Extract from:

UNITED NATIONS JURIDICAL YEARBOOK

2006

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

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

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Chapter VI

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

A. Legal opinions of the Secretariat of the United Nations

(Issued or prepared by the Office of Legal Affairs)

1. Privileges and immunities

(*a*) Note on the legal status of the United Nations in the United States of America

Privileges and immunities of the United Nations in the United States of America—Convention on the privileges and immunities of the United Nations, 1946[*]—Articles 104 and 105 of the Charter of the United Nations—Necessity of privileges and immunities for the exercise by the organization of its functions and the fulfilment of its purposes—Legal capacities arising from the legal personality of the United Nations—Privileges and immunities of United Nations officials, headquarters, property, assets and archives—United Nations' duty to cooperate with federal authorities for the administration of justice

7 February 2006

1. The United Nations is an intergovernmental organization established pursuant to the Charter of the United Nations in 1945. Its legal status in the host country is governed by the relevant provisions of the Charter of the United Nations, the 1946 Convention on the Privileges and Immunities of the United Nations, the 1947 Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations[**] and the 1961 Vienna Convention on Diplomatic Relations.[***] Without prejudice to the above treaties, the federal, state and local laws and regulations of the United States are applicable within the Headquarters district.

2. The main focus of this Note is on the privileges and immunities of the United Nations to the extent of their relevancy to the relationship between the Organization and the host country.

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

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

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

Principle of functional necessity of United Nations privileges and immunities

3. The Charter of the United Nations does not specify the exact scope and extent of the legal capacities and privileges and immunities of the Organization. In this regard, it only sets out the major principles that are premised on a functional necessity approach. Thus, according to Articles 104 and 105 of the Charter, the Organization enjoys in the territory of each of its Members such legal capacity, and such privileges and immunities as may be necessary for the exercise of its functions and for the fulfilment of its purposes. These principles have been developed in the Convention on the Privileges and Immunities of the United Nations adopted by the General Assembly in 1946 (hereinafter "the General Convention"). They have also been reflected in the 1947 Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations (hereinafter "the Headquarters Agreement").

Legal capacities and immunity from legal process

4. As an entity, the United Nations possesses juridical personality and has the capacity (a) to enter into legally binding agreements and contracts, (b) to acquire and dispose of movable and immovable property, and (c) to institute legal proceedings (Section 1). Furthermore, the General Convention established that the United Nations, its property and assets, wherever located and by whomsoever held, enjoy immunity from every form of legal process. This immunity, however, can be waived by the Secretary-General in any particular case if it is in the interest of the Organization. The General Convention then established that no waiver of immunity can be extended to any measure of execution (Section 2).

Inviolability of the Headquarters district

5. Under Section 3 the General Convention and Section 9 (a) of the Headquarters Agreement the premises and the Headquarters district of the United Nations are inviolable. Federal, state or local officers or officials of the United States, whether administrative, judicial, military or police, can enter the Headquarters district to perform any official duties only with the express consent of and under conditions agreed to by the Secretary-General. The service of legal process, including the seizure of private property, may also take place only with the consent of the Secretary-General.

Applicability of United States law in the Headquarters district

6. Section 7 of the Headquarters Agreement specifies that the Headquarters district is under the control and authority of the United Nations. However, as noted in paragraph 1 above, except as otherwise provided in the Headquarters Agreement and the General Convention, the federal, state and local law applies in the Headquarters district.

Immunity from search and confiscation of United Nations property and assets

7. The property and assets of the Organization, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action (Section 3 of the General Convention).

Inviolability of archives and documents

8. The General Convention also established that the archives of the Organization and in general all its documents are also inviolable, wherever located. This provision should be understood to mean that without the express consent of the Secretary-General, documents belonging to the Organization or held by it, cannot be taken or somehow expropriated by any outside authority (Section 4).

The independence of United Nations officials as a fundamental principle

9. The independence of United Nations Officials is enshrined in the Charter of the United Nations. Pursuant to Article 100 (1) of the Charter, the Secretary-General and the staff of the United Nations, in the performance of their official duties, "shall not seek or receive instructions from any Government or from any other authority external to the Organization". They have, furthermore, "to refrain from any action which might reflect on their position as international officials responsible only to the Organization." Corresponding obligations for Member States are defined in paragraph 2 of this Article. Namely, each Member of the United Nations also undertakes to respect the exclusively international character of the functions and responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities and functions.

Functional privileges and immunities of United Nations officials

10. In order to assure to United Nations Officials an independent status, Article 105, paragraph 2, of the Charter provides that they shall enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization. These privileges and immunities are detailed in the General Convention. In particular, 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. In accordance with the established jurisprudence, it is the Secretary-General's prerogative to establish what constitutes "official capacity."

11. Furthermore, Officials of the Organization are exempt from taxation on their salaries and emoluments. They are also immune from national service obligations and from immigration restrictions and alien registration. They have the right to import free of duty their furniture and effects at the time of first taking up their post in the host country.

12. It should be noted that when becoming Parties to the General Convention, several Member States made certain reservations. For example, the United States made reservations to Section 18 (b) and (c) providing for immunity from taxation and national service obligations, respectively.

Diplomatic status of the Secretary-General, Deputy Secretary-General, Under-Secretaries-General (USGs) and Assistant-Secretaries-General (ASGs)

13. In addition to the functional immunities enjoyed by the staff at large, the Secretary-General, Deputy Secretary-General, USGs and ASGs are accorded in respect of themselves, their spouses and minor children, the diplomatic privileges and immunities, exemptions and facilities. The latter are codified in the 1961 Vienna Convention on Diplomatic Relations. In particular, they are entitled to enjoy immunity from criminal, civil

and administrative jurisdiction of the host country, although that immunity is subject to a number of exceptions. They cannot be obliged to give evidence as a witness and shall not be subject to any form of arrest and detention. With several exceptions, they are also exempt from all dues and taxes whether personal or real, national, regional, or municipal.

Waiver of immunity of United Nations officials

14. Under the General Convention, privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. Accordingly, the Secretary-General has the right and the duty to waive the immunity of any official in any case when the immunity impedes the course of justice. This right and duty is qualified by the provision stipulating that immunity can be waived when it is without prejudice to the interests of the Organization.

Waiver of Immunity of the Secretary-General

15. The right to waive immunity of the Secretary-General is vested in the Security Council.

Duty to cooperate

16. The Organization has the duty to cooperate at all times with the appropriate authorities to facilitate the administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the privileges immunities and facilities accorded to its officials (Section 21 of the General Convention).

Appropriate American authorities: Ultimate responsibility of the Federal Government

17. For the purposes of the Headquarters Agreement, the expression "appropriate American authorities" is defined as "such federal, state, or local authorities in the United States as may be appropriate in the context and in accordance with the laws and customs of the United States, including the laws and customs of the state and local government involved" (Section 1 (b)). However, the Headquarters Agreement unequivocally established that the Government of the United States has the ultimate responsibility for the fulfilment of the obligations under the Agreement by the appropriate American authorities.

Communications and contacts with the host country authorities

18. In 1996, following the request from the United States Mission to the United Nations, the Under-Secretary-General for Administration and Management issued an Information Circular[*] ST/IC/1996/60 setting out the Organization's policy with respect to communications and contacts with the host country authorities. This Administrative Instruction reads as follows:

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

1. With a view to ensuring the best possible coordination, between the Government of the United States of America and the United Nations, the United States Mission to the United Nations has recently informed the Organization that communications and contacts with United States government agencies should normally be channelled through the United States Mission to the United Nations.

2. The United States Mission has advised that this policy is not intended to apply to matters of a routine nature. Officials of the Organization should call the Minister-Counsellor for Host Country Affairs [Name and telephone] to confirm that the contact is of such a routine nature that it and similar contacts may be made directly.

(*b*) Letter to the Department of Environmental Conservation (DEC) of the State of New York relating to the issue of payment by the United Nations of fees under the State Pollutant Discharge Elimination System (SPDES)

Privileges and immunities of the United Nations—Convention on the privileges and immunities of the United Nations, 1946*—United Nations exempted from direct taxes—Not exempted from charges for public utility services—Such services should be specifically identified, described and itemized—United Nations entitled to the most favourable rate when being charged for public utility services

19 May 2006

I write in response to your letter of 21 February 2006 addressed to [Name], Under-Secretary-General for Management, concerning the long-standing issue of payment by the United Nations of fees under the "State Pollutant Discharge Elimination System" (SPDES).

You note that such fees relate to the United Nations' use of water from the East River for cooling purposes, which results in water being heated, and then discharged into the East River, and that the discharge of the heated water constitutes a pollutant under New York Law, in respect of which regulatory fees are assessed. You state that as of the date of your letter, the amount in back regulatory fees owed by the United Nations is $[number], irrespective of penalties or interest.

The legal position of the United Nations with respect to the payment of such fees is governed by the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations of 4 August 1947** ("the Headquarters Agreement"), Public Law 80–357, 4 August 1947, and the Convention on the Privileges and Immunities of the United Nations ("the Convention") (United Nations, *Treaty Series,* vol. 1 p. 15). The United States became a party to the Convention on 29 April 1970 (21 *U.S.T.* 1418, [1970] *T.I.A.S.* No. 6900).

Under Article VII, Section 17 (a) of the Headquarters Agreement, the United Nations is to be "supplied *on equitable terms* with the necessary public services, including electricity, water, gas, post, telephone, telegraph transportation, drainage, collection of refuse, fire protection, snow removal, et cetera . . ." (emphasis added). Accordingly, the charge for the services in question must be levied at the most favourable rate.

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

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

Pursuant to Article II, Section 7 (a) of the Convention "the United Nations, its assets, income and other property shall be exempt from all direct taxes; it is understood, however, that the United Nations will not claim exemption from taxes which are, in fact, no more than charges for public utility services". Accordingly, while the United Nations is exempt from direct taxes under the Convention, the Organization will not claim exemption with respect to "taxes" which are in fact no more than charges for public utility services.

With respect to what constitute "charges for public utility services", it has been the long-standing practice of the United Nations to interpret the term "public utility services" as having a restricted connotation applying to particular supplies or services rendered by a Government, or a corporation under Government regulation, for which charges are made at a fixed rate according to the amount of supplies furnished or services rendered.

This interpretation has been accepted by Member States and is set forth in the Study prepared by the Secretariat on the "Practice of the United Nations, the Specialized Agencies and the International Atomic Energy Agency concerning their Status, Privileges and Immunities" (*Yearbook of the International Law Commission,* 1967, Vol. II, at page 248; and *Yearbook of the International Law Commission,* 1985, Vol. II at page 165; as attached).[*] The Study explains that "as a matter of principle and as a matter of obvious practical necessity, charges for actual services rendered must relate *to services which can be specifically identified, described and itemized*" (emphasis added). We further attach a more recent opinion from the 1992 *United Nations Juridical Yearbook,* at pp 474–475, which again sets forth this interpretation.[*]

We note that [Name 1], the former Director of the General Legal Division, wrote to [Name 2], Deputy Commissioner and General Counsel of the DEC in August 2004 concerning (i) the liability of the United Nations to pay the SPDES fees; and (ii) the classification of the Organization as the basis for the amount of the SPDES fees assessed. With respect to the question concerning the liability of the United Nations to pay the fees, we note that [Name 1]'s assessment was based on an unpublished decision of the United States Federal Court (*New York State Department of Environmental Conservation* v *United States Department of Energy,* Nos. 89-CV-197, 89 CV-196, 1997 W.L. 797523, N.D.N.Y., Dec 24, 1997) regarding the liability of the United States Government to pay such fees, in which the court made a specific finding that the SPDES fees were not taxes, but constituted charges for public services provided by the State of New York relating to the management of the state's water resources.

As the United Nations is constituted by 191 Member States, each of which may have its own national approach as to what constitutes a "charge for services" as opposed to a "tax", it is essential that the same test is applied across the board with respect to what constitutes "charges for public utility services" so as to ensure the consistent application of the Convention. As such, it is not feasible, nor permissible, for the United Nations to rely on the determinations of national courts.

Accordingly, the United Nations invites the DEC to demonstrate how the fees imposed on it in respect of its discharge of heated water into the East River are calculated. In order to make payment for such services, the Organization must be presented with invoices which specifically identify, describe and itemize the services that have actually been ren-

[*] Not reproduced therein.

dered to it. If it can be shown that a "service" is provided, and that the charges for this "service" are calculated at a fixed rate, according to the amount of services rendered, which amount must, in turn, be calculated in accordance with some predetermined unit, the Organization will not consider itself exempt from payment of such charges. In addition, the charges must be levied at the most favourable rate, which entails parity of treatment with United States Government facilities. Absent such a showing, which has not yet been made, the Organization must continue to treat such fees as being in the nature of a tax in accordance with Article II, Section 7 (a) of the Convention.

(*c*) Interoffice memorandum to the Officer-in-Charge, United Nations Framework Convention on Climate Change (UNFCCC) Secretariat, regarding the privileges and immunities of individuals serving on constituted bodies established under the Kyoto Protocol to the UNFCCC

Scope of the Convention on the privileges and immunities of the United Nations, 1946[*]—Bodies established under UNFCCC[**] and the Kyoto Protocol[***] are not United Nations organs—Individuals serving on constituted bodies and on expert review teams under the Kyoto Protocol do not enjoy privileges and immunities under the 1946 Convention—Only individuals appointed by the Secretary-General or performing missions for the United Nations are entitled to the status of "experts on mission"—Other legal options for the granting of privileges and immunities to those individuals

30 June 2006

1. This is with reference to your memorandum dated 26 May 2006 addressed to the Secretary-General with respect to the request by the Subsidiary Body for Implementation, established under the UNFCCC, for further information from the United Nations Secretary-General on the scope of application of the Convention on the Privileges and Immunities of the United Nations ("the General Convention"), and in particular whether it could be applied to individuals serving on constituted bodies established under the Kyoto Protocol, and individuals serving on expert review teams under the Kyoto Protocol. You further inform us that the Parties have requested the views of the Secretary-General as to whether these individuals could enjoy privileges and immunities under the General Convention: "(a) by considering them 'Experts on missions for the United Nations', pursuant to Article VI of the General Convention; or (b) by other ways".

2. You also seek our advice as to whether the Conference of the Parties, the supreme body of the UNFCCC serving as the Meeting of the Parties to the Kyoto Protocol (COP/MOP), could invite the United Nations General Assembly to adopt a resolution that would recognize individuals serving on constituted bodies established under the Kyoto Protocol and individuals serving on expert review teams under the Kyoto Protocol as "Experts on missions for the United Nations" within the context of the General Convention, or a resolution that applies the General Convention to such individuals in some other way.

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

[**] United Nations, *Treaty Series,* vol. 1771, p. 107.

[***] United Nations, *Treaty Series,* vol. 2303, p. 148.

3. With respect to the question as to whether such individuals serving on expert bodies/review teams could be considered "Experts on missions for the United Nations" pursuant to Article VI of the Convention, we wish to advise that this would not be appropriate, as such individuals are neither appointed by the Secretary-General, nor "perform missions for the United Nations". The "Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Missions" (ST/SGB/2002/9)* provide guidance concerning the appointment of experts on missions. According to Regulation 1(b):

> " . . . experts on missions shall make the following written declaration witnessed by the Secretary-General or an authorized representative:
>
> 'I solemnly declare and promise to exercise in all loyalty, discretion and conscience the functions entrusted to me by the United Nations. To discharge these functions and regulate my conduct with the interests of the United Nations only in view, and not seek or accept instructions in regard to the performance of my duties from any Government or other source external to the Organization'".
>
> Regulation 2 (b) unequivocally provides:
>
> "[i]n the performance of their duties, . . . experts on mission shall neither seek nor accept instructions from any Government or from any other source external to the Organization" (emphasis added). Regulation 3 further provides that "experts on mission are accountable to the United Nations for the proper discharge of their functions".

4. As the bodies established under the UNFCCC and the Kyoto Protocol are not United Nations organs, experts and any other individuals serving on such bodies cannot be accorded the status of experts on missions for the United Nations under the General Convention.

5. In our view, the following four options could be considered by which such individuals serving on expert bodies/review teams could be provided with the necessary privileges and immunities in respect of their official functions.

6. First, the COP/MOP could amend the Kyoto Protocol and insert additional provisions which explicitly provide for immunity from legal process and other privileges and immunities, as appropriate, for individuals serving on constituted expert bodies and expert review teams under the Kyoto Protocol. The procedure and other relevant requirements to adopt amendments are set forth under Article 20 of the Kyoto Protocol.

7. Second, the Parties to the Kyoto Protocol could create a new multilateral instrument which would provide for the necessary privileges and immunities in respect of individuals serving on expert bodies/review teams. Such an instrument would need to be accepted, approved or ratified by the Parties to the Kyoto Protocol in order for the individuals to enjoy privileges and immunities in the national jurisdictions concerned.

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

8. Third, the Parties to the Kyoto Protocol could adopt a decision to apply *mutatis mutandis* the General Convention to the individuals in question. The implementation of this decision would require appropriate action at the national level as well.

9. Fourth, the Kyoto Protocol Secretariat could negotiate and enter into bilateral agreements with the Parties to the Kyoto Protocol to ensure that the latter accord the necessary privileges and immunities to the individuals concerned in the national jurisdictions of each Party. We note that individuals who serve on constituted bodies under the Kyoto Protocol enjoy privileges and immunities in Germany by virtue of the "Protocol amending the Agreement among the United Nations, the Government of the Federal Republic of Germany and the Secretariat of the United Nations Framework Convention on Climate Change concerning the Headquarters of the Kyoto Protocol Secretariat" (the Headquarters Agreement). As mentioned in our advice of 30 March 2006, in order for the Secretariat of the COP/MOP to possess the legal capacity to enter into agreements (with Parties other than Germany), there must be a decision of the COP/MOP to this effect.

10. With respect to the question whether the COP/MOP could request the General Assembly to extend the application of the General Convention to the individuals on the expert bodies/review teams, we consider that even if the General Assembly were to agree to this request, States Parties would need to amend the General Convention accordingly and make corresponding changes to their domestic implementing legislation in order to give effect to such a decision. As such, we do not consider this option to be realistic and viable.

11. Finally, please note that this Office will be available to provide any assistance needed in the preparation of draft instruments as referred to above.

(*d*) Note to the Assistant Secretary-General of the Department of Peacekeeping Operations on the question of searches of personal luggage of members of a United Nations Mission by customs officials of the Country of deployment of the Mission

Convention on the Privileges and Immunities of the United Nations, 1946*—Status of Forces Agreement—Scope of privileges and immunities granted to members of the Mission varies according to their status and grade—Distinction between custom searches and inspections for security purposes—Inspection of baggage by customs officials should not impede or delay travels of the members of the Mission—Absolute immunity for official documents and correspondence of the United Nations carried in personal baggages

14 November 2006

I refer to your Note dated 19 October 2006, forwarding a copy of [the Mission] Code Cable [Number] of 11 October 2006. It appears from that Code Cable and its attachments that officials of the customs service of the Government of [Country] stationed at [Cities 1 and 2] and airports have been conducting manual searches of the personal baggage of members of [the Mission] passing through those airports. [The Mission] has protested these searches as contrary to paragraph 38 (*sic*) of the Agreement between the United Nations and [Country] Concerning the Status of the [United Nations Mission], done at

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

New York on [date] (the SOFA). The Government has responded, maintaining that such searches are fully consistent with the SOFA. You seek our advice.

Our advice, in summary form, is as follows:

– The personal baggage of the Special Representative of the Secretary-General (SRSG), the Deputy SRSG, the Force Commander, the Police Commissioner and other high-ranking members of the staff of SRSG agreed upon with the Government is, in the normal course of events, exempt from inspection and search by the [Country] customs authorities. However, those authorities may conduct a search of that baggage if they have serious grounds for believing that the particular set of baggage in front of them in fact contains certain kinds of items, specifically items (i) that are neither for the official use of [the Mission] nor for the personal use of those high officials or their family members forming part of their households or (ii) items whose import or export is prohibited by the national laws of [Country] or controlled by its quarantine regulations.

– Similar considerations apply with respect to the personal baggage of military observers and civilian police of [the Mission].

– The personal baggage of United Nations officials serving in the civilian component of [the Mission] does not enjoy any immunity from inspection or search by [Country] customs.

– The personal baggage of military personnel of national contingents assigned to the military component of [the Mission] also does not enjoy any such immunity.

– Neither does the personal baggage of United Nations Volunteers serving with [the Mission].

– It would be inconsistent with the SOFA if inspections and searches of the personal baggage of members of [the Mission] were to be carried out in such a way as to substantially impede and substantially delay their entry into or departure from [Country].

– It would also be inconsistent with the SOFA if searches were conducted in a manner that specifically targeted members of [the Mission], such that they were subjected to delays and impediments which were not faced by other travellers using the two airports concerned.

– In searching the personal baggage of members of [the Mission], [Country] customs officers may not, under any circumstances, inspect, read, photograph, copy or retain official documents or correspondence of the United Nations that might be carried in that baggage.

– Moreover, in so far as they may properly conduct a search of the personal baggage of high-ranking members of [the Mission] or of its military observers or civilian police, [Country] customs officers may not inspect, read, photograph, copy or retain any documents or correspondence that might be contained in that baggage.

– It is not clear from the Code Cable of [the Mission] and its attachments whether the personal baggage of members of [the Mission] is also being searched for security purposes. If security searches are indeed in issue, we stand ready to provide further assistance and advice. However, we would first require certain additional information from [the Mission].

A detailed explanation of the above advice is contained in an Annex to this Note. [. . .]

Annex

(A) Immunities of personal baggage from search for customs purposes

In accordance with paragraph 39 of the SOFA (not paragraph 38, as stated in the letter of [the Mission] of 31 August 2005 attached to its Code Cable [Number] of 11 October 2006)

> "[L]e Représentant Spécial et les membres de [la Mission] sont dispensés des formalités d'inspection et de restrictions prévues par les services d'immigration à l'entrée et la sortie de la zone de la mission".

As is apparent from its terms, this provision concerns inspections carried out by the Government's immigration services, as well as immigration restrictions—not inspections that are carried out by the customs services of the Government of [Country] for the purposes of enforcing [Country]'s national customs laws and regulations. It is therefore not relevant for present purposes.

There is no other provision of the SOFA that, by its express terms, confers on any member of [the Mission] any exemption from inspection of his or her personal baggage by the [Country] customs services.

That having been said, a number of the provisions of the SOFA are relevant in this regard.

We will consider those provisions as they relate to each of the categories of [the Mission]'s members and officials.

(i) *The SRSG and other high-ranking officials*

Paragraph 29 of the SOFA provides:

> "[L]e Représentant spécial, le Représentant spécial adjoint, le commandant de la force de l'unité militaire, le Commissaire de police dirigeant l'unité de sécurité et ceux des collaborateurs de haut rang du Représentant spécial dont il peut être convenu avec le Gouvernement jouissent du statut spécifié dans les sections 19 et 27 de la Convention [sur les privilèges et immunités des Nations Unies], dans la mesure où les privilèges et immunités visés sont ceux que le droit international reconnait aux envoyés diplomatiques".

Section 19 of the Convention on the Privileges and Immunities of the United Nations (the 'General Convention') provides, *inter alia,* that the high officials of the United Nations who fall within its scope are to be accorded "the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law".

Those privileges, immunities, exemptions and facilities are codified in the Convention on Diplomatic Relations,[*] done at Vienna on 18 April 1961.

Article 36, paragraph 2, of the Vienna Convention provides as follows:

> "The personal baggage of a diplomatic agent shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State. Such inspection shall be conducted only in the presence of the diplomatic agent or of his authorized representative."

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

The items listed in paragraph 1 of Article 36 are ones for the official use of the diplomatic mission or for the personal use of the diplomatic agent or members of his or her family forming part of his or her household.

In the light of these provisions, it is clear that the personal baggage of the SRSG, the Deputy SRSG, the Force Commander and the Police Commissioner do not enjoy absolute and unconditional immunity from inspection and search by the customs services of [Country].

However, in accordance with the terms of Article 36, paragraph 2, of the Vienna Convention, the customs authorities of [Country] may properly and lawfully inspect and search the personal baggage of any of these high officials only if there are serious grounds for presuming that the personal baggage concerned contains either (i) items that are neither for the official use of [the Mission] nor for the personal use of those high officials or their family members forming part of their households or (ii) items whose import or export is prohibited by the national laws of [Country] or controlled by its quarantine regulations.

Moreover, the [Country] customs service must have serious grounds for suspecting that the particular personal baggage that they wish to inspect or search contains such an article. It will hardly be sufficient to found any such suspicion that certain members of [the Mission] have in the past been found to be carrying items whose importation was prohibited by [Country] law or which were not for their personal use or that of their families. Much less would it be consistent with this condition for the customs service to follow a general policy of inspecting and searching the personal baggage of all members of [the Mission].

Furthermore, it follows from the terms of paragraph 29 of the SOFA, as well as from those of Section 19 of the General Convention, that high officials of [the Mission] should be accorded the same treatment by the Government of [Country] as it accords to diplomatic envoys accredited to [Country]. It would be inconsistent with these provisions if the practices of inspection and search that were applied by the [Country] customs services to the personal baggage of [the Mission]'s high officials passing through [City 1] airport were more exacting or more intrusive than those followed with respect to the baggage of diplomatic envoys that are accredited to [Country] when they pass through [Country]'s airports, whether at [City 1] or elsewhere. Information on the treatment that is accorded to diplomatic envoys in [Country] may presumably be obtained from the Dean of the Diplomatic Corps in [Capital of the Country]

(ii) Officials of the United Nations assigned to [the Mission]'s civilian component

Paragraph 30 of the SOFA stipulates that:

> "Les fonctionnaires des Nations Unies qui sont affectés à l'unité civile mise au service de la [Mission] demeurent des fonctionnaires des Nations Unies jouissant des privilèges et immunités énoncés dans les articles V et VII de la Convention [sur les privilèges et immunités des Nations Unies]. "

Under-Secretaries-General and Assistant Secretaries-General aside, Articles V and VII of the General Convention do not confer on officials of the United Nations any immunities in respect of their personal baggage.

The personal baggage of United Nations officials serving with [the Mission]'s civilian component is therefore not immune from search by the [Country] customs authorities.

(iii) Military observers and civilian police

Paragraph 31 of the SOFA provides that:

> "Les observateurs militaires, les membres de l'unité de sécurité et les agents civils non fonctionnaires des Nations Unies dont les noms sont communiqués à cette fin au Gouvernement par le Représentant spécial sont considérés comme des experts en mission au sens de l'article VI et VII de la Convention [sur les privilèges et immunités des Nations Unies]."

Article VI, Section 22 (f), of the General Convention provides that experts performing missions for the United Nations shall be accorded "the same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys".

The observations set out above with respect to the personal baggage of high-ranking members of [the Mission] therefore apply equally with respect to the personal baggage of military observers and civilian police.

(iv) Military personnel of national contingents

Paragraph 32 of the [the Mission] SOFA provides that:

> "Le personnel militaire des contingents nationaux affecté à l'unité militaire de la [Mission] jouit des privilèges et immunités expressément prévus dans le présent Accord."

There is no provision in the [the Mission] SOFA that confers on military personnel of national contingents assigned to the military component of [the Mission] any immunity from inspection or search of their personal baggage.

The personal baggage of such military personnel is therefore not immune from search by the [Country] customs services.

(v) United Nations Volunteers

The SOFA does not contain any provisions regarding the status, privileges, immunities, facilities or exemptions of United Nations Volunteers serving with [the Mission]. Nor are there any other legal instruments of which we are aware that would confer any privileges or immunities on them.

The personal baggage of United Nations Volunteers serving with [the Mission] is therefore not immune from search by the [Country] customs services.

(B) General considerations related to searches of personal baggage

Subject to what is said above, the following provisions of the SOFA and of the General Convention may also be of relevance in the event that officials of the [Country] customs service conduct searches of the personal baggage of members of [the Mission].

(i) Failure to facilitate speedy entry and departure

Paragraph 38 of the SOFA provides, in part, that "[1]e Gouvernement s'engage à faciliter l'entrée dans la zone de la mission du Représentant spécial et des membres de la [Mission] ainsi que leur sortie". More importantly still, paragraph 35 of the SOFA provides in part that "[s]'il en est averti à l'avance et par écrit, le Gouvernement accorde des facilités

spéciales en vue de l'accomplissement rapide des formalités d'entrée et de sortie pour tous les membres de la [Mission], y compris l'unité militaire."

Further, pursuant to paragraphs 29, 30 and 31 of the SOFA, high-ranking officials of [the Mission], United Nations officials assigned to its civilian component and military observers and civilian police officers serving with the mission are all entitled to the privileges and facilities laid down in the applicable provisions of Article VII of the General Convention. In accordance with Sections 25, 26 and 27 of that Article, these members of [the Mission] shall be "granted facilities for speedy travel", while high-ranking members of [the Mission] are also to be "granted the same facilities as are accorded to diplomatic envoys".

It would clearly be inconsistent with these various provisions if inspections and searches of the personal baggage of the members of [the Mission] concerned were to be carried out in such a way as to substantially impede or substantially delay their entry into or departure from [Country].

It would likewise be inconsistent with these provisions if searches were to be conducted in a manner that specifically targeted members of [the Mission], such that they were subjected to delays and impediments not faced by other travellers using the two airports concerned.

(ii) Inviolability of documents and correspondence

Paragraph 3 of the SOFA provides that:

> "La [Mission], ses biens, fonds et avoirs ainsi que ses membres, y compris le Représentant spécial, jouissent des privilèges et immunités énoncés dans le présent Accord ainsi que de ceux prévus dans la Convention [sur les privilèges et immunités des Nations Unies], à laquelle le [Pays] est partie."

Article II, Section 4, of the General Convention stipulates that "all documents belonging to the United Nations or held by it, shall be inviolable wherever located".

[Country] customs officers may, in the course of searching the personal baggage of members of [the Mission], properly require that folders, binders, envelopes and document bags contained in that baggage be opened to verify their contents.

However, in view of these provisions, they may not, under any circumstances, inspect, read, photograph, copy or retain official documents or correspondence of the United Nations that might be contained in those folders, binders, envelopes or bags—or, for that matter, which may be carried loose in the personal baggage concerned or on the person of the member of [the Mission] whose baggage it is.

Further, as already noted, paragraph 31 of the SOFA provides that military observers and civilian police are to be considered experts on mission within the meaning of Articles V and VII of the General Convention. Section 22 (c) of Article V of the General Convention provides that experts on mission are to be accorded "inviolability for all papers and documents".

Again, as already noted, pursuant to paragraph 29 of the SOFA, the SRSG and other high-ranking members of [the Mission] are to be accorded the privileges and immunities, facilities and exemptions accorded to diplomatic envoys in accordance with international

law. Article 30, paragraph 2, of the Vienna Convention on Diplomatic Relations stipulates that the papers and correspondence of a diplomatic agent "shall enjoy [. . .] inviolability".

In so far as they may properly conduct a search of the personal baggage of high-ranking members of [the Mission] or of its military observers or civilian police, [Country] customs officers may therefore *not* inspect, read, photograph, copy or retain *any* documents or correspondence that might be contained in that baggage.

(C) Searches for security purposes

It is not clear from [the Mission]'s Code Cable and its attachments whether the personal baggage of members of [the Mission] is also being subject to security searches. In case it is, we would make the following brief observations.

Passengers boarding aircraft are nowadays routinely expected, as a condition of their carriage, to submit to the screening of their personal baggage. Such screening may involve the conduct of random searches by hand. These searches are usually carried out, not by customs officers, but by or on behalf of the air carrier or else by members of the Government's airport security services. The need for such precautions has been generally accepted by diplomats. In any event, an airline may refuse to carry anyone who refuses voluntarily to submit to such a search. The qualified immunity from inspection of their personal baggage that the SRSG and other high-ranking members of [the Mission] enjoy, as well as [the Mission]'s military observers and civilian police, does not in any way preclude an airline from following and implementing this policy.

If security searches are indeed in issue in the present case, we stand ready to provide further assistance and advice. However, we would need for this purpose much more detailed information from [the Mission], in particular regarding the precise point or points in the boarding process at which such searches are conducted, by whom they are conducted and on whose behalf, on the basis of what precise justification and what the consequences are of failure to comply. It would also be helpful to know the provisions of any relevant [Country] national laws or regulations on this matter.

(*e*) Interoffice memorandum to the Deputy of the Under-Secretary-General for Safety and Security on the search of United Nations laptop computers by Host Country customs

Convention on the privileges and immunities of the United Nations, 1946*—Immunity and inviolability of United Nations property and archives—Information stored on laptop viewed as archives—Security inspection of the laptop by border control officials is deemed compatible with immunity if no file is opened, copied or read

28 November 2006

1. This is in reference to your memorandum of 8 November 2006 requesting our advice as to what action should be taken by a United Nations staff member returning from an official mission should [Host Country] border officials try to take possession or examine

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

the contents of a laptop computer belonging to the United Nations, which contains United Nations documents. You also seek our views as to whether it would be appropriate for a "sticker" to be attached to United Nations laptops advising host country officials of their status, or whether United Nations staff should be provided with a document which could be presented to border officials in such situations.

2. The Convention on the Privileges and Immunities of the United Nations (the "Convention"), to which the [Host Country] acceded on [date], sets forth the relevant legal framework concerning search and seizure of United Nations property. Pursuant to Article II, Section 3 of the Convention "[t]he property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action". In addition, Article II, Section 4 of the Convention provides"[t]he archives of the United Nations, and in general all documents belonging to it or held by it, shall be inviolable wherever located." Accordingly, pursuant to Article II, Section 3 of the Convention, United Nations laptop computers, as property of the United Nations, should not be searched, confiscated or interfered with in any way by border officials. Similarly, pursuant to Article II, Section 4 of the Convention, the documents stored on United Nations laptops, which form part of the "archives" and "documents" of the United Nations, are inviolable.

3. At the same time, however, the above provisions must be interpreted in light of Article V, Section 21 of the Convention, under which the United Nations is under an obligation to "co-operate at all times with the appropriate authorities of Members to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the privileges, immunities and facilities mentioned in this article."

4. Accordingly, it is reasonable to allow United Nations property to be examined from a security perspective at border control security checkpoints. In our view, it is reasonable to allow a laptop to be subjected to an external visual inspection, to be put through an X-ray machine, to be swiped for explosive residue, and to be turned on to see if it works. We consider that a rapid, non-intrusive visual inspection would not constitute a "search" as such, and would not amount to "interference" with the "property" or "archives" of the United Nations, within the meaning of Article II, Sections 3 and 4 of the Convention. However, we consider that the opening and reading of documents is not reasonable, and cannot be tolerated by the United Nations. It is also not reasonable for a border official to take a United Nations laptop away and examine it without it being in the presence of the United Nations official. In such circumstances, a staff member should politely object to the procedure and request to see a supervisor if necessary. If the search persists, the staff member should make a note of the incident and report it without delay to the Office of the Legal Counsel, which Office will then take the matter up with the host country authorities.

5. With respect to your question whether a "sticker" should be attached to United Nations laptop computers, or whether a document should be provided to the bearer of such a laptop, we see no objection to such courses of action, and would be happy to assist in preparing any necessary language setting forth the relevant provisions of the Convention.

(*f*) Note to the Assistant Secretary-General for Peacekeeping Operations regarding the letter from the President of the House of Representatives of [Country]

Immunities of United Nations officials in the context of invitations to appear before national parliamentary bodies—Cooperation with national bodies viewed to be in the interests of the Organization is possible on a strictly voluntary basis—United Nations officials duly authorized by the Secretary-General can provide informal information—Formal testimony requiring official's immunity to be waived may be considered on a case-by-case basis

30 November 2006

1. This is with reference to your Note dated 20 November 2006, to which was attached a copy of a letter dated 16 November 2006 from the President of the House of Representatives of [Country], addressed to the Secretary-General. The letter informs that the Standing Committee on Institutions, Merit and the Commissioner for Administration (Ombudsman) of the [Country] House of Representatives is currently looking into a matter scheduled for debate, entitled "The institutional issue of financing Non Governmental Organizations or persons in the framework of the [Plan] and the need of legislation, which will regulate with transparency the issue of financing persons and organizations functioning in the Republic of [Country]." In this context, the Committee is seeking "every possible assistance by the United Nations Secretariat in this delicate matter".

2. In particular, the President of the House of Representatives requests the Secretary-General to ensure "that all United Nations officials concerned will be able to cooperate with the House of Representatives, without hindrance due to immunity considerations, so that the House could proceed, in the framework of its powers to exercise parliamentary control, according to the Republic of [Country] Constitution." The letter from the President of the House of Representatives does not specify any names of United Nations officials who would have to provide the requested information; and it contains no specific request for a waiver of their immunity in this connection.

3. We would like to recall that earlier in October, a United Nations Development Programme (UNDP) Programme Manager in [City of the Country], [Name A] received a somewhat similar request from the Chairman of the Standing Committee on Institutions, Merit and the Commissioner for Administration (Ombudsman), [Name B]. In his letter dated 25 October 2006, [Name B] requests that [Name A] *inter alia* "inform the said Committee on matters pertaining to the financing by the United Nations Office for Project Service (UNOPS)/UNDP or other cooperating Organizations or Funds, drawing on [Country C] Aid funds for [Country], during the period preceding the Referendum on the [Plan] . . ." by "temporarily setting aside [his] diplomatic immunity" for this purpose. Furthermore, the 25 October letter from the Chairman of the House Standing Committee attached a list of fifteen specific written questions addressed to [Name A]. UNDP has informed us of [Name A]'s preference to respond to the questions posed in writing rather than appearing in person before the House Standing Committee.

4. It has been the long-standing policy of the Organization that invitations to United Nations officials to appear before national parliamentary committees or congressional bodies may only be accepted upon a specific authorization by the Secretary-General, which

is granted if in his opinion such authorization is in the interests of the Organization. However, it has also been the consistent practice of the Organization that if for reasons having to do with the interests both of States and of the Organization, officials may need to provide information to national governmental bodies on specific issues, this could be achieved through private briefings, as and when appropriate, on an informal basis.

5. In our view, the requests from the President of the [Country] House of Representatives and the Chairman of the House Standing Committee should be considered in the light of the above-referenced policy and practice. We would see no objection from a legal standpoint if United Nations officials concerned provide on a purely informal and voluntary basis the information sought. It is understood that such information could be provided orally or in writing. However, pursuant to United Nations Staff Regulation 1.5, the provision of such information must be with the authorization of the Secretary-General.

6. Should the request from the [Country] House of Representatives be construed to mean that the staff members concerned would have to give formal testimony to parliamentary hearings then specific requests for waiver of their immunity would have to be considered on a case-by-case basis.

7. Accordingly, if it is found that cooperating with the [Country] House of Representatives in the present matter is in the interests of the Organization, the President of the House of Representatives should be advised of the United Nations' willingness to do so on a strictly voluntary and informal basis, without prejudice to the privileges and immunities, including immunity from legal process of the United Nations officials concerned. However, if the information sought is needed for formal testimony by the United Nations officials concerned, then the Organization would be prepared to consider, on a case-by-case basis, specific requests for a waiver of immunity of such officials, in accordance with the applicable international legal instruments.

2. Procedural and institutional issues

(*a*) Note relating to the powers and role of the Secretary-General as Chief Administrative Officer of the United Nations in the context of the proposal for the creation of a position of Chief Operating Officer

Role of the United Nations Secretary-General as chief administrative officer—Articles 97 and 101 of the Charter of the United Nations—Exclusive power to appoint and manage staff—Administrative powers limited by the General Assembly's powers—Secretary-General's acquiescence to a certain interference by the General Assembly in his administrative powers—Financial responsibilities of the Secretary-General under the supervision of the General Assembly—A new chief operating officer should be appointed directly by the Secretary-General

17 January 2006

1. I write further to your oral request, in the context of the Post-Summit Coordination Committee, for a brief analysis of the powers and role of the Secretary-General as the Chief Administrative Officer (CAO) of the Organization. Specifically, you wish to know whether these powers and role have been codified and whether they are now more limited

than what was originally intended. Finally, you enquire as to whether there are any legal ramifications for the creation of a position of Chief Operating Officer (COO).

The role of the Secretary-General under the Charter of the United Nations

2. The Charter states the following:

– The Secretary-General "shall be the chief administrative officer of the Organization" (Article 97);

– He is to "perform such functions as are entrusted to him" by the principal organs (Article 98);

– He shall make an annual report to the General Assembly on the activities of the Organization (Article 98);

– He may bring to the attention of the Security Council any matter which, in his opinion, may threaten the maintenance of international peace and security (Article 99);

– He is also the head of the United Nations Secretariat, which "shall comprise of the Secretary-General and such staff as the Organization may require" (Article 97);

– Such staff are to be appointed by the Secretary-General under regulations established by the General Assembly (Article 101 (1));

– The Secretary-General is also given specific roles under Articles 12 (2), 20 and 73 (e) (notifying the General Assembly on matters of peace and security, convoking special sessions of the General Assembly, receiving certain information from Member States).

3. The Charter thus gives the Secretary-General a broad administrative role, as well as a political role. His political role derives from Article 99, and has developed extensively through practice, recognized and accepted by the political organs. His administrative role encompasses the duties assigned to him under Article 98, as well as those inherent in his designation under Article 97 as CAO, and his power to appoint and manage staff under Article 101. Since this Note is intended for discussions related to administrative reform, it will not explore the political role of the Secretary-General. It will focus, instead, on the pertinent administrative role and powers under Articles 97 and 101.

The administrative role of the Secretary-General under the Charter

4. The precise scope of the Secretary-General's administrative role and how it interacts with the powers and role of the principal organs of the United Nations is not codified in the Charter. Generally, it must be noted that the Secretary-General is the CAO of not only the Secretariat, but also of the Organization as a whole. Through his staff in the Secretariat, he is therefore responsible for the delivery of the programmes and implementation of the policies laid down by the principal political organs and their subsidiary bodies. In order to fulfil this responsibility, the Secretary-General must have authority over the administration of the Secretariat and its staff. Such administrative power is, however, limited by the Charter in two respects:

– The General Assembly has the normative power to regulate the Secretariat under Article 101 (1); and

– The General Assembly also has the power to consider and approve the budget of the Organization under Article 17.

5. The system set up by the Charter can, therefore, be seen as a dynamic system in which the General Assembly (i) sets the regulatory parameters and (ii) the budget within which the Secretary-General is to (a) administer the Secretariat and (b) implement the policies and programmes decided upon by the General Assembly and other United Nations organs. The Charter does not, however, specify the exact limits of the General Assembly's authority over the Secretary-General in administrative matters, and the delineation of such borders has been left to evolve through practice. It must be stressed that practice in the application of the Charter not only serves to interpret the Charter, but may also eventually constitute an informal modification of the Charter, if the practice is acquiesced in by the Secretary-General and the principal political organs for a period of time.

THE EVOLVING PRACTICE IN RESPECT OF THE ADMINISTRATIVE ROLE OF THE SECRETARY-GENERAL

(a) Personnel functions

6. The Secretary-General has the sole responsibility for appointing and administering his staff, although he must do so under regulations established by the General Assembly. The General Assembly has delegated some of its normative powers to the Secretary-General, so that he now has the authority to make subsidiary legislation, so long as it is consistent with the Staff Regulations.[1] Such delegated powers can always be taken back by the General Assembly.[2]

7. Despite the fact that the Charter would seem to confer on the Secretary-General exclusive powers over the matter, the General Assembly has nevertheless assumed some responsibility in respect of the appointment of certain senior officials (e.g. Executive Director of United Nations Environment Programme, Office of the United Nations High Commissioner for Refugees (UNHCR), etc). This Office and the Secretary-General have expressed concern at this extension of the General Assembly's jurisdiction on a number of occasions. In view of the fact that this practice is well established and the Secretary-General has acquiesced in it, it would now be very difficult, though, to contest its legality.

8. The General Assembly has also displayed a strong interest in the procedures for the recruitment and promotion of United Nations staff, and through its resolutions and the Staff Regulations has legislated extensively on the matter. This Office has previously advised that the General Assembly has the constitutional power to do so pursuant to its normative powers under Article 101 of the Charter.

9. The General Assembly has effectively circumscribed the power of the Secretary-General to administer his staff through the establishment of the Administrative Tribunal (UNAT), which monitors the legality of his administrative actions. The International Court of Justice has ruled that the establishment of the UNAT was not an improper interference with the powers of the Secretary-General.[3]

10. Finally, the decentralization of the Secretariat through the direct assignment by the General Assembly of the power to administer the staff of certain subsidiary organs which are financed from voluntary contributions (such as United Nations Development

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[1] See Staff Regulation 12.2

[2] For example, in its resolution 34/165, Part u, para. 3, the General Assembly decided on the question of repatriation grants itself.

[3] See Effect of Awards Advisory Opinion, [1954] *I.C.J. Reports* p. 47, at p. 60.

Programme, United Nations Children's Fund, UNHCR) to the Executive Heads of these organs can be seen as an appropriation by the General Assembly of the exclusive power of the Secretary-General under the Charter to administer his staff. This Office has expressed concerns on this matter previously. Once more, though, in view of the established nature of this practice and the Secretary-General's acquiescence in it, it would be difficult now to say that this is at variance with the Charter or otherwise inappropriate.

(b) Financial and related functions

11. Although the Charter is silent on the Secretary-General's financial responsibilities and functions, some are inherent in his role as CAO, while others have been specifically assigned to him by the General Assembly. The Secretary-General collects, holds in custody and disburses or commits the funds of the United Nations. He also administers trust funds according to procedures he establishes.[4] The Secretary-General also prepares the proposed programme budget for each financial period for the General Assembly's approval, through the Administrative Committee on Administrative and Budgetary Questions (ACABQ).[5]

12. The Secretary-General's power to structure the Secretariat is closely related to his powers over the budget. The General Assembly, at its first session, explicitly recognized the authority of the Secretary-General to restructure the Secretariat.[6] In practice, though, any transfer of resources between departments or offices will require approval of the ACABQ,[7] whilst the creation or abolition of any post will require full General Assembly approval. As such, the Secretary-General is only free to transfer resources within departments or offices. Nevertheless, it appears that a practice has evolved to only inform the ACABQ *ex post facto* in respect of transfers between offices and departments.

13. Although the General Assembly can limit the authority of the Secretary-General to restructure the Secretariat, a balance must be struck between the need for effective management of the Secretariat by the Secretary-General and the supervisory function of the General Assembly. This Office has previously advised that the Financial Regulations should not be interpreted so as to limit the authority and responsibility of the Secretary-General to streamline the structure of the Secretariat. Clearly, however, there are limits to the restructuring which the Secretary-General can make without General Assembly approval. For instance, the Secretary-General cannot reformulate entire sub programmes, or introduce new programmes in the programme budget without prior General Assembly approval.

(c) Has there been an erosion of the Secretary-General's role?

14. The role of the Secretary-General, and his powers to administer the Organization vis-à-vis those of the General Assembly are in a state of constant flux. They evolve together with Organization. As the Organization and its activities have grown in scope, and as the General Assembly and Security Council have assigned more functions to the

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[4] See Financial Regulations 6.6–6.7.

[5] See Financial Regulation 3.1.

[6] General Assembly Resolution 13 (1) of 13 February 1946.

[7] See Financial Rule 104.4, whereby the General Assembly delegates this power to the ACABQ.

Secretary-General, his responsibilities in respect of the administration of the Organization, and specifically the Secretariat have also grown. The General Assembly, at the same time, has increasingly sought to control and restrain such responsibilities. It cannot, therefore, be said that the role originally intended for the Secretary-General has been curtailed by the General Assembly, since the nature and functions of the Organizations in general, and of the Secretary-General specifically, have substantially evolved since the creation of the Organization.

15. Generally, however, the institutional architecture envisaged by the Charter can be said to have the General Assembly lay down general rules, while the Secretary-General applies these to specific cases. On this basis, it is possible to detect a pattern whereby the General Assembly may be increasingly dealing with the particulars of administering the Organization, rather than merely setting the general rules. As much as it is difficult to point to an exact border between the general and the specific, the Secretary-General needs to be able to manage the Secretariat in an effective manner so as to deliver the programmes mandated by the General Assembly and other political organs. He should, of course, report to the General Assembly in accordance with his obligations, and takes into account its views.

Legal implications for the creation of the position of chief operating officer

16. Generally, the Secretary-General is entitled to delegate any power that he himself has. Further, by virtue of Article 97 of the Charter, the Secretary-General is the CAO of the Organization, and the sole head of the Secretariat. As such, in the absence of any amendment of the Charter, a future COO must be subordinate to the Secretary-General. Further, without explicit General Assembly approval, the COO cannot have any powers or functions which the Secretary-General himself does not have. One further consideration to bear in mind is that the COO should be appointed exclusively by the Secretary-General, and the General Assembly should not have any official role in appointing the COO. This would ensure the authority of the Secretary-General to appoint his staff under Article 101 (1) of the Charter. Finally, General Assembly approval will be needed to create this new post in view of the budgetary implications. (See paragraph 13 above).

17. I have examined the four options which [Name] is proposing in respect of a COO. As required to ensure consistency with the Charter, all four options keep the Secretary-General as the head of the Secretariat. As long as the COO is appointed directly by the Secretary-General, and does not have powers in excess of those of the Secretary-General, there would be no legal obstacles to any of the four options. The choice between these is clearly a policy matter.

(*b*) Note relating to the powers and role of the Secretary-General

Distinction between powers of the General Assembly and of the Secretary-General being loosened—Intervention of the General Assembly in specific matters of staff administration—Reduction of the managerial discretion of the Secretary-General in how to implement programmes, due to the change in the drafting procedure of the Organization's budget and the greater control exercised by the General Assembly—Established practice of the General Assembly to approve all new posts and all transfers of posts between programme sections

25 January 2006

1. I write further to my Note to you of 17 January 2006[*] and to the discussions at the Post-Summit Coordination Committee meeting of 18 January 2006 on the above matter. I understand that you wish to have further analysis and examples of specific resolutions of the General Assembly in which the authority of the Secretary-General in administrative matters can be considered to have been curtailed or circumscribed.

2. As indicated in my Note of 17 January 2006, the Charter assigns general functions to the General Assembly and to the Secretary-General, but it does not define precise limits to the responsibilities of each. Generally, the institutional architecture envisaged by the Charter can be said to have the General Assembly lay down general rules, while the Secretary-General applies these to specific cases.

3. An analogy to domestic systems would have the General Assembly as a quasi-legislative body and the Secretary-General as a quasi-executive body. In such a system, the legislature would decide on programmes, whether or not on proposal of the executive. The executive would indicate the resources required to carry out such programmes, which the legislature would scrutinize and, where appropriate, authorize. The executive would then carry out these programmes. The executive would be accountable to the legislature for the fulfilment of these programmes.

4. As discussed in my Note of 17 January 2006, the delineation of the borders between the Secretary-General's authority to manage and the General Assembly's authority to legislate and oversee has evolved through practice. In coordination with the Office of the Controller, and the Office of Human Resources Management (OHRM), my Office has examined this practice through resolutions of the General Assembly in matters relating to personnel and budget in order to ascertain whether the Secretary-General's power is being circumscribed by the General Assembly. This examination was based on examples provided by OHRM and the Office of the Controller.

(i) Personnel functions

5. As detailed in paragraph 2 above, the Secretary-General is responsible for delivering the programmes mandated by the General Assembly through his staff in the Secretariat. His capacity to manage such staff is, therefore, essential to fulfil his responsibilities to the General Assembly.

6. The Secretary-General has the sole responsibility for appointing and administering his staff, although he must do so under regulations established by the General Assembly. The United Nations Staff Regulations delegate to the Secretary-General the power to make subsidiary legislation. The dichotomy of the General Assembly dealing with the generic and the Secretary-General dealing with the specific is thus reinforced in this area of administration. Yet, the practice shows a trend of the General Assembly dealing with specific matters of staff administration. Some examples are listed below.

a. The General Assembly urged the Secretary-General to ensure that successful candidates of the National Competitive Exam (NCE) are offered positions within one year after their selection. (General Assembly resolution 49/222, Section I, para. 14). The placement of successful NCE candidates should be responsive to the managerial needs of

[*] See (a) above.

the Secretary-General, and the General Assembly's urging the Secretary-General in this respect may be seen as an encroachment.

b. The General Assembly requested the Secretary-General to take measures to prevent the placement of staff members against higher-level unencumbered posts for periods longer than three months, and issue vacancy announcements within a three-month period. (General Assembly resolution 51/226, Section III (B), para. 10). Again, this may be seen as the General Assembly circumscribing the managerial power of the Secretary-General over his staff.

c. Staff Regulation 1.2 (c) provides that "[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." However, this authority is circumscribed by General Assembly resolution 51/226 which specifically limits the discretionary power of the Secretary-General to appoint and promote outside the established procedures to his Executive Office, Under-Secretary-General and Assistant Secretary-General levels and special envoys. (General Assembly resolution 51/226, II, paragraph 5.) Consequently, the Secretary-General currently does not have the authority to move staff within the Organization outside established procedures, as may be required by the interests of the Organization.

d. The General Assembly requested the Secretary-General not to extend the contracts of 17 individuals who were former gratis personnel and subsequently recruited by the International Criminal Tribunal for the ex-Yugoslavia. (General Assembly resolution 53/221, Section V, para. 11). This request descends at the level of specific decisions by the General Assembly over the administration of the Secretariat, an encroachment into the managerial powers of the Secretary-General.

e. The General Assembly discouraged the Secretary-General from using retired former staff to present reports to any intergovernmental body. (General Assembly resolution 57/305, Section VI, para. 7). The use of former staff, so long as it is consistent with the Staff Regulations, should be the prerogative of the Secretary-General and not a concern of the General Assembly.

f. The General Assembly authorized the Secretary-General to appoint to posts not subject to geographical distribution at the P-2 level up to seven successful candidates from the General Service to Professional examination each year, and to appoint to P-2 posts in duty stations with chronically high vacancy rates up to three successful candidates from the G to P examination each year when no successful candidates from the NCE are available. (General Assembly resolution 59/266, Section III, paras. 2 and 3). The appointment of staff within the approved programme budget, and subject to the Staff Regulations, should be the prerogative of the Secretary-General.

(ii) Budgetary functions

7. The General Assembly, through its budgetary powers under Article 17 of the Charter, considers and approves the budget of the Organization. Through resolution 14 (1) of 13 February 1946, the General Assembly set up the Advisory Committee on Administrative and Budgetary Questions (ACABQ) to, *inter alia,* examine and report on the draft budget submitted by the Secretary-General to the General Assembly. The level of consideration by the General Assembly, and the amount of detail which is requested from the Secretary-General,

and subsequently approved by the General Assembly, is the "grey area" between the jurisdiction of the General Assembly and the Secretary-General's managerial role.

8. Initially, the Secretary-General submitted draft budgets with global sums for each budget section, with each budget section representing a functional category (i.e. staff costs, equipment, etc.) but not divided in programmatic categories (i.e. human rights, political and peacekeeping, etc). The General Assembly, through the ACABQ, considered and approved this budget. Within this framework, the Secretary-General had considerable managerial discretion in how to implement the programmes which the General Assembly and other political organs mandated him to execute, so long as he did so within the total budget.

9. This approach changed when the General Assembly adopted its resolution 3043 (XXVII) of 19 December 1972 on "Form of presentation of the United Nations budget and duration of the budget cycle." This resolution was based on a proposal of the Secretary-General himself (A/C.5/1429 of 20 April 1972) to introduce programme budgeting. The purpose of this new approach was to "facilitate an easy correlation between the main components of the programmes and activities of the Organization and the appropriations required for their implementation." At the time, the Secretary-General positively noted that "the degree of control which could be exercised in the first instance by the main organs and subsidiary organs, and by the [Secretary-General] on their behalf, would be intensified." With the change to the new form of budget, the Secretary-General lost some managerial discretion in implementing the Organization's work programme, as the General Assembly would consider and approve specific resources for each section of the work programme. The Secretary-General's power to organize and re-arrange the deployment of such resources mid-programme was thus reduced.

10. Indeed, in a legal opinion of 30 September 1975 from the Legal Counsel to the Controller, this Office confirmed that the General Assembly must approve every post in each respective budget section. This is now established practice, and thus it is clearly within the General Assembly's competence to approve all new posts, as well as all transfer of posts between programme sections, although as pointed out in my Note of 17 January 2006, a practice has evolved to only inform the ACABQ *ex post facto* in respect of transfers between offices and departments. As such, the General Assembly, through the ACABQ, considers and approves a very detailed budget, and the Secretary-General is hardly in a position to refuse to provide the level of detail requested.

11. Within this framework, it is difficult to identify specific resolutions of the General Assembly where it exceeds its competence in budgetary matters. It must, however, be noted that the in-depth questioning by the ACABQ and the Fifth Committee over every aspect of the budget is proving to be a strain on the Secretariat, and is of questionable value to the General Assembly. Examples of the type of questions and comments which the Secretariat has had to answer over the budget include:

a. Requesting the Secretary-General to provide details of estimates of travel requirements including number of trips, destinations, duration, etc., and the purpose of the travel;

b. Querying why the Secretary-General cannot refurbish existing vehicles to meet the security requirements rather than buying new ones; and

c. Requesting that there should be one printer for every four computers.

12. It should be noted that the level of minutiae which the General Assembly and the ACABQ have been concerning themselves with should hardly fall within the purview of an intergovernmental organ. The intergovernmental organ should more properly concern itself with the reasonableness of the overall budgetary envelope, rather than a detailed line item analysis, and should leave the Secretary-General a margin of managerial discretion within which to effectively implement the work programme.

(iii) Conclusion

13. As detailed in my Note of 17 January 2006, it cannot be said that the role originally intended for the Secretary-General has been curtailed by the General Assembly, since the nature and functions of the Organizations in general, and of the Secretary-General specifically, have substantially evolved since the creation of the Organization. It can, however, be queried whether the requests and demands the General Assembly has increasingly been making on the Secretary-General in respect of very specific aspects of the administration of the Organization are a proper use of the General Assembly's jurisdiction.

14. There is no specific legal injunction on the General Assembly not to exercise this level of oversight and control, and the problem is better framed in terms of what the most effective way to administer the Organization is. In general constitutional terms, it appears more proper for the General Assembly to only direct the Secretary-General on broad and general issues, leaving the specifics of administration to the Secretary-General.

(*c*) Interoffice memorandum to the Officer-in-Charge, Policy, Information and Resource Mobilization Section of the United Nations Mine Action Service, Department of Peacekeeping Operations, regarding contractual provisions on sexual exploitation and abuse

United Nations general conditions of contracts—Secretary-General's bulletin ST/SGB/2003/13*—Contracts signed with non-United Nations entities must include provisions prohibiting sexual exploitation and abuse—Such entities must commit themselves to take all appropriate measures to prevent sexual exploitation or abuse of anyone by any of its personnel—Contract provisions must comply with the specific standards set forth in ST/SGB/2003/13

1 February 2006

1. This is in response to your memorandum of 22 December 2005, requesting advice as to whether the model agreement for cooperation between the United Nations Mines Action Service (UNMAS) and non-United Nations entities should be modified to include provisions concerning sexual exploitation and abuse, pursuant to Section 6 of ST/SGB/2003/13, of 9 October 2003, and if so, the appropriate language for such provisions.

2. ST/SGB/2003/13, entitled "Special measures for protection from sexual exploitation and sexual abuse", was promulgated for the purpose of "preventing and addressing cases of sexual exploitation and abuse" (See opening paragraph of ST/SGB/2003/13, unnumbered). Section 6.1 of ST/SGB/2003/13 provides as follows:

* For information on Secretary-General's bulletins, see note in section 1 (c), para. 3, above.

"When entering into cooperative arrangements with non-United Nations entities or individuals, relevant United Nations officials shall inform those entities or individuals of the standards of conduct listed in section 3, and shall receive a written undertaking from those entities or individuals that they accept these standards".

3. Section 3, entitled "Prohibition of sexual exploitation and abuse", reaffirms the prohibition against sexual exploitation and abuse for United Nations staff, pursuant to the Staff Regulations and Rules (section 6.1), and further provides, in section 3.2, as follows:

"In order to further protect the most vulnerable populations, especially women and children, the following specific standards which reiterate existing general obligations under the United Nations Staff Regulation and Rules, are promulgated:

(a) Sexual exploitation and sexual abuse constitute acts of serious misconduct and are therefore grounds for disciplinary measures, including summary dismissal;

(b) Sexual activity with children (persons under the age of 18) is prohibited regardless of the age of majority or age of consent locally. Mistaken belief in the age of a child is not a defence;

(c) Exchange of money, employment, goods or services for sex, including sexual favours or other forms of humiliating, degrading or exploitative behaviour, is prohibited. This includes any exchange of assistance that is due to beneficiaries of assistance;

(d) Sexual relationships between United Nations staff and beneficiaries of assistance, since they are based on inherently unequal power dynamics, undermine the credibility and integrity of the work of the United Nations and are strongly discouraged;

(e) Where a United Nations staff member develops concerns or suspicions regarding sexual exploitation or sexual abuse by a fellow worker, whether in the same agency or not and whether or not within the United Nations system, he or she must report such concerns via established reporting mechanisms;

(f) United Nations staff are obliged to create and maintain an environment that prevents sexual exploitation and sexual abuse. Managers at all levels have a particular responsibility to support and develop systems that maintain this environment."

4. Section 4 imposes upon Heads of Departments, Offices and Missions responsibility for the enforcement of those standards, while providing the following exception:

"The Head of Department, Office or Mission shall not apply the standard prescribed in section 3.2 (b), where a staff member is legally married to someone under the age of 18 but over the age of majority or consent in their country of citizenship. (Section 4.4)"

5. The United Nations General Conditions of Contract have already been amended, pursuant to section 6.1, to meet the standards established by section 3 of ST/SGB/2003/13, without the exception in section 4.4. We propose that the model agreement between UNMAS and non-United Nations entities be amended along the same lines as the United Nations General Conditions of Contract, but that the amendment also include the exception in section 4.4 of ST/SGB/2003/13.

6. Accordingly, the sample Agreement between the United Nations and the Geneva International Centre for Humanitarian Demining (GICHD), which you submitted to us and which follows the model agreement, should be amended by the insertion, after the current paragraph 2 in Article IV, Personnel Requirements, of the following provisions, as paragraphs 3 and 4:

"3. GICHD shall take all appropriate measures to prevent sexual exploitation or abuse of anyone by it or by any of its personnel or any other persons who may be engaged by GICHD to perform any services under this Agreement. For these purposes, sexual activity with any person less than eighteen years of age, regardless of the age of majority or consent, shall constitute the sexual exploitation and abuse of such person. In addition, GICHD shall refrain from, and shall take all appropriate measures to prohibit its personnel or other persons engaged by it from, exchanging any money, goods, services, offers of employment or other things of value, for sexual favors or activities, or from engaging in any sexual activities that are exploitive or degrading to any person. GICHD acknowledges and agrees that the provisions hereof constitute an essential term of the Agreement and that failure to take preventive measures against exploitation or abuse, to investigate allegations thereof, or to take corrective action when sexual exploitation or sexual abuse has occurred, shall constitute grounds for termination in accordance with Article XIII."

"4. The United Nations shall not apply the standard above relating to age where the GICHD personnel or any person engaged by GICHD to perform any services is married to someone under the age of eighteen and such marriage is recognized as valid under the law of their country of citizenship."

7. Consequentially, the current paragraphs 3 and 4 should be renumbered 5 and 6 respectively.

(*d*) Interoffice memorandum to the Executive Office of the Secretary-General regarding the method of submission of the Report on programme performance of the United Nations for the biennium 2004–2005

Policy and practice governing programme performance and monitoring—function of programme performance monitoring entrusted to the Secretary-General—Secretary-General required to submit reports concerning programme performance to the General Assembly—Programme performance reports prepared by OIOS considered to be reports of the Secretary-General under the relevant programme monitoring legislative scheme established by the General Assembly.

9 February 2006

1. This refers to the note to the Secretary-General, dated 30 November 2005, from the Under-Secretary-General for Internal Oversight Services regarding her questions concerning the manner of submission of the Programme Performance Report (PPR) of the United Nations for the biennium 2004–2005. That note was referred to this Office for advice. The question raised by the note is whether the PPR should be submitted directly to the General Assembly by the Office of Internal Oversight Services (OIOS), in accordance with paragraph 3 of General Assembly resolution 59/272 of 2 January 2005, which provides that reports of OIOS shall be submitted directly to the General Assembly, with the Secretary-General providing any comments separately to the General Assembly. On this basis, it was the understanding of OIOS that the 2004–2005 PPR, being a report of OIOS, would have to be submitted directly to the General Assembly (with a copy to the Secretary-General) for consideration by the Committee for Programme and Coordination (CPC) at its forty-sixth session and, subsequently, by the General Assembly at its sixty-first session.

2. The Office of Programme Planning, Budget and Accounts (OPPBA) has taken issue with the proposed method for submission of the PPR report, contending that the direct submission of the PPR to the General Assembly by OIOS would be inconsistent with the policy and practice governing programme performance and monitoring and the role of the Secretary-General in managing and reporting on programme performance. Thus, in an e-mail, dated 17 December 2005, the Office of the Controller stated that,

> "the biennial programme performance report (PPR) is a report which is coordinated and consolidated by OIOS on the basis of inputs from all departments. This PPR reflects the 'monitoring' component of the planning, programme budgeting, monitoring and evaluation cycle, as mentioned by OIOS and contains reporting on the work implemented by the Secretariat, i.e. the Departments. It is not an evaluation nor an audit nor an investigation nor an inspection by OIOS of the work of the Secretariat. The PPR is technically a report of the Secretary-General. There is a history attached to the placement of monitoring activities and management consultant services in an oversight entity."
>
> "The 2005 World Summit Outcome requested an evaluation of governance, auditing and oversight, including a review of OIOS which will include a review of the services and responsibilities to be satisfied through OIOS and those that should be satisfied elsewhere (A/60/568, Annex II, section B refers). It would be appropriate to await the results of the evaluation/review prior to changing the established practice."

Based on the foregoing, there is a difference of opinion between OIOS and OPPBA on whether the PPR is a report of the Secretary-General that should be submitted by him to the General Assembly in accordance with long-standing practice or, rather, is a report of OIOS that, in accordance with resolution 59/272, should be submitted directly to the General Assembly.

3. The practice concerning programme performance monitoring and reporting was established by the General Assembly in its resolution 37/234 of 21 December 1982, pursuant to which it first adopted the Regulations Governing Programme Planning, the Programme Aspects of the Budget, the Monitoring of Implementation and the Methods of Evaluation (PPBME Regulations).[1] Regulation 5.1 of the PPBME Regulations provided that, "the Secretary-General shall monitor the delivery of output scheduled in the approved programme budget through a central unit in the Secretariat. After the completion of the biennial budget period, the Secretary-General shall report to the General Assembly, through the Committee for Programme and Coordination, on programme performance during that period." Thus, as originally established by the PPBME Regulations, the function of programme performance monitoring was entrusted to the Secretary-General, who was required to submit reports concerning programme performance to the General Assembly, through the CPC.

4. By its resolution 48/218 B of 29 July 1994, the General Assembly established the Office of Internal Oversight Services. Under paragraph 5 (a) of that resolution, OIOS would "exercise operational independence under the authority of the Secretary-General in the

[1] See also, ST/SGB/204, of 4 September 1984, by which the Secretary-General first promulgated rules corresponding to the PPBME Regulations (PPBME Regulations and Rules). The PPBME Regulations and the accompanying rules of the Secretary-General were re-issued as a separate bulletin in 1987 (see ST/SGB/PPBME Rules/1 (1987)), following revisions to the PPBME Regulations adopted by General Assembly resolution 42/215 of 21 December 1987.

conduct of its duties" and would "have the authority to initiate, carry out and report on any action which it considers necessary to fulfil its responsibilities with regard to monitoring, internal audit, inspection and evaluation and investigations . . ." Paragraph 5 (c) of the resolution provided that OIOS would exercise five primary functions: monitoring, internal audit, inspection and evaluation, investigation, and reporting on the implementation of its recommendations. In paragraph 5 (e)(i) of resolution 48/218 B, the General Assembly mandated that, in carrying out its principal functions, OIOS would submit its reports to the Secretary-General who, in turn, would submit such reports to the General Assembly in the same form as submitted by OIOS, together with any "separate comments" that the Secretary-General might deem appropriate.

5. With respect to its monitoring function, paragraph 5 (c) provided that OIOS "shall assist the Secretary-General in implementing the provisions of article V of the [PPBME Regulations and Rules] on monitoring of programme implementation." Out of the five functions set forth in paragraph 5 (c) of the resolution, only with respect to the monitoring of programme performance was OIOS called upon to "assist the Secretary-General." In respect of its other functions, OIOS was given direct responsibility, such as to "examine, review and appraise the use of financial resources of the United Nations," in the case of its internal auditing function, or to "evaluate the efficiency and effectiveness of the implementation of the programmes and legislative mandates of the Organization," in the case of its inspection and evaluation function, or to "investigate reports of violations of United Nations regulations, rules and pertinent administrative issuances," in the case of its investigation function. Moreover, paragraph 5 (c) of the resolution made clear that the monitoring function of OIOS was that of assisting the Secretary-General in implementing article V of the PPBME Regulations and Rules. Thus, the PPBME Regulations and Rules were to be read as being consistent with the mandate of OIOS, which was to assist the Secretary-General in monitoring programme implementation.

6. After promulgating the mandate of OIOS by resolution 48/218 B, the General Assembly issued changes to the PPBME Regulations.[2] In doing so, however, the General Assembly did not alter the PPBME Regulations that govern the monitoring of programme performance, as are now set forth in article VI of the PPBME Regulations and Rules.[3] Thus, Regulation 6.1 (formerly Regulation 5.1) of the PPBME Regulations and Rules continues to provide that the Secretary-General shall monitor programme accomplishments and that the Secretary-General shall report to the General Assembly through the CPC. Accordingly, there is nothing in the action taken by the General Assembly to suggest that it changed the role of OIOS from one of assisting the Secretary-General in carrying out his programme performance functions under article VI of the PPBME Regulations and Rules, including his responsibility to submit reports on programme performance to the General Assembly through the CPC.

7. In her note to the Secretary-General, the Under-Secretary-General for Internal Oversight Services concludes that, as a result of the change of reporting methods set forth in resolution 59/272, OIOS should submit PPRs directly to the General Assembly. However,

[2] See, *e.g.*, General Assembly resolution 53/207, of 18 December 1998, pursuant to which the latest revisions to the PPBME Regulations were adopted.

[3] See ST/SGB/2000/8, of 19 April 2000, setting out the latest version of the PPBME Regulations and Rules.

that conclusion assumes that PPRs are reports of the OIOS. It is not clear that the General Assembly has ever sought to change the PPBME Regulation governing the method of programme performance reporting. That Regulation, PPBME Regulation 6.1, states that PPRs are reports of the Secretary-General. The role of OIOS, as clearly set forth in the mandate of OIOS established by General Assembly resolution 48/218 B, is to assist the Secretary-General in monitoring programme performance and in reporting thereon to the General Assembly through the CPC. Resolution 48/218 B should be construed consistently with and in a manner that is complementary of resolution 59/272. Thus, because the General Assembly did not expressly indicate its intention to change past practice concerning OIOS's role in assisting the Secretary-General in monitoring programme performance, we should not assume it intended to do so.

8. PPRs are reports of the Secretary-General under the relevant programme monitoring legislative scheme that was established by the General Assembly both prior to and after the creation of OIOS. Accordingly, the requirements, as set forth in resolution 59/272, concerning the methods of submission of reports of OIOS do not appear to apply to PPRs. In our view, unless the General Assembly clearly mandates that PPRs should be subject to the reporting procedures set forth in resolution 59/272, PPRs should continue to be submitted by the Secretary-General to the General Assembly through the CPC.

(*e*) Note to the Under-Secretary-General for Peacekeeping Operations relating to the applicability of Security Council decisions to the United Nations organizations operating in Afghanistan

Sanctions regime decided by the Security Council—Implementation of the sanctions regime by a United Nations Mission in the context of its interaction with a provincial government led by a person listed by the 1267 Committee[*]—The Mission may provide financial assistance through protected channels for specific humanitarian projects in the province—The Mission cannot allow such person to travel on United Nations air assets—The Mission cannot provide military assistance to the provincial government

24 March 2006

1. This is in response to your Note dated 24 February 2006, which refers to code cable [Number] of 19 February 2006 seeking guidance as to "the applicability of Security Council decisions to United Nations organizations operating in Afghanistan, and the extent of their responsibility in ensuring the implementation of the sanctions regime". In particular, you seek our advice on making financial aid available to a provincial government in Afghanistan led by a person listed by the 1267 Committee, and as to whether individuals listed by the 1267 Committee may travel on United Nations air assets. We note that paragraph 4 of [code cable] also refers to the provision of military assistance to a provincial government which is under the control of a listed person. Our views are as follows.

2. At the outset, we advise that the interpretation of decisions of the deliberative organs of the United Nations is the prerogative of such organs themselves. Accordingly, it is

[*] The 1267 Committee is the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and Associated Individuals and Entities.

advisable that guidance on the issues raised in [code cable] of 19 February 2006 be sought from the 1267 Committee. Notwithstanding the above, our general observations as to the issues raised are as follows.

3. With respect to the question as to the applicability of the decisions of the Security Council vis-à-vis United Nations organizations operating in Afghanistan, it should be noted that although Security Council resolutions may be addressed to "States", such resolutions are nevertheless binding by implication on the United Nations. While it is the responsibility of States to establish mechanisms to implement the sanctions of the Security Council, the United Nations is bound to comply with such decisions. To that end, and until such time as the Government of Afghanistan establishes appropriate mechanisms to enforce the provisions of relevant Security Council resolutions, including resolution 1617 (2005), the United Nations Assistance Mission in Afghanistan should refrain from dealing, directly or indirectly, with persons and or entities included in the 1267 Committee's List in such a way as would contravene relevant Security Council resolutions.

4. With respect to whether financial assistance may be provided to a provincial government under the control of a listed person, we note that the Security Council, acting under Chapter VII of the Charter, decided in its resolution 1617 (2005), operative paragraph 1 (a), that all States shall take measures to:

> "[f]reeze without delay the funds and other financial assets or economic resources of [listed] individuals . . . , including funds derived from property owned or controlled, directly or indirectly, by them or by persons acting on their behalf or at their direction, and to ensure that neither these nor any other funds, financial assets or economic resources are made available, directly or indirectly, for such persons' benefits, by their nationals or by any persons within their territory."

In our view, the provision of financial assistance to a provincial government under the control of a listed person would not be consistent with the requirement to "ensure that neither these nor any other funds, financial assets or economic resources are made available, directly or indirectly, for such persons' benefit . . .".

5. However, the above provision should be understood in the greater context in which the Security Council recognizes the important role played by the United Nations and other humanitarian relief agencies in Afghanistan. Various Security Council resolutions, including resolutions 1659 (2006) of 15 February 2006 and 1589 (2005) of 24 March 2005, envisage United Nations operations in Afghanistan which require close coordination with the Government of Afghanistan. Accordingly the terms "for such person's benefit" as included in operative paragraph 1 (a) of resolution 1617 (2005) must be interpreted restrictively, so as not to preclude humanitarian assistance to Afghanistan by the United Nations and its agencies. In addition, the question as to whether the terms of the resolution would be breached by United Nations bodies would depend on the practical means by which the United Nations carries out its mandate in Afghanistan. If funds are not channeled through the Government, but are provided through protected channels for specific humanitarian projects, we do not consider that such assistance would constitute either "direct or indirect" provision of financial assistance for the "benefit" of the listed person.

6. With respect to whether a listed individual may travel on United Nations air assets, we refer to operative paragraph 1(b) of resolution 1617 (2005) which obliges States to "[p]revent the entry into or transit through their territories of [the listed] individuals". In

our view, provision of United Nations air assets to such individuals would be inconsistent with the letter and the intent of Security Council resolution 1617 (2005).

7. With respect to the provision of military assistance to a provincial government under the control of a listed individual, we note that operative paragraph 1(c) of resolution 1617 (2005) obliges States to:

> "[p]revent the direct or indirect supply, sale or transfer to [listed individuals] . . . of arms and related material of all types including weapons and ammunition, military, vehicles and equipment, paramilitary equipment and spare parts for the aforementioned and technical advice, assistance, or training related to military activities".

In our view, any military assistance to a provincial government under the control of a listed person would be inconsistent with the above-mentioned requirement.

(*f*) Interoffice memorandum to the Legal Affairs Section of the Office of the United Nations High Commissioner for Refugees (UNHCR) regarding the status of experts on mission

Definition of experts on mission—Convention on the Privileges and Immunities of the United Nations, 1946*—Experts on mission are persons entrusted with a mission for the Organization, who are not officials of the Organization—Such experts must be appointed directly by the Organization and make a written declaration—Missions assigned to experts are increasingly varied in nature—Such experts must enter into an agreement with the Organization specifying their obligations

17 April 2006

1. This is in reference to your memorandum dated 3 April 2006 requesting our advice with respect to the status of experts on mission. We understand that the issue has arisen in the context of the negotiation of a Memorandum of Understanding (MOU) between UNHCR and the [Country] Immigration and Refugee Board (IRB) concerning the deployment of IRB experts to train UNHCR staff in the field with respect to the determination of refugee status. While there is a reference in the MOU that experts provided by the IRB will enjoy the status of experts on mission under Article VI, Section 22 of the Convention on the Privileges and Immunities of the United Nations ("the Convention"), you request our advice as to whether it is necessary, in order to ensure that such individuals enjoy the status of experts on mission in countries other than [Country], that there also be some form of agreement or undertaking between the individual experts and UNHCR. We note that the IRB does not accept that its personnel deployed to UNHCR sign an undertaking.

2. The "Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission" (ST/SGB/2002/9)** ("the Regulations") provide guidance concerning the appointment of experts on mission. According to Regulation 1(b):

> " . . . experts on mission shall make the following written declaration witnessed by the Secretary-General or an authorized representative:

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

** For information on Secretary-General's bulletins, see note in section 1 (c), para. 3, above.

'I solemnly declare and promise to exercise in all loyalty, discretion and conscience the functions entrusted to me by the United Nations. To discharge these functions and regulate my conduct with the interests of the United Nations only in view, and not seek or accept instructions in regard to the performance of my duties from any Government or other source external to the Organization'."

Regulation 1 (d) provides: "[e]xperts on mission will receive a copy of the present Regulations . . . when they receive documentation from the United Nations relating to their mission and will be required to acknowledge receipt of the Regulations . . ."

Regulation 2 (b) provides: "[i]n the performance of their duties, . . . experts on mission shall neither seek, nor accept instructions from any Government or from any other source external to the Organization". Regulation 3 further provides that "experts on mission are accountable to the United Nations for the proper discharge of their functions".

The commentary to Regulation 1 (d) states:

"1. Experts on mission retained by the Secretariat sign a consultant contract or receive a letter or other documentation indicating the scope of their mission for the Organization. The consultant contract or other documentation will incorporate the Regulations by reference, and experts will be required to acknowledge that they will abide by the Regulations.

2. At times, legislative bodies entrust tasks to individuals to perform assignments for those bodies (for example, members and special rapporteurs of the International Law Commission and other bodies). Those individuals have the status of experts on mission. Although their appointments may have been concluded without the signature of any document of appointment, their attention will be drawn to the Regulations when they receive documentation from the Secretariat relating to their functions and/or assignment. That documentation will include a copy of the Regulations explaining that they were adopted by the General Assembly and thus constitute part of the conditions of those individuals' assignment for the United Nations . . ."

3. In the Advisory Opinion of the International Court of Justice (ICJ) of 15 December 1989 entitled "Applicability of Article VI, Section 22 of the Convention on the Privileges and Immunities of the United Nations",[*] the ICJ considered the meaning of "experts on missions" for the purposes of Section 22. Noting that the Convention gives no definition, it found that "the purpose of Section 22 is nevertheless evident, namely, to enable the United Nations *to entrust missions to persons* who do not have the status of an official of the Organization and to guarantee them "such privileges and immunities as are necessary for the independent exercise of their functions" (emphasis added). The Court noted that in practice that "the United Nations has had occasions *to entrust missions—increasingly varied in nature*—to persons not having the status of United Nations officials. Such persons have been entrusted with mediation, with preparing reports, preparing studies, conducting investigations or finding and establishing facts. In addition, many committees, commissions or similar bodies whose members serve, not as representatives of States, but in a personal capacity, have been set up in the Organization. In all these cases, the practice of the United Nations shows that the *persons so appointed*, and in particular the members of these committees and commissions, have been regarded as experts on missions within the meaning of Section 22" (emphasis added). The ICJ summed up "that Section 22 . . . is appli-

[*] *I.C.J. Reports 1989*, p. 177.

cable to persons (other than United Nations officials) *to whom a mission has been entrusted by the Organization* and who are therefore entitled to enjoy the privileges and immunities provided for in this Section with a view to the independent exercise of their functions . . ." (emphasis added). While the term "experts on mission" may be applied in respect of a variety of different missions performed for the United Nations, it is essential that this status is reserved for persons who perform missions for the United Nations in an "expert" capacity, and that such missions be entrusted to the individuals by the Organization.

4. As the individuals will be provided to UNHCR by the IRB on a "non-reimbursable basis", rather than being directly appointed by the United Nations, it is essential that the individuals enter into some form of an agreement or undertaking with UNHCR which sets forth their obligations as experts on missions, as outlined in the Regulations. If there is no such agreement or undertaking between the individual expert and UNHCR, the individuals could be seen as having the status of "sub-contractors" or as "implementing partners" of the United Nations, and would not enjoy "expert on mission" status. It is clear from the above mentioned ICJ Advisory Opinion that such missions must be entrusted to the individuals concerned, in order for such individuals to enjoy the status of experts on mission. Thus, we suggest that agreements or undertakings are entered into with the IRB individuals, which would be parallel to the MOU.

5. With respect to the above-mentioned MOU, while we have not been requested to review or provide any assistance with respect to its provisions, we suggest that in Section 5, paragraph (B), which concerns the "Status of the IRB experts", the first line be amended to read "[f]or the purpose of privileges and immunities, UNHCR will ensure that IRB experts will be considered by the host-country as having the legal status of experts on mission . . ."

6. We further suggest that the language in Section 9 concerning "Liability, indemnity and insurance" be strengthened to ensure that the IRB will take out the necessary indemnity insurance, and hold the United Nations harmless, in respect to any claims brought against the United Nations in respect of any loss, injury or death caused to the IRB experts in the performance of their assignments under the MOU.

(*g*) Note to the Deputy Secretary-General regarding due process in the context of audits performed by the Office of Internal Oversight Service (OIOS)

Procedures to be followed by OIOS during audits—Duty of staff to fully cooperate with auditors—Auditors have the right to direct and prompt access to staff members—Respect of due process rights of staff members audited, especially during audits that may uncover possible misconduct—Taping viewed as a good practice to ensure accurate record and report of interviews—Presence of a witness or request to have questions and answers in writing viewed as a concern for the integrity of the audit process

19 April 2006

1. You have requested a legal opinion on the authority of the Secretary-General to instruct OIOS to respect due process rights of staff members in audits. I note that your query is related to the question of the United Nations Mission in the Sudan (UNMIS) cooperation with an OIOS audit, and that I provided legal advice on this matter in my Note

of 7 April 2006 to [the Assistant Secretary-General for Mission Support in the Department of Peacekeeping Operations] (copy attached for ease of reference). My advice should be read against the information set out in that Note. I should also point out that this opinion relates to all audits and is not limited to the UNMIS case.

Background

2. OIOS was established by General Assembly resolution 48/218 B of 29 July 1994 as an office "under the authority of the Secretary-General." (Paragraph 4). OIOS "exercise[s] operational independence under the authority of the Secretary-General in the conduct of its duties and, in accordance with Article 97 of the Charter, ha[s] the authority to initiate, carry out and report on any action which it considers necessary to fulfil its responsibilities with regard to monitoring, internal audit, inspection and evaluation and investigations as set forth in [48/218 B] resolution." (Paragraph 5 (a)). General Assembly resolution 54/244 of 23 December 1999, entitled "Review of the implementation of General Assembly resolution 48/218 B", emphasized that, "the operational independence of [OIOS] is related to the performance of its internal oversight functions." (Paragraph 18).

3. While the precise scope of the authority of the Secretary-General over OIOS has not been defined by the General Assembly, it is however clear that the authority to initiate, carry out and report on any action which it considers necessary to fulfil its responsibilities lies with OIOS. Nevertheless, OIOS carries out its functions under the authority of the Secretary-General and in accordance with Article 97 of the Charter, which vests the Secretary-General with the authority of Chief Administrative Officer of the Organization.

Due process

4. As elaborated in my Note of 7 April 2006, relevant legislative texts and administrative issuances do not deal directly or precisely with the rights of staff members in the context of OIOS audits. Nevertheless, in accordance with the jurisprudence of the United Nations Administrative Tribunal (UNAT), we consider that any audit that leads to findings that an individual may have committed misconduct should afford such an individual certain due process rights. In that Note, it was concluded that the right to be treated fairly during an OIOS audit would be a basic due process right of a staff member. Further, we suggested that the right to be treated fairly during an OIOS audit included the right to have any formal interview with OIOS accurately recorded and reported. Clearly, it would not be within the mandate of OIOS to carry out its functions without respect for the staff regulations and rules and without respect for the individual rights of staff members as provided for therein, in administrative issuances, and in light of UNAT jurisprudence.

5. As indicated above, although OIOS has operational independence in the conduct of its duties, it carries out those functions as an Office under the authority of the Secretary-General and in accordance with Article 97 of the Charter, which establishes the Secretary-General as Chief Administrative Officer of the Organization. To this extent, whilst OIOS is operationally independent, the Secretary-General, as Chief Administrative Officer, must ensure that the administrative and legislative framework which provides for the rights of staff members is respected. To this extent, the Secretary-General retains authority under Article 97 of the Charter to ensure that OIOS carries out its functions, including audit functions, with due respect for the rights of staff members.

Attachment

Note to the Assistant Secretary-General for Mission Support, Department of Peacekeeping Operations regarding UNMIS cooperation with auditors

7 April 2006

1. I refer to your Note of 22 March 2006, attaching for our review a draft note from the Special Representative of the Secretary-General (SRSG) for the Sudan, [. . .] to UNMIS personnel regarding their cooperation with OIOS staff during audits. I note that UNMIS personnel have expressed concern about the modalities of their cooperation with OIOS auditors. In his note to UNMIS staff, [the SRSG] sets out his view that UNMIS staff members may, when being interviewed by OIOS auditors, request that: (a) any questions be put in writing, and that replies in the written form be accepted; (b) a witness be allowed during interviews; (c) the interview be taped; or (d) the interview be transcribed and approved by the staff member concerned. He notes that OIOS has reserved the right to refuse such requests, and that he has sought a legal opinion on this issue from my Office. Such a request has not yet been received. In the meantime, he informs UNMIS staff that OIOS may, indeed, refuse such requests, although he hopes that refusals will be kept to a minimum.

2. We have reviewed [the SRSG]'s note to UNMIS staff. Although we have not yet received the formal request for advice from [the SRSG], we provide below our comments on the underlying issues which he raises.

3. Initially, we would note that pursuant to ST/SGB/272,[*] entitled "Establishment of the Office of Internal Oversight Services", OIOS is to discharge its responsibilities, including its audit functions, without any hindrance or need for prior clearance, that OIOS staff including its auditors, have the right to direct and prompt access to all staff, and are to receive their full cooperation. [The SRSG] must, thus, be clear with his staff that they (and he) have a duty to fully cooperate with OIOS auditors.

4. The underlying issue at stake, however, appears to be whether staff members, whilst providing this full cooperation, have the "due process" right to request measures to ensure that their statements made to OIOS auditors are accurately reflected by OIOS in its records of such statements.

5. Initially, we would note that OIOS audits may identify discrepancies within a document trail, and implicate individuals with potential misconduct. The statements made by such individuals may subsequently be used in any disciplinary proceedings which may ensue. In this respect, some audits may have the same consequences as OIOS investigations, and it may be pertinent to note some of the jurisprudence of the United Nation's Administrative Tribunal (UNAT).

6. In Judgement No. 1246 [of 2005],[**] the Tribunal stated that "as soon as a person is identified, or reasonably concludes that he has been identified, as a possible wrongdoer in any investigation procedure and at any stage, he has the right to invoke due process with everything that this guarantees." As such, when an audit leads to any finding that an

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[*] For information on Secretary-General's bulletins, see note in section 1 (c), para. 3, above.

[**] Judgement No. 1246 (22 July 2005): *Applicant* v. *the Secretary-General of the United Nations.*

individual may have committed misconduct, thus potentially affecting his or her rights, it is our view that such an individual should be afforded due process rights.

7. We have reviewed the Staff Regulations and Rules, and pertinent administrative instructions, and the issue of due process rights during audits does not appear to be directly addressed, although the General Assembly did issue the clear instruction, in its resolution 48/218 B that staff members have due process rights during investigations. The Secretary-General also made reference to due process rights and fairness in investigations in ST/SGB/273.

8. We have also reviewed the OIOS Inspection Manual, which does not deal directly with the rights of staff members to request specific modalities during interviews with OIOS auditors. The OIOS Investigation Manual does note that investigators may request a staff member to sign a written statement of an interview (paragraph 19), although the right of a staff member to request or refuse such a signed statement is not addressed. This, in any event, is limited to OIOS investigations and does not apply to OIOS audits.

9. Although neither the Staff Regulations and Rules, nor OIOS internal manuals address the issue of due process rights during OIOS audits, any audit that leads to findings that an individual may have committed misconduct should afford such an individual certain due process rights. The question, thus, is what due process rights are applicable in these circumstances.

10. In this respect, we draw a distinction between the due process rights applicable after a staff member has been charged with misconduct, those applicable during an investigation into alleged misconduct by an already identified staff member, and those applicable during an audit which, incidentally, may uncover possible misconduct by a staff member. In respect of the latter, we are of the view that only the basic due process rights apply, namely those of "fairness" and "justice" in the Administration's dealings with such individuals.

11. The right of a staff member to have his interview accurately recorded by OIOS auditors, whenever the audit may uncover possible misconduct by this staff member, would seem to us as much a "due process" right of the staff member to be fairly treated by the Administration, as a good practice for OIOS to follow in order to minimize claims against the Organization, and strengthen the evidence it gathers. Further, we would suggest that the right to be treated fairly during an OIOS audit includes the right to have any interview with OIOS accurately recorded and reported. The failure to ensure that such a right is respected may lead to a finding against the Organization by the UNAT, with consequent financial implications.

12. In order to ensure that this right is respected, we are of the view that staff members may request that interviews be transcribed, and signed off by the staff member concerned to confirm their accuracy, and that OIOS should generally accede to such a request. In this respect, we would note that if a staff member later refuses to sign a transcript of an interview which OIOS nevertheless believes is an accurate reflection of the interview, OIOS may still use the contested transcript as evidence with an appropriate indication of the refusal. OIOS can, in the alternative, inform the staff member that the interview will be taped, so that any disagreement as to what was said at the interview can be verified through the use of a master tape.

13. We do, however, have some concerns in respect of staff members requesting to having a witness present at interviews with OIOS, and to give staff members a right to request that all questions and answers be in writing. In respect of both, there may be issues of the integrity of the audit process. Further, such measures do not appear to strike the correct balance between the rights of staff members to due process during audits, and their duty to cooperate with duly authorized audits. As such, we do not believe that staff members have the right to request such measures from OIOS.

14. Given the above, we are of the opinion that [the SRSG]'s note contains a number of inaccuracies and inconsistencies with applicable regulations and rules, although some of the underlying issues which he raises do, indeed, have some merit. It is a matter of policy for the management of the Department of Peacekeeping Operations (DPKO) as to how it wishes to deal with [the SRSG]'s note, and we have limited ourselves to providing advice on the underlying legal issues. We would ask both OIOS and DPKO to take due note of these.

15. In the interests of transparency, I must note that we have shared various drafts of this advice with OIOS with a view to finding a common understanding in respect of its contents. We understand that OIOS has not, however, been able to agree with our approach or the content of this note. Nevertheless, this represents the legal opinion of the Office of Legal Affairs (OLA), and whatever concerns OIOS might have with the managerial issues raised therein may be addressed at the management level. OLA stands ready to provide further advice on this matter upon request.

(*h*) Interoffice memorandum to the Deputy Secretary, Economic and Social Council, regarding the request from the 'Ramsar Secretariat' for 'Observer Status' with the Economic and Social Council

Observer status with the Economic and Social Council—Definition of "international organization" under international law—Definition and functions of the secretariat of an international organization

26 April 2006

1. This is with reference to your memorandum of 5 April 2006 seeking our views as to whether the 'Ramsar Secretariat'[*] qualifies as an intergovernmental organization in order to be considered for 'observer status' with the Economic and Social Council. You informed us that the Bureau of the Council is apparently inclined to positively recommend granting the Ramsar Secretariat the status requested.

2. At the outset, we note that, in its request to the Economic and Social Council, the Ramsar Secretariat mainly prefers the term "international organizations", as opposed to "intergovernmental organizations", which is the term used in Rule 79 ("Intergovernmental Organizations") of the Economic and Social Council Rules of Procedure. Please note that in view of the observations made by the International Law Commission in 1985[**] and in

[*] The Ramsar Secretariat refers to the Secretariat of the Convention on Wetlands of International Importance especially as Waterfowl Habitat, signed in Ramsar (Iran) on 2 February 1971; reproduced in United Nations, *Treaty Series,* vol. 996, p. 245.

[**] See *Yearbook of the International Law Commission, 1985,* vol. I (United Nations publication, Sales No. E.86.V.4), pp. 283–312.

light of Article 2 (i) of the 1969 Vienna Convention on the Law of Treaties,[*] the two terms appear to be interchangeable.

3. With respect to the institutional structure of the Ramsar Convention, we note that the 9th Meeting of the Conference of the Parties to the 1971 Convention on wetlands, held in Uganda from 8 to 15 November 2005, decided in its resolution IX.10 that "in its external relations the Ramsar Bureau may be used the descriptor 'the Ramsar Secretariat' in its official statements and documents when such a descriptor is considered to be more suitable". Article 10 *bis*.3 of the Convention defines the "Bureau" as the "organization or government performing the continuing bureau duties under the Convention". In accordance with Article 8 of the Convention, the "International Union for Conservation of Nature and Natural Resources" performs these duties, including provision of the necessary staff. As recalled by resolution IX.10, the Bureau is considered to be "an administrative unit performing those duties which amount to the Convention's secretariat functions". Article 6 of the Convention established a Conference of the Contracting Parties "to review and promote the implementation" of the Convention. Finally, we understand that there is a Standing Committee, established by the Conference of the Contracting Parties, of an intergovernmental nature, to guide the Convention's progress and oversee the work of the Bureau.

4. With respect to your question, we note that there seems to be no clear definition of the term "intergovernmental organization" in public international law that can be applied to make a definitive determination on this matter. For the sake of simplicity, however, the following definition has been found acceptable, in accordance with the discussions held by the International Law Commission in 1985: "an international organization is one that is established by the will of States which form it, but acts and operates in the international community with its own personality, even if it is not clearly defined, for the purposes of fulfilling its tasks and the aims for which it has been established."

5. The above definition, although pragmatic in its approach, does not take into consideration institutional frameworks created under certain multilateral environmental treaties, such as the Ramsar Secretariat. Furthermore, it should be noted that the Ramsar Secretariat is only the "administrative unit performing those duties which amount to the Convention's secretariat functions"; and it has no intergovernmental nature. Moreover, in fact, neither the Parties to the Convention,[1] nor the Ramsar Secretariat itself[2] does recognize the Ramsar Secretariat as an "international organization".

6. In light of the above, granting the Ramsar Secretariat an "observer status" (i.e., participation on a continuing basis) with the Economic and Social Council does not seem advisable.

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

[1] In its 9th Meeting, the Conference of the Parties to the Convention instructed the Secretary General of the Ramsar Secretariat, in its Resolution IX.10, to "engage in a consultative process" regarding the options and implications "for the transformation of the status of the Ramsar Secretariat towards an International Organization".

[2] In its application to the Economic and Social Council, the Ramsar Secretariat acknowledges that it is "in a kind of legal limbo, which has frequently been the occasion of operational problems in terms of contractual arrangements with public and private funding sources, internal financial management, visas for official travel, custom status, and recognition in international fora".

7. Despite the foregoing observation, we would like to note several examples of treaty bodies and, in general, less structured mechanisms of international cooperation that appear to become gradually in practice international organizations. This has been the case of the Conference on Security and Cooperation in Europe (CSCE) established in 1975, which was given throughout the years a formal structure until it was officially decided to change the name of the Conference to the "Organization for Security and Cooperation in Europe" (OCSE). A similar process was followed by the General Agreement on Tariffs and Trade (GATT), created in 1947 and gradually transformed into an international organization. Yet another example would be the 1959 Antarctic Treaty* that originally did not establish an international organization. However, in 2001 a permanent Secretariat was established and in 2003 the plenary organ of the Treaty (the Consultative Meeting) was given the authority to conclude a headquarters agreement with Argentina.

8. The Ramsar Convention appears to fall within the above-described categories. In fact, while the institutional framework of the Ramsar Convention cannot be considered an international organization *stricto sensu,* it acts as it were one, albeit of a less formal, more *ad hoc* nature, than traditional international organizations. Moreover, we realize that an international organization "in the making", such as the Ramsar Convention, could participate in the work of the Economic and Social Council only under Rule 79.

9. In view of the above considerations, and the wish of the Economic and Social Council Bureau to respond positively to this request, we would see no objection if, for political reasons, the Ramsar Convention were invited, pursuant to Rule 79, on *ad hoc* basis to participate in the work of the Economic and Social Council. Once the Ramsar Convention has been transformed into a full fledged international organization, a formal request for observer status, i.e, participation on a continuing basis, could be considered.

(*i*) Note to the Executive Office of the Secretary-General (EOSG) regarding fair and clear procedures in Security Council sanctions regimes and, in particular, the release of study commissioned by the Office of Legal Affairs

Sanctions regime decided by the Security Council—International momentum to adopt fair and clear sanctions procedures vis-à-vis individuals—Right to be informed—Right to be heard—Right to a counsel—Right to an effective remedy

3 May 2006

1. In paragraph 109 of the 2005 World Summit Outcome resolution 60/1 of 16 September 2005, the General Assembly called "upon the Security Council, with the support of the Secretary-General, to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions". Pursuant to this mandate, the Policy Committee, by its decision of 27 September 2005, has tasked the Office of Legal Affairs to lead an interdepartmental process to develop proposals and guidelines that would be available for the consideration of the Security Council. In particular, the Policy Committee requested the Office of Legal Affairs to closely cooperate with the Department of Political Affairs and the Office of the High Commissioner for Human Rights. In paragraph 20 of his report on the "Implementation

* United Nations, *Treaty Series,* vol. 402, p. 71.

of decisions from the 2005 World Summit Outcome for action by the Secretary-General", the Secretary-General has informed the General Assembly of this decision (A/60/430 of 19 October 2005).

2. Having received inputs on this issue from the Department of Political Affairs (DPA) and the Office of the High Commissioner for Human Rights (OHCHR), the Office of Legal Affairs (OLA) commissioned a study from Professor Bardo Fassbender of Humboldt University Berlin on the question of the responsibility of the Security Council to ensure that fair and clear procedures are made available to individuals and entities targeted with sanctions under Chapter VII of the Charter. The study has been scrutinized at an OLA organized closed in-house seminar on 27 February 2006, following which it has been finalized by Professor Fassbender.

3. Several Member States are aware of this study and have approached us with a view to obtaining a copy thereof. In the interest of transparency, it is advisable that the study be made available to interested Member States. The study could be placed on the internet with an appropriate disclaimer. If there is no objection, we will proceed accordingly. Please find attached a copy of this study for your information.[*]

4. In the context of this matter, we wish to provide you with some background information and inform you of the key elements for a strategy as to how to proceed in this matter.

5. The above cited paragraph 109 of the 2005 World Summit Outcome resolution triggered or accelerated several developments that OLA closely followed:

a) Germany, Sweden and Switzerland commissioned a study, entitled "Strengthening Targeted Sanctions through Fair and Clear Procedures", which was prepared by the Watson Institute for International Studies at Brown University and presented to Member States on 30 March 2006. This study, which was endorsed by the States that commissioned it, elaborates several proposals for the Security Council to address shortcomings of existing Security Council sanctions procedures. The proposals focus, in particular, on listing and procedural issues and provide options for a review mechanism (a copy of this study is attached for your information).[**]

b) The Council of Europe commissioned a study, entitled "The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Due Process and United Nations Security Council Counter-Terrorism Sanctions",[***] which was prepared by Professor Iain Cameron of Uppsala University and discussed at the last meeting of the Legal Advisers of the Council of Europe Member States (CAHDI) on 24 March 2006. The study examines the problems caused for due process by sanctions introduced by the Security Council in the context of counter-terrorism; analyzes the case-law of the European Court of Human Rights relevant to the issues and addresses the question whether the ECHR standards represent general human rights principles. The study concludes that the adoption by ECHR States Parties, while acting in the Security Council, of targeted sanc-

[*] Not reproduced therein. The study is now available on the internet at: http://www.un.org/law/counsel/Fassbender_study.pdf.

[**] Not reproduced therein. The study is available on the internet at: http://www.watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf

[***] Doc. CAHDI (2006) 23.

tions containing no due process safeguards would be contrary to general human rights principles embodied in the ECHR. This would not mean that the sanctions are invalid, rather that the relevant ECHR States Parties incur State responsibility for the violation of the ECHR. The Cameron study further concludes that it would be possible to create an appropriate level of due process safeguards at the Security Council level while carrying out its function aimed at maintaining international peace and security (a copy of the Cameron study is attached for your information).*

c) On 21 September 2005, the Court of First Instance of the European Communities upheld European Union regulations implementing Security Council resolutions establishing sanctions regimes. *Inter alia,* the Court of First Instance held that the obligations of Member States under the Charter, including Security Council resolutions, prevail over their other obligations under, for example, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).** We have informed the Secretary-General about these decisions (a copy of the Note, dated 21 September 2005, is attached for your ease of reference).* In the meantime, the applicants have appealed these decisions and the cases are pending before the Court of Justice of the European Communities, as the court of last resort. The appeals decision can be expected during the second half of 2007.

6. These developments have created a certain momentum and may be perceived as putting pressure on the Security Council to further adapt the procedures in sanctions regimes to be more responsive to the minimum standards of fair and clear procedures. At the same time they have generated interest in the Fassbender study commissioned by OLA.

7. As to the substance of the Fassbender study, I should like to mention that we agree to a large extent with its findings and conclusions. The study contains several elements that we believe are important to the Security Council with respect to sanctions regimes. It sets forth the minimum elements required to ensure fair and clear procedures vis-à-vis individuals (see paragraph 8 below), and analyzes the state of the law with respect to whether such rights are binding on the Security Council. As a matter of strategy, my Office will, in consultation with DPA and OHCHR, prepare a paper for submission to the Policy Committee. On the basis of this paper, the Policy Committee could subsequently advise the Secretary-General on possible ways forward.

8. The minimum standards required to ensure fair and clear procedures include the following four basic elements:

a) The right of a person against whom measures have been taken by the Security Council to be informed of those measures, and to know the case against him or her, as soon as possible without thwarting their purpose;

b) The right of such a person to be heard within a reasonable time either by the Council or by an impartial, competent and effective review mechanism;

c) The right of such a person to counsel with respect to proceedings vis-à-vis the Security Council or the review mechanism;

d) The right of such a person to an effective remedy.

9. This paper, *inter alia,* would:

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* Not reproduced therein.

** *European Treaty Series,* No. 005.

a) Identify the minimum standards required under international law for fair and clear procedures in Security Council sanctions regimes;

b) Suggest practical steps as to how fair and clear procedures in sanctions regimes could be attained;

c) Provide the necessary background information in support of the proposal.

10. The paper would also suggest several options how the matter could be raised with the Security Council. The Policy Committee could recommend that the Secretary-General:

a) inform the President of the Security Council of his intentions by means of a letter;

b) informally approach the Security Council on the occasion of the upcoming Security Council retreat or in the framework of a Security Council luncheon;

c) share observations and suggestions with a specific Security Council sanctions committee, for example the 1267 Committee, or with the Working Group on General Issues on Sanctions of the Security Council;

d) address a Note along the lines described above (*paragraph 8*) to the Security Council without prior consultations.

11. Given the fact that the political mandate stems from General Assembly resolution 60/1 the Secretary-General should keep the President of the General Assembly informed.

12. If you are agreeable to the suggested course of action, we will proceed accordingly.

(*j*) Interoffice memorandum to the Acting Director, Administrative Support Division of the Department of Peacekeeping Operations, regarding the draft Memorandum of Understanding with the United Nations Development Programme (UNDP) on cost-sharing arrangements for the post of the Deputy Special Representative of the Secretary-General (Resident Coordinator/Humanitarian Coordinator/Resident Representative) (DSRSG (RC/HC/RR))

Memorandum of understanding between the United Nations Secretariat and UNDP relating to the cost-sharing arrangements for the post of DSRSG (RC/HC/RR)—Unprecedented case of "dual appointment" of a United Nations staff member—Distinction between designation and appointment—Terms and conditions of appointments defined in letter of appointment—Inappropriateness of having two distinct letters of appointment covering the same period of time—Legal options available to adequately reflect this exceptional situation in the Memorandum

22 May 2006

1. This refers to your memoranda of 29 March and 2 May 2006, responding to my memorandum of 22 November 2005, and requesting our review of a revised draft of the above-referenced Memorandum of Understanding (MOU) ("revised draft MOU"). Attached to your memorandum of 29 March 2006 are, *inter alia,* copies of comments of the Office of Human Resources Management (OHRM) on the matter set out in [Chief of Human Resources Policy Service]'s memoranda of 11 January and 7 March 2006, and

comments of the Office of Programme Planning, Budget and Accounts (OPPBA) set out in [Director of Accounts Division]'s memorandum of 28 February 2006. We have reviewed the revised draft MOU in the light of the clarifications provided by you, OHRM and OPPBA, and have the following further comments. Our comments are also indicated in the attached mark-up draft.*

"Appointment" of the Deputy Special Representative of the Secretary-General (Resident Coordinator/Humanitarian Coordinator/Resident Representative)

2. Regarding the issue of "appointment" versus "designation" of the Deputy Special Representative of the Secretary-General (Resident Coordinator/Humanitarian Coordinator/Resident Representative), (hereinafter the "DSRSG (RC/HC/RR)"), you have indicated, following consultation with OHRM, that a DSRSG (RC/HC/RR) would be "appointed" by the Secretary-General by a Letter of Appointment (LoA), while maintaining a contractual relationship with the United Nations Development Programme (UNDP). In this regard, OHRM has indicated that the alternative of "designation" would, in their view, "do justice neither to the functions involved nor to the special status, responsibilities and accountabilities of Deputy SRSGs in the mission" (para. 3 of OHRM's memorandum of 31 January 2006 refers). Therefore, paragraph 1.1 of the revised draft MOU retains the word "appoint" and paragraph 3.1 has been revised, reflecting the wording proposed by OHRM.

3. As OHRM has indicated in its memorandum of 11 January 2005 (para. 3 thereof), the proposed arrangement involving "dual appointment" of a United Nations staff member seems unprecedented. While we are aware of the unique circumstances relating to the "appointment" of a DSRSG (RC/HC/RR), we consider that the arrangement, whereby the staff member concerned would be governed by two separate LoAs covering the same period of service for the Organization, would be inappropriate from a legal point of view. In this respect, the two LoAs issued to the DSRSG (RC/HC/RR) could be under different Series of the Staff Rules, e.g. a 100 Series appointment with UNDP and an Appointment of Limited Duration (ALD) under the 300 Series of the Staff Rules as the DSRSG. Since the terms and conditions of 100 and 300 Series appointments are different, the DSRSG (RC/HC/RR) holding such LoAs could conceivably be subject to different terms and conditions of appointment, which obviously should be avoided.

4. In this regard, we understand from the revised draft MOU, including Annex C thereto, that the terms of conditions of the appointment of the DSRSG (RC/HC/RR), including the salaries, benefits and allowances, would continue to be governed by the terms of his/her appointment with UNDP. It thus appears to us that the primary purpose of the LoA issued by the Secretary-General would be to assign the staff member concerned to discharge the functions of the DSRSG, in addition to carrying out his/her functions as the RC/HC/RR. If this is the case, we are of the view that a letter of "designation" issued by the Secretary-Genera] to the staff member would achieve the same objective. Alternatively, the LoA issued by UNDP could be amended to stipulate that the staff member shall perform the functions of the DSRSG, in accordance with the provisions of the MOU, and a copy of the MOU could be attached to the revised LoA. This would appear to constitute a reasonable solution.

* Not reproduced therein.

5. In view of the above, we wish to reiterate our suggestion made in our 22 November 2005 memorandum that the DSRSG (RC/HC/RR) should be "designated" by the Secretary-General, rather than be "appointed" by him. However, if "appointment" is deemed absolutely necessary by the Department of Peacekeeping Operations (DPKO) and OHRM, we recommend that the proposed "dual appointment" be expressly approved by the Secretary-General as an exception, in order to avoid creating a precedent for "dual appointment" of United Nations staff members. We would also recommend that the arrangement be reported to the General Assembly, pointing out the exceptional circumstances for the "appointment" of the DSRSG (RC/HC/RR).

6. In view of the foregoing, we have placed the references to the word "appoint", in relevant parts, within square brackets and included the word "designate", also in square brackets, next to it, and have placed paragraph 3.2 in square brackets. In this regard, "designation" of the DSRSG (RC/HC/RR) seems to affect the basis for the cost-sharing arrangement which, under the revised draft MOU, is the 50 percent of the amount normally payable at the level of appointment under a United Nations Appointment of Limited Duration. We would therefore recommend that, depending on the decision taken concerning "appointment" or "designation" of the DSRSG (RC/HC/RR), any necessary revisions be made to the provisions relating the cost-sharing arrangements, including the provisions in Annex C. Please note that in the mark-up draft, we have not made any revisions to those provisions.

7. If it is decided that the DSRSG (RC/HC/RR) would be "appointed" by the Secretary-General, we would recommend that the following sentence be included in paragraph 3.1 of the MOU, as the new second sentence:

> "Unless otherwise expressly stated in this Memorandum of Understanding and the Letter of Appointment issued by the Secretary-General, the terms and conditions of the appointment, including salaries, benefits and allowances, of the Deputy Special Representative of the Secretary-General (Resident Coordinator/Humanitarian Coordinator/Resident Representative) shall continue to be governed by the terms of his or her contractual relationship with UNDP."

We would also recommend that a similar provision be included in the LoA issued by the Secretary-General, in addition to the provisions recommended by OHRM in paragraphs 9 and 10 of its memorandum of 11 January 2006 (which you have indicated would be included):

> "Unless otherwise expressly stated in this Letter of Appointment and the Memorandum of Understanding of [date] between the United Nations and UNDP, which is attached hereto, the terms and conditions of the appointment of the staff member, including salaries, benefits and allowances, shall continue to be governed by the terms of the staff member's contractual relationship with UNDP."

In addition, we would recommend that the following provision, reflecting the provision recommended by OHRM in paragraph 10 of its 11 January 2006 memorandum, be included in paragraph 3.2, as the new second sentence:

> "The Letter of Appointment issued by the Secretary-General shall indicate that the appointment is subject to the provisions of this Memorandum of Understanding, which shall be attached to the Letter of Appointment."

Reporting lines of the DSRSG (RC/HC/RR)

8. Regarding the reporting lines of the DSRSG (RC/HC/RR), you have indicated that "primary" and "secondary" reporting lines of the DSRSG (RC/HC/RR) are addressed in the Secretary-General's Note of Guidance on Integrated Missions, which is referred to in paragraph 2.1 of the revised draft MOU, but not attached thereto. We recommend that paragraphs 17 to 22 of the Notes of Guidance concerning the "Role, responsibility and authority of the DSRSG/RC/HC" (or the Notes of Guidance in their entirety, if appropriate) be attached to the MOU as Annex A, and the numbering of the other Annexes be adjusted. In this regard, the Notes of Guidance only refer to the DSRSG (RC/HC) but do not refer to his or her functions as the Resident Representative. However, based on paragraph 8 of your memorandum of 29 March 2006, we understand that the Resident Representative is also be covered by the references to the DSRSG (RC/HC) in the Notes of Guidance. This should be clarified.

(*k*) Interoffice memorandum to the Secretary, Commission on Human Rights, regarding the implications of Article 12 of the United Nations Charter and the Human Rights Council

Scope of Article 12 of the United Nations Charter—Article 12 applies to subsidiary bodies of the General Assembly—Human Rights Council entitled to convene a special session to discuss a matter considered by the Security Council—Difference in the title of the item on the agenda of the two bodies—Human Rights Council entitled to make recommendations regarding aspects of the situation, within the scope of its mandate, which are not in connection with the maintenance of international peace and security

6 July 2006

1. I refer to the request by the President of the Human Rights Council during the Bureau meeting of 30 June 2006 about the legal implications of Article 12 of the Charter vis-à-vis the decision of the Human Rights Council to convene a special session to discuss a matter that was also under consideration by the Security Council.

2. We note that on 30 June, [State] supported by 21 other members of the Human Rights Council, submitted a request to the President calling for a special session of the Human Rights Council to discuss the "latest escalation of the situation in the Palestinian and other Occupied Arab Territories." The request met the requirements set out in paragraph 10 of General Assembly resolution 60/251, which provides that the Council "shall be able to hold special sessions, when needed, at the request of a member of the Council with the support of one third of the membership of the Council." The President of the Human Rights Council discussed the options for holding the special session in a Bureau meeting right after closing the regular session and decided to hold it on Thursday, 6 July 2006.

3. We also note that, at the requests of [State], the Security Council held a meeting on 30 June 2006 to consider the item entitled "The situation in the Middle East, including the Palestinian question." At the end of the meeting, the President of the Security Council stated that, with the list of speakers exhausted, the Council had "concluded the present stage of its consideration of the item on its agenda."

4. The question put before us is whether Article 12 of the Charter applies to subsidiary organs of the General Assembly and, if so, whether Article 12 provides for any obstacle for the Human Rights Council to meet, discuss and make recommendations on the issue raised by [State].

5. Article 12, paragraph 1, of the Charter provides as follows: "While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests."

6. Consistent with the previous position of this Office on the matter, we consider that the above provision of the Charter applies to subsidiary organs of the General Assembly, including the Human Rights Council.

7. Furthermore, in accordance with the practice of the Assembly, Article 12 does not prevent the General Assembly, and its subsidiary organs, from generally considering, discussing and making recommendations on items which are on the agenda of the Security Council, in particular where the titles of the items before the Council and the Assembly are not identical.

8. It is to be noted that the General Assembly has interpreted the words "is exercising" in Article 12 in a restricted fashion, as meaning "is exercising at this moment" and, consequently, it had made recommendations on matters which the Security Council was also considering. Examples of such matters are the situations in Congo (1960–61), Angola (1961–62), the apartheid question (1960–63), territories under the Portuguese administration (1962–63) or the question of Southern Rhodesia (1962–63).

9. On the question at hand, we note that the Security Council has concluded the present stage of its consideration of item on its agenda. In addition, the title of the item in the Security Council is not identical to that of the Human Rights Council.

10. In light of the foregoing, in our view the Security Council is not exercising its functions under the Charter "at this moment" on this particular issue. Therefore, Article 12 of the Charter should not be considered as an obstacle for the Human Rights Council to meet in a special session to consider recommendations to the General Assembly on the "'latest escalation of the situation in the Palestinian and other Occupied Arab Territories", as proposed by [State].

11. Furthermore, we would point out that the International Court of Justice, in paragraph 27 of its advisory opinion of 9 July 2004 on the "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory", noted that there had been "an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter" (see, for example, recently, the cases of Bosnia and Herzegovina and Somalia) and that "while the Security Council has tended to focus on the aspects of such matters related to international peace and security, the General Assembly has taken a broader view, considering also their humanitarian, social and economic aspects."

12. Accordingly, we believe that, even if the Security Council was "exercising at this moment" its functions under the Charter on the matter, the Human Rights Council should also be able to make recommendations regarding those aspects of the situation which do not have any connection with the maintenance of international peace and security, and which are within the scope of its mandate.

13. We would be grateful if you could convey our opinion to the President of the Human Rights Council.

(*1*) Note to the Director, Accounts Division of the Office of Programme Planning, Budget and Accounts, regarding the performance bond provisions in United Nations contracts

United Nations contracts with vendors—United Nations entitled to request performance bonds from vendors—Failure to exercise such a right not to be construed as a waiver of this right—Right to request performance bond can be exercised at any time—United Nations always entitled to withhold payment in case vendors fail to provide the requested performance bonds

28 July 2006

I refer to your e-mail of 27 July 2006, by which you requested assistance in interpreting performance bond provisions from various contracts. The provisions you cited in your e-mail message appear to provide that the Organization may withhold payments from vendors' invoices in cases where the vendors have not provided performance bonds to the United Nations within the time limits specified in the contracts at issue.

As in any contract, the United Nations' exercising its rights under its contracts should be effected with care in order to minimize exposure to claims from contractors.

We note that the failure by the United Nations to exercise its right to a performance bond may be construed as a waiver of its right to demand such performance bond. In this regard, our model contracts contain provisions stating that failure by the United Nations to exercise any rights available to it shall not be construed as a waiver by the United Nations of any such right or any remedy associated therewith, and shall not relieve the Contractor of any of its obligations under the contract. If such a provision is included in the contracts at issue, then the United Nations could exercise, at a late stage, its right to demand that the vendors submit a performance bond in accordance with the contractual stipulations. Should the vendors fail to comply with the United Nations' demand, the United Nations could begin withholding payments owed to the vendor pursuant to the contractual stipulations.

On the other hand, if the contracts at issue do not contain provisions regarding the non-waiver of remedies, the vendors may object to the United Nation's efforts to enforce the performance bond provisions now, after much time has elapsed, without a prior demand for the production of the performance bonds. Even if the vendors object to the United Nations' belated demand, the contracts do require the vendors to provide the United Nations with a performance bond. Accordingly, the Payroll Section should remain firm in continuing to seek to exercise the United Nations' right to either obtain a performance bond in accordance with the requirements of the contracts or, failing the vendors' providing such a performance bond, withholding monies in accordance with the contract provisions you have cited.

Therefore, the Payroll Section should in any case notify the vendors in writing that the United Nations demands the provision of the required performance bonds pursuant to the applicable provisions of the contracts, within a time period to be determined by the Payroll Section. Such notices to the vendors should further make clear that the vendors' failure to

provide the required performance bonds within such timeframe will result in the United Nations' exercising its rights in accordance with the contracts to withhold payments from the contractors' invoices up to the value of the performance bonds in question.

(m) Interoffice memorandum to the Executive Secretary, International Civil Service Commission (ICSC), regarding conditions for candidate organizations to join ICSC

United Nations common system—International Civil Service Commission aiming to develop a single unified international civil service—Impossibility to adhere only selectively to the common system—Obligation to accept ICSC statute in its entirety as well as its decisions and recommendations concerning allowances and benefits—Possibility of joining the common system without joining the United Nations Joint Staff Pension Fund

16 August 2006

1. I refer to your memorandum of 3 August 2006, seeking advice of the Office of Legal Affairs (OLA) on the conditions that a candidate organization must fulfil in order to join the United Nations common system and be invited to participate in the work of the International Civil Service Commission (ICSC). I understand that questions were recently addressed to the ICSC by two candidate organizations, [International Organizations A and B] I further understand that you seek our advice only on the questions raised by [International Organization A], and not by [International Organization B], since you indicate that [International Organization B] is preparing its candidacy "in a straightforward manner." You have stated that [International Organization A] apparently believes that it can join the United Nations common system, while selectively accepting the decisions of the ICSC and recommendations concerning certain allowances and benefits that have been endorsed by the General Assembly, and without becoming a member organization in the United Nations Joint Staff Pension Fund (UNJSPF). Please find herewith our comments.

2. The Statute of the ICSC, approved by the General Assembly by its resolution 3357 (XXIX) of 18 December 1974, states in Article 1, paragraph 2, the following:

> "The Commission shall perform its functions in respect of the United Nations and of those specialized agencies and other international organizations, which participate in the United Nations common system and which accept the present statute . . ."

Therefore, if [International Organization A] wishes to join the common system, it would have to accept the Statute of the ICSC in its entirety, including the provisions therein concerning the functions and powers of the ICSC set out in Chapter III of the Statute. We understand that all other organizations, participating in the common system accept the ICSC Statute in its entirety.

3. Moreover, Article 9 of the Statute of the ICSC provides that:

> "In the exercise of its functions, the Commission shall be guided by the principle set out in the agreements between the United Nations and the other organizations, which aims at the development of a single unified international civil service through the application of common personnel standards, methods and arrangements."

Pursuant to Article 9, we understand that an agreement is to be concluded between the United Nations and each organization participating in the United Nations common system. We note that the Annex to the Statute and Rules of Procedure of the ICSC set out relevant provisions of the agreements concluded by the United Nations and other participating organizations, concerning the coordination in personnel matters. Consistent with Article 9 of the Statute, the provisions contained in the Annex reflect the agreement of the participating organizations to cooperate to develop a single unified international civil service through the application of common personnel standards, methods and arrangements. Thus, having the [International Organization A] only selectively accept the Statute of the ICSC, including Article 9, would not seem appropriate. In view of the fact that the purpose of the ICSC is to develop a single unified international civil service, we consider that selective acceptance of the ICSC Statute would defeat that purpose.

4. With respect to the second issue raised in your memorandum on whether the [International Organization A] may join the United Nations common system without becoming a member organization of the UNJSPF, as far as we can determine from the ICSC Statute, being a member organization in the UNJSPF is not a requirement to join the United Nations common system. We have noted, in fact, that not every organization that is a participating organization in the common system is a member of the UNJSPF, as illustrated by the case of the Universal Postal Union (UPU). (See Table 1, in the Statute and Rules of Procedure of the ICSC). We also note that Article 11 of the ICSC Statute provides that the Commission shall establish:

> "(a) The methods by which the principles for determining conditions of service should be applied;
>
> (b) Rates of allowances and benefits, *other than pensions* and those referred to in article 10 (c) [dealing with allowances and benefits of staff determined by the General Assembly], the conditions of entitlement thereto and standards of travel; (emphasis added) . . ."

According to Article 11, establishing pension rates is not a function of the ICSC.

5. Therefore, while we consider that full acceptance of the Statute of the ICSC is required by any organization that wishes to join the United Nations common system, membership in the UNJSPF does not appear to be a prerequisite to joining the common system.

(*n*) Note to the Assistant Secretary-General for Policy Coordination and Strategic Planning, Executive Office of the Secretary-General, regarding the name of the United Nations Office on Drugs and Crime (UNODC)

Mandate of UNODC as established by the Secretary-General pursuant to General Assembly resolutions 45/179 and 46/152—UNODC mandated to implement two programmes: drug control and crime prevention—Inclusion of functions relating to terrorism prevention in the crime prevention programme—UNODC's name viewed as adequately reflecting its mandate

19 October 2006

1. I refer to your electronic mail message of 17 October 2006, seeking my urgent advice concerning the proposal to add the word "Terrorism" to the name of the United Nations Office on Drugs and Crime (UNODC). Please see below for my comments on the proposal.

2. Secretary-General's bulletin ST/SGB/2004/6 of 15 March 2004,* entitled "Organization of the United Nations Office on Drugs and Crime" states that, prior to 1 October 2002, the United Nations Office on Drugs and Crime (UNODC) was called "Office for Drug Control and Crime Prevention" (ODCCP) (see footnote 1 to ST/SGB/2004/6 . . .). (It is further stated in footnote 1 that ODCCP was established in accordance with the Secretary-General's reform programme described in part two, section V, of document A/51/950, dated 14 July 1997).

3. Section 2.1 of ST/SGB/2004/6 provides that UNODC has been:

> "established to implement the Organization's drug programme [footnote 2 hereto is omitted; see below] and crime programme [footnote 3 hereto is omitted; see below] in an integrated manner, addressing the interrelated issues of drug control, crime prevention and *international terrorism* in the context of sustainable development and human security". (Emphasis added).

With regard to the Organization's drug programme, footnote 3 to section 2.1 of ST/SGB/2004/6 provides as follows:

> "The United Nations International Drug Control Programme was established pursuant to General Assembly resolution 45/179 of 21 December 1990 as the body responsible for coordinated international action in the field of drug abuse control. The authority for the Fund of the Programme was conferred on the Executive Director by the General Assembly in its resolution 46/185 C of 20 December 1991."

With regard to the Organization's crime programme, footnote 4 to section 2.1 of ST/SGB/2004/6 provides as follows:

> "The Crime Prevention and Criminal Justice Programme was established by the General Assembly in its resolution 46/152 of 18 December 1991. Since 1997, the Programme has been implemented by the Centre for International Crime Prevention, which was established in accordance with the Secretary-General's reform programme described in part two, section V, of document A/51/950, dated 14 July 1997."

In view of the foregoing provisions in ST/SGB/2004/6, it appears that the name, United Nations Office on Drugs and Crime (as well as its predecessor name ODCCP), is intended to reflect the fact that UNODC implements the above-referenced two programmes established by the General Assembly, i.e. the United Nations International Drug Control Programme established by General Assembly resolution 45/179, and the Crime Prevention and Criminal Justice Programme established by General Assembly resolution 46/152.

4. UNODC's functions relating to terrorism prevention are implemented through UNODC's crime programme. In this regard, section 2.3 of ST/SGB/2004/6 provides as follows:

> "Through its crime programme, the United Nations Office on Drugs and Crime:
>
> "(a) Is responsible for carrying out activities in the field of international crime prevention and control; strengthening regional and international cooperation in prevent-

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* For information on Secretary-General's bulletins, see note in section 1 (c), para. 3, above.

ing and combating transnational crime, in particular organized and economic crime, money-laundering, illicit trafficking in women and children, financial crimes and *terrorism in all its forms*: [. . .];

"(b) Serves as the repository of technical expertise in the field of crime and *terrorism prevention* and criminal justice for the Secretariat of the United Nations, including the regional commissions, and other United Nations organs [. . .]" (Emphasis added).

5. The Secretary-General has certain discretionary authority concerning the naming of the organizational units within the Secretariat, except for the names of units established by the General Assembly, e.g., OIOS. Although UNODC in and of itself was not established by the General Assembly, its mandate is to implement the Organization's drug programme and crime programme established by the General Assembly (see paragraph 3 above). In my view, the current name of the Office, United Nations Office on Drugs and Crime, accurately reflects those two mandates of UNODC. Moreover, UNODC's functions relating to terrorism prevention fall under UNODC's crime programme (see paragraph 4 above). In the light of the above, the need to add the word "Terrorism" to the name of UNODC does not seem to be obvious. If, however, the addition of the word "Terrorism" is intended to go beyond the activities already carried out by UNODC, this could be perceived as a change of the mandate or programmatic activities of UNODC for which the prior approval or endorsement of the General Assembly would be required.

3. Other issues relating to peacekeeping operations

(*a*) Note to the Under-Secretary-General for Political Affairs regarding guidance on activities of the Special Envoy in [Rebel Group]-affected areas

Negotiation of conflict resolution—Implementation of the mandate of the United Nations Representative in the context of interaction with rebel leaders—Contact with rebel leaders indicted by the International Criminal Court (ICC) should be avoided—Preferable to interact with non-indicted rebel leaders—National amnesties for the crime of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law are not recognized by the United Nations

31 August 2006

1. I refer to your note of 24 August 2006, by which you sought our views on how Special Envoy designate [Name] in carrying out his mandate might interact with members of the [Rebel Group]-who have been indicted by the International Criminal Court (ICC). Further, you seek guidance on the implications of an amnesty offered by [Country] President to the [Rebel Group]-indictees in relation to the mandate of the Special Envoy.

2. We recall that on several occasions in the past, this Office has advised that United Nations programmes, funds and offices carrying out humanitarian or development mandates in [Rebel Group]-affected areas, should avoid any direct contacts with indicted [Rebel Group]-leaders unless such contacts are strictly necessary to carry out their mandated activities, and not beyond.

3. In the present case, the Terms of Reference of the Special Envoy entrusts him with a mandate to:

(*i*) promote, assist and facilitate the national dialogue and reconciliation in [Country], including, as appropriate, transitional justice initiative, (3 (b));

(*ii*) promote, assist and facilitate, as required, peaceful approaches to ending the hostilities with the [Rebel Group], (3 (c)); and

(*iii*) promote and complement the peacebuilding, development and ex-combatant re-integration initiatives required to sustain peace and stability in [part of the Country], (3 (d)).

4. For the Special Envoy to carry out his mandated activities—whether in the pursuit of the Emergency Plan for Humanitarian Interventions and the future National Peace, Recovery and Development Plan, or of the Secretary-General's good offices—direct contacts with the five indicated leaders may be required. They should, however, be limited to what is strictly required for carrying out his mandate. The presence of the Special Envoy in any ceremonial or similar occasions should be avoided. We should also add that when contacts with the [Rebel Group] are necessary, an attempt should be made to interact with *non-indicted [Rebel Group] leaders,* if at all possible.

5. We note that the "Agreement on Cessation of Hostilities between the Government of the Republic of [Country] and [Rebel Group]", signed on [date] 2006 in [City, Country 2], does not grant amnesty to [Rebel Group] members. The [country] Amnesty Act 2000, however, provides for a sweeping amnesty which is unlimited in time and unqualified in scope. Paragraph 3 (2) of the Amnesty Act provides that,

> "A person referred to under subsection (1) shall not be prosecuted or subjected to any form of punishment for the participation in the war or rebellion *for any crime* committed in the cause of the war or armed rebellion" (emphasis added).

6. Amnesty is thus, in principle, applicable to any person, including [Rebel Group] leaders indicted by the ICC, and to crimes which were, or are being committed with no limitation in time. As a national measure, any amnesty granted under the [Country] Amnesty Act, has no effect on the ongoing investigations against the five leaders, the validity of ICC arrest warrants, the power of the ICC to request the surrender of indicted individuals, or the international obligation of [Country] to surrender them. While the Special Envoy may, when absolutely necessary, interact with the indicted leaders for the purpose of carrying out his mandate, he should avoid any action which would obstruct their eventual surrender to the ICC.

7. We should note, in this connection, that in the event that the Special Envoy is called upon to conduct, facilitate or otherwise participate in negotiations of a permanent cease-fire or a peace agreement, especially if the Agreement includes an amnesty clause, the following should be borne in mind. It has been the long-standing position of the United Nations not to recognize, let alone condone any amnesties for the crime of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. We wish to recall that the 1999 "Guidelines for United Nations representatives on certain aspects of negotiations for conflict resolution" (copy attached) contain clear instructions for United Nations representatives in the field. They provide, in particular, that the " United Nations Representative should seek guidance from Headquarters should any of the following issues arise during the negotiations [. . .] demands for amnesty may be made on behalf of different elements [. . .]." At the end of this paragraph, the "guide-

lines" set forth that "the United Nations cannot condone amnesties regarding war crimes, crimes against humanity and genocide [. . .]."

8. This Office stands ready to provide further advice on any specific question that may arise in the course of the Special Envoy's mandate with regard to any of these issues.

Annex

Introduction to the guidelines for United Nations representatives in certain aspects of negotiations for conflict resolution

In recent years, since the United Nations has become more deeply involved in efforts to resolve internal conflicts, United Nations representatives have had to grapple with the urgency of stopping the fighting, on the one hand, and the need to address punishable human rights violations, on the other, particularly when the temptation to enact hasty amnesties arises as negotiations draw to a close. This can create dilemmas for these representatives who may find themselves navigating with apparently conflicting mandates, with deep roots in the United Nations Charter and the Universal Declaration of Human Rights[*] and other sources of international law. In order to assist them in discharging their task, the attached confidential guidelines have been prepared, having in mind the overarching goal that solutions to conflicts should be durable. They are meant as a useful practical tool for United Nations negotiators that will also serve the purpose of ensuring the consistency and quality of agreements reached in the area of human rights, under the auspices of the United Nations.

The guidelines were prepared after extensive consultations with experienced practitioners in the mediation of conflicts under the auspices of the United Nations, of other multilateral organizations, member states and non-governmental organizations on one side, and human rights experts and scholars of international law on the other. They were asked to consider, with an emphasis on the practical problems faced by those who work to secure transitions from a violent past, such questions as: Is it a mediator's duty to bring human rights considerations to the attention of parties to a negotiation, and if so which? If parties to a negotiation seem to be headed towards an arrangement that would involve reciprocal impunity, ignoring internationally accepted human rights standards, what should the mediator do? and what is the mediator's responsibility with respect to addressing the past?

Finding answers to these questions will never be easy; it is not the intention of the guidelines to provide hard and fast rules for universal application. Rather, it is hoped that the existence of the guidelines, which are accompanied by a background paper (attached as an annex),[**] will help alert representatives of the United Nations engaged in negotiation processes to some of the challenges they may encounter regarding human rights, including amnesties and the question of accountability and how to address the past, and encourage them to seek guidance and support from United Nations Headquarters. It goes without saying that the guidelines should at all times remain confidential to the United Nations representative; the timing with which he/she chooses to apply them within the specific

[*] General Assembly resolution 217 (III) of 10 December 1948.

[**] Not reproduced therein.

process in which he/she is engaged would, as the final point of the guidelines makes clear, be entirely a question of his/her judgement and discretion.

Guidelines for United Nations representatives on certain aspects of negotiations for conflict resolution

1. Peace negotiations with the mediation or good offices of a Representative of the Secretary-General are deemed as taking place under the auspices of the United Nations. The Secretary-General's Representative must therefore be mindful that, as an agent of the Organization, he/she is acting within a framework of established purposes, principles and rules.

2. The purposes and principles of the United Nations Charter must be promoted and upheld. The United Nations has a record and credibility to defend and cannot condone agreements arrived at through negotiations that would violate Charter principles. Under the Charter, disputes should be settled in conformity with the principles of justice and international law.

3. Parties must be led to understand that negotiations that are conducted with an awareness of these concerns will contribute to forming the basis for a sustainable peace. The United Nations will thus be in a better position to marshal the support of the System as a whole, regional and other intergovernmental organizations, as well as non-governmental organizations for implementation of the agreements.

4. In addition, agreements signed under the auspices of the Secretary-General must withstand the scrutiny of a variety of constituencies; the Secretary-General's representatives must therefore make every effort to make them politically defensible.

5. For a peace agreement to be durable, the parties, with the assistance of the United Nations Representative, should look ahead to the implementation phase at an early stage of the negotiations. The negotiators should be alerted to the need to address issues of capacity and/or institution-building which, particularly when undertaken in the areas of governance, public security and the judicial system, will contribute to prevent the recurrence of conflict.

6. In view of the importance of issues of governance, legal, electoral and socio-economic reform to the sustainability of peace, the United Nations Representative should alert the parties to the resources available within the System and elsewhere and be prepared to engage the various United Nations agencies and programmes in the provision of support to his/her efforts.

7. Negotiations often take place in a context of human rights violations and violations of the laws of armed conflict. Early commitments to respect human rights and humanitarian principles should be encouraged. Measures to be considered in this regard could include international access, observation and verification, which may mitigate or deter violations and contribute to the building of confidence in the peace process as a whole.

8. It should be borne in mind that human rights violations by state organs and acts committed by rebel groups do not fall in the same category under law, given the primary duty of the state to guarantee respect for human rights. Violations by state organs and those by rebel groups may therefore need to be addressed in different ways. This is without prejudice to individual criminal responsibility for violations of human rights and inter-

national humanitarian law for which there is no distinction to be made as between the category of perpetrators.

9. In some circumstances the United Nations Representative may need to acquaint the parties to a conflict with the existence of a body of international law and practice regarding these issues, including those related to current human rights and humanitarian obligations, accountability and amnesties.

10. While every effort should be made to address these questions satisfactorily in the agreements, in the event that this is not possible the parties should be urged to include language that will allow for the possibility of further elaboration of any outstanding issues.

11. In the event that the negotiations are proceeding towards an agreement that may be seriously flawed from the perspective of the United Nations, the United Nations Representative should, after obtaining political and legal advice from United Nations Headquarters, in an appropriate way and at a time of his/her judgement, draw the attention of the parties to the consequences for the sustainability of the agreement and, having regard to international law and opinion, for United Nations engagement and donor assistance. He/she may even need to warn the parties that, if they cross certain lines, the United Nations might be put in a position where it would have to take a stance, on the public record, concerning aspects of the agreement.

12. The United Nations Representative should seek guidance from Headquarters should any of the following issues arise during the negotiations, in order to furnish the parties with the necessary advice and assistance:

> Allegations of serious human rights violations or violations of international humanitarian law recently committed or currently being committed that might require immediate investigation;
>
> Requests for investigation of allegations of serious violations of human rights or international humanitarian law committed in the past. Such demands may raise issues of prosecution of those allegedly responsible for such acts or for a comprehensive investigation into a systematic pattern of abuses that may lead to the establishment of mechanisms such as "Truth Commissions";
>
> Demands for amnesty may be made on behalf of different elements. It may be necessary and proper for immunity from prosecution to be granted to members of the armed opposition seeking reintegration into society as part of a national reconciliation process. Government negotiators may seek endorsement of self-amnesty proposals; however, the United Nations cannot condone amnesties regarding war crimes, crimes against humanity and genocide or foster those that violate relevant treaty obligations of the parties in this field.

13. United Nations representatives should keep in mind opportunities to encourage the parties and assist them in incorporating into agreements provisions and arrangements for the promotion and protection of human rights, inspired by international and regional standards.

14. It is understood that the preceding guidelines are drafted in general terms so as to cover a wide range of conflicts and mediations. The timing and manner in which the United Nations Representative may wish to raise these issues would, of course, be a matter for his/her judgement and discretion.

(*b*) Interoffice memorandum relating to the United Nations position on peace and justice in post-conflict societies

Recognition of amnesties granted at national level and in peace agreements—no recognition of amnesties for crimes of genocide, crimes against humanity, war crimes and serious violations of international humanitarian law—Relationship between the United Nations and the International Criminal Court—Cooperation between the two Organizations limited by mandates and other rules—No obligation for the United Nations to support policies and strategic decisions of ICC

25 September 2006

With the growing involvement of the United Nations in post-conflict societies—both in facilitating the negotiation of peace agreements and in establishing judicial and non-judicial accountability mechanisms—the Organization has frequently been called upon to express its position on the relationship between peace and justice, on the validity and lawful contours of amnesty, on the relationship between the United Nations and the International Criminal Court (ICC), and on the interaction between United Nations representatives and persons indicted by international and United Nations-based tribunals, who continue to hold positions of authority in their respective countries. This Note reflects the long-established policy and practice of the Organization in all of these respects. While general in character, it also deals with the situation in [Country] where peace negotiations are conducted with [Rebel Group] leaders against whom ICC indictments for war crimes and crimes against humanity have been issued. This Note does not obviate the need to consult with the relevant United Nations Departments, including Office of Legal Affairs, on the applicability of these principles in the specificities of any given case.

1. The relationship between peace and justice: there is no sustainable peace without justice—although they can be sequenced in time

– "Justice and peace must be regarded as complimentary requirements. There can be no lasting peace without justice. The problem is not one of choosing between peace and justice, but of the best way to interlink one with the other, in the light of specific circumstances, without ever sacrificing the duty of justice." (22 June 2006, the Legal Counsel in the Security Council, S/PV.5474).

– "We should know that there cannot be real peace without justice, yet the relentless pursuit of justice may sometimes be an obstacle to peace. If we insist, at all times and in all places, on punishing those who are guilty of extreme violations of human rights, it may be difficult or even impossible to stop the bloodshed and save innocent civilians. If we always and everywhere insist on uncompromising standards of justice, a delicate peace may not survive. But equally, if we ignore the demands of justice simply to secure agreement, the foundations of that agreement will be fragile, and we will set bad precedents." (24 September 2003, the Secretary-General in the Security Council, S/PV.4833).

– "There are no easy answers to such moral, legal and philosophical dilemmas. At times, we may need to accept something less than full or perfect justice or to devise intermediate solutions such as truth and reconciliation commissions. We may need to put off the day when the guilty are brought to trial. At other times, we may need to accept, in the short-term, a degree of risk to the peace in the hope that in the long-term peace will be

more securely guaranteed." (24 September 2003, the Secretary-General in the Security Council, S/PV.4833).

2. The lawful contours of amnesty and the non-recognition of amnesty for genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law

– The United Nations does not recognize any amnesty for genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. This principle, which reflects a long-standing position and practice, applies to peace agreements negotiated or facilitated by the United Nations, or otherwise conducted under its auspices. In the event that such a peace agreement nevertheless grants amnesty for such crimes, the United Nations representative, when witnessing the agreement on behalf of the United Nations, shall affix a declaration next to his or her signature, stating that "the United Nations does not recognize amnesty for genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law."

– Where amnesty has already been granted in any given country and the United Nations is subsequently involved in the establishment of a judicial accountability mechanism in that country, the United Nations will ensure that an amnesty thus granted will not be a bar to prosecution before the United Nations-based tribunal.

– The 1999 "Guidelines for United Nations representatives on certain aspects of negotiations for conflict resolution" contain instructions for United Nations representatives in the field with respect to the negotiation of peace agreements. They provide, in particular, that the "United Nations Representative should seek guidance from Headquarters should any of the following issues arise during the negotiations (. . .) demands for amnesty may be made on behalf of different elements (. . .)."

3. United Nations-ICC relationship—While the ICC is independent of the United Nations, the United Nations supports the Court and avoids any action likely to undermine its authority

– The ICC is an international judicial institution independent of the United Nations. The United Nations, however, played a major role in assisting States in creating this institution and continues to support it.

– The legal basis for cooperation with and assistance to the ICC is the "'Relationship Agreement between the United Nations and the International Criminal Court", which entered into force on 4 October 2004.[*] Under the Agreement, the United Nations and the ICC will cooperate closely, whenever appropriate, with a view to facilitating the effective discharge of their respective responsibilities and to consulting each other on matters of mutual interest. This cooperation, however, is not unlimited, but has several qualifiers. The United Nations can only cooperate within the limits of existing mandates, staff rules, procurement rules, confidentiality rules, security imperatives and privileges and immunities related rules.

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[*] United Nations, *Treaty Series,* vol. 2283, p. 195.

– While the Relationship Agreement does not oblige the United Nations to support any policy or strategy decision of the ICC. The United Nations should, if possible, avoid any action that would undermine or counteract key ICC policies and strategies.

– Under Article 14 of the Rome Statute, a State may refer a situation to the competence of the ICC. Once its competence is triggered, however, the requesting State may no longer influence the course of justice. Under Article 16 of the Rome Statute, only the Security Council has the power to defer or put on hold investigations or prosecutions for a period of 12 months.

4. Interaction between United Nations representatives and persons indicted by international criminal jurisdictions holding positions of authority in their respective countries

– Contacts between United Nations representatives and persons indicted by international criminal jurisdictions holding positions of authority in their respective countries should be limited to what is strictly required for carrying out United Nations mandated activities. The presence of United Nations representatives in any ceremonial or similar occasion with such individuals should be avoided. When contacts are absolutely necessary, an attempt should be made to interact with non-indicted individuals of the same group or party.

5. Specificity of the situation in [Country]

[. . .]

(*c*) Note to the Secretary-General relating to the meetings with the Mission of [Country] on arrests, detention and expulsion of United Nations officials

28 September 2006

On 26 September, [the Legal Counsel] invited the Permanent Representative of [Country], Ambassador [Name 1], to meet and discuss the legal obligations of [Country] vis-à-vis the Organization, including [the United Nations Mission], and its officials. Representatives of the Department of Peacekeeping Operations, the Department of Political Affairs and the Department of Safety and Security also attended the meeting. [The Legal Counsel] handed over to him the attached *Aide-Memoire*.

We expressed serious concern about the recent decision of the Government to declare *persona non grata* five United Nations officials and the pattern of arrest and detention of United Nations officials, especially the case of an international United Nations Volunteer. [The Legal Counsel] stressed that such actions were contrary to international law. He also reiterated the need for the United Nations to have access to detained United Nations officials and our willingness to cooperate and investigate any allegation of wrongdoings, for which the cooperation of the Government would be indispensable.

During the discussion, it became apparent that the Government was blaming the United Nations for the failure to implement the binding international arbitral award on the border demarcation between [Country] and [Country 2]. [The Legal Counsel] made it clear that the lack of compliance with the arbitral award on the border demarcation could

not excuse [Country] for not observing its obligations under international law vis-à-vis the United Nations and its staff.

Yesterday, [the Legal Counsel] received the Director General for the Department of Americas and International Organizations of the [Country] Ministry for Foreign Affairs, Ambassador [Name 2], at his request, who was accompanied by Ambassador [Name 1]. [The Legal Counsel] reiterated the message delivered the day before. Ambassador [Name 2] denied any political linkage between the decisions to declare United Nations officials *persona non grata,* arrest or detain them, and the unresolved border demarcation. He insisted, however, on the right of his Government to arrest, detain and/or declare any United Nations official *persona non grata,* if they were found involved in activities posing a threat to national security. He also blamed the United Nations for not taking timely corrective action when United Nations officials were allegedly involved in wrongdoings. He further expressed strong dissatisfaction with the reaction of the United Nations to the recent expulsions by the Government, which he said it had the sovereign right to do.

[The Legal Counsel] clarified again the legal obligations of [Country] under international law and made three specific requests, namely (a) to accept a United Nations Team dispatched to [Country] to investigate the latest allegations, especially the United Nations Volunteer case; (b) to make available Government competent authorities in order to cooperate with the Team; and (c) to grant immediate access to the detained United Nations officials. Ambassador [Name 2] took note of the requests and promised to respond to us as soon as possible.

In the Office of Legal Affairs' view, the Organization should take effective steps to prevent any wrongdoings and, if they occur, act promptly and decisively. It seems advisable that the investigative capacity of the United Nations in the country be strengthened with a view to addressing any credible allegation expeditiously and effectively. The Organization should be ready to dispatch a professional team to [Country] as soon as possible to investigate the latest allegations, in particular the United Nations Volunteer case.

Aide-memoire

The Legal Counsel's attention has been drawn to recent instances of arbitrary arrests, detention and expulsions of United Nations officials serving in [Country]. The Legal Counsel would like to clarify the obligations of the Government of [Country] under the applicable international legal instruments as follows.

The status of the United Nations and its officials in [Country] is governed by Article 105 of the Charter of the United Nations. Pursuant to paragraph 1 of Article 105, "[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes." Pursuant to paragraph 2 of the same Article, " . . . officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization." These privileges and immunities are specified in the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly of the United Nations on 13 February 1946[*] (hereinafter the "Convention"). Although

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

[Country] has not yet become a party to the Convention, it has unequivocally agreed to apply this instrument.

In accordance with the Agreement between the United Nations and the Government of [Country] relating to the Establishment in [Country] of a United Nations Office (the "Office Agreement"), concluded on [date], the Government has assumed an obligation to apply the Convention "to the United Nations, the Office, and the United Nations Agencies, Programmes and Funds, their property, funds and assets, and to officials of the United Nations, and experts on mission in [Country]." (Article IV)

Moreover, pursuant to Security Council resolution [number and date], the model status of forces agreement (A/45/594) ("the model") shall provisionally apply to the United Nations Mission in [Country 2] and [Country], pending conclusion of a status of forces agreement with the Government. As no status of forces agreement has as yet been concluded with the Government the model continues, pursuant to Security Council resolution [number], to apply. Under paragraph 3 of the model, the Convention shall apply to [the United Nations Mission].

The Legal Counsel wishes to recall that the General Assembly, in its resolution 76 (I) of 7 December 1946, approved the granting of the privileges and immunities under the Convention to "all members of the staff of the United Nations, with the exception of those recruited locally and assigned to hourly rates." Thus, in the application of the privileges and immunities to officials of the United Nations, no distinction should be made on the basis of their nationality or place of recruitment.

The Legal Counsel notes with deep concern the instances of the arrests, detention and expulsions of United Nations officials serving in [Country], both locally and internationally recruited. Such instances are inconsistent with the obligations of the Government under the aforementioned instruments, in particular Article V, Section 18 (a) of the Convention stipulating that "officials of the United Nations shall be immune from legal process."

It is noted that the Government of [Country] has refused to answer repeated requests by the United Nations as to the reasons for such arrests, detention and expulsion. In addition, the Government of [Country] has denied the Organization access to the arrested and detained staff, thus preventing the United Nations from exercising its right to safeguard the legal interests of the Organization and its staff. The attached table lists the United Nations officials concerned who, to our knowledge, have been arrested and detained from 1 January to 31 August 2006.

The Legal Counsel has been informed that some instances of arrests and detention might have occurred in order to compel locally-recruited officials to perform national service obligations. In this respect, the Legal Counsel wishes to clarify that pursuant to Article V, Section 18 (c) of the Convention, officials of the United Nations, irrespective of nationality or place of recruitment, "shall be immune from national service obligations." This obligation is also contained in Article VII. 1 (c) of the Office Agreement and paragraph 28 of the model status of forces agreement.

Furthermore, the Legal Counsel notes with great concern the recent request to [the United Nations Mission] that four of its officials, and the United Nations Security Adviser assigned to [Country], leave [Country] "for performing activities incompatible with their duties." At no time have the competent authorities of [Country] brought to the attention of [the United Nations Mission] any specific evidence or charges against the [the United

Nations Mission] officials concerned. In the absence of any specific evidence or charges, the United Nations cannot accept blanket, unsubstantiated accusations against [the United Nations Mission] officials. The measures undertaken by the Government of [Country] are not compatible with its international obligations vis-à-vis the Organization, under the latter's Charter, the Convention, the Office Agreement and the model status of forces agreement.

The Government of [Country] is obliged to give effect under its national laws to the provisions of the above-referenced international legal instruments.

The Legal Counsel respectfully requests that urgent steps be taken by the Government of [Country] with the view to ensuring its full compliance under the applicable international legal instruments referred to above. The Legal Counsel trusts that the Government will grant the Organization unimpeded access to the concerned United Nations officials to enable the Organization to safeguard its legal rights in such situations and to discharge its obligations to the staff.

(*d*) Note to the Under-Secretary-General for Peacekeeping Operations regarding [the United Nations Mission] staff members declared *persona non grata*

Privileges and immunities of United Nations Mission personnel—Concept of *persona non grata* exclusively within bilateral diplomatic relations—Impossibility for a State to declare a Mission staff member *persona non grata*—Whenever a Mission staff member is considered to have committed a criminal offence, State must inform the Special Representative of the Secretary-General and present some evidence—Mission staff members are entitled to immunity for acts related to their official duties—Disciplinary procedure and possibility to waive such immunity for acts not related to their official duties—Exclusive right of the Secretary-General to waive immunity of Mission personnel

3 October 2006

1. This is with reference to your Note of 28 September 2006 bringing to our attention [Mission note] of 26 September, with attachments, and your response thereto in code cable [number] concerning the decision by the [Country] Government to declare "persona non grata" two [Mission] international staff members, [Name 1] and [Name 2], and to request them to leave the country within 72 hours. From paragraph 6 of [Mission note], we note that the staff members were seriously mistreated and manhandled by [Country] National security at the time. We further note that the Government, in its note verbale [reference] of 26 September, refers to the incident of 6 September 2006 in which the staff members "were caught, in clear violation of their mission and mandate, inside a university campus in [City] in a day of riots and demonstrations." In your code cable [Number], you indicate that the Government has not provided any evidence substantiating the alleged wrongdoing of the two staff members involved. You seek legal advice on the matter. Please be advised as follows.

2. The status of the United Nations and [Mission] officials in [Country] is governed by the Charter of the United Nations, the Convention on the Privileges and Immunities of

the United Nations, adopted by the General Assembly on 13 February 1946* (hereinafter "the General Convention"), the Agreement between the United Nations and the Government of [Country] concerning the Activities of the United Nations Mission in [Country] concluded by the Parties on [Date] 2004 (hereinafter "the 2004 Agreement") and the Agreement between the United Nations and the Government of [Country] concerning the Status of the United Nations Mission in [Country] concluded by the parties on [Date] 2005 (hereinafter "the SOFA") as well as other applicable international legal instruments as will be explained below. A detailed description of the legal obligations incumbent on [Country] is set out in the attached Annex which makes it clear that the Government has breached those obligations by expelling the two staff members concerned.

3. In the present circumstances, we should focus on the SOFA. In accordance with Section 51 of the SOFA should the Government consider that any member of [Mission] has committed a criminal offence, it shall promptly inform the Special Representative of the Secretary-General (SRSG) and present to him any evidence available to it. If the accused person is a member of the civilian component of [Mission], the procedure established under the SOFA authorizes the SRSG to "conduct any necessary supplementary inquiry and then agree with the Government whether or not criminal proceeding should be instituted." Failing such agreement, the question must be resolved as provided in the disputes settlement clause of the SOFA.

4. For your background information, in accordance with Section 52 of the SOFA, on civil proceedings, such proceedings shall be discontinued if the SRSG "certifies that the proceeding is related to official duties." If the SRSG certifies that the proceeding is not related to official duties, the proceeding may continue.

5. It should be noted that none of the agreements referred above nor any other international legal instruments regulating the status of United Nations officials worldwide allows for the latter to be declared *persona non grata*. The United Nations staff members are not representing any particular government nor are they accredited to such government. The *persona non grata* concept applies only in bilateral diplomatic relations. Accordingly, the decision of the Government of [Country] to declare the two [Mission] staff members *persona non grata* is at variance with its legal obligations to the United Nations.

6. Moreover, requests for staff members to leave a country of their assignment are inconsistent with the fundamental principles of the international civil service enshrined in the Charter of the United Nations. In accordance with paragraph 2 of Article 100 of the Charter, each Member State of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff of the Organization and shall not seek to influence them in the discharge of their responsibilities. The demand that the two staff members leave [Country] within 72 hours was also at variance with the above-mentioned provisions of the Charter of the United Nations and the applicable agreements referred to above.

7. We note that on 6 September all [Mission] staff received a Security Advisory concerning a demonstration expected that day in [City] organized by opposition parties. In particular, staff members were directed to avoid unnecessary movement into the City until an "all clear" signal was given and in particular to restrict movement to the area of

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

[City] City Center and [City] University. From the explanatory statements made by the staff members concerned, it appears that both were aware of the Security Advisory. We also note that the Chief Security Advisor in [Country], in his report dated 7 September 2006, concluded that based on the facts presented by the staff members concerned, they "ignored [the] United Nations Security Advisory with respect to their movements into both [University Name] and [City] University."

8. In accordance with Article 6 of the 1994 Convention, United Nations personnel have the duty to respect the laws and regulations of the host State and to refrain from any action or activity incompatible with the impartial and international nature of their duties. Pursuant to paragraph 6 of the same Article, the Secretary-General is obliged to take all appropriate measures to ensure the observance of the above-stated obligations. In accordance with Section 43 of the SOFA, the Special Representative shall take all appropriate measures to ensure the maintenance of discipline and good order among members of [Mission].

9. It should be recalled that Regulation 1.1 (f) of the Staff Regulations and Rules specifies that the privileges and immunities enjoyed by United Nations staff members "are conferred in the interests of the Organization." The Regulation further provides that "these privileges and immunities furnish no excuse to the staff members who are covered by them to fail to observe laws and police regulations of the State in which they are located." Moreover, the Regulation stipulates that "in any case where an issue arises regarding the application of these privileges and immunities, staff members shall immediately report the matter to the Secretary-General, who alone may decide whether such privileges and immunities exist and whether they shall be waived in accordance with the relevant instruments."

10. From the documents made available to us, it is not clear whether or not the staff members were performing their official duties while attending the events in [City] on 6 September 2006. If the internal review of their actions comes to the conclusion that they acted outside of their official functions, such behaviour may give rise to disciplinary action.

11. Based on the foregoing, the Government should be informed that the concept *persona non grata* cannot be applied to [Mission] officials and that the Government's demands for staff members to leave the country are in contravention of the [Country]'s obligations under the Charter, the General Convention, the 2004 Agreement and the SOFA, as well as other relevant international legal instruments. The Government of [Country] is obliged to give effect under its national laws to the provisions of the above-referenced international legal instruments.

12. In the absence of any specific evidence or charges, the United Nations cannot accept unsubstantiated accusations against two [Mission] officials to justify expulsion. However, their actions seem to warrant a careful internal review by the Organization of their activities particularly to ascertain whether they were not performed in their official capacity and were in violation of local laws and police regulations. Depending on the findings of the review, a waiver of immunities may or may not be in order.

Annex

Treaty obligations of [Country]

1. In accordance with paragraph 1 of Article 105 of the Charter, "[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are

necessary for the fulfilment of its purposes." Pursuant to paragraph 2 of the same Article, " . . . officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization." These privileges and immunities are specified in the General Convention.

2. Pursuant to Section 18 (a) of the General Convention, officials of the United Nations shall enjoy immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity. [Country] acceded to the General Convention on 21 March 1977 without any reservation.

3. In Article I, paragraph 2 (a) of the Agreement, the Government has unequivocally undertaken to extend the privileges and immunities set out in the General Convention to all United Nations officials assigned to serve with [Mission]. Pursuant to paragraph 6 (ii) of Article VI of the Agreement, [Mission] officials, for the fulfilment of their functions, are entitled to "full and unrestricted freedom of movement throughout the country . . . without the need for travel permits or prior authorization or notification . . .".

4. The Agreement contains a number of detailed provisions on safety and security of [Mission] personnel. Thus, under Article VI, paragraph 1, of the Agreement, the Government has an obligation to ensure the safety, security and freedom of movement of [Mission] personnel. However, if in the course of the performance of their duties members of [Mission] are captured, detained or held hostage, the Agreement provides for a clear obligation of the Government to "make every endeavour to secure their immediate release to the United Nations", once their identification has been established (paragraph 2 (ii) of Article VI of the Agreement).

5. Moreover, under paragraph 2 of Article VI of the Agreement, the Government has agreed to ensure that the provisions of the Convention on the Safety of United Nations and Associated Personnel[*] (hereinafter "the 1994 Convention"), are applied to and in respect of [Mission] and its members. This Agreement binds the Government of [Country], even though it is not a party to the Convention. Article 7 of the 1994 Convention stipulates that "United Nations and associated personnel, their equipment and premises shall not be made the object of attack or of any action that prevents them from discharging their mandate." Pursuant to Article 8 of the same Convention, they "shall not be subjected to interrogation and they shall be promptly released and returned to United Nations or other appropriate authorities, if they are captured or detained in the course of the performance of their duties and their identification has been established." The Convention requires that pending their release, such personnel shall be treated in accordance with universally recognized standards of human rights and the principles and spirit of the 1949 Geneva Conventions.

6. The SOFA confirms the application of the privileges and immunities contained in the General Convention to [Mission] and its personnel. Pursuant to Section 45 of the SOFA, without prejudice to privileges and immunities, the Government may take into custody any member of [Mission] when such a member "is apprehended in the commission or attempted commission of a criminal offence." Under Section 46, the Government may make a preliminary investigation, but may not delay the transfer of custody of an [Mission] member concerned. Furthermore, in accordance with Section 47 of the SOFA, [Mission]

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

and the Government shall assist each other in carrying out all necessary investigations into offences in respect of which either or both have an interest.

4. Liability and responsibility of international organizations

(*a*) Note to the Office of Programme Planning, Budget and Accounts regarding the liability for damages and repairs to the Economic and Social Commission for Western Asia (ESCWA) facilities in Beirut, Lebanon

Headquarters agreements relating to occupancy and use of premises—Share of costs and responsibilities between the Government of Lebanon and the United Nations—Requirement of detailed assessment of damages and loss of property—Government of Lebanon responsible for repairing or replacing all installations, fixtures and equipment it supplied under the agreement—United Nations responsible for repairing or replacing all furniture and equipment it owned and supplied—Claims to be made to the insurance companies

4 August 2006

Introduction

1. This note responds to your e-mail, dated 31 July 2006 [. . .]. Based on an inquiry by the Deputy to the Under-Secretary-General for Safety and Security, you requested advice concerning the allocation of liability between the United Nations and the Government of Lebanon for damages to and loss of property at the headquarters facilities of ESCWA in Beirut, Lebanon, that occurred during recent civil disturbances. Other than reports in the media, this Office has not been informed about the nature or the extent of the damage or loss of property. Accordingly, the following presents general advice about the allocation of liability for the damage and losses.

The Supplementary Agreement to the ESCWA Headquarters Agreement

2. The occupancy and use of the building located in the Jb 132 Zokak El-Blat area, Beirut Central District, together with the fixtures therein and the surrounding grounds and parking areas ("Premises"), is the subject of the "Supplementary Agreement between the United Nations and the Government of Lebanon Relating to the Occupancy and Use of United Nations Premises in Beirut, Lebanon," which was concluded and came into force on 9 October 1997 (United Nations, *Treaty Series,* vol. 1993, p. 321) ("Supplementary Agreement"). The Supplementary Agreement is an addendum to the Headquarters Agreement between the Organization and the Government of Lebanon, concluded on 27 August 1997.[*]

3. Pursuant to Article 1 of the Supplementary Agreement, the Government of Lebanon granted to the United Nations the occupancy and use of the Premises, "free of taxes, duties, levies" and any other similar charges referred to in the Headquarters Agreement. The portion of the Premises occupied by the Organization for the headquarters of ESCWA is "provided by the Government free of rent" and the Government also agreed to "furnish

[*] United Nations, *Treaty Series,* vol. 1988, p. 339.

and equip the ESCWA headquarters, free of charge," provided that the "United Nations shall not be the owner of such furnishings and equipment."

4. In addition to use of the Premises for ESCWA, Article 1 of the Supplementary Agreement provides that the United Nations can "authorize, after consultation with the Government, the use and occupancy of the Premises by other offices of the United Nations" as well as "offices of other international organizations institutionally linked with the United Nations." Each such occupant would be required "to conclude a separate tripartite arrangement with the United Nations and the Government in order to set out the rent to be paid and, as appropriate, any additional details. . . ." The files of the Office of Legal Affairs (OLA) only contain a memorandum of agreement, dated 24 November 1998, between ESCWA and the United Nations Development Programme, the United Nations Population Fund, the United Nations Children's Fund, and the United Nations Industrial Development Organization, for the use of the Premises as "common premises" (within the meaning of GA resolutions 44/211, of 22 December 1989, and 47/199, of 22 December 1992). However, such memorandum of understanding does not appear to be a tripartite arrangement with the Government of Lebanon, as contemplated by Article 1 of the Supplementary Agreement. It is not clear from OLA's files whether there have been any other agreements concluded with the Government of Lebanon for the use and occupancy of the Premises as common premises by other Funds and Programmes or the Specialized Agencies or other organizations of the United Nations system.

5. Under Article 3 of the Supplementary Agreement, the Government of Lebanon is "responsible, at its own cost and expense, for major modifications and repairs to the Premises, including structural repairs and replacements to the building, installations, fixtures and equipment." In addition, the Government "shall retain title to all installations, furniture and equipment that *it provides* under this Supplementary Agreement and shall be responsible for the cost of insuring, maintaining and repairing and replacing such installations, furniture and equipment as may be necessary" (emphasis added). Article 3 further provides that the "United Nations shall retain the ownership of and title to any installations, additions, furniture, equipment and fixtures that the United Nations shall, from time to time furnish or install at its own expense. . . ." Article 3 makes clear that "the United Nations shall have no financial responsibility and shall not be obligated to make any repairs or replacements made necessary as a result of damage to the Premises caused by civil disturbance, riot, vandalism, aircraft, and other aircraft and aerial devices, war, floods, earthquakes or *force majeure*."

6. Article 5 of the Supplementary Agreement requires the Government of Lebanon to "ensure that the Premises are insured against damage by fire, civil disturbance, riot, vandalism, flood, earthquakes or any other cause." Such insurance must "name the United Nations as an additional insured and include a waiver of subrogation of the Government's rights to the insurance company against the United Nations." Further, the Organization is "responsible for insuring or self-insuring its own property, fixtures and fittings, and that of its officials, employees, agents, servants, invitees or subcontractors in the Premises. . . ." Additionally, under Article 5, to the extent that the Premises are used as common premises by other Funds and Programmes or the Specialized Agencies or other organizations of the United Nations system, the "United Nations shall ensure that [such] other Occupants maintain insurance."

7. Article 6 of the Supplementary Agreement requires the Government of Lebanon to restore the Premises or any part thereof should they "be damaged by fire or any other cause." Article 6 further states that "[i]n the event that, at the sole discretion of the United Nations, the Premises are totally destroyed or otherwise unfit for further occupancy or use, the Government shall provide the United Nations, without undue delay, with other suitable and comparable premises acceptable to the United Nations, under terms and conditions similar to those under which the Premises are provided under th[e] Supplementary Agreement, and shall cover all costs related to the move of ESCWA headquarters and, as appropriate, other offices, to such new premises including all costs due to the inconvenience created by such move."

Recommended action

8. A full assessment of the damages and loss of property at the Premises should be undertaken by the ESCWA and Government authorities as soon as possible. If feasible, an agreement on such assessment should be obtained in writing.

9. Based on the foregoing review of the Supplementary Agreement:

(*a*) to the extent that such assessment reveals that the damage to and loss of property at the Premises that took place during recent civil disturbances occurred in respect of the building, or any part thereof, or to any installations, fixtures, furniture and equipment supplied by the Government of Lebanon, the Government would bear the liability and responsibility for repairing or replacing such property;

(*b*) to the extent that the damages to and loss of property occurred in respect of the furniture, equipment or other items owned and supplied by the United Nations, the Organization would be responsible for repairing or replacing such property.

10. In the light of any such assessment, steps with respect to addressing claims under relevant insurance coverage for losses or damages to the Premises and other property contained therein could be undertaken as follows:

(*a*) In respect of the damages or losses for which the Government of Lebanon bears responsibility, the Organization may wish to determine whether the Government has maintained the insurance coverage required under the Supplementary Agreement, including that the United Nations has been named an additional insured under such policies, and whether such policies have time limits for instituting claims. If the policies do provide for time limits on filing claims and the Government has not been able to initiate claims under the policies, the United Nations may then wish to seek to preserve its rights to bring such claims as an additional insured under the policies.

(*b*) To the extent that such damages or losses occurred in respect of the property of the United Nations, the Organization should make appropriate claims against the insurance it has maintained in respect thereof.

11. Finally, to the extent that damages or losses occurred to property of any of the Funds and Programmes or the Specialized Agencies or other organizations of the United Nations system using the Premises as common premises, presumably the same allocation of liability and responsibility for repairing or replacing such damaged property would apply. However, should questions arise about responsibility for repairing or replacing property in any of such common premises, this Office will have to conduct a fuller review

of the matter after obtaining any other relevant agreements or documents that are not contained in OLA's files.

(*b*) Observations of the United Nations as a third party in the cases in front of the European Court of Human Rights: Application Nos. 71412/01: *Behrami and Behrami* v. *France* and 78166/01: *Saramati* v. *France, Norway and Germany*

(Extracts)

Observations on respective mandates and responsibilities of the United Nations Mission in Kosovo (UNMIK) and Kosovo Force (KFOR)* —Mandates considered to be a task, a power or competence, an authority to act or a directive to engage—Mandate not to be viewed as an obligation of result—Discretion of the United Nations to determine modalities of implementation of Mission mandates, including the timing and prioritization—Transfer of responsibility *de facto* for demining between KFOR and UNMIK—Residual and continuous responsibility of KFOR to cooperate and support demining process, especially by identifying and reporting locations of cluster bomb strike sites—Impossibility for UNMIK to demine without such information—Failure to demine not attributable to UNMIK—UNMIK and KFOR are separate entities, established and functioning independently from each other—Review of legality of arrests and detention by KFOR outside of UNMIK's competence—Illegal arrest or detention not attributable to UNMIK.

13 October 2006

I. Introduction

1. By a letter of 10 July 2006 the Deputy Registrar of the European Court of Human Rights ("the Court") informed the Legal Counsel of the United Nations that the applicants in the case of *Behrami and Behrami* v. *France* ("the Behrami case") and the case of *Saramati* v. *France, Norway and Germany* ("the Saramati case"), have complained "of matters related to the action of United Nations Mission in Kosovo (UNMIK) and Kosovo Force (KFOR) in Kosovo."

2. The President of the Grand Chamber has accordingly invited the United Nations to intervene as third party in both cases, should it wish to do so, and submit written observations on the following questions:

71412/01 ***Behrami and Behrami*** **v.** ***France***

> "1. Was KFOR or UNMIK (United Nations Mine Action Coordination Centre "UNMACC") legally responsible, at the relevant time, for marking and/or de-mining the ordinance which exploded in the present case (see, in particular, Article 9(e) of the United Nations Security Council Resolution 1244 and paragraphs 40–42 of the attached "Facts")? "
>
> 2. Is the applicants' complaint compatible *ratione personae* and/or *loci* with the provisions of the Convention and/or can they be considered to have fallen "within the jurisdiction" of the respondent State? In particular, can the impugned inaction be attrib-

* KFOR is the international military force led by the North Atlantic Treaty Organization in Kosovo.

uted to the United Nations or the respondent State given the latter's participation in a measure adopted under Chapter VII of the United Nations Charter?"

78166/01 *Saramati* v. *France, Norway and Germany*

"1. Are the applicant's complaints compatible *ratione personae* and/or *loci* with the provisions of the Convention and/or can he be considered to have fallen "within the jurisdiction" of the respondent States?

2. In particular, can the impugned action be attributed to the United Nations or to each of the respondent States given the latter's participation in a measure adopted under Chapter VII of the United Nations Charter?"

3. While as a non-party to the European Convention on Human Rights ("the European Convention"), the United Nations is not subject to the jurisdiction of the Court, it has nevertheless agreed to intervene as a third party in order to assist the Court in its deliberations. Furthermore, although the internationally-recognized human rights standards contained in international and regional human rights conventions, including the European Convention, were incorporated into the "applicable law" in Kosovo,[1] the United Nations Interim Administration Mission in Kosovo (UNMIK) is not subject to the institutional review mechanism of the Convention or the jurisdiction of its judicial institution.

4. The United Nations, and UNMIK as its subsidiary organ, are entitled to privileges and immunities under the 1946 Convention on the Privileges and Immunities of the United Nations adopted by the General Assembly on 13 February 1946* pursuant to Article 105 of the United Nations Charter. Under Article II, Section 2 of the Convention, the United Nations, its property, funds and assets enjoy immunity from any form of legal process except in so far as it has expressly waived its immunity. This submission, therefore, is without prejudice to, and should not be considered as a waiver, of any of the aforementioned privileges and immunities.

5. In its submission, the United Nations will not comment on whether the complaint in either Application falls within the provisions of the European Convention or the jurisdiction of the Respondent States within the meaning of Article 1 of the Convention, as it considers these questions to be matters for the Parties and the Court. The observations provided by the United Nations are confined to the questions bearing upon the respective mandates of UNMIK and KFOR in the circumstances of the *Behrami* and *Saramati* cases. With respect to the *Behrami case:*

– Was KFOR or UNMIK/UNMACC responsible, at the relevant time, for marking and/or demining the ordnance which exploded? and,

– Can the impugned inaction be attributed to the United Nations?

and with respect to the *Saramati case:*

– Whether the impugned action could be attributed to the United Nations?

6. In addressing these questions this submission will elaborate on the following:

(*i*) The respective mandates of UNMIK and KFOR under Security Council resolution 1244 (1999) of 10 June 1999;

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[1] UNMIK Regulation 1999/24 on the Law Applicable in Kosovo, section 1.3.

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

(*ii*) The legal status of UNMIK as a subsidiary organ of the United Nations and as the Interim Administration in Kosovo, and its relationship to KFOR;

(*iii*) The *Behrami case*—the mandate to demine and the responsibility for demining activities in Kosovo;

(*iv*) The *Saramati case*—the mandate to ensure public safety and order and the power to detain.

II. The respective mandates of UNMIK and KFOR under Security Council resolution 1244 (1999)

7. The responsibilities of the two international presences as set forth in Security Council resolution 1244 constitute their respective mandates. Understanding the nature of a "mandate" or "responsibility" to carry out a mandated activity in the context of a United Nations operation is key to understanding whether the "action" or "inaction" in the cases before the Court can be attributed to the United Nations. Mandates adopted by the legislative organs of the United Nations are an expression of the will of the Member States and the means by which the United Nations membership as a whole grants a United Nations organ authority to act. A mandate is thus a task, a power or competence, an authority to act or a directive to engage. It is an authority granted and a duty to act. It is not, however, an obligation of result. In executing its mandate, the United Nations operation, unless otherwise specified, retains discretion to determine the modalities of its implementation, including timing and prioritization.[2]

8. By resolution 1244 (1999) of 10 June 1999 ("the Resolution"), the Security Council, determining that the situation in the region constituted a threat to international peace and security, and acting under Chapter VII of the United Nations Charter, established two international presences in Kosovo: an international civil presence and an international security presence. Paragraph 7 of that resolution authorized the establishment of the international security presence "with all necessary means" to fulfil its responsibilities as identified in paragraph 9. The main responsibilities of the *international security presence* included the following:

– Establishing a secure environment in which refugees and displaced persons can return home in safety, the international civil presence can operate, a transitional administration can be established, and humanitarian aid can be delivered (para. 9 (c));

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[2] The margin of discretion to decide on the timing, priorities and modalities of implementation is of particular importance in the context of demining operations which, depending on their scope, may span over a lengthy period of time, and where the necessity of prioritizing is imposed by the constraints of resources, both human and financial. The "Evaluation Report of the United Nations Mine Action Programme in Kosovo 1999–2001" (prepared by the Praxis Group, Ltd. Riverside/Geneva, January 2002) defined the success of any demining operation thus:

[t]he ultimate objective of mine action programmes is the complete elimination of the mine/unexploded ordnance (UXO) problem. In many mine-affected countries, this is usually not feasible in the short term as it may require many years (or even decades) to achieve this. As a consequence, most mine action programmes initially aim to contain the problem such that the impact on the affected communities is reduced or minimized. Subsequent (or concurrent) international efforts usually aim to build a sustainable local capacity that can then work towards the ultimate end-state of complete elimination or mines and UXO" (page 70).

– Ensuring public safety and order until the international civil presence can take responsibility for this task (para. 9 (d));

– Supervising demining until the international civil presence can, as appropriate, take over responsibility for this task (para. 9 (e)); and

– Supporting, as appropriate, and coordinating closely with the work of the international civil presence (para. 9 ((f)).

9. The international civil presence in Kosovo was established to provide an interim administration for Kosovo under which the people of Kosovo could enjoy substantial autonomy within the Federal Republic of Yugoslavia, while at the same time establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo.[3] The main responsibilities of the international civil presence included, *inter alia,* the following: [4]

– Performing basic civilian administrative functions where and as long as required (para. 11 (b));

– Supporting, in coordination with international humanitarian organizations, humanitarian and disaster relief aid (para. 11 (h));

– Maintaining civil law and order, including establishing local police forces (para. 11 (i));

– Protecting and promoting human rights (para. 11 (j)); and

– Assuring the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo (para. 11 (k)).

10. In his first report to the Security Council pursuant to paragraph 10 of Security Council Resolution 1244, the Secretary-General presented an operational plan for the international civil presence, to be known as the United Nations Interim Administration Mission in Kosovo (UNMIK).[5] Accordingly, UNMIK comprised of four components, each having a lead role in a designated area. They included:

(*a*) Interim civil administration: the United Nations;

(*b*) Humanitarian affairs: the Office of the United Nations High Commissioner for Refugees (UNHCR);

(*c*) Institution-building: the Organization for Security and Cooperation in Europe (OSCE); and

(*d*) Reconstruction: the European Union.

III. The legal status of UNMIK and its relationship to KFOR

11. Established by a Security Council resolution, the United Nations Interim Administration in Kosovo is a subsidiary organ of the United Nations entitled to the privileges and immunities as set forth under the 1946 Convention on the Privileges and Immunities of the United Nations. As an Interim Administration, it was mandated to administer the territory and people of Kosovo pending a determination of its final status. While recogniz-

[3] Operative paragraph 10 of the Resolution.

[4] Operative paragraph 11 of the Resolution, sub-paragraphs (b), (h), (i), (j) and (k).

[5] S/1999/672 of 12 June 1999.

ing the continued sovereignty and territorial integrity of the Federal Republic of Yugoslavia, the Security Council endowed the Interim Administration with all-inclusive legislative and administrative powers, including the administration of justice.[6]

12. UMMIK and KFOR were established as two equal presences with separate mandates and command and control structures. KFOR, the international security presence, is a NATO-led operation authorized by the Security Council under unified command and control; UNMIK, the international civil presence, is a United Nations operation headed by a Special Representative of the Secretary-General and reporting to the Security Council through the Secretary-General. There is no formal or hierarchical relationship between the two presences, nor is the military in any way accountable to the civil presence. Operating independently of each other and in complete parity, both presences are required to coordinate their activities to ensure that they operate in a mutually supportive manner towards the same goals. Their general, and at times imprecise mandates were, for the most part, left to be concretized and agreed upon in the realities of their daily operations. In the territory of Kosovo, both presences enjoy immunity from local jurisdiction, although members of either operation are duty-bound to respect the local law, including UNMIK-promulgated Regulations.[7]

13. This analysis of the nature, legal status and mandates of the two international presences operating on a par, is essential to the understanding of their respective and shared responsibilities in the areas of demining and security in Kosovo.

IV. The *Behrami case:* a mandate to demine and the responsibility for demining activities

14. The responsibility for supervising demining was entrusted by the Security Council to the international security presence with a view to its subsequent transfer to the international civil presence "as appropriate". The arrangements for the transfer of responsibility and continued cooperation and support in demining activities were left, however, to be determined by the two presences.

[. . .]

16. On 17 June 1999, a Mine Action Coordination Centre (MACC) was established within the "Humanitarian Affairs" Pillar, as the "focal point and coordination mechanism for all mine action activities in Kosovo". Its capability to fulfil these functions depended largely on close cooperation with all concerned partners, including KFOR, non-governmental organizations, commercial and relief organizations, and the local population. [. . .]

18. Responsibility for demining was *de facto* assumed by UNMACC in August 1999, although it was not until October that year that UNMIK officially informed KFOR that

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[6] Regulation 1999/1 on the Authority of the Interim Administration in Kosovo provides that: "All legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK, and is exercised by the Special Representative of the Secretary-General".

[7] Section 2.2 of UNMIK Regulation 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel.

it was in a position to assume responsibility for mine action in Kosovo.[11] The transfer of responsibility to UNMIK, however, did not absolve KFOR from its residual and continuous responsibility to cooperate and support demining activities, and in particular, to identify, mark and report on the location of cluster bomb "strike sites". Such cooperation and support was considered critical to the successful implementation of the clearance operation and eradication of mines and unexploded ordnance from the territory of Kosovo.

[. . .]

22. In the specificities of the *Behrami* case, responsibility for demining the area depended on whether accurate information was available at the time on the location of the dangerous site and the existence within the site of unexploded ordnance. Unaware of the actual location of the strike site and the presence of unexploded cluster munitions where the incident took place, UNMACC took no action to demine the unmarked area.[13]

23. In response to the questions put by the Court, the United Nations submits that while the actual demining operation would have fallen within UNMACC's mandate, in the absence of the necessary information on the precise location of the site, the inaction—subject of the *Behrami* complaint—cannot be attributed to UNMIK.

V. The *Saramati* case—The mandate to ensure public safety and order and the authority to detain

24. Mr. Saramati complains of being held in pre-trial detention by order of KFOR in a KFOR detention facility between 13 July 2001 and 26 January 2002. Prior to his detention he had been indicted by a Kosovo Court and on 23 January 2002 was convicted of attempted murder. On 26 January 2002, he was transferred by KFOR to an UNMIK detention facility in Pristina. The Supreme Court of Kosovo subsequently quashed his conviction, sent the case for re-trial to the Pristina District Court, and ordered his release.

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[11] By his letter of 5 October 1999, [the] SE/DSRSG UNMIK informed [the] Commander of KFOR that "following the recent approval of the attached 'Outline Concept Plan for the UNMIK Mine Action Programme', UNMIK are now in a position to officially assume responsibility for mine action in Kosovo". [. . .]

[13] A communication exchange between KFOR and UNMIK following the incident reaffirmed the continued validity of the arrangements contained in KFOR. Directives, notably "FRAGO 300", and KFOR's role in marking-off all CBU strike sites, and its continued support for UNMACC's efforts by marking and fencing CBU sites. In his letter to KFOR Commander of 6 April 2000, DSRSG [. . .] wrote:

> "Despite the progress that has been made . . . there have been two recent incidents involving children and teenagers who encountered CBUs. The first incident occurred on 11 March 2000 in MNB (N) . . . In both cases, the strike areas were not marked or recorded as dangerous areas. While the assistance provided by KFOR has been invaluable, I have been advised by UNMACC that inaccuracies in the information provided by NATO often make it difficult to identify the exact location of the CBU strike areas. For example, despite using NATO information to identify the sites, KFOR EOD teams were able to locate only 31 of the 76 CBU strikes that occurred in the MNB (C) area. I am deeply concerned that we are going to continue to locate remaining CBU strike areas in Kosovo, only when serious accidents occur. I would therefore be most grateful for your personal support to ensure that KFOR continues to support the clearance process by identifying and marking these areas with a matter of urgency. In addition, the provision of any additional information from NATO that may provide greater clarity on the exact location of CBU strike areas would greatly assist us in this important task". [. . .]

25. Security Council resolution 1244 (1999) mandated the international security presence to establish a secure environment and to maintain public safety and order; a mandate interpreted as an authority to detain individuals believed to constitute a threat to the safety of KFOR troops and to public safety and order in Kosovo.

26. Having been established as equal but separate international presences, UNMIK and KFOR functioned independently of each other. KFOR was not accountable to UNMIK, nor was it subject to its authority or to the jurisdiction of the local courts, from which it is immune. Consequently, neither UNMIK nor the local courts could review the legality of arrests or detentions ordered by KFOR.

27. In response to the question put by the Court, therefore, and given the legal status of the two international presences and the relationship between them, the United Nations submits that the action complained of in the *Saramati* case cannot be attributed to UNMIK.

5. Treaty law

Note to the Under-Secretary-General for Peacekeeping Operations regarding the Common Aviation Area Agreement (ECAA) in respect of Kosovo

Limited treaty making power of the United Nations Mission in Kosovo (UNMIK)—Department of Peacekeeping Operations must approve the signature by UNMIK of an international agreement—Agreement must be necessary for the purposes of the United Nations Administration of Kosovo and limited to its duration—UNMIK cannot bind future authority of Kosovo—Ultimate responsibility of UNMIK, and not of the United Nations, to implement such agreement—Signature of such Agreement must go with a declaration about the restricted scope of the agreement

6 June 2006

1. I wish to refer to your Note dated 2 June 2006 concerning the European Common Aviation Agreement (ECAA), which is in response to our Note on this matter dated 25 May 2006 in which we had raised questions firstly about whether the conclusion of this Agreement is necessary for the United Nations Mission in Kosovo (UNMIK) administration of Kosovo and secondly, whether the necessary legal framework is in place within the current Kosovo legal system in order to implement the Agreement. UNMIK in its Code Cable of 30 May 2006 indicates, for the reasons given in that Cable, that it is well placed to fulfil the commitments arising out of the Agreement, at least for its first transitional phase.

2. In your Note you concur with UNMIK's position that there is "a valid justification that the ECAA is essential for the governance and administration of Kosovo and for the duration of its interim administration." You therefore conclude that UNMIK's arguments made in previous Code Cables "highlight the need for the ECAA for the immediate and long-term administrative needs of Kosovo" and you request our views on how "the legal concerns can be addressed in order to provide, if possible, a positive response to UNMIK's request [for authorisation to sign the ECAA Agreement]."

3. While our position as expressed in previous Notes remains unchanged, as does our view on UNMIK's Treaty making power, it is for the Department of Peacekeeping Operations to approve the signature of this Agreement on the basis of its determination that it is necessary for the purposes and for the duration of the United Nations Administration in Kosovo. If approval is given we suggest that the attached Declaration be appended to the Agreement. This Declaration makes it clear, *inter alia,* that this Agreement is limited for the duration of UNMIK's administration of Kosovo, that it does not bind the future authorities of Kosovo and that it is UNMIK and not the United Nations that has ultimate responsibility for the implementation of this Agreement.

4. In accordance with previous practice [. . .], this Declaration, while not part of the Agreement itself, would constitute part of the records of the Agreement and be used, when necessary, as an element in the interpretation of the Agreement. We would also suggest that when the signature is actually affixed to the signature page on behalf of UNMIK, the following language should be included under the signature "With declaration". In this way, there is a reference in the Agreement itself to the declaration. We should also recall that a similar declaration should be attached to the notification of approval submitted by UNMIK in accordance with Article 105 of the Agreement, modifying, as necessary, references to "signature", "signing", and the like.

5. Finally, we wish to reiterate our view that UNMIK has a limited treaty-making power to engage on the international level on behalf of Kosovo in matters required strictly for the administration of the territory. Agreements that promote Kosovo's participation in the European integration process are matters for the future authorities of Kosovo. We wish to recall, in this connection, the view expressed in our Note to you of 21 February 2006 that, "this Agreement is only one in a series of agreements concluded by the European Community with South-East European countries aiming at creating a political-economic integration. Taken as a whole, this trend will affect the status and nature of the territory of Kosovo for years to come and long after UNMIK will have completed its mandate."

Declaration

I, [. . .], Special Representative of the Secretary-General and Head of the United Nations Interim Administration Mission in Kosovo (UNMIK), on behalf of the United Nations Interim Administration Mission in Kosovo (UNMIK),

Hereby declare that the United Nations Interim Administration Mission in Kosovo (UNMIK) makes the following declaration upon signature of the Treaty establishing the European Common Aviation Agreement (ECAAA), adopted on . . . :

(*i*) The United Nations Interim Administration Mission in Kosovo (UNMIK) established by Security Council resolution 1244 (1999) of 10 June 1999 signs the Treaty on behalf of Kosovo;

(*ii*) The Treaty is valid in respect of Kosovo for the duration of the United Nations Interim Administration Mission in Kosovo (UNMIK) administration under resolution 1244 (1999), and its continued validity beyond that would depend on the future authorities of Kosovo;

(*iii*) The participation in the Treaty on behalf of the United Nations Interim Administration Mission in Kosovo (UNMIK) is without prejudice to the future status of Kosovo;

(*iv*) The Treaty does not engage the responsibility of the United Nations, nor does it create for the Organization any legal, financial or other obligations.

(*v*) This Declaration shall be duly registered and published pursuant to Article 102 of the United Nations Charter along with the Treaty establishing the Energy Community, adopted on . . . , to which it relates.

Witness whereof, I have hereto set my hand and seal,

Done at Pristina on. [SRSG]

6. International humanitarian law

Note on the protection of peacekeeping personnel under international humanitarian law

Absence of specific protective legal regime of United Nations peacekeepers—Relevance of principles of international humanitarian law—Protected and protective status of United Nations emblem—Duty of Parties to the armed conflict to protect peacekeepers against the effects of mines—Obligation to ensure security and safety of peacekeepers—Criminalization under national and international laws of attacks against non-combatant peacekeepers—Cumulative effect of various protective clauses for peacekeepers under international humanitarian law—Emergence of customary principle that non-combatant peacekeepers are entitled to the status of "protected group".

9 August 2006

1. This Note examines the protective legal regime of United Nations peacekeeping operations, when in a situation of armed conflict they take no part in the hostilities, or otherwise engage therein as combatants. It surveys the international humanitarian law (IHL) principles and rules under the 1977 Additional Protocol I to the Geneva Conventions ("Additional Protocol I"),[*] Protocol II to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects, as amended, ("Protocol II to the 1980 Convention"),[**] and the Statute of the International Criminal Court (ICC).[***] The 1994 Convention on the Safety of United Nations and Associated Personnel,[****] while not an IHL instrument as such, is, in part, at least, applicable also in times of armed conflict.

[*] United Nations, *Treaty Series,* vol. 1125, p. 3.

[**] United Nations, *Treaty Series,* vol. 1342, p. 137 and CCW/CONF.I/16 (Part I) for the Protocol II as amended on 3 May 1996.

[***] United Nations, *Treaty Series,* vol. 2187, p. 3.

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

A. Additional Protocol I to the Geneva Conventions, 1977.

2. The 1949 Geneva Conventions[*] which preceded the inception of peacekeeping operations are obviously silent on the question. Additional Protocol I to the Geneva Conventions, adopted in 1977, prohibits perfidy, [1] in particular,

> "the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict" (Article 37, para. 1 (d)).[2]

3. Article 38, para. 2 of Additional Protocol I prohibits the "use of the distinctive emblem of the United Nations except as authorized by that Organization", [3] and thus recognizes it both as a protected and protective emblem. In protecting the United Nations emblem and prohibiting its feigning or unauthorized use, the Protocol recognizes also and perhaps primarily so, the "protected status" of persons and premises of United Nations operations rightfully entitled to use the emblem.

B. Protocol II to the 1980 Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects, as amended

4. Article 12 of Protocol II to the 1980 Convention provides for specific protection to United Nations forces from the effects of mines. It applies to "any United Nations force or mission performing peacekeeping, observation or similar functions in any area in accordance with the Charter of the United Nations", and enjoins the Parties, if so requested by the head of a force or mission, to "take such measures as are necessary to protect the force or mission from the effects of mines, booby-traps and other devices in any area under its control." Each Party is bound, in order effectively to protect such personnel, "to remove or render harmless, so far as it is able, all mines, booby-traps and other devices in that area", and "inform the head of the force or mission of the locations of all known minefields, mined areas, mines, booby-traps and other devices in the area in which the force or mission is performing its functions".

C. The protective regime of the 1994 Convention on the safety of United Nations and associated personnel

5. As part of the general prohibition on attacks against any person within a State's territory, attacks against peacekeepers are prohibited under the municipal laws of all host States in whose territories peacekeeping forces are deployed. The 1994 Convention, however, "internationalized" the crime and enjoined its Parties to criminalize attacks against peacekeepers in their national laws, and "prosecute or extradite" the offender.

6. The crime of "attacks against peacekeepers" is defined in Article 9 of the Convention, in part, as follows:

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[*] United Nations, *Treaty Series,* vol. 75, p. 31; p. 85; p. 185 and p. 287.

[1] Perfidy is defined in Article 37 (1) of the Protocol as an act inviting the confidence of an adversary to lead him to believe that he is entitled to protection with the intent to betray that confidence.

[3] In its Commentary to Article 38(2) of the Protocol, the ICRC notes:

> "The United Nations emblem only has a *protective character* to the extent that it can be assimilated to the emblem of neutral or other States or parties to the conflict, but not when the United Nations intervenes in a conflict by sending combatants"(emphasis added).

"The intentional commission of:

a. A murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel;

b. A violent attack upon the official premises, the private accommodation or the means of transportation of any United Nations or associated personnel likely to endanger his or her person or liberty".

7. The relationship between the protective regime of the Convention and international humanitarian law were not defined in the Convention. While enforcement actions under Chapter VII, in which any peacekeeping personnel are engaged as combatants, are explicitly excluded from the scope of the Convention (Article 2), Article 20 of the Convention provides that:

"Nothing in this Convention shall affect:

(a) The applicability of international humanitarian law and universally recognized standards of human rights as contained in international instruments in relation to the protection of United Nations operations and United Nations and associated personnel or the responsibility of such personnel to respect such law and standards".

8. The applicability of either regime depends, however, on whether in any given conflict peacekeeping personnel are engaged therein as combatants, or whether, situated in the theatre of war, they take no part in the hostilities. In the former case they are protected and bound by international humanitarian law, in the latter, they are entitled to the protection given to civilians in armed conflict and may also be entitled to the protective regime of the Convention. In its "non-prejudice" clause, the Convention recognizes that in certain (albeit undefined) circumstances, the protective regime of the Convention and international humanitarian law are mutually inclusive.

9. While for the most part, the Convention does not lend itself to applicability in times of armed conflict, the obligation to ensure the safety and security of United Nations and associated personnel (whether in the territory of the State Party or in the territory of a third State where its military forces are deployed), is the exception. Article 7 provides in that respect:

"1. United Nations and associated personnel, their equipment and premises shall not be made the object of attack or of any action that prevents them from discharging their mandate".

2. States Parties shall take all appropriate measures to ensure the safety and security of United Nations and associated personnel".

D. The Statute of the International Criminal Court (ICC)

10. The Statute of the ICC established the crime of attacks against peacekeepers as a war crime subject to the jurisdiction of the Court, and for the first time drew a clear distinction between peacekeepers as combatants and peacekeepers as civilians. Article 8 (2) (b)) (iii) of the Statute lists the following among the war crimes falling within the jurisdiction of the Court:

"Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance

with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under international law of armed conflict".

11. In determining the criminal individual responsibility of the accused for attacks against peacekeepers, it must, therefore, be proven that the perpetrator had both knowledge and intent to attack the United Nations peacekeeping personnel and missions as such.[4]

E. Conclusion

11. While none of the afore-mentioned IHL instruments explicitly grant peacekeeping operations the status of a "protected group" (similar to the one enjoyed by medical personnel and units), the cumulative effect of the "protective clauses" in a series of legal instruments—namely, the protected and protective status of the United Nations emblem, the obligation to protect peacekeeping missions from the effects of mines, the duty to ensure their safety and security and the criminalization and internationalization of attacks against peacekeepers when in an armed conflict they are entitled to protection given to civilians—is an indication that a customary international humanitarian law principle has emerged, whereby peacekeeping personnel performing functions under the United Nations Charter in an area and situation of armed conflict and taking no part in the hostilities, are entitled to the status of a "protected group"; with the correlative obligation on the Parties to the conflict to take precautionary measures to respect their protected status.

7. Human rights and refugee law

Note to the Assistant Secretary-General for Political Affairs on the granting of protection to third parties on United Nations premises

Protection of third parties on United Nations premises—No obligation under international law to provide refuge—Possibility to grant refuge, on humanitarian grounds, in case of immediate danger for the person's life—Persons trying to evade justice by seeking such refuge must be handed over to national authorities with certain warranties—Risk of jeopardizing the inviolability and security of United Nations premises when granting such refuge

16 February 2006

1. Further to our meeting last week, you asked me to provide a couple of points concerning the granting of protection to third parties on United Nations premises. Set out below are the legal principles applicable to situations where third parties seek protection on United Nations premises. It should be emphasized that each case is different, which is why when an office or mission finds itself in a situation where a third party is seeking or has been granted protection on United Nations premises, United Nations Headquarters should be contacted immediately and the views of the Office of Legal Affairs be sought.

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[4] The Commentary on the Rome Statute states in this respect as follows:

"It may be mentioned, however, that the term "intentionally" is used to convey the requirements that the perpetrator of the crime must in fact have been aware that the personnel or objects were involved in a humanitarian assistance or peacekeeping mission. Thus, it is required that the attack was on humanitarian assistance or peacekeeping personnel or objects a such" (p. 196).

2. The question of those who seek protection on United Nations premises has legal as well as humanitarian aspects. Legally, the right to seek refuge and the correlative obligation to provide for such refuge are not recognized as part of customary international law. On a humanitarian basis, however, refuge may be given if there is an imminent danger to that person's life and for the duration of such danger. By "imminent danger", we mean that if a person is faced with an immediate threat of violence and that threat is credible, the person in question may, on humanitarian grounds, be given temporary protection.

3. The question of those who seek protection on United Nations premises is therefore governed by the principle of inviolability of our premises and our obligation not to allow them to be used as a refuge for persons evading justice.

4. Under the Convention on the Privileges and Immunities of the United Nations[*] the premises of the United Nations are inviolable. The United Nations alone can exercise authority over such premises and no governmental or other authority or person can enter the premises without prior consent. The purpose behind such inviolability is to enable the United Nations and its offices as well as peacekeeping operations and political missions to be able to fulfill their mandate and it is important that members of an office/mission/operation do nothing that is inconsistent with the impartial and international nature of their duties.

5. Certain United Nations Office/Headquarters Agreements contain the following standard provision:

> "Without prejudice to the provisions of the General Convention and this Agreement, the [Office/HQ] shall not allow the premises to become a refuge from justice for persons avoiding arrest or prosecution under the laws of [the host country], or against whom a warrant of arrest or an order of extradition, expulsion or deportation has been issued by the competent authorities".

6. Should a person who has been granted refuge be facing prosecution in the host country and the United Nations is so informed by the Government, we could agree to hand him/her over to national authorities on condition of safe conduct out of United Nations premises and that he or she would be guaranteed due process of law, i.e., that the Government would not act arbitrarily. As appropriate, a humanitarian organization such as the International Committee of the Red Cross (ICRC) could act as an intermediary between the United Nations and the Government and assist with the hand-over.

7. In this connection and by way of an example, I attach a legal opinion dated 29 August 1995 concerning 65 individuals who sought refuge in the United Nations compound in [City, Country]. The legal opinion included advice as to how the United Nations should respond to the Government's request for their hand-over as well as to how ICRC and the Office of the United Nations High Commissioner for Refugees should be involved in this process.

8. In conclusion, I would point out that there are important policy and legal reasons that militate against granting temporary refuge to third parties on our premises. In the first instance, by granting temporary refuge, we assume responsibility for the protection of that individual. Secondly, we may, through granting such assistance, be undermining our own international status and jeopardizing the safety and security of our own staff.

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

8. Personnel questions

(*a*) Interoffice memorandum to a Human Resources Officer, Personnel Management and Support Service of the Department of Peacekeeping Operations, regarding the release of personal effects of a [staff member]

Hand-over of personal effects of a deceased staff member—Organization's duty to identify a suitable heir—No obligation to identify actual heirs according to national laws—Dispute between possible heirs must be brought to appropriate national court

25 April 2006

1. I refer to your memorandum of 31 March 2006 in respect of the above matter, and note that pursuant to our advice of 17 January 2006, you have written to both [staff member]'s parents and to his sister, asking them whether a Notary Public has determined who the heirs to [staff member]'s estate are. I note that only [staff member]'s parents have responded, forwarding a notarized attestation of the heirs to [staff member]'s estate. Such heirs include both [staff member]'s parents and his sister. The attestation states that any of the heirs "are solely competent and authorized to perform any and all acts of administration and disposal as regards the aforementioned estate, including the right to claim and take receipt of any and all objects and assets belonging thereto, and to validly give discharge for same."

2. In our memorandum to you of 31 March 2005, we had noted that the policy of the Organization in respect of the personal effects of deceased staff members is to hand them over to the "presumed heirs", and have them sign a "receipt and release, hold harmless and identification agreement" before a notary public (as contained in Annex 2 of the Handbook). The policy does not oblige the Organization to identify the actual heirs according to national laws, but merely identify a suitable person to hand over the effects to, and hand them over on the condition that the Organization is held harmless in any subsequent dispute.

3. As such, we would propose that the late [staff member]'s personal effects should now be sent to his parents upon their signing the above mentioned hold harmless agreement. The reason is that the Organization is not in a position to arbitrate a dispute between [Staff member]'s family, if indeed there is one, and its only duty is to hand over the personal effects to a presumed heir. Enough proof has been submitted by [Staff member]'s parents that they are indeed presumed heirs. We also suggest that, as a matter of proper procedure, the Department of Peacekeeping Operations inform [Staff member]'s sister that his personal effects are being handed over to his parents upon their signing of a hold harmless agreement, and that should she wish to contest their possession of such effects, she should bring the dispute to the appropriate national court.

(*b*) Interoffice memorandum to the Director, Office of Legal and Procurement Support of the United Nations Development Programme (UNDP), regarding the discretionary authority of the United Nations Joint Staff Pension Fund (UNJSPF) to determine periods of contributory service for purposes of participation in the UNJSPF

Determination of periods of contributory service—Period of notice of a staff on special leave without pay—Exclusive role of the Pension Board of UNJSPF

TO INTERPRET ITS REGULATIONS AND ADMINISTRATIVE RULES—UNJSPF NOT BOUND BY SEPARATION PACKAGES AGREED BETWEEN A MEMBER ORGANIZATION AND ONE OF ITS STAFF MEMBERS—POSSIBILITY TO APPEAL DECISIONS OF UNJSPF FOLLOWING THE RELEVANT ADMINISTRATIVE REVIEW PROCESS

6 June 2006

1. [. . .] You have requested advice regarding the participation of staff of UNDP in the United Nations Joint Staff Pension Fund (UNJSPF) when such staff are on special leave without pay (SLWOP).

Authority of the UNJSPF to determine eligibility for participation in the Fund

2. As a preliminary matter, Staff Regulation 6.1 provides that participation of staff members in the UNJSPF is governed by the Regulations of the UNJSPF. Article 2 of the Regulations provides that the United Nations Joint Staff Pension Board ("Pension Board") has the authority to interpret the Regulations and the Administrative Rules of the UNJSPF to the extent required to give effect thereto. Therefore only the Board of the UNJSPF has the authority to interpret and apply them. Moreover, a participant in the UNJSPF or anyone else entitled to rights under the Regulations and Administrative Rules of the UNJSPF who claims that a decision of the Board of the UNJSPF constitutes a "non-observance" of such Regulations and Administrative Rules may submit an application to the Administrative Tribunal, in accordance with Article 48 of the Regulations and Section K of the Administrative Rules of the UNJSPF appealing such decision. In light of the limited role of this Office in interpreting and applying the Regulations and Administrative Rules of the UNJSPF, I suggest that notwithstanding my advice below, you address your request for advice to the Secretariat of the UNJSPF.

Notice period as contributory service

3. You have requested advice as to whether the period of notice given to a staff member in accordance with Staff Rule 109.3 is contributory service for purposes of participation in the UNJSPF, if such period of notice occurs after an interval of SLWOP.[1]

4. Under Article 21(c) of the Regulations of the UNJSPF, participation in the UNJSPF ceases when a participant has completed three consecutive years of service without concurrent contributions having been paid into the UNJSPF while serving on leave without pay. If such a period of leave without pay is interrupted by periods of contributory service, participation ceases when a participant completes, within any five-year period, a total of four years of non-contributory service while on leave without pay. Article 21(c), therefore, establishes clear limits to participation in the UNJSPF for participants who are on leave without pay and for whom concurrent contributions to the UNJSPF are not being made.

[1] Staff Rule 109.3 provides that a staff member whose appointment is terminated is entitled to either an appropriate notice period, or, in lieu of such notice period, compensation "equivalent to salary, applicable post adjustment and allowances corresponding to the relevant notice period." The Staff Rules do not address the situation in which a staff member actually serves during such a notice period with pay and allowances after having been on SLWOP.

5. In addition to the limits on participation in the UNJSPF while on leave without pay set forth in Article 21 of the Regulations of the UNJSPF, Rule J.6 of the Administrative Rules of the UNJSPF provides as follows:

> "The contributory service of a participant shall not include unused annual leave accrued at the date of separation, for which compensation is paid, or any period in respect of which payment is made in lieu of notice of termination."

This Rule makes clear that payment in lieu of notice under Staff Rule 103.9(c) cannot be used as a means for resuming contributory service under the Regulations of the UNJSPF.

6. The more complex question you have raised is whether service during a notice period after an interval of SLWOP constitutes contributory service within the meaning of the Regulations of the UNJSPF. As previously noted, it is the exclusive role of the Pension Board of the UNJSPF to interpret its Regulations and Administrative Rules. In this regard, I understand that it is the UNJSPF's policy not to consider a notice period served after an interval of SLWOP as constituting contributory service if the purpose of serving such notice period is merely to allow a staff member to re-enter the UNJSPF as a participant and to avoid the time limits set forth in Article 21. The UNJSPF appears to be of the view that such notice periods after SLWOP intervals are effectively the same as compensation in lieu of a notice period pursuant to Staff Rule 109.3(c), particularly if the staff member does not perform any actual duties. In this regard, the UNJSPF's concerns relate to the risk of liability to the UNJSPF itself, including potential payments of death and disability benefits. I further understand that such policy is now the subject of an appeal filed by a UNDP staff member who has been on SLWOP for an extended period of time and who had agreed to a separation package, and that this issue may only finally be resolved by the Administrative Tribunal.

7. These problems, relating to the cessation of participation in the UNJSPF, could be avoided if the employing organization informed its staff members in advance of the implications that taking SLWOP and/or agreeing to a separation package may have on their pension entitlements. In addition, such staff members should be made aware of the possibility of continuing concurrent contributions in accordance with Article 22(b) and 25(b) of the Regulations of the UNJSPF, provided that such concurrent contributions commence before SLWOP is first taken.

8. As regards separation agreements, I would like to state that such agreements concluded between a member organization of the UNJSPF and a staff member relating to pension entitlements and benefits must conform to the Regulations and Administrative Rules of the UNJSPF. The UNJSPF is not bound by such bilateral agreements, and therefore, they can have no bearing on the application of the Regulations and Administrative Rules of the UNJSPF.

Case of [Name]

9. In addition to requesting advice generally about participation of staff in the UNJSPF while serving on SLWOP, you have asked for our views on the specific case of one such UNDP staff member, [Name]. In this regard, you stated that [Name] had been a staff member of UNDP on a permanent appointment for 24 years, 10 months and 26 days when he accepted a separation package offered by UNDP. Pursuant to this separation package, [Name] was placed on SLWOP for a period of 2 years, 6 months and 23 days. He was then

reinstated by UNDP to pay status for the duration of his termination notice period in order to bridge his contributory service with the UNJSPF to 25 years, in such a case, the UNJSPF participant would normally be entitled to either a withdrawal settlement or a deferred retirement benefit. UNDP and [Name] also agreed that he would be placed on SLWOP until he reached the age of 55, when he would be eligible for an early retirement benefit pursuant to Article 29 of the Regulations of the UNJSPF. After he served an additional month on SLWOP, UNDP offered [Name] a short-term assignment for a period of six months. It appears that these administrative measures were taken by UNDP to maximize the pension benefits of [Name] who was not yet eligible for an early retirement benefit.

10. After considering [Name]'s case, the UNJSPF stated that the notice period during which he returned to UNDP service did not constitute contributory service for purposes of participation in the UNJSPF. In addition, after UNDP had provided the UNJSPF with [Name]'s Personnel Action form (PA) concerning his short-term assignment, the UNJSPF requested that UNDP also submit [Name]'s terms of reference and his employment contract. In this regard, you have raised the following questions: (i) whether the decision of the UNJSPF that [Name]'s notice period did not constitute contributory service was supportable, and, (ii) whether the UNJSPF has the right to request and review [Name]'s terms of reference and his employment contract.

11. As mentioned in paragraph 6 above, it is for the UNJSPF to determine whether a staff member's service during a notice period constitutes contributory service for purposes of applying Article 21(c) of the Regulations and Rule J.6 of the Administrative Rules of the UNJSPF. While in [Name]'s case no payment had been made in lieu of notice, you specifically indicated that the purpose of his reinstatement to pay status was to enable [Name] to attain 25 years of contributory service with the UNJSPF and, thus, to become eligible for an early retirement benefit. While you indicated that [Name] was "available to perform duties" during his notice period, it is unclear whether he actually performed any work. In light of the foregoing, it appears that the UNJSPF's determination that [Name]'s service during the notice period did not constitute contributory service within the meaning of Article 21(c) of the Regulation the UNJSPF was arguably within its discretionary authority. In any case, if [Name] is of the view that the decision of the UNJSPF is not supportable under the Regulations and Administrative Rules of the UNJSPF, he may appeal that decision in accordance with Article 48 of the Regulations and Section K of the Administrative Rules of the UNJSPF.

12. Finally, as regards UNJSPF's request to UNDP to submit further documents concerning [Name]'s short-term assignment, I refer to Article 21 of the Regulations of the UNJSPF which establishes the conditions of participation in the Fund, as well as Rule B.I of the Administrative Rules of the UNJSPF, which provides that the member organization has an obligation to register a staff member's admission to the Fund as a participant by furnishing the secretary of the staff pension committee of the organization with such information as is required, including the terms of appointment. Furthermore, Rule B.I specifically indicates that the member organization shall "*thereafter* notify the secretary [of the staff pension committee of the organization] of any changes which occur therein." (Emphasis added). It appears, therefore, that the UNJSPF's request to UNDP to submit [Name]'s terms of reference and his employment contract was made pursuant to such provisions of the Regulations and Administrative Rules of the UNJSPF.

13. Please do not hesitate to contact me should you have any further questions or require any clarifications regarding the foregoing advice.

(*c*) Letter to the Interim Director of the United Nations System Staff College (Turin, Italy) regarding the calculation of end of service payment (*Liquidazione*)

End of service of locally-recruited staff members—No end of service packages provided for in United Nations Staff Rules and Regulations—Flemming principle—Staff members transferred from an organization providing for end of service packages, having severed their contractual link with this organization, lost their entitlement to such packages unless specifically provided otherwise in the transfer agreements—Possibility for the Organization to establish end of service packages for current staff members without retroactive effects for former staff members

14 June 2006

1. I refer to your letter dated 24 March 2006, received on 4 May 2006 at our Office, in which you sought my advice on the implementation of an end of service payment policy (*Liquidazione*) by the United Nations System Staff College (Staff College) with respect to its locally recruited General Service staff members (GS staff members). In particular, you asked whether (i) previous service with the International Training Centre of the International Labour Organization (ITC-ILO) of staff members who transferred to the Staff College upon its inception and their subsequent service with the Staff College should be considered for the calculation of their end of service payment; and, (ii) whether service of staff members of the Staff College who were recruited by the Staff College prior to 1 January 2006 should be considered for the calculation of their end of service payment.

2. The Staff College was established by resolution 55/207 of the General Assembly on 1 January 2002 after approval of its Statute, and is part of the United Nations. Pursuant to Article V, paragraph 4 of the Staff College's Statute, approved by the General Assembly in resolution 55/278, "the terms and conditions of service of the Director and the staff shall be those provided for in the Staff Regulations and Rules of the United Nations, subject to such administrative arrangements as are approved by the Secretary-General in his capacity as Chairman of the Administrative Committee on Coordination". The United Nations Staff Regulations and Rules do not provide for an end of service payment for staff members. I understand, however, that the majority of Italian-based United Nations organizations have implemented an end of service payment policy for their locally recruited GS staff members, based on the Flemming principle.[*]

3. I further understand that upon the establishment of the Staff College in January 2002, some of ITC-ILO's staff members holding fixed-term appointments transferred to the Staff College on the basis of the Inter-Organization Agreement concerning Transfer, Secondment or Loan of Staff among the Organizations applying the United Nations Com-

[*] The Flemming Principle establishes the conditions of service for General Service staff on the basis of the best prevailing local conditions. The principle has been subject to several reviews since its adoption by the General Assembly in 1949.

mon System of Salaries and Allowances (Inter-Agency Agreement). This Agreement sets forth in Section I, article 1(b) that "it does not of itself give the staff members rights which are enforceable against an organization. It merely sets out what the organizations will normally do. The agreement can only be enforced to the extent that either the organizations have included appropriate provisions in their administrative rules or the parties have accepted to apply it in the individual case".

4. With regard to the transfer ITC-ILO staff members to the Staff College, ITC-ILO and the Staff College agreed that transferring staff members would carry over the following entitlements: service credits, salary and allowances, annual leave credit, home leave entitlement and participation in the United Nations Joint Staff Pension Fund (UNJSPF). However, even though ITC-ILO had an end of service payment policy in place at the time of the transfer, it appears from the facts made available to us that the organizations did not take any explicit decision as to whether this policy should continue to apply to staff members transferring to the Staff College. The Personnel Action forms issued to the transferring staff members by the United Nations Office at Geneva did not include such an end of service payment entitlement either.

5. In accordance with Section III, article 8 (a) and (b) of the Inter-Agency Agreement, a staff member will cease to have any contractual relationship with the releasing organization as of the date of transfer, and from then on the staff member's entitlements will be governed by his/her contractual relationship with the receiving organization. The conditions of service of the staff members who transferred from ITC-ILO to the Staff College are therefore, as of the date of their transfer, governed by the United Nations Staff Regulations and Rules. Thus, in the absence of any contractual agreement, these staff members do not have any right to an end of service payment even though they were entitled to such payment under the conditions of service of the releasing organization.

6. I also understand that the Staff College has directly recruited local GS staff members since its inception. In this regard, and as mentioned above, the terms and conditions of service of staff members of the Staff College are governed by the United Nations Staff Regulations and Rules, in accordance with Article V, paragraph 4 of the Staff College's Statute. As these Regulations and Rules do not provide for an end of service payment entitlement, and as the Staff College had not implemented an end of service policy, staff members directly recruited by the Staff College do not have a right to an end of service payment at this time.

7. In light of the above, there appears to be no legal impediment to introduce the end of service payment as of 1 January 2006 only for current staff members, and not to apply it retroactively to former staff members. This view is supported by the case *Brimicombe and Ablett* in which the Administrative Tribunal of the United Nations (UNAT) held that:

> "With respect to the question of whether the benefits ought to have been extended to all staff members, including former staff members [. . .], the Tribunal finds that it was reasonable for the Respondent to decline to do so. [. . .], if the Applicants had wished to challenge their recruitment status, the appropriate time to do so was within two months of their recruitment, in accordance with staff rule 111.2, and certainly within their employment, when they knew or should have known of their claim."
>
> (See Judgement No. 871, *Brimicombe and Ablett* (1998))

8. With regard to your question as to whether service prior to the implementation of the end of service payment policy should be taken into consideration for the calculation of such payment, we are of the view that, while there would be no legal objection thereto, it might be unreasonable to take into account any service of staff members prior to the inception of the Staff College. Therefore, previous service with the ITC-ILO of staff members who transferred to the Staff College does not necessarily have to be considered for the calculation of their end of service payment.

9. The question as to whether service of staff members with the Staff College prior to the implementation of an end of service policy should be considered for the calculation of the end of service payment is a policy question for you to decide. We recommend, however, that such decision will ensure equal and fair treatment of all staff members concerned, namely those who transferred from the ITC-ILO, as well as those who were directly recruited by the Staff College. From a legal point of view, the end of service payment may be calculated either:

(*a*) By taking into account service of eligible staff members with the Staff College prior to the implementation of the end of service payment policy; or,

(*b*) By taking into account service of eligible staff members with the Staff College only as of the date of the implementation of the end of service payment policy.

10. Please do not hesitate to contact me should you have any further questions or require any clarifications regarding the foregoing advice.

(*d*) Interoffice memorandum to the Secretary, Advisory Board on Compensation Claims, regarding recreational activities sponsored by the United Nations Staff Union

Compensation of a staff member for injuries sustained during Inter-Agency sport Games—Games not considered to be official United Nations events—Participating staff members are not on official duty—Despite a broad notion of injury incurred "in the course of employment", such injury cannot be viewed as work-related and thus compensated—Recommendation to have staff members sign a waiver before taking part in future similar events

28 June 2006

1. I refer to your memorandum of 10 May 2006, requesting the opinion of the Office of Legal Affairs (OLA), as to whether injuries arising from, sports/athletic events that are scheduled for Staff Day and for Inter-Agency Games may be compensated under Appendix D to the Staff Rules, in addition, you request OLA's opinion as to whether, for future events, the Staff Union could be encouraged to schedule events that would less likely result in injuries to staff.

2. We understand that the Advisory Board on Compensation Claims (the "Board") has received one claim thus far resulting from Staff Day activities from a staff member who sustained an injury to his right rib cage while participating in a football game. We are not aware whether the Board has received any other claims arising from the Inter-Agency Games that took place in Pesaro, Italy, last month. With respect to the Inter-Agency games, you have informed us that while participating staff are responsible for their own travel

arrangements, the leave is considered as official business (special leave with pay) and that staff members have not been requested to sign any sort of waiver in case they sustain an injury while travelling to or participating in the games.

3. At the outset, I note that as recreational and sports events for staff members, Staff Day activities and the United Nations Inter-Agency Games are not official United Nations events. Furthermore, the Inter-Agency Games do not fall within the scope of ST/AI/2000/20 of 22 December 2000 on official travel.[*] Accordingly, staff participating in these sports and recreational activities are not considered to be on official duty, even if staff are granted special leave with pay at the discretion of their supervisors. This Office has also in the past advised that as the Inter-Agency Games are not official United Nations events, use of the un-modified United Nations emblem on uniforms made for the Games would not be appropriate.

4. Pursuant to Article 2(a) of Appendix D, "Compensation shall be awarded in the event of death, injury or illness of a staff member which is attributable to the performance of official duties on behalf of the United Nations . . ." Article 2(b) adds that:

> "Without restricting the generality of paragraph (a), death, injury or illness of a staff member shall be deemed to be attributable to the performance of official duties on behalf of the United Nations in the absence of any wilful misconduct or wilful intent when:
>
> (i) The death, injury or illness resulted as a natural incident of performing official duties on behalf of the United Nations; or
>
> (ii) The death, injury or illness was directly due to the presence of the staff member, in accordance with an assignment by the United Nations, in an area involving special hazards to the staff member's health or security, and occurred as the result of such hazards; or
>
> (iii) The death, injury or illness occurred as a direct result of travelling by means of transportation furnished by or at the expense or direction of the United Nations in connexion with the performance of official duties; provided that the provisions of this sub-paragraph shall not extend to private motor vehicle transportation sanctioned or authorized by the United Nations solely on the request and for the convenience of the staff member."

5. As you may be aware, Appendix D is somewhat analogous to workmen's compensation schemes. Therefore, the Board may be guided by the following factors in such schemes that have been considered as important in establishing whether a recreational injury occurred "in the course of employment":

a. place where the injury occurred: did it occur on the premises of the employer?

b. time the injury occurred: during normal working hours? during lunch time? or after normal working hours?

c. activity giving rise to the injury: was it encouraged, organized or financed by the employer (in order to encourage physical fitness, to create employee good will, or even as an inducement for entry into employment)?

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

d. any benefits to employer: e.g. team competing against others under the employer's name, thus in effect advertising for the employer?

6. Furthermore, most Worker Compensation Acts do not require that the employee be on the clock when the injury occurred. In many instances, it is sufficient that the injury occurred within a reasonable time before or after the scheduled hours of work. In addition, under the jurisdiction of some States of the Host Country, a compensable injury may occur while the employee is involved with an employer-sponsored athletic event, social function or other after-work related activity, as long as the employee is performing some activity to promote the employer's business interest or affairs. Courts also apply the "totality of the circumstances" test in order to determine whether there is sufficient causal connection between the injury and employment in order to justify compensation. The criteria used are generally those listed in paragraph 5 above.

7. Thus, the context of the recreational or sports event that leads to an injury of a staff member would have to be analyzed to determine whether the activity in question occurred in the course of a staff member's official duties.

8. As the Inter-Agency Games do not appear to satisfy most of the criteria in paragraphs 5 and 6 above and would not be considered as "performance of official duties" according to Article 2 of Appendix D, we believe that Appendix D coverage would not extend to staff members participating in the Games. Given the criteria cited above, however, it may be probable that some recreational activities taking place on Staff Day may fall under Appendix D. Therefore, the specific facts of claims should be examined on a case-by-case basis, taking into account the guidelines listed above.

9. The Board should also note, however, that the United Nations Administrative Tribunal has recognized that, "depending upon the circumstances of a given case, an accident occurring while a staff member is engaged in an activity not strictly within the official duties defined and listed in any job description might nevertheless be attributable to performance of official duties as a natural incident thereof." (See Judgement No. 570, *Roth* (1992), paragraph VI). To safeguard against potential claims by staff members that may be appealed and ultimately viewed favourably by the United Nations Administrative Tribunal, we would recommend that staff members participating at recreational and sports events that include a risk for injury should sign a waiver beforehand. At the very least, such staff members should be warned in advance of the risk that they may suffer non-compensable injury.

10. With respect to your question of whether, for future events, the Staff Union could be encouraged to schedule events that would less likely result in injuries to staff, that is a policy decision that is outside the purview of this Office.

(*e*) Interoffice memorandum to the Officer-in-Charge, Policy Support Unit of the Office of Human Resources Management regarding the decision on payment of death benefit to staff member's husband who is in prison as the prime suspect in her murder

Payment of death benefits to the spouse of a deceased staff member—Exceptional withholding of such payment pending the trial of the spouse for the murder of

the staff member—In case of guilty verdict, the payment would have to be made to the staff member's child

2 August 2006

1. This refers to your memorandum dated 11 July 2006 asking advice on whether it would be justified to hold the "death benefit" payable to a staff member's spouse under Staff Rule 109.10 (a) in escrow until there is a judgement from the competent [national] court as to whether the deceased staff member's spouse is guilty or not of her murder. The staff member died on 5 October 2005, and, as advised in an email of 22 June 2006 from the International Criminal Tribunal for Rwanda, the husband is still being held by the [national] police as a prime suspect "under investigation". If he is found not guilty, the Organization would pay him the benefit. If he were found to be guilty, you request our advice as to whether it would be legally justified to make an exception to the applicable Staff Rules and pay the benefit to the staff member's dependent child, who is already entitled to 50 % of the total amount of the death benefit of $9,395.75.

2. It is an accepted general principle of law that no one should be allowed to profit from his/her own wrongdoing. The United Nations Staff Rules are rules of general application and do not envisage very unusual situations such as the one you presented. Of course, we recognize that the accused remains innocent until proven guilty. However, we also recognize that once the funds are distributed, it would be very unlikely that they could ever be retrieved. Accordingly, the escrow proposal, pending the resolution of the criminal case, seems appropriate. Therefore, in light of the extraordinary circumstances of this case, the Organization should hold the death benefit normally due to the staff member's spouse until there is a judgement from the competent [national] court. Should the staff member's spouse be found guilty, it would be in accordance with general principles of law for the staff member's dependent child to receive the share of the staff member's spouse. We consider that there are very limited risks that the United Nations Administrative Tribunal would reverse a decision denying a death benefit to the murderer of a staff member.

(*f*) Interoffice memorandum to the Assistant Secretary-General for Human Resources Management regarding the travel of staff members with [Country] nationality

Status of stateless persons—Statelessness determined by reference to national law—Status granted only to stateless persons *de jure* and not to those *de facto*—Widespread lack of recognition of a national passport not regarded as *de jure* statelessness—Official travel on behalf of the Organization—Staff members on official travel can use their United Nations *Laissez-Passer* as valid travel documents

26 October 2006

1. This is in reference to your memorandum of 25 May 2006 in which you seek our advice with respect to the issues raised by [Name], President of the Coordinating Committee for International Staff Unions and Associations of the United Nations System (CCISUA), in his letter dated 15 May 2006. [Name] draws attention to the increasing difficulties experienced by staff members of [Country] nationality with regard to official travel on behalf of the Organization, including their inability to obtain travel visas. You request

our advice on his behalf as to whether the Organization has ever considered issuing travel documents in respect of staff who are considered "stateless", and if not, what the United Nations might do to address this specific situation.

2. The principles governing the status of stateless persons are established in the Convention Relating to the Status of Stateless Persons of 28 September 1954,[*] and the Convention on the Reduction of Statelessness of 30 August 1961.[**] A "stateless person" is defined as "a person who is not considered as a national by any State *under the operation of its law*" (emphasis added). As such, a person's "statelessness" is determined solely by reference to the national law of the original State of nationality. In adopting this approach, the 1954 Convention has adopted a "*de jure*" (legal) as distinguished from a "*de facto*" (actual) definition of "statelessness". In the present case, therefore, the question of whether any [Country] staff members may be considered "stateless" would be determined under [Country] law.

3. As noted in your memorandum, the staff members at hand are in fact nationals of [Country]. Accordingly, it is the widespread lack of recognition of the [Country] passport which places them in a situation akin to "statelessness", rather than the operation of [Country] law regarding nationality. As such they are *"de facto"* stateless. As the determination of nationality or statelessness remains within the purview of the national law, *"de facto"* stateless persons are not internationally protected, and no third State or international organization, including the United Nations, can substitute the State of nationality and pronounce itself on the nationality or statelessness of any person. As unsatisfactory as this situation may be, there is little that the United Nations can do by way of issuing travel documents to the said staff members.

4. With respect to official travel by United Nations officials, Article VII of the Convention on the Privileges and Immunities of the United Nations[***] ("the General Convention") sets forth provisions which relate to United Nations *Laissez-Passer* (UNLP):

> *Section 24* "the United Nations may issue United Nations *laissez-passer* to its officials. These *laissez-passer* shall be recognized and accepted as valid travel documents by the authorities of members taking into account the provisions of section 25".
>
> *Section 25* "Applications for visas (where required) from the holders of United Nations *laissez-passer,* when accompanied by a certificate that they are traveling on the business of the United Nations, shall be dealt with as speedily as possible. In addition, such persons shall be granted facilities for speedy travel".

5. Based on the provisions of Article VII above, [Country] staff members should be able to undertake official travel using their UNLPs as valid travel documents. Although the recognition of a passport issued by [Country] is a matter for the Member State to which the [Country] national wishes to travel, the issuance of visas in respect of official travel is a matter in which the United Nations can be of assistance on the basis of Member States' obligations under the General Convention. Accordingly, with respect to your question as to what the United Nations might do to address this specific situation, we suggest that this issue be approached on a case-by-case basis. Should a Member State refuse to issue a visa

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[*] United Nations, *Treaty Series,* vol. 360, p. 117.

[**] United Nations, *Treaty Series,* vol. 989, p. 175.

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

to a [Country] staff member in respect of official travel, this matter may be taken up by the Office of Legal Affairs of the United Nations vis-à-vis the national authorities concerned.

(*g*) Note to the Treasurer regarding the adherence to United Nations policy for salary payments—status of [Association Name]

Payment of salaries of United Nations staff members—Salaries must be paid to a bank account held in the name of the staff member and no more than one other person

1 December 2006

1. We refer to your memorandum of 9 November 2006, requesting our advice in connection with the payment by the United Nations of salaries of eleven staff members into a shared bank account, which is held in the name of the [Association Name] at the United Nations Federal Credit Union in New York (UNFCU). We also refer to our various follow-up discussions with your office. Under separate cover, we will revert on the concerns raised in your 9 November memorandum regarding the status of the [Association Name] (including [Association Name]'s operation and management) under applicable banking laws.

2. You stated in your 9 November memorandum that Treasury has recently become aware that, pursuant to their written instructions, salaries of eleven staff members have been paid into a shared bank account, held at the UNFCU in the name of the [Association Name]. Upon learning of this fact, Treasury advised the staff members concerned that the designation of a shared bank account was inconsistent with United Nations rules governing the payment of emoluments, and requested the staff members concerned to amend their payment instructions, to ensure that their salaries would be paid into a bank account held in the name of the individual staff member or a joint account maintained by the staff member and no more than one other person.

3. We concur with Treasury's view that payment of staff salaries into a shared bank account does not comport with applicable United Nations rules. Administrative Instruction ST/AI/2001/1,[*] dated 8 February 2001, entitled "Currency and modalities of payment of salaries and allowances", sets out the procedures for the payment of salaries to staff members employed by the United Nations. In this regard, Section 2.2 of ST/AI/2001/1 provides that "salaries [. . .] shall be paid to *individual staff members* [. . .]" (emphasis added). Moreover, Annex II to Information Circular ST/IC/2001/14,[**] dated 8 February 2001, entitled "Direct deposit of salary, salary distribution request and funds transfer request forms" provides that, for purposes of receiving salary payments from United Nations Headquarters, the staff member must have a bank account in his or her name or a joint account

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

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

maintained by the staff member and no more than one other person.[1] Accordingly, we concur with Treasury's course of action to request the staff members concerned to designate individual bank accounts for the payment of their salaries.

(*h*) Interoffice memorandum to the Senior Adviser, Office of the Executive Director of the United Nations Children's Fund (UNICEF) regarding the disclosure of employment records of a UNICEF staff member

Release to a third party of employment and medical records of a staff member—Immunity and privileges of United Nations archives—Possibility to release to a third party, at the request of the staff member and on a strictly voluntary basis, information relating to attendance and earnings—Copies of medical records can only be provided to the staff member

8 December 2006

1. I refer to your memorandum, dated 6 November 2006, by which you forwarded to us copies of the letters of [Name 1] of the [Law Firm Name], dated 17 August and 13 October 2006, respectively, regarding the release of employment records of [Name 2], a UNICEF staff member. You requested our assistance in responding to those letters.

2. I understand that [Name 1] is the legal representative of [Names 3 and 4], against whom [Name 2] has instituted a law suit in New Jersey. From the information provided to this Office, it is not clear what the subject matter of the law suit is. It appears, however, that it is in connection with a private dispute that does not involve the Organization. I note that [Name 1] has requested UNICEF to release certified copies of [Name 2]'s employment records for the purposes of discovery. In this regard, [Name 2] has signed a form authorizing UNICEF to release certified copies of "records in its possession pertaining to [her] attendance at work, as well as [her] earnings and any other medical records pertaining to disability, sick time, Workers' Compensation claims, ability to discharge [her] duties for [UNICEF], to [Law Firm, Address]."

3. As you know, pursuant to Article II, Section 2 of the Convention on the Privileges and Immunities of the United Nations of 1946 ("United Nations Convention"), (United Nations, *Treaty Series,* vol. 1, p. 15), to which the United States of America became a party in 1970 (21 *UST* 1418; *TIAS* No. 6900), "[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity." Pursuant to Article II, Section 4 of the Convention, "[t]he archives of the United Nations, and in general all documents belonging to it or held by it, shall be inviolable wherever located". However, the United Nations may, on a strictly voluntary basis, cooperate in order to facilitate the proper administration of justice, and may, therefore, agree to release certain information on a staff member at his or her request.

4. In this regard, [Name 2] has signed a form authorizing UNICEF to release certified copies of: (i) her attendance records; (ii) records relating to her earnings; and (iii) medi-

[1] Annex II to ST/IC/2001/14 applies to internationally recruited staff members stationed in the field. It is our understanding that the 11 staff members concerned are all internationally recruited staff members.

cal records (see paragraph 3 above). Pursuant to the release signed by [Name 2], the release of her attendance records and records relating to her earnings, do not seem objectionable, unless UNICEF considers that those records should be provided by [Name 2] directly to [Name 1]'s firm, since the staff member herself can obtain them from the relevant offices in UNICEF (or she may already be in possession of those records).

5. With regard to [Name 2]'s medical records, under existing United Nations policy, a staff member's medical records cannot be released to a third party, notwithstanding a release provided by the staff member concerned. The Organization should therefore not accede to [Name 1]'s request for the release of [Name 2]'s medical records. However, you may wish to inform [Name 1] that, under current United Nations policy, [Name 2] herself may obtain copies of her medical records from the Medical Services Division, which copies [Name 2] can then provide to [Name 1].

6. In light of the above, we have prepared and attached a draft letter which you may wish to consider sending to [Name 1].

Draft letter from UNICEF to the outside counsel

Employment records of [Name 2]

I refer to your letters of 17 August and 13 October 2006, requesting certified copies of employment records of [Name 2], a UNICEF staff member, pertaining to her attendance at work, her earnings, her medical records relating to disability, sick time and Worker's Compensation claims, as well as records relating to her ability to discharge her duties.

I understand that your request is made in connection with a law suit initiated by [Name 2] against your clients. From the information provided to us, it is not clear what the subject matter of the law suit is. It appears, however, that it concerns a private dispute that does not involve the United Nations.

We wish to inform you that under Article II, Section 2 of the Convention on the Privileges and Immunities of the United Nations of 1946 ("United Nations Convention"), (United Nations, *Treaty Series,* vol. 1, p. 15), to which the United States of America became a party in 1970, 21 *UST* 1418; *TIAS* No. 6900, "[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity." Pursuant to Article II, Section 4 of the United Nations Convention, "[t]he archives of the United Nations, and in general all documents belonging to it or held by it, shall be inviolable wherever located". However, the United Nations may, on a strictly voluntary basis, cooperate in order to facilitate the proper administration of justice, and may, therefore, agree to release certain information on a staff member at his or her request.

In this regard, you have submitted a form signed by [Name 2], authorizing UNICEF to release certified copies of "records in its possession pertaining to [her] attendance at work as well as [her] earnings and any other medical records pertaining to disability, sick time, Workers' Compensation claims, ability to discharge [her] duties for [UNICEF], to [Law Firm, Address]."

Pursuant to the above-referenced request for release, please find enclosed certified copies of [Name 2]'s (i) attendance records and (ii) records relating to her earnings. With regard [Name 2]'s medical records, please be informed that the United Nations is not in

a position to accede to your request since, under United Nations policy, a staff member's medical file cannot be released to a third party, notwithstanding a release provided by the staff member concerned. Under United Nations policy, however, a staff member may obtain copies of medical records from the United Nations Medical Services Division. Therefore, we suggest that you contact [Name 2] directly with a request to provide you with copies of the medical records referred to above.

Please take notice that nothing in or relating to the foregoing, including the provision of the copies of [Name 2]'s records relating to her attendance and earnings, shall be deemed a waiver, express or implied, of the privileges and immunities of the United Nations.

(*i*) Interoffice memorandum to the Senior Advisor, Office of the executive Director of the United Nations Children's Fund (UNICEF), regarding the release of records relating to the earnings of a UNICEF staff member

Release to a third party of earnings records of a staff member—Immunity and privileges of United Nations archives—Possibility to release, at the request of the staff member and on a strictly voluntary basis, records relating to payments, pension and insurance plans

8 December 2006

1. I refer to your e-mail message of 4 December 2006, by which you forwarded to us a copy of the letter of [Name A], Attorney at Law, dated 15 November 2006, regarding the release of the records relating to the earnings of [Name B], a retired UNICEF staff member. You requested our assistance in responding to this letter.

2. I understand that [Name A] has requested UNICEF to provide him with copies "of all pay statements issued to [Name B] [by UNICEF] between 1 January 2000, and the present". I note that [Name B] has signed a form authorizing UNICEF to release" any and all information regarding any pension plan, savings plan, insurance plan, or any other benefit of [his] employment to [Name A, Address]". From the information provided to us, it is not clear whether [Name A] is representing [Name B] or why [Name A] is requesting those documents.

3. Under Article II, Section 2 of the Convention on the Privileges and Immunities of the United Nations of 1946 ("United Nations Convention"), (United Nations, *Treaty Series,* vol. 1, p. 15), to which the United States of America became a party in 1970 (21 *UST* 1418; *TIAS* No. 6900), "[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity." Pursuant to Article II, Section 4 of the United Nations Convention, "[t]he archives of the United Nations, and in general all documents belonging to it or held by it, shall be inviolable wherever located". However, the United Nations may, on a strictly voluntary basis, cooperate in order to facilitate the proper administration of justice, and may, therefore, agree to release certain information on a staff member at his or her request. UNICEF is a subsidiary organ of the United Nations, and, therefore, is covered by the United Nations Convention.

4. Pursuant to the above-mentioned release signed by [Name B], the release of his records relating to his earnings while employed by UNICEF does not seem objectionable.

However, UNICEF might consider that those records should be provided by [Name B] directly to [Name A], since the retired staff member himself may already be in possession of those records.

5. In light of the above, we have prepared and attached hereto a draft response which UNICEF may wish to consider sending to [Name A].

Draft letter from UNICEF to the outside counsel

Records relating to [Name B]'s earnings

I refer to your letter of 15 November 2006, requesting copies of all pay statements issued by UNICEF to [Name B], a retired UNICEF staff member, between 1 January 2000 and the present. From the information provided to us, it is not clear whether you are representing [Name B] in a matter or for what purpose you have requested those records.

We wish to inform you that under Article II, Section 2 of the Convention on the Privileges and Immunities of the United Nations of 1946 ("United Nations Convention") (United Nations, *Treaty Series,* vol. 1, p. 15), to which the United States of America became a party in 1970 (21 *UST* 1418; TIAS No. *6900*), "[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity." Pursuant to Article II, Section 4 of the United Nations Convention, "[t]he archives of the United Nations, and in general all documents belonging to it or held by it, shall be inviolable wherever located". However, the United Nations may, on a strictly voluntary basis, cooperate in order to facilitate the proper administration of justice, and may, therefore, agree to release certain information on a staff member at his or her request. UNICEF is a subsidiary organ of the United Nations, and, therefore, is covered by the United Nations Convention.

In this regard, you have submitted a form signed by [Name B], authorizing UNICEF to release to you copies of "any pension plan, savings plan, insurance plan, or any other benefit of [his] employment."

Pursuant to the above-referenced request for release, please find enclosed copies of records relating to [Name B]'s earnings while employed by UNICEF.

Nothing in or relating to the foregoing, including the provision of the copies of [Name B]'s records relating to his earnings, shall be deemed a waiver, express or implied, of the privileges and immunities of the United Nations, including its subsidiary organs.

9. Miscellaneous

Note to the Assistant Secretary-General for Peacekeeping Operations regarding the request from [Country] for the amnesty of [Name]

Criminal accountability and responsibility in peacekeeping missions—Staff member sentenced by Court in Kosovo to time in jail for murder and larceny committed while on mission in Kosovo—Sentence enforced in his country of origin—Possibility of granting an amnesty in accordance with the laws of his country of origin, if approved by the sentencing party, UNMIK—Information relating to national laws regarding amnesty must be conveyed by the Government and not the staff member's attorney—In view of the grave and violent nature of crimes involved, such amnesty would be inconsistent with the rule of law and principles of accountability

20 September 2006

1. I wish to refer to Code Cable [Number] from [the Under-Secretary-General for Peacekeeping operations] to UNMIK dated 23 August 2006 and copied to [the Under-Secretary-General for Legal Affairs] attaching a Note Verbale from the Permanent Mission of [Country] which reiterates the Government's request that [Name], who is currently serving a thirteen year jail sentence in [Country] for murder and larceny he committed in Kosovo, be granted amnesty. You will recall that [Name], previously an international police officer in Kosovo, was convicted and sentenced in 2002 by a Court in Kosovo for murdering his language assistant. He was then transferred to [Country] pursuant to an Agreement concluded in 2003 between UNMIK and the Government whereby the Government agreed to enforce [Name]'s sentence.

2. However, the Government has requested that UNMIK approve the granting of an amnesty to [Name] in accordance with Article 9 of the Agreement which provides that the Government may grant the sentenced person amnesty or a commutation of his sentence in accordance with its laws, "if such amnesty or commutation is of general applicability and the sentencing Party [UNMIK] approves."

3. We had previously, for purposes of considering this request, asked the Government to provide us with the relevant laws under which amnesty is granted in [Country] as well as further details as to how the Government pursuant to its national laws intends to grant [Name] amnesty.

4. In response, the Government, by its Note Verbale of 23 August has submitted a memorandum from [Name]'s attorney that explains the laws pursuant to which amnesty is granted. This memorandum cites provisions in the [Country] Constitution as well as the [Country] Penal Code which indicate that the granting of amnesty is at the discretion of the President and can be of general applicability. The memorandum explains that, "The application of amnesty in [Country] is based on the issuance of [an] amnesty sentence by the President for the sentenced persons at the various religious and national occasions" and that "such amnesty is a general one including general groups of prisoners who [have] already executed a given or specified period of the penalties issued against them conditioning on their good behavior."

5. Furthermore, the President, may, at his discretion, under the Constitution, grant amnesty, "to those who are suffering from health problems or [are] having some special

family circumstance." The memorandum reiterates that amnesty is of general applicability of which thousands of sentenced persons at [Country] jails take advantage. It concludes by stating that the request for amnesty for [Name] falls within the "general applicability of amnesty" provided for under Article 9 of the Agreement and that there are also humanitarian grounds that should be taken into account, including the fact that [Name] is the father of a son and also needs to assist his parents who are suffering from health problems.

6. In the first instance, the United Nations is not in a position to act pursuant to information provided by the defence counsel of [Name] and would prefer that information concerning the granting of amnesty and the laws pursuant to which amnesty is granted be conveyed through the Government's official channels. Secondly, the amnesty of "general applicability" from which [Name] will benefit should be further clarified by the Government. While the amnesty laws in [Country] may be of general application, Article 9 of the Agreement referred to above makes clear that the amnesty to be granted has to be of "general applicability". This means that the act of amnesty should be based on general criteria which should be applicable to a broad category of prisoners, including [Name].

7. Finally, even if the Government did confirm that [Name] was to benefit from an amnesty of "general applicability" as defined above, we nevertheless remain of the view that given the grave and violent nature of the crimes for which he was convicted, UNMIK should not approve any amnesty for [Name]. Any approval of amnesty in this particular case would be inconsistent with the Organization's policy of promoting the rule of law as well as the principles of accountability and responsibility for serious crimes.

B. LEGAL OPINIONS OF THE SECRETARIATS OF INTERGOVERNMENTAL ORGANIZATIONS RELATED TO THE UNITED NATIONS

1. International Labour Organization[1]

(*a*) Legal Adviser's opinion on the relationship between Parts A and B of the Code[2]

New form of legal instruments—Legal question arising from the coexistence of binding and non-binding provisions in a single Convention

Questions were addressed to the Legal Adviser by the Government representatives of the Netherlands and Denmark, as well as those of Cyprus and Norway, as to the various consequences flowing from the coexistence in the draft consolidated Convention of binding and non-binding provisions for ratifying Members.

The High-level Tripartite Working Group on Maritime Labour Standards is, in accordance with its mandate, working on a consolidated Convention as a new type of instrument compared with those adopted up to now. The consolidation of maritime instruments in force is aimed at placing all substantive elements in a single instrument in an approach radically different to that employed up to now, where Conventions contain detailed techni-

[1] Submitted by the Legal Adviser of the International Labour Conference.

[2] Adoption of an instrument to consolidate maritime labour standards.

cal provisions, often accompanied by Recommendations. From this perspective, conclusions cannot be drawn from the traditional formal arrangement based on the distinction between a Convention—where the provisions are binding—and a Recommendation–where they are not.

The future instrument is a Convention open to ratification by States Members providing explicitly for the coexistence of binding and non-binding provisions (proposed Article VI, paragraph 1). The provisions of Part A of the Code would be binding; those of Part B would not. Some international labour Conventions set out, alongside binding provisions, others that are of a different nature.[3] The novelty introduced in the future instrument essentially resides in the great number of non-binding provisions in the instrument. It should equally be noted that other organizations, such as the International Maritime Organization, have adopted conventions containing the two types of provisions without any apparent legal problems in their application.

Members ratifying the Convention would have to conform to the obligations set out in the Articles, the Regulations and Part A of the Code. Their only obligation under Part B of the Code would be to examine in good faith to what extent they would give effect to such provisions in order to implement the Articles, the Regulations and Part A of the Code. Members would be free to adopt measures different from those in Part B of the Code so long as the obligations set out elsewhere in the instrument were respected. Any State Member which decided to implement the measures and procedures set out in Part B of the Code would be presumed to have properly implemented the corresponding provisions of the binding parts of the instrument. A Member which chose to employ other measures and procedures would, if necessary, and particularly where the Member's application of the Convention was questioned in the supervisory machinery, have to provide justification that the measures taken by it did indeed enable it to properly implement the binding provisions concerned.

(*b*) Provisional record 20, Fourth item on the Agenda: Committee on Occupational Safety and Health

Legal significance of International Labour Organization (ILO) recommendations

Following a request from the Worker Vice-Chairperson, the representative of the ILO Legal Adviser clarified the status of ILO Recommendations. He explained that they were instruments of the International Labour Organization and, like Conventions, they were formally adopted by the International Labour Conference but, unlike Conventions, they were not subject to ratification by member States and were not binding on them. Most Recommendations supplemented Conventions and as such they were intended to guide government action in implementing the latter. Like unratified Conventions, Recommendations entailed an obligation for Members to report on the state of law and practice in their

[3] Annex D, Report 1 (1 A) Adoption of an instrument to consolidate maritime labour standards available at http://www.ilo.org/public/english/standards/relm/ilc/ilc94/rep-i-la.pdf

See, for example, the Occupational Health Services Convention, 1985 (No. 161), Article 9, paragraph 1: " . . . occupational health services should be multidisciplinary."

country in regard to the matters covered by the Recommendation, when requested by the Governing Body.

2. United Nations Industrial Development Organization

(*a*) Legal opinion re: Privileges and immunities of non-[State's] staff members of the rank of P-5 and above who are (permanent) residents of [State]

PRIVILEGES AND IMMUNITIES OF STAFF MEMBERS OF RANK P-5 AND ABOVE—PERMANENT RESIDENCE IN RECEIVING STATE—VIENNA CONVENTION ON DIPLOMATIC RELATIONS, 1961*—ADDITIONAL PRIVILEGES AND IMMUNITIES GRANTED BY RECEIVING STATE

The main legal question raised by the [. . .] Foreign Ministry's request to return [Name's] red legitimation card is whether officials of the rank of P-5 and above who have acquired (permanent) residence in [State] are entitled to diplomatic privileges and immunities in terms of UNIDO's Headquarters Agreement.

Section 37 of the Headquarters Agreement lists the privileges and immunities granted to officials of all ranks, while section 38 grants additional privileges and immunities to the Director-General and officials of the rank of P-5 and above. In relevant part, section 38 (c) reads:

> "(c) *Except as provided in Section 39,* other officials having the professional grade of P-5 and above . . . shall be accorded the same privileges and immunities, exemptions and facilities as the Government accords to members, having comparable rank, of the staffs of chiefs of diplomatic missions accredited to [State]." (Emphasis added.)

In accordance with the opening exception in this paragraph, the granting of diplomatic privileges and immunities to officials of the rank of P-5 and above does not extend to [State's] nationals and stateless persons resident in [State], who under section 39 (a) are granted the privileges and immunities foreseen in the Convention on the Privileges and Immunities of the United Nations of 1946,** together with tax exemption on pensions and access to the Commissary.

In section 38 (c), the phrase "shall be accorded the same privileges and immunities, exemptions and facilities as the Government accords to members, having comparable rank, of the staffs of chiefs of diplomatic missions accredited to [State]", describes the privileges and immunities accorded and not the persons to whom they are accorded under this section.

Section 38 (c) therefore expressly excludes only [State's] nationals and stateless persons resident in [State] from its field of application. It thus applies to all other officials of the rank P-5 and above, whether or not they may be (permanently) resident in [State]. If the intention had been to deny additional diplomatic privileges and immunities to non-[State's] nationals (permanently) resident in [State], section 38 or some other section should have stated as much.

It follows from the above that the remark [privileges and immunities in terms of the Headquarters Agreement only], which the foreign ministry proposes to add to [name's]

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

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

legitimation card, cannot have the effect of limiting his diplomatic privileges and immunities.

The Vienna Convention on Diplomatic Relations of 1961, which provides the framework for the diplomatic privileges and immunities accorded to officials of the rank of P-5 and above, foresees a limited range of privileges and immunities where the diplomatic agent is a national or permanent resident of the receiving state. Paragraph 1 of article 38 of the convention stipulates that:

> "1. *Except insofar as additional privileges and immunities may be granted by the receiving State,* a diplomatic agent who is a national of or permanently resident in that State shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions." (Emphasis added.)

This provision contains an important qualification, underlined above, making it possible for the receiving state to grant additional diplomatic privileges and immunities to its nationals or permanent residents, should it so choose. [State] appears to have exercised this right in section 38 (c) of the Headquarters Agreement, which, by expressly excluding only [State's] nationals and stateless persons resident in [State] from its scope, implies agreement that diplomatic privileges and immunities should extend to all other officials of the rank of P-5 and above, including those who acquire (permanent) residence in [State].

In view of the above, the Office of Legal Affairs doubts that the provisions of the Headquarters Agreement provide a satisfactory justification for the opinion that staff members of the rank of P-5 and above who acquire (permanent) residence in [State] enjoy only a limited range of privileges and immunities. In order to restrict the privileges and immunities granted to (permanent) residents of [State], it would appear necessary to amend the Headquarters Agreement. This is particularly so since the agreement does not refer to or define the concept of 'permanent' residence.

(*b*) Interoffice memorandum re*:* Legal basis of UNIDO's exemption from value-added tax in [State]

Exemption from value-added tax for international organizations—Convention on the Privileges and Immunities of the Specialized Agencies, 1947[*]—European Union (EU) harmonization of tax exemptions—Request for statement from tax authorities

I refer to your email dated [. . .] addressed to [name], in which you requested additional justifications regarding UNIDO's exemption from Value Added Tax (VAT) in [State]. The justifications are needed in view of certain difficulties which a supplier, [name], is said to be experiencing with the [State's] tax authorities. [. . .]

In your email you state that the [State's] tax authorities are requiring a statement from the [host country] tax authorities regarding UNIDO's exemption from VAT. You mention that you are of the opinion that the fact that UNIDO does not pay tax within the EU has nothing to do with the [host country] tax authorities, but with the agreement that [State] has signed with UNIDO.

[*] United Nations, *Treaty Series,* vol. 33, p. 261.

The legal basis under international and EU law of UNIDO's exemption from VAT in [State] is as follows:

(*a*) **Convention on the privileges and immunities of the specialized agencies of 1947**, to which [State] acceded on [date]. Section 10 of the Convention provides that States parties to the Convention will, whenever possible, make appropriate administrative arrangements for the remission or return of the amount of duty or tax which forms part of the price to be paid. VAT is a "tax which forms part of the price to be paid".

(*b*) **EU Directive 77/388/EEC of 17 May 1977**, which governs the harmonization of the laws of EU member states relating to VAT. In particular, article 15, paragraph 10, of the directive provides that EU member States shall exempt from VAT supplies of goods and services to international organizations recognized as such by the public authorities of the host country, within the limits and under the conditions laid down by the international conventions establishing the organizations or by headquarters agreements. The same paragraph states that the exemption may be implemented by means of a refund of the tax. The fact that [host country] is a member of and has concluded a headquarters agreement with UNIDO indicates that UNIDO is an international organization "recognized as such by the public authorities of the host country". Since UNIDO is exempt from all forms of taxation in [host country] pursuant to section 24(a)-(b) of its headquarters agreement, the Organization benefits in other EU member states from the VAT exemption established by the directive. Even though VAT charged in [host country] is refunded to UNIDO rather than exempted at the point of sale, the general practice seems to be for other EU member states to grant UNIDO an exemption at source.

In my view, it would not be an acceptable precedent to obtain a statement from the [host country] tax authorities as requested by the local [State's] tax authorities.

You may wish to bring the above-mentioned provisions to the attention of the supplier. [. . .]

(*c*) Internal e-mail message re: Query regarding dispute settlement by [Name]

Dispute settlement between Members of UNIDO—Application or interpretation of the Constitution of UNIDO—Article 22 of the Constitution of UNIDO—Industrial Development Board—Advisory opinions of the International Court of Justice—Arbitral tribunal—Conciliation commission

I refer to your e-mail of [date] to [Name] concerning a request from [Name], a student of international law at [City] University. [Name] has requested detailed information about the mechanism of dispute settlement between Members of UNIDO and requests for advi-

sory opinions as foreseen in Art. 22[1] of the Constitution of UNIDO. I would be grateful if you could transmit the following information to [Name], [. . .]

Article 22 of the UNIDO Constitution, which was opened for signature on 7 October 1979, regulates the settlement of possible disputes between Members of the Organization concerning the interpretation or application of the Constitution. Paragraph 1(a) of Article 22 provides that any dispute among two or more Members concerning the interpretation or application of the Constitution, including its annexes, that is not settled by negotiation shall be referred to the Industrial Development Board unless the parties agree on another mode of settlement. For disputes that are not settled in the afore-mentioned manner to the satisfaction of any party to the dispute, paragraph 1(b) of Article 22 provides that that party may refer the matter either (i) to the International Court of Justice or to an arbitral tribunal, if the parties so agree, or (ii) to a conciliation commission. The same paragraph stipulates that the rules concerning the procedures and the operation of the arbitral tribunal and of the conciliation commission are laid down in Annex III to the Constitution.

Paragraph 2 of Article 22 provides that the General Conference and the Industrial Development Board are separately empowered, subject to authorization from the General Assembly of the United Nations, to request an advisory opinion from the International Court of Justice on any legal question arising within the scope of UNIDO's activities. The requisite authorization for both the General Conference and the Industrial Development Board has been granted in terms of Article 12 of the Agreement concerning the Relationship between the United Nations and UNIDO,* which was concluded pursuant to Article 57 of the Charter of the United Nations and Article 18 of the Constitution of UNIDO. The Agreement was provisionally applied from 12 December 1985 and came into force definitively on 17 December 1985.

In practice, no dispute between Members of UNIDO has arisen concerning the interpretation or application of the Constitution which has necessitated referral to the International Court of Justice (ICJ), an arbitral tribunal or a conciliation commission pursuant to Article 22. In addition, neither the General Conference nor the International Development

[1] "Article 22. Settlement of disputes and requests for advisory opinions

1. (*a*) Any dispute among two or more Members concerning the interpretation or application of this Constitution, including its annexes, that is not settled by negotiation shall be referred to the Board unless the parties concerned agree on another mode of settlement. If the dispute is of particular concern to a Member not represented on the Board, that Member shall be entitled to be represented in accordance with rules to be adopted by the Board.

(*b*) If the dispute is not settled pursuant to paragraph 1 (a) to the satisfaction of any party to the dispute, that party may refer the matter: either, (i) if the parties so agree:

(A) to the International Court of Justice; or

(B) to an arbitral tribunal;

or, (ii) otherwise, to a conciliation commission.

The rules concerning the procedures and operation of the arbitral tribunal and of the conciliation commission are laid down in Annex III to this Constitution.

2. The Conference and the Board are separately empowered, subject to authorization from the General Assembly of the United Nations, to request the International Court of Justice to give an advisory opinion on any legal question arising within the scope of the Organizations' activities."

* United Nations, *Treaty Series,* vol. 1412, p. 305.

Board has requested an advisory opinion from the ICJ. For these reasons, no statements of arguments or arbitration panel decisions are available.

Finally, it may be relevant to mention that UNIDO includes in its country-office agreements and other agreements with States an appropriate clause, usually providing for arbitration, on the settlement of any dispute between the parties. A typical example of such an clause is Article XIII[1] of UNIDO's Model Standard Basic Cooperation Agreement, a copy of which is attached for your information.*

(*d*) Information circular: Privileges and immunities and traffic violations

PRIVILEGES AND IMMUNITIES—TRAFFIC VIOLATIONS AND PARKING OFFENCES—STAFF REGULATIONS PROVISIONS 1.3 AND 1.7—FUNCTIONAL IMMUNITY REGARDING AUTHORIZED OFFICIAL BUSINESS

In view of the number of cases involving violations of [Host Country] traffic regulations by staff members, both with and without diplomatic status, which have been reported to the Organization by the [Host Country] Federal Ministry of Foreign Affairs, the attention of all staff is drawn to the following Staff Regulations:

> *Regulation 1.3: Staff shall conduct themselves at all times in a manner befitting their status as international civil servants.* They shall not engage in any activity that is incompatible with the proper discharge of their duties with the Organization. They shall avoid any action and in particular any kind of public pronouncement which may adversely reflect on their status, or on the integrity, independence and impartiality which are required by that status. (Emphasis added)
>
> *Regulation 1.7: The immunities and privileges attached to the Organization by virtue of Article 21 of the Constitution are conferred in the interests of the Organization. These privileges and immunities furnish no excuse to the staff who enjoy them for non-performance of their private obligations or failure to observe laws and police regulations.* In any

[1] Article XIII "*Settlement of Disputes*

1. Any dispute between UNIDO and the Government arising out of or relating to the interpretation or application of this Agreement, which is not settled by negotiation or other agreed mode of settlement, shall be submitted to arbitration at the request of either Party. Each Party shall appoint one arbitrator, and the two arbitrators so appointed shall appoint a third, who shall be the chairman. If within thirty days of the request for arbitration either Party has not appointed an arbitrator or if within fifteen days of the appointment of two arbitrators the third arbitrator has not been appointed, either Party may request the President of the International Court of Justice to appoint an arbitrator. The procedure of the arbitration shall be fixed by the arbitrators, and the expenses of the arbitration shall be borne by the Parties as assessed by the arbitrators. The arbitral award shall contain a statement of the reasons on which it is based and shall be accepted by the Parties as the final adjudication of the dispute.

2. Any dispute between the Government and an operational expert arising out of or relating to the conditions of his service with the Government may be referred to UNIDO by either the Government or the operational expert involved, and UNIDO shall use its good offices to assist them in arriving at a settlement. If the dispute cannot be settled in accordance with the preceding sentence or by other agreed mode of settlement, the matter shall at the request of either the Government or UNIDO be submitted to arbitration following the same provisions as are laid down in paragraph 1 of this Article, except that the arbitrator not appointed by either Party or by the arbitrators of the Parties shall be appointed by the Secretary General of the Permanent Court of Arbitration."

* Not reproduced therein.

> case where a question of these privileges and immunities arises, the staff member shall immediately report to the Director-General, with whom alone it rests to decide whether they shall be waived. In the case of the Director-General, the Industrial Development Board shall have the right to waive immunities. (Emphasis added)

Staff members are reminded that privileges and immunities are conferred solely in the interests of the Organization and not for the personal benefit of the individuals themselves. Immunities do not excuse staff from the performance of their private obligations or from the observance of laws and regulations. In particular, staff members are not exempt from paying fines issued for violations of traffic and parking regulations, which should be settled on a personal basis. If a staff member considers that a fine has been wrongly imposed, he or she should take the steps provided by the law to appeal against the decision. Recurrent traffic violations by a staff member reflect upon the Organization and cannot be considered merely the private matter of the staff member concerned.

Communications from the [Host Country] authorities regarding traffic violations, parking offenses and related matters are normally sent to staff members directly. Staff members are therefore requested to ensure that they provide their private residential addresses and not that of the Organization when registering their privately owned vehicles with the competent [Host Country's] authorities. Staff members who have provided the address of the Organization should change the address accordingly.

Whenever the Secretariat receives diplomatic notes concerning traffic violations or parking offenses by staff members and their dependents, the Office of Legal Affairs initiates appropriate action in cooperation with the Human Resources Management Branch. The Human Resources Management Branch generally forwards diplomatic notes to the staff members concerned for comments before the Office of Legal Affairs replies to the foreign ministry. A traffic violation or parking offence incurred by a staff member while on authorized official business may be reported to the Human Resources Management Branch with an explanation of the circumstances of the violation or offence, the nature of the official business and a request that functional immunity be claimed. In the event that functional immunity can be claimed, the Office of Legal Affairs will take steps to inform the foreign ministry that the staff member was on official business.