IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID H. LEMPERT, Plaintiff, v. SUSAN RICE, U.S. Ambassador to the United Nations, UNITED NATIONS, UNITED NATIONS DEVELOPMENT PROGRAMME, Defendants.	)	Civil Action No. 12-01518 (CKK)

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

BACKGROUND 1

ARGUMENT 3

I. THE UN IS ABSOLUTELY IMMUNE FROM SUIT UNDER THE CONVENTION ON PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS 3

II. THE INTERNATIONAL ORGANIZATIONS IMMUNITIES ACT DOES NOT AUTHORIZE THE UNITED STATES TO WAIVE THE IMMUNITY OF THE UN 5

CONCLUSION 7

TABLE OF AUTHORITIES

CASES

Boimah v. United Nations General Assembly,
664 F. Supp. 69 (E.D.N.Y.1987) 4

Brzak v. United Nations,
597 F.3d 107 (2d Cir. 2010).....5, 6

Brzak v. United Nations,
551 F. Supp. 2d 313 (S.D.N.Y. 2008).....5, 7

De Luca v. United Nations Org.,
841 F. Supp. 531 (S.D.N.Y.1994) 6

Kolovrat v.Oregon,
366 U.S. 187 (1961).....4

Sadikoglu v. UN Development Programme,
No. 11-Civ-0294 (PKC), 2011 WL. 4953994 (S.D.N.Y. Oct. 14, 2011) 5, 6

FEDERAL STATUTES

22 U.S.C. § 288.....5, 6

28 U.S.C. § 517.....1, 7

FEDERAL REGULATIONS

Exec. Order No. 9698, 11 Fed. Reg. 1809 (Fed. 19, 1946) 6

FEDERAL RULES

Federal Rules of Civil Procedure 12.....1

TREATIES AND INTERNATIONAL AGREEMENTS

21 U.S.T. 1418, 1 U.N.T.S. 16 (Feb. 13, 1946).....3, 4, 5, 6, 7

59 Stat. 1031 (June 26, 1945) 3

INTRODUCTION

Pursuant to 28 U.S.C. § 517,[1] the United States of America respectfully submits this Statement of Interest in response to the Court's request for the United States' views on whether the United Nations ("UN") is immune from suit in this action. *See* Order Soliciting the Views of the United States (ECF No. 11). Under the plain language of the UN General Convention on Privileges and Immunities, a treaty to which the United States is a party, the UN is absolutely immune from all legal process, including suit, in the absence of an express waiver by the UN of its own immunity. Because the UN has not expressly waived its immunity — indeed, it has requested that the United States take steps to protect its privileges and immunities in this case — the Court lacks subject matter jurisdiction over all of plaintiff's claims against the UN.

BACKGROUND

On September 13, 2012, David H. Lempert, proceeding *pro se*, filed suit against the UN, the UN Development Programme ("UNDP") (collectively, "UN Defendants"), and the United States Ambassador to the UN Susan E. Rice ("Ambassador Rice"), alleging that the defendants are liable for breach of contract and for the torts of fraud and "harassment."[2] *See generally* Compl. (ECF No. 1). According to his Complaint, Plaintiff is an anthropologist and law school graduate with experience as an international consultant on "rights protections." *Id.* ¶ 4. His lawsuit arises out of his alleged efforts to secure a position with the UN Volunteers ("UNV") in Laos, which was to be administrated by the UNDP — a program that reports directly to the

[1] The Government's authority to file a Statement of Interest derives from 28 U.S.C. § 517, which provides that the "Solicitor General, or any other office 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."

[2] The United States is also filing a motion to dismiss today on behalf of Ambassador Rice pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

General Assembly.[3] *Id*. ¶ 4. In February 2009, plaintiff alleges that the UN offered him the sought-after position "subject to Lao government clearance and Medical clearance." *Id*. ¶ 12. In September 2009, however, he alleges that the UNDP informed him that the Lao government had refused to issue him a long-term visa for unknown reasons and that the UNDP was therefore rescinding his position. *Id*. ¶¶ 28, 34. Plaintiff alleges that he later discovered that the UNDP had not submitted a proper visa request to the Lao government because it had already hired two lawyers to work on the project in Laos. *Id*. ¶ 30. The Complaint further alleges that plaintiff traveled to Laos in reliance on the UNDP's false representation that it was attempting to secure a long term visa on his behalf, and that UN officials have attempted to "induce him" to "drop any call for investigations of misconduct by the U.N." *Id*. ¶¶ 47, 86. Based on these allegations, plaintiff contends that the UN breached an employment contract it had entered into with him, *id*. ¶¶ 75-81, 83, and that it committed the torts of fraud and "harassment," *id*. ¶¶ 84-90, 92-93, 97-98.

With respect to his claims against Ambassador Rice, Plaintiff alleges that he requested that she waive the immunity of the UN. *See id*. ¶¶ 42, 48. He also alleges that Ambassador Rice's office caused him harm when it forwarded a letter of his complaining about UN misconduct to UN officials "without any comment." *Id*. ¶ 89. Based on these allegations, he contends that Ambassador Rice is "jointly and severally" liable as a party to his alleged employment contract with the UN, *id*. ¶ 82, and that she is also liable for the UN's alleged tortious acts of fraud and harassment, *id*. ¶¶ 91, 95, 97.

[3] *See* United Nations: Structure and Organization, http://www.un.org/en/aboutun/structure/ (last visited May 1, 2013).

Plaintiff seeks damages as well as a "full, thorough and independent investigation" of the misconduct alleged in his Complaint. Prayer for Relief (A-E).

ARGUMENT

In its order requesting the views of the United States regarding whether the UN is immune from suit, this Court requested that the United States address whether the UN is immune from suit under the Convention on Privileges and Immunities of the United Nations and/or under the International Organizations Immunities Act. Order Soliciting the Views of the United States (ECF No. 11). In response, the United States explains below that the UN is absolutely immune under the Convention on Privileges and Immunities of the United Nations. In addition, contrary to plaintiff's contention in his Complaint, *see id*. ¶ 2, the International Organizations Immunities Act does not provide the Court with jurisdiction over his claims against the UN Defendants nor does it grant the United States authority to waive the UN's immunity from suit.

I. THE UN IS ABSOLUTELY IMMUNE FROM SUIT UNDER THE CONVENTION ON PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS.

Absent an express waiver, the UN is absolutely immune from suit and all legal process. The UN Charter provides that the UN "shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes." The Charter of the United Nations, June 26, 1945, 59 Stat. 1031, art 105.1. 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 ("General Convention"), adopted by the UN shortly after the UN Charter, defines the UN's privileges and immunities by providing 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, sec. 2.

The United States understands this provision to mean what it unambiguously says: the UN, including its integral component the UNDP, enjoys absolute immunity from this or any suit unless the UN itself expressly waives its immunity. Here, the UN has not expressly waived its immunity. On the contrary, it has expressly invoked its immunity and has requested the United States to take appropriate steps to protect its privileges and immunity from suit. *See* February 26, 2013 Letter from Patricia O'Brien, Under-Secretary-General for Legal Affairs, to Ambassador Rice (Exhibit A) ("[W]e wish to advise that the United Nations expressly maintains its privileges and immunities" with respect to plaintiff's lawsuit, and that "we respectfully request the Government of the United States to take the appropriate steps to ensure that the privileges and immunities of the United Nations are maintained in respect of this legal action."). To the extent there could be any contrary reading of the General Convention's text, the Court should defer to the Executive Branch's interpretation that the UN is immune from suit here. *See Kolovrat v.Oregon*, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight").

Consistent with this interpretation, courts routinely recognize the UN's absolute immunity from suit absent an express waiver on the part of the UN. "Under the [General] Convention the United Nations' immunity is absolute, subject only to the organization's express waiver thereof in particular cases." *Boimah v. United Nations General Assembly*, 664 F.Supp. 69, 71 (E.D.N.Y.1987). "[W]here, as here, the United Nations has not waived its immunity, the

General Convention mandates dismissal of Plaintiffs' claims against the United Nations for lack of subject matter jurisdiction." *Brzak v. United Nations*, 551 F. Supp. 2d 313, 318 (S.D.N.Y. 2008), *aff'd*, *Brzak v. United Nations*, 597 F.3d 107, 112 (2d Cir. 2010); *see also, e.g.*, *De Luca v. United Nations Org.*, 841 F.Supp. 531, 534 (S.D.N.Y.1994). Furthermore, it is clear that the UN's immunity extends to the UNDP. *See Sadikoglu v. UN Development Programme*, No. 11-Civ-0294 (PKC), 2011 WL 4953994 at * 3 (S.D.N.Y. Oct. 14, 2011) (ruling that "because UNDP — as a subsidiary program of the UN that reports directly to the General Assembly — has not waived its immunity," the General Convention "mandates dismissal . . . for lack of subject matter jurisdiction").

Therefore, because the General Convention provides for the UN to be immune in a suit such as this one, and because the UN has not waived its immunity, the Court lacks jurisdiction over plaintiff's claims against the UN Defendants.[4]

II. THE INTERNATIONAL ORGANIZATIONS IMMUNITIES ACT DOES NOT AUTHORIZE THE UNITED STATES TO WAIVE THE IMMUNITY OF THE UN.

Plaintiff alleges that the International Organizations Immunities Act of 1945 ("IOIA"), 22 U.S.C. §§ 288 *et seq*., provides jurisdiction over his claims against the UN Defendants and that it authorizes the United States to waive the UN's immunity from suit. *See* Compl. ¶¶ 2, 6, 48. Plaintiff's position is without merit, because the IOIA neither requires nor authorizes the United States to waive the immunity of the UN.

[4] Plaintiff appears to recognize the UN's immunity in this case, given, as discussed immediately following, he mistakenly contends that the United States can waive the UN's immunity. *See* Compl. ¶¶ 2, 6, 48.

President Truman designated the UN as an international organization subject to the IOIA shortly after the statute's enactment. *See* Exec. Order No. 9698, 11 Fed. Reg. 1809 (Fed. 19, 1946). Under the IOIA, the President retains the authority "by appropriate Executive Order" to "withhold or withdraw from any such organization . . . any of the privileges, exemptions and immunities provided for in this subchapter . . . or to condition or limit the enjoyment by any such organization . . . of any such privilege, exemption, or immunity." 22 U.S.C. § 288. This provision, however, does not have an effect on the UN's immunity because the General Convention provides an independent source of immunity for the UN, which only the UN may waive. *See* General Convention, art. II, sec. 2 (providing that UN "shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity"). For this reason, the Second Circuit in *Brzak* squarely rejected the argument that the UN's immunity may be challenged under the IOIA. "[W]hatever immunities are possessed by other organizations [under the IOIA], the [General Convention] unequivocally grants the United Nations absolute immunity without exception." *Brzak*, 597 F.3d at 112; *see also Sadikoglu*, 2011 WL 4953994 at *4 (rejecting argument that the IOIA limits the immunity of the UNDP because the UNDP's immunity derives from the General Convention). Therefore, Plaintiff is mistaken that the United States may waive the UN's immunity, or that the IOIA creates subject matter jurisdiction over his claims against the UN.

In sum, it is clear that the UN is absolutely immune from suit in this matter pursuant to the General Convention. Therefore, in accordance with the United States' interest in honoring its treaty obligations to respect the immunities of the UN, the United States requests that the Court

dismiss Plaintiff's suit against the UN Defendants with prejudice.[5] *See Brzak*, 551 F. Supp. 2d at 316 ("The United States' interest [in filing a Statement of Interest pursuant to 28 U.S.C. § 517] arises from the nation's treaty obligations to respect the applicable immunities of the UN").

CONCLUSION

For the reasons stated above, the UN, including the UNDP, enjoys absolute immunity, and the Court therefore lacks subject matter jurisdiction over this action against the UN Defendants.

Dated: May 3, 2013

Respectfully submitted,

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Deputy Branch Director
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By: _____/s/_____
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[5] The Court should also deny plaintiff's request for an order requiring the U.S. Marshals to serve the UN and to impose sanctions against the UN for the costs of effectuating service. *See* Motion for Court Service of Defendant United Nations and United Development Programme (ECF No. 16). As demonstrated above, because there is no express waiver here, the UN is immune "from every form of legal process," which clearly includes service of process. *See* General Convention, art. II, sec. 2 (providing 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.").

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CERTIFICATE OF SERVICE

I, Nicholas Cartier, hereby certify that on May 3, 2013, I placed a copy of the foregoing in the mail in a prepaid envelope to the following person and address: "David H. Lempert, c/o Walter Schwartz, 110 Crestview Place, Ardsley, NY 10502."

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STATEMENT OF INTEREST OF UNITED STATES OF AMERICA

EXHIBIT A

United Nations Nations Unies

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REFERENCE: 2010-GLD-000218

26 February 2013

Excellency,

RE: Case of *David H. Lempert*

I write to inform you that the United Nations has been made aware that Mr. David H. Lempert, a candidate for a United Nations Volunteer (UNV) position at the Country Office of the United Nations Development Programme (UNDP) in the Lao People's Democratic Republic in 2009, has filed a complaint in the United States District Court for the District of Columbia against "Susan E. Rice U.S. Ambassador to the United Nations..., [the] United Nations ... and [the] United Nations Development Programme...". Please find enclosed a copy of the complaint.

As you are aware, the United Nations is an international intergovernmental organization established pursuant to the Charter of the United Nations (hereinafter the "UN Charter"), a multilateral treaty signed on 26 June 1945. The UN Charter was ratified by the Government of the United States on 8 August 1945 and came into force in the United States on 28 October 1945. *See* UN Charter, 59 Stat. 1031 (1945) *reprinted* in 1945 U.S. Code Cong. & Admin. News, 961 *at seq.*

Pursuant to Article 105, paragraph 1 of the UN Charter, "[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes." Paragraph 2 of Article 105 of the UN Charter provides that "[r]epresentatives of the Members of the United Nations and 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". Finally, paragraph 3 of Article 105 stipulates that "[t]he General Assembly may make recommendations with a view to determining the details of the application of paragraph 1 ... of this Article or may propose conventions to the Members of the United Nations for this purpose." UN Charter, Art. 105, 1945 U.S. Code Cong. & Admin. News, at 985.

In order to give effect to Article 105 of the UN Charter, the General Assembly of the United Nations adopted the Convention on the Privileges and Immunities of the United Nations (hereinafter the "General Convention") on February 13, 1946. 1 U.N.T.S. 15 (1946). The United States acceded to the General Convention on 29 April, 1970. 21 U.S.T. 1418; [1970] TIAS No. 6900.

Her Excellency
Ms. Susan E. Rice
Permanent Representative of the United States
to the United Nations
New York

Article II, Section 2, of the General Convention provides 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. It is, however, understood that no waiver of immunity shall extend to any measure of execution." Section 3 of the General Convention further provides that "[t]he premises of the United Nations shall be inviolable. 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, whether by executive, administrative, judicial or legislative action". Section 18 (a) of the General Convention confirms that "[o]fficials of the United Nations shall ... be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity".

In view of the foregoing, we wish to advise that the United Nations expressly maintains its privileges and immunities in respect of the above-mentioned complaint filed before the United States Court for the District of Columbia. Therefore, we respectfully request the Government of the United States to take the appropriate steps to ensure that the privileges and immunities of the United Nations are maintained in respect of this legal action.

I also wish to advise you that the Organization has extensively discussed Mr. Lempert's grievances with him and remains available to continue these discussions, if necessary, in a manner consistent with the privileges and immunities enjoyed by the Organization and its officials under the applicable legal instruments.

Sincerely yours,

Patricia O'Brien
Under-Secretary-General for Legal Affairs
the Legal Counsel