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

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

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. Legal consequences of an inability of the General Assembly to elect a non-permanent member of the Security Council

Statement made by the Legal Counsel of the United Nations at the 118th Plenary Meeting of the thirty-fourth session of the General Assembly

The question has been raised of the legal and constitutional consequences arising from the possible inability of the General Assembly to elect a non-permanent member of the Security Council which would thereby result temporarily in a Security Council of only 14 members instead of 15 members, as prescribed by the Charter.

Before addressing the consequences of such an eventuality, it is necessary to consider the function and role of the General Assembly in the election of non-permanent members of the Security Council and the nature of the obligation of the Assembly in this regard. Article 23 of the Charter provides, *inter alia*, that:

> "The General Assembly shall elect 10 other Members of the United Nations to be non-permanent members of the Security Council. . . ".

This provision is confirmed and clarified in rule 142 of the rules of procedure of the General Assembly, which states:

> "The General Assembly shall each year, in the course of its regular session, elect five non-permanent members of the Security Council for a term of two years."

In addition, rule 94 contains detailed provisions on the conduct of the elections which leave no doubt as to the absolute nature of the obligation of the Assembly, since the balloting must continue until a result is achieved — that is, ". . . and so on until all the places have been filled."

Finally, in the event that a member ceases to belong to a Council before its term of office expires, rule 140 requires the General Assembly to conduct a by-election at the next session to elect a member for the unexpired term.

From all those provisions it is clear that the Charter and the General Assembly's own rules of procedure establish the function and role of the Assembly as essentially procedural in nature — for example, the election of a non-permanent member of the Council — and it is equally clear that the obligation of the Assembly in this regard is absolute and mandatory.

In the past the Assembly has resolved difficulties of this nature by resorting to the technique of split terms of membership. That was the case in 1956-1957 with Yugoslavia and the Philippines, in 1960-1961 with Poland and Turkey, in 1961-1962 with Liberia and Ireland, in 1962-1963 with Romania and the Philippines, and in 1964-1965 with Czechoslovakia and Malaysia. It should, however, be noted that no split terms of membership have occurred since the enlargement of the Security Council in 1965 from 11 to 15 members.

The failure of the General Assembly to elect a non-permanent member would constitute a failure to comply with its constitutional functions and would violate the clear language of Article 23 of the Charter, the mandatory nature of which leads to the conclusion that a Security Council of less than 15 members would not be legally constituted in accordance with the Charter.

We now turn to the consideration of the consequences of such a failure of the General Assembly for the constitution and functioning of the Security Council. The question arises whether there are circumstances in which the Security Council may continue to function notwithstanding the fact that temporarily it may not be legally constituted in membership. The first such situation, which has never in fact occurred, is that foreseen in rule 140 of the rules of procedure of the General Assembly. It states:

> "Should a member cease to belong to a Council before its term of office expires, a by-election shall be held separately at the next session of the General Assembly to elect a member for the unexpired term."

That rule applies also to the Security Council. However, the fact that that rule is part of the rules of procedure of the General Assembly indicates, first and foremost, the obligation of the General Assembly to hold a by-election. But the implication of that rule is that it may occur that between the cessation of membership in the Council and the time of the by-election in the General Assembly the Security Council does not consist of the number of members prescribed by Article 23 of the Charter. A membership short of the prescribed number would not, therefore, affect the functioning of the Security Council in this situation. As pointed out, however, this situation has never developed, but even if it were to develop it would be a very exceptional circumstance and one, furthermore, over which the General Assembly could have no control.

A further situation in which the Security Council membership might no longer be in accordance with the constitutional requirements of the Charter would be during the period of time between the entry into force of a Charter amendment increasing the membership and the actual election of the new members. This very exceptional situation arose in connexion with the Charter amendments adopted by the General Assembly in 1963. The amendment increasing the membership of the Security Council was adopted by the General Assembly on 17 December 1963 and came into force on 31 August 1965. The Legal Counsel's opinion was sought on the legal position of the Security Council during the interim period between the entry into force of the amendment and the election of new members. The Legal Counsel was confronted with the alternatives presented by Articles 23 and 28 of the Charter respectively. In his opinion, he argued that, where the two alternatives are both possible, the

> "interpretation to be adopted is the one most consonant with the terms and purposes of the instruments as a whole. An interpretation tending to so extreme a consequence as a break in the functioning [of the Security Council] could not be accepted without clear support in the text itself. . .".

That legal opinion can be found in the *United Nations Juridical Yearbook, 1965*, on pages 224 and 225.

Therefore, notwithstanding the entry into force of the new Article 23 expanding the membership of the Council from 11 to 15, the Council continued to function under the previous régime until the election of the additional members.

A third situation in which the Security Council could be faced with a discrepancy between the prescribed membership and the actual membership could arise because of the inability of the General Assembly to reach agreement on an election. This situation, which we face today, may be distinguished from the two previous situations in which the temporary shortfall in membership was beyond the control of the Assembly although the Assembly has the ultimate obligation to fill the vacancy. The inability of the General Assembly to elect all the non-permanent members of the Security Council is not something which is beyond the control of the Assembly. On the contrary, the General Assembly is under an obligation to elect the members of the Council under the Charter. The question, then, is whether the Security Council may continue to function even when its membership is not the prescribed number as a result of a situation which is not beyond the control of the Assembly.

As indicated, Article 23 of the Charter provides that the Security Council "shall consist" of 15 Members of the United Nations. It is clear, therefore, that a legally constituted Security Council must have 15 members. However, Article 23 must be read in the context of the Charter as a whole, taking into particular consideration its object and purpose. The object and purpose of a treaty are of

particular importance in the interpretation of treaties establishing international organizations because constitutions, such as the Charter, as distinct from mere contracts, are designed to give effect to certain purposes and principles in a moving political context.

In this broader perspective, it must be recognized that the Members of the United Nations have conferred on the Security Council "primary responsibility for the maintenance of international peace and security" (Article 24), which is one of the purposes of the Organization (Article 1, paragraph 1), and that the Security Council "shall be so organized as to be able to function continuously" (Article 28).

Thus, at the very least, the compositional requirement of Article 23 must be balanced against the requirements of other provisions of the Charter concerning the functioning of the Council in so far as the non-compliance with the requirement of Article 23 does not run counter to the provisions of Article 27, which may be considered as an implied quorum provision.

Accordingly, an act of omission or the failure of the General Assembly to fulfil its constitutional obligations cannot be held to produce legal consequences so fundamental to the Organization as the paralysis of a principal organ. To argue otherwise would be to effect a constitutional amendment of the Charter through extra-constitutional means. Such a paralysis could have the gravest consequence for the whole system of the preservation of international peace and security, including a potential shift of well-established powers between the Security Council and the General Assembly.

The foregoing suggests that in theory and in practice the Security Council may continue to function notwithstanding the fact that it is not legally constituted.

In conclusion, while the failure of the General Assembly to elect a non-permanent member of the Security Council would be inconsistent with Article 23 of the Charter, such an act of omission could not produce legal consequences for the functioning of the Security Council, which is the organ primarily responsible for the maintenance of international peace and security. In such a situation, it would be the view of the Office of Legal Affairs that decisions of the Security Council taken in accordance with the relevant provisions of Article 27 of the Charter would constitute valid decisions. This is not to say, however, that the exceptional situation created by such a failure on the part of the General Assembly is either legally or constitutionally desirable. But in the interests of maintaining the authority of the Security Council and the balance of powers between the General Assembly and the Security Council, it is essential that the General Assembly should fulfil its obligations and responsibilities under the Charter.

31 December 1979

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2. QUESTION OF REPRESENTATION OF DEMOCRATIC KAMPUCHEA AT THE RESUMED THIRTY-THIRD SESSION OF THE GENERAL ASSEMBLY — PROVISIONAL SEATING OF CHALLENGED REPRESENTATIVES OF A MEMBER STATE — MAJORITY REQUIRED FOR RECONSIDERATION OF REPRESENTATIVES' CREDENTIALS ALREADY ACCEPTED BY THE GENERAL ASSEMBLY — THE GENERAL ASSEMBLY IS NOT BOUND BY OTHER UNITED NATIONS ORGANS' DECISIONS REGARDING REPRESENTATION

Memorandum to the Under-Secretary-General for Political and General Assembly Affairs

Credentials questions

1. The current thirty-third session of the General Assembly has accepted the credentials of the delegation of Democratic Kampuchea signed by the Deputy Prime Minister in charge of Foreign Affairs of that country.

2. The Security Council at its 2108th meeting held yesterday approved the report of the Secretary-General (S/13021) stating that the credentials of the delegation of Democratic Kampuchea to the Security Council emanating from the same authority were in order. Subsequently, the Council extended an invitation to Prince Sihanouk, Chairman of the delegation, to address the Council under rule 37 of its procedure, i.e. as a representative of a Member of the United Nations which is not a member of the Security Council.

3. In the light of the above, it is clear that it is the delegation of Democratic Kampuchea that should be seated in the General Assembly and in its Main Committees. If the question of representation is raised in plenary[1] and the credentials of the Kampuchean delegation are challenged, the provisions of rule 29 of the General Assembly rules of procedure become applicable. The rule provides as follows:

> "Any representative to whose admission a Member has made objection shall be seated provisionally with the same rights as other representatives until the Credentials Committee has reported and the General Assembly has given its decision."

Since the Credentials Committee has already reported on the credentials of the delegation of Kampuchea at the current session and the General Assembly has accepted these credentials, in the absence of conflicting credentials submitted by the new régime, a decision to refer the former credentials to the Credentials Committee once again would involve a re-opening of the matter and therefore such a decision would in effect amount to a motion for reconsideration of the decision concerning the credentials of the delegation of Kampuchea. Under rule 81 of the Assembly rules such a motion required a two-thirds majority for adoption by the Assembly.

Inclusion of an additional agenda item

4. Should any member of the Assembly propose the inclusion of the question of the representation of Democratic Kampuchea or even the question of the situation in Democratic Kampuchea as an additional item on the agenda for consideration at the resumed session this raises the question of the majority required for such a decision to be adopted by the Assembly. In this connexion it should be recalled that on 20 December 1978, at its 90th meeting, the General Assembly decided that "the present session would be suspended to be resumed on 15 January 1979 in order to proceed to a vote on item 32 (Policies of *apartheid* of the Government of South Africa) and to consider the reports of the Second Committee on agenda items 58 (*b*) to (*e*) and 70, the report of the Third Committee on agenda item 88 and Part IV of the report of the Fifth Committee on item 100". (In paragraph (*b*) of its second report (A/33/250/Add.1) the General Committee recommended that "the session should be resumed on 15 January 1979 for a period of one week to 10 days exclusively to conclude the consideration of the remaining items on the agenda of the current session".) It is clear from the foregoing that any decision to include a new item for consideration during the resumed session would involve a reconsideration of the General Assembly's earlier decision regarding its programme of work. Under rule 81 of the Assembly rules, a motion to reconsider a decision taken at the same session requires a two-thirds majority for adoption. If the motion to reconsider is adopted, then rule 15 of the General Assembly rules becomes applicable. Under this rule, additional items may be placed on the agenda if the General Assembly so decides by a majority of the representatives present and voting.

General observations

5. In connexion with the question of representation of a Member State in the United Nations, it is relevant to refer to General Assembly resolution 396 (V) of 14 December 1950. The operative parts of this resolution read as follows:

> "1. *Recommends* that, whenever more than one authority claims to be the government entitled to represent a Member State in the United Nations and this question becomes the subject of controversy in the United Nations, the question should be considered in the light of the Purposes and Principles of the Charter and the circumstances of each case;
>
> "2. *Recommends* that, when any such question arises, it should be considered by the General Assembly, or by the Interim Committee if the General Assembly is not in session;
>
> "3. *Recommends* that the attitude adopted by the General Assembly or its Interim Committee concerning any such question should be taken into account in other organs of the United Nations and in the specialized agencies;

[1] The Chairmen of the Second, Third and Fifth Committees should be advised that if the question is raised in their Committee they should state that it is not a matter which the Committee can consider and should draw the attention of the President to the fact that it has been raised.

"4. *Declares* that the attitude adopted by the General Assembly or its Interim Committee concerning any such question shall not of itself affect the direct relations of individual Member States with the State concerned;

"5. *Requests* the Secretary-General to transmit the present resolution to the other organs of the United Nations and to the specialized agencies for such action as may be appropriate."

It is clear from this resolution that the General Assembly considers itself the organ best suited to resolve the controversy where more than one authority claims to be the Government entitled to represent a Member State of the United Nations. Moreover, the General Assembly does not consider itself bound by decisions by other United Nations organs taken with regard to questions of representation.

12 January 1979

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3. THE ACCREDITATION OF A PERMANENT REPRESENTATIVE TO THE SECRETARY-GENERAL IN NEW YORK DOES NOT EXTEND TO THE UNITED NATIONS OFFICE AND THE ECONOMIC COMMISSION FOR EUROPE AT GENEVA UNLESS THIS IS EXPRESSLY STATED IN THE CREDENTIALS — THE PHRASE "FOR ALL ORGANS" INCLUDED IN SOME LETTERS OF ACCREDITATION TO THE SECRETARY-GENERAL SHOULD BE INTERPRETED AS REFERRING TO THE GENERAL ASSEMBLY, THE ECONOMIC AND SOCIAL COUNCIL, THE TRUSTEESHIP COUNCIL AND THE SECURITY COUNCIL — FORM OF ACCREDITATION OF PERMANENT REPRESENTATIVES AT GENEVA

Memorandum to the Chief of Protocol

1. You have requested me to explain to you the practice with respect to letters of accreditation (or credentials) as regards the accreditation of permanent representatives to the United Nations at Geneva (the United Nations Office and the Economic Commission for Europe). More specifically you asked me:

(*a*) Whether permanent representatives to the United Nations accredited to the Secretary-General were *ipso facto* considered to be accredited to the United Nations Office and the Economic Commission for Europe at Geneva;

(*b*) Whether the phrase "full powers for all organs" included in some letters of accreditation to the Secretary-General covered the Office and the Economic Commission; and

(*c*) If credentials (or a letter of accreditation) were to be issued to a permanent representative at Geneva, what authority should issue them?

2. Subject to a more detailed study of this question, and subject to any comments which Protocol at Geneva might have on the subjects I can inform you as follows:

(*a*) Although General Assembly resolution 257 A (III), which governs this question, mentions permanent missions to the European Office of the United Nations, since 1953 the annual report of the Secretary-General on permanent missions to the United Nations has not listed States maintaining a permanent mission in Geneva. Whenever the Secretary-General receives credentials accrediting a permanent representative at Geneva, Protocol takes note and transmits to Geneva.

(*b*) Unless expressly stipulated in the credentials of a permanent representative to the United Nations — *and there is no objection to this* — the practice is to consider the accreditation of a permanent representative to the Secretary-General in New York as not extending to the Office or the Commission at Geneva. Representatives of missions in Geneva are generally accredited to the Director-General of the Office, who represents the Secretary-General. There are practical reasons for this:

The Swiss federal authorities accord to permanent representatives at Geneva special privileges and immunities to which permanent representatives in New York are not entitled merely because they are accredited to the Secretary-General.

(*c*) The phrase "all organs" should be interpreted as referring to the General Assembly, the Economic and Social Council, the Trusteeship Council and the Security Council.

Although the International Court of Justice is a principal organ of the United Nations, the inclusion of the words "all organs" does not give permanent representatives the power to represent their countries before the Court. A party bringing a case before the Court notifies the Registrar of the name of the Agent who will represent it in the proceedings. Similarly, in order to make arrangements for communications to the States parties to proceedings before the Court, the Registrar requests the Minister for Foreign Affairs to inform him of the channel through which his Government wishes to receive such communications.

Also excluded are all specialized agencies, many of which are in Geneva and to which permanent representatives should be accredited if their Governments so desire.

(*d*) Unlike letters of accreditation or credentials for permanent representatives to the Secretary-General, which must be issued either by the Head of the State or Government or by the Minister of Foreign Affairs, the practice as regards the form of credentials — or letters of accreditation — for permanent representatives at Geneva is, to my knowledge, to accept as valid credentials any communication, provided that it sets out the clearly expressed intention of the Government concerned.

23 October 1979

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4. LEGAL BASIS FOR THE OBSERVER STATUS OF THE PALESTINE LIBERATION ORGANIZATION — APPLICABILITY OF CERTAIN PROVISIONS OF THE HEADQUARTERS AGREEMENT BETWEEN THE UNITED NATIONS AND THE HOST COUNTRY — LACK OF ENTITLEMENT OF PLO OBSERVER TO DIPLOMATIC PRIVILEGES AND IMMUNITIES — APPLICABILITY OF LOCAL ZONING LAWS AND REGULATIONS TO PROPERTY ACQUIRED BY PLO IN THE HEADQUARTERS DISTRICT

Letter to a private lawyer

1. This is in reply to your letter, in which you requested me to give you a legal opinion on the legal status of the Office of the Permanent Observer of the Palestine Liberation Organization to the United Nations and whether the Palestine Liberation Organization would be required to comply with the City of New York's zoning laws if it purchases a townhouse to serve as an office and a residence for the Permanent Observer in a residential zone on the East Side of Manhattan.

2. By its resolution 3237 (XXIX) of 22 November 1974, entitled "Observer status for the Palestine Liberation Organization", the General Assembly issued a standing invitation to the Palestine Liberation Organization to participate in the sessions and the work of the General Assembly and in the work of all international conferences convened under its auspices in the capacity of observer.

3. The resolution just mentioned provides the legal basis for the observer status that the Palestine Liberation Organization has in the United Nations.

4. The Permanent Observer appointed by the Palestine Liberation Organization pursuant to General Assembly resolution 3237 (XXIX) benefits from the following provisions of the Headquarters Agreement between the United Nations and the host State:

(i) Section 11, which provides that the federal, state or local authorities of the United States "shall not impose any impediments to transit to or from the headquarters district of . . . persons invited to the headquarters district by the United Nations" and that "the appropriate American authorities shall afford any necessary protection to such persons while in transit to or from the headquarters district";

(ii) Section 12, which provides that section 11 is applicable irrespective of relations between the Governments of the persons referred to in the latter section and the host State; and

(iii) Section 13, which provides that the host State shall grant visas "without charge and as promptly as possible" to persons referred to in section 11 and also exempts such persons from being required to leave the United States on account of any activities performed by them in their official capacity.

5. In addition to the foregoing privileges and immunities, it is my belief that it necessarily follows from the obligations imposed by Article 105 of the Charter of the United Nations that the

Palestine Liberation Organization Observer enjoys immunity from legal process in respect of words spoken or written and all acts performed by members of the delegation in their official capacity before relevant United Nations organs.

6. The above privileges and immunities represent in my view the scope of such privileges and immunities which the host State is obliged under existing international instruments to accord to the Palestine Liberation Organization. The host State may, of course, as a matter of courtesy, extend a wider variety of privileges and immunities to the delegation. However, this is for the Palestine Liberation Organization a matter to negotiate with the host State.

7. The Permanent Observer for the Palestine Liberation Organization is not entitled to diplomatic privileges or immunities under the Headquarters Agreement between the United Nations and the United States or under other statutory provisions applicable in the host State. Thus whatever facilities the Palestine Liberation Organization observers may be granted in the United States other than those to which they are entitled under the provisions of the Headquarters Agreement referred to above are merely gestures of courtesy by the United States authorities.

8. In the light of the foregoing and in the absence of any legal basis for an exemption it would appear that the local zoning laws and regulations which apply to all properties including those purchased by foreign Governments for official purposes would apply also to any property purchased by the PLO in the Headquarters District.

9. However, we have had informal consultations with the United States authorities and they have indicated to us that the question of a mission having an Office in a residential zone has never been raised.

19 November 1979

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5. QUESTION WHETHER GENERAL ASSEMBLY APPROPRIATIONS FOR THE UNITED NATIONS INTERNATIONAL SCHOOL CAN BE CONSIDERED "EXPENSES OF THE ORGANIZATION" WITHIN THE MEANING OF PARAGRAPH 2 OF ARTICLE 17 OF THE CHARTER

Memorandum to the Under-Secretary-General for Administration, Finance and Management

1. This is in response to your request of 28 November for a legal opinion as to whether appropriations authorized by the General Assembly for the United Nations International School (UNIS) can be considered "expenses of the Organization" within the meaning of paragraph 2 of Article 17 of the Charter.

2. Although UNIS is legally separate from the United Nations — it is a New York State not-for-profit corporation, operating as an educational institution under the general supervision of the New York State Board of Regents — it is clear that the school was established for the purpose of assisting members of the staff of the United Nations stationed at Headquarters, and in particular expatriate staff, in educating their children. This purpose is recognized in section 1 (*a*) of article II of the instrument governing the School (the Constitution of the Association for the United Nations International School), and is supported by the provisions in articles III and IV concerning the governance of the school, whereby its Board of Trustees consists predominantly of persons drawn from a list nominated by the Secretary-General or elected by members of the Association, who must be members of the Secretariat of the United Nations or specialized agencies, or members of a permanent mission or otherwise accredited to the United Nations, or parents of a child attending the school.

3. The General Assembly has repeatedly recognized that "the continuing functioning of the School is one of the important non-financial factors contributing to the recruitment and retention of international staff" (e.g. resolutions 1102 (XI) and 1228 (XII)) and even that "the provision of adequate accommodation for UNIS is in the best interest of the Organization" (resolution 1297 (XIII)). Indeed, at one time the General Assembly approved in principle the construction of UNIS on part of the Headquarters site (resolution 2003 (XIX)), which site is explicitly dedicated

for the purposes of the Organization; later the Assembly authorized the Secretary-General to accept from the City of New York an alternative site (resolution 2123 (XX)).

4. Indeed, the preoccupation of the General Assembly with UNIS is indicated by the fact that it adopted resolutions or decisions relating to the School at least at 16 of its regular sessions, starting in 1957. But even before that, starting in 1951 and in many years thereafter, it specifically authorized appropriations either for the general purpose of the School or for restricted ones, such as its building fund. In addition, it authorized the Secretary-General to undertake various functions and responsibilities in respect of the School.

5. There can be no doubt that the education of the children of staff members and of members of missions at their duty stations is a legitimate concern of the Organization, not merely from a social point of view but also to attract to and keep at such duty stations persons who will enhance the work of the Secretariat and of permanent missions accredited to the Organization. From the beginning of the Organization the General Assembly has acted on that concern in several ways: by authorizing and from time to time increasing education grants for expatriate members of the Secretariat, or by subsidizing UNIS in general or in respect of particular activities. In view of their purpose, all these are legitimate expenses of the Organization, though it is obviously a matter of discretion for the Assembly to what extent and by what means financial and other support for such purposes should be given. But the mere fact that payments are authorized to or for the support of an entity separate from the United Nations, such as a school or hospital or other enterprise to benefit United Nations-related persons, does not affect the legitimacy of an expenditure made for a purpose closely related to the administration and operation of the Organization.

30 November 1979

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6. Question concerning the characterization of the United Nations Fund for Population Activities as a subsidiary organ of the General Assembly

Memorandum to the Office of Secretariat Services for Economic and Social Matters

1. You have requested an opinion from the Legal Office on whether the characterization of the United Nations Fund for Population Activities (UNFPA) as a subsidiary organ of the General Assembly in the draft resolution A/C.2/34/L.50 now being considered in the Second Committee correctly reflects the status of the Fund. It is useful in this connexion to review briefly the relevant resolutions of the General Assembly relating to the establishment and administrative structure of the Fund.

2. By its resolution 2211 (XXI) of 17 December 1966 the General Assembly called upon the organizations of the United Nations System to provide assistance in the field of population. In response to this resolution the Secretary-General established in 1967 the United Nations Trust Fund for Population Activities. Its status then was that of a trust fund of the Secretary-General subject to the financial rules and regulations governing the administration of such funds. In 1969 the Secretary-General entrusted the administration of the Fund to the Administrator of the United Nations Development Programme and changed its name to United Nations Fund for Population Activities. This change did not affect its status as a trust fund of the Secretary-General. Since that time UNFPA with a separate secretariat within the framework of UNDP has developed quickly and its financial resources have increased substantially. On 14 December 1971 through its resolution 2815 (XXVI) the General Assembly requested the Secretary-General in consultation with the Administrator of UNDP and the Executive Director of UNFPA to improve the administrative machinery of the Fund and to inform the General Assembly and the Economic and Social Council of the steps taken by him in the implementation of that resolution and of any recommendations he might wish to make in that regard.

3. The Secretary-General submitted his recommendations to the Economic and Social Council at its fifty-third session and to the General Assembly at its twenty-seventh session. In

presenting his submissions the Secretary-General stated *inter alia* that the UNFPA had reached a size, and was undertaking a range of activities which made it advisable to change the character of the Fund from a trust fund of the Secretary-General into a fund established under the authority of the General Assembly.

4. By its resolution 3019 (XXVII) of 18 December 1972 the General Assembly approved the Secretary-General's recommendation referred to in the preceding paragraph to change the character of the Fund and decided to place it under the authority of the General Assembly (operative paragraph 1) and decided further "without prejudice to the overall responsibilities and policy functions of the Economic and Social Council, that the Governing Council of the United Nations Development Programme, subject to conditions to be established by the Economic and Social Council, shall be the governing body of the United Nations Fund for Population Activities..." (operative paragraph 2).

5. As a consequence of the adoption of General Assembly resolution 3019 (XXVII) the Fund ceased to be a trust fund of the Secretary-General and became a Fund under the authority of the General Assembly with an intergovernmental governing body, having its own financial regulations and rules. It thus ceased to be a trust fund, which is merely a financial account, and became a subsidiary organ of the Assembly similar to other Funds having intergovernmental supervisory bodies such as UNICEF, the Capital Development Fund and the United Nations Special Fund. In this respect, it should be noted that Article 22 of the Charter authorizes the Assembly to create "subsidiary organs" which are to be distinguished from principal organs specified in the Charter or completely autonomous bodies which have to be established by separate intergovernmental agreement.

6. From a legal standpoint, therefore, the wording in operative paragraph 1 of the draft resolution contained in document A/C.2/34/L.50 correctly reflects the situation that has existed since the adoption of resolution 3019 (XXVII). Adoption of this operative paragraph as it is now worded would merely confirm the existing arrangements and would not in our view involve any new budgetary implications relating to the administrative support of the Fund.

20 November 1979

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7. QUESTION WHETHER THE COOK ISLANDS ARE ELIGIBLE TO RECEIVE A UNITED NATIONS DEVELOPMENT PROGRAMME INDICATIVE PLANNING FIGURE (IPF) INDEPENDENCE BONUS — DISTINCTION BETWEEN SELF-GOVERNING TERRITORIES AND INDEPENDENT STATES UNDER INTERNATIONAL LAW

Memorandum addressed to the Chief of Division One, Regional Bureau for Asia and the Pacific of the United Nations Development Programme

1. I refer to your memorandum of 17 May 1979 in which you requested our opinion on whether the United Nations Development Programme can consider the Cook Islands as eligible to receive an indicative planning figure (IPF) independence bonus.

2. The Governing Council of UNDP decided in July 1976 that each recipient country "that had gained independence since the start of 1973 should have its IPF increased in the amount of $500,000 plus 15 per cent of the IPF." (Official Records of the Economic and Social Council, 1976, Supplement No. 12 (E/5846/Rev.1)). The Council pointed out in its report that it had decided that the IPFs of newly independent countries should be recalculated in order to provide them with increased resources to meet their special acute needs (para. 251). Accordingly, a country will be eligible to receive the independence bonus only if it can be considered as an independent country which gained its independence since the start of 1973.

3. The Territory of the Cook Islands is a self-governing territory in free association with New Zealand. New Zealand, in consultation with the government of the Cook Islands, discharges the responsibilites for the external affairs and defence of the Cook Islands and under the same arrangements the Cook Islanders remain New Zealand citizens. The question is whether the Cook Islands in their present status, can be considered as an independent country for the purposes of the

above-mentioned decision of the Governing Council. The term "independent country" (or "independence") has not been defined by the Governing Council, but the legislative history indicates that the decision was intended to apply to fully sovereign independent States within the meaning of that term in international law and the practice of the United Nations. In his explanatory note on the purposes of the independence bonus the Administrator of UNDP stated:

> "... the present intention is to provide additional resources for 1977-1981 to countries whose national independence was achieved in the more recent past. For example, there are 10 recipient countries whose independence has been gained since the start of 1973."[2]

In a foot-note to that observation, the Administrator listed the following ten States: Angola, Bahamas, Cape Verde, Comoros, Granada, Guinea-Bissau, Mozambique, Papua New Guinea, Sao Tome and Principe, and Suriname. All these States are sovereign independent States and Member States of the United Nations.

4. An independent State under the generally-accepted definition in international law must have *inter alia* one central political authority — the government which represents the State internally and externally. In that sense independence means that a state may conduct its internal and international affairs unrestricted legally except through the operation of international law. Thus, a self-governing territory which does not possess the full capacity to enter into foreign relations cannot be regarded as a sovereign independent state. In other words, every independent country is by definition also a self-governing territory but a self-governing territory is not necessarily an independent country.

5. This distinction between "self-government" and "independence" is reflected also in the Charter of the United Nations. In Article 76 (*b*) of the Charter the basic objective of the trusteeship system is declared to be the "progressive development towards self-government or independence." Thus "self-government" and "independence" become alternative goals. Furthermore, it is clear from the legislative history of Articles 73 and 76 that these terms refer to different situations (for more detailed information, see Goodrich, Hambro and Simons, *Charter of the United Nations, Commentary and Documents*, 3rd ed., p. 468). This distinction was also pointed out by the General Assembly. In resolution 742 (VII) of 27 November 1953 the General Assembly considered that "the manner in which Territories referred to in Chapter XI of the Charter can become fully self-governing is primarily through the attainment of independence, although it is recognized that self-government can also be achieved by association with another State or group of States if this is done freely and on the basis of absolute equality." A list of factors indicative of the attainment of independence annexed to that resolution, point out that a given territory be considered as independent if it has international status together with internal self-government. The factors which indicate the international status of a territory include full international responsibility of the territory, eligibility for membership in the United Nations, power to enter into direct relations of every kind with other governments and with international institutions and sovereign right to provide for the national defence.

6. In view of the essential characteristics of independent States as described above, it follows that the status of the Cook Islands is not sovereign independence in the juridical sense. Moreover, the General Assembly in its resolution 2064 (XX) of 16 December 1965 on the question of the Cook Islands reaffirmed the responsibility of the United Nations "to assist the people of the Cook Islands in the eventual achievement of full independence, if they so wish, at a future date". This resolution which was adopted in view of the change in the status of the Cook Islands further indicates that the Cook Islands have not attained yet full independence within the meaning of that term in the United Nations terminology.

7. Furthermore, even if the present status of the Cook Islands could be considered as "independent" for the purpose of the independence bonus, it appears that they would have to be considered as having already gained such "independence" before 1973 and not after 1973 as required by the decision of the Governing Council. The general elections for the Cook Islands Legislative Assembly were held on 20 April 1965. The Constitution, as amended by the New

[2] See document DP/199, Note by the Administrator, para. 5.

Zealand Parliament at the request of the Legislative Assembly, was adopted by the Cook Islands Legislative Assembly on 20 July and was brought into force on 4 August 1965. By the same act the Legislative Assembly resolved that the Cook Islands shall be self-governing in free association with New Zealand and it requested New Zealand to discharge the responsibilities for the external affairs and defence of the Cook Islands. The General Assembly in its resolution 2064 (XX) of 16 December 1965 decided that since the Cook Islands have attained full internal self-government, the transmission of information in respect of the Cook Islands — under Article 73 (*c*) of the Charter — is no longer necessary. In an exchange of letters of 4 May 1973 between the Prime Minister of New Zealand and the Premier of the Cook Islands, the New Zealand Government clarified the nature of the special relationship between the Cook Islands and New Zealand. These letters were tabled in the Cook Islands Legislative Assembly and in the New Zealand Parliament as an indication of "the true nature" of the ties between the two countries. It appears that these letters did not purport to change the status of the Cook Islands as already resolved by the legislative bodies of both countries in 1965. The sole purpose of these letters was to reaffirm the existing arrangements between the two countries and clarify some outstanding issues.

8. In the light of the above, it is our view that under the terms of the 1976 Governing Council's decision the Cook Islands are not eligible to receive a UNDP indicative planning figure (IPF) independence bonus. However, it should be noted that the Governing Council has the authority to apply the principles of the independence bonus to self-governing territories in the same way as it was applied in the case of Namibia.

8 June 1979

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8. QUESTION WHETHER THE LAW ENFORCEMENT TECHNIQUE OF "CONTROLLED DELIVERY" MAY BE CONSIDERED IN COMPLIANCE WITH INTERNATIONAL CONVENTIONS ON NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES — THE SAID CONVENTIONS PROVIDE STATE PARTIES WITH A LEGAL POWER TO SEIZE AND CONFISCATE ILLICIT DRUGS BUT DO NOT CREATE A LEGAL OBLIGATION TO DO SO — COMPATIBILITY OF THE "CONTROLLED DELIVERY" TECHNIQUE WITH THE OBJECT AND PURPOSE OF THE CONVENTIONS CONCERNED — THE SAID TECHNIQUE AS A LEGITIMATE EXERCISE OF THE DISCRETION OF STATE PARTIES AS TO THE MANNER IN WHICH THE AUTHORITY TO SEIZE AND CONFISCATE SHOULD BE EXERCISED

Letter to the Acting Secretary of the Commission on Narcotic Drugs

1. This is in response to your letter of 21 June 1979 in which you referred to this Office a request for a legal opinion on the question of whether the law enforcement technique of "controlled delivery" can be considered as being in compliance with the provisions of the international treaties on narcotic drugs and psychotropic substances.

2. As you have explained, "controlled delivery" consists of permitting the passage through the territory of one or several states of consignments of illicit drugs under surveillance but without interfering with the shipment itself. This technique, the purpose of which is to enable law enforcement agencies to track illicit shipments from origin to destination, is of recent origin. The 1961 Single Convention and the 1971 Convention on Psychotropic Substances, however, contain provisions to the effect that any drugs, substances and equipment in illicit traffic shall be liable to seizure and confiscation. The question raised is one of treaty interpretation: is the technique of "controlled delivery" compatible with the provisions of the 1961 and 1971 Conventions and, in particular, articles 37 and 22 thereof?

3. Article 37 of the Single Convention and article 22, paragraph 3, of the Psychotropic Substances Convention are virtually identical provisions on seizure and confiscation. In both cases, the drugs, substances and equipment which are the subject of the illicit traffic "shall be liable to seizure and confiscation". The question of interpretation posed in the present case is whether this language imposes a legal obligation on the Parties to effect immediate seizure and confiscation or whether it merely confers upon the Parties the duty to authorize seizure and confiscation while leaving them a degree of discretion in deciding how to exercise such authority.

4. The general rule of interpretation of treaties as stated in the Vienna Convention on the Law of Treaties, 1969 (not yet in force but which may be considered as the authentic codification of the law) is that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose (article 31, paragraph 1).

5. The good faith interpretation of the Conventions under consideration here is self-evident and we need not concern ourselves with this aspect of the problem. The present opinion, therefore, rests on a consideration of the ordinary meaning to be given to the expression "shall be liable to seizure and confiscation" in the context and in the light of the object and purpose of the treaties in question.

6. The ordinary meaning of the expression "shall be liable to seizure and confiscation" is that the drugs are liable to seizure, that is to say that the authority to seize and confiscate exists. This is not the same thing as saying that there is a legal obligation to seize and confiscate. The French and Spanish versions of the text corroborate this view. The French text reads "pourront être saisis et confisqués", while the Spanish text reads "podran ser objeto de aprehension y decomiso".

7. We are aware that the Commentary on the Single Convention[3] maintains that the expression in question is in fact open to two interpretations, that of a legal obligation and that of providing for the legal power of the competent authorities to act. Basing itself on the official records of the 1961 Conference, the Commentary states that the "stronger view at the Conference favoured a definite obligation of Parties to seize and confiscate the drugs, substances and equipment concerned". (*Commentary*, p. 442.) An examination of the *Official Records* of the 1961 Conference[4] shows that some delegates were unclear as to the precise meaning of the expression and that the expression was possibly ambiguous as to the establishment of a legal obligation. The *Official Records* do not by any means establish that a "stronger view" favouring a definite obligation prevailed among the delegates. Indeed, if this had been the case the Conference would have had the opportunity to adjust the English, French and Spanish texts accordingly.

8. In addition, the *Commentary* relies heavily on a statement made by the Legal Adviser of the Conference who stated that "in his opinion the purpose of (the provision) was to compel a country which had no law authorizing seizure and confiscation to adopt such a law." (*Official Records*, vol. II, p. 246.) This statement does not, in our view, establish the proposition that there is a legal obligation to seize and confiscate; it merely establishes that the authority to seize and confiscate should be enacted.

9. Turning to an examination of the meaning of this expression in the light of the object and purpose of the treaty, it must be asked whether the interpretation put forward in the preceding paragraph is consistent with the object and purpose of the treaties. The preamble to the 1961 Convention states that "effective measures against abuse of narcotic drugs require coordinated and universal action", while article 4 calls upon the Parties to take legislative and administrative action to co-operate with other States in the execution of the provisions of the Convention. These general obligations are specified in greater detail in article 35 of the Single Convention and article 21 of the Psychotropic Convention. In particular, the Parties are required to assist each other in the campaign against the illicit traffic in drugs and ensure co-operation and co-ordination. It would seem to be clear, therefore, that even though the technique of "controlled delivery" had not been perfected at the time of the adoption of the Convention, the international character of the campaign against illicit traffic and the framework for international co-operation and co-ordination was fully perceived and provided for. Since the purpose of the "controlled delivery" technique is to break the entire chain of the traffic rather than one of its links, it must be recognized that the technique is fully compatible with the object and purpose of the Convention.

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[3] *Commentary on the Single Convention on Narcotic Drugs*, 1961 (United Nations publication, Sales No. 73.XI.1).

[4] *Official Records of the United Nations Conference for the Adoption of a Single Convention on Narcotic Drugs* (United Nations publication, Sales No. 63.XI.4-5 (2 vols.)).

10. In conclusion, therefore, we would be of the opinion that articles 37 and 22 (3) of the 1961 Single Convention and 1972 Psychotropic Substances Convention, respectively, while establishing a legal obligation to authorize seizure and confiscation of illicit drugs, provide a measure of discretion to States parties as to the manner in which this authority should be exercised. The technique of "controlled delivery" would constitute a legitimate exercise of this discretion since it is clearly compatible with the object and purpose of the treaties in question.

11. We have taken note of the fact that the technique of "controlled delivery" has been employed by a number of States Parties for some time and that, therefore, a presumption may be said to exist as to its legality. We would not be of the opinion that a formal statement of this interpretation is necessary unless a question to this effect is raised by a State Party.

12 July 1979

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9. RELATIONSHIP BETWEEN CHAIRMANSHIP AND MEMBERSHIP OF THE INTERNATIONAL CIVIL SERVICE COMMISSION — QUESTION WHETHER THE CHAIRMAN (OR VICE-CHAIRMAN) MAY RESIGN THE CHAIRMANSHIP (OR VICE-CHAIRMANSHIP) WHILE REMAINING A MEMBER OF THE COMMISSION

Internal memorandum

1. The Chairman of the International Civil Service Commission has informed the Secretary-General that he wishes to resign the Chairmanship of the Commission on 1 September 1979 but that he intends to continue his membership through 31 December 1982. Since article 2 of the Commission's Statute provides that "the Commission shall consist of fifteen members appointed by the General Assembly, of whom two, who shall be designated Chairman and Vice-Chairman respectively, shall serve full-time", it follows that the Chairman occupies one of the fifteen seats on the Commission. The question arises as to whether or not the Chairman is entitled to make a distinction between the chair and the seat, choosing to resign the former and retain the latter. The answer is that such a distinction would be insupportable since it might conflict with the requirements set forth in articles 2, 3 and 4 of the Statute.

2. As indicated above, article 2 of the Statute distinguishes between the Chairman and Vice-Chairman and the other members of the Commission. The Chairman and Vice-Chairman are required to serve full-time; the other members serve only part-time. Article 3, paragraph 2 of the Statute provides that "the members of the Commission, no two of whom shall be nationals of the same State, shall be selected with due regard to geographic distribution". Since the Chairman and Vice-Chairman are themselves members of the Commission, the requirements as to geographic distribution applies to them.

3. Article 4, paragraph 1 of the Statute provides that "after appropriate consultations ... the Secretary-General ... shall compile a list of candidates for appointment as Chairman, Vice-Chairman and members of the Commission ...". Article 4, paragraph 2 provides that "in the same way, the names of candidates shall be submitted to the General Assembly to replace members whose terms of office have expired or who have resigned or otherwise ceased to be available". Though paragraph 1 refers to "candidates for appointment as Chairman, Vice-Chairman and members of the Commission", it is apparent that the Chairman and Vice-Chairman are themselves members of the Commission and that reference to other members of the Commission was intended. This interpretation is supported by the language of paragraph 2, which refers to the replacement of "members" without distinction as between the thirteen who serve part-time and the two who serve full-time as Chairman and Vice-Chairman.

4. The language of article 4, paragraph 2 with its reference to "members" without distinction and their "terms of office" again without distinction makes it quite clear that the General Assembly views membership as primary and Chairmanship as secondary as far as the individual's relationship to the Commission is concerned. The Assembly's view is reflected in its resolutions on the matter: an individual is *first* appointed as member and then *designated* as Chairman. It would appear that the

only way for an individual to sever his relationship with the Commission is to resign his appointment as member. If the individual happens to be Chairman, his function would then be extinguished with the appointment on which it depends.

5. If it were permissible for an individual to retain his seat while resigning the chair, it might be difficult, if not impossible, for the Secretary-General to discharge his responsibilities under articles 2 and 3 of the Statute. When making his recommendations for Chairman and Vice-Chairman under article 4, the Secretary-General must ensure that both candidates are available full-time and that the two candidates — as individuals and as a pair — satisfy equitable geographic distribution. The Secretary-General has an easier task in recommending the 13 part-time members who need only satisfy equitable geographic distribution overall. His task could be complicated enormously if he were constrained to identify a new Chairman among the other members, only one of whom, the Vice-Chairman, is presumed to be available full-time, and any one of whom might, through no fault of his own, distort equitable geographic distribution. The consultations envisioned under article 4 might be as difficult as the process of identification and the result might be impasse in the selection of a new Chairman.

6. Despite the inherent difficulties, it seems that it may be possible on this occasion to identify a new Chairman among the other members. The possibility should be regarded as a fortuity in this instance and the formulation to be employed in connexion with the outgoing Chairman should be considered carefully. It would seem desirable to employ a formulation along the following lines:

"At its ____ plenary meeting, on _____ 1979, the General Assembly, on the recommendation of the Fifth Committee:

"(*a*) Noted Mr. _____'s decision to relinquish his functions as Chairman of the International Civil Service Commission as from 1 September 1979;

"(*b*) Confirmed Mr. _____'s appointment as a member of the International Civil Service Commission for the remainder of the four-year term which began on 1 January 1979;

"(*c*) Designated _____ [and _____] as Chairman [and Vice-Chairman, respectively,] of the International Civil Service Commission until [a date to coincide with the end of the present term of office] [respectively]."

A formulation of this kind would serve as a precedent, if any is needed, to establish the principle that the Chairman of the Commission cannot bind the General Assembly by making an election between Chairmanship and membership.

24 July 1979

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10. Question whether a unit of the Secretariat may perform functions "under the guidance" of organs other than the Secretary-General — Exclusive responsibility of the Secretary-General with regard to the staff of the Organization

Memorandum to the Secretary-General

1. You have requested my advice with respect to the text of operative paragraph 2 of the draft resolution on the question of Palestine (A/34/L.42) which requests the Secretary-General to ensure that the "Division" for Palestinian Rights (now the Special Unit on Palestinian Rights) performs its functions and responsibilities in consultation with the Committee on the Exercise of the Inalienable Rights of the Palestinian People and under its guidance."

2. In nearly all resolutions adopted by United Nations bodies, the Secretary-General is entrusted with certain tasks, this being in accordance with Article 98 of the Charter, which provides that "the Secretary-General shall perform such other functions as are entrusted to him by these organs." However, in the discharge of the tasks entrusted to the Secretary-General and to the Secretariat the principle that the Secretary-General and the staff act independently has never been

challenged. In other words, the organs of the Organization can legitimately claim to impose certain tasks upon the Secretary-General (the Secretariat), but they are not to determine how the Secretary-General is to carry out these tasks. Members of the Secretariat are to act under the sole authority of the Secretary-General and cannot properly accept instructions from any other authority as to the tenor or direction of their activities.

3. If the draft resolution is adopted as now worded it would require the Secretary-General to ensure that a unit of the Secretariat which forms part of "the staff of the Organization" performs its tasks in consultation with and under the guidance of the Committee on the Exercise of the Inalienable Rights of the Palestinian People. The words "under the guidance of" are generally accepted as being synonymous with the words "under the direction of" or "under the control of". As a matter of fact, the French translation of the same term in General Assembly resolution 32/40 of 2 December 1977 and in the French version of the draft resolution (A/34/L.42) is "sous la direction de". Furthermore, there seems to be a clear contradiction between the expressions "in consultation with" and "under its guidance". "Consultation" is a meaningful exchange of views or discussion where one party does not impose its views upon the other party, whereas "guidance" implies that the guiding party expects the guided party to follow its directions.

4. It is clear, therefore, that from a legal standpoint such a request would impinge on the exclusive responsibilities of the Secretary-General with regard to the staff of the Organization and would consequently be in violation of the constitutional provisions regarding the independence of the Secretariat.

30 November 1979

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11. Question concerning non-United Nations use of the United Nations Environment Programme symbol — Analogy with non-United Nations use of the United Nations emblem — Discretion of the Secretary-General on the matter

Letter to the Legal Liaison Officer at the United Nations Environment Programme

1. We have been consulted in the past in a few instances involving non-United Nations use of the UNEP symbol. First of all, I should say that there is — at least to my knowledge — no "standard procedure" or policy for dealing with such cases. The action we have recommended in the past was based on a number of facts and considerations, which I shall try to outline below.

2. The "Only One Earth" symbol was chosen in 1971 by the secretariat of the United Nations Conference on the Human Environment as the "official insignia" of the Conference. As you will see from the enclosed press release (HE/14 of 14 June 1971), it was designed by a United Nations staff member, and, therefore, all rights in it are vested in the United Nations (staff rule 112.7).

3. It appears that the secretariat of the Conference has permitted liberal use of the symbol for publicity purposes and it may therefore be difficult at this stage to attempt to place legal restrictions on its use. No copyright was taken on it at the time, nor has any action subsequently been taken, as far as I know, by a political organ (similar to that taken by the General Assembly in resolution 92 (I) with respect to the United Nations emblem) to protect the symbol from misuse. Consequently, anyone desiring to use the symbol might argue that it is in the public domain. (On the other hand, it may be noted that the symbol probably enjoys some protection under existing trade mark laws and article 6 of the Paris Convention for the protection of industrial property,[5] as an "emblem of an international inter-governmental organization".)

4. Potential problems arose when UNEP began using the symbol as its own distinctive sign (in its letterhead and on its documents, official publications and other publicity materials) and hence non-UNEP use of the symbol might be understood to imply an official connexion with UNEP. In one

[5] See United Nations, *Treaty Series*, vol. 828, p. 327.

of the first cases which was brought to our attention, involving a request for use of the symbol by a non-United Nations body, we asked the UNEP secretariat to clarify whether the symbol was intended for use solely by UNEP as its distinctive sign, or whether the UNEP secretariat now viewed it, bearing in mind the past policy of liberal use, as embodying the over-all concept of environment improvement and *not as representing UNEP exclusively.*

5. We did not receive an answer to our questions, but I believe that a reasonable position, which takes account of the past history of the "Only One Earth" symbol, would be that the symbol should continue to serve primarily as the distinctive sign of UNEP, as it has become generally known as such, but that in special circumstances a limited, clearly defined and (as far as possible) controlled non-UNEP use of it should be permitted in appropriate cases. Authorizations for such use of the symbol could be based on principles analogous to those applicable to the non-United Nations use of the United Nations emblem and the non-official (UN — WE BELIEVE) emblem, namely:

(*a*) The proposed activity for which permission to use the symbol is requested should be clearly supportive of the objectives of the Environment Programme, e.g. undertaken with the support (financial or other) of UNEP or at least in consultation or co-operation with UNEP (i.e., there should be an official or *de facto* link between the Programme or its objectives, on the one hand, and the outside activity, on the other);

(*b*) It should not be a purely or primarily commercial venture for private profit;

(*c*) Adequate assurances should be obtained that misuse of the symbol will be prevented.

6. Use of the symbol in such a way as to create the misleading impression that an outside activity (publication or other) is UNEP-supported or sponsored, if this is not in fact the case, should clearly not be permitted.

7. Each case will have to be considered on its merits. As in the case of non-United Nations use of the United Nations emblem, there may be borderline cases by no means easy to decide: where certain aspects of a proposed activity may be advantageous to UNEP from the publicity point of view (heightening of environment consciousness, etc.), but at the same time contain a commercial element. It will then have to be determined which element is predominant, i.e., whether the activity in question is essentially UNEP supportive and non-profit, or if it has too much of a commercial flavour.

8. In the light of the above consideration, the use of the symbol by the Umseltbundesamt would seem to be permissible.

9. By way of conclusion to be drawn from the foregoing, I believe that it would be desirable, since — as stated in the beginning of this letter — there is as yet no established policy or procedure for dealing with cases involving non-UNEP use of the symbol, for UNEP and the Office of Legal Affairs to try to formulate such a policy. As already indicated, there is no directly applicable United Nations resolution or other decision regulating the use of the symbol and, consequently, the Secretary-General has full discretion in the matter. However, such discretion should be exercised in a consistent manner, on the basis of recognized principles, bearing in mind those developed for the application of General Assembly resolution 92 (I) (see above) and the particular facts and issues involved in each case.

10. If you believe that there is a danger of misuse of the symbol, such as to warrant the taking of additional measures for its protection, the matter could be brought to the attention of the UNEP Governing Council with a view to its adopting a resolution or decision on the lines of that adopted by the General Assembly with respect to the United Nations emblem (resolution 92 (I)). Such legislative action would no doubt strengthen the Executive Director's hand when trying to restrain improper use of the symbol. This is, of course, a policy decision to be taken by the UNEP secretariat in light of its assessment of the facts. If you would consider such a step, I could then try to send you (as a drafting aid) copies of the preparatory documentation relating to the adoption by the General Assembly of resolution 92 (I). However, unless your assessment indicates that there is a clear and perceived danger of misuse of the symbol, it may be preferable to continue to deal informally with problems as they arise, judging each case on its merits in the light of the principles and considerations set out above.

11. An alternative course might be to submit draft guidelines for the use of the symbol to the Governing Council for its approval. Such guidelines could perhaps be similar to those which were agreed upon for the use of the IWY symbol. The purpose then would be not primarily to restrain improper use, although that could be a desirable by-product, but rather to encourage outside use, including commercial use (e.g., for environmentally sound products or production methods). As in the case of the International Women's Year symbol, arrangements could be made with a representative non-governmental organization or group of NGOs in establishing a procedure for application of the agreed guidelines.

12. There are several choices open (in the absence of a resolution placing restrictions on the use of the symbol, such as 92 (I) which practically rules out commercial use of the United Nations emblem). It all depends for what purposes the UNEP secretariat intends the symbol to be used, primarily or exclusively.

30 May 1979

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12. CIRCUMSTANCES UNDER WHICH A STAFF MEMBER SHOULD BE CLASSIFIED AS STATELESS FOR UNITED NATIONS PURPOSES — LACK OF VALID PASSPORT DOES NOT NECESSARILY INDICATE STATELESSNESS — "*DE JURE*" AND NOT "*DE FACTO*" STATELESSNESS SHOULD BE CONSIDERED FOR UNITED NATIONS PURPOSES — THE CASE OF BLACK SOUTH AFRICANS UNDER SOUTH AFRICAN LAWS WITH PARTICULAR REFERENCE TO BANTU HOMELANDS AND INDEPENDENT HOMELANDS

Memorandum to the Executive Officer of the Offices of the Secretary-General

1. The question has arisen as to the validity of considering a black South African, selected candidate for a post in the Secretariat, who was born in South Africa but does not hold a passport, as stateless for recording purposes. This matter raises the general question of the circumstance when a staff member should be considered as stateless for recording or other United Nations purposes.

2. The Convention Relating to the Status of Stateless Persons of 28 September 1954 defines "stateless person" as "a person who is not considered as a national of any State under the operation of its laws."[6] This definition was later accepted by the drafters of other international instruments such as the Convention on the Reduction of Statelessness of 30 August 1961 (A/CONF.9/15, 1961) as properly reflecting the definition of *de jure* stateless persons. It is important to note that most of the rules as to nationality are the sole concern of municipal law and that it is the prerogative of each State to determine according to its laws what classes of persons shall be entitled to its nationality. A valid passport is, for most countries, conclusive evidence of nationality. However, the fact that a person does not hold a passport may indicate that protection and assistance are not provided to him by any State but it cannot be considered in itself as evidence of statelessness.

3. The need to find a solution for the category of persons who are stateless "*de facto*", was raised during the debates which led to the conclusion of the conventions dealing with the question of statelessness. Stateless persons *de facto*, according to a study on statelessness prepared in 1949 by the Department of Economic and Social Affairs are persons "who, having left the country of which they were nationals, no longer enjoy the protection and assistance of their national authorities, either because these authorities refuse to grant them assistance and protection or because they themselves renounce the assistance and protection of the countries of which they are nationals". In other words, *de facto* stateless persons have a juridical nationality which is as concerns any advantage to the individual only a nominal and ineffective nationality. The drafters of the conventions dealing with the question of statelessness limit the scope of these conventions to the solution of problems relating

[6] United Nations, *Treaty Series*, vol. 360, p. 130.

to *de jure* stateless persons mainly because of the difficulty to provide an objective criteria for the definition of *de facto* stateless persons (see *Yearbook of the International Law Commission*, 1954, vol. 1, pp. 18-45, 171-176, 196-197). However, the United Nations Conference on the Elimination or Reduction of Future Statelessness adopted, in August 1961, a resolution recommending that "persons who are stateless *de facto* should as far as possible be treated as stateless *de jure* to enable them to acquire an effective nationality" (Final Act of the Conference, A/CONF.9/14 (1961)).

4. It seems that the purpose of the above-mentioned resolution is to encourage States to provide an effective legal nationality to persons who are stateless *de facto*. This the United Nations Secretariat is not in a position to do; it can consider only whether a person is legally a national of any given State. Thus, it would seem inappropriate for the Secretariat to characterize for United Nations recording purposes a candidate for United Nations appointment or a staff member as stateless when that person has the nationality of a State according to the laws of that State.

5. It may also be observed that various resolutions of the General Assembly on the geographical distribution of the staff provide that clear preference is to be given to the recruitment of nationals of Member States and does not require that such recruits enjoy the favour of the government in power at the time. The system of desirable ranges of posts for each Member State leaves no allocation, no "quota" of posts for persons who are not nationals of Member States. As a matter of policy it would be inadvisable to increase the number of staff classified as "stateless" by including in that category "de facto" stateless persons.

6. Thus, in order to determine when a certain staff member should be considered as stateless for United Nations administrative purposes it is essential to know whether he is a national of any State either under the local laws of the State where he was born or any other State with which he has substantial ties. Accordingly, in the case of a staff member who was born in South Africa and has not acquired the nationality of any other State the question is whether under the operation of the South African laws he is a South African national.

7. Under the laws of South Africa it appears that every black person in South Africa remains a South African national while at the same time being a citizen of one of the pre-independent "bantu homelands". The legal situation is different with respect to the citizens of those "homelands" (Transkei and Bophuthatswana) which became independent under the national laws of South Africa. The citizens of these "independent homelands" ceased to have South African nationality (see W. H. B. Dean, "A citizen of Transkei", *Comparative and International Law Journal of Southern Africa (1978)*, p. 57; W. H. Oliver, "Bophuthatswana nationality", *South Africa Yearbook of International Law* (1977, p. 108)).

8. It appears therefore that if a person born in South Africa has the citizenship of one of the "independent homelands" he ceased to have the nationality of South Africa. As those "homelands" have never been recognized as sovereign States or subjects of international law, it follows that such "nationality" does not constitute nationality under international law and a person thus deprived of South African nationality would properly be considered stateless. (Of course South African legislation rendering persons previously holding South African nationality "stateless" would violate principles in article 15 of the Universal Declaration of Human Rights as well as in articles 8 and 9 of the Convention on the Reduction of Statelessness — to which, however, South Africa is not party.)

9. On the other hand, in the absence of any indication of withdrawal of South African nationality, it would be correct to consider a black South African to be a South African national for United Nations purposes notwithstanding that he lacked a passport and was deprived of protection and assistance granted to other nationals by the present South African régime.

30 May 1979

13. Law regulating marital status for United Nations administrative purposes

Memorandum to the Acting Chief of the Allowances and Benefits Unit, Office of Personnel Services

1. In your memorandum of 24 August 1979 you requested our advice on whether the attached documents submitted by Mr. A. could be accepted by your Office as proof of his divorce and remarriage.

2. It is United Nations policy to determine the marital status for United Nations administrative purposes by reference to the law of the home country of the staff member concerned. While countries vary as to their recognition of foreign divorce decrees, none will recognize a foreign divorce decree which is not recognized as valid in the place where the divorce was rendered. In this case, we must accordingly first ascertain whether Mr. A's divorce and remarriage, which took place in Egypt, are legally effective in Egypt. We have reviewed the documents submitted and in our opinion they do not evidence a valid divorce or valid remarriage recognized in Egypt itself.

3. Though it is true that under Islamic law a marriage can be dissolved by the husband through a unilateral declaration of his desire to do so, under current Egyptian law — in particular the statute of 4 January 1955, which regulates the functions of the *Ma'zoon* or Matrimonial Notary Public — such a declaration has no effect unless it is made before the *Ma'zoon* (Matrimonial Notary Public) and embodied in an official document drawn by him. The documents which Mr. A. has submitted have not been drawn up by or certified by a *Ma'zoon*.

4. Even if Mr. A. had followed this procedure before the *Ma'zoon*, he, as a Ghanaian national, would not have obtained a valid Egyptian divorce because under article 13, paragraph 2 of the Egyptian civil code,

> "... divorce and separation are governed by the law of the country to which the husband belongs at the time of the commencement of the legal proceedings".

Since Mr. A. is of Ghanaian nationality, an Egyptian Matrimonial Notary Public could not effectively certify his divorce. In order to obtain an Egyptian divorce, Mr. A. would have to initiate divorce proceedings in an Egyptian Court where an Egyptian Judge would presumably apply Ghanaian law.

5. On the basis of the documents presented by Mr. A. therefore, there is no adequate basis to recognize a change in his marital status for United Nations administrative purposes.

10 September 1979

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14. Question of applicable law in work relations between the United Nations and its staff — Inapplicability of national laws — Applicability of United Nations Staff Regulations and Rules — Distinction between fixed-term appointments and appointments for indefinite periods — Extension of fixed-term appointments to permit exhaustion of sick leave entitlements already accrued

Letter to the Legal Liaison Officer at the United Nations Environment Programme Headquarters

1. I am writing you in answer to your inquiry about the letter from a French lawyer about a former UNEP staff member who was separated after three years of service in the Paris/UNEP office on successive fixed-term appointments.

2. The Convention on Privileges and Immunities of course applies to preclude any legal action in French court, but the staff member's lawyer does not suggest an intention to bring suit; he is rather inquiring about applicable law. On that the Charter (to which France is party) specifies in

Article 101 that the staff shall be appointed by the Secretary-General "under regulations by the General Assembly". Consequently, it is only the United Nations Staff Regulations and Rules which apply to United Nations staff, regardless of where they are actually appointed or assigned. Actually this is so well established so far as the United Nations is concerned that we have not had occasion in recent years to deal with the question directly. You may be interested in a case now pending in the United States Circuit Court of Appeals involving former staff members of the Organization of American States, who, not being satisfied with the OAS Administrative Tribunal's awards of compensation to them, brought suit in the United States District Court for the District of Columbia. The suit was dismissed and the appeal is now pending in the Circuit Court of Appeals to which the United Nations has submitted an *amicus* brief.

3. The staff member has not appealed, and I would suggest that her lawyer be advised of the exclusive application of the United Nations Staff Regulations and Rules and the benefits, e.g. annual leave, pension withdrawal, sick leave, etc., actually paid to the staff member on separation, as well as of the resource available to her under chapter XI and under the Statute of the Tribunal.

4. The staff member's lawyer refers to the French rule (which is followed under the general labour law principles in many countries but not for civil service) that a fixed-term employment contract is deemed to be for an indefinite period after several renewals. This is not the rule under United Nations Staff Regulations and Rules, which specifically maintain the distinction between fixed-term appointments and appointments for indefinite periods (annex III). (Proposals to provide for termination indemnities upon the expiry of fixed-term appointments have been made but rejected by the General Assembly). While the United Nations Administrative Tribunal's jurisprudence recognizes the possibility of a holder of a fixed-term appointment acquiring a legitimate expectancy of renewal, no such expectancy arises simply by virtue of renewals.

5. You have asked for guidance on the question (not actually raised in the correspondence) of health as a factor in non-renewal. Sickness or ill health does not preclude the non-renewal of an appointment after expiry date; none the less it is established United Nations practice for fixed-term appointments to be extended to permit the exhaustion of sick leave entitlements already accrued if the staff member is on sick leave at the time of expiry of the original appointment. In the present case, the contract seems to have been extended until the sick leave was exhausted. No further entitlement existed — even if she were deemed to be unable to work — except to the extent that an entitlement may have arisen under appendix D or the Pension Regulations. In the absence of a service-incurred illness or pensionable disability, I do not see any basis for further payments or benefits after expiry of the fixed-term contract.

12 February 1979

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15. QUESTION REGARDING THE REFUSAL OF SEVERAL OPERATIONAL ASSISTANCE (OPAS) EXPERTS TO FOLLOW INSTRUCTIONS OF THE SECRETARY-GENERAL — OPAS EXPERTS ARE SUBJECT TO INSTRUCTIONS OF THE SECRETARY-GENERAL, INCLUDING ON SECURITY MATTERS — CONSEQUENCES OF REFUSAL TO FOLLOW SUCH INSTRUCTIONS

Memorandum to the Director of the Office of General Services

1. I refer to your memorandum of 21 June 1979 regarding several Operational Assistance (OPAS) experts who have refused to follow the instruction of the Secretary-General concerning the evacuation of Uganda owing to the security situation in that State. In view of the special status of OPAS experts the present case raises the following questions:

(*a*) Whether OPAS experts are subject to the instructions of the Secretary-General and in particular to those which relate to declared security situations;

(*b*) Whether OPAS experts should be submitted to the same disciplinary measures that may face experts who have the status of staff members should they not follow the order of the Secretary-General to evacuate a country in case of crises;

(*c*) What action would be appropriate and consistent both with the obligations of the Organization under its agreement with the Government and with its contract with the expert.

2. Analysis of these questions in the light of the OPAS arrangements between the United Nations, the Government and the expert (which is set forth in the attached memorandum of law), has led to the following conclusions:

(*a*) OPAS experts must serve the cause and interests of the United Nations and observe international standards of conduct. Accordingly, these experts must follow the instructions given by the Secretary-General in all these matters;

(*b*) In time of crisis or security situation the Secretary-General has the full discretion whether in the United Nations interest directly, or the interests of the personnel to determine that all United Nations personnel including OPAS experts must evacuate a certain state or area. The refusal of these experts to follow such instructions is incompatible with their international status and constitutes a breach of their contract.

(*c*) In view of the fact that there is no direct employment relationship between the United Nations and OPAS experts they are not subject to the United Nations disciplinary procedures or measures;

(*d*) The refusal of OPAS experts to follow the instructions of the Secretary-General concerning evacuation constitutes sufficient ground for the termination of their contract;

(*e*) The termination of OPAS experts' contract based on the misconduct of the expert or on the non-observance by him of his obligations to the United Nations would not run counter to the obligations of the Organization vis-à-vis the Government and would also be in conformity with the applicable administrative practices of the Organization and thus with the expert's rights under his United Nations contract.

ANNEX

Memorandum of Law

1. The case of OPAS experts who have refused to follow the instructions of the Secretary-General concerning the evacuation of Uganda owing to the security situation in that State raises the following questions:

(*a*) Whether OPAS experts are subject to the instructions of the Secretary-General and in particular to those which relate to declared security situations;

(*b*) Whether OPAS experts should be submitted to the same disciplinary measures that may face experts who have the status of staff members should they not follow the order of the Secretary-General to evacuate a country in case of crises;

(*c*) What action would be appropriate and consistent both with the obligations of the Organization under its agreement with the Government and with its contract with the expert.

2. OPAS experts are recruited by the United Nations for the Government concerned. The officers enter the service of the requesting Government, perform functions as national civil servants or other comparable Government employees and are under the exclusive direction of the Government with regard to the performance of their duties. As regards salaries and emoluments, OPAS officers received from the Government an amount equivalent to the salary of national officers of comparable rank, supplemented by an additional stipend and allowances to be paid by the Organization, so that they receive in total approximately the same remuneration as international civil servants of equivalent category.

3. The legal status of OPAS experts is governed by the following documents:

(*a*) The OPAS Standard Agreement concerning the relationship between the Organization and the Government (or in many cases — the UNDP Standard Basic Assistance Agreement, which has superseded the OPAS Standard Agreements);

(*b*) The contract between the United Nations and the expert;

(*c*) The relationship contract or arrangements between the Government and the expert concerned.

The UNDP Standard Basic Assistance Agreement (which was signed in the case of Uganda on 29 April 1977 and superseded the OPAS Standard Agreement signed on 27 February 1967 and amended on 9 May 1972) stipulates: "Operational experts shall be solely responsible to, and be under the exclusive direction of, the Government... but shall not be required to perform any functions incompatible with their international status or with the purposes of the UNDP or of the executing agency..." (Art. III, para. 5). The Agreement lays down that OPAS experts will be entitled to the same privileges and immunities as officials of the United Nations (Art. IX, paras. 4 and 5). The Contract between the Organization and the Officer specifies the conditions under which the officer, as employee, agrees to place his services at the disposal of the Government as his employer and further defines the mutual relationship that shall exist in this connexion between the Organization and the officer. Thus the contract states that the officer shall be responsible to the Government and that in the performance of his duties "he shall neither seek nor accept instructions from any other Government or from any other authority external to the Government". But under the terms of the contract the officer is obliged to "conduct himself at all times with the fullest regard for the aims of the Organization and in a manner befitting his status under this contract". The contract also provides that the expert "shall not be engaged in any activity that is incompatible with the purposes of the Organization or the proper discharge of his duties with the Government".

4. Owing to the complexities of this dual status of OPAS experts, it is difficult to define with precision their relationship to the Government and to the United Nations. The agreements show clearly that these experts are subject to the authority of the Government with regard to the performance of their duties and therefore obliged to follow the instructions of the Government in that respect. But these agreements also recognize that OPAS experts have certain obligations in respect of the United Nations. Although these obligations are not always spelled out, they derive directly from the special international status granted to the experts under the OPAS arrangements. Thus the legal relationship between the United Nations and the experts should be determined in the light of their special status. Accordingly the obligation of these experts to serve the cause and interests of the United Nations and observe international standards of conduct clearly indicates that the Secretary-General as the chief administrative officer of the Organization has the exclusive authority to guide these experts in all matters related to the purposes and interests of the United Nations. Thus, in time of international crisis or internal security situations, the Secretary-General has the full discretion to determine that it is in the interests of the Organization that United Nations staff, including those who are entitled to the protection of the United Nations, will evacuate a certain area.

5. Furthermore, there is no question that the contractual link with the United Nations is an essential element determining the consent of a person who agrees to become an OPAS expert (see United Nations Administrative Tribunal Judgement No. 150 (Irani), para. VI). It seems that the expert's entitlement to special international status and to the same privileges and immunities as United Nations officials are major factors in this contractual link. It appears that these experts are under the protection of the United Nations in view of the fact that they have been charged with carrying out or helping to carry out some of the Organization's functions. (For general discussion on the protection entitled by United Nations agents see the Advisory Opinion of the International Court of Justice in the Reparation for Injuries Suffered in the Service of the United Nations, *I. C. J. Reports*, 1949, p. 174.) The United Nations will not be in a position to assume its responsibilities with regard to the protection of these experts without their full co-operation. Moreover, it appears that this protection is not optional for the expert: the special status as well as the privileges and immunities are granted to OPAS experts in the interests of the United Nations and not for the personal benefit of the individuals themselves (see also section 19 of the Convention on Privileges and Immunities of the United Nations) and therefore these experts are not in a position unilaterally to waive that protection. In other words, the protection of OPAS experts can be guaranteed only with their full co-operation, which in view of their special international status is not optional but obligatory. Furthermore, OPAS experts are not entitled to increase the envisaged financial risks incumbent on the Organization in case of their death or injury. The conclusion is therefore that the refusal of OPAS experts to follow the instructions of the Secretary-General concerning evacuation is incompatible with their international status and thus constitutes a breach of their contract with the Organization.

6. The fact that there is no direct employment relationship between the United Nations and OPAS experts clearly indicates that these experts are not subject to the disciplinary system of the Organization. Moreover, since OPAS experts do not have the legal status of officials or staff members, they are not subject to the Staff Regulations and Rules and thus the disciplinary measures defined in Rule 110.3 of the Staff Rules are not applicable in their case.

7. It would therefore appear that the only effective measure which the Organization may take in a case of serious breach of requisite conduct by an OPAS expert, is the termination of his contract. But this raises two preliminary questions: first, whether the unilateral termination of the contract by the United Nations would be in conformity with the provisions of its agreement with the Government and second whether the termination of the

contract under such circumstances would be in conformity with the administrative practices which the OPAS expert may be entitled to invoke.

8. As to the Government, the services of OPAS experts are defined by the provisions of Article II of the UNDP Standard Basic Assistance Agreement as a form of assistance; and therefore, Article XI of this Agreement which provides for unilateral suspension or termination of assistance after notice to the Government is *prima facie* applicable also to the termination of the services of OPAS experts. But in view of the fact that the OPAS arrangements are governed also by other agreements and that according to article XI the UNDP may terminate its assistance only after a period of suspension, a procedure which does not seem to be practical in the case of OPAS experts, it would appear that the terms of Article XI could not literally be applied in this case. Nonetheless, as the Government is a party to the OPAS arrangements and its consent is a pre-condition for the placement of the expert in the country, it would seem incumbent on the Organization to notify the Government of the intention to terminate the expert's United Nations contract if possible.

9. As regards the OPAS expert's rights, article IV of the expert's contract with the Organization provides *inter alia* that the contract is concluded for one year, that it may be terminated by either party upon one month of written notice and that should the Organization so terminate the contract, it should pay to the officer an indemnity equal to one week's salary of each month of uncompleted service under the contract. The contract stipulates that no indemnity shall be due if its termination is based on the misconduct of the officer or on the non-observance by him of the obligations incumbent upon him. The Administrative Tribunal in the case of Mirza (United Nations Administrative Tribunal Judgement No. 149) regarded as an essential requirement of due process that "a fixed-term appointment may be terminated before the expiry of the term for cause, but not arbitrarily by giving a month's notice". The Tribunal then proceeded to examine the grounds on which an OPAS contract could be prematurely terminated. The Tribunal referred to article VII, paragraph 3 of the contract and concluded: "Since the administrative practices of the Organization are based on the staff rules, the Tribunal holds that the staff rules relating to termination are relevant to the determination of the case", and consequently found that "in the absence of a specific provision in the contract regarding premature termination, the relevant provisions of ICAO Field Service Staff Rules are applicable to the present case even though the Applicant does not have the status of staff member".

10. Unlike that case, the present cases involve a situation which falls within a specific contract provision for termination prior to expiry, and the express reference in article IV to non-observance of obligations makes it unnecessary to seek analogy in the Staff Rules. Apart from the substantive basis for termination, it is also to be noted, as regards procedure, that Joint Disciplinary Committee submissions are not mandatory even for staff members if serving away from established duty stations, and hence there can be no question of necessary application to OPAS experts by analogy. Accordingly the termination of the experts in this situation would not violate any contract rights expressed or implied.

11. In the light of the foregoing, our conclusions may be summarized as follows:

(*a*) OPAS experts must serve the cause and interests of the United Nations and observe international standards of conduct. Accordingly, these experts must follow the instructions given by the Secretary-General in all these matters;

(*b*) In time of crisis or security situation the Secretary-General has the full discretion whether in the United Nations interest directly or the interests of the personnel to determine that all United Nations personnel including OPAS experts must evacuate a certain State or area. The refusal of these experts to follow such instructions is incompatible with their international status and constitutes a breach of their contract;

(*c*) In view of the fact that there is no direct employment relationship between the United Nations and OPAS experts they are not subject to the United Nations disciplinary procedures or measures;

(*d*) The refusal of OPAS experts to follow the instructions of the Secretary-General concerning evacuation constitutes sufficient ground for the termination of their contract;

(*e*) The termination of OPAS expert's contract based on the misconduct of the expert or on the non-observance by him of his obligations to the United Nations would not run counter to the obligations of the Organization vis-à-vis the Government and would also be in conformity with the applicable administrative practices of the Organization and thus with the expert's rights under his United Nations contract.

5 September 1979

16. QUESTION CONCERNING THE LEGAL STATUS OF UNITED NATIONS CONSULTANTS—SPECIAL SERVICE AGREEMENTS REGULATE RIGHTS AND OBLIGATIONS OF CONSULTANTS, NOT UNITED NATIONS STAFF RULES — LACK OF A RIGHT TO COMPENSATION FOR LOSS OF PERSONAL EFFECTS — DIFFERENCE IN NATURE BETWEEN COMPENSATION FOR LOSS OF PERSONAL EFFECTS AND COMPENSATION FOR DEATH, INJURY OR ILLNESS

Memorandum to the Under-Secretary-General for Administration, Finance and Management

1. Please refer to your memorandum of 22 October 1979 addressed to the Legal Counsel in which you requested advice regarding a claim for compensation by the above-named consultant in connexion with the loss of personal effects which occurred while he was retained on a special service agreement by the United Nations. Since there is no indication that the loss might have been occasioned by negligence on the part of the United Nations we have treated the matter as one of contractual obligation and not tort liability for purposes of this memorandum. For the reasons set forth in the following paragraphs, I wish to advise you that in our opinion the United Nations has no legal liability to pay such compensation under existing terms of contract to consultants on special service agreements. In our view, compensation for loss of personal effects is not one of those social security benefits like compensation for death, injury or illness which should be provided routinely as a matter of moral obligation.

2. The special service agreement of 9 October 1978 between the United Nations and Mr. Martin-Bates sets forth the respective rights and obligations of the parties. The second sentence of paragraph 4 provides that

> "the subscriber shall be considered as having the legal status of an Expert on Mission for the purposes of the Convention on the Privileges and Immunities of the United Nations. The subscriber shall not be considered in any respect as being a staff member of the United Nations".

Since a subscriber is not a staff member, and since one must be a staff member to avail oneself of the Staff Regulations and Rules, it follows that a subscriber cannot avail himself of the regulations and rules.

3. Mr. Martin-Bates' rights are limited to those which are set forth in the agreement under paragraph 5 as follows:

> "The rights and obligations of the subscriber are strictly limited to the terms and conditions of this agreement. Accordingly, the subscriber shall not be entitled to any benefit, payment, subsidy, compensation or entitlement, except as expressly provided in this agreement. In the event of death, injury or illness attributable to the performance of services on behalf of the United Nations under the terms of this agreement, the subscriber shall be entitled to compensation equivalent to the compensation which would be payable under Appendix D to the Staff Rules to a staff member of the United Nations of a similar rank, but not higher than the rank of Director."

The only "compensation" to which a consultant may be entitled is that provided in the event of death, injury or illness and all other "compensation" is precluded.

4. Paragraphs 4 and 5, taken together, eliminate any possibility that the staff rules or the administrative instruction on compensation in the event of loss of or damage to personal effects could apply to a consultant as a matter of right. It is, of course, possible to include the gist of a given staff rule or administrative instruction as a provision of the agreement in much the same way as the Appendix D provisions have been assimilated in the third sentence of paragraph 5. But, in the absence of such assimilation, no legal right in a subscriber arises under the staff rules and administrative instruction. I therefore have no hesitancy in stating that the special service agreement does not create a legal liability on the part of the United Nations to compensate Mr. Martin-Bates for loss of his personal effects.

5. Whether there is a moral obligation such as to make payment desirable in the interest of the Organization is not for this office to determine under the Financial Rules, but I would point out that

compensation for loss of personal effects is distinguishable from compensation for death, injury or illness. The latter is provided on the theory that such compensation represents a social security benefit which should be made available by all employers even to consultants because of the seriousness of the risk involved, not only to the consultant himself, but to dependants, who may be deprived of support. Compensation for loss of personal effects is a different matter because the risk involved does not appear to be so serious as to require that all employers should provide the benefit as a matter of social policy. As an independent contractor, a consultant accepts a number of limited risks and loss of personal effects is one of them.

6. There may be cases when the Organization increases the consultant's risk of loss through its own actions or omissions. If, for example, the Organization failed to take appropriate measures to safeguard a consultant's effects, or the Organization retained a consultant on a long-term basis instead of providing him with an appointment which carries Appendix D coverage, it could be argued that the Organization had wrongfully increased the consultant's risk, whether actual or potential. In this case, however, there is no indication that the Organization had increased the consultant's risk in any way before the loss. There is a suggestion that the consultant was disadvantaged after the loss because he was misinformed as to his rights to recover, but such disadvantage cannot be chargeable to the Organization since the consultant's rights in this regard were clearly set forth in the special service agreement.

7. As we have mentioned earlier, the decision as to moral obligation and the interest of the Organization is not for this Office. We have stated our views only for the purpose of elucidating the issues involved. If it is decided that an *ex-gratia* payment should be made, it would be entirely appropriate for the Claims Board to assess the loss and to recommend the amount of compensation.

26 November 1979

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17. QUESTION CONCERNING TERMINATION OF PERMANENT APPOINTMENTS ON THE BASIS OF ABOLITION OF POSTS — CONDITIONS TO BE MET AND PROCEDURES TO BE FOLLOWED UNDER THE STAFF REGULATIONS — CONSIDERATION OF AFFECTED STAFF MEMBERS TO BE RETAINED IN PREFERENCE TO THOSE ON ALL OTHER TYPES OF APPOINTMENTS — QUESTION WHETHER AFFECTED STAFF MEMBERS SHOULD BE CONSIDERED FOR LOWER-LEVEL POSTS — QUESTION WHETHER IN CASES OF ABOLITION OF POSTS AGREED TERMINATION MAY BE OFFERED TO AFFECTED STAFF MEMBERS

Memorandum to the Chief of Staff Services, Office of Personnel Services

1. I understand that approximately 10 locally-recruited General Service staff members on permanent appointments in Geneva and one locally-recruited General Service staff member on a permanent appointment in New York face termination of their appointments because the units in which they work have, or are to be, transferred to Vienna. You have requested my advice on whether the staff members concerned may be terminated on the basis of abolition of posts and reduction of staff under United Nations staff regulation 9.1 (*a*); whether it would be possible to terminate the staff members under the agreed termination provision contained in the final paragraph of United Nations staff regulation 9.1 (*a*); and whether other staff members on appointments other than permanent or regular appointments would have to be "bumped" to make posts available for the staff members on permanent contracts whose appointments are subject to termination.

2. For the reasons set out below, it is my view that the staff members concerned are subject to termination on the basis of abolition of post pursuant to staff regulation 9.1 (*a*) *provided* that *all* the requirements set out in staff rule 109.1 (*c*) are met; that, depending on the fact situation in each particular case, it may be legally open to the Administration to offer agreed terminations to some staff members under the final paragraph of staff regulation 9.1 (*a*) with the consequent possibility of

receiving higher termination indemnity under staff regulation 9.3 (*b*); and that staff members to be terminated under staff regulations 9.1 (*a*) on the basis of abolition of post must be found unsuitable for both vacant positions and positions currently occupied by other staff members who have appointments other than regular or permanent appointments, although if the Administration chose not to "bump" other staff members a colourable (although probably unsuccessful) argument could be made that staff rule 109.1 (*c*) (i) did not mandate "bumping" in the event of an appeal by the redundant staff member.

Abolition of post

3. The jurisprudence of the United Nations Administrative Tribunal makes it clear that the elimination of General Service posts in Geneva and New York, upon the transfer to Vienna of the substantive units which they service, constitutes an abolition of posts for the purposes of staff regulation 9.1 (*a*) as the number of posts in New York and Geneva respectively is reduced even though the total number of posts including those in Vienna remains the same since equivalent posts have been established in Vienna. This is a consequence of the locally recruited General Service status of the staff involved.

Exercise of the Administration's right to terminate permanent staff members on the basis of abolition of post

4. The propriety of the Administration terminating the appointment of a staff member who holds a permanent appointment is dependent upon strictly following the procedure set out in staff rule 109.1 (*c*). The United Nations Administrative Tribunal has consistently held that the validity of a termination under this provision depends on clearly demonstrating that the staff member concerned could not be retained in accordance with staff rule 109.1 (*c*). The Tribunal has held that the Administration must demonstrate that the staff member concerned was in fact *fairly and objectively* considered for available posts and was *fairly and objectively* found not suitable for any of them. The Tribunal has pointed out that this burden is not discharged by a simple assertion that the staff member was not suitable but this fact must be clearly demonstrated and proved e.g. by a contemporaneous memorandum which sets out the details of the qualifications required for all available posts and explains in each case why the particular staff member to be terminated is not suitable for each of those posts.

The obligation to "bump" other United Nations staff members

5. United Nations staff rule 109.1 (*c*) provides, *inter alia*, that

> "if the necessities of the service require abolition of a post or reduction of the staff, and subject to the availability of suitable posts in which their services can be effectively utilized, staff members with permanent or regular appointments shall be retained in preference to those on all other types of appointments..."

6. The ILO Administrative Tribunal has held that the Administration must consider staff members on permanent appointments who are to be terminated for posts currently occupied by other staff members on lesser appointments. I think that this conclusion is justified although if the Administration did not choose to "bump" other staff members it would be possible to argue that the phrase "subject to the *availability* of suitable posts" means that the posts must be *available* in the sense of being vacant or about to become vacant (e.g. by retirement or by the expiration of fixed term contracts). However, this construction would probably not be accepted by the United Nations Administration Tribunal which would in all likelihood adopt the approach of the ILO Tribunal which more clearly appears to reflect the intention of the staff rule. I understand, in view of the particular grade level and qualifications of the posts in question (at least in Geneva) that this problem may ultimately not be significant in the present situation.

7. A potentially more serious problem is *dicta* of the ILO Administrative Tribunal that if a staff member to be terminated is willing to accept a post at a lower level he must be considered for such posts. If this becomes a concrete problem I will consider the matter in more detail but I am of

the preliminary opinion that valid arguments based, *inter alia*, on the necessities of efficient administration might in some cases be cited in opposition to that requirement.

Agreed termination

8. If each staff member refrains from contesting the termination and accepts the regular termination indemnity there would be no difficulty whether finally the termination is grounded on abolition of post, under the first paragraph of staff regulation 9.1 (*a*), or in the interests of good administration, the staff member not contesting, under the last paragraph of staff regulation 9.1 (*a*). The question remains whether it would be possible to offer the higher indemnities which are discretionary under staff regulation 9.3 (*b*) for "agreed" termination but which could not be paid upon termination grounded on abolition of post.

9. In my view it would be improper so to act in all the cases because the text and, in particular, the legislative history of the final paragraph of staff regulation 9.1 (*a*) indicate that the uncontested-termination provisions should apply only in cases where none of the grounds specified in the first paragraph of staff regulation 9.1 (*a*) is clearly available. I think that it would be justifiable to invoke the agreed termination procedure and the discretion to pay higher indemnities in exceptional cases where it is difficult for the Administration to demonstrate that the staff member could *not* have been retained in service in another post. If on the other hand there are, in fact, only a limited number of possible alternative posts at the particular grade and none could reasonably be considered suitable and if, further, no recruitment for comparable posts is anticipated at the same duty station, then it would be proper to rely on the ground of abolition of post rather than to invoke the last paragraph of staff regulation 9.1 (*a*) together with staff regulation 9.3 (*b*) as a justification for higher termination payments.

14 December 1979

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18. CLAIMS FOR COMPENSATION UNDER ARTICLES 5 AND 6 OF APPENDIX D OF THE STAFF RULES — QUESTION REGARDING THEIR APPLICABILITY IN CASE OF THE EXISTENCE OF "NO FAULT" LAWS IN THE LOCAL FORUM — SUMS RECOVERED THROUGH APPLICATION OF "NO FAULT" LAWS OR THROUGH A COMMON LAW NEGLIGENCE CLAIM TO BE TAKEN INTO ACCOUNT BY THE SECRETARY-GENERAL WHEN AWARDING COMPENSATION UNDER APPENDIX D — SALARY PAYMENTS DUE TO SICK LEAVE ENTITLEMENTS DO NOT CONSTITUTE COMPENSATION UNDER APPENDIX D

Memorandum to the Secretary of the Advisory Board on Compensation Claims

1. I refer to your memorandum dated 18 June 1979 attaching a claim for compensation form submitted by Miss F.R. The memorandum requests a legal opinion on the applicability of article 6 of Appendix D of the Staff Rules.

The facts

2. The claim form indicates that on 5 February 1979 Miss R. was run down by a truck at the corner of First Avenue and 58th Street on her way home from work in the main library. She has claimed "credit de congé de maladie nécessité par accident" and has advised that her medical bills have been sent to her attorney who is handling a "no fault insurance" claim on her behalf.

3. You subsequently orally informed my office that Miss R. has not yet returned to work and will probably be absent on sick leave for many more months. You also indicated that the Advisory Board on Compensation Claims would not necessarily confine itself to the relief requested by the claimant and consequently might grant her compensation if, for example, she is permanently incapacitated.

Liability of third party: New York Comprehensive Automobile Insurance Reparations Act

4. The claim form attached to your memorandum indicates that the claimant has forwarded all medical bills to her attorney in connexion with a claim under New York's "no fault" insurance law (the Comprehensive Automobile Insurance Reparations Act).

5. This Act would oblige the insurer to pay the medical expenses that were caused by the accident: section 671.1 (*a*). Miss R. could also recover for any loss of earnings that resulted from the accident. However, if an injured person receives voluntary or contractual benefits, such as sick pay from an employer, which is equal to the injured employee's earnings, then no recovery for loss of earnings from work is permitted: section 671.1 (*c*). Miss R. would appear to be within this provision as she is currently on sick leave. However, if she is disabled and exhausts her sick leave she will be able to recover for any loss in earnings that subsequently results up to $1,000 per month for not more than three years less a 20 per cent deductible: sections 671.1 and 671.2. There is an over-all limit of $50,000 per person on benefits: section 671.1.

6. The first difficulty is that article 6 of appendix D operates when there is a "legal liability in a third person to pay damages" for the injury for which the United Nations pays compensation. The New York legislation does not provide for payment of damages. Instead, it provides for the payment of "first party benefits" to eligible persons for loss arising out of the operation of a motor vehicle in the State of New York. Since these benefits are payable irrespective of fault it is difficult to characterize them as damages. It follows that should Miss R. obtain benefits under the New York legislation article 5 would be the applicable provision rather than article 6.[7]

7. In a recent decision the United States sought to recover medical expenses that it had paid for an employee injured in a New York motor accident.[8] The United States relied on a statutory provision similar in form to article 6 of appendix D.[9] The Court held that it was not necessary to resolve the uncertainties between this statute and the "no fault" law since the United States could recover under the terms of the defendant's no fault policy issued pursuant to the provisions of the "no fault" law because the New York "no fault legislation enabled recovery of medical expenses not only by the injured person but by any person who had suffered loss on account of the personal injury arising out of the use or operation of a motor vehicle in New York".[10] Whether a particular policy could exclude such payments was not considered by the Court.

8. Although this decision would appear to enable the employer to recover for medical expenses the question of other payments such as disability annuities is much less clear since the terms of the legislation dealing with loss of earnings etc. imply that only payments to the injured person are envisaged by the Act.

9. If Miss R. has a common law action then these problems relating to recovery do not apply.[11]

10. I suggest, therefore, that at this stage you simply draw Miss R.'s attention to the provisions of both articles 5 and 6 and request her to keep you informed of the progress of her case against the driver of the truck and his insurers. You should inform her that if she in fact receives compensation under the New York "no fault" statute prior to the settlement of her claim against the United Nations such amounts may be taken into account in any award of compensation that the United Nations might make. You should also inform her that should she receive damages if her attorney proceeds with a common law negligence claim the amount of those damages will be taken into account by the Secretary-General when awarding compensation.

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[7] This distinction may be of great importance to Miss R. for article 5 gives the Secretary-General discretion whether to take into account any compensation payments under governmental, institutional or industrial schemes.

[8] United States *v.* Leonard (1978) 448 F. Supp. 99. (United States District Court, W.D., N.Y.).

[9] Federal Medical Care Recovery Act, 42 U.S.C. S2651.

[10] 448 F. Supp. 99 at 102.

[11] Miss R.'s injuries appear sufficiently serious to permit a common law negligence action (assuming the truck driver was negligent): s673 of the New York Comprehensive Automobile Insurance Reparations Act.

11. If it appears that the claim for compensation against the United Nations will be heard before Miss. R.'s claim against the truck driver and his insurers, the file should be returned to this office for advice on whether an assignment of her claim is required or whether any amounts ultimately received by Miss. R. from the insurers of the truck driver should merely be deducted, perhaps over a period of time, from compensation payable by the United Nations. At the present stage it would appear that the latter course is more likely since it would appear that any compensation would most probably take the form of annuities for total disability. However, until you can advise me of exactly what compensation payments are likely to be made by the United Nations and some idea of the amounts involved it is difficult to advise on the precise recovery procedure that should be used in this case.

12. This need for precise information is particularly relevant if Miss R.'s recovery rights are in fact under the New York "no fault" legislation which takes into account payments made to the injured person under an employment contract. The recovery rights of the United Nations may ultimately thus be more academic than real in respect of payments other than medical expenses.

13. Perhaps I should add that salary payments made to Miss R. pursuant to her sick leave entitlements are not really "compensation" within the meaning of appendix D because article 18 (*a*) provides that authorized absences occasioned by the injury or illness shall be charged to the sick leave of the staff member. The situation changes upon exhaustion of sick leave since in such cases article 18 (*a*) provides that the staff member shall be placed on special leave while article 11.1 (*b*) provides for the payment of compensation. Arguably, if the claimant subsequently returns to work and later, because of another injury or illness exhausts her remaining sick leave, the special leave credit which the Secretary-General may authorize could either be considered as "compensation" or could be considered as converting the initial grant of sick leave for the compensable injury into "compensation". However, since those payments would depend upon a subsequent use of sick leave not related to the compensable injury (if it were related then compensation is payable under article 11) it would follow that article 6 is not applicable since that subsequent injury or illness was not caused in circumstances creating a legal liability on the part of the third party who caused the first injury.

Payments made by Blue Cross

14. You orally requested for advice on the question of any hospital payments that might have been made pursuant to the United Nations Blue Cross group policy since those payments would be reflected in the rates charged to staff members in the future.

15. Any action that Blue Cross takes would, in the first instance, be a decision for that organization and its legal advisors. Accordingly, if you can ascertain whether Blue Cross has in fact made such payments under the United Nations Group Policy you may wish to inform the United Nations Insurance Unit and request them to advise Blue Cross that Miss R. has claimed compensation under the New York "no fault" law.

26 June 1979

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19. COMPENSATION IN THE EVENT OF ILLNESS, ACCIDENT OR DEATH ATTRIBUTABLE TO THE PERFORMANCE OF OFFICIAL DUTIES ON BEHALF OF THE UNITED NATIONS — PHILOSOPHY AND PURPOSE OF APPENDIX D OF THE STAFF RULES — DISCRETION OF THE SECRETARY-GENERAL TO REQUIRE CLAIMANTS OF COMPENSATION TO ASSIGN RIGHTS OF ACTION AGAINST THIRD PARTIES OR TO JOIN IN PROSECUTING SUCH ACTION — SUMS THUS RECOVERED FROM THIRD PARTIES AS FACTORS TO BE CONSIDERED IN ASSESSING PAYMENTS OF COMPENSATION

Memorandum to the Secretary of the Advisory Board on Compensation Claims (ABCC)

1. I refer to your memorandum dated 14 May 1979 requesting an opinion of the Office of Legal Affairs on the application of article 6 of appendix D of the Staff Rules. Since this case raises

recurring issues of general application in the administration of appendix D, I have taken this opportunity to prepare a detailed opinion which can be used as a point of reference for procedure in future compensation claims where third party liability exists.

Outline of facts

2. Dr. D. R., a locally-recruited UNICEF staff member, died on 20 December 1978 as a result of injuries sustained at Hyderabad on 17 December 1978 when an Air India airliner on which he was a passenger crashed during take-off. The staff member, on official travel, was on the return leg of a New Delhi-Hyderabad-New Delhi flight. Since the staff member's ticket was for a domestic (i.e. non-international) air travel the liability of Air India for the accident is governed by Indian Law.[12]

3. Your file reveals that the staff member's gross earnings at the time of death were 124,670 rupees per annum and that he is survived by four children, two of whom are dependants (hereafter referred to as the dependent children) within the meaning of the United Nations Staff Rules. As Dr. R.'s death resulted from an accident while travelling in connexion with his official duties, the dependent children appear eligible to receive compensation under appendix D of the Staff Rules.[13]

Philosophy and purpose of appendix D of the Staff Rules

4. Appendix D of the Staff Rules implements the Secretary-General's mandate to "establish a scheme of social security for the staff, including provisions for health protection, sick leave and maternity leave, and reasonable compensation in the event of illness, accident or death attributable to the performance of official duties on behalf of the United Nations".[14]

5. As appendix D implements a system of social security it follows that United Nations accident compensation payments will be influenced by the receipt or entitlement to other payments in respect of the accident in question. One of the principal sources of such payments or entitlements is damages payable by a party legally liable for the accident. Article 6 of appendix D of the Staff Rules seeks to deal with this problem.[15]

Liability of third party (Air India)

6. The liability of an Indian air carrier for the death of passengers during a domestic flight in India is governed by the Indian Carriage by Air Act 1972. This Act implements the 1929 Warsaw Convention and the Warsaw Convention as amended at The Hague, 1955, and applies the rules contained in these Conventions to domestic air carriage. These Conventions, in return for what amounts to strict liability of an air carrier for the consequences of accidents, severely limit the amount of compensation payable by the air carrier.[16]

7. The Indian Carriage by Air Act provides that the liability of an air carrier in the case of the death of a passenger is enforceable by the personal representative of the deceased and by members of the passenger's family who have sustained damage as a result of the passenger's death. The total amount of compensation recoverable under the Act in respect of the death of the passenger is divided between the claimants in such proportion as the Court thinks fit.

8. Air India has admitted liability under the Act for the death of Dr. R. and has advised that its liability is limited to 100,000 rupees together with additional minor amounts for loss of Dr. R.'s

[12] There is no evidence in your file to indicate that other third parties might also be liable, e.g. negligent air traffic controllers or manufacturers of defective equipment.

[13] Article 2 (*b*) (iii).

[14] Staff regulation 6.2. The rules are separately issued as appendix D to the Staff Rules in accordance with staff rule 106.4.

[15] Other sources of payments include United Nations pension entitlements (see article 4) and non-United Nations compensation entitlements (see article 5).

[16] There are certain circumstances when a carrier cannot avail itself of the limits of liability, e.g. wilful or reckless misconduct or failure to issue a passenger ticket. There is no evidence in your file to indicate that this case raises such issues.

baggage etc.[17] Whether this total amount will in fact be payable by Air India will, of course, depend upon whether the claimants can establish that amount of financial loss. Since Dr. R.'s annual salary was well over 100,000 rupees, I think that it is clear that the dependent children (as defined by the United Nations Staff Rules) alone have already suffered such a financial loss. However, the amount received by the two dependent children may be considerably less than the 100,000 rupees permitted by the Indian Act, since that total amount of compensation is divided between eligible claimants, including the estate of the deceased, in such proportion as the Court thinks fit. Doubtless, the Court would take into account when determining each claimant's share of compensation the fact that the United Nations was providing compensation to some of the eligible claimants under the Indian Act and that the United Nations was seeking to recover those payments from any compensation payable by Air India to those claimants. Accordingly, the extent of recovery by the United Nations depends upon the number of claimants who will share, and in what proportion, in the amount payable by Air India.[18]

Recovery procedures under Article 6 of Appendix D

9. The discretion given to the Secretary-General under article 6 relates only to the question as to whether the United Nations should require claimants to assign rights of action against third parties or to join in prosecuting such action. Usually, the Secretary-General will not require assignment of a claim against a third party[19] but will request the claimant (with United Nations assistance, if necessary) to make a claim against the third party and will permit the claimant to receive that compensation. The amount received will then be deducted, perhaps over a period of time, from the annuities payable to the claimant under article 10 of appendix D.[20] If a claim has been prosecuted to judgement or otherwise settled, with or without United Nations participation, the sums recovered have to be taken into account in assessing payments of compensation due to the claimant by the United Nations[21] or recovered by the United Nations if it has already made an award of compensation.[22]

10. Accordingly, I suggest that you draw the attention of the guardian of the dependent children to the provisions of article 6 of Appendix D and point out that any payments made by Air India to the children will be taken into account by the United Nations in determining the amount of compensation it will pay. In order to expedite the hearing of the children's claim he should be requested also to provide full details of the state of the children's claim against Air India together with details of any payments (if any) received to date. A copy of my letter to Air India could also be given to him. You might also inform the guardian that it is the usual policy of the United Nations, provided that the settlement is approved by the United Nations, to permit claimants to receive payments of damages from third parties with repayment to the United Nations being effected, interest free, over a period of time from the annuities payable to the claimants by the United Nations. However, if the guardian does not pursue the claim against Air India any award of United Nations compensation may be conditional upon assignment to the United Nations of the children's right of action against Air India.

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[17] See their letter dated 27 March 1979 in your file. This amount seems broadly in line with the limits on liability laid down in the Conventions which the Act implements. Those limits are, however, expressed in terms of French francs with a stated gold content. Section 6 of the Act provides that conversion to rupees is made at the date on which the amount of damages to be paid by the Carrier is ascertained by the Court (presumably the date of judgement or the date the Court approves a settlement).

[18] There is no information on this point in your file. I have written to Air India for details. However, they may require consent of the dependent children's guardian before supplying me with any information.

[19] Such an assignment was required in the case of *Waldron-Ramsey* in 1969 (*ABCC* No. 1714).

[20] Whether the Secretary-General should exercise his discretion to "spread out" deductions over a period of time depends, of course, on the particular circumstances of each case. However, this discretion will normally be exercised in those air crash deaths, such as the present case, where the entitlement of the survivors is confined to the limited amounts prescribed by the Warsaw Convention (see para. 6 above). See, for example, the case of *Beslon* in 1968 (*ABCC* No. 1660).

[21] See, for example, the case of *Beslon*, note 9 above.

[22] See, for example, the case of *Chang* in 1972 (*ABCC* No. 1895).

11. In the meantime, in view of UNICEF's understandable desire that this case be handled expeditiously, the merits of the case could be considered by the ABCC. In the event that the guardian advises that he does not intend to take action against Air India the award could be made conditional upon assignment to the United Nations of the children's right of action against Air India. The file could then be returned to this Office for advice as to the extent to which the United Nations should pursue the claim against Air India.

12. However, I think it is more likely that the guardian will pursue the children's claim in which case, after this Office has approved the settlement, the question of repayment to the United Nations can be handled administratively by your Office. Alternately, if settlement has already been effected recovery would be again an administrative matter.

31 May 1979

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20. PRACTICE OF THE SECRETARIAT IN CASES WHERE AN AGREEMENT SUBMITTED FOR REGISTRATION MAKES REFERENCE TO AN AGREEMENT WHICH HAS NOT YET BEEN REGISTERED UNDER ARTICLE 102 OF THE CHARTER — INTERPRETATION OF PARAGRAPH 2 OF THAT ARTICLE — QUESTION WHETHER REFERENCE TO AN UNREGISTERED AGREEMENT DOES NOT CONSTITUTE "INVOCATION" OF THAT AGREEMENT BEFORE AN ORGAN OF THE UNITED NATIONS (THE SECRETARIAT), WHICH WOULD PRECLUDE REGISTRATION OF THE NEW AGREEMENT — POSSIBLE CASES AND COURSES OF ACTION BY THE SECRETARIAT

Internal memorandum

A. *The problem*

1. The material recently submitted by the Government of Egypt with a view to the registration of the Treaty of Peace between Egypt and Israel of 25 March 1979 makes reference to the Agreement between Egypt and Israel initialled on 1 September 1975. In particular, article I (2) (*a*) of the appendix to annex I provides as follows:

> "... until Israeli armed forces complete withdrawal from the current J and M Lines established by the Egyptian-Israeli Agreement of September 1975, hereinafter referred to as the 1975 Agreement, up to the interim withdrawal line, all military arrangements existing under that Agreement will remain in effect, except those military arrangements otherwise provided for in this Appendix".

2. Neither the September 1975 Agreement nor the Agreement of 18 January 1974 between Egypt and Israel concerning disengagement of forces, to which it refers, was registered with the Secretariat under Article 102, as it should have been as soon as possible after its entry into force.

3. Among the questions raised by such cases, which occur not infrequently, is whether reference to an unregistered agreement does not constitute "invocation" of that agreement before an organ of the United Nations (the Secretariat), which would be contrary to Article 102, paragraph 2, of the Charter and would preclude registration of the new agreement by the Secretariat.

B. *Interpretation of Article 2, paragraph 2, of the Charter*

4. The *travaux préparatoires* to Article 102 of the Charter shed no light on this question, although it is clear that what the authors of the Charter had mostly in mind was the invoking of an agreement before the International Court of Justice (see volume 13 of the Documents of the San Francisco Conference on International Organization: Registration and publication of treaties).

C. *Practice of the Secretariat*

5. Where the 1979 Treaty of Peace between Egypt and Israel is concerned, the Secretary-General, in his reply to the Egyptian note verbale of 25 April 1979, suggested that the Government of Egypt should register the 1974 and 1975 Agreements.

6. This suggestion is in conformity with standing practice in such cases. References to earlier agreements in an agreement submitted for registration can be divided into three categories:

(*a*) Reference to international agreements which are subject to the provisions of Article 102 of the Charter and are evidently still in force, but knowledge of which is not necessary for the application of the agreement submitted for registration;

(*b*) References to international agreements which are subject to the provisions of Article 102 of the Charter and a knowledge of which is necessary for the application of the new agreement, whether or not they are still in force; and

(*c*) References to international agreements which are subject to the provisions of Article 102 of the Charter but which are superseded in their entirety by the agreement submitted for registration.

In case (*a*), the attention of the registering authority is drawn to Article 102 of the Charter and to the provisions of the General Assembly regulations, and it is suggested that the registering authority, if it is a party of the old agreement, should register (or file and record) the latter agreement.

In case (*b*), the Secretariat holds the new agreement in abeyance and suggests that the registering authority should take the necessary steps to register the earlier agreements. (Quite often the new agreement, while stating that it entirely supersedes the earlier agreement, nevertheless refers back to its provisions, knowledge of which is therefore necessary for the application of the new agreement. In such a case, the Secretariat will suggest that the old agreement should be registered; for neither Article 102 nor the related General Assembly regulations expressly precluded the registration of abrogated agreements, and even if an agreement is abrogated it may still have created residual legal situations that can lead to its being invoked before an organ of the United Nations.)

Lastly, in case (*c*), the Secretariat normally refrains from drawing attention to the fact that the old agreement was not registered.

7. There are dozens — indeed hundreds — of examples of this Secretariat practice. In most cases, Governments and organizations responded favourably to our suggestion that the agreements in question should be registered. In a minority of cases, we received no reply; when that happened, the new agreement remained in abeyance. There never seems to have been a case in which any Government or intergovernmental organization contested our position on this point.

8. It must be pointed out that the Secretariat is bound to refrain from publishing for information in the *Treaty Series*, without prior registration, any international agreement that is subject to the provisions of Article 102 of the Charter. The reason for this is that, unlike registration, publication "for information" in the *Treaty Series* is an act of the Secretariat and not an act of the parties (see *Repertory of Practice of United Nations Organs*, vol. V, Article 102, para. 85); consequently, the Secretariat could not, on pain of becoming a party to a violation of Article 102 of the Charter, publish in the *Treaty Series* without the safeguards provided by the registration procedure (certification of authenticity, declaration of the absence of reservations, etc.) an international agreement recognized as such by the parties, even if the registering authority requested it to do so. (If, however, the authority submitting the new agreement for registration declares that the instrument referred to in that agreement is not an international agreement within the meaning of Article 102 of the Charter, the Secretariat, having received that assurance, may decide to publish the document for information along with the agreement that is being registered; the important point is for the Secretariat not to take any initiative that can be regarded as contravening Article 102 of the Charter.)

D. *Conclusions*

9. As has been mentioned, the practice of the Secretariat described above has never been formally contested. On the other hand, it must be borne in mind that this practice, although rational, is not expressly provided for in the Charter or in the regulations. Moreover, it is possible that an organ of the United Nations other than the Secretariat may have already taken a position (perhaps implicitly) by allowing an unregistered agreement to be invoked before it. This is precisely what

occurred in the case of the Agreement between Egypt and Israel of 18 January 1974; that Agreement, which the United Nations signed as a witness and in the application of which it took an active part, has already been reproduced as a Security Council document; obviously, therefore, the Secretariat would hardly be in a position to refuse registration of the new Agreement on the ground that the 1974 Agreement had not been registered. Lastly, it can simply be argued that refusing to register and publish an agreement for the sole reason that it refers to an agreement which has not itself been registered would be directly contrary to the purpose sought by Article 102 of the Charter.

10. In view of the foregoing, I should be obliged if you would confirm to me that you agree with the following conclusions:

(1) *In the case of the Treaty of Peace between Egypt and Israel of 25 March 1979*

If Egypt replies in the negative to our suggestion that the Egyptian-Israeli Agreements of 1974 and 1975 should be registered, we shall take note of that decision and shall nevertheless proceed to the registration of the 1979 Treaty of Peace on behalf of Egypt, provided that the other conditions are fulfilled. In the *Treaty Series*, as an exceptional measure, foot-note references to the Security Council documents reproducing the 1974 and 1975 Agreements will be inserted wherever those Agreements are mentioned in the Treaty of Peace, but we shall not publish those Agreements for information in the *Treaty Series*.

(2) *As a general rule*

(i) Where an international agreement submitted for registration refers to another international agreement which has not itself been registered, the Secretariat will continue, in accordance with existing practice, to bring this to the attention of the registering authority and, where appropriate, will defer registration pending a reply.

(ii) If the registering authority indicates that it does not intend to register the old agreement, the Secretariat will take note of this and proceed to register the agreement originally transmitted.

(iii) The Secretariat will not publish for information in the *Treaty Series*, without its having first been subjected to the registration procedure, any agreement which appears to the Secretariat to be subject to the provisions of Article 102 of the Charter, unless the registering authority responsible for registration confirms to it that it does not consider the agreement in question to be subject to the provisions of Article 102.

4 May 1979

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

1. UNIVERSAL POSTAL UNION

RESPONSIBILITY OF POSTAL ADMINISTRATIONS IN CASE OF DAMAGE CAUSED TO THE EXTERIOR PACKAGING OF A POSTAL PARCEL (PARCELS, AGREEMENT, ART. 39)

An Administration requested the opinion of the International Bureau on a question in connexion with the extent of the responsibility of Postal Administrations with respect to postal parcels. More precisely, it wished to know whether Administrations were responsible for the damage caused to the exterior packaging of a parcel, in this instance a unit case, if the contents were not damaged. The International Bureau replied as follows:

1. The problem raised by your Administration relates both to the packaging of postal parcels and to the extent of the responsibility of Administrations, as conditioned, in the case under consideration, by application of the regulations relating to packaging.

2. The general conditions relating to packaging are contained in article 104 of the operating regulations of the Postal Parcels Agreement. The specific instance of suitcases is not provided for, and no reference to any such case has been found in the records of the International Bureau (Acts of Congress, EC, CCPS, inquiries, etc.). The said article 104 can thus give rise to more or less restrictive interpretations with respect to suitcases as packaging. Indeed, paragraphs 1 and 2 provide that:

> "All parcels must be packaged and sealed in a manner appropriate to the weight, shape and nature of the contents as well as the means of transport and the length of the journey"

and that:

> "Parcels should be made particularly sturdy if they are:
>
> (*a*) To be transported over long distances;
>
> (*b*) To be trans-shipped a number of times or handled on a number of occasions."

In our view, a suitcase fulfils all of these conditions and may be used as a container, that is, as packaging. On the other hand, if an empty suitcase (without any contents) is consigned to the post as a parcel, it should be packaged, since it does not benefit from the derogation provided for in article 104, paragraph 5 (*b*), in particular because it is not normal commercial practice to send an empty suitcase (new suitcase) from one country to another without packaging. However, in the case under consideration the suitcase had been used as a container (packaging) and should be treated as such under the postal regulations.

3. It remains to be determined whether, in case of damage, responsibility extends not only to the contents but also to the container. There again, UPU regulations contain no specific provision. The very fact that certain parcels are accepted without packaging means that the extent of responsibility in this respect is not precisely delineated. However, by going back to the source of article 39, paragraph 3, of the Postal Parcels Agreement, according to which "the indemnity is calculated according to the current prices, converted into gold francs, of goods of the same kind . . . ", one can see that that provision was adopted with the specification that "it is generally possible to determine the current price of the goods which constitute a parcel" (Acts of the Congress of Madrid, 1920, vol. II, p. 498).

In this regard, it should also be recalled that the question of responsibility for damage arising from delays in the sending and delivery of postal parcels has been discussed on many occasions by Congress and that each Congress had stated the moral obligation of Postal Administrations if delay results in the complete or partial deterioration of the contents of the parcel (see, for example, Acts of the Congress of Stockholm, 1924, vol. II, p. 816).

It therefore seems to us that it was the intent of the legislator that the indemnity should be calculated on the basis of the market value of the contents of the parcels. In other words an Administration is responsible only for the contents of a parcel and not for damage to its packaging.

4. To sum up, with respect to the responsibility of Postal Administrations in case of damage to postal parcels, the Postal Parcels Agreement contains no provision specifying that such responsibility extends not only to the contents of the parcels but also to the container (packaging). Nevertheless, it would appear, as indicated in paragraph 3 above, that at the time of the adoption of the provisions of article 39, paragraph 3, and the consideration of questions relating to the indemnity to be paid, the intent of Congress was to establish the responsibility of Administrations solely for the contents of parcels and not for their packaging.

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2. WORLD HEALTH ORGANIZATION

AMENDMENT TO RULES OF PROCEDURE OF THE ASSEMBLY REQUIRING TWO-THIRDS MAJORITY FOR NEW CATEGORY OF DECISIONS IN ADDITION TO THOSE FOR WHICH WHO CONSTITUTION REQUIRES SUCH MAJORITY — QUESTION OF CONSTITUTIONALITY OF THE AMENDMENT

Statement made by the Director of the Legal Division at the 12th Plenary Meeting of the Thirty-second World Health Assembly on 22 May 1979[23]

Mr. President, the delegate of Bahrain has raised the problem as to whether the draft amendment to rule 72 contained in the report before you is constitutional, and he has indicated that in his view it is not possible, through an amendment to the rules of procedure, to alter a provision of the Constitution, in this case article 60 of the Constitution which stipulates that decisions of the Health Assembly on important questions shall be made by a two-thirds majority. In other words is the amendment to rule 72 of the rules of procedure compatible with the provisions of article 60 of the Constitution? If I have understood the question correctly, this is the problem that the delegate of Bahrain has asked me to solve.

Before replying to this question I should like to point out that, as one delegation mentioned in committee, the legal adviser only gives opinions and that it is up to the Assembly to make a definite decision, in full knowledge of the facts, on the problem before it. Having said that, I shall try as clearly as possible to give some background information which the Assembly may wish to consider.

In order to interpret a text it is necessary, according to the rules laid down by the Vienna Convention on the Law of Treaties, to consider a certain number of aspects, in particular the ordinary meaning of the provision in question, the preparatory work, and the practice subsequently followed in applying the text. If the Assembly agrees, I should like to go over these various aspects in chronological order.

The first aspect of interpretation is the preparatory work. The people who drew up the Constitution of the World Health Organization had Articles 18 and 19 of the United Nations Charter in mind when they drafted article 60. The Technical Preparatory Committee examined the proposals made to it, which had initially recommended a qualified majority vote only in the cases specified in the Constitution itself. It was initially intended, therefore, that there would be only a certain restricted number of listed cases in which a vote could be taken by qualified majority, that is by two-thirds majority. However, the International Health Conference which followed the Technical Preparatory Committee unanimously approved a suggestion to include the present text of article 60 in the Constitution.

This text, which constitutes the second aspect of interpretation, consists of two different parts. First of all paragraph (*a*) of this article states that "Decisions of the Health Assembly on important questions shall be made by a two-thirds majority . . . These questions shall include: . . . " and three cases in which the two-thirds majority is required by the Constitution are given. Paragraph (*b*) of article 60 stipulates that decisions on other questions, including the determination of additional categories of questions to be decided by a two-thirds majority, shall be made by a majority of the members present and voting. This is the present text of the Constitution which you can find in *Basic Documents*.

The third aspect of interpretation of the text consists of the precedents. The first precedent for the application of article 60 (*b*), which provides for the introduction of additional categories of questions to be decided by a two-thirds majority, is the adoption by the First World Health Assembly of the present rule 73 of the rules of procedure, which established the Assembly's right to demand a qualified majority through a simple provision in the rules. The second precedent can be found in the amendment made in 1958 to the present rule 72 of the rules of procedure, which added to the categories of questions to be decided by a two-thirds majority as laid down in article 60 (*a*) of the Constitution, a new category concerning decisions on the amount of the effective working budget;

[23] Document WHA32/1979/REC/2, Verbatim Record of 12th Plenary Meeting.

this category was added following resolution WHA11.36 adopted by the World Health Assembly on 12 June 1958 at its seventh plenary meeting. This resolution is contained in *Official Records* No. 87, page 33. It may be remembered that this amendment was the subject of lengthy debate during which constitutional objections were raised, particularly by the delegate of Iraq. Following these discussions the amendment was adopted in committee and in plenary session, with six dissenting votes in committee and eight dissenting votes in plenary. Those are the two precedents established by the Health Assembly itself. I could of course give details of the practice of other organizations if I were asked to do so, but I shall simply point out that these provisions are contained in the United Nations Charter and in the rules of procedure of the General Assembly.

That is the information I am able to supply to the Assembly so that it can make a sovereign decision on the validity of the constitutional objection that has been raised; it should of course be pointed out that, if the procedure is not recognized as constitutional by the Assembly, this would affect rules 72 and 73 of the rules of procedure and the resolution adopted in 1958, the constitutional character of which could be called into question.
