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October 2, 2007

BY HAND
The Honorable Robert W. Sweet
United States District Judge
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1920
New York, New York 10007-1312

Re: *Brzak, et al. v. United Nations, et al.*, 06 Civ. 3432 (RWS)

Dear Judge Sweet:

Pursuant to 28 U.S.C. § 517, the United States respectfully submits this letter in connection with the above-referenced case, brought against the United Nations ("U.N.") and several former U.N. officials. In accordance with the United States' treaty obligations to respect the immunities of the U.N. and its officials, we explain those immunities herein, and we further relay to the Court the U.N. Secretary-General's position on the application of those immunities to the plaintiffs' allegations.[1]

I. Background

Plaintiffs filed their complaint on May 4, 2006. *See* Complaint (attached hereto at Tab A). According to the complaint, plaintiffs - Cynthia Brzak, a citizen of the United States, and Nasr Ishak, a French and Egyptian national - are both employed by the Office of the U.N. High Commissioner for Refugees ("UNHCR"), located in Geneva, Switzerland. *See id.* ¶¶ 7-8. Brzak alleges that she was grabbed in a sexual manner by defendant Ruud Lubbers at the conclusion of a business meeting in Lubbers' office in Geneva in December 2003. *See id.* ¶ 19. Lubbers was the U.N. High Commissioner for Refugees at the time and remained in that capacity until February 2005. *See id.* ¶ 11. Brzak alleges that she sought advice on how to respond to the alleged incident from plaintiff Ishak (who worked in the UNHCR Inspector General's office), and that Ishak advised Brzak to file a complaint with the U.N.'s Office of Internal Oversight Services

[1] 28 U.S.C. § 517 provides that the "Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

("OIOS"). *See id.* ¶ 21. Brzak filed an OIOS complaint on April 27, 2004. *See id.* ¶ 22. Thereafter, she alleges, Lubbers and other superiors retaliated against her by, among other things, displaying open hostility toward her, verbally harassing her, and giving her unmanageable work assignments. *See id.* ¶¶ 23, 25. Ishak similarly claims that, after it became known that he had counseled Brzak to file an OIOS complaint, he was not given a promotion for which he had been recommended, and that Lubbers attempted to abolish the office to which Ishak was attached. *See id.* ¶ 24. Plaintiffs allege that the OIOS issued a report that confirmed Brzak's allegations, but that the report's findings were subsequently rejected by the U.N. Secretary-General, who was Kofi Annan at the time. *See id.* ¶¶ 22, 25. According to the complaint, Brzak filed a formal appeal from the Secretary-General's decision within the U.N.'s internal dispute resolution system, *see id.*,[2] but the complaint does not indicate that Brzak pursued the appeal process to completion. Nor does the complaint indicate whether plaintiff Ishak availed himself of the U.N.'s internal dispute resolution system to any extent.

Plaintiffs assert causes of action principally under Title VII, as well as causes of action for intentional infliction of emotional distress, indecent battery, and civil RICO violations. *See id.* ¶¶ 27-59. The U.N. itself and eight individual U.N. officials were initially named as defendants. *See id.* ¶¶ 9-17. By letter dated July 11, 2007, plaintiffs represented to the Court that they had effected service on four defendants – the U.N., Kofi Annan, Ruud Lubbers, and Wendy Chamberlin, who was Deputy U.N. High Commissioner for Refugees at the time of the events in question (but who no longer holds that position). Plaintiffs' letter further stated that they did not intend to proceed against the other defendants named in the complaint. Accordingly, the Court dismissed the case with prejudice as against those defendants by order dated July 24, 2007.

II. Interest of the United States

The United States' interest in the immunity issues presented by this case arises from the nation's treaty obligations – which are binding on its courts – to respect the applicable immunities of the U.N. and its officials. *See generally Tachiona v. United States*, 386 F.3d 205, 212 (4th Cir. 2004) ("A corollary to the executive's power to enter into treaties is its obligation to ensure that the United States complies with them."). These immunities arise from the Charter of the United Nations, June 26, 1945, 59 Stat. 1031 (entered into force Oct. 24, 1945) ("U.N. Charter"), and the Convention on Privileges and Immunities of the United Nations, *adopted* Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 16 (entered into force Sept. 17, 1946; for the United States April 29, 1970) (the "General Convention") – both treaties to which the United States is a party. Because these immunities, where applicable, are intended to shield the U.N. and its officials from the burdens of litigation, the question of immunity should be decided at the outset, as a

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[2] The U.N. has an internal dispute resolution system pursuant to the Charter of the United Nations, June 26, 1945, 59 Stat. 1031 (entered into force Oct. 24, 1945), which specifies that "the staff of the Organization are appointed under regulations established by the General Assembly," *id.* art. 101, para. 1, and Chapter XI of the Staff Regulations of the United Nations, which provides procedures for resolving and redressing allegations of employee misconduct.

threshold jurisdictional matter. *See De Luca v. United Nations Organization*, 841 F. Supp. 531, 533 (S.D.N.Y. 1994) ("Properly invoked immunity shields a defendant not only from the consequences of litigation's results, but also from the burden of defending themselves.") (internal quotation marks and citation omitted); *see also Tuck v. Pan American Health Org.*, 668 F.2d 547, 549 (D.C. Cir. 1981) ("This shield would be lost if the merits of a complaint were fully tried before the immunity question was addressed."); *cf. NYSA-ILA Pension Trust Fund ex rel. Bowers v. Garuda Indonesia*, 7 F.3d 35, 39 (2d Cir. 1993) (holding that, before applying "any other rule of law in a case involving a foreign state," the foreign state's immunity must be addressed as a threshold matter).

Pursuant to the foregoing treaties, the U.N. itself is absolutely immune from suit and legal process absent an express waiver. The U.N. Charter provides that the United Nations "shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes." U.N. Charter, art. 105(1). The General Convention fleshes out these privileges and immunities, providing in relevant part that "[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." General Convention, art. II, § 2. The U.N. has not expressly waived its immunity with respect to this case. To the contrary, it has explicitly affirmed its immunity by letters addressed to the United States' Ambassador to the U.N. dated May 15, 2006 and October 19, 2006 (attached hereto at Tabs B and C, respectively).

The General Convention also governs the immunity of U.N. officials. In particular, the General Convention grants the Secretary-General and all Assistant Secretaries-General – which include both the High Commissioner and Deputy High Commissioner for Refugees – "the privileges and immunities . . . accorded to diplomatic envoys, in accordance with international law." General Convention, art. V, § 19. The privileges and immunities accorded to diplomatic envoys are specified in turn by the Vienna Convention on Diplomatic Relations, *done* Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 (entered into force for the United States Dec. 13, 1972) ("VCDR"). Under the VCDR, diplomatic officials sued after leaving office continue to receive immunity "with respect to acts performed . . . in the exercise of [their] functions." *Id.* art. 39(2).[3]

[3] Beyond these treaty provisions specifically applicable to the Secretary General and Assistant Secretaries-General, the General Convention also provides that U.N. officials generally, whether current or former, are immune from suit and legal process "in respect of words spoken or written and all acts performed by them in their official capacity." General Convention art. V, § 18(a). Similarly, under the International Organizations Immunities Act, 22 U.S.C. §§ 288 *et seq.*, the officers and employees of any international organization covered by the statute, including the U.N., receive immunity from suit and legal process as to "acts performed by them in their official capacity and falling within their functions as such . . . officers, or employees." 22 U.S.C. § 288d(b).

Under U.S. law, it is for the Court to decide the applicability of these immunities.[4] However, in accordance with its treaty obligations to communicate the views of the Secretary-General, *see* Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights, 1999 I.C.J. 62, 87-88, *available at* 1999 WL 33210678 (Apr. 29, 1999), the United States hereby conveys to the Court the position of the Secretary-General that the three remaining individual defendants are entitled to immunity in this matter. *See* U.N. Letters attached at Tabs B and C. The International Court of Justice has advised that the Secretary-General's views concerning the scope of immunity owed to U.N. officials should normally be accorded a high degree of deference. *See id.* at 87; *cf. Leutwyler v. Office of Her Majesty Queen Rania Al-Abdullah*, 184 F. Supp. 2d 277, 287 (S.D.N.Y. 2001) (noting similar treatment accorded to views of foreign governments concerning the immunities of their officials). The United States is not taking a position on the applicability of official-acts immunity to any of the allegations in this case.

III. Conclusion

The U.N.'s immunity and the individual defendants' official-acts immunities are governed by the principles set forth above. The United States respectfully requests that this letter be docketed and made a part of the record of this proceeding. The United States reserves the right to file a supplemental letter in response to any submissions made by the parties on this issue.

Respectfully,

MICHAEL J. GARCIA
United States Attorney for the
Southern District of New York

By: /s/ Serrin Turner
SERRIN TURNER
Assistant U.S. Attorney

Encls.

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[4] U.S. courts have broadly interpreted the immunity of officials of international organizations, particularly in the employment context, in the interest of protecting the autonomy of such organizations concerning their own internal affairs. *See Broadbent v. Organization of American States*, 628 F.2d 27, 34-35 (D.C. Cir. 1980); *Mendaro v. World Bank*, 717 F.2d 610, 615-16 (D.C. Cir.1983); *see also, e.g.*, *Van Aggelen*, No. 06 Civ. 8240(LBS), 2007 WL 1121744, at *2 (S.D.N.Y. Apr. 12, 2007); *D'Cruz v. Annan*, No. 05 Civ. 8918 (DC), 2005 WL 3527153, at *1 (S.D.N.Y. Dec. 22, 2005); *Hunter v. United Nations*, 800 N.Y.S.2d 347 (table), 2004 WL 3104829, at *2, *5 (N.Y. Sup. 2004). On the other hand, official-acts immunity does not encompass purely private conduct. *See People v. Leo*, 407 N.Y.S.2d 941, 944 (N.Y. Crim Ct. 1978).

cc: Monika Ona Bileris, Esq. (by email)
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