASG/OCSS.

[5] For procurement cases relating to the UNJSPF, the HCC submits its recommendations to the head of the UNJSPF.

10. In this regard, we note that a fiduciary obligation entails one of the most demanding standards of responsibility generally prescribed by legal systems, and the status of being a fiduciary gives rise to certain specific duties and obligations. Generally, a fiduciary relationship exists where a person or an entity has undertaken to act in the interests of another and not in his or its own interest. In common law systems, for example, individuals or institutions that serve as executors of estate, directors in corporations, receivers in bankruptcy, or trustees of a trust have fiduciary responsibilities. Within the context of the United Nations, the Secretary-General who is considered to be a trustee of the assets of the United Nations Joint Staff Pension Fund has been recognized as having a fiduciary responsibility with respect to the interests of the participants and beneficiaries of the United Nations Joint Staff Pension Fund under the Regulations and Rules of the Fund.[6] The key element in most legal systems for the recognition of such a fiduciary obligation is that the entity or individual having such fiduciary duty must exercise decisional authority over the assets or liabilities of another person or entity. In short, fiduciary responsibility implies an ability to control the disposition of such assets or liabilities.

11. As noted in Management's response to OIOS' recommendation, the HCC is an administrative body without decision-making authority. The HCC's recommendations are subject to the decision-makers' consideration and subsequent acceptance or rejection. We do not consider that the responsibilities and duties of the HCC, which acts in a limited advisory capacity, are comparable to those of fiduciaries, such as those described above.

Oversight responsibility

12. The Audit Report also recommends that the Under-Secretary-General for Management determine the accountability of the HCC for its failure to properly discharge its oversight responsibilities. The OIOS recommendation would appear to be premised on the assumption that an oversight responsibility exists for the HCC with respect to the procurement actions it reviews; the HCC failed to discharge this responsibility; and the breach proximately caused injury to the Organization.

13. As discussed above in connection with the issue of fiduciary duty, the responsibility of the HCC is to provide advice to the decision-makers on certain procurement actions leading to the award or amendment of procurement contracts. Thus, the HCC has an advisory role, which is separate and distinct from oversight or monitoring functions. Insofar as the relevant sections of the Financial Regulations and Rules and the Procurement Manual (Rev. 05) limit the role of the HCC to an advisory one, it would appear that oversight authorities or responsibilities are not specifically contemplated for the HCC. In addition, we note that, according to General Assembly resolution 48/218B of 29 July 1994, pursuant to which the OIOS was established, the oversight functions within the United Nations rest with the OIOS. In this regard, we understand that OIOS often requests and is permitted to have its representatives attend meetings of the HCC or review the minutes thereof in order to carry out OIOS oversight responsibilities.

[6] See General Assembly resolution 35/216 of 17 December 1980, Part B.

ACCOUNTABILITY UNDER STAFF RULES AND THE FINANCIAL REGULATIONS AND RULES

14. Irrespective of whether the HCC, or its members, have fiduciary or oversight responsibilities for the procurement actions subject to its review, the members of the HCC remain subject to staff rule 112.3[7] and rule 101.2 of the Financial Regulations and Rules, relating to the accountability of staff members of the United Nations. Thus, staff rule 112.3 provides that:

> Any staff member may be required to reimburse the United Nations either partially or in full for any financial loss suffered by the United Nations as a result of the staff member's *gross negligence* or of his or her having violated any regulation, rule or administrative instruction. (Emphasis added.)

In addition, rule 101.2 of the Financial Regulations and Rules provides, in relevant part, that:

> [a]ny staff member who contravenes the [Financial Regulations and Rules] or corresponding administrative instruction may be held personally accountable and financially liable for his or her action.

15. The implementation of staff rules 112.3, 212.2, 312.2 and rule 101.2 of the Financial Regulations and Rules is subject to the conditions set forth in administrative instruction* ST/AI/2004/3, of 29 September 2004, entitled "Financial responsibility of staff members for gross negligence." That Administrative Instruction details the procedures applicable to cases giving rise to financial recovery proceedings. Sections 1.2 and 1.3 of ST/AI/2004/3 provide as follows:

> 1.2 The provisions of the present [administrative] instruction are based on the Organization's established policy to maintain a clear distinction between:
>
> (a) Instances where a financial loss suffered by the Organization results from an inadvertent error, oversight or simple negligence, or inability to foresee the negative consequences of a chosen course of action, in which case no financial recovery against staff members shall be undertaken and any deficiencies on the part of the officials involved shall be addressed through performance management mechanisms; and,
>
> (b) Instances where a financial loss results from gross negligence, as defined in section 1.3 below. Financial responsibility in such instances shall be established in accordance with the provisions set out in the present instruction.
>
> 1.3 For the purposes of the present instruction, 'gross negligence' is negligence of a very high degree involving an extreme and wilful or reckless failure to act as a reasonable person in applying or in failing to apply the regulations and rules of the Organization.

16. Thus, pursuant to ST/AI/2004/3, before the issue of personal accountability arises, whether financial or otherwise, a determination must be made as to whether the Organization has suffered quantifiable financial loss due to the HCC recommendations relating to the IT Contracts. We note that the Audit Report does not specify the amount of the financial loss suffered by the Organization because of the HCC recommendations on the IT Contracts. In this regard, as you pointed out in your memorandum, in calculating the resulting financial loss, if any, the Organization would need to consider whether the HCC, or its members, could be held accountable, financially or otherwise, for recommend-

[7] See also staff rules 212.2 and 312.2.

* For information on administrative instructions, see note under section 2 of chaper VI B, above.

ing against the extension of a critical contract, such as the IT Contracts, which, following acceptance of the recommendation by the decision maker, results in operational disruption and costs resulting from such disruption.

17. Once a finding has been made with respect to the Organization's financial loss, if any, consideration could then be given as to whether the financial loss suffered by the Organization, if any, resulted from "inadvertent error, oversight or simple negligence, or inability to foresee the negative consequences of a chosen course of action" or "gross negligence." ST/AI/2004/3 sets out the procedures to be followed when there is "reason to believe that the gross negligence of a staff member may have led to financial loss or receives credible allegations to that effect."

Conclusion

18. In the light of the foregoing, in our view, the HCC is an advisory body whose responsibilities, as set forth in the Financial Regulations and Rules and the Procurement Manual (Rev. 05), do not appear to give rise to fiduciary or oversight responsibilities.

19. Nevertheless, it is clear that the members of the HCC are subject to staff rule 112.3 (or 212.2 or 312.2, as appropriate) and rule 101.2 of the Financial Regulations and Rules. Pursuant to the procedures set forth in ST/AI/2004/3 on financial recovery proceedings, if the members of the HCC are to be held personally accountable for any advice given by the HCC, then the Organization must first establish whether the Organization suffered quantifiable financial loss as a result of the HCC's recommendations. Once such a finding has been made, consideration would then be given as to whether the loss resulted from (i) inadvertent error, oversight or simple negligence or (ii) gross negligence. If the financial loss resulted from inadvertent error, oversight or simple negligence, then deficiencies, if any, on the part of the HCC, or its members, should be addressed through performance management mechanisms. If, however, the final loss resulted from the "gross negligence" of the members of the HCC, as that term is defined in the administrative instruction ST/AI/2004/3, then financial responsibility should be established in accordance with the provisions set out therein.

10 July 2009

(*d*) Interoffice memorandum to the Director, Procurement Division, Office of Central Support Services, regarding the participation of a vendor in the competitive solicitation for the build phase of the United Nations Enterprise Resource Planning Project

Importance of scrupulous adherence to procedures set forth in request for proposals in procurement process—Requirement to conclude "fire wall" agreement to avoid information obtained by a company during design phase to provide unfair advantage *vis-à-vis* other vendors competing in the build phase—Definition of the term "design phase related information"

1. This refers to an e-mail message from the Procurement Division (PD) to the Office of Legal Affairs (OLA), dated 23 September 2009, transmitting for our review a draft agreement to be executed between the United Nations and [Company] in connection with

[Company]'s possible participation in the upcoming competitive solicitation exercise for the build phase (Build Phase) of the Enterprise Resource Planning Project (ERP). We also refer to subsequent telephone and e-mail exchanges between representatives of our Offices, including a telephone discussion among representatives of PD, OLA and [Company] on 25 September 2009 regarding the terms of the proposed agreement.

2. According to PD e-mail messages, we note that the United Nations and [Company] entered into a contract for the provision of design phase services (Design Phase) for ERP (PD/C0095/09) on the basis of the request for proposal (RFPS-1289), dated 12 January 2009. The Statement of Work (SOW) appended to the request for proposal, a copy of which was provided to OLA on 25 September 2009, provides that the services for the Build Phase would be procured by the United Nations under a separate competitive solicitation and would be subject to certain conditions set forth therein.

3. At the outset, it seems to us that it would be extremely important for the United Nations to adhere scrupulously to the procedures set forth in the request for proposal regarding all vendors,' including [Company]'s, participation in the Build Phase competitive solicitation. A failure to observe those procedures may result in criticism and potential claims against the Organization by aggrieved vendors. In order to avoid any such criticism and potential claims for having acted arbitrarily, it is necessary to ensure that the competitive solicitation for the Build Phase is carried out pursuant to the terms and procedures included in the request for proposal with respect to the Build Phase competitive solicitation, and in particular, article 2.4 of the SOW of the request for proposal, which stipulates certain specific conditions about that solicitation.

4. Regarding participation in competitive solicitation for the Build Phase, article 2.4 of the SOW provides as follows:

> [t]he Service Providers wishing to participate in the solicitation(s) for the subsequent phase(s) may do so, should they wish and qualify as per criteria set in the solicitation documentation. However, the Service Provider that will be awarded the contract for the Design Phase, will be requested to *sign a "fire-wall" agreement, whereby the mobilized Design Phase Team agrees that any and all Design Phase related information will be contained within the team, and that no advance information will be passed on inside the company to assist those who may be preparing a bid for the subsequent phases.* (Emphasis added).

5. Therefore, pursuant to article 2.4 of the SOW, because [Company] was awarded the Design Phase contract, [Company]'s participation in the Build Phase competitive solicitation is conditional upon [Company]'s concluding a "fire-wall" agreement. Such "fire-wall" agreement, according to article 2.4 of the SOW, would include, at a minimum, the following undertakings by [Company]:

> (i) any and all Design Phase related information will be contained within the [Company] team [mobilized for the Design Phase]; and
>
> (ii) no advance information will be passed on inside [Company] to assist those who may be preparing a bid for the subsequent phases.

6. It is worth noting in this connection that section 9.11.2 (2) of the Procurement Manual includes the following guidance on source selection process:

> [a]11 invitees shall receive the same information, and to the extent possible, *simultaneously*, to avoid the appearance of partiality, and to prevent the perception that other

> parties have received information that can offer them an advantage in winning United Nations contract awards. (Emphasis added.)

The requirements described in article 2.4 of the SOW regarding (i) the containment of all Design Phase related information strictly within the [Company] team working on the Design Phase; and (ii) the prohibition against sharing of advance information or the provision of assistance by the [Company] team working on the Design Phase to those [Company] personnel who may be preparing the Build Phase proposal are consistent with the above-cited section of the Procurement Manual, as well as the four general procurement principles set forth in financial regulation 5.12. In order to ensure compliance with such provision of the Procurement Manual and such Financial Regulation, as well as the specific terms of the request for proposal, the "fire-wall" agreement envisaged under article 2.4 of the SOW should ensure that [Company] is prohibited from gaining an unfair advantage *vis-à-vis* other vendors competing in the Build Phase competitive solicitation, including because of improperly obtaining access to ERP or other United Nations-related information during the Design Phase.

7. In this regard, the definition of what constitutes "Design Phase related information," which must be strictly contained within the [Company] team working on the Design Phase, is critical in guarding against [Company]'s gaining a possible advantage due to its involvement in the Design Phase. Article 3 of the draft agreement transmitted by PD defines "Design Phase related information," as follows:

> [Company] shall not permit any individuals who have knowledge of or involvement in the development of the Design Documents under the Master Services Agreement to participate in the Proposal or to assist any other individual in connection with the Proposal. Design Documents are defined as the following, the Process Definition Document (as defined in Work Order 4 of the Master Services Agreement:
>
> Process Model—BPP (business process procedures) for level IV processes in scope-Process Flow; Business Process Requirements; Key Design Decisions; Risks; Organizational Change Matrix; Key Performance Indicators; and Technical Components.

8. Given the importance attached to including in the "fire-wall" agreement a proper definition of "Design Phase related information," as intended under article 2.4 of the SOW, we recommend that PD, in consultation with the ERP Office, review the above-quoted definition to determine whether it is sufficiently broad not only to include all Design Phase related information that should be contained within the [Company] team working on the Design Phase, but also to prevent its disclosure to other [Company] personnel preparing the proposal for the Build Phase. Thus, PD, in consultation with the ERP Office, should be satisfied that the description of "Design Phase related information" currently included in article 3 of the draft agreement transmitted by PD is sufficiently expansive to include all Design Phase related information envisaged under article 2.4 of the SOW. However, if the current definition of "Design Phase related information" is found to be too narrow (e.g., because it excludes Design Phase related information which should not be shared with the [Company] team preparing the proposal for the Build Phase), we recommend that PD, in consultation with the ERP Office, revise that definition to broaden the description of the kinds of information and deliverables that

should not be shared by the [Company] team working on the Design Phase with other [Company] personnel involved in preparing the proposal for the Build Phase.

9. Subject to our foregoing comments, we have revised the draft agreement that PD forwarded to OLA and attach hereto* a revised draft agreement for PD's consideration.

6 October 2009

(*e*) Interoffice memorandum to the Director, Procurement Division, regarding the use of the International Federation of Consulting Engineers (FIDIC) Standard Agreement for Construction Contracts in the solicitation of bids from construction contractors

Use of standard construction contracts in solicitation of bids—Necessary that contracts are consistent with policies, privileges and immunities, and financial regulations and rules of the United Nations—Standard contract by International Federation of Consulting Engineers (FIDIC) not consistent with United Nations requirements

1. This is in reference to your memorandum, dated 14 August 2009, seeking the advice of the Office of Legal Affairs (OLA) in relation to an OIOS audit recommendation, set forth in paragraph 37 of its draft report on assignment no. AC/2009/514/08, entitled "Audit on the construction of additional office facilities and improvements to conference facilities at the United Nations Office at Nairobi" (the Draft Report). Such audit recommendation, as well as paragraph 36 of the Draft Report, reads as follows:

> 36. The form of contract used to solicit bids from construction contractors has been developed by the United Nations. OIOS was advised that personnel at UNON and contractors in East Africa are not familiar with the terms and conditions of the United Nations contract and usually use the standard form of the International Federation of Consulting Engineers (FIDIC) instead of the United Nations contract. Use of this form of contract (or another international standard), would give the advantage of being better understood by contractors. It would also have been tested in arbitration or court for scenarios that may arise, given the complex nature of construction works. *The possibility of using FIDIC had been raised with, and addressed by the Office of Legal Affairs back in 2005. At that time the Office of Legal Affairs was not in favour*, but it may be worth revisiting this possibility for future projects. The World Bank uses FIDIC with additional clauses included for special circumstances, if required. (It is noteworthy that United Nations staff based in ECA, Addis Ababa also favour the use of FIDIC).
>
> 37. Recommendation: The Procurement Division in consultation with the Office of Legal Affairs should examine whether it would be acceptable to use international forms of construction contracts that are familiar to local technical staff and contractors for future construction works. (Emphasis added).

2. We note the statement by OIOS set forth in paragraph 36 of the Draft Report as follows, the "possibility of using FIDIC had been raised with, and addressed by, the Office of Legal Affairs back in 2005. At that time the Office of Legal Affairs was not in favour . . .." We have reviewed our files and note that in a memorandum from PD to the General

* Not reproduced herein.

Legal Division (GLD), dated 1 September 2004,[1] PD had forwarded to GLD a draft contract which had been prepared by the Economic Commission for Africa (ECA), using a standard FIDIC format as a base (the "Draft Contract"). The Draft Contract was intended for use in a tender that was to be issued for an ECA construction project.

3. In response to PD, in its memorandum dated 5 April 2005, GLD advised PD, *inter alia*, of the following. GLD had indicated its understanding that the Draft Contract was prepared by ECA and was based upon the form of contract used by the International Federation of Consulting Engineers (FIDIC). ECA wished to use a FIDIC-type of construction contract because, *inter alia*, it was used extensively in Africa and, more generally, on certain international government projects in Ethiopia. In this regard, GLD noted that while the FIDIC form of contract may be widely used in Africa, as is the American Institute of Architects (AIA) form of contract in the United States, these industry models do not fully meet the unique status and requirements of the Organization, and do not fully protect the interests of the Organization. Thus, a number of material provisions in the Draft Contract were not only incompatible with the status of the United Nations as an international intergovernmental organization but also with the policies of the Organization reflected in the United Nations General Conditions of Contract and other terms generally agreed upon between the United Nations and its contractors in commercial agreements, including construction contracts.

4. In its memorandum, dated 5 April 2005, GLD highlighted various examples of provisions in the Draft Contract, which GLD found objectionable, because such clauses either departed significantly from the established policies of the Organization, were contrary to the privileges and immunities of the Organization or contrary to the financial regulations and rules of the United Nations.

5. While GLD is not intimately familiar with the most recent versions of the FIDIC forms of contract,[2] we believe that any changes to the FIDIC forms of contract since 2005 would likely not have addressed the concerns raised by OLA in its memorandum of 5 April 2005. In order to provide comprehensive advice on whether the FIDIC, or any other, form of contract would be suitable for use by the United Nations, GLD would need to be provided with a copy of such forms of contract, for its review. Without having had the benefit of reviewing such forms of contract, we note that to the extent that such forms are inconsistent with the policies, regulations and/or rules of the Organization, such forms would need to be substantially modified, in order to make them appropriate to the United Nations context.

6. With regard to the statement by OIOS regarding the World Bank's use of the FIDIC forms of contract, namely, "The World Bank uses FIDIC with additional clauses included for special circumstances, if required,"[3] we understand that OIOS is referring to the Multilateral Development Bank Harmonised Edition, dated March 2006 (the Harmonised Edition). It is our understanding that the World Bank commissioned FIDIC to substantially modify the standard FIDIC forms of contract for use by the World Bank in order to develop such Harmonised Edition. GLD's cursory review of the Harmonised Edition indicates that it also

[1] Memorandum, dated 1 September 2004, is attached for convenience. *[Not reproduced herein.]*

[2] FIDIC forms of contract are proprietary to the FIDIC and are subject to payment of subscription fees, prior to being released to the subscriber.

[3] See paragraph 36 of the Draft Report.

contains a number of those provisions which had been identified by OLA in its 5 April 2005 memorandum, as being inappropriate for use by the United Nations.

7. You may wish to note the DFS has, this week, informed OLA that it is establishing a working group for the purpose of developing a set of standard form contracts for construction projects (the Working Group). OLA has been invited to nominate a representative to participate in the Working Group and we understand that, in addition to DFS, other participants will be drawn from PD and the Field Missions. We understand that the Working Group may be reviewing the FIDIC forms of contract, as well as other internationally recognized standards, when undertaking its review, for the purpose of drafting standard form construction contracts for use by field missions.

15 October 2009

(*f*) Interoffice memorandum to the Officer-in-Charge, Procurement Operations Service, Procurement Division, regarding the termination of a food rations contract

TERMINATION OF CONTRACT DUE TO TERMINATION OF MISSION MANDATE—REIMBURSEMENT OF REASONABLE COSTS INCURRED PRIOR TO RECEIPT OF NOTICE OF TERMINATION—PAYMENT FOR RATIONS IN STOCK OR IN TRANSIT ORDERED BY THE UNITED NATIONS PRIOR TO DATE OF TERMINATION

1. This is with reference to your memorandum, dated 24 February 2009, seeking our advice in connection with a claim from [Company] for reimbursement of certain costs that [Company] allegedly incurred due to the termination of a food rations contract [Contract No.] (the Contract) by the United Nations. Specifically, you request our advice as to whether [Company] is entitled to reimbursement of the sum of [Euro] representing the net book value, after depreciation, of certain items of equipment acquired by [Company] to provide services under the Contract.

2. We also refer to the various discussions between representatives of our respective Offices and the further documentation provided by the Procurement Division (PD) to assist in our review of this matter.

[. . .]

BACKGROUND

4. Based on the information and documentation provided by PD, our understanding of the background of this matter is as follows:

(i) On 21 October 2007, the United Nations and [Company] entered into the Contract for the provision of food rations, bottled water and related services in support of the United Nations Mission in Ethiopia and Eritrea (UNMEE). The Contract was for an initial term of three years from 31 August 2006 through 31 August 2009.

(ii) In February 2008, the number of UNMEE troops was reduced significantly and the remaining troops were moved to new locations within the mission area.

(iii) Between March-July 2008, various discussions took place between PD and [Company] as to how the downsizing and re-configuration of UNMEE would impact on the provision of rations under the Contract.[1]

(iv) On 16 July 2008, PD served notice terminating the Contract with effect from 31 July 2008. The termination notice was based on article 15.2 of the United Nations General Conditions of Contract (see paragraph 5 below) and requested that [Company] "cease all operations and remove all of its assets from Eritrea by 31 July 2008."

(v) On 18 July 2008, [Company] responded to the termination notice stating that it "would do its utmost to limit the United Nations' exposure to the cost of terminating this contract and will provide the United Nations these costs in due course."

(vi) In resolution 1827 (2008), dated 30 July 2008, the Security Council terminated the UNMEE mandate with effect from 31 July 2008.

(vii) On 31 November 2008, [Company] submitted a claim for [Euro] for "the United Nations' cost for terminating the [Contract] for convenience." According to the attachments to [Company]'s letter, the amount claimed represented the net book value, after depreciation, of various items of equipment acquired by [Company] to provide services under the Contract.

Analysis

5. As noted above, the termination notice served by the United Nations was based on article 15.2 of the United Nations General Conditions of Contract (attached at Annex A to the Contract), which provides as follows:

> The United Nations may terminate this Contract at any time should the mandate or the funding of [UNMEE] be curtailed or terminated, in which case the Contractor shall be reimbursed by the United Nations for *all reasonable costs incurred by the Contractor prior to receipt of such notice of termination*. (Emphasis provided).

6. The issue that arises, therefore, is whether the amount claimed by [Company] is reasonable. This issue should be considered in light of the relevant provisions of the Contract, in particular, article 16 which addresses the financial consequences of contract termination.[2] In this connection, article 16.7 of the Contract provides as follows:

> Upon the expiration or termination of this Contract, other than termination for the Contractor's material breach, the United Nations shall pay the Contractor for Reserve Rations and the Food Rations in transit or in the Contractor's warehouses that have been

[1] According to the documentation provided by PD, a number of potential options were discussed with [Company], including a possible agreed termination ("termination for convenience") of the Contract. PD has confirmed, however, that the outcome of the discussions was inconclusive.

[2] In accordance with article 23.2 of the Contract, the provisions in article 16 take priority over the United Nations General Conditions of Contract.

ordered pursuant to duly issued Requisitions. Payment shall be made according to the Food Rations prices listed in Annex D (Pricing Schedule), provided that the goods are in a satisfactory condition when delivered to the United Nations.

7. Article 16.9 of the Contract further provides that:

Upon the expiration or termination of this Contract, the Contractor shall give the United Nations and/or its successor, *the right to purchase any or all of the Equipment* owned by the Contractor and used exclusively for the performance of the services under this Contract that the Contractor desires to sell. (Emphasis provided.)

8. In accordance with article 16.7, therefore, the United Nations would have a strong basis for arguing that [Company] is only entitled to payment for rations, either in stock or in transit, which were ordered by the United Nations prior to the date of termination. We understand from PD that payment for such stocks has already been made to the Contractor. In relation to article 16.9, we further understand from PD that, with the exception of two refrigerated containers that were transferred to UNMEE, the Equipment used by [Company] to provide services under the Contract was either removed from the mission area or abandoned by the Contractor following the termination of the Contract. PD has also confirmed that the United Nations did not make any agreement, or promise any payment, in respect of the equipment prior to termination of the Contract.

Conclusion

9. Based on the information provided by PD, therefore, apart from the above-mentioned refrigerated containers, we can find no legal basis upon which [Company] would be entitled to reimbursement of the residual value of the equipment it used to provide services under the Contract. We also note that, to date, [Company] has provided no basis to substantiate its claim, either under the terms of the Contract, or otherwise. Should [Company] provide such substantiation at a future date, we would be happy to consider the matter further.

10. Insofar as the two refrigerated containers transferred to UNMEE are concerned, [Company] would *prima facie* be entitled to payment for the containers, as agreed at the time the transfer took place.

11 November 2009

4. Liability and responsibility of the United Nations

(*a*) Interoffice memorandum to the Controller, Assistant Secretary-General, Office of Programme Planning, Budgets and Accounts, regarding *ex gratia* payment to an injured civilian Haitian

PAYMENT OF *EX GRATIA* DECIDED UPON BY THE SECRETARY-GENERAL AS DEEMED NECESSARY IN THE INTEREST OF THE ORGANIZATION WHEN NO CLEAR LEGAL LIABILITY ON PART OF THE ORGANIZATION IS FOUND BY THE LEGAL COUNSEL—CIVILIAN INJURED DURING MILITARY OPERATION BETWEEN UNITED NATIONS SOLDIERS AND LOCAL GANG—NO CLEAR LEGAL LIABILITY ON PART OF THE UNITED NATIONS—IMPORTANCE OF CONVENING A BOARD OF INQUIRY IN CASES OF THIS NATURE

1. This is in response to your note addressed to the Legal Counsel, dated 10 December 2008, seeking the advice of the Office of Legal Affairs (OLA) in connection with a recommendation by the United Nations Stabilization Force in Haiti (MINUSTAH) Local Claims Review Board (LCRB) to pay [Name], a civilian Haitian national, an *ex gratia* payment of [USD].

Background

2. According to the documents attached to your note, [Name] was injured in the Cité Militaire area of Port-au-Prince, on 13 July 2006. The incident occurred while United Nations soldiers from the MINUSTAH Brazilian Battalion (BRABATT) were engaged in a military operation involving local gang members. [Name], who was apparently crossing the street at the time, was shot in the leg during an exchange of gunfire.

3. We understand that MINUSTAH did not convene a Board of Inquiry in respect of this case. Two investigations were, however, conducted by the MINUSTAH Military Force Provost Marshall (FPM) and by the MINUSTAH Special Investigation Unit (SIU).

4. In its report, dated 2 March 2007, the FPM found that [Name] "did not see where the shots came from" and that "it was not possible to recover the projectiles that hit [her]." The FPM added that "given the position occupied by the hostile forces," [Name] had most likely been shot by them. The FPM further concluded, however, that, although the MINUSTAH "acted in self-defence," "the possibility of collateral damage caused by an accidental fire can not be completely discarded."

5. In its report, dated 12 March 2007 (SIU/PAP/800/06), the SIU endorsed the conclusions of the MINUSTAH military police, confirming that "although the BRABATT troops were acting in self-defense and according to the rules, it is not possible to discard definitely the possibility of collateral damage."

6. On 26 December 2006, [Name] submitted a claim for compensation in the amount of [USD] to MINUSTAH. On 12 November 2007, she amended her claim and requested that she be sent to a country "like Cuba" to receive medical treatment for her injuries.

7. The matter was submitted to the MINUSTAH LCRB on 24 April 2008. Noting the inconclusive findings of the two MINUSTAH investigation reports, the LCRB found that, unless there was conclusive evidence that MINUSTAH was responsible for the injury sustained by [Name], the Organization would not be liable to compensate her. The LCRB decided, therefore, to defer its review of the claim, pending the advice of the MINUSTAH Legal Office as to whether the Organization's liability had been engaged.

8. The MINUSTAH Legal Office provided advice in respect of [Name]'s claim on 10 July 2008. The advice concluded that the "liability of the United Nations cannot be clearly established."

9. On 28 July 2008, the LCRB reconvened to review [Name]'s claim. During that meeting, the LCRB considered that "it continues to be unclear and inconclusive as to whether the Organization was liable or not for collateral damage and that any compensation granted would be purely on humanitarian grounds." The LCRB, taking note of the sensitive political visibility of this matter, recommended, "in the best interest of the Organization," that [USD] be paid to [Name] on an *ex gratia* basis.

10. The recommendation of the LCRB was endorsed by the MINUSTAH Chief of Mission Support and submitted to the Controller for his consideration and approval on 14 October 2008.

Legal Analysis

11. Financial regulation 5.11 provides that the "Secretary-General may make such *ex gratia* payments as are deemed to be necessary in the interest of the Organization" (ST/SGB/2003/7). In accordance with financial rule 105.12, "*[e]x gratia* payments may be made in cases where, although in the opinion of the Legal Counsel there is no clear legal liability on the part of the United Nations, payment is in the interest of the Organization . . . The approval of the Under-Secretary-General for Management is required for all *ex gratia* payments." In deciding whether an *ex gratia* payment may be made, therefore, the role of the Office of Legal Affairs is to determine whether the Organization is legally liable or not to make the payment.

12. In the present case, we note that neither of the investigations conducted by MINUSTAH in respect of this incident were able to establish whether the injury sustained by [Name] was caused by BRABATT, or by the local gang members. In the absence of evidence of BRABATT's responsibility, it is the opinion of this Office that there is no clear legal liability on the part of the United Nations to compensate [Name].

13. Should the Controller decide that it is in the interest of the Organization that an *ex gratia* payment be made to [Name], we recommend that a signed release be obtained from her before such payment is made. We would also reiterate how important it is to ensure that a Board of Inquiry is convened in cases of this nature.

29 January 2009

(*b*) Note to the Controller, Assistant Secretary-General for Programme Planning, Budget and Accounts, regarding requests for reimbursement for infrastructure installed by the European Union in Chad

Request for reimbursement for infrastructure installed in Chad by the European Union-led peacekeeping force (EUFOR) prior to transfer of military authority to the United Nations—No basis for obligation to reimburse the European Union (EU) under Security Council resolutions 1861 (2008) and 1778 (2007)—Exchange of letters and subsequent technical arrangement provide for reimbursement for infrastructure installed at N'Djamena and Abeche airports—Discussions held between the United Nations and the EU may have created an expectancy that an increased level of reimbursement would be provided, but does not amount to a legal obligation

1. This is in response to your note dated 19 March 2009, requesting the advice of the Office of Legal Affairs (OLA) in relation to the Organization's potential exposure to legal liability if it does not reimburse the European Union (EU) for the infrastructure installed by the European Union-led peacekeeping force (EUFOR) in Chad.

2. We understand that your request has arisen in the context of a request by the Department of Field Support (DFS) for reconsideration of a decision by the Office of Central

Support Services (OCSS) not to reimburse the EU for the EUFOR-installed infrastructure. We also understand that the OCSS decision was made on the basis that, pursuant to the United Nations Financial Regulations and Rules, the Organization cannot reimburse the EU for EUFOR-installed infrastructure which was provided to the United Nations not by EUFOR, but by the Government of Chad. Within this context, you have also requested OLA's advice on the interpretation of paragraph 12 of Security Council resolution 1861 (2008).

3. We have examined your request on the basis of the documentation and information made available to us on this matter. As detailed in the attached analysis, we have concluded that, in the absence of any additional express undertaking by the United Nations to reimburse the EU for infrastructure installed by EUFOR in Chad, the United Nations legal obligation to reimburse the EU for such infrastructure is limited to its obligation to contribute 25.38 percent of the cost of the infrastructural improvements effected by EUFOR at N'Djamena and Abeche airports.

Reimbursement for EUFOR-installed infrastructure in Chad

Analysis

A. Security Council resolution 1861 (2008)

1. In paragraph 12 of Security Council resolution 1861 (2008), the Security Council:

> Encourages the Governments of Chad and the Central African Republic to continue to cooperate with the United Nations and the European Union to facilitate the smooth transition from EUFOR to the United Nations military component, including the handover of all sites and infrastructure established by EUFOR to the United Nations follow-on presence;

2. This provision reflects the normal principle that host Governments will cooperate with Security Council-mandated peacekeeping operations deployed in their territories, including that host Governments will "provide. . . . such areas for headquarters, camps or other premises as may be necessary for the conduct of the United Nations peacekeeping operation's operational and administrative activities and for the accommodation of [its] members."[1] Consistent with those principles, and with its obligation to provide premises set out in the Status-of-Forces Agreement it concluded with the EU on 6 March 2008, the Government of Chad provided to EUFOR the lands required to establish the EUFOR camps, together with facilities at N'Djamena and Abeche airports. Subsequently, in anticipation of the transfer of military authority from EUFOR to the United Nations on 15 March 2009 (TOA), as authorized in paragraph 3 of Security Council resolution 1861 (2009), the Government concluded a Memorandum of Understanding with United Nations Mission in the Central African Republic and Chad (MINURCAT) in which the Government agreed that the lands upon which EUFOR had established its camps, and the EUFOR-occupied areas at N'Djamena and Abeche airports, together with related infrastructure, would be provided to MINURCAT, with effect from TOA, once those facilities had been handed back to the Government by EUFOR.

[1] Paragraph 16 of the Model Status-of-Forces Agreement (A/45/594).

3. Accordingly, based on our review of Security Council resolution 1861 (2008), we do not find any basis for concluding that this resolution infers any obligation on the part of the United Nations to reimburse EUFOR for the infrastructure it installed during its mandate.

B. Security Council Resolution 1778 (2007)

4. We understand from the attachment to your note that the basis of the EU request to be reimbursed for the infrastructure installed by EUFOR is that EUFOR allegedly installed infrastructure of longer durability than its one-year mandate, in anticipation of the subsequent United Nations-led operation envisaged in Security Council resolution 1778 (2007).

5. Based on our review of Security Council resolution 1778 (2007), we find no basis for concluding that the Security Council requested the EU Mission to install infrastructure in excess of its own requirements, or that the Security Council intended to give rise to any legal responsibility on the part of the United Nations to reimburse EUFOR for the infrastructure it installed during its mandate.

C. Agreements between the United Nations and the EU

6. The arrangements for cooperation between the EU and the United Nations relating to Chad and the Central African Republic are set out in an Exchange of Letters concluded between the Secretary-General and the High Representative for the Common Foreign and Security Policy of the EU, in March 2008 (the EoL). The EoL provides that EUFOR and MINURCAT would provide mutual logistics support to each other, on a cost reimbursement basis, including "costs incurred by [EUFOR] to fulfill MINURCAT operational requirements, including investment cost for airports, airstrips and [EUFOR] camps, running costs and airport services." The EoL further provides that the detailed modalities for the provision of such mutual logistics support and "for a possible hand-over of infrastructures after the end of [the EUFOR] mandate" would be set out in subsequent technical arrangements to be concluded between EUFOR and MINURCAT.

7. The Technical Arrangement (TA) concluded between the United Nations and EUFOR in July 2008 provides that the United Nations commitment to reimburse EUFOR for infrastructure is limited to a 25.38 percent contribution towards the cost of infrastructural improvements carried out by EUFOR at N'Djamena and Abeche airports. The TA does not include any obligation on the part of the United Nations to reimburse EUFOR for infrastructure it installed at any other location. OLA is also not aware of any written task order issued by the United Nations to EUFOR pursuant to the TA to install infrastructure in any of its camps to a standard higher than that required for its own purposes in order to "fulfill MINURCAT operational requirements." Absent such a written task order, the TA provides no support for the EU assertion that it is entitled to reimbursement for the infrastructure installed by EUFOR in those other locations.

8. It is, of course, conceivable that, at the time the EoL was concluded, the parties intended that the infrastructure installed in the EUFOR camps, other than at the two airport locations, would be the subject of a separate technical arrangement. We understand, however, that no such other technical arrangement was concluded.

D. Discussions between the United Nations and the EU

9. In December 2008, in anticipation of TOA, the Organization entered into discussions with the EU/EUFOR with regard to the arrangements required to ensure an orderly transition. We understand that, during those discussions, the EU indicated that it would seek payment from the United Nations of 80% of the cost of the infrastructure installed by EUFOR. *It would appear from the draft agreement provided by the EU at that time that the infrastructure referred to included the infrastructure installed by EUFOR at N'Djamena and Abeche airports, as well as the infrastructure installed in the other EUFOR camps.*

10. In a letter to the EUFOR Operations Commander, dated 11 December 2008, the Organization stated that the EU/EUFOR proposal was under review by senior management. In his response dated 17 December 2008, the EUFOR Operations Commander noted that the EU proposal was under review, "in particular the depreciation rate." Noting that any agreement reached would require approval by the EU member States, the EUFOR Operations Commander proposed sending a financial team to United Nations Headquarters early in January 2008 "to discuss the issue and define the procedures to come to an agreed settlement."

11. Between 19 and 23 January 2009, a number of working level meetings were held with the visiting EU delegation to discuss various issues relating to the transition. Based on the account of those meetings provided by your Office, it would appear that a number of 'offers' or 'scenarios' as to the potential level of United Nations reimbursement for the infrastructure in the EUFOR camp sites and at N'Djamena and Abeche airports were presented to the EU delegation. No agreement was reached, however, and at the conclusion of the discussions, the EU delegation requested the United Nations to provide its position in writing so that it could be discussed with the EU management. OLA is not aware whether this was done.

12. Whilst it could be argued that by entering into further discussions as to the level of reimbursement the United Nations might potentially pay for the infrastructure installed by EUFOR, the Organization may have created an expectancy on the part of the EU that an increased level of reimbursement would be provided, such expectancy does not, in our view, amount to a legal obligation. In this connection, the extent of the United Nations' commitment to reimburse the EU for the EUFOR-installed infrastructure at N'Djamena and Abeche airports is clearly set out in the TA.[2] The account of the working level meetings that took place between the United Nations and the EU delegation in January 2008 also indicates that the discussions concerning the handover of EUFOR-installed infrastructure were "subject to review by internal [United Nations] committees and approval by legislative bodies." The account of those meetings also clearly states that, at the conclusion of the discussions, no agreement had been reached.

13. Accordingly, based on the information provided by the Office of Programme Planning, Budget and Accounts (OPPBA), as well as the documentation available in OLA's records, we do not find any basis for concluding that the United Nations is legally liable to reimburse the EU for the infrastructure installed by EUFOR, either under the relevant Security Council resolutions, or as a result of any subsequent action taken by the United Nations, save to the extent expressly set out in the TA referred to in paragraph 7 above.

[2] The TA also provides that any modifications or amendments to the TA shall be in writing.

Should any additional information to support the existence of such a legal obligation become available, we would be happy to review the matter further.

26 March 2009

(*c*) Interoffice memorandum to the Director, Medical Services Division, concerning emergency response services provided to areas outside the Secretariat building

HEADQUARTERS AND SUPPLEMENTAL AGREEMENTS DO NOT COVER ALL BUILDINGS USED BY THE ORGANIZATION NOR PUBLIC AREAS IN SUCH BUILDINGS—STAFF MEMBERS ENJOY IMMUNITY FROM LEGAL PROCESS WITH REGARD TO CLAIMS BROUGHT BEFORE NATIONAL COURTS OR PROFESSIONAL BOARDS IF THE ACT WAS CARRIED OUT AS PART OF OFFICIAL FUNCTIONS, IRRESPECTIVE OF WHERE THE ACT WAS PERFORMED—DETERMINATION WHETHER THE STAFF MEMBER ACTED WITHIN OFFICIAL FUNCTIONS IS TO BE MADE BY THE SECRETARY-GENERAL ON A CASE-BY-CASE BASIS—PERSONAL LIABILITY OF STAFF MEMBER WOULD BE TRIGGERED ONLY WHEN ACTING OUTSIDE THE SCOPE OF OFFICIAL FUNCTIONS OR IN THE EVENT OF GROSS NEGLIGENCE OR OTHER VIOLATIONS OF A REGULATION, RULE OR ADMINISTRATIVE INSTRUCTION

1. This is with reference to an email message from your Division dated 14 November 2008 regarding emergency response services provided by the UN Medical Services Division (MSD) to areas outside of the United Nations Secretariat, such as the DC-1, DC-2 and DC-3 (UNICEF) buildings. In particular, MSD requested clarification on whether there are any agreements that cover emergency response services provided in such buildings, especially in the lobbies, stairways, elevators and cafeterias. We note that the MSD is concerned about the exposure of medical staff to liability when performing services in those areas.

I. Headquarters Agreement and the Headquarters District

2. Section 8 of the 1947 Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations* (hereinafter the "Headquarters Agreement") provides that "[t]he United Nations shall have the power to make regulations, operative within the headquarters district, for the purpose of establishing therein conditions in all respects necessary for the full execution of its functions. No federal, state or local law or regulation of the United States which is inconsistent with a regulation of the United Nations authorized by this section shall, to the extent of such inconsistency, be applicable within the headquarters district."

3. In accordance with this section, the General Assembly approved in its resolution 604 (VI) of 1 February 1952, Headquarters Regulation No. 2 on qualifications for professional or other special occupational services within the United Nations. This Regulation provides as follows:

> The qualifications and requirements necessary for the performance of professional or other special occupational services within the Headquarters District shall be determined by the Secretary-General; provided that, prior to authorizing medical or nursing services by any person, the Secretary-General shall ascertain that such person has been duly qualified to perform such services in his own or another country.

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

Thus, so long as the individuals covered by this Regulation meet the qualifications and the requirements set by the Secretary-General, the corresponding United States laws remain inapplicable.

4. The Headquarters District is defined by the Headquarters Agreement and three Supplemental Agreements to the Headquarters Agreement of 1966[*] (as amended), 1969[**] and 1980.[***] We are currently negotiating a Fourth Supplemental Agreement to cover the temporary space being leased by the United Nations pursuant to the Capital Master Plan.

5. Firstly, it is important to note that not all buildings currently used by the United Nations are explicitly covered by the Headquarters and Supplemental Agreements. In particular, buildings such as the FF, DC-2 and DC-3 (UNICEF) Buildings are not covered by the Supplemental Agreements. Secondly, even where buildings have been included in the Supplemental Agreements, only the specific floors that are used by the United Nations fall within the Headquarters District. Public areas, such as stairways and elevators, are explicitly excluded. Thus, for example, the Third Supplemental Agreement provides as follows in relation to one United Nations Plaza (DC-1 Building):

> The entire third to twenty-fourth floors of the UNDC Building, located at 44th Street and 1st Avenue, New York City. Said premises shall include all offices, rooms, halls and corridors on the floors mentioned above, but shall not include any stairways and elevators giving public access to other floors.
>
> That part of the first floor of said building as indicated on the plan. Said premises shall include the interior lobby opening to 1st Avenue. Said premises shall not include any stairways or elevators giving public access to other floors.
>
> That part of the second floor of said building as indicated on the plan. Said premises shall not include any stairways or elevators giving public access to other floors.

6. Therefore, in many cases, the MSD staff might provide emergency response services in areas outside of the Headquarters District and thus, outside the scope of the aforementioned Regulations. This issue is discussed further below.

II. Claims against the United Nations staff members

(a) Before national courts

7. United Nations officials enjoy immunity "from legal process in respect of words spoken or written and all acts performed by them in their official capacity" (article V, section 18 (a) of the Convention on the Privileges and Immunities of the United Nations[****] (hereinafter the General Convention). There are currently 157 States parties to the General Convention including the United States. Accordingly, if a claim is brought against a staff member of the MSD before national courts, including United States courts, such individuals enjoy immunity so long as the act was carried out as a part of the staff member's official functions. In this regard, it is for the Secretary-General to make a determination whether the individual acted within his/her official functions. Such a determination would be made on a

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[*] United Nations, *Treaty Series*, vol. 581, p. 362.

[**] *Ibid.*, vol. 687, p. 408.

[***] *Ibid.*, vol. 1207, p. 304.

[****] *Ibid.*, vol. 1, p. 15, and vol. 90, p. 327 (corrigendum to vol. 1).

case-by-case basis. In order to facilitate such a determination, the MSD may wish to set out a broad policy of how and when trained staff should provide emergency medical services. Such a policy should attempt to capture all cases, in particular, grey areas such as those where a medically trained staff member who is not certified in the United States provides emergency response services to a non-staff member outside of the Headquarters District. In order to determine the implications of providing such services and the Organization's exposure to liability in these grey areas, we would suggest obtaining advice on local law, in particular, as it relates to "good Samaritan" responses. This Office is not in a position to provide advice on national law regarding this issue. However, the Organization could engage outside counsel to provide such advice, and this Office would be able to assist you in this matter.

(i) Where the act is within the official functions of the staff member

8. In the event that the staff member is deemed to have acted within his/her official functions, this Office would assert the staff member's immunity from legal process through the Permanent Mission concerned unless the Secretary-General determines that "the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations" (article V, section 20 of the General Convention).

9. Where immunity of the staff member is asserted, under article VIII, section 29 of the General Convention: "[t]he United Nations shall make provisions for appropriate modes of settlement of (a) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party," (b) Disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity is not waived by the Secretary-General." Thus, in the event that the United Nations would assert the immunity of the staff member concerned before a national court, the United Nations would have an obligation under the General Convention to resolve the underlying claim. It should be stressed, however, that this would be an obligation of the Organization and not the staff member concerned. Consequently, the burden of resolving the claim and any resulting potential liability would shift from the staff member to the Organization. In such a scenario, once a claim has been resolved by the Organization, the staff member's personal responsibility would become engaged only in the event of gross negligence, pursuant to staff rule 112.3, as amended by Secretary-General's bulletin* ST/SGB/2005/1 of 1 January 2005, which provides that a staff member may be required to reimburse the United Nations either partially or in full for any financial loss suffered by the United Nations as a result of the staff member's gross negligence or of his or her having violated any regulation, rule or administrative instruction.[1]

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* For information on Secretary-General's bulletins, see note under section 1 of chapter V A, above.

[1] Administrative instruction ST/AI/2004/3 of 29 September 2004 on "Financial responsibility of staff members for gross negligence," defines the conditions for implementing, *inter alia*, Staff Rule 112.3 and Financial Rule 101.2. Section 1.2 of ST/AI/2004/3 stipulates that the provisions of ST/AI/2004/3 are based on the Organization's established policy to maintain a clear distinction between:

> (a) instances where a financial loss suffered by the Organization results from an *inadvertent error, oversight or simple negligence, or inability to foresee* the negative consequences of a chosen course of action, in which *case no financial recovery against staff members shall be undertaken* and any deficiencies on the part of the officials involved shall be addressed through performance management mechanisms; and
>
> (b) instances where a financial loss results from *gross negligence*, as defined in Section 1.3 of [ST/AI/2004/3] (emphasis added).

10. Where immunity is waived by the Secretary-General, in accordance with article V, section 20 of the General Convention, the concerned staff member would personally have to answer the claim before the national court. We recall in this regard that under article V, section 21 of the General Convention, the United Nations has an obligation to "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 [article V of the General Convention]."

(ii) Where the act is outside the official functions of the staff member

11. An example of such a scenario would be a case where a staff member provides emergency medical services to a neighbor in his/her building in the middle of the night. In such cases, immunity would not apply and the staff member concerned would have to personally answer the claim before the national courts. It is important to note in this regard that it is still for the Secretary-General to determine whether the act concerned relates to the staff member's official functions and to notify the relevant authorities accordingly.

(b) Disciplinary action before professional boards

12. Legal process has been interpreted by the United Nations to include "legal process before national authorities, whether judicial, administrative or executive functions according to national law" (see page 224 of the Practice of the United Nations, the Specialized Agencies, and the International Atomic Energy Agency concerning their Status, Privileges and Immunities: Study prepared by the Secretariat. (A/CN.4/L.118 and Add. 1), 1967 Yearbook of the International Law Commission Vol. II). Accordingly, if a disciplinary action is commenced against a staff member of the MSD before a professional board, such as a medical board, immunity from legal process would apply in the same manner as stated above with regard to cases before national courts. However, as a staff member, the concerned individual is subject to the Staff Regulations and Rules, including the disciplinary measures contained therein.

III. Conclusion

13. United Nations staff members enjoy immunity from legal process with regard to claims brought before national courts or professional boards if the act in question was carried out as a part of their official functions, irrespective of where this act was performed, i.e. inside or outside the Headquarters District. The personal liability of the staff member would be triggered only in the event that he/she was acting outside the scope of his/her official functions or in the event of gross negligence or other violations of a regulation, rule or administrative instruction.

24 April 2009

(*d*) Note to the Controller, Assistant Secretary-General, Office of Programme Planning, Budgets and Accounts, regarding a claim for damage to property situated in Monserrado County, Liberia

CLAIM BY LESSOR FOR DAMAGE TO PROPERTY LEASED TO UNITED NATIONS MISSION IN LIBERIA (UNMIL)—AMOUNT RECOMMENDED TO BE PAID EXCEEDS FINANCIAL AUTHORITY DELEGATED TO UNMIL—UNMIL LIABLE TO COMPENSATE COSTS FOR REPLACEMENT AND INSTALLATION OF DAMAGED ITEMS TO THE EXTENT NOT ATTRIBUTABLE TO WEAR AND TEAR—COMPENSATION TO BE PAID TO THE CLAIMANT ONLY UPON SIGNATURE OF A SETTLEMENT AND RELEASE AGREEMENT

1. This is with reference to your note dated 26 February 2009, requesting the advice of the Office of Legal Affairs (OLA) in connection with a recommendation by the United Nations Mission in Liberia (UNMIL) to pay [USD] to [Name 1] in settlement of his claim for property damages to the Tweh Farm compound in Monserrado County, Liberia.

2. With your note you have provided us a copy of the minutes of the meeting of 10 December 2008 of the UNMIL Local Claims Review Board (LCRB), with the following supporting documentation: (i) a memorandum dated 18 November 2008 from the Deputy-Supervisor of the Security and Investigation Unit (SIU) to the Director of Mission Support (DMS) and related SIU investigation report dated 16 November; (ii) the "Third party uninsured claim form" submitted by the claimant on 14 July 2008; and (iii) the Lease Agreement between UNMIL and [Name 2] , [Name 3] and [Name 1] dated 20 October 2005, and two amendments.

3. We subsequently requested, and received the following additional documents from UNMIL (i) the Property Handover Report dated 20 June 2008; and (ii) an itemized list of the damages submitted by [Name 1] in support of his claim.

A. Background

4. Based on the documents provided to us, our understanding of the facts is as follows. On 20 October 2005, UNMIL entered into a lease with [Name 2], [Name 3] and [Name 1] for the lease of a compound with 12 bungalows known as the "Tweh Farm" located in Boshrod Island, Liberia, for the period from 1 December 2005 to 30 November 2007 (the Lease). The premises were used to accommodate UNMIL military personnel from the UNMIL [State] Battalion. The Lease was subsequently extended for an additional four-month period until 31 March 2008. By the time of expiration of the first extension, 90% of the troops accommodated on the premises had been relocated to another location. On 1 April 2008, the parties agreed to a further extension of the Lease until 30 June 2008 to allow UNMIL to remove all UNMIL equipment from the premises. 10% of the [UNMIL Battalion] troops remained on the premises to guard the UNMIL equipment.

5. On 19 June 2008, the parties conducted a joint inspection and hand-over of the premises. The property handover report signed by UNMIL and [Name 1] states, *inter alia*, the following:

a. Damages to the premises and missing items

The property is presently in good condition however, the premises revealed minor holes on the wall (from removing UNMIL assets-ACs), a damage kerb/road which could have happen[ed] as a result of vehicular traffic. There are minor damages and missing items

> on bungalows 1 through 9 (2 fa[u]cets, 18 wardrobe sliding doors and 14 window slide glass) while bungalows 10 through 12 seem to carry major damages and it includes the following; twenty-eight wooden doors (28 pcs), complete bathrooms sets (6 pcs), electrical wiring, window glasses (18 pcs slides), electrical sockets are all considered missing or completely damaged.
>
> b. Fixed and removable furniture
>
> No portions/parts of the premises occupied by the troops were furnished. The fixed furniture (kitchen cabinets and wardrobes) [and] revealed kitchen sink (3 sets), [are] completely damaged on bungalows 10 through 12.

6. On 14 July 2008, [Name 1] submitted, on behalf of himself and the other family members named in the Lease, a claim for compensation in an aggregate amount of [USD] which included for each of the 12 bungalows located on the premises an itemized list of the alleged damaged or missing items and the estimated cost of their replacement. The claim also included 30% of these estimated replacement costs for labour, 10% for transport, and 10% for contingency.

7. Beginning of August 2008, SIU was requested to conduct an investigation to ascertain the cause and extent of the damages. In its report dated 16 November 2008, SIU found, *inter alia*:

> That, during this inspection [of 20 June 2008] it was discovered that Houses #10, 11 and 12 were already being vandalised apart from the other houses.
>
> That, the theft and damages to the houses were done when the compound was still partly occupied by the remaining [UNMIL Battalion] troops.
>
> That, the houses being vandalised are situated next to the river with no security fence. Only rows of concertina wires are being placed on the river side to cover for the open area with no Security guards. . . .

SIU concluded, *inter alia*, that "Houses # 10, 11 and 12 were vandalized by unknown persons as there is sufficient evidence to prove that unlawful entry(ies) have been made, whereas the rest of the houses [Houses #1–9], damages could or may have been done by the [UNMIL Battalion] troops during the tenure of legal occupancy."

8. The claim was reviewed by the LCRB on 10 December 2008. Based on the findings of the SIU report, the LCRB found that (i) "since UNMIL had officially handed over the property back to the [Name 1] family, the onus of guarding the premises was on the claimant"; (ii) "since the SIU report established that damage to houses 1 to 9 was due to wear and tear as a result of occupancy by [UNMIL Battalion] peacekeepers, then UNMIL is not responsible for repair costs pertaining to those houses"; and (iii) "since the major damage to houses 10 to 12 was observed during the inspection of the premises prior to its hand over, then it is justified to consider it as constituting the claim." The LCRB recommended that the [Name 1] family be paid [USD] as compensation for the damages to the premises.

9. The LCRB recommendation was endorsed by the CMS/UNMIL on 15 December 2008. Since the amount of compensation that UNMIL recommended be paid to the claimant exceeds the financial authority delegated to the Mission for the settlement of third party claims, the claim has been forwarded to Headquarters for further review and approval by your Office.

B. Legal analysis

10. According to the terms of the Lease, "UNMIL shall take good care of the demised Premises and the fixtures and appurtenances therein reasonable wear and tear excepted." (See Lease, article 3).

11. At the hand-over of the Tweh Farm compound to [Name 1], the parties undertook a joint inspection of the premises during which "minor damages" in bungalows 1 through 9 and "major damages" in bungalows 10 through 12 were observed (see paragraph 5 above). Accordingly, UNMIL is responsible to compensate the claimant for such damages to the extent the damages have not been caused by wear and tear.

12. *Bungalows 1 through 9*: The LCRB has based its recommendation not to compensate the claimant for the damages to bungalows 1 through 9 on the SIU finding that those damages had been incurred due to wear and tear. We do not agree with this recommendation for the following reasons. Firstly, SIU did not arrive at such a finding, and secondly, the damages (on 2 faucets, 18 wardrobe sliding doors and 14 window slide glasses) listed in the property handover report, albeit "minor," do not appear to be of the type that would normally be caused by wear and tear. From a review of the itemized lists for bungalows 1 through 9 submitted by [Name 1] in support of his claim, it would appear possible to identify most if not all of the items listed in the property handover report. Accordingly, we recommend that UNMIL Engineering be requested to review the items on the property handover list and assess whether or not such items fall under wear and tear. Subject to the UNMIL/Engineering assessment, the claimant should be compensated for the replacement and installation costs of the items listed in the property handover report that are not attributable to fair wear and tear.

13. *Bungalows 10 through 12*: According to the property handover report, there were major damages to 28 wooden doors, 18 window slide glasses, 6 complete bathrooms sets, 3 sets of kitchen cabinets, 3 sets of kitchen sinks, 3 sets of wardrobes, the electrical wiring and the electrical sockets in bungalows 10 through 12 for which the claimant is entitled to be compensated. The LCRB recommended that he be paid a total of [USD] in compensation of those damages. While we generally agree with the methodology applied by the LCRB in determining which items are compensable (e.g. the exclusion of repairs to the roof, ceilings and floors), it would appear that some errors have occurred in the arithmetic. Subject to correction of those errors, we agree with the LCRB recommendation in respect of bungalows 10 through 12.

14. *50% overhead on estimated replacement cost*: We note that in [Name 1]'s claim an overhead of (i) 30% of the estimated replacement cost for the lost or damaged items was allocated to labor; (ii) 10% to transport; and (ii) 10% to contingencies. We recommend that the advice of UNMIL Engineering be sought to determine whether this assessment is reasonable.

C. Recommendations

15. We recommend that the claim be referred back to UNMIL for review and settlement in light of our forgoing analysis and comments. We also recommend that the compensation be paid to the claimant only upon signature of a settlement and release agreement by all of the lessors named in the Lease. Alternatively, the settlement and release

agreement could be signed by [Name 1] on behalf of the two other family members named in the Lease on presentation of a valid power of attorney.

16. On a final note, we recommend that cases involving contractual issues, such as the present case, be reviewed by the Mission Legal Office before they are presented to the LCRB.

26 June 2009

(*e*) Interoffice memorandum to the Chief of NGO Relations, Department of Public Information (DPI), regarding a draft letter of agreement between the United Nations and the NGO/DPI Executive Committee concerning transfer of funds for the organization of the 62nd Annual DPI/NGO Conference

Organization of the 62nd Annual DPI/NGO Conference—Liability for claims—United Nations collaboration with an entity that does not have sufficient assets or that does not carry adequate insurance coverage exposes the Organization to the risk of financial liabilities for third-party claims

1. I refer to an e-mail message of 1 July 2009, from your Office, requesting the Office of Legal Affairs (OLA) to attend a meeting with representatives of the Executive Committee of Non-Governmental Organizations Associated with the United Nations Department of Public Information (NGO/DPI Executive Committee), concerning a draft letter of agreement between the United Nations and the NGO/DPI Executive Committee, in respect of the parties' collaboration for the organization of the 62nd Annual DPI/NGO Conference scheduled to take place in Mexico from 9 to 11 September 2009 (the draft LoA). Pursuant to your Office's request, on 8 July 2008, members of [the General Legal Division] attended a meeting with members of your office and representatives of the NGO/DPI Executive Committee, including its Executive Director and the legal adviser to discuss the draft LoA, in particular paragraph 6 thereof on "Liability for claims." I also refer to OLA's memoranda to you dated 9 June and 9 July 2008, concerning a draft LoA with the NGO/DPI Executive Committee for the 61st Annual DPI/NGO Conference that took place in Paris in September 2008 (the 2008 LoA).

2. As requested and discussed at the meeting of 8 July 2009, we have reviewed the revised paragraph 6 of the draft LoA, submitted by the NGO/DPI Executive Committee, and we set forth a further, revised text in the attached revised draft LoA in the track change format.* I believe that our suggestions are self-explanatory, and the revised text reflects the outcome of the meeting of 8 July. I recommend that, after a review of the revised draft LoA by your Office, it be forwarded to the NGO/DPI Executive Committee for comments.

3. In this connection, OLA was informed at the meeting that the clause on "Liability for claims" had not been included in the signed text of the 2008 LoA, and a copy of the signed text without the liability clause was shown to the OLA representatives at the meeting. We note that the draft of the 2008 LoA that was cleared by OLA and by the

* Not reproduced herein.

Controller's Office last year included a liability clause. Therefore, it is unclear what might have transpired in respect of the signed text of the 2008 LoA.[1]

4. In addition, as a general comment, we understand that the NGO/DPI Executive Committee currently does not maintain any liability insurance to cover third-party claims that may arise out of its activities, including the activities of its officers and directors. We understand, however, that the NGO/DPI Executive Committee is reviewing this issue with a view to obtaining such insurance although, as it appears, the insurance may not be in place in time for the upcoming Conference in Mexico. As we mentioned after the meeting, we consider that collaborating with an entity that does not have sufficient assets or that does not carry adequate insurance coverage exposes the Organization to the risk of financial liabilities should third-party claims be brought against the entity and the United Nations in connection with the parties' collaboration. Therefore, it is crucial that the NGO/DPI Executive Committee procure and maintain all necessary insurance in respect of its activities, including those of its officers and directors, and we urge DPI to request the NGO/DPI Executive Committee to expedite its efforts to obtain such insurance.

5. We note that the draft LoA requires the Controller's clearance before it can be signed. Finally, we wish to reiterate our recommendation to conclude a relationship agreement with the NGO/DPI Executive Committee, clarifying its role and responsibilities *vis-à-vis* the Organization (see paragraph 6 of our memorandum of 9 June 2008).

10 July 2009

(*f*) Interoffice memorandum to the Controller, Assistant Secretary-General for Programme Planning, Budget and Accounts, concerning a claim for compensation for damages to a vehicle owned by the Permanent Mission of [State] to the United Nations

DAMAGE TO VEHICLE OWNED BY PERMANENT MISSION OF A MEMBER STATE TO THE UNITED NATIONS ATTRIBUTABLE TO ACTS OR OMISSIONS OF SECURITY AND SAFETY OFFICER—COST OF ESTIMATION BY INDEPENDENT APPRAISER WOULD BE DISPROPORTIONATE TO THE ACTUAL COST CHARGED FOR REPAIR—RECOMMENDATION THAT ORGANIZATION SETTLE BY PAYING COSTS FOR REPARATION OF VEHICLE

ISSUE AND SUMMARY OF RECOMMENDATION

1. This refers to the memorandum of 19 June 2009 from the Security and Safety Service (SSS) to the Office of Legal Affairs (OLA). (. . .) That memorandum concerned a request by the Permanent Mission of [State] to the United Nations (the Mission) for compensation for damages sustained by the above-referenced vehicle as it was entering the United Nations compound at the entrance on First Avenue and 43rd Street.

2. Section 3 of the Secretary-General's bulletin* ST/SGB/230 on the "Resolution of Tort Claims" provides that, "[i]f, upon its preliminary review of all the facts and circum-

[1] We noted that the paragraph numbering on page 2 of the signed 2008 LoA was not consequential to the paragraph numbering on page 1, and one paragraph appeared to be missing from page 2.

* For information on Secretary-General bulletins, see note under section 1 of chapter V A, above.

stances, [OLA] is of the view that a claim is justified and can be settled by payment of a sum not in excess of USD 5,000, it shall so report to the Controller and, subject to his approval, negotiate an appropriate settlement." That Bulletin was promulgated as part of the Organization's adoption of a self-insurance scheme for tort claims occurring on Headquarters premises.[1] Accordingly, we are forwarding this matter to you with our recommendation that the claim be settled by paying the costs of repair as assessed.

The incident

3. According to the investigation report of the SSS on this incident, on 6 February 2009, at approximately 12:25 hours, the above-referenced vehicle was damaged when entering the United Nations Headquarters premises through the entrance on First Avenue and 43rd Street. The investigation report states that the driver in question stopped to be searched and that after the vehicle was searched, it was allowed access onto the United Nations premises. While proceeding on to the United Nations premises, the arm barrier which at that time was in the raised position came down, collided with the vehicle, and caused damage to the windshield and roof of the vehicle. The investigation report determined that the accident occurred as a result of human error on the part of the Security and Safety Officers assigned to the post of that entrance.

4. Based on the foregoing, the damage to the Mission's vehicle does not appear to have been caused by the fault of the driver. Rather, the facts, as set forth in the investigation report, indicate that the cause of the damage is most likely attributable to the acts or omissions of the Security and Safety Officers who were assigned to the post at the time of the incident because they failed to follow standard operating procedures. Accordingly, based on the reported facts, if this matter were to proceed to an appropriate mode of settlement, such as one involving a neutral, third-party arbitrator, it would likely be determined that the Organization has an obligation to compensate the Mission for the damage caused to its vehicle.

Claim for compensation by the Mission

5. According to an invoice, dated 11 February 2009, and issued by [Company], a copy of which was enclosed with the 19 June 2009 memorandum from SSS to OLA, the repairs to the Mission's vehicle in respect of the damages resulting from this incident consisted of the installation of windshield and amounted to [USD]. That invoice also contains a stamp stating that the amount was fully paid on 11 February 2009.

6. Given the Organization's self-insurance scheme and the difficulty in determining the extent of damages to the vehicle or of entering into arrangements for its repair, the normal practice in these matters would be to compensate the Mission based on an estimated cost of repair prepared by an independent appraiser. In this case, however, the vehicle was already repaired and the cost for such repairs has been paid by the Mission. If the Mission now were to be requested to submit an independent evaluation of the cost of the repair

[1] See Report of the Fifth Committee, A/41/957, 8 December 1986, paras. 22 and 23. See also General Assembly resolution 41/210 of 11 December 1986, establishing Headquarters Regulation No. 4, under the 1947 Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations. That Headquarters Regulation establishes limits on the Organization's liabilities for tort claims occurring on Headquarters premises.

carried out by [Company], it would appear that the cost of such evaluation, which would have to be borne by the Organization, would be disproportionate to the actual cost charged for the repair of the vehicle, i.e., [USD]. Accordingly, we recommend that in the present case, the actual fee charged by [Company] should be accepted *in lieu* of an estimate by an independent appraiser.

Conclusion and recommendation

7. Based on the information provided to OLA regarding this incident as described above, the Organization appears to be liable to compensate the Mission for the damages caused to the vehicle. We therefore recommend that the Organization settle this matter with the Mission by agreeing to pay the amount of [USD] for the expenses borne by the Mission to repair the vehicle as a result of the incident. Should you approve this settlement, we will prepare and forward to the Mission a General Release and Settlement Agreement along these lines.

16 September 2009

(*g*) Interoffice memorandum to the Officer-in-Charge, Procurement Operations Service, Procurement Division, regarding a dispute arising from an *en-route* deviation during the sea shipment of contingent-owned equipment from Liberia to Pakistan

Shipment of contingent-owned equipment—Increased security requirements due to piracy risk—Definition of *force majeure*—Whether event is unforeseeable depends on prevailing practices in the shipping industry at the relevant time—Contractor must provide convincing and objective evidence to substantiate assertion that requirement for vessel to deviate from planned course was unforeseeable—Allocation of costs between the parties in case of *force majeure*—Advisability of developing standard shipping contract

1. This is in response to your memorandum, dated 28 September 2009, seeking our advice in connection with a dispute between the Organization and [Company] arising from the shipment of contingent-owned equipment (COE) from Port Monrovia, Liberia, to Karachi, Pakistan. Specifically, [Company] claims reimbursement of [USD] for additional costs allegedly incurred as a result of an *en-route* deviation of the vessel due to a piracy alert.

I. Background

2. Based on the documentation provided by the Procurement Division (PD), our understanding of the facts is as follows. A Request for Proposal (RFP) for the shipment of the COE from Liberia to Pakistan was issued to potential bidders on 6 February 2009. [Company] submitted its proposal on 18 February 2009. On 20 February 2009, the United Nations informed [Company] that it would be awarded the contract (Notice of Award) setting out the following itinerary:

ETA/ETD Load port Monrovia, Liberia: 25/28 March 2009
ETA Discharge port Karachi: 22/25 April 2009
Required delivery date at door Karachi: 24/28 April 2009

3. On 19 March 2009, a purchase order was issued for the shipment showing the same itinerary. The purchase order was signed by [Company] on 10 April 2009.

4. On 2 April 2009, [Company] informed the Movement Control Section/Department of Field Support (DFS) that the Maritime Security Center Horn of Africa (MSCHOA) had issued a piracy alert advising vessels to maintain a distance of not less than 600 nautical miles from the coastline of Somalia. In its e-mail, [Company] noted that the MSCHOA alert would require the vessel to take a longer route around the east coast of Madagascar and requested advice as to "how to proceed with what appears to be a *force majeure* resulting in additional charges to the contractor for transit and bunkering of the [a]ffected ship." DFS replied to [Company] stating that it did not consider the change in the vessel's routing to be *force majeure* and that any additional costs incurred as a result of the deviation would be the responsibility of the contractor. DFS also informed [Company] that the time required for the vessel to make an additional re-fuelling stop in South Africa would be taken into consideration and that the contractual delivery date would be adjusted accordingly.

5. On 14 May 2009, [Company] submitted a claim for [USD] for four additional days sailing and additional re-fuelling costs. On 24 June 2009, PD responded informing [Company], *inter alia*, that:

> [A]s per the terms of annex A of the RFP, any delay due to causes beyond the control of the United Nations shall not be charged to the United Nations.[1] The piracy alert was not caused by the United Nations, nor is it within the control of the United Nations. In addition, the piracy situation in the Horn of Africa did not arise for the first time when the vessel [. . .] set sail, and the Contractor should have been well aware of the security situation in the region when submitting the offer. Therefore, the deviation of the vessel from the contractual agreement is not the responsibility of the United Nations.

6. Between June and September 2009, a number of meetings and e-mail exchanges took place between [Company] and PD in which the parties disputed the date(s) upon which various anti-piracy security alerts and maritime insurance advisories were issued and/or became known within the shipping industry. According to [Company], at the time it submitted its proposal, vessels were only advised to maintain a distance of 500 nautical miles from the Somali coast. The MSCHOA alert increasing the recommended distance to 600 nautical miles was not issued until after the contracted vessel had departed Liberia and constituted an event of *force majeure*. PD's position, on the other hand, was that the danger of piracy in the area was well-known before the RFP was issued and that [Company] ought to have been aware of the risk at the time it submitted its proposal. The discussions ended in an impasse. On 10 September 2009, PD received a letter from [Company]'s attorney essentially reiterating [Company]'s position as described above.

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[1] Paragraph 19 of Annex A of the RFP provides that:

> The Contractor shall be responsible for any delays due to reasons except for *force majeure* or other occurrence of equal force and effect, including but not limited to war, civil disturbances or other hostilities, hurricanes, storms or other weather disturbances. The United Nations reserves the right to request Proposers to pay the United Nations any financial damages caused by delay or non-provision of ships, trucks and/or rail cars. Any delay generating detention charges to be paid by the United Nations must be justified by written explanation, duly certified by the authorized United Nations official. *Any delay due to causes beyond the control of the United Nations shall not be charged to the United Nations*. (Emphasis provided.)

II. Analysis

7. The main issues to be addressed are: (i) whether the MSCHOA piracy alert advising ships to maintain a distance of 600 miles from the east coast of Somalia constituted *force majeure*; and (ii) if so, how the additional costs arising from the vessel's deviation should be allocated between the parties.

8. Article 15.3 of the United Nations General Conditions of Contract (UNGCC) attached at annexe E of the RFP, defines *force majeure* as follows:

"any unforeseeable and irresistible act of nature, any act of war (whether declared or not), invasion, revolution, insurrection, terrorism, or any other acts of a similar nature of force, provided that such acts arise from causes beyond the control and without the fault or negligence of the Contractor [. . . .].

9. Article 15.1 of the UNGCC further provides that:

> 15.1 In the event of and as soon as possible after the occurrence of any cause constituting *force majeure*, the affected Party shall give notice and full particulars in writing to the other Party of such occurrence or cause [. . .] Not more than fifteen (15) days following the provision of such notice of *force majeure* or other changes in condition or occurrence, the affected Party shall also submit a statement to the other Party of estimated expenditures that will likely be incurred for the duration of the change in condition or the event of *force majeure*. On receipt of the notice or notices required hereunder, the Party not affected by the occurrence of a cause constituting *force majeure* shall take such action as it reasonably considers to be appropriate or necessary in the circumstances, including the granting to the affected Party of a reasonable extension of time in which to perform any obligations under the Contract.

10. The parties do not dispute that the threat of piracy comes within the meaning of "insurrection, terrorism, or any other acts of similar nature or force" as referred to in article 15.3 of the UNGCC, nor do they dispute that the vessel acted appropriately by complying with the MSCHOA alert. For [Company] to succeed in its argument that the vessel's deviation constituted *force majeure* as defined in article 15.3 of the UNGCC, however, the contractor must show that the events that caused the vessel to deviate were unforeseeable. This is a factual matter and would depend on the prevailing practices in the shipping industry at the relevant time.

11. In this connection, rather than engaging in further exchanges as to when various anti-piracy alerts and insurance advisories were published on the internet, we suggest that PD informs [Company] that its claim cannot be considered further unless the contractor provides convincing and objective evidence to substantiate its assertion that the requirement for the vessel to deviate from its originally planned course was unforeseeable. For example, PD's request for [Company] to provide confirmation from the vessel's insurers that the originally proposed route did not breach Institute Warranty Limits would seem reasonable in the circumstances.

12. If it is determined that the vessel's deviation was due to *force majeure*, the question arises as to how the additional costs incurred as a result of the deviation should be allocated between the parties. In this connection, article 15.1 of the UNGCC is silent as to how additional costs should be dealt with in cases of *force majeure*. PD's contention, based on annex A of the RFP, that the additional costs should be borne by the contractor (see paragraph 5 above) is not, however, convincing in the overall context of the contract

documents. Whilst it is impossible to predict how the issue of the allocation of the additional costs would be decided should the matter go to arbitration, it is likely that the United Nations' costs in such arbitration would exceed the amount that is in dispute.

III. Conclusion

13. Accordingly, we recommend that PD inform [Company] that the United Nations would be prepared to reconsider its claim provided the contractor provides cogent and objective evidence to substantiate its assertion that the events that caused the vessel to deviate, *i.e.* heightened security measures due to pirate activity, were unforeseeable. We further recommend that, if such evidence is provided by the contractor, an equitable split of the additional costs be negotiated between the parties.

14. Finally, as previously advised, we recommend that the contract documents used in cases of this nature be reviewed and the various inconsistencies be removed. It would also be advisable to develop a standard shipping contract, encapsulating the entire agreement between the parties. As expressed on previous occasions, this Office would be happy to review such revised contractual documents, if requested to do so.

11 December 2009

(*h*) Note to the Controller, Assistant Secretary-General for Programme Planning, Budget and Accounts, regarding a third-party claim for accommodation by United Nations Operation in Côte d'Ivoire

Request for compensation for occupation of motel by members of United Nations mission—Recommended amount exceeding financial authority delegated to mission—Provision under Status-of-Forces of Agreement that accommodation be provided to United Nations forces by the Government free of charge—Compensation firstly to be sought from local authorities—Compensation to be provided to the claimant reserving the United Nations mission's right to claim reimbursement from the Government

1. This is with reference to your note, dated 18 October 2009, seeking the advice of the Office of Legal Affairs (OLA) in connection with a recommendation by United Nations Operation in Côte d'Ivoire (UNOCI) to pay to the owner of the [Motel Name] (the Motel), Côte d'Ivoire, the sum of [CFA] for the alleged occupation of the Motel by members of the UNOCI [State] contingent. As the recommended amount exceeds the financial authority delegated to UNOCI for the settlement of third party claims, the Mission has forwarded the claim to the Controller for approval.

2. Attached to your note, you have provided the minutes of the UNOCI Local Claims Review Board (LCRB), together with various supporting documentation.

Background

3. Based on the documentation provided, we understand that the background to this matter is as follows. On 2 December 2003, the Motel in Zuenoula, Côte d'Ivoire, was requisitioned by the Local Prefect and placed at the disposal of the MICECI (Economic Community of West African States (ECOWAS) Mission in Côte d'Ivoire) [State] contingent

for the duration of the MICECI mandate. The Motel was used as accommodation by the contingent command party, while the main bulk of the contingent was located in a nearby tented camp. Unbeknownst to the UNOCI administration, this arrangement continued after the MICECI (ECOWAS) [State] troops "re-hatted" to UNOCI on 4 April 2004.

4. On 25 July 2005, the owner of the Motel, [Name], submitted a claim for the occupation of his Motel by the MICECI (ECOWAS) [State] troops from 22 April 2003 to 3 April 2004 and by the UNOCI [State] troops from 4 April 2004 to 23 October 2004. The amount claimed was [CFA].

5. The claim was reviewed by the UNOCI LCRB at its meeting on 26 November 2008. The LCRB noted, *inter alia*, that the Motel had been placed at the disposal of the MICEI (ECOWAS) contingent by the local authorities and that the Status-of-Forces Agreement (SOFA) concluded between the United Nations and the Government of Cote d'Ivoire on 29 June 2004 provides that the Government would provide premises to UNOCI, free of charge. In the circumstances, the LCRB recommended that the claimant should first seek compensation for the occupation of the Motel from the local authorities.

6. Noting that the claim may ultimately have to be settled by UNOCI, however, the LCRB further noted that:

6.1 The portion of the claim relating to the period of the MICECI (ECOWAS) mandate (i.e. from 22 April 2003 to 3 April 2004) was not receivable by the Organization;

6.2 As regards the occupation of the Motel during the UNOCI mandate (from 4 April 2004 to 23 October 2004), the daily room rate of [CFA] claimed by the claimant was acceptable; and

6.3 Although the command party of the UNOCI [State] contingent (approximately 20 rooms) had been accommodated in the Motel, it appeared from the information provided to the Board that the Government of [State] had received United Nations reimbursement for COE-provided tented accommodation for the full strength of the [State] contingent during the period in question.

7. The LCRB recommended therefore that the claimant be compensated in the sum of [CFA], based on the occupation of 20 Motel rooms by members of the UNOCI [State] contingent between 4 April and 23 October 2004 (203 days) at the rate of [CFA] per day. The LCRB further recommended that the amount of the settlement be recovered from the Government of [State]. The LCRB recommendation was endorsed by the CMS/UNOCI on 16 December 2008.

Legal Analysis

8. Based on the information provided, we agree that this claim should be referred to the host Government for appropriate action consistent with the Government's obligation under the SOFA to provide premises to UNOCI free of charge. As the LCRB minutes and supporting documentation forwarded to us do not provide any information as to what, if any, action UNOCI has taken in this regard, however, we recommend that the claim be returned to UNOCI for clarification of this issue and, if applicable, further action as described above. We further recommend that the claimant be informed accordingly.

9. In the event that the host Government fails to take appropriate action to dispose of the claim, the Government should be informed that the settlement of the claim by UNOCI directly with the claimant shall be concluded under protest and without prejudice

to the Government's obligation to provide premises, free of charge, pursuant to the SOFA. The Government should also be informed that UNOCI reserves the right to claim reimbursement from the Government for any settlement amount paid to the claimant.

10. Subject to our comments in paragraphs 8 and 9 above, we agree with the UNOCI recommendation that the claimant be compensated in the sum of [CFA] for the occupation of the Motel by members of the UNOCI [State] contingent from 4 April to 23 October 2004. We also agree that the amount of such settlement be recovered from the Government of [State].

30 December 2009

5. Other issues relating to peacekeeping operations

(*a*) Interoffice memorandum to the Office of Military Affairs, Department of Peacekeeping Operations, regarding a request to award the United Nations Medal to national support element personnel under the [State] contingent in the United Nations Mission in Sudan

Award of the United Nations Medal to military personnel in the service of the United Nations—National support elements personnel considered to be in service of their national Governments—To award United Nations Medal to national support element personnel is not consistent with established policy

1. This is in response to your memorandum addressed to the Legal Counsel, dated 20 January 2009, seeking the advice of the Office of Legal Affairs (OLA) in connection with a request from the Permanent Mission of [State] to the United Nations for the award of the United Nations Medal to national support element (NSE) personnel serving, or who have served with, the Canadian contingent in the United Nations Mission in Sudan (UNMIS).

2. As noted in your memorandum, the Regulations for the United Nations Medal (Regulations) provide that the United Nations Medal may be awarded "to military personnel who are or have been in the service of the United Nations."[1] Responsibility for implementing the Regulations has been delegated to the Under-Secretary-General for Peacekeeping Operations.

3. We understand from the attachments to your memorandum that, in accordance with Department of Peacekeeping Operations (DPKO) policy, in order to qualify for the United Nations Medal, military personnel (and with effect from 1994 civilian police personnel) must serve the requisite qualifying period "under the operational or tactical control of the United Nations." [2] We further understand, however, that NSE personnel are deployed to peacekeeping operations to perform national functions and are, therefore, considered to be in the service of their national Governments. We also understand that previous requests by Member States for the award of United Nations Medals to NSE personnel have been denied on the basis that such personnel are a national responsibility.

[1] ST/SGB/119 of 30 July 1959 and ST/SGB/119/Add.1 of October 1963.

[2] See DPKO Code Cable 3797 to all peacekeeping missions, dated 16 November 1994.

4. In light of the above, the award of the United Nations Medal to the [State] NSE personnel in UNMIS does not seem to be consistent with the established policy of DPKO.

7 April 2009

6. Treaty law

(*a*) Interoffice memorandum to the Executive Secretary of the United Nations Convention to Combat Desertification Secretariat regarding questions posed by the Joint Inspection Unit

A mandate specified in a treaty can only be modified by amendment procedures contained in that treaty—Amendment procedures provided for under the 1969 Vienna Convention on the Law of Treaties—Authority of State parties to interpret text of treaty including the scope of its mandate—Subsidiary bodies established under a convention—Additional functions may be assigned to the Global Mechanism under the United Nations Convention to Combat Desertification—Legal personality of an international entity—Capacity of an international organization to conclude treaties is governed by the rules of that organization—Global Mechanism as a subsidiary body has not been entrusted with the legal personality to enter into legally binding agreements—Managing Director of the Global Mechanism is able to enter into legally binding agreements if this is within the authority delegated by the President of IFAD in accordance with IFAD's Rules and Regulations—Determination whether an instrument, whatever its designation, is a treaty is to be done on the basis of the intention of the parties

1. This is with reference to your memorandum requesting advice on a number of questions that the Joint Inspection Unit has posed in relation to its assessment of the Global Mechanism of the United Nations Convention to Combat Desertification[*] (hereinafter the Convention). . . .

(i) Mandate of the Convention

2. In response to your question regarding the mandate of the Convention and decisions rendered by the Conference of the Parties (COP), and possible overlaps, it should be recalled that the mandate as specified in a treaty or a convention may only be modified by the amendment procedures contained in the treaty. In this regard, article 30 of the Convention outlines the procedure for adopting amendments to the Convention. Furthermore, part IV of the 1969 Vienna Convention on the Law of Treaties[**] provides the rules on amendment and modification of treaties.

3. We also note that it is a matter for the States parties to a treaty to interpret the text, including the scope of the mandate. Accordingly, the COP would be the authoritative body to interpret the mandate and decide on the scope of the mandate as well as to determine the effect of its decisions, including decision 3/COP.8 on "The 10-year strategic plan

[*] United Nations, *Treaty Series*, vol. 1954, p. 3.

[**] *Ibid.*, vol. 1155, p. 331.

and framework to enhance the implementation of the Convention." In this regard, we are not aware of any dissenting view by a State party that this decision was not in accordance with the original mandate as specified in the Convention.

(II) Status of the Global Mechanism

4. Article 21, paragraph 4, of the Convention provides for the establishment of the Global Mechanism and article 23 provides for the establishment of the Permanent Secretariat. Accordingly, both the Global Mechanism and Secretariat are subsidiary bodies (or "treaty bodies") properly established by the Convention.

(III) Article 21 of the Convention

5. With regard to your query as to whether the words "*inter alia*" in article 21, paragraph 5, of the Convention allows the possibility of additional functions to be assigned to the Global Mechanism, we are of the view that it does. In this regard, we note that this paragraph provides that the COP and "the organization it has identified shall agree upon modalities for this Global Mechanism to ensure *inter alia* that such Mechanism. . ." This paragraph continues by listing the responsibilities of the Global Mechanism. Thus, it is for the COP and the International Fund for Agricultural Development (IFAD), which was chosen to house the Global Mechanism in decision 24/COP.1, to agree on the modalities for the Global Mechanism. We also note that in accordance with article 21, paragraph 4, the Global Mechanism is to function under the authority and guidance of the COP. Therefore, COP has the authority to add to the functions of the Global Mechanism pursuant to article 21, paragraph 5. In this regard, please also refer to our comments in paragraph 3 above.

(IV) The capacity of the Global Mechanism to enter into legally binding agreements

6. An international entity has legal personality if, in accordance with its constituent instrument, it is established as an international organization subject to international law. Under subparagraph (i) of article I of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations* (hereinafter the 1986 Vienna Convention),[1] the term "international organization" is defined as an "intergovernmental organization." The legal personality of an international entity/organization and the scope of that personality are determined by the constituent instrument creating the organization. Through its constituent instrument, an international entity/organization has implied powers to carry out its purposes and duties and, thus, may have the legal capacity to enter into treaties, contracts, acquire and dispose of property, be a party to judicial proceedings. The International Court of Justice (ICJ) in the 1949 advisory opinion *Reparation for Injuries Suffered in the Service of the United Nations* reaffirmed that international entities/organizations would not be able to carry out the intentions of their founders if such organizations were devoid of international personality.

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* A/CONF.129/15.

[1] While the 1986 Vienna Convention has not yet entered into force, its provisions are instructive on the position of international law on this question.

7. The 1986 Vienna Convention provides in article 6 that the capacity of an international organization to conclude treaties is governed by the rules of that organization. Under article 2 of the Convention the term "rules of the organization" means, in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization.

8. In the light of the foregoing, for an international entity to have the capacity to enter into legally binding agreements/arrangements, that entity should be established either as an international organization, with its own legal personality, or as a subsidiary body of an international organization or organizations. In the latter case a decision on the establishment of a subsidiary body should indicate that this body is entrusted by the parent organization or organizations with the legal capacity to enter into legally binding arrangements within its competence.

9. As noted in paragraph 4 above, the Global Mechanism and Secretariat are subsidiary bodies established by the Convention. Article 21 of the Convention which established the Global Mechanism (or any other provision in the Convention) does not entrust the Global Mechanism with the capacity to enter independently into legally binding agreements. The COP, which gives guidance and has overall authority over the Global Mechanism, has outlined the functions of the Global Mechanism in carrying out its mandate under article 21, paragraph 4, of the Convention in the annex of decision 24/COP.1 (the annex). The Global Mechanism was established "in order to increase the effectiveness and efficiency of existing financial mechanisms, [. . .] to promote actions leading to the mobilization and channeling of substantial financial resources" (preambular paragraph of the annex). Its functions mainly pertain to the identification, collection and dissemination of information; analyzing and advising on requests; the mobilization and channeling of financial resources; and promotion of action for cooperation and coordination. We note, however, that one activity under "mobilizing and chanelling financial resources" (section 4 of the annex) tasks the Global Mechanism to use "its own resources made available to it through trust fund(s) and/or equivalent arrangements established by [IFAD] for the Global Mechanism's functioning and activities, as defined in [the annex], from bilateral and multilateral sources through [IFAD] and from the budget of the Convention" (section 4 (f) of the annex).

10. Decision 10/COP.3 approved the memorandum of understanding between the COP and IFAD regarding the modalities and administrative operations of the Global Mechanism (the MOU). We note that the MOU has also been approved by the Executive Board of IFAD as well. The MOU provides that IFAD "[a]s the housing institution [. . .] will support the Global Mechanism in performing these functions in the framework of the mandate and policies of the [IFAD]" (section I) but shall have a separate identity within IFAD (section II (A)). Section II C of the MOU further provides that "[w]ith respect to the funds received by IFAD under (a), (b) and (c) [of section II of the MOU], all these amounts will be received, held and disbursed and the said accounts will be administered by [IFAD] in accordance with the rules and procedures of the [IFAD]." Section V provides that IFAD "will make appropriate arrangements to obtain supporting services from the United Nations country teams" and section VI on administrative infrastructure stipulates that the Global Mechanism "shall enjoy full access to all of the administrative infrastructure [. . .], including [. . .] personnel, financial, communications and information management services."

11. Having reviewed the MOU and the COP decisions, we are of the view that the Global Mechanism has not been entrusted with the legal personality to enter into legally binding agreements. Moreover, pursuant to the MOU, it is IFAD, as the housing institution, which has been tasked to provide services to the Global Mechanism in order to carry out its mandated activities including managing its budget, contracting on its behalf, administering its personnel, for example employment contracts etc. Accordingly, the relevant administrative and financial rules and regulations of IFAD apply to the Global Mechanism.

12. We understand that the Managing Director of the Global Mechanism (hereinafter the Managing Director), who in accordance with section II D of the MOU is nominated by the Administrator of UNDP and appointed by the President of IFAD, has certain delegated authority by the President on administrative issues. Accordingly, in our view, the Managing Director would be able to enter into a legally binding agreement if this is within the authority delegated by the President of IFAD to the Managing Director in accordance with IFAD's rules and regulations.

13. In response to your question as to whether the Global Mechanism, and in particular its Managing Director and staff at a lower level, have a legal basis to enter into memoranda of understandings and *aide-mémoires* with Governments and other partners, we note that memoranda of understandings and *aide-mémoires* are not necessarily legally binding documents. We recall that there are a number of terms commonly used in practice for instruments which fall within the definition of a "treaty" in the 1969 Vienna Convention on the Law of Treaties. The crucial question in determining whether an instrument is a treaty is whether the parties intend it to be governed by, and be legally binding under, international law, or whether the parties intend it not to be legally binding of its own force and only of political and moral weight (and therefore an arrangement of less than treaty status). An instrument which is legally binding of its own force, whatever its designation, is a treaty. Aspects of form and drafting should reflect the intended status of the document. Accordingly, the ability of the Managing Director and other representatives of the Global Mechanism to enter into such agreement depends on the delegated authority given by IFAD as well as the intent of the parties to the memoranda of understandings and *aide-mémoires*. In this regard, we would note our observations at paragraph 11 above.

16 September 2009

7. Personnel questions

(*a*) Interoffice memorandum to the Legal Adviser of the Office of the High Commissioner for Human Rights (OHCHR) concerning membership in the Human Rights Committee

Election of a United Nations staff member to the Human Rights Committee—The International Covenant on Civil and Political Rights (ICCPR) does not bar United Nations staff members from election to the Committee—Duties of staff members under staff regulation 1.2 (c), (d), (e), (f) and (o)—Role of the Committee includes publicly taking positions on whether States have complied with their human rights obligations under the ICCPR—Engaging in such activities would be inconsistent with staff member's status as an international civil servant

1. This is in reference to your memorandum dated 10 December 2008 seeking advice as to whether a Senior Legal Adviser in the Office of the Prosecutor at the International Criminal Tribunal for Rwanda (ICTR) may serve as an expert on the Human Rights Committee (the Committee) established under the 1966 International Covenant on Civil and Political Rights (ICCPR).

2. You state that the United Nations staff member in question, [Name] (Morocco) was elected on 4 September 2008 at the twenty-seventh meeting of the States' Parties to the ICCPR. The relevant provisions of the ICCPR on this question read as follows:

Provisions of the ICCPR

Article 28

1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.

2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.

3. The members of the Committee shall be elected and shall serve in their personal capacity.

Article 29, paragraph 1

The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in Article 28 and nominated for the purpose by the States Parties to the present Covenant.

Article 30, paragraph 3:

The Secretary-General of the United Nations shall prepare a list in alphabetical order of all the persons thus nominated, with an indication of the States Parties which have nominated them, and shall submit it to the States Parties to the present Covenant no later than one month before the date of each election.

Article 38

Every member of the Committee shall, before taking up his duties, make a solemn declaration in open committee that he will perform his functions impartially and objectively.

Article 40:

1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights:

(a) Within one year of the entry into force of the present Covenant for the States

Parties concerned;

(b) Thereafter whenever the Committee so requests.

2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.

3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.

4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.

5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

Analysis

3. From the documents you have provided it appears that, in accordance with the above provisions of the ICCPR, the Secretary-General, in a note verbale dated 14 February 2008 invited the States Parties to submit their nominations for the election of nine members of the Committee. [Name] was subsequently nominated by the Government of Morocco and the Secretary-General by his note of 10 July 2008 (CCPR/SP/7I) officially circulated the names and *curricula vitae* of candidates nominated by the States Parties of the ICCPR. This included the name and *curriculum vitae* of [Name] which expressly mentioned that he currently worked as "Senior Legal Adviser in the Office of the Prosecutor, International Criminal Tribunal for Rwanda (1997 to date, more than 10 years)."

4. On 4 September 2008, [Name] was elected as a member of the Committee at the twenty-seventh meeting of States Parties to the ICCPR for a term of four years beginning on 1 January 2009. Now that [Name] has been elected, you ask whether he can serve on the Committee and also retain his position as a United Nations official at the ICTR.

5. In this particular case, States Parties to the ICCPR elected [Name] to the Committee fully aware of his status as a full time United Nations staff member. Indeed, the ICCPR does not expressly bar United Nations staff members from standing for election to the Committee.

6. However, for the United Nations the question is whether [Name]'s position as a member of the Committee would be compatible and consistent with his status and obligations as a staff member under the United Nations Staff Regulations and Rules and other administrative issuances. Our views on this question are as follows.

7. Under staff regulation 1.2 (c), "[s]taff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations." Moreover, staff regulation 1.2 (e) provides that staff members "pledge themselves to discharge their functions and regulate their conduct with the interests of the Organization only in view." Pursuant to staff regulation 1.2 (f), staff members "shall conduct themselves at all times in a manner befitting their status as international civil servants and shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations. They shall avoid any action and, in particular, any kind of public pronouncement that may adversely reflect on their status, or on the integrity, independence and impartiality that are required by that status." Finally, staff regulation 1.2 (o) provides that "[s]taff members shall not engage in any outside occupation or employment, whether remunerated or not, without the approval of the Secretary-General."

8. One of the main functions of the Committee, pursuant to article 40 of the Covenant, is to review reports submitted by the States parties on measures they have adopted to give effect to the rights recognized in the Covenant and, "on progress made in the enjoyment of those rights." Meetings are pursuant to rule 33 of the Rules of Procedure of the Committee (the Rules), held in public, unless the Committee decides otherwise. Pursuant to rule 36, the summary records of public meetings of the Committee, which includes the views expressed by members of the Committee, are documents of general distribution unless the Committee decides otherwise.

9. In addition, pursuant to article 40, paragraph 4, of the ICCPR, the Committee studies the reports submitted by the States parties to the present Covenant and transmits its own reports, and such general comments as it may consider appropriate, to the States parties. The Committee may also transmit to the Economic and Social Council (ECOSOC) these comments along with the copies of the reports it has received from States Parties to the Covenant. Pursuant to rule 64 of the Rules, all reports, formal decisions and all other official documents of the Committee and its subsidiary bodies are documents of general distribution unless the Committee decides otherwise. Furthermore, pursuant to article 45 of the ICCPR the Committee submits to the United Nations General Assembly, through ECOSOC, an annual report on its activities.

10. In the case of [Name], he would, as someone who has been nominated and elected by States parties, be participating in the activities of a Committee which publicly takes positions on whether States have complied with their human rights obligations under the ICCPR. In doing so, he would be playing a key role in an inter-State process under the ICCPR, while at the same time serving as a United Nations staff member under the authority of the Secretary-General. In our view engaging in such activities would be inconsistent with [Name]'s status as an international civil servant under the Staff Regulations and Rules and in particular, staff regulation 1.2 (f).

11. Furthermore, the participation by a United Nations staff member in the decision-making of the Committee could create the perception that the Secretary-General is involved through one of his staff members in the Committee's decision-making. However, under the ICCPR the Secretary-General plays no role in the substantive decision-making of the members of the Committee. Indeed, the Secretary-General would not wish to create the perception that he is in any way involved or seeking to influence the decisions of members of the Committee who under article 38 of the ICCPR perform their functions, "impartially and conscientiously."

12. I would also like to point out that the Office of Legal Affairs has advised on a similar, but not identical situation in the past (see memorandum of 26 January 1979, attached).* That advice provided that election of a staff member to the International Law Commission was incompatible with the staff regulations and rules.

13. While it appears that the Secretary-General was aware that [Name] was, and continues to be, a staff member of the Secretariat prior to his nomination and subsequent election to the Committee, [Name] should have specifically informed the Organization that his candidature had been put forward by the Government of Morocco for the Committee and sought prior approval from the Secretary-General in accordance with estab-

* Not reproduced herein.

lished procedures. Indeed, at that time, the Secretary-General would have reminded the staff member of his status as an international civil servant and all that it entails. Most likely, his participation in the Committee would not have been authorized.

14. Given the fact that [Name]'s participation in the Committee is incompatible with his status as a staff member the simplest solution therefore, would be for [Name] to resign from the Committee.

15. Should [Name] decide to resign, which would have to be done in accordance with article 33, paragraph 2, of the ICCPR; then an election would have to be held for a vacant seat pursuant to the provisions of article 34 of the Covenant.

16. Alternatively, [Name] may also resign from service with the United Nations and then continue to serve on the Committee.

13 February 2009

(*b*) Interoffice memorandum to the Acting Chief, Policy Support Unit, Human Resources Policy Service, regarding a request for an exception to section 3 of the General Conditions of Contracts for the Services of Consultants or Individual Contractors

Intellectual property financed by the Organization and developed by a contractor becomes property of the Organization—Policy ensures that Organization retains title and control over the intellectual property—Same provisions apply to United Nations vendors—United Nations has recognized rights of contractors to pre-existing intellectual property

. . .

3. Section 3 of the General Conditions of Contracts for the Services of Consultants or Individual Contractors is based on the long-standing policy and practice of the Organization to treat intellectual property that it finances and is developed by a contractor, as a "work made for hire," within the meaning of applicable copyright law, i.e., the Organization, and not the consultant, becomes the owner of the intellectual property. The rationale is to ensure that the Organization retains title to and thus control over the intellectual property provided by the contractor in order to be able to use it, in the best interest of the Organization, without the need to later obtain the contractor's consent. Thus, while the United Nations has recognized the rights of contractors to *pre-existing* intellectual property, it has not done so with respect to works made for hire, including specially ordered or commissioned works. According to our understanding, [Name]'s work, to be financed by the Department of Public Information (DPI), would fall within the latter category. We note that section 3 of the General Conditions is also reflected in the United Nations General Conditions of Contracts, which is attached to and becomes an integral part of a United Nations contract with a commercial vendor. In view of the foregoing, this Office cannot grant an exception to section 3 of the General Conditions.

23 April 2009

(*c*) Interoffice memorandum to the Officer-in-Charge, Accounts Division, Office of Programme Planning, Budget and Accounts, regarding payments of proceeds under the Malicious Acts Insurance Policy pursuant to Administrative Tribunal Judgment No. 1388

INTERPRETATION OF JUDGMENT NO. 1388 BY THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL (UNAT)—COMPENSATION AWARDED AS A RESULT OF ORGANIZATION'S FAILURE TO COMPLY WITH DUTY OF CARE IN HANDLING INSURANCE CLAIM—NO LEGAL BASIS TO OFFSET COMPENSATION SUBSEQUENTLY RECEIVED FROM INSURER—ST/SGB/2004/11 DOES NOT PROVIDE FOR DEDUCTION OF AMOUNTS FROM INSURANCE PROCEEDS BY THE ORGANIZATION

1. This is in response to your memorandum, dated 9 June 2009, in which you request the advice of the Office of Legal Affairs (OLA) as to whether the compensation awarded by the United Nations Administrative Tribunal (UNAT) to [Name 1] in Judgment No. 1388* may be offset against the proceeds of the Malicious Acts Insurance Policy (MAIP) received in respect of the death of her husband. . . .

A. Background

2. The background to this matter is as follows. On 18 August 2000, [Name 2], a UNDP staff member, was found hanged in his hotel room while on official mission to the Democratic Republic of the Congo. The MAIP claim submitted by the Office of the United Nations Security Coordinator (UNSECOORD) (now Department of Safety and Security (DSS)) in respect of [Name 2]'s death was rejected by the insurers.[1]

3. In Judgement No. 1388, dated 25 July 2008, UNAT awarded [Name 1] compensation in the sum of USD 250,000. We understand that this amount has already been paid by UNDP to [Name 2]'s widow.

4. In early 2009, following a review of the facts of the case and the UNAT Judgement, the Insurance and Disbursement Service, Office of Programme Planning, Budget and Accounts (OPPBA), requested the MAIP insurers to reopen the claim in light of the UNAT findings. As a result of this action and subsequent related discussions, the MAIP insurers reclassified the claim as payable in the sum of USD 500,000. This amount has recently been transferred by the insurers to the Organization.

B. Analysis

5. By memorandum, dated 22 October 2008, the Legal Counsel provided an analysis of UNAT Judgement No. 1388 to the Under-Secretary-General for Management. A copy of that analysis is attached hereto.* In relation to the MAIP claim submitted in respect of [Name 2]'s death, the Tribunal found, *inter alia,* that:

5.1 The Organization, as the administrator of MAIP claims, owed a duty of good faith to staff members who are Insured Persons under the MAIP and their beneficiaries. This

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* For a summary of Judgment No. 1388, see the 2008 edition of this publication, chapter V A.

[1] At the time the claim was submitted, the MAIP was administrated by UNSECOORD. Responsibility for administering the MAIP was transferred to the Insurance and Disbursement Service/OPPBA with effect from 2004.

* Not reproduced herein.

duty entailed two obligations, "first, to conduct—or verify that local law enforcement had conducted—an adequate investigation of the death, and, second, to pursue the Applicant's claim as beneficiary under the MAIP fairly, effectively and efficiently in her best interests." (See Judgement, paragraph VII.)

5.2 Due to the absence of a proper investigation by the local authorities and deficiencies in the investigations conducted by UNSECOORD and MONUC, the "definite and unqualified conclusion" of the UNSECOORD investigation that the staff member's death was due to suicide was unwarranted and that the "strength of the conclusion of suicide must have had a significant influence on the underwriters." (*Ibid*, paragraphs VIII—IX.)

5.3 As for the Organization's obligation to vigorously pursue the Applicant's claim, the Tribunal considered that the UNSECOORD cover letter submitting the claim gave too much weight to the theory that the staff member committed suicide and highlighted the weaknesses of the claim. The Organization had, therefore, "seriously failed to present a fair and impartial description of the circumstances leading to the claim" (*ibid*, paragraph X). In addition, the Organization's procedural failure to carry out an internal review of a MAIP claim, or to consult the Applicant, prior to the submission of the claim to the underwriter, constituted a "failure of due process in the Organization's handling of the Applicant's claim." (*Ibid*, paragraphs XI.)

5.4 The Tribunal also criticized the Organization's lack of transparency in dealing with the Applicant, noting, *inter alia*, the unconscionable delays in its response and its refusal to provide her with the text of the MAIP and the documentation sent to the insurer. (*Ibid*, paragraph XII.)

6. The Tribunal concluded that "the MAIP claim was seriously mishandled by the Organization in breach of the duty of good faith, and that there was also a serious failure of due process." Accordingly, the Applicant was entitled to compensation. In assessing the amount of compensation, the Tribunal:

> [took] account of the fact that, even if the claim had been properly handled and due process had not been denied, the underwriters may still have rejected the claim on the ground that it was not due to one of the events specified in the policy (such as the act of a foreign enemy). On the other hand, had the claim been properly handled, it is not unlikely the insurer would have felt obliged to negotiate a settlement of the claim in order to avoid litigation. In this regard, it is to be noted that the insurer expressed willingness to receive further information but the Organization made no efforts whatsoever to follow up on this, despite repeated requests by the Applicant.
>
> In light of these circumstances, the Tribunal assesses the compensation due to the Applicant at USD 250,000. Although this exceeds the equivalent of two years' net base salary . . . it is justified in light of the reckless and callous treatment of the Applicant by the Organization." (*Ibid*, paragraph XIII.)

7. We note from your memorandum that, when resubmitting the claim to the MAIP insurers, OPPBA anticipated that any insurance proceeds received would be used to reimburse UNDP for the payment made to [Name 1] pursuant to the UNAT Judgement. Based on our analysis of the UNAT Judgement, however, we are of the view that the damages awarded by the Tribunal were to compensate the Applicant for the loss she had suffered as a result of the Organization's failure to comply with its duty of care in the handling of the MAIP claim in respect of her deceased husband. Accordingly, we see no legal basis

for offsetting the compensation awarded by the Tribunal against the insurance proceeds subsequently received from the MAIP insurers. We further note that Secretary-General's bulletin* ST/SGB/2004/11 provides that MAIP proceeds in respect of deceased staff members shall be paid to their surviving dependent(s). ST/SGB/2004/11 does not provide for the deduction of amounts from such insurance proceeds by the Organization and such a course of action could lead to further legal action by [Name 1].

24 June 2009

(*d*) Letter to the Prosecutor of the Special Tribunal for Lebanon concerning a proposal to establish a United Nations Service Medal

LONGSTANDING PRACTICE OF THE UNITED NATIONS NOT TO AWARD MEDALS TO STAFF MEMBERS

. . .

On behalf of the Secretary-General, I would like to thank you for your letter, dated 27 February 2009, in which you propose the establishment of a United Nations Service Medal for award to staff members who have served a minimum qualifying period with the United Nations International Independent Investigation Commission (UNIIIC), as well as to members of the Special Task Force established by the Government of Lebanon to provide support to UNIIIC.

The Secretary-General has requested me to convey his appreciation to you and to the staff of UNIIIC for their valuable service in the performance of the UNIIIC mandate. In particular, the Secretary-General is aware of the difficult environment in which UNIIIC had to operate and deeply appreciates the hard work and personal sacrifices that went into meeting those challenges.

As you will understand, however, as a matter of longstanding practice, the Organization does not award medals to United Nations staff members as their service throughout the world, often in difficult and challenging environments, is itself a testament to their achievements. The award of medals to military personnel under the command of their national governments is a matter for the national authorities concerned.

21 July 2009

(*e*) Interoffice memorandum to the Secretary of the Advisory Board of Compensation Claims regarding a claim for compensation under Appendix D of the Staff Rules

INSURANCE COVERAGE FOR CONSULTANTS ENGAGED UNDER A SPECIAL SERVICE AGREEMENT (SSA)—UNDER SSA CONDITIONS OF SERVICE COVERAGE UNDER APPENDIX D OF STAFF RULES APPLIES ONLY WHEN TRAVEL IS UNDERTAKEN ON MISSION—TRAVEL TO AND FROM WORK IS NOT CONSIDERED TRAVEL ON MISSION—SSA INTENDED FOR CONSULTANT ENGAGED FOR A DEFINED PERIOD TO PROVIDE SERVICES OF SPECIFIC NATURE THAT REQUIRE EXPERT SKILLS NOT OTHERWISE AVAILABLE WITHIN THE ORGANIZATION—SSA HOLDERS ARE NOT STAFF MEMBERS NOR DO THEY ACQUIRE RIGHTS EQUIVALENT OF THOSE OF STAFF MEMBERS

* For information on Secretary-General's bulletins, see note under section 1 of chapter V A, above.

1. This is with reference to your memorandum, dated 27 March 2009, requesting the advice of the Office of Legal Affairs (OLA) as to whether a former United Nations Development Programme (UNDP) consultant who was shot while returning home from work in Haiti is entitled to Appendix D coverage.

[. . .]

Background

3. Based on the documents provided, we understand that the background to this matter is as follows. On 27 February 2004, a UNDP consultant, [Name], was returning home from work in Port au Prince, Haiti, when he was attacked by armed men. Despite being shot in the arm, [Name] managed to flee the scene and drove to the Canapé Vert Hospital where he was admitted for treatment. Unfortunately, the Canapé Vert Hospital was attacked by armed militia that same evening and [Name] was unable to receive the medical treatment required for his injury. He subsequently received the necessary treatment in the United States.

4. [Name], with the assistance of the UNDP administration in Haiti, subsequently submitted a claim in respect of his injuries under Appendix D of the Staff Rules. His claim was considered by the Advisory Board on Compensation Claims (ABCC) at its 442nd and 443rd meeting held on 14 November 2008 and 30 January 2009, respectively. The ABCC noted that, at the time of his injury, [Name] was engaged by UNDP pursuant to a Special Service Agreement (SSA). In accordance with paragraph 6 (b) of the conditions of service attached to the SSA, Appendix D coverage "shall not apply if the consultant is not required by UNDP to undertake travel on mission under this contract." The ABCC further noted the statement provided by the UNDP Operations Manager in Haiti that "[Name] was returning home from work on 27 February 2004 via the most direct route and his normal route when he was gun fired. [He] was not traveling on official mission . . ."

5. We understand that while a majority of the members of the ABCC were of the opinion that the terms of [Name]'s SSA excluded coverage under Appendix D except for travel on official mission, one member was of the opinion that individuals engaged on SSAs are in effect staff members and should receive the same entitlements as staff members. In view of this difference of opinion, and the precedent that this case will set, the ABCC requested the OLA's advice as to whether commuting home after work could be considered as giving rise to an entitlement to Appendix D coverage within the terms of [Name]'s SSA.

Analysis

6. We note from the description of services on the first page of [Name]'s SSA that no travel details were included as part of his work assignment. We also note that it is not in dispute that [Name] was commuting from work to his usual place of residence at the time the attack occurred.

7. Paragraph 6 of the conditions of service attached to [Name]'s SSA provides, *inter alia*, that:

a. In the event of death, injury or illness attributable to the performance of services on behalf of UNDP under the terms of this contract, the consultant shall be entitled to com-

pensation equivalent to the compensation which would be payable under Appendix D to the Staff Rules of the United Nations to a staff member of the United Nations of similar rank, but not higher than the rank of Director, such compensation to be determined by UNDP on the basis of those Staff Rules.

b. *The provisions of the preceding subsection shall not apply if the consultant is not required by UNDP to undertake travel on mission under this contract.* (Emphasis added.)

c. . . . .

d. No compensation shall be payable under this paragraph unless the required medical certificate of good health is received by UNDP prior to the consultant's departure on assignment.

8. Paragraph 2 of the conditions of service further provide as follows:

The rights and obligations of the consultant are strictly limited to terms and conditions of this contract. Accordingly, the consultant shall not be entitled to any benefit, payment, subsidy, compensation or entitlement, except as expressly provided in this contract.

9. In our view, given the above-mentioned conditions in [Name]'s SSA contract, his travel to and from work would not be considered as travel on mission such as to give rise to an entitlement to Appendix D coverage.

10. With regard to the view of one member of the ABCC that individuals engaged on SSAs should receive the same entitlements as staff members, we would note that SSA holders are consultants who are engaged for a defined period to provide services of a specific nature that require expert skills not otherwise available within the Organization. Consultants hired under these arrangements are not staff members, nor do they acquire rights equivalent to staff members.

Conclusion

11. [Name] was not a staff member of the Organization at the time he was injured. Accordingly, under the terms of his SSA, he is not entitled to coverage under Appendix D of the Staff Rules in the circumstances of this present case.

12. Notwithstanding the above, we understand from our discussions with the Strategic Planning and Advisory Service of the Bureau of Management of UNDP that UNDP maintains a commercial insurance policy to provide certain coverage *in lieu* of Appendix D to consultants and individual contactors engaged under SSAs. Whilst we are not aware of the details of such commercial insurance coverage, or when the policy was taken out, we recommend that [Name] be advised to contact the Strategic Planning and Advisory Service of UNDP for consideration as to whether he would be entitled to coverage under the insurance policy held by UNDP for this purpose.

9 December 2009

8. Miscellaneous

(*a*) Proposed use of the name of United Nations Office for Partnerships (UNOPS) by two non-UN non-profit organizations that are providing *pro bono* legal and policy advisory services to certain governments under a UNOPS project for UNDP

Policy of the Organization, pursuant to General Assembly resolution 92 (I), to prohibit use of the name and emblem of the United Nations for commercial purposes—The fact that an entity is non-profit and provides services on a *pro bono* basis does not constitute basis to grant authorization to use name and emblem in furtherance of its activities

1. This is in reference to a memorandum, dated 20 November 2008, requesting the assistance of the Office of Legal Affairs in obtaining the necessary authorization, pursuant to General Assembly resolution 92 (I) of 7 December 1946, for the International Senior Lawyers Project (ISLP) and the Revenue Watch Institute (RWI) to use the UNOPS name, in the manner set forth on page 2 of the memorandum. This also refers to the telephone consultations that took place between representatives of our respective Offices in December 2008 and January 2009.

2. We understand that ISLP[1] and RWI[2] are providing *pro bono* legal and policy advisory services to several African governments under contract with UNOPS, in relation to a UNOPS implemented project, on behalf of UNDP. UNOPS has indicated that the project is aimed at strengthening the capacity of African States to negotiate, manage and regulate large-scale investment contracts, particularly in, but not limited to, the natural resources sector. The project will take the form of a regional facility based in the UNDP Regional Service Centre in Dakar that can support requests from African countries for support in targeted areas.

3. ISLP has requested that the UNOPS-ISLP contract include the following provision:

> 5. *Advertising*. Except where expressly otherwise agreed to in writing or required by law, the Organization shall not advertise or otherwise make public the fact that it has entered into an Agreement with UNOPS or use the name, emblem or official seal of UNOPS or the United Nations or any abbreviation of the name of UNOPS or the United Nations for advertising purposes or any other purposes. *UNOPS hereby agrees that the Organization may disclose to its donors, civil society and government agencies this Agreement and the fact that UNOPS has provided financial support for particular projects, including the amount and nature of such support*. (Emphasis added.)

4. Similarly, RWI has requested that the UNOPS-RWI contract include the following provision:

> 5. *Advertising*. Except where expressly otherwise agreed in writing or required by law, the Organization shall not advertise or otherwise make public for purposes of com-

[1] A "501 (c) (3)" organization, for the purpose of taxation, under the Internal Revenue Code of the United States of America.

[2] A New York based non-profit policy institute and grant-making organization that promotes the responsible management of oil, gas and mineral resources for the public good.

> mercial advantage or goodwill that it has entered into an Agreement with UNOPS or use the name, emblem or official seal of the United Nations, UNDP or UNOPS, or any abbreviation of the name of the United Nations, UNDP or UNOPS. *UNOPS hereby agrees that the Organization may disclose to its donors, civil society, parliamentary bodies and government agencies this Agreement*. (Emphasis added.)

5. The provisions set forth under paragraphs 3 and 4 above, with the exception of the emphasized wording, appear to be modified versions of article 12 of the United Nations General Conditions of Contract for the provision of Services (version, Jan. 2008) (the UNGCCs). We understand that UNOPS uses either the UNGCCs or a version that is based on the UNGCCs, as part of its contracts with third parties. The last sentences of paragraphs 3 and 4 above, contemplate that both ISLP and RWI would be granted permission by UNOPS to disclose certain facts about their respective agreements with UNOPS to their donors, civil society and government agencies. Such disclosure seems to contemplate that the two entities would be allowed to use the name of the United Nations, UNDP or UNOPS, or any abbreviation of those names, and possibly the emblem or official seal of the United Nations, UNDP or UNOPS (collectively and severally referred to as the "Name and Emblem"), in furtherance of their respective activities, e.g., fund-raising. In view of the foregoing, UNOPS has requested OLA's assistance to obtain the necessary authorization for ISLP and RWI to use the Name and Emblem.

6. Pursuant to General Assembly resolution 92 (I), it is the long-standing policy of the Organization to prohibit the use of the United Nations name and emblem for commercial purposes, which is reflected in the original wording of article 12 of the UNGCCs. The aim of article 12 is to prevent public solicitation for business on the basis of a connection with the United Nations. In this respect, the fact that the ISLP and RWI are non-profit entities and, as we understand it, providing the services under contract with UNOPS on a *pro bono* basis, would not constitute a basis to grant authorization to use the Name and Emblem in furtherance of their respective activities, including fund-raising. In view of the foregoing and the intended purposes for the ISLP's and RWI's respective uses of the Name and Emblem (as set forth under paragraphs 3 and 4 above), an authorization to use the Name and Emblem cannot be granted to either entity.

7. Finally, we note that the proposed contractual provisions set forth under paragraphs 3 and 4 above, define the respective vendors as the "Organization." In light of the fact that the United Nations is also often referred to as the "Organization," we suggest that a defined term, other than the "Organization," be utilised in future UNOPS contracts when referring to a vendor.

3 February 2009

(*b*) Interoffice memorandum to the Director, Mine Action Service, Department of Peacekeeping Operations, regarding a United Kingdom Department for International Development open mine action competition

Provision of any services to a Member State, person or entity must be within the mandate of the Organization and within the programme of work as approved by the General Assembly—Long-standing policy and practice of the United Nations system organizations not to engage in competitive bidding in connection with provision of services to Member States—Question of competitive bidding should

BE BROUGHT BEFORE THE GENERAL ASSEMBLY TO ENSURE THAT IT IS APPROPRIATELY WITHIN MANDATE—CONTRACT WOULD HAVE TO BE ACCEPTABLE TO THE UNITED NATIONS AS AN INTERNATIONAL ORGANIZATION POSSESSING PRIVILEGES AND IMMUNITIES

1. This is in reference to your memorandum, dated 15 July 2009, seeking the advice of the Office of Legal Affairs (OLA) regarding two questions relating to a proposed open competition process for mine action activities (the "Competitive Process"). Your memorandum explained that the Competitive Process would be conducted by the Government of the United Kingdom of Great Britain and Northern Ireland, acting through the Department of International Development (DFID). Thus, you asked:

(*i*) Whether the United Nations Mine Action Service (UNMAS), as part of the United Nations Secretariat, would be allowed to participate as a potential service provider in a competitive tender for solicitation of mine action related services initiated by a Member State; and

(*ii*) In the event that UNMAS would be eligible to participate in such a competitive tender, whether the DFID contractual documents for the acquisition of mine action related services from UNMAS would be in accordance with the applicable United Nations regulations and rules.

2. Your memorandum also attaches five documents that relate to the Competitive Process, as well as an existing memorandum of understanding between UNMAS and DFID in relation to a grant towards the UNMAS programme 2007/2010. Those documents are as follows:

(*i*) DFID General Conditions of Contract (the DFID General Conditions);

(*ii*) DFID Form of Contract for Consultancy Services (the DFID Contract);

(*iii*) DFID Schedule of Prices;

(*iv*) DFID Invitation to Tender Instructions;

(*v*) DFID's "Commercial Strategy: Procurement Can Make it Happen: A DFID Commercial Strategy," dated 10 December 2008; and

(*vi*) A signed Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the United Nations regarding a Contribution to United Nations Mine Action Service (UNMAS) Programme 2007/2010 (the MOU).

3. We set forth, below, our advice in relation to each of your questions, in turn.

(i) Whether UNMAS, as part of the United Nations Secretariat, would be allowed to participate in a competitive tender with a Member State

4. As an initial matter, your questions raise the issue of whether and how the Organization should provide services to Governments of Member States or to other persons or entities. Clearly, as a threshold matter, the provision of any services to a Member State or to any other person or entity by the Organization must be within the mandate of the Organization, as established by the General Assembly or other principal or subsidiary organs of the United Nations in accordance with the Charter of the United Nations. Additionally, the provision of any such services and the utilization of the Organization's resources in connection therewith must be within the programme of work approved by the General Assembly. This Office does not have sufficient information about the services that DFID

is soliciting through the competitive process to determine whether or not it would be within all applicable mandates for UNMAS to provide such services. In any event, such a determination is more appropriate for DPKO to make, perhaps in consultation with the Controller's Office.

5. The question of whether United Nations system organizations can participate as bidders in procurement exercises conducted by Governments of Member States has previously been considered by OLA in connection with the assistance provided by such United Nations System organizations to Governments of Member States for the execution of projects funded from World Bank loans or International Development Association (IDA) credits. In a note prepared by the General Legal Division/OLA to the Legal Counsel, dated 1 March 1999[1] (the GLD Note), in connection with the preparation of a note from the Legal Counsel to the Legal Advisers of the United Nations System, GLD stated, *inter alia* that:

> 7. While the long-standing and consistent practice of the United Nations system organizations has been not to engage in competitive bidding, we are not aware of any express prohibition to their doing so. Under the circumstances, the question of whether or not they should be allowed to participate in competitive bidding seems essentially to be a policy matter.
>
> 8. In any event, we believe that there are important considerations that should be taken into account in making a decision on the matter. These considerations relate to:
>
> (a) the fundamental differences between United Nations organizations and private companies, and between their respective activities;
>
> (b) the implications for the interests of the United Nations organizations in allowing them to compete with private companies.
>
> In concluding, the note provides, in relevant part, that:
>
> 21. While it appears that the traditional policies and practices of United Nations system organizations has been not to engage in competitive bidding for the provision of assistance or services to Governments, we are not aware of any express prohibition to their doing so. While difficult to evaluate, it also appears that engaging in competitive bidding by United Nations system organizations may entail a risk of challenges to their immunity or adverse reactions from Member States.

6. In a related note to the Legal Advisers of the United Nations System, dated 5 March 1999, the Legal Counsel summarized the conclusions that were reached at their 1999 Meeting in Rome on 4 and 5 March 1999. The Legal Counsel stated, in relevant part, that, "[I]t must be recognized that, while there are significant legal aspects to the matter, whether or not the organizations will engage in competitive bidding is fundamentally a policy matter. As far as the Legal Advisers were aware, participation in competitive bidding was never contemplated by the General Assembly or the Economic and Social Council of the United Nations."

7. In light of the foregoing, we consider that it is essentially a policy matter as to whether to participate in a competitive tender with a Member State or, more specifically, whether to participate in the Competitive Process to be conducted by DFID. In reach-

[1] Although the note is dated 1 March 1989, the note references dates that occurred after 1989. Therefore, we consider that the reference to "1989" was a typographical error, and that it probably meant "1999," instead.

ing such decision, consideration should be given to the provisions of Secretary-General's bulletin* ST/SGB/2000/9, entitled "Functions and organization of the Department of Peacekeeping Operations," section 8, which sets forth the six core functions of the Mine Action Service (see attachment).* In any event, should it be considered desirable to depart from the long standing policy and practice of the United Nations system organizations not to engage in competitive bidding in connection with the provision of services to Member States, in view of the importance and sensitivity of this issue, this question should be brought to the attention of the General Assembly in an appropriate format (e.g., a separate report, or a strategic plan for the Department of Peacekeeping Operations (DPKO), etc.) to ensure that this is appropriately within the mandate of DPKO and the Mine Action Service.

8. Although this Office has not been asked to comment on the United Nations Development Programme (UNDP) or United Nations Children's Fund (UNICEF) proposed participation in the Competitive Process, the GLD Note, in its paragraph 15, does reference those two entities, as follows:

> 15. UNDP and UNICEF indicated that it is not their policy to participate in competitive bidding, and that this would in their view not be appropriate. In their view, participation in competitive bidding would not be consistent with the established framework for their cooperation with Governments, which reflects the concept of a partnership between them and such Governments for the realization of the Governments" development objectives, based on the respective mandates set by their governing bodies, the agreements concluded with such Governments to establish the basic conditions of their cooperation (*i.e.*, the Basic Cooperation in the case of UNICEF and the Basic Assistance Agreement in the case of UNDP), and the instruments agreed with such Governments for the coordination and integration of their cooperation (the Masterplan of Operations in the case of UNICEF, and the Country Cooperation Framework in the case of UNDP.)

(ii) In the event that UNMAS would be eligible to participate in a competitive tender with a Member State, whether DFID's contractual documents would be in accordance with the applicable United Nations regulations and rules

9. We note that neither the DFID Contract nor the DFID General Conditions would be appropriate for the United Nations to sign. The two documents contemplate that the successful bidder is a commercial entity, rather than an intergovernmental organization, such as the United Nations, possessing certain privileges and immunities.[2] Furthermore, we note that both the DFID Invitation to Tender and the DFID Schedule of Prices would contemplate payment to UNMAS after the services have been provided, either in a lump sum on completion of the services or at relevant points throughout the contract period. In this regard, the United Nations typically receives funds *prior to* undertaking activities.

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* For information on Secretary-General's bulletins, see note under section 1 of chapter V A, above.

* Not reproduced herein.

[2] For example, many of the provisions contained within the DFID General Conditions are contrary to the UN's privileges and immunities (see section 9 (Access and Audit), providing DFID with the right of unrestricted access to the UN's records; see section 8 (Official Secrets Act), which purports to make the successful bidder and the successful bidder's personnel subject to the Official Secrets Act 1911–1989; see Section 30 (Law) which specifies that the Contract shall be governed by the laws of England and Wales; and Section 31 (Amicable Settlement), which provides for arbitration procedures that are not in accordance with the UN's requirements on this subject matter.

10. Accordingly, should UNMAS decide to participate in the DFID Competitive Process, UNMAS would first need to obtain DFID's agreement that, should UNMAS be successful, the parties would sign a memorandum of understanding in a form acceptable to the United Nations rather than sign the DFID Contract. If UNMAS is considering participating in the competitive process in collaboration with UNDP and UNICEF, the text of any resulting memorandum of understanding would need to be agreed by all four parties (DFID, UNMAS, UNDP and UNICEF), *prior to* the United Nations submitting a tender. This Office would be prepared, as appropriate, to review the forms of such agreements.

29 July 2009

(*c*) Note to the Special Representative of the Secretary-General for Children and Armed Conflict concerning criteria for listing and de-listing parties in the Annexes of the Secretary-General's report on children and armed conflict

CRITERIA FOR LISTING AND DE-LISTING PARTIES TO CONFLICTS IN THE ANNEXES TO THE SECRETARY-GENERAL'S REPORTS ON CHILDREN AND ARMED CONFLICT—ISOLATED INCIDENTS OF RAPE, ACTS OF SEXUAL VIOLENCE, OR KILLING AND MAIMING, WHEN NOT PART OF A PATTERN OF VIOLATIONS ARE NOT SUFFICIENT TO LIST A PARTY IN THE ANNEXES—INCLUSION OF "OTHER SITUATIONS OF CONCERN" IN MANDATE OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY GENERAL IMPLIES A BROADER CONTEXT THAN THAT OF ARMED CONFLICT

1. This is in reference to your memorandum to the Legal Counsel, to which a Guidelines Note on "Listing and de-listing criteria for killing and maiming of children and acts of rape and other sexual violence against children in armed conflict" (the Note) was attached for our comments. The Note was prepared at the request of the Security Council Working Group on Children and Armed Conflict to provide clarity on the criteria selected for the listing and de-listing of parties in the annexes to the Secretary-General's reports on children and armed conflict. Reference is also made to Security Council resolution 1882 (2009) adopted on 4 August 2009, in which, for the first time since the introduction of the two annexes by the Special Representative of the Secretary-General (SRSG) for children and armed conflict, the Council explicitly recognized the extension of the scope of annex II beyond situations of armed conflict to "other situations of concern." In reviewing the Note we have, therefore, considered also the implications of resolution 1882 (2009).

A. The threshold for inclusion in the Annexes

2. In its first introductory paragraph, the Note indicates that "isolated incidents of rape . . . as prohibited by international law . . . [is] not sufficient to list a particular party." This paragraph calls for two comments. *Firstly*, isolated incidents of rape, acts of sexual violence, or killing and maiming, as such and when they are not part of a pattern of violations are not considered international crimes, but rather crimes under the national law of the State of their commission. The reference to "as prohibited by international law" should, therefore, be deleted. *Secondly*, while the Note establishes a threshold for non-inclusion in the list, namely, "isolated cases," it does not establish a threshold for inclusion. Paragraph 2 (a) on "listing and de-listing criteria" refers to crimes constituting "grave breaches," and thus implicitly establishes too high a threshold, in that the crimes, within the definition of the Geneva Conventions and the Statute of the International Criminal Court (ICC), must

be committed in situations of armed conflict *only* and not in other situations of concern. We suggest instead the use of the words "*pattern* of killing and maiming of children and/or rape and other sexual violence against children," which is language taken from operative paragraph 3 of Security Council resolution 1882 (2009).

3. The penultimate sentence of paragraph 1 of the Note would thus read: "Parties will be listed on the basis of information provided which establishes a pattern of violations. Isolated incidents of rape or other acts of sexual violence or of killing and maiming of children would not be sufficient to list a party in either of the annexes."

4. In the second paragraph on page 1 of the Note (and throughout the text), we recommend that you replace the words "grave violations" with "serious violations."

5. In the third paragraph of the same page, second line from the top, you may wish to replace the words "as the Secretary-General deems the situation to be of concern," with the words "as long as the Secretary-General remains concerned that serious violations may re-occur."

6. In paragraph 2 (a) (i), first bullet, add the words "pattern of" before "rape, sexual slavery," and delete the words "also constituting a grave breach of the Geneva Conventions."

B. "Situations of concern"

7. Security Council resolution 1882 (2009), for the first time, recognized that annex II of the Secretary-General's reports lists parties in a context broader than that of an armed conflict, whether international or non-international in nature, and in paragraph 19 (a) thereof, refers explicitly to "other situations of concern." You will recall that for a number of years this terminology has been used by the SRSG for children and armed conflict and included in the title of annex II without a clear mandate of the Security Council, nor, for that matter, its endorsement; a situation which gave rise to legal, political and practical difficulties for the Secretary-General, the SRSG and the Secretariat as a whole.

8. With the recognition of a broader scope of annex II, we suggest the following re-formulation of paragraph 2 (a) (i), second bullet:

> *Context of the violation*—The sexual violence was committed in the context of, or associated with an armed conflict, international or non-international in nature, or in other situations of concern not necessarily amounting to an armed conflict.

9. In paragraph 2 (b) (i), second bullet, add the words "or in other situations of concern not necessarily amounting to an armed conflict," after the words "in nature."

10. In paragraph 2 (a) (i) and (ii), and in paragraph 2 (b) (i) and (ii), respectively, add the words "or to other situations of concern," after the words "any party" or "a party to the conflict."

11. In view of the foregoing we suggest that the footnote at the end of the note be deleted. The text of the footnote, as revised, should be inserted as paragraph 2 of the introduction to the note to read as follows:

> In listing parties on Annex II in situations of armed conflict not on the agenda of the Security Council, the Secretary-General has been guided by the criteria for determining the existence of an armed conflict found in international humanitarian law and international jurisprudence. The Secretary-General has adopted a pragmatic approach to this

issue, with a humanitarian emphasis focusing on ensuring broad and effective protection for children exposed and affected by conflict or other situations of concern. Paragraph 19 (a) of Security Council resolution 1882 (2009) has now broadened the scope of Annex II to include, in addition to situations of armed conflict, whether or not on the agenda of the Security Council, also "other situations of concern," which may not necessarily amount to an "armed conflict." Reference to a ''situation of concern" is not a legal determination and reference to a non-State party does not affect its legal status.

12. Given the importance of this resolution and its implications for the preparation of future Secretary-General's reports on children and armed conflict, we suggest that an explanatory note be sent to the Secretary-General, through his Chef de Cabinet, informing him of this development. We would be ready to prepare one for the consideration and signature of both the SRSG for children and armed conflict and the Legal Counsel.

19 August 2009

(*d*) Interoffice memorandum to the Director of the Codification Division, Office of Legal Affairs, concerning the International Association of Law Libraries award to the Audiovisual Library of International Law

Award by a non-profit-organization to a website created by the Codification Division—Award given to the website and not a staff member—Staff Regulations and Rules and administrative issuances promulgated thereunder are not applicable—No legal impediment to the acceptance of the award—Taking into account the non-profit-status of the organization granting the award, the award can be displayed in a discreet manner on website

1. I refer to your memorandum of 21 October 2009, seeking my advice concerning the above-referenced matter. You have indicated that the International Association of Law Libraries (IALL) has selected the United Nations Audiovisual Library of International Law (AVL), created by the Codification Division, Office of Legal Affairs (COD/OLA), for its 2009 Website Award. It is indicated in the e-mail message of 20 October 2009 from IALL that the purpose of the IALL Website Award is "to recognize and promote free legal information website that are authoritative, comprehensive, up-to-date, useful, and user-friendly," and the 2009 award was announced during the IALL annual conference on 13 October 2009 in Istanbul. You have indicated that the award consists of a certificate, a copy of which was attached to your memorandum, and an award logo for display on the AVL website. You have also indicated that the previous recipients of this prestigious award include the website of the Peace Palace Library and the Electronic Information System for International Law (EISIL) website of the American Society of International Law. From the website of IALL, I understand that IALL is a not-for-profit organization incorporated under the laws of Washington D.C., USA.

2. As you have indicated, the award is given to the AVL website, and not to any staff member of COD/OLA. Therefore, the United Nations Staff Regulations and Rules and administrative issuances promulgated thereunder concerning the acceptance by staff members of honours, gifts or remuneration from outside sources are not applicable to the present case, and there appears to be no legal impediment to the acceptance of the IALL award by COD/OLA.

3. With respect to the proposed display of the award logo on the AVL website, based on the clarifications provided by COD/OLA, I understand that COD/OLA would like to display the award certificate, which contains the award logo, on the AVL website. Taking into account the status of IALL as a not-for-profit organization, the proposal does not seem objectionable, provided that the certificate is displayed in a discreet manner. In addition, since the IALL's e-mail message of 20 October 2009 states that the award logo, and not the certificate, could be displayed on the AVL website, I suggest that you verify with IALL that the certificate, too, could be displayed.

4 November 2009

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

United Nations Industrial Development Organization

(*a*) Interoffice memorandum regarding the appointment of United Nations Industrial Development Organization (UNIDO) Officer-in-Charge in [State 1]

Appointment of officer-in-charge of mission pending appointment of UNIDO Representative—By analogy to diplomatic practice of States, officer-in-charge need not be cleared by receiving State—Receiving State should be informed of appointment by means of letter or note to foreign ministry

1. This is with reference to your email of [date] regarding the appointment of [Name], who is currently Head of UNIDO Operations in [State 2], as officer-in-charge of the UNIDO Office in [State 1]. The question is whether we should seek governmental clearance for his appointment or whether it would be sufficient to provide him with a formal letter of accreditation.

2. According to the diplomatic practice of States, it is not necessary to seek the consent of the receiving State for the appointment of a chargé d'affaires *ad interim*, who is left in charge until the appointment of a new head of mission (see *Satow's Guide to Diplomatic Practice*, 5th ed., 11.18). If the appointment of the chargé d'affaires takes place before the departure of the head of mission, the latter can simply write to the host authorities to inform them of the appointment. After the head of mission's departure, the appointment should be made by the ministry of foreign affairs of the sending state (see Satow, 21.5).

3. By analogy to international organizations, the appointment of an officer-in-charge of a field office need not be cleared by the receiving State. The appointment should, however, be announced by means of a letter or note. Where the appointment takes place after the departure of the former representative, the headquarters of the organization concerned should write to the local mission or foreign ministry of the receiving State.

4. It is my understanding that [Name] will serve as officer-in-charge in [State 1] pending the appointment of a UNIDO Representative. There is therefore no need to request formal governmental clearance for his appointment. I would suggest that you send a note verbale to the permanent mission in [City] informing them of his appointment and requesting that the information be conveyed to the foreign ministry. Alternatively, you could send a separate note to the foreign ministry as well.

(*b*) Interoffice memorandum regarding the format of the credentials of the Permanent Representative of [State]

No requirement that credentials of permanent representative to an international organization bear letterhead, seals, stamps or other official insignia—Provided that there is no doubt that credentials are signed by the foreign minister in person, no objection to accepting such credentials

1. I refer to your email of [date] concerning the format of the credentials of the new Permanent Representative of [State]. Attached to your emails were other emails from the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO), International Atomic Energy Agency (IAEA) and the United Nations stating their respective positions on the matter. You asked me to advise you if "UNIDO can accept the credentials submitted by the Permanent Representative of [State] on [Date] (without letter head but signed by the Minister of Foreign Affairs), or whether the matter should be revisited."

2. I wish to recall that rules 27, 28 and 29 of the Rules of Procedure of the General Conference of UNIDO regulate the credentials of representatives and other persons constituting the members' delegations. These rules are silent on the format of credentials. We should therefore decide the matter on the basis of UNIDO practice. If we have no practice on the matter, then I would agree with the approach of the IAEA [Office], which is set out in the email from [Name], dated [. . .]:

> As a matter of law, the only requirement is that "the credentials shall be issued either by the Head of State or Government or by the Minister for Foreign Affairs." International law does not explicitly impose any other requirements in this regard.
>
> As a matter of practice, it is rather customary for such instruments to contain letterheads, seals, stamps or other official insignia.
>
> On the rare occasion where it has received instruments without such insignia, it appears that the Agency has in the past accepted them as formal credentials provided that they are signed in the original by the *bona fide* Head of State or Government or Minister for Foreign Affairs. A fax or copy of such an instrument, with or without insignia, would in Agency practice be deemed a provisional credential.

3. According to the relevant files of the [UNIDO Office], a number of credentials from UNIDO member States do not contain letterheads, seals, stamps or other official insignia. Provided there is no doubt that the credentials of the Permanent Representative of [State] were signed by the foreign minister in person, I see no objection to accepting them as presented.

(*c*) Interoffice memorandum regarding representation to UNIDO of [organization]

Internal dispute of non-governmental accredited to UNIDO as to authority to represent organization—Decision granting formal recognition of representatives deferred until conclusive determination by courts has been reached or organization's affairs are otherwise brought to order

1. This is with reference to the correspondence received by this Office regarding the above subject. . . .

2. At issue is an internal dispute within the [organization], which has resulted in challenges and counter-challenges to the authority of [organization]'s representatives in [City 1], [Name B] and [Name C]. In view of conflicting information received on the matter, you have asked for legal advice on what course of action to take. In order to furnish this advice, it is necessary, first, to provide a concise summary of events as they relate to UNIDO. As will become apparent, the matter is still unresolved, suggesting that it would be premature for UNIDO to recognize [Name B] and [Name C] or to regularize its relations with [organization] at this stage.

Background

3. [Organization] is a non-governmental organization registered under the laws of [State] with headquarters at [City 2]. The association was granted consultative status with UNIDO in [Year] and maintains a representative office in [City 1]. A dispute arose within [Organization] in [Year], apparently triggered by charges of malfeasance against the former Secretary General of the association. Two competing parties emerged, both claiming to be the lawful representatives of [organization], both convening meetings of its governing bodies, both having recourse to the courts, and both requesting UNIDO to take action that serves their respective interests.

4. The dispute came to UNIDO's attention last year when we received a letter dated [. . .] from one [Name D], who purported to be the Secretary General of [organization] and who informed UNIDO that [organization] had discontinued its association with [Name B] and [Name C]. Acting on what appeared to be a legitimate notification, [UNIDO Office] advised [Name B] and [Name C] that their accreditation to the forthcoming session of the Industrial Development Board had been cancelled.

5. On [Date], the ousted [Organization] representatives informed UNIDO that the high court in [City 2] had issued an order against [Name D] in [Date] which restrained him from implementing any decisions concerning the affairs of [organization]. They also advised that the former Secretary General of [organization], [Name E], had resigned from his functions and had been arrested on charges of fraud, and that the authorized office bearer of the association was its Executive Director, [Name F], who would submit proof that [Name D]'s letter of [date] was an "illegal act."

6. On [Date], [UNIDO Office] wrote to [Name B] to withdraw UNIDO's participation in the meeting of the governing bodies of [organization] convened in [City 1] later that month. [Name B] was further advised that UNIDO was not in a position to take any final decision on the basis of the information provided and that matters would remain frozen until further notice.

7. On [Date], UNIDO received a letter from the Executive Director of [Organization], [Name F], claiming that [Name D] had been appointed by an "illegal Governing Body" of [Organization], and requesting UNIDO to restore [Name B] and [Name C] to their functions as [Organization] representatives to UNIDO. [Name F]'s letter was accompanied by certain documents relating to the case, including high court papers (a notice of contempt of court proceedings against [Name D]) and a legal opinion from a firm of advocates in City 2].

8. On [Date], one [Name G], who also claimed to be the Executive Director of [Organization] (and who is listed as such on the association's website), sent a letter to

the Director-General, claiming that there were ongoing civil and criminal proceedings against [Name F] in connection with the misappropriation and embezzlement of funds. He claimed further that [Name B] and [Name C] were "acting in connivance" with [Name F] in convening an "illegal meeting" of [Organization] in [City 1] in [Date], which he urged UNIDO not to attend.

9. On [date], [Name B] again wrote to [UNIDO Office] requesting that he and [Name C] be restored to their positions as duly authorized representatives of [Organization] to UNIDO.

Questions

10. The main questions under consideration are:

- whether UNIDO should accept [Name B] and [Name C] as [Organization] representatives to UNIDO, and
- whether UNIDO should again participate in meetings convened by [Organization].

Assessment and advice

11. It would appear that the dispute for control of [organization] has not been definitively resolved. The last court document brought to our attention is the notice, dated [. . .], of contempt of court proceedings against [Name D], the putative Secretary General of [Organization]. The outcome of those proceedings, which were set down for [Date], is unknown, as is the outcome of other possible cases related to the dispute. As a result, UNIDO does not have all the information necessary to take a decision on the position of [Name B] and [Name C], or on the UNIDO's participation in [Organization] meetings, the legitimacy of which may still be challenged.

12. In view of the above, I would recommend deferring a decision to grant formal recognition to [Name B] and [Name C] until there has been a conclusive determination by the courts or until [Organization] has otherwise brought its affairs in order. In the meantime, this Office would gladly provide advice on the content of any letter you may wish to send to [Name B] and [Name C]. In particular, it would be useful to request them to provide an update on the status of litigation relating to [Organization] and to furnish us with copies of all orders and judgments issued by the [State]'s courts in this regard.

(*d*) Note verbale of the United Nations on behalf of Vienna-based International Organizations regarding a decision by the [State 1] authorities to reduce Permanent Mission of [State 2]'s right to sell its official vehicles and those of its staff

Privileges and immunities of permanent missions to international organizations—Privileges and immunities are to be accorded all permanent missions unconditionally and on an equal basis

The Secretariat of the United Nations (Vienna) presents its compliments to the [Ministry], and has the honour to refer to a communication from the Permanent Mission of [State

2] to the United Nations and other International Organizations in Vienna, concerning the decision by the [State] authorities to reduce the Mission's right to sell its official vehicles and those of its staff. The [State] authorities have increased the minimum period after which the Permanent Mission is permitted to sell the vehicles from two to five years.

In this connection, the Secretariat, also on behalf of the Vienna-based International Organizations, wishes to provide the comments below.

The Secretariat has been informed that the [Ministry] has based its position on sections 31 and 50 of the Agreement between [State] and the United Nations regarding the Seat of the United Nations in [City], signed on [Date] (the Seat Agreement).

The Secretariat is of the view—as stated on previous occasions- that neither of the above provisions cited by the [Ministry] provide legal justification to curtail the privileges and immunities of permanent missions by invoking the principle of bilateral reciprocity. Permanent missions are accredited to international organizations (section 31) and fall within the context of multilateral diplomacy. This interpretation is clearly supported by the terms of article 50 of the Seat Agreement, which expressly excludes reciprocity as follows:

> This Agreement shall apply whether or not the Government maintains diplomatic relations with the State or Organization concerned and irrespective of whether the State concerned grants the same privileges or immunities to diplomatic envoys or nationals of the [State].

This article is included in the "General Provisions" (article XV) which apply to the Seat Agreement as a whole. Its rationale is to prevent any selective treatment of the permanent missions by the host country, depending on the existing bilateral relations they might have, thus, permitting the international organization to function effectively and undisturbed in its operations by national requirements of reciprocity.

Similarly, it is the Secretariat's view that the reference to section 31 of the Seat Agreement does not provide any legal ground for limiting a permanent mission's privileges and immunities. The purpose of the provision reading: "Permanent missions accredited to the United Nations in [City] shall enjoy the same privileges and immunities as are accorded to diplomatic missions in [State 1]" is to ensure that the privileges and immunities accorded to permanent missions are not selectively different from those enjoyed by all other Diplomatic Missions. Granting such privileges and immunities to a particular permanent mission does not mean that it should be subject to the reciprocity existing in the bilateral relations with [State 1]. Privileges and immunities are to be accorded to the permanent missions unconditionally and on equal basis.

In the light of the above, the Secretariat, also on behalf of the Vienna-based international organizations, is not in a position to accept the [Ministry]'s application of reciprocity with regard to the permanent mission of the [State 2] to the United Nations and other international organizations in Vienna. Therefore, it would be appreciated if the [State 1] authorities were to take steps to discontinue the practice of curtailing the permanent mission's privileges and immunities by applying the principle of reciprocity, and to reinstate the privileges and immunities.