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**Note verbale to the Minister of Foreign Affairs of a Member State, concerning
importation of medical supplies and educational material**

ARTICLE 105 OF CHARTER OF THE UNITED NATIONS—CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS, 1946—UNITED NATIONS PROPERTY AND ASSETS ARE IMMUNE FROM SEARCH, REQUISITION, CONFISCATION, EXPROPRIATION, AND ANY OTHER FORM OF INTERFERENCE—EXEMPTION FROM CUSTOMS DUTIES, PROHIBITIONS AND RESTRICTIONS ON IMPORTS AND EXPORTS IN RESPECT OF ARTICLES IMPORTED BY THE UNITED NATIONS FOR ITS OFFICIAL USE—MEANING OF “ARTICLES INTENDED FOR OFFICIAL USE”—REQUIREMENT TO OBTAIN STANDARDS TESTING CERTIFICATION FOR ARTICLES IMPORTED AS PART OF AN OFFICIAL PROGRAMME OF THE ORGANIZATION IS INCONSISTENT WITH THE CHARTER AND THE 1946 CONVENTION

The Legal Counsel of the United Nations presents her compliments to the Minister of Foreign Affairs of [Member State] and has the honour to bring to the Minister’s attention the severe difficulties being faced by the [United Nations Agency] in importing medical supplies as well as educational materials to be used in [United Nations Agency] schools in [...]. Currently, 15 consignments have not been cleared by port authorities and, therefore, remain at the border, causing the Agency additional costs associated with their storage.

The Legal Counsel understands that this problem has been persisting since 2008, despite a number of letters sent and meetings conducted by [United Nations Agency] with both the Ministry of Foreign Affairs as well as other competent authorities of [Member State]. The Legal Counsel further understands that the [Member State] authorities refer to the lack of standards testing certification as the ground for not clearing the above-mentioned shipments.

In this regard, the Legal Counsel wishes to express her serious concern with the situation and to confirm the position outlined in the letter of the [United Nations Agency] Deputy Commissioner-General to the Deputy Director General for the United Nations and International Organizations Division of the Ministry of Foreign Affairs of [Member State], dated 22 July 2012 (attached),* and the letter of the Director of [United Nations Agency] Operations in [territory] to the [Member State], dated 9 November 2010 (attached).*

The Legal Counsel also would like to summarize the applicable legal norms and principles as follows.

The status, privileges and immunities of [the United Nations Agency], as a part of the United Nations, is governed in [Member State] by Article 105 of the Charter of the United Nations. Paragraph 1 of this Article provides that “[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes”. Pursuant to paragraph 3 of the same Article, the General Assembly in 1946 adopted the Convention on the Privileges and Immunities of the United Nations (hereinafter the “General Convention”)** “with a view to determining the details of the application of paragraphs 1 and 2 of this Article”.

[Member State] has been a party to the General Convention since [date] without any reservations. Article II, section 3, of the General Convention provides that the 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...”.

* Not reproduced herein.

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

Article II, section 7, of the General Convention further provides that “[t]he United Nations, its assets, income and other property shall be:

...

(b) exempt from customs duties and prohibitions and restrictions on imports and exports in respect of articles imported or exported by the United Nations for its official use. It is understood, however, that articles imported under such exemption will not be sold in the country into which they were imported except under conditions agreed with the Government of that country”.

In 1952 the Office of Legal Affairs clarified the meaning of the term “articles intended for official use”, which has been widely accepted ever since, as follows:

“We are not of the opinion that the contention of the Government that the provisions of section 7(b) of the Convention on the Privileges and Immunities of the United Nations are restricted to imports required for administrative purposes only can be legally justified. It is our view that the phrase “for its official use” in section 7(b) must be interpreted to include the importation of any goods, materials, foodstuffs or otherwise, which are used in and form a part of the official programme of [United Nations Agency]. The fact that such goods imported by the United Nations are thereafter distributed to individuals within the country in accordance with the purpose and aims of the programme instituted by [United Nations Agency] can hardly be regarded as negating the purposes of the exemption under this section, when the very reason for the existence of [United Nations Agency] is to perform such functions, and not merely to consume administrative supplies.

...

For this reason, any discussion with the Government on the meaning of section 7 of the Convention must relate back to the criterion of necessity set up in Article 105 of the Charter, which the Convention merely implements.” (*The Yearbook of the International Law Commission, 1967, Vol. II, para. 181*).

Therefore, the imposition on [United Nations Agency] of the requirement to obtain standards testing certification is not consistent with the legal obligations of [Member State] under the abovementioned instruments.

In this regard, the General Assembly, including most recently in its resolution [...], has called “upon [Member State] particularly to cease obstructing the movement and access of the staff, vehicles and supplies of the Agency and to cease the levying of taxes, extra fees and charges, which affect the Agency’s operations detrimentally.” Furthermore, the General Assembly urged “the Government of [Member State] to expeditiously reimburse the Agency for all transit charges incurred and other financial losses sustained as a result of delays and restrictions on movement and access imposed by [Member State]”.

In light of the above, the Legal Counsel respectfully requests the Government of [Member State], in line with its legal obligations under the Charter of the United Nations and the General Convention, to ensure that [United Nations Agency] is exempt from the requirement to provide standards testing certifications for the articles imported as part of Agency’s humanitarian efforts. In particular, the Legal Counsel respectfully requests that all [United Nations Agency] imports be promptly cleared and released without any further delay.

In this regard the Legal Counsel would like to recall that the report of the Committee on the San Francisco Conference, responsible for the drafting of Article 105 of the Charter, unequivocally pointed out that “if there is one principle certain it is that no Member State may hinder in any way the working of the Organization or take any measure the effect of which might be to increase its burdens financial or otherwise”.

The Legal Counsel of the United Nations avails herself of this opportunity to renew to the Minister of Foreign Affairs of the [Member State] the assurances of her highest consideration.

31 January 2013

**Letter regarding a request to access United Nations documents for use in proceedings
before the International Criminal Tribunal for the former Yugoslavia**

DISCLOSURE OF UNITED NATIONS DOCUMENTS FOR USE IN INTERNATIONAL CRIMINAL LAW PROCEEDINGS—INSPECTION OF DOCUMENTS AT UNITED NATIONS PREMISES—DOCUMENTS RELEASED MUST NOT CONTAIN INFORMATION THE DISCLOSURE OF WHICH WOULD PLACE ANYONE IN DANGER, VIOLATE A DUTY OF CONFIDENTIALITY WHICH THE ORGANIZATION OWES TO A THIRD PARTY, COMPROMISE THE CONFIDENTIALITY OF THE ORGANIZATION'S INTERNAL DECISION-MAKING PROCESSES, OR IMPEDE THE EFFECTIVE FUNCTIONING OF MISSIONS OR OPERATIONS OF THE ORGANIZATION—PROVISION OF DOCUMENTS IS WITHOUT PREJUDICE TO THE IMMUNITY FROM LEGAL PROCESS OF THE UNITED NATIONS AND ITS OFFICIALS AND TO THE INVIOABILITY OF ITS ARCHIVES

Prosecutor v. [Name]
[...]

I refer to your letter of 18 February 2013, in which you request that the United Nations provide you with documents considered relevant for the preparation of the defence in the case against [Name] before the International Criminal Tribunal for the former Yugoslavia (ICTY).

I wish to advise you that, in principle and in so far as they may be in their custody and control, the United Nations Department of Peacekeeping Operations (DPKO) through the United Nations Archives and Record Management Section (UNARMS), are willing to make available for inspection, copies of the types of documents that you have requested.

Please note that access to the records will not be granted until the Office of Legal Affairs (OLA) receives written agreement to all the exceptions and conditions outlined below.

DPKO archives held by UNARMS that may contain the documents requested are extensive, and are located both in New York and in Geneva. The task of searching for and locating documents that meet your request – that span a period of four years, 20 years ago – might prove overly taxing to UNARMS and the other offices involved. Furthermore, searching for such documents is a task that is not easily and effectively undertaken other than by someone who is already familiar with the history of the region at that time. Staff with expertise of this kind are now very few in number and cannot easily be released for the substantial periods of time required to conduct any search of the registry. In addition, there may be some gaps in the records and the registry may not contain all the documents that fall within the scope of your request. I would wish you to be aware of these matters in order to avoid any possible misunderstandings.

In similar case in the past, the United Nations has offered the following arrangement, with a view to ensuring availability of copies of documents sought.

A staff member who is familiar with the history of the region would identify the particular boxes within UNARMS' registry that are likely to contain the documents sought. The Defence would be provided with a list of the files available in these boxes that would be retrieved for inspection. Under the supervision of a staff member, the Defence would be permitted to review this list of the files retrieved and choose the boxes that the Defence would wish to inspect from that list. The Defence would then have access to the files in those

boxes at the United Nations, to review the contents of those files and to identify, from among their contents, those documents that the Defence may request to be disclosed.

Once the documents are identified, they are copied and sent to the substantive department, in this case DPKO, who in consultation with OLA will review the documents in order to verify that they do not (i) contain any information the disclosure of which would place anyone in danger, (ii) violate a duty of confidentiality which the United Nations owes to a third party, (iii) compromise the confidentiality of the Organization's internal decision-making processes, including the political organs of the United Nations, or (iv) impede the effective functioning of current or future operations of the United Nations.

Should DPKO, with the assistance of OLA, determine that any of the documents or materials that you identify contains information that cannot be disclosed based on the criteria mentioned above, DPKO would proceed to redact that document so as to delete from it the information concerned and then make a copy of the redacted document available to you. Alternatively, if it were not feasible so to redact the document as to delete from it all such information, the document would not be provided to you. DPKO would provide you with a written explanation as to why the document concerned was being provided to you in redacted form or was not being made available to you, as the case may be.

Please confirm that this arrangement is agreeable to you and kindly provide us with the names of any other members of your team who will be inspecting the archives. As soon as we receive this confirmation, and determine that the requested documents are available in our archives you will be contacted in order to arrange your access to the relevant files in the registry.

Finally, please note that the preparedness of the United Nations to offer this arrangement is not to be understood in any way as constituting recognition of any obligation to make those documents available to you; nor is it to be understood as involving the assumption of any obligation to that effect. It is to be understood as being without prejudice to the immunity of the United Nations and its officials from legal process and the inviolability of its archives.

I am copying this letter to DPKO and ARMS.

30 April 2013

Inter-office memorandum to the Assistant Secretary-General for the Department of Field Support, concerning payment of garbage collection fees on a United Nations Entity

PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS—ARTICLE 105 OF THE CHARTER OF THE UNITED NATIONS—CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS, 1946—UNITED NATIONS ASSETS, INCOME AND OTHER PROPERTY SHALL BE EXEMPT FROM ALL DIRECT TAXES—NON-EXEMPTION FROM TAXES WHICH ARE, IN FACT, NO MORE THAN CHARGES FOR PUBLIC UTILITY SERVICES—DEFINITION OF CHARGES FOR PUBLIC UTILITY SERVICES—CHARGE IMPOSED MUST BEAR SOME RELATION TO THE AMOUNT OF SERVICES RENDERED

1. This is with reference to the email dated 24 September 2013 from [Name], forwarding an email from [United Nations Entity] (attached)* which seeks the Office of Legal Affairs' advice on the imposition of a local fee for waste collection and disposal services that [United Nations Entity] has been asked to pay by the [City] municipality in light of the privileges and immunities of the United Nations.

Factual background

2. Since its establishment, [United Nations Entity] has used a private contractor for waste collection and waste disposal services since the premises of [United Nations Entity] are located on a military installation in [Member State], where the company used by the municipality does not have access to provide such public services. The [United Nations Entity] contract that is currently in place expires at the end of October 2013. Accordingly, [United Nations Entity] has had discussions with the relevant municipal office to discuss entering into a contract with the municipality for the provision of waste collection and disposal services.

3. In March 2013, [Company], the tax and debt collection company for the [City] municipality requested a meeting with [United Nations Entity] to calculate the allegedly unpaid "tax" [...] amounts owed to the city of [...] for the provision of waste collection and disposal services.

4. On 15 March 2013, [United Nations Entity] sent a note verbale to the [Member State] Ministry of Foreign Affairs, informing the [Member State] authorities that [United Nations Entity] would not enter into discussions with [the Company] as [United Nations Entity] has never availed itself of the waste disposal services provided by the [City] municipality.

5. On 20 March 2013, the Ministry of Foreign Affairs responded by note verbale, stating that "the taxes for the disposal of urban waste traditionally fall under the services rendered as per art. 34 of the 1961 Vienna Convention on Diplomatic Relations,** and that, although [the Company] did not directly intervene inside this base, the related waste was, in any case, disposed of in the [City] municipality".

6. [United Nations Entity] understands that the Air Force of [Member State] pays [tax] for the military installation premises on which [United Nations Entity] is located, but it is unclear whether the Air Force is paying on behalf of [United Nations Entity] or only for the Air Force-occupied premises.

* Not reproduced herein.

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

Legal analysis

7. [The tax], or tax for urban solid waste, is regulated by [Member State] law, which states that [tax] is owed for occupying or owning facilities and open areas destined to whatever use, excluding the open areas and appurtenances of residential buildings other than green areas, located in the areas of the municipal territory in which the service is established and active or in any case rendered in a continuous manner.

8. According to the legal advice sought by [United Nations Entity] from [a Member State] law firm in August 2013, [tax] is comprised of both a fee and a tax. In part, it is tax which requires payment based on the potential capability of an occupier of premises producing garbage, which is independent of any service rendered directly by the State. The other part is the fee for the actual cost of the disposal.

9. As an international organization, the United Nations has been accorded certain privileges and immunities which are necessary for the fulfilment of the purposes of the Organization. Article 105 of the Charter of the United Nations provides the general basis for the privileges and immunities of the United Nations. In order to give effect to Article 105 of the United Nations Charter, the General Assembly of the United Nations adopted the Convention on the Privileges and Immunities of the United Nations (the “General Convention”) on 13 February 1946,^{***} to which [Member State] acceded on [date] without reservation.

10. Pursuant to article II, section 7(a) of the General Convention, “[t]he 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”.

11. The [year] Memorandum of Understanding between the Government of the [Member State] and the United Nations regarding the Use by the United Nations of Premises on Military Installations in [Member State] for the Support of Peacekeeping, Humanitarian and Related Operations (the “MOU”) provides in article III that the terms of the General Convention shall apply to [United Nations Entity] and its property. Article IX(1) of the MOU stipulates that the United Nations shall be exempt from all direct taxation levied by [Member State], as well as the regions, provinces and municipalities of [Member State]. Article IX(5) additionally provides that the “exemptions and facilities stipulated in this article shall not apply to charges for public general services rendered to the United Nations, it being understood that such charges shall be at the rates duly established by the appropriate [Member State] authorities and that these charges shall be specifically identified and itemized”.

12. As indicated in paragraph 36 of the 1985 study on “*The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities*”^{****} by the International Law Commission (the “1985 ILC Study”), the United Nations has consistently maintained a narrow definition of the phrase “charges for public utility services” under section 7(a) of the General Convention, which must relate to “particular supplies or services rendered by a Government or a

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

^{****} A/CN.4/L.383 and Add. 1-3, paragraph 36, reproduced in the *Yearbook of the International Law Commission, 1985*, vol. II (1)/Add.1.

corporation under government regulation, for which charges are made at a fixed rate according to the amount of supplies furnished or services rendered”. Such services, must, be “services that can be specifically identified, described and itemized”. Accordingly, the charge imposed must bear some relation to the amount of services rendered. If it does not, then it does not constitute a charge for public utility services, but rather is a direct tax on the Organization.

13. By way of example, water and electricity services are considered as charges for public utility services as they are charged for on the basis of definite units of measurement, such as the kilowatts used per hour in the latter case.

14. If the Government of [Member State] believes that the payments due are for actual services, the United Nations would require an itemized invoice showing the specific services provided on each occasion, the cost of each service and how the total cost was arrived at, as such an invoice should be normal practice whenever a party is billed for particular services.

15. In view of the above, it is clear that the portion of [tax] that is collected simply based on the fact that [United Nations Entity] occupies premises and may potentially produce waste that needs to be disposed of is a direct tax on the United Nations as this portion of [tax] is not imposed in relation to specific services rendered. As noted in the 1985 ILC Study, in a memorandum of 27 February 1968, the Office of Legal Affairs noted that “[t]he Office of Legal Affairs has always held the view that, where services furnished by municipalities are charged not according to the value of the services but according to property evaluation or other independent criteria, the payment thus made constitutes a tax”.****

16. With respect to the portion of [tax] that is a fee for actual services, [United Nations Entity] would not be exempt from the payment of this portion for [tax] if this is the actual charge for services that are provided and utilized by [United Nations Entity] and these costs can be specifically identified, described and itemized. If, however, this portion of [tax] is not calculated based upon services that can be specifically identified, describe and itemized, then [United Nations Entity] would also be exempt from payment of this portion of [tax] as well.

17. Finally, I note that the Ministry’s reference to the Vienna Convention on Diplomatic Relations is misplaced as it is the General Convention and the MOU that are the relevant agreements in this context. Both of those agreements make clear that [United Nations Entity] is not exempt from payment of charges for public utility services, but the Government must demonstrate that the payments required are for actual services rendered according to the amount of services provided.

18. Should you have any future questions, please do not hesitate to contact me directly.

17 October 2013

**** A/CN.4/L.383 and Add. 1-3, paragraph 35, reproduced in the *Yearbook of the International Law Commission, 1985*, vol. II (1)/Add.1.