*Extract from:*

# UNITED NATIONS JURIDICAL YEARBOOK

## 1991

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

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# Chapter VI

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

## A. Legal opinions of the Secretariat of the United Nations (Issued or prepared by the Office of Legal Affairs)

### 1. QUESTION WHETHER THE UNITED NATIONS EMBLEM MAY BE USED ON THE FLAG OF A NATIONAL MILITARY CONTINGENT IN UNITED NATIONS PEACE-KEEPING OPERATIONS TOGETHER WITH THE EMBLEM AND THE COLOURS OF THE STATE CONCERNED—RELEVANT PROVISIONS OF THE UNITED NATIONS FLAG CODE AND REGULATIONS TO IMPLEMENT THE FLAG CODE

*Note to the Permanent Mission of a Member State*

The Secretariat of the United Nations presents its compliments to the Permanent Mission of (name of a Member State) and has the honour to refer to the Mission's note dated 28 May 1991 requesting the authorization of the Secretary-General to use the emblem of the United Nations on a flag to be established for a military contingent in the United Nations peace-keeping operations.

The proposed flag would feature, on one side, the emblem of the United Nations on a United Nations blue background with the inscriptions "UN" in each corner and, on the other side, the symbol of the State concerned, i.e., the eagle, together with the national colours. The national eagle symbol would also be placed at the top of the pole carrying the combined flag, which is also trimmed with gold braid at the edges on both sides.

The Secretariat of the United Nations has considered the appropriateness of the proposed flag in the light of the United Nations Flag Code, issued by the Secretary-General on 19 December 1947, pursuant to General Assembly resolution 167 (II) of 20 October 1947, as amended on 11 November 1952, and in the light of the Regulations issued by the Secretary-General to implement the Flag Code, the latest of which became effective on 1 January 1967.

Article 1 of the Flag Code provides that:

> "*The Flag of the United Nations shall be the official emblem of the United Nations, centred on a United Nations blue background.* Such emblem shall appear in white on both sides of the flag except when otherwise prescribed by regulation . . ." (emphasis added)

Article IV (*e*) of the regulations to implement the Flag Code provides that:

> "No mark, insignia, letter, word, figure, design, picture or drawing of any nature shall ever be placed upon or attached to the United Nations Flag or placed upon any replica thereof."

The Secretariat of the United Nations notes that the proposed flag consists of an alteration to the United Nations flag which diminishes its distinctive appearance, combined with a different design and insignia attached thereto. The Secretariat of the United Nations is of the view that such treatment of the United Nations flag is contrary to the Flag Code and Regulations to implement the Flag Code, and therefore regrets to inform the Permanent Mission that the Secretary-General has concluded that it would not be appropriate to consent to the proposed flag.

The Secretariat of the United Nations notes in this connection that the Head of Mission of a peace-keeping operation may in appropriate circumstances allow a military contingent to fly the United Nations flag itself.

26 June 1991

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## 2. Question whether, in the light of General Assembly resolution 44/46 of 8 December 1989, activities related to the International Space Year may be financed through voluntary contributions from sources other than States—Use of the United Nations name and emblem in soliciting funds

*Memorandum to the Chief, Outer Space Division, Department of Political and Security Council Affairs*

1. This refers to your memorandum of 26 March requesting our views on proposals for fund-raising to finance activities related to the International Space Year, 1992 (ISY), in particular the holding, in cooperation with the Department of Public Information, of the "Home Planet" Exhibition (the Exhibition) and of the "Global Television Special and Video Series" (the Television Special). We understand that the producers of these activities have been advised that if the Exhibition or the video telecast are to take place, the execution of these activities ". . . shall be undertaken at no cost to the United Nations but with funding to be provided by corporations or individual donors that are acceptable in the United Nations".

*Authority to carry out fund-raising to finance ISY activities*

2. The General Assembly, in paragraph 21 of its resolution 44/46 of 8 December 1989, stated the following:

> *"The General Assembly . . .*

"*Endorses* the recommendation of the Committee [on the Peaceful Uses of Outer Space] that international cooperation should be promoted through the International Space Year, which should be carried out for the benefit and in the interests of all States, taking into particular account the needs of developing countries, and that, in that context, the training and educational capabilities of the United Nations Programme on Space Applications should be utilized to bring about a meaningful role for the United Nations, *through voluntary contributions by Member States* and without any impact on the regular budget on the United Nations or the existing programme of work of the Programme" (emphasis added).

3. In his note verbale of 17 December 1990 to all Member States on the participation of the United Nations in ISY, the Secretary-General reminded Member States that "... in endorsing the participation of the United Nations in the International Space Year, the General Assembly directed that the activities should be implemented '*through voluntary contributions by Member States* and without any impact on the United Nations regular budget or the existing programme of work of the Programme' (*Official Records of the General Assembly, Forty-fourth Session, Supplement No. 20*, A/44/20, para. 117) ..." (emphasis added). The Secretary-General also indicated that a trust fund had already been established for the United Nations Programme on Space Application which would "also receive the *voluntary contributions from Member States* in support of the implementation of the activities planned ... for the participation of the United Nations in the International Space Year" and that "*the full support and co-operation of all Member States* will enable the United Nations to carry out the planned United Nations-ISY activities for the benefit of all Member States" (emphasis added).

4. In the light of the above, it appears that under the literal meaning of the General Assembly mandate, the activities to be undertaken by the United Nations in the context of ISY are to be financed *solely* through voluntary contributions by *Member States*. In our view, therefore, there does not at present appear to be a legal basis for the United Nations to enter into fund-raising arrangements to finance those activities from private sources.

5. This interpretation is in line with the recent interpretation of Economic and Social Council resolution 1908 (LVII) of 2 August 1974 given by the Office of Legal Affairs in connection with a proposed agreement between the United Nations Centre on Transnational Corporations (UNCTC) and a university of one of the Member States to undertake a cooperative education programme in another Member State, which envisaged that activities would be financed through private fund-raising. Paragraph 6 of Economic and Social Council resolution 1908 (LVII) provides as follows:

"*The Economic and Social Council* ...

"6. *Decides* to establish an information and research centre on transnational corporations and requests the Secretary-General, pending further arrangements regarding the modalities of operation of

the centre, to set up, in accordance with Article 101 of the Charter of the United Nations, a nucleus of the centre in the light of the Secretary-General's report and the report of the Group, *and bearing in mind also that such a centre should be financed through the regular United Nations budget, without prejudice to any voluntary contributions from Member States*" (emphasis added).

We concluded that, under its present mandate, while UNCTC may receive additional resources from voluntary contributions by Member States, it was not authorized to undertake fund-raising activities from private sources. We recommend that the proper way for UNCTC to undertake such activities and receive such funds would be to obtain appropriate authority from the Economic and Social Council.

6. We have been informed, however, that the formulations of paragraph 21 of General Assembly resolution 44/46 and of the Secretary-General's note verbale of 17 December 1990 (referred to in paragraphs 2 and 3 hereabove), reflect concerns expressed by Member States that the ISY activities should not be financed from the regular budget; Member States on the other hand were not concerned to exclude the possibility of raising funds, on a voluntary basis, from sources *other* than Member States. We have also been informed that the States members of the Committee on the Peaceful Uses of Outer Space and its Scientific and Technical Subcommittee were fully aware of the fact that funds might be raised, on a voluntary basis, from sources *other* than Member States.

7. We further note, in this connection, that paragraph 85 of the report of the Committee on the work of its thirty-third session in 1990 merely provides for financing "through voluntary contributions" without express reference to "Member States" as the source of those contributions.

8. In view of the meaning apparently intended to be given to the words "through voluntary contributions by Member States" in paragraph 21 of General Assembly resolution 44/46 of 8 December 1989, we would recommend that the intention of Member States be clarified in the report of the Committee on the Peaceful Uses of Outer Space at its upcoming thirty-fourth session. In our view, the addition of wording such as "and other donors . . ." or "and other sources . . ." after the words "voluntary contributions by Member States" would constitute a sufficient legal basis for accepting contributions from private sources, including through fund-raising activities.

*Use of the United Nations name and emblem in soliciting funds*

9. We note that it is proposed that the producers of the Exhibition and the producers of the Television Special be requested to raise the necessary funds from corporations and private donors to cover all costs of the envisaged activities. The respective producers would also, we assume, retain a percentage of the funds raised as their fee. It would appear that solicitations for contributions by the producers for United Nations-sponsored activities will be made using the United Nations name in some form or another.

10. Under General Assembly resolution 92 (I) of 7 December 1946, the use of the United Nations name and emblem is not permitted without the authorization of the Secretary-General and such use for commercial purposes is prohibited. Accordingly, any solicitation for contributions by the producers using the United Nations name should first be submitted to the United Nations for approval.

11. We reviewed "the Home Planet Exhibition" report and noted the following statement:

> ". . . participating corporations will receive appropriate recognition within the exhibition, *and will have the right to call attention to their funding through pre-approved advertising and public relations* . . . Carefully designated United Nations guidelines for public recognition will be rigorously applied". (emphasis added)

In that respect, we wish to point out that, while some form of acknowledgement by the United Nations for participating corporations' contributions may be acceptable, subject to prior review by and approval of the United Nations, any use of the United Nations name and emblem by the firms in their promotional material for advertising purposes would be objectionable under the commercial-use prohibition of General Assembly resolution 92 (I).

13 May 1991

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### 3. QUESTION OF THE LEGAL PROTECTION OF THE EMBLEM AND FLAG OF THE UNITED NATIONS CHILDREN'S FUND

*Memorandum to the Director of the Office of Administrative Management, United Nations Children's Fund*

1. This responds to the memorandum of 13 December 1990 from your Office seeking our advice on the request addressed to the Executive Director of UNICEF for authorization to carry the flag of UNICEF during the "Expedition Last Crossing", and also on a broader question regarding the use, in general, of the UNICEF flag.

*Legal protection available to the UNICEF emblem*

2. The limitations on the use of the UNICEF flag are invariably connected with the protection afforded to the UNICEF emblem which figures prominently in the flag, and the United Nations acronym in the UNICEF name. The UNICEF emblem is protected under the Paris Convention for the Protection of Industrial Property, as revised at Stockholm in 1967,[1] an international convention which contains rules governing the use of trademarks. Article 6 ter 1 (*a*) and (*b*) of that Convention protects the names and emblems of international intergovernmental organizations provided that those names and emblems have been registered with WIPO (this was done in 1975) and have been communicated to member States.

The protection provided by the Convention is that States party to the Convention agree "to prohibit by appropriate measures the use, without authorization by the competent authorities", of the names and emblems of international organizations. It follows that the UNICEF name and emblem as registered by UNICEF with WIPO in 1975 are effectively protected pursuant to article 6 ter of the Convention and that UNICEF can take action in countries party to the Convention to prevent their unauthorized use. This is a vital consideration given the fact that UNICEF licenses the use of its name and emblem to third parties who presume—and justifiably—that UNICEF has the right to grant such use and can prevent unauthorized users from infringing upon such licences.

*Policy to be followed in authorizing the use of the emblem of UNICEF*

3. From our investigation, it appears that, unlike the name and logo of the United Nations, the UNICEF emblem is not directly governed by General Assembly resolution 92 (I) of 7 December 1946. However, to the extent that the name of UNICEF contains the United Nations acronym, the use of the emblem on the official seal and emblem of the United Nations is equally circumscribed by General Assembly resolution 92 (I), which provides that "it is necessary to protect the name of the Organization and its distinctive emblem and official seal" and recommends "that Members of the United Nations should take such legislative or other appropriate measures as are necessary to prevent the use, without authorization by the Secretary-General of the United Nations, and in particular for commercial purposes by means of trade marks or commercial labels, of the emblem, the official seal and the name of the United Nations, and of abbreviations of that name through the use of its initial letters". It is, therefore, suggested that regulations should be adopted by the Executive Director similar to those governing the United Nations emblem to limit the use of the UNICEF emblem on the basis of the following criteria:

(*a*) The proposed activity for which permission to use the emblem is requested should be clearly supportive of the objectives of UNICEF and there should be a connection between the outside activity and the goals of UNICEF;

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

(*c*) Adequate assurances should be obtained that misuse of the emblem will be prevented;

(*d*) Use of the emblem in such a way as to create the misleading impression that an outside activity is UNICEF-sponsored, if this is not in fact the case, should clearly not be permitted.

*Regulations concerning the use of the United Nations flag*

4. You may wish to know that, as far as the use of the United Nations flag is concerned, the General Assembly, by its resolution 167 (II) of 20 October 1947, authorized the Secretary-General to adopt a flag code, having in mind the desirability of a regulated use of the United Nations

flag and the protection of its dignity. Under this authority the Secretary-General issued a Flag Code on 19 December 1947 and amended it on 11 November 1952. The Secretary-General has issued Regulations implementing the United Nations Flag Code, the latest of which are those which became effective on 1 January 1967. The Code and the Regulations provide that the Flag may be displayed "by Governments, organizations and individuals to demonstrate support of the United Nations and to further its principles and purposes."

*Authorization to use the UNICEF flag by the "Expedition Last Crossing"*

5. We understand from the documents made available to us that the "Expedition Last Crossing" is a crossing of the American continent from Argentina to Alaska as a symbolic journey by five individuals concerned with environmental issues. It is suggested that, until UNICEF adopts its own regulations for use of its flag, consideration of the requested authorization to use the UNICEF flag, in the context of the expedition, should be on the basis of the criteria for the use of the UNICEF emblem in paragraph 3 above. In this connection, it should also be noted that in respect of the United Nations flag, and as provided in General Assembly resolution 92 (I) in respect of the use of the United Nations emblem and name, article 7 of the Flag Code and section IV of the Regulations specifically prohibit the use of the United Nations flag for commercial purposes or in direct association with an article of merchandise.

18 January 1991

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### 4. Request to use the United Nations emblem on an aircraft chartered by the International Organization for Migration, acting as executing agency for the United Nations Disaster Relief Coordinator—Practice of the United Nations regarding the use of its name and emblem by non-United Nations entities

*Memorandum to the United Nations Disaster Relief Coordinator*

1. This is in response to your cable of 16 Januay 1991, where you indicate that the International Organization for Migration (IOM) has been "working as executing agency for UNDRO" since the beginning of the repatriation operation resulting from the Gulf crisis in undertaking the transport of people and relief goods. You further explain therein that, in preparation for a second influx of people from Iraq and Kuwait, you "called upon bilateral donors during [a meeting on 15 January 1991] to put at the disposal of IOM the aircraft needed for this operation". In this regard, you indicate that the "IOM is writing to donor countries confirming the need for such aircraft and wishes to be allowed for identification purposes to use the

United Nations emblem on the planes". In indicating that you support this request, you have asked for the concurrence of this Office.

2. In our preliminary memorandum of 17 January to the Officer-in-Charge of the UNDRO/New York office, we explained that we needed additional information regarding certain aspects of the transport arrangements, particularly in respect of the terms governing the provision of aircraft by the Governments concerned and the extent of UNDRO control over the IOM-organized flights, in order to be in a position to review the subject request. In response, the Officer-in-Charge forwarded a copy of the fax that he received from your Deputy of 18 January addressing some of the queries presented in our memorandum and enclosing a copy of the fax sent by your Deputy to the IOM Director General of 3 September 1990. In particular, we note that your Deputy in responding to our query of whether any agreement was to be signed between UNDRO and the respective donor countries governing provision of the aircraft, indicates that such aircraft are to be loaned directly to IOM in the following terms:

> "With regard to aircraft loaned by Governments to IOM, UNDRO does not enter into any agreement and I am not sure that IOM does that in each case. The purpose of course would be the same, namely to repatriate refugees or displaced persons to their home countries within the United Nations Humanitarian Plan of Action for the region."

3. As you are probably aware, the use of the United Nations name and emblem is restricted by General Assembly resolution 92 (I) of 7 December 1946 by which the Assembly adopted the United Nations emblem. In that resolution, the Assembly recognized it as "desirable to approve a distinctive emblem of the United Nations and to authorize its use for the official seal of the Organization" and therefore resolved "that the design [of the United Nations emblem] shall be the emblem and *distinctive sign of the United Nations and shall be used for the official seal of the Organization*" (emphasis added). In the same resolution, the Assembly stated that it considered it necessary to protect the name and emblem of the United Nations, and recommended that its Member States:

> "should take such legislative or other appropriate measures as are necessary to prevent the use, without authorization by the Secretary-General of the United Nations, and in particular for commercial purposes by means of trade marks or commercial labels, of the emblem, the official seal and the name of the United Nations, and of abbreviations of that name through the use of its initial letters; . . ."

Thus, the terms of the resolution clearly indicate that: (*a*) the United Nations emblem is intended for official use by the Organization (including its principal and subsidiary organs); and (*b*) any non-United Nations use of the emblem, especially for commercial purposes, is prohibited without authorization from the Secretary-General.

4. Accordingly, it has been the practice of the United Nations to refrain from authorizing the use of the United Nations name and emblem in a manner which might imply that a non-United Nations entity is part of the United Nations or that activities being carried on by a non-United

Nations entity are being carried on by the United Nations or subject to its control. Authorization has none the less been granted, on appropriate occasions, for non-United Nations bodies supporting United Nations goals or programmes to use the United Nations emblem with the words "UNITED NATIONS" or the letters "UN" placed above the emblem and the words "WE BELIEVE" or "OUR HOPE FOR MANKIND" ("OUR HOPE FOR THE FUTURE") placed below the emblem if, in the relevant circumstances, it is clear that the display of the emblem with those accompanying words is intended as a demonstration of support for the United Nations. We would also mention that, in the particular case of requested use of United Nations decals on equipment, the Organization has taken the position that use of such decals on equipment not owned by the United Nations may be considered permissible where *(a)* the equipment is provided for the exclusive use of the United Nations and is being exclusively used by the United Nations and *(b)* identification of the equipment as equipment in United Nations use is deemed advisable.

5. In so far as IOM was established pursuant to the resolution adopted on 5 December 1951 by the Migration Conference in Brussels, and not by a resolution of the General Assembly, IOM is not a United Nations organ. As is reflected in its amended constitution adopted on 20 May 1987, IOM has the status of an autonomous organization, outside of the United Nations framework, with an independent juridical personality. As regards the repatriation transportation to be undertaken by IOM in the upcoming period, we understand from the information provided in the above-cited correspondence from your Office that *(a)* the aircraft to be used will be chartered by IOM (and not by UNDRO) or put at IOM's disposal by Governments and *(b)* the aircraft will be under the operational control and authority of IOM for the duration of the relief flights. Under these circumstances, it is our view that the display of the United Nations emblem on the exterior of these aircraft—which apparently are not owned, operated or controlled by the United Nations—would not be appropriate as it could give the misleading impression that such aircraft belong to the United Nations or are under its exclusive use or authority. While we acknowledge that IOM is carrying out this repatriation transportation operation in close cooperation with UNDRO, the fact that UNDRO sought IOM assistance or that it serves as the coordinating body for relief efforts in the area would not, in our opinion, render appropriate the use of the United Nations emblem on non-United Nations–owned aircraft under the operational control of IOM. Given the circumstances of the present case, we also do not consider that use by IOM of the above-mentioned modified version of the United Nations emblem would be appropriate, as the addition of the accompanying words to the United Nations emblem on the outside of the aircraft is unlikely to make it clear to the viewer *(a)* that no official use of the United Nations emblem is involved and *(b)* that the United Nations emblem is not being displayed as the emblem of the United Nations but simply as a demonstration of support of the United Nations.

21 January 1991

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5. RULES GOVERNING THE AWARD OF COMPENSATION IN THE CASE OF DEATH, INJURY OR ILLNESS OF CIVILIAN POLICE MONITORS OF THE UNITED NATIONS TRANSITION ASSISTANCE GROUP—PROCEDURE FOR THE SUBMISSION AND REVIEW OF CLAIMS FOR COMPENSATION

*Note to the Permanent Representative of a Member State*

The Legal Counsel of the United Nations presents his compliments to the Permanent Representative of (name of a Member State) to the United Nations and has the honour to refer to the Permanent Representative's note to the Secretary-General of 12 November 1990 regarding injuries sustained by civilian police monitors on 22 March 1990 while on assignment with the civilian police unit of the United Nations Transition Assistance Group (UNTAG). In his note, the Permanent Representative inquires about the compensation for which the above-mentioned personnel are eligible "due to the fact that they suffered serious injuries during their tour of duty in Namibia".

The Legal Counsel wishes to inform the Permanent Representative that the applicable rules for the award of compensation in the case of death, injury or illness of an UNTAG civilian police monitor are contained in paragraphs 67 through 76 of the "UNTAG Notes for the Guidance of Police Monitors on Appointment". In this regard, the Legal Counsel wishes to highlight that under paragraph 67 of the UNTAG Notes, the United Nations provides maximum compensation coverage of a specified amount to each police monitor "for death, injury or illness determined by the Secretary-General to be attributable to the performance of official duties on behalf of the United Nations", while, under paragraph 68, no compensation shall be awarded when such death, injury or illness has been occasioned by either "the wilful misconduct of the monitor" or "the monitor's wilful intent to bring about death, injury or illness of himself or another". Paragraph 69 of the UNTAG Notes outlines the conditions under which death, injury or illness shall be deemed to be attributable to the performance of official duties on behalf of the United Nations in the absence of any wilful misconduct or wilful intent.

The Legal Counsel also wishes to bring to the attention of the Permanent Representative that paragraph 71 of the UNTAG Notes specifies the procedure for submission and review of claims for compensation by or on behalf of a police monitor. As appears from the paragraph reproduced below, the Advisory Board on Compensation Claims (ABCC) at United Nations Headquarters has been designated as the competent body to review such claims:

> "A claim for compensation by or on behalf of a Police Monitor shall be submitted through the Director of Administration to the United Nations Secretary-General by the Monitor, his/her dependants or his/her Government within four months of the Monitor's death, injury or onset of illness. In exceptional circumstances, the Secretary-General may accept for consideration a claim made at a later date. The Secretary-General has appointed an Advisory Board on Compensation Claims (ABCC) to review claims filed under the rules governing entitlement and to report to him regarding such claims

or appeals. The determination of the injury or illness and the type and degree of incapacity and of the relevant award shall be decided on the basis of the documentary evidence and in accordance with the provisions established by the Secretary-General."

On the basis of the above, the Legal Counsel wishes to advise the Permanent Representative that any claims for compensation on behalf of the persons in question should be submitted, with appropriate substantiating documentation, through the Director of the Field Operations Division at United Nations Headquarters, to the Secretary-General. Upon receipt of any such claims by the Secretariat, the appropriate review and assessment will be undertaken in accordance with the above-cited procedure.

18 January 1991

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### 6. QUESTION WHETHER THE GOVERNING COUNCIL OF THE UNITED NATIONS ENVIRONMENT PROGRAMME COULD DELEGATE ITS DECISION-MAKING AND APPROVING POWERS TO A SUBSIDIARY ORGAN

*Cable to the Secretary of the Governing Council of the United Nations Environment Programme*

This is in response to your telefax of 25 May. In the context of the question whether the Governing Council of UNEP could entrust one of its subsidiary organs with the task of reviewing and approving certain measures such as establishing programme priorities and approving additional activities under a supplementary programme, you asked our advice as to whether the Governing Council could "delegate its decision-making and approving powers to a subsidiary body."

In the absence of a decision of the General Assembly, the answer to the question would be negative. The Governing Council is itself a subsidiary body of the General Assembly; its tasks and functions have been determined by the General Assembly and may not be changed without approval of the Assembly. Attention may be drawn in particular to section I, paragraph 2 (*b*), of General Assembly resolution 2997 (XXVII) of 15 December 1972, by which the Assembly decided that the Governing Council "shall have the following main functions and responsibilities: . . . (*b*) to provide general policy guidance for the direction and coordination of environmental programmes within the United Nations system".

It goes without saying that subsidiary bodies of the Council are fully entitled to consider and make recommendations to the Council or to implement Council decisions when requested. Rule 62 of the Council's rules of procedure should be understood as providing for the establishment of subsidiary organs for the effective discharge by the Council of its functions.

31 May 1991

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7. VOLUNTARY FUND FOR SUPPORTING DEVELOPING COUNTRIES PARTICIPATING IN THE UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT AND ITS PREPARATORY PROCESS, ESTABLISHED UNDER GENERAL ASSEMBLY RESOLUTION 44/228—QUESTION WHETHER GENERAL ASSEMBLY RESOLUTIONS 45/211 AND 45/248 A WOULD AUTHORIZE THE PAYMENT FROM THAT FUND OF DAILY SUBSISTENCE ALLOWANCE TO REPRESENTATIVES OF DEVELOPING COUNTRIES NOT BELONGING TO THE CATEGORY OF LEAST DEVELOPED COUNTRIES

*Memorandum to the Executive Officer, United Nations Conference on Environment and Development*

1. This is in response to your memorandum of 26 June 1991 requesting our advice on the interpretation of General Assembly resolutions 45/211 and 45/248 A both of 21 December 1990, regarding the use of the Voluntary Fund established by the General Assembly in its resolution 44/228 of 22 December 1989, in particular whether the said resolutions would authorize the payment of daily subsistence allowance (DSA) to representatives from developing countries, additional to such payments already being made to representatives from the least developed countries.

A. RELEVANT GENERAL ASSEMBLY RESOLUTIONS

2. Paragraph 15 of section II of General Assembly resolution 44/228 reads as follows:

> "*Decides* to establish a voluntary fund for the purpose of assisting *developing countries, in particular the least developed among them*, to participate fully and effectively in the Conference and in its preparatory process, and invites Governments to contribute to the fund;" (emphasis added)

3. Paragraph 8 of General Assembly resolution 45/211 reads as follows:

> "*Expresses its appreciation* to the Governments that have contributed to the Voluntary Fund for the United Nations Conference on Environment and Development, and invites Governments to contribute urgently and generously to the Fund in order that the operation of the Fund may enable *developing countries, in particular the least developed among them*, to participate fully and effectively in the Conference and in its preparatory process, in accordance with section II, paragraph 15 of General Assembly resolution 44/228;" (emphasis added)

4. Section XII of General Assembly resolution 45/248 A reads as follows:

> "*Approves the recommendation that, on an exceptional basis, payment be made for daily subsistence for representatives of the least developed countries* from the Voluntary Fund for Supporting Developing Countries Participating in the United Nations Conference on Environment and Development and its Preparatory Process;" (emphasis added)

## B. ANALYSIS

5. In the report by the Secretary-General on the basis of which General Assembly resolution 45/248 A was adopted (A/C.5/45/65), it was indicated in paragraph 37 that the Voluntary Fund established by the General Assembly in its resolution 44/228 "would be utilized to pay for the *travel* of one representative for each eligible Member State to the sessions of the Preparatory Committee and to the Conference itself" (emphasis added). The report also transmitted, for General Assembly action, the decision of the Preparatory Committee adopted at its first substantive session (decision 1/3) that "payment be made from the Voluntary Fund *of travel expenses and, on an exceptional basis, daily subsistence allowance, for representatives of the least developed countries only*."[2] (emphasis added).

6. While the provisions in the General Assembly resolutions quoted in section A above are relevant, we note in particular that section XII of resolution 45/248 A specifically limits permissible payments for daily subsistence. In our view, therefore, the limitation in that section (i.e., that payment for daily subsistence be restricted to representatives of the least developed countries) must be observed.

## C. VOLUNTARY FUND FOR SUPPORTING PARTICIPATION IN THE NEGOTIATING PROCESS BY THE DEVELOPING COUNTRIES FOR THE PROTECTION OF GLOBAL CLIMATE FOR THE PRESENT AND FUTURE GENERATIONS OF MANKIND (CLIMATE FUND)

7. The above-captioned Climate Fund was established by the General Assembly in its resolution 45/212 of 21 December 1990, to be administered by the head of the ad hoc secretariat under the authority of the Secretary-General of the United Nations. Under paragraph 10 of that resolution, the purpose of the Climate Fund was "*to ensure that developing countries, in particular the least developed among them, as well as small island developing countries, are able to participate fully and effectively in the negotiating process* . . ." (emphasis added). No limitation as to its use similar to that imposed in respect of the Voluntary Fund of the Conference on Environment and Development was imposed. Furthermore, in the report of the first session of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change (4-14 February 1991), it was indicated[3] that the reimbursement from the Climate Fund would include subsistence (per diem) as well as travel costs of representatives from developing countries and that such arrangements were differentiated from the arrangements for the Preparatory Committee for the United Nations Conference on Environment and Development which provide for "the payment of travel costs for one representative per developing country, on request, and of *per diem to representatives of a limited category of developing countries, in that case the least developed countries*" (emphasis added).

8. We therefore have no legal objection to your interpretation of General Assembly resolutions 45/211 and 45/248 A that payments from the Voluntary Fund for the Conference on Environment and Development must be restricted to financing one ticket per delegate from a devel-

oping country and in addition payment of daily subsistence allowance to one delegate each from the least developed countries.

16 July 1991

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### 8. Restriction imposed on the General Assembly by Article 12, paragraph 1, of the Charter of the United Nations whereby "while the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests"—Interpretation of that restriction in the practice of the General Assembly

*Memorandum to the Secretary of the Fourth Committee*

1. This is in response to your memoranda of 3 and 7 October 1991 concerning the application of Article 12 of the Charter of the United Nations to discussions and decision-making in the Fourth Committee regarding Western Sahara issues during the forty-sixth session of the General Assembly.

2. Article 12, paragraph 1, of the Charter reads as follows:

> "While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests."

3. Any analysis of Article 12 should of course first begin with the plain meaning of the text. What is prohibited by Article 12, paragraph 1, is the General Assembly making recommendations with regard to any dispute or situation while the Security Council is exercising its functions with respect to that dispute or situation, absent a Council request to the Assembly that it do so. The text does not bar debate or discussion in the General Assembly of any such dispute or situation. Thus, there is clearly no legal bar to the discussion of the matter at issue, including the hearing of petitioners thereon. That is not to say, however, that the Committee could not decide, as matter of policy, not to discuss a matter or to impose limitations on the subject-matters to be discussed; those are policy matters for the Member States to consider and decide.

4. The purpose of Article 12, paragraph 1, is to safeguard the Security Council's primary responsibility for the maintenance of international peace and security. The restriction imposed by it upon the competence of the General Assembly is, however, narrow. The disputes and situations which come before the Council are often very broad and frequently of many layers and ramifications. From the beginning, it has not been the practice of the Assembly to regard Article 12, paragraph 1, as precluding it

from adopting *any* resolution relating to a dispute or a situation before the Council. There are and have always been a number of matters which are simultaneously before the two organs and on which these two organs adopt decisions and recommendations. Whether it is possible to draw a dividing line, and if so, exactly where the line must be drawn, are matters which must be addressed on a case-by-case basis. Should questions or objections arise in this respect in the General Assembly, it is for the Assembly to decide the issue.

5. One particular purpose of Article 12, paragraph 1, is to avoid conflicting actions between the General Assembly and the Security Council. The article continues to serve this purpose and remains applicable to avoid the situation of the two organs adopting contemporaneous recommendations which are contradictory or at cross-purposes. This aspect is reflected in the statement, found in a 1968 legal opinion on Article 12, that the Assembly in practice has interpreted the words "is exercising" in paragraph 1 of Article 12 as meaning "is exercising *at this moment*".[4]

8 October 1991

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## 9. Question whether a voluntary abstention by a permanent member of the Security Council affects the validity of a decision of the Council—Article 27 of the Charter of the United Nations—Relevant pronouncement of the International Court of Justice in its Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) of 21 June 1971

*Memorandum to the Secretary-General*

1. During our meeting on 21 January 1991, you asked me whether a voluntary abstention by a permanent member of the Security Council affects the validity of a decision of the Security Council. As I told you, there is a long-standing practice of the Security Council which interprets the Charter of the United Nations to mean that an abstention by a permanent member does not invalidate decisions which otherwise meet the voting requirements.

2. The voting procedure of the Security Council is stated in Article 27 of the Charter, paragraph 3 of which provides that decisions of the Security Council on non-procedural matters "shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting."

3. It is not at all uncommon for permanent members to abstain from voting rather than cast a negative vote, which would prevent the Council from taking a decision. These cases include the establishment of United Nations peace-keeping forces, such as the United Nations Interim Force in Lebanon (UNIFIL), and, most recently, resolution 678 (1990).

4. This practice of abstention by permanent members has been generally accepted as not affecting the legal validity of Security Council resolutions. There is an extensive literature on this question. In its advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* of 21 June 1971, the International Court of Justice referred *obiter dicta* to the practice of voluntary abstention by a permanent member in the following terms:

> "By abstaining, a member does not signify its objection to the approval of what is being proposed; in order to prevent the adoption of a resolution requiring unanimity of the permanent members, a permanent member has only to cast a negative vote. This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been generally accepted by Members of the United Nations and evidences a general practice of that Organization."[5]

5. In conclusion, I should add that it is a widely held view among writers on the subject that this particular practice constitutes an authentic example of a de facto modification of a constitutive instrument, in this case the Charter of the United Nations, through the manner of its implementation by Member States.

22 January 1991

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### 10. Legislative framework for the administration and custody of the United Nations Compensation Fund created by Security Council resolution 687 (1991) and established by Council resolution 692 (1991)—Authority and responsibilities of the Secretary-General for the custody of the Compensation Fund

*Memorandum to the Controller*

1. This is in response to your request for my views on the administration and custody of the United Nations Compensation Fund. The Compensation Fund and the Compensation Commission have been created by section E, paragraph 18, of Security Council resolution 687 (1991), and established by paragraph 3 of Security Council resolution 692 (1991) in accordance with section I of the report of the Secretary-General (S/22559) pursuant to paragraph 19 of resolution 687 (1991). Both the two resolutions and the Secretary-General's report contain relevant provisions for the administration of the Fund.

2. In paragraph 18 of resolution 687 (1991) the Security Council decided "to create a fund to pay compensation for claims that fall within paragraph 16 above and to establish a commission that will administer the fund". In paragraph 19 of the same resolution, the Council directs the Secretary-General to present to the Council recommendations, *inter alia*, on the administration of the Fund.

3. In paragraph 3 of his report, the Secretary-General made the following recommendation as to the status of the Fund:

> "The Fund . . . will be established by the Secretary-General as a special account of the United Nations . . . The Fund will be operated in accordance with the United Nations Financial Regulations and Rules. As a special account of the United Nations, the Fund therefore, will enjoy . . . the status, facilities, privileges and immunities accorded to the United Nations. The Fund will be used to pay compensation for 'any direct loss, damage . . .' as provided for in paragraph 16 of resolution 687 (1991)."

Several other paragraphs in section I of the Secretary-General's report contain provisions relevant to the status and administration of the Fund:

—paragraph 4 states, *inter alia*, that "the Fund is to be administered by the Commission established by the Security Council in paragraph 18 of resolution 687 (1991)";

—paragraph 6 states that "the Executive Secretary's primary responsibility will be the technical administration of the Fund";

—paragraph 10 includes among the policy-making functions of the Governing Council the establishment of guidelines "on all policy matters, in particular, those relating to the administration and financing of the Fund" and the establishment of the procedures to be applied to the processing and settlement of claims, "as well as to the payments to be made from the Fund";

—paragraph 12, finally, states that "under the direction of the Executive Secretary, the secretariat will carry out such tasks as may be assigned to it by the Governing Council and the commissioners, in particular the technical administration of the Fund . . ."

4. In paragraph 3 of resolution 692 (1991), as mentioned above, the Security Council approved section I of the Secretary-General's report by deciding that the Fund and the Commission would be established in accordance with that section. In paragraph 5 the Council directed the Governing Council to implement section E of resolution 687 (1991), taking into account the recommendations in section II of the Secretary-General's report.

5. The legislative framework which emerges from the above-mentioned provisions is to be summarized as follows: the Compensation Fund is a special account of the United Nations, established by the Secretary-General and subject to the United Nations Financial Regulations and Rules. The resolutions and the report of the Secretary-General thus assume that the Secretary-General maintains his authority and responsibilities thereunder. The Governing Council, as the policy-making organ of the Commission, has the authority to establish guidelines, *inter alia*, on the administration and financing of the Fund, and to establish procedures for the payment of claims. The Executive Secretary and the secretariat of the Commission, subject to such guidelines and procedures, carry out the technical administration of the Fund. It should also be underlined that

the secretariat of the Commission is part of the Secretariat of the United Nations. This legislative framework is complemented by section II of the Secretary-General's report, which provides some examples of the powers of the Governing Council pertaining to the financing and administration of the Fund. Reference can be made to paragraphs 17 (arrangements for ensuring that payments are made to the Fund) and 28 (payment of claims and allocation of funds).

6. It is necessary at this point to clarify what the responsibilities of the Secretary-General are under the Financial Regulations and Rules in connection with special accounts of the United Nations. In this respect, rule 106.1 provides that "no commitments, obligations or expenditures against any funds may be incurred without the written authorization of the Controller." Regulation 8.1, which concerns the custody of funds, states that "the Secretary-General shall designate the bank or banks in which the funds of the Organization shall be kept"; rules 108.1 to 108.12 provide the specifics for the implementation by the Secretary-General of regulation 8.1 and deal, *inter alia*, with bank accounts (rule 108.1) and approval of obligations and payments (rule 108.9). Regulations 9.1 and 9.2 deal with the investment of funds and provide for the authority of the Secretary-General to make short-term as well as long-term investments of moneys standing to the credit of funds and accounts. Once again, rules 109.1 to 109.5 set out procedures for the implementation of those regulations.

7. It is clear from the foregoing that a distinction must be made between the responsibilities of the Compensation Commission under the relevant Security Council resolutions, and of the Secretary-General, as chief administrative officer of the Organization, under the Financial Regulations and Rules. Flowing from this, a distinction should be made, especially having in mind the financial practices of the United Nations, between, on the one hand, financing and administration and, on the other hand, custody of the assets of the Fund. The custody of the Fund covers the designation of the banks where the fund will be held, the receipt of the moneys, the investment of the assets and the necessary internal arrangements. The financing of the Fund relates to the establishment of mechanisms for determining the appropriate level of Iraq's contribution to the Fund, as well as the arrangements for ensuring that payments are made to the Fund. The administration of the Fund rather concerns the utilization of the assets of the Fund in accordance with its purpose, i.e., the disbursement and allocation of those assets. The above-mentioned provisions of resolution 687 (1991) and the Secretary-General's report, in the light of the purpose of the whole section E of that resolution (to compensate the victims of Iraq's invasion of Kuwait), and in conjunction with the Financial Regulations and Rules, shows that the authority of the Commission mainly concerns the financing of the Fund and the disbursement and allocation of the resources of the Fund.

8. The first conclusion which is therefore to be drawn is that the legislative framework highlighted above does not intend to derogate from the authority and responsibilities of the Secretary-General for the custody of the Compensation Fund. This conclusion follows from the interpretation of the above-mentioned legal instruments and is strengthened by the

consideration that, since the Secretary-General has under the Financial Regulations and Rules general fiduciary responsibility for United Nations funds, every exception thereto should be construed in a restrictive way.

9. As far as the disbursements from the Fund are concerned, two different kinds of expenses are in the forefront, namely, payment of claims on the one hand and operational expenses of the Commission on the other hand (e.g., payment of Secretariat staff, payment of Commissioners, purchase of equipment).

10. As regards the payment of claims, the Governing Council is the competent organ to establish criteria and guidelines for the allocation of funds among the various claimants; to establish procedures for the payment of claims; and to make a final determination on whether individual claims would be compensated and on the amounts to be awarded (paragraphs 19 of resolution 687 (1991) and 27 and 28 of the Secretary-General's report). The secretariat of the Commission acts in accordance with these criteria and procedures in carrying out the necessary technical tasks. The determination by the Governing Council of the amount to award to a claimant constitutes sufficient authority to cause the obligation of the corresponding amount from the Fund. The bureaucratic task of doing the paperwork necessary to actually disburse the moneys is part of any financial operation, does not entail a discretionary power of the Secretary-General which might affect the authority of the Compensation Commission, and could be carried out either by the Controller (on behalf of the Secretary-General) or by the Executive Secretary. This aspect could be easily agreed upon between the Secretary-General and the Executive Secretary.

11. The Governing Council has also the possibility to influence the operational expenses of the Commission, for example by requesting the Executive Secretary to appoint a certain number of Commissioners for specific tasks. However, what matters in this connection is rather the status of the Executive Secretary as staff member of the United Nations, appointed by the Secretary-General and subject to the Staff Regulations and Rules. The Executive Secretary must therefore abide by the Financial Regulations and Rules in the expenditure of money from the Fund, in particular rule 106.1, quoted above. If there is a concern that the normal procedures could cause unnecessary delays, the Secretary-General would expressly delegate to the Executive Secretary the authority for incurring expenditures; another similar arrangement would consist in the appointment by the Controller of certifying and approving officers, in accordance with financial rule 108.9, to take care exclusively of the expenditures mentioned in this paragraph. These officers could be located at the headquarters of the Commission. The Secretary-General could give assurances to the Governing Council that he would be prepared to establish an administrative/managerial mechanism that would ensure that the work of the Commission was not impeded by bureaucratic delays.

17 October 1991

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## 11. STATUS OF THE SPECIAL COMMISSION ESTABLISHED BY THE SECRETARY-GENERAL PURSUANT TO PARAGRAPH 9 (*b*) (i) OF SECURITY COUNCIL RESOLUTION 687 (1991)

*Memorandum to the Under-Secretary-General for Disarmament Affairs*

1. During a recent meeting of the Secretariat Task Force on the implementation of Security Council resolution 687 (1991), my views were requested on the question of the status of the Special Commission established by the Secretary-General pursuant to paragraph 9 (*b*) (i) of Security Council 687 (1991).

2. By paragraph 9 (*b*) (i) of its resolution 687 (1991), the Security Council decided that "the Secretary-General . . . shall develop and submit to the Council for approval a plan calling for the completion of the following acts within 45 days of such approval: the forming of a Special Commission . . ."

3. In his report to the Security Council, the Secretary-General stated the following: "Subject to the approval of the Security Council, it is my intention to set up the Special Commission . . . and to make all necessary arrangements for it to begin implementation of its tasks . . . I propose that it should have an Executive Chairman with a Deputy Executive Chairman . . . the formal membership of the Special Commission would be of the order of 20 to 25 persons."[6]

4. By a letter dated 19 April 1991, the President of the Security Council informed the Secretary-General that the above-mentioned report had been brought to the attention of Council members, who "agreed to the proposals" contained therein.[7]

5. While the Secretary-General, not the Security Council, actually appointed the members of the Special Commission, he did so following Security Council approval of the proposals he had submitted pursuant to Council resolution 687 (1991). The Commission's title properly reflects its link to the Council: "Special Commission established by the Secretary-General pursuant to paragraph 9 (*b*) (i) of Security Council resolution 687 (1991)". The Special Commission owes its origin to, and received its mandate from, the Security Council.

6. In the *Repertory of Practice of United Nations Organs* prepared by the Secretary-General, the section devoted to subsidiary organs of the Security Council (Article 29) includes "subsidiary organs set up by the Secretary-General pursuant to Council resolutions" in its list of Council subsidiary organs and in the summary of practice on the establishment of such organs.[8] While a caveat is added that "no implication is intended as to whether those bodies are or are not subsidiary organs within the meaning of Article 29", none the less, in the *Repertory*, the Secretary-General treats these bodies as if they were subsidiary bodies of the Security Council.

7. In view of the above, the Special Commission should, for all intents and purposes, be treated as if it were a subsidiary organ of the Security Council.

20 May 1991

## 12. United Nations practice with respect to requests for deletion of statements from official records

*Cable to the Chief of Protocol, Office of the Director-General, United Nations Office at Geneva*

This is with reference to the penultimate paragraph of the note verbale of 25 February 1991 from the Permanent Mission of (name of a Member State), attached to your cable which reads as follows: "The Permanent Mission of (name of the Member State) therefore requests that the above-mentioned statement be struck from the records of the Commission on Human Rights". Please note that it is not the practice of the United Nations to expunge from official records statements duly entered into such records.[9] If the statement made by the member of the delegation of the State concerned in the Commission on Human Rights was properly made pursuant to the rules of procedure of the Commission, the mission in question should be advised that its request for deletion of the statement from the records of the Commission cannot, in accordance with established United Nations practice, be acceded to. The Mission can, if it so wishes, place on record its views concerning the statement in question. The two statements will form part of the legislative history of the proceedings of the Commission during its forty-seventh session.

26 February 1991

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## 13. Legal capacity of international intergovernmental organizations to establish other international organizations—Legal capacity of the United Nations Development Programme to participate in the establishment of other international organizations or to establish its own subsidiary organs

*Memorandum to the Officer-in-Charge, Regional Bureau for Arab States and Europe, United Nations Development Programme*

### I. *Introduction*

1. This is in reference to your memorandum of 17 July 1991, to which you attached a copy, for our review, of an already signed agreement between UNDP and the Government of (name of a Member State) for the establishment of the Centre for Environment and Development Programme for the Arab Region and Europe (CEDARE) (hereinafter the "Centre").

2. The proposed Centre is to be an "international organization" jointly established by UNDP and the Government in question, whose headquarters are to be located on the territory of the country concerned, with subsidiary or operational units in the Arab region and Europe. It is, under article III of the Agreement, to be established as "an autonomous, non-profit international institute governed by a Board of Trustees in

accordance with the provisions of its own Charter". The Centre is to be endowed with an independent legal personality and with the powers necessary to carry out its objectives, including, in particular, the power "to enter into contracts or agreements with Governments, international, public or private organizations and agencies . . ." (article VI (5)). The Centre, its international staff and representatives of member States participating in its activities are entitled to the privileges and immunities stipulated in article VIII of the Agreement.

3. This Agreement raises some fundamental questions pertaining to the legal capacity of international intergovernmental organizations, in general, and of the UNDP, in particular, to create other international organizations endowed with an independent legal personality, and to establish their own subsidiary organs. These issues are set out below at some length for future reference.

II. *Legal capacity of international intergovernmental organizations to establish other international organizations or their own subsidiary organs*

4. The capacity to establish international intergovernmental organizations having separate legal personality is, under international law, conferred upon States through the conclusion of agreements.[10] International intergovernmental organizations which are the creation of States cannot in and of themselves create new international organizations, endowed with the same international legal personality, unless they are specifically mandated to do so by States.

5. The power of international intergovernmental organizations to establish their own subsidiary organs depends on their mandate. In the case of the United Nations the legal capacity to establish subsidiary organs is conferred upon three of the principal organs of the United Nations: the General Assembly, the Security Council and the Economic and Social Council, under Articles 22, 29 and 68 of the Charter of the United Nations, respectively.

III. *Legal capacity of the United Nations Development Programme to participate in the establishment of other international organizations, or to establish its own subsidiary organs*

6. The United Nations Development Programme was created by the General Assembly in its resolution 2029 (XX) of 22 November 1965, as a combined organ of the Expanded Programme of Technical Assistance and the Special Fund, to be administered under the authority of the Economic and Social Council and the General Assembly. It is a subsidiary organ of the United Nations, and as such it has only those powers which are vested in it in its founding resolution, and in General Assembly resolution 2688 (XXV) of 11 December 1970 ("the Consensus Resolution").

7. Under its mandate, as defined in the above-mentioned resolutions, UNDP has been authorized to conclude with Governments agreements for the establishment of its offices in the host country for the implementation of projects and, in general, for the conduct of UNDP technical cooperation for development activities on a country, inter-country,

subregional, regional, interregional and global level. For these purposes, UNDP can cooperate with the host country or with a group of countries in establishing national or regional structures, and it can, under a proper legislative authority, establish its own subsidiary organs, to carry out development activities.

### A. NATIONAL STRUCTURES

8. UNDP can, by an agreement with a State, extend its technical or financial assistance to a national institution, established and governed by the national laws of that State. Notwithstanding the conclusion of an international agreement and the obligations undertaken by the parties on the international level, the legal status of the institution would be that of a national or private corporation established under the laws of the host country.

9. The question of whether a private non-profit corporation, established under the laws of a given State, could be attributed an international legal status by an agreement between UNDP and the State or other international organizations, has arisen in relation to the International Centre for Living Aquatic Resources Management (ICLARM), situated in the Philippines. When requested to give its advice, this Office responded that international organizations do not have the legal capacity to establish new international organizations with an independent international legal personality, and that the only means by which ICLARM could become an international institute would be by an agreement between States on the territories of which the Institute was to conduct its activities. It was therefore advised that UNDP would not join with other international organizations, or with the Government of the Philippines alone, in order to give a national institute an international status.

10. UNDP, could, however, on the basis of an international agreement, extend its assistance to a national institute, established and governed by the laws of the State in the territory in which it is situated. The International Institute on Aging in Malta is an example of such a national institute, established under the national laws of Malta in cooperation with the United Nations. In this case, the Agreement between the United Nations and the Government of Malta regarding the Establishment in Malta of the International Institute on Aging, was concluded pursuant to General Assembly resolution 37/51 of 3 December 1982, in which the Assembly endorsed the International Plan of Action on Aging adopted by the World Assembly on Aging. The said International Plan of Action provided that: "Practical training centres should be promoted and encouraged ... [T]hese centres would also provide updating and refresher courses and ... *they would be linked with appropriate United Nations agencies and facilities*" (emphasis added). As for the means of cooperation between the Institute and other United Nations organizations, article VII of the Agreement provides that:

"(i) The Institute shall develop arrangements for active and close cooperation with the specialized agencies and other organizations, programmes and institutions of the United Nations ..."

### B. REGIONAL STRUCTURES

11. UNDP can likewise participate, as a funding agency and through cooperative arrangements, in the establishment of a regional institute created pursuant to an international agreement, signed by several States, all or most of which belong to the same region. A notable example is the Civil Aviation Training Centre at Mvengué, Gabon, which was established pursuant to a decision of the Ministerial Conference of African States held at Libreville, Gabon, from 24 to 26 October 1978. The States participating at the Conference concluded the Convention on the Establishment of the Multinational Civil Aviation Training Centre of Mvengué (Libreville Convention), whereby they committed themselves to participate in the operation of the Centre and to contribute to its costs. The Convention provided that the Centre shall be situated in Gabon, and that the host country would undertake to provide for land, buildings and related facilities. The signatory States were: Cameroon, Comoros, Ivory Coast, Central African Republic, Gabon, Guinea, Mali, Mauritania, Rwanda, Sao Tome and Principe, Senegal, Chad, Tonga and Zaire.

12. Having established the Centre, UNDP and ICAO entered into cooperation arrangements with the Governments of the signatories to the Convention with a view to financing part of the operational costs of the Centre. The cooperative arrangements were incorporated in a Project Document, signed on behalf of the States signatories to the Libreville Convention, ICAO and the UNDP.

### C. SUBSIDIARY ORGANS

13. The power to establish United Nations subsidiary organs, which under the Charter of the United Nations is conferred upon three of the principal organs of the United Nations, is clearly not conferred upon UNDP, which is itself a subsidiary organ of the United Nations. However, UNDP may be empowered in a specific case, and under an appropriate legislative authority of the General Assembly, or of its Governing Council, to establish its own subsidiary organs.

14. One such example is the African Institute for Economic Development and Planning, which was established as a subsidiary organ of the United Nations Economic Commission for Africa under resolution 58 (VI), adopted at the fourth session of ECA. Following the establishment of the Institute, an agreement was concluded between the Economic Commission for Africa and the Government of Senegal in order to ensure that the obligations of the Government, concerning the establishment and the operation of the Institute on Senegalese territory, were fully met.

## IV. *The ICARDA precedent*

15. In your memorandum under reference, you mentioned that the present Agreement was taken almost verbatim from the Agreement creating the International Centre for Agricultural Research in the Dry Areas (ICARDA), in Alleppo, Syrian Arab Republic. Although the texts of these agreements are similar, the legal capacity of the parties signatories to each of these agreements is fundamentally different.

16. The Agreement for the Establishment of ICARDA in the Syrian Arab Republic was concluded between the Syrian Government and the International Development Research Centre acting as the Executing Agency for the Consultative Group on International Agricultural Research (CGIAR). CGIAR is an association of some 20 States, 6 intergovernmental organizations (African Development Bank, Asian Development Bank, Inter-American Development Bank, FAO, UNDP and IBRD) and 4 private institutions. The parties to the ICARDA Agreement, unlike the parties to the Agreement under consideration, are therefore primarily States whose capacity to establish international organizations having separate legal personality is not disputed. For this reason, the Agreement establishing ICARDA cannot serve as a precedent for the present Agreement for the establishment of an international organization by the UNDP and the Government in question.

V. *Conclusion and recommendation*

17. From the foregoing it can be concluded that UNDP does not possess the legal capacity to establish a new international organization alone or with only one other State; nor does it have the capacity to establish a United Nations subsidiary organ absent a legislative authority of the General Assembly or of the UNDP Governing Council. The Agreement for the Establishment of ICARDA in the Syrian Arab Republic cannot be taken as a precedent since the signatories to that Agreement were the Syrian Government and the International Development Research Centre, in its capacity as an Executing Agency acting on behalf of the Consultative Group, which is an association of some 20 States and several organizations.

18. Given the importance of the proposed Centre for Environment and Development for the Arab Region and Europe and its contribution to sustainable development in the countries of the Arab region in the fields of freshwater resources, land resources, marine resources, and urbanization and human settlement, we suggest the following alternative modalities for the establishment of the Centre:

(*a*) The Centre could be established as a regional institution by an agreement between the State in question and other countries in the region. UNDP may extend its financial or technical assistance to the Centre under agreed cooperative arrangements, which can either be included in the founding agreement, or be established in a separate agreement between UNDP and the signatory States, as was done in the case of the Mvengué Centre. Under either option, the role of UNDP as it is presently envisaged under article XIII of the Agreement should be redefined;

(*b*) The Centre could also be established under a national legislation as a national entity governed by the law of the State in question. Pursuant to such legislation, UNDP and the host country may conclude an agreement stipulating the legal status of the Centre, its objectives, functions, powers, the privileges and immunities accorded to it by the host country and the nature of the assistance provided to it by UNDP. Under this option, the present articles on the legal status of the Centre and the role of UNDP should be redrafted to conform to the national character of the Centre.

(*c*) UNDP, or for that matter any interested State of the region, may seek legislative authority from the UNDP Governing Council for the creation of the Centre as a subsidiary organ of UNDP. We understand, however, that this course of action is not at present envisaged.

1 November 1991

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## 14. QUESTION WHETHER, FOR THE PURPOSE OF ARRIVING AT A QUORUM FOR MEETINGS OF THE CARIBBEAN DEVELOPMENT AND COOPERATION COMMITTEE, ASSOCIATE MEMBERS OF THE COMMITTEE MAY BE COUNTED—QUESTION WHETHER AN ASSOCIATE MEMBER'S REPRESENTATIVE CAN HOLD OFFICE IN ANY SUBORDINATE BODY OF THE ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN

*Memorandum to the Executive Secretary, Economic Commission for Latin America and the Caribbean*

1. This is in reply to your facsimile message dated 1 October 1991 by which you brought to our attention certain passages appearing in the report of the last meeting of the Caribbean Development and Cooperation Committee. Those passages relate to the issue whether associate members of the Committee may be counted for the purpose of arriving at a quorum for meetings. The meeting requested its secretariat to consult with this Office on the matter.

2. Rule 14 of the functions and rules of procedure of the Committee provides as follows:

> "Two thirds of the members of the Committee shall constitute a quorum for any meeting. Each member shall have one vote. Procedural matters may be decided by simple majority. Substantive matters shall be decided by a two-thirds majority of members present and voting. Abstentions from voting shall not affect such majority. Should doubts arise whether a matter is substantive or procedural, the Chairman shall decide after consulting the Vice-Chairmen."

3. It is clear from the above text that the phrase "members" in that rule refers to full members of the Committee, since associate members are not entitled to vote. Thus as the rule stands now, a quorum is achieved when two thirds of the full members are present, without counting associate members.

4. Whether or not an associate member's representative can hold office is another matter not related to the quorum requirement. That matter is not addressed in the rules of the Committee, but it is addressed in the terms of reference of the Economic Commission for Latin America and the Caribbean. Rule 3 (*c*) of those terms provides in the relevant part that "representatives of associate members . . . shall be eligible to hold office" in such body (any committee or other subordinate body which may be set up by the Commission).

5. The right to hold office does not in itself lead to the creation of other rights in favour of representatives of associate members, absent a decision by the appropriate intergovernmental body.

6. If the Committee believes the present quorum requirement should be changed, there is always the possibility of amending or suspending its rules pursuant to rule 20. You may note that it has been the recent practice of the General Assembly to waive its quorum requirement for declaring a meeting open and permitting the debate to proceed, on the understanding that this did not imply any permanent change in the provisions of the relevant rules (see A/46/250, para. 9). It must be stressed that the Assembly did not change or waive in any way the quorum requirement for the taking of decisions.

28 October 1991

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15. APPLICATION OF THE REPUBLIC OF THE MARSHALL ISLANDS FOR FULL MEMBERSHIP IN THE ECONOMIC AND SOCIAL COMMISSION FOR ASIA AND THE PACIFIC—STATUS OF THE REPUBLIC OF THE MARSHALL ISLANDS IN THE LIGHT OF SECURITY COUNCIL RESOLUTION 683 (1990)

*Cable to the Executive Secretary, Economic and Social Commission for Asia and the Pacific*

This is in reply to your facsimile message to me of 28 March 1991 regarding a communication from the Minister of Foreign Affairs of the Republic of the Marshall Islands conveying his Government's decision to become a full member of the Economic and Social Commission for Asia and the Pacific. Our comments on the various issues raised in your message are as follows:

(*a*) By its resolution 683 (1990) of 22 December 1990, the Security Council determined, "in the light of the entry into force of the new status agreements for the Federated States of Micronesia, the Marshall Islands and the Northern Mariana Islands, that the objectives of the Trusteeship Agreement [for the former Japanese-mandated islands, since known as the Trust Territory of the Pacific Islands] have been fully attained, and that applicability of the Trusteeship Agreement has terminated, with respect to those entities";

(*b*) The Republic of the Marshall Islands is a full State member of a United Nations specialized agency (ICAO) and we understand is responsible for the conduct of its own international relations. Thus, a request from the Republic of the Marshall Islands for admission as a full member of ESCAP is receivable;[11]

(*c*) Should the Economic and Social Council wish to admit the Marshall Islands to membership in ESCAP, it would require amending ESCAP's terms of reference as follows: (1) in paragraph 2, which sets out

the geographic scope of ESCAP, "the Republic of the Marshall Islands" would be added; (2) in paragraph 3, which lists the names of the full members of ESCAP, "the Republic of the Marshall Islands" would be added; (3) in paragraph 4, which lists the names of the associate members of ESCAP, "the Republic of the Marshall Islands" would be deleted;

(*d*) The procedure we recommended in 1985 with regard to the application of Tuvalu, recently reconfirmed with regard to the application of Kiribati, would still apply;

(*e*) As to the question of the appropriate timing to take up the matter, that is for the members of ESCAP to consider. It may be noted that rule 8 of the rules of procedure of the functional commissions of the Economic and Social Council provides that the Commission may amend its agenda at any time. Thus, the Commission is not barred from adding a new agenda item on this question. Whether or not this would be advisable at this stage of the Commission's proceedings is a matter of judgement for the members of the Commission;

(*f*) However, I would draw your attention to a number of factors: (1) the Federated States of Micronesia is legally in the same position as the Republic of the Marshall Islands and may, at some point, also wish to convert its ESCAP associate membership into full membership;[12] (2) the Commonwealth of the Northern Mariana Islands is *not* in the same position as the Republic of the Marshall Islands, as the conduct of its international relations continues to be the responsibility of the United States. Thus, it should retain its present status as associate member. However, pursuant to Security Council resolution 683 (1990), the Trusteeship Agreement is no longer applicable to it and the reference in the geographic scope of ESCAP to "the Trust Territory of the Pacific Islands" no longer covers the Commonwealth of the Northern Mariana Islands. Thus, paragraph 2 of the terms of reference should be amended by the Economic and Social Council to specifically include that Commonwealth in ESCAP's geographic scope; (3) the reference in paragraph 2 of the terms of reference to "the Trust Territory of the Pacific Islands" should remain unchanged, as the Trusteeship Agreement remains in full force for one ESCAP associate member: the Republic of Palau.

1 April 1991

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### 16. Procedures for obtaining authorization to request advisory opinions from the International Court of Justice

*Letter to the Executive Director, United Nations Environment Programme*

Reference is made to your letter dated 21 March 1991 requesting information about the procedures for obtaining authorization for UNEP to request advisory opinions from the International Court of Justice.

Article 96, paragraph 1, of the Charter of the United Nations provides that the General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question. Paragraph 2 of this article further provides that "other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities".

Pursuant to paragraph 2 of Article 96, two principal organs (the Trusteeship Council and the Economic and Social Council), two subsidiary organs (the Interim Committee of the General Assembly and the Committee on Applications for Review of Administrative Tribunal Judgements) and 16 specialized agencies of the United Nations have been authorized to request advisory opinions.[13] In all these cases, the authorization was given by the General Assembly in the form of a resolution.

As you know, UNEP was established by the General Assembly as a subsidiary organ of the United Nations within the meaning of Article 7, paragraph 2, of the Charter, and not as a specialized agency as defined in Article 57 of the Charter. From the legal standpoint UNEP, as a subsidiary organ, falls within the scope of Article 96, paragraph 2, and may thus request the General Assembly to grant it the authority to request advisory opinions. However, you may wish to note that divergent views were expressed when the requests of the Interim Committee and of the Committee on Applications for Review were considered by the General Assembly.[14] States took different positions on whether a "subsidiary organ" could or should be authorized to request advisory opinions. In the final analysis, the Assembly gave its consent in these two cases in view of the special status of the organs concerned. Since 1955, no subsidiary organ has been added to the list. In 1988, a legal question arose in the Subcommission on Prevention of Discrimination and Protection of Minorities (a subsidiary organ of the Commission on Human Rights, itself a subsidiary organ of the Economic and Social Council) with respect to the privileges and immunities of one of the Subcommission's Special Rapporteurs. It was decided that the request for an advisory opinion should be made by the Economic and Social Council. No suggestion was made at that time that either the Subcommittee or the Commission on Human Rights should be separately authorized to do so.

17 April 1991

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## 17. Procedure to be followed in order to claim disability compensation for injuries attributable to service with the United Nations Peace-keeping Force in Cyprus

*Letter to a private solicitor*

This is in response to your letter of 24 June 1991 in which you inquire about the procedure to be followed in order to claim disability compensation on behalf of your client for injuries allegedly sustained "as a result of

exposure to noxious dust and fumes during two terms of six months in 1967 and 1971/72" while serving with his country contingent of the United Nations Peace-keeping Force in Cyprus (UNFICYP). You state that the "camp in which your client and others were placed was beside a copper mine" and that "[i]t has recently come to light that as a result of the exposure, [y]our client has suffered severe cronic broncial [sic] problems in respect of which he has had and continues to undergo constant treatment and surgury [sic]".

In this regard, I wish to inform you that in accordance with established arrangements between the United Nations and Member States contributing military personnel for United Nations peace-keeping operations, claims arising from death, injury or illness incurred by individual members of national military contingents while performing official duties with a peace-keeping force are to be settled, in the first instance, by the respective national authorities of the State concerned on the basis of its national legislation. This principle is explicitly embodied in the Regulations for the United Nations Peace-keeping Force in Cyprus, which were issued by the Secretary-General on 25 April 1964. Article 39 of the Regulations, which follows, specifically places a responsibility on the respective troop-contributing State to make such compensatory awards:

> "*Service-incurred death, injury or illness.* In the event of death, injury or illness of a member of the Force attributable to service with the Force, the respective State from whose military services the member has come will be responsible for such benefits or compensation awards as may be payable under the laws and regulations applicable to service in the armed forces of that State . . .".

In such cases, the United Nations reimburses the troop-contributing State for compensation paid on behalf of one of its contingent members provided that the State's claim for reimbursement has been duly certified by its Auditor General (or an official of similar rank) as based on payment properly made pursuant to specific provisions of national legislation applicable to service in the armed forces of that State.

I would therefore advise that you pursue any claim for compensation on behalf of your client directly with the competent authorities of the State concerned.

15 July 1991

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## 18. STATUS OF MEMBERS OF THE UNITED NATIONS VOLUNTEERS—QUESTION WHETHER THEY ARE CONSIDERED AS "OFFICIALS" OR AS "EXPERTS ON MISSION" FOR THE PURPOSES OF THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

### *Letter to the Revenue Service in a Member State*

1. This is in response to your letter of 29 November 1990, requesting our advice as to the status of members of the United Nations Volunteers,

in particular, whether they are considered as "officials" or as "experts on mission" for the purposes of the privileges and immunities of the United Nations.

### A. STATUS OF THE UNITED NATIONS VOLUNTEERS

2. The United Nations Volunteers programme was established by the General Assembly in its resolution 2659 (XXV) of 7 December 1970 as an additional source for providing technical assistance to developing countries in the form of middle-level expertise under volunteer conditions of service. A service agreement is concluded between the United Nations and each individual volunteer and the "Rules of Conduct and Conditions of Service for United Nations Volunteers" are made a part of this service agreement.

3. Although the volunteers are not, strictly speaking, staff members, they are assigned by the United Nations to assist in the carrying out of United Nations–assisted projects or programmes in developing countries. The volunteers are engaged on substantially similar terms and serve under the same conditions as United Nations technical assistance experts, except that they do not receive a salary, but only living expenses and certain related benefits. Like technical assistance experts, volunteers subscribe, upon accepting appointment, to the same oath required of staff members by the Staff Regulations; are subject to the authority of the Organization; are responsible to it in the exercise of their functions; and are required to refrain from accepting any instruction deriving from sources external to the United Nations (see section I of the Rules of Conduct).

### B. SERVICE AGREEMENT: PRIVILEGES AND IMMUNITIES

4. Paragraph 17 of the Rules of Conduct and Conditions of Service for United Nations Volunteers,[15] which is attached to the service agreement, states as follows:

> "*Privileges and immunities*: The United Nations Volunteers undertake to negotiate with the host Government the provision of such limited privileges and immunities as are necessary for the proper performance of its functions."

### C. STANDARD BASIC ASSISTANCE AGREEMENT: PRIVILEGES AND IMMUNITIES

5. Under the Standard Basic Assistance Agreement usually concluded between UNDP and a Government receiving UNDP assistance (which includes the services of United Nations Volunteers), the Government agrees to grant these persons the same privileges and immunities as are accorded to officials of the United Nations. Paragraph 4 (*a*) of article IX of the Standard Basic Assistance Agreement provides as follows:

> "Except as the parties may otherwise agree in Project Documents relating to specific projects, the Government shall grant all persons,[16] other than Government nationals employed locally, performing services on behalf of the UNDP, . . . the same privileges and immunities as officials of the United Nations, . . . under section 18 . . .

of the Convention on the Privileges and Immunities of the United Nations . . .".[17]

6. Therefore, in the country of service, the individual volunteer enjoys the same privileges and immunities as those enjoyed by a United Nations official.

D. CONCLUSIONS

7. As you may note from the above, United Nations Volunteers have substantially the same terms of service as technical assistance experts who are regarded as officials of the United Nations (see para. 3 above, and the circular dated 9 May 1951 sent by the Secretary-General to all interested Governments), and they are in the country of service regarded as "officials" and granted the same kind of privileges and immunities as are granted to "officials" by virtue of the Basic Assistance Agreement signed by the country of service (see para. 5 above). None the less, it is a fact that United Nations Volunteers are not covered by the Convention on the Privileges and Immunities of the United Nations. We would, of course, hope that, in view of their close assimilation to technical assistance experts and the nature of their employment (including their limited allowances), it would be possible to regard such allowances as tax-exempt.

10 July 1991

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19. QUESTION OF THE LIABILITY OF THE UNITED NATIONS DEVELOPMENT PROGRAMME FOR LOSS OR DAMAGE RESULTING FROM GRATUITOUS SERVICES EXTENDED TO ITS STAFF IN THE FIELD, FOR THEIR CONVENIENCE

*Memorandum to the Director, Division for Administrative and Management Services, United Nations Development Programme*

I. *Introduction*

1. This is further to our memorandum of 30 January 1990 and the memorandum of 19 May 1990 addressed to us by the Secretary, Headquarters Property Survey Board, enclosing additional documentation on a United Nations volunteer's claim against UNDP in connection with a vehicle accident in Jamaica. We understand that UNDP is interested in receiving a legal opinion from this Office on this particular case, and on the general issue of UNDP's liability for loss or damage resulting from gratuitous services extended to its staff in the field, for their convenience.

2. We have reviewed the additional documentation communicated to us and provide below a summary of the facts and our opinion.

II. *The United Nations volunteer's case*

3. The facts of the case as they appear from the documentation submitted to us are as follows: on 27 February 1989, a Volvo motor car

owned by the United Nations volunteer stationed in Montego Bay, Jamaica, arrived on the island. After being cleared from the wharf by the UNDP driver, the car was brought to UNDP premises in Kingston, from where it was later taken for servicing. On 21 March 1989, in response to the volunteer's inquiry, the UNDP Senior Administrative Assistant informed him that the car would be passed and licensed the following day, and that he should make the necessary arrangements to come and collect the car. On 22 March, the driver, while driving the car to the Examination Depot, was involved in a road accident.

4. The particulars of the car accident are detailed in the Motor Accident Report form provided by the insurance company and signed by the driver, an abstract of which is given in the police report dated 10 May 1989. According to the report, the driver was driving along Old Hope Road in Kingston, making a right turn into a service station, after being allowed to do so by a taxi driver coming from the opposite direction—in the inner lane. At the same moment an Isuzu motor vehicle came from the opposite direction, in the outer lane, and collided with the Volvo motor car. There were no personal injuries but both motor vehicles sustained material damage.

5. From the letter of 20 March 1990 addressed to you by the UNDP Resident Representative, it appears that the volunteer in question and the third party had the same insurance company and their respective claims were settled amicably. The volunteer's claim was settled in the amount of J$ 19,311.55 and the third party's claim for the amount of J$ 17,320. According to the same letter, the volunteer's policy had an excess of J$ 15,000. The total damage to the Volvo motor vehicle was thus valued at J$ 34,311.55. The volunteer requested UNDP to reimburse him the amount of J$ 15,000, not covered by his insurance, on the basis that the damage to his car had occurred when driven by a UNDP driver.

III. *The legal issues*

6. The legal issues to be addressed are the following:

(*a*) UNDP's liability; (*b*) determination of fault on the part of the UNDP driver; and (*c*) whether UNDP was in breach of any duty of care to the volunteer in question.

### A. UNDP'S LIABILITY

7. In law, an employer is responsible, under the doctrine *respondeat superior*, for the wrongful acts of his employees when they are performed in the course of the employees' employment. Under this doctrine, the employer may be held liable for the negligent acts of his employee, occurring in the course of the servant's employment, proximately resulting in injury or damage to those to whom the employer owes a duty of care.

8. It follows from the above that in order for UNDP to be made liable for the damage caused to the volunteer's car, one would have to establish, first, that the UNDP driver was acting in the course of his employment when he had the accident; second, that the UNDP driver caused the accident by some fault on his part; and third, that UNDP in

some way owed the volunteer a duty of care. On the facts, it is not disputed that the UNDP driver had been detailed to drive the volunteer's car as part of his official business. The questions that remain are whether he was at fault and whether his fault can be attributable to UNDP.

### B. DETERMINATION OF FAULT ON THE PART OF THE UNDP DRIVER

9. In this case, the question of fault for the occurrence of the road accident in Kingston, Jamaica, could only be determined by a Jamaican court of law, in accordance with the applicable local law. However, the rival claims in this case were settled by the insurance company based on the extent of the damage without any admission or adjudication of fault. The UNDP driver was never charged or prosecuted for any traffic offence, and no civil suit was filed against him for negligence. There is, therefore, no determination or assignment of fault. In the absence of a judicial determination of fault on the part of the driver or other clear evidence establishing that the driver was solely responsible for the accident, UNDP, as his employer, is under no obligation to consider the volunteer's claim.

### C. UNDP'S DUTY OF CARE

10. Independently of the question of fault on the part of the UNDP driver, UNDP, as an organization, could be held liable under the law of bailment, if it were established that the volunteer's car was damaged while in the custody of UNDP or one of its employees. There is recognized in law a duty on the part of the bailee to exercise reasonable care for the safety of property entrusted to him and to return this property in its original state in accordance with the contract made with the bailor. The law of bailment distinguishes, however, between a bailment for hire, for mutual benefit, and a gratuitous bailment, to each of which it assigns a different degree of care, on the part of the bailee.

11. In the case of the volunteer, UNDP offered to assist him with the formalities of clearing the vehicle through customs and getting it licensed. The vehicle was entrusted to the UNDP driver and was thus in the possession of UNDP at the time of the accident. However, since the services provided by UNDP to the volunteer in connection with the car were for his own personal benefit, for which he was not charged a fee, and UNDP could not be said to derive a direct benefit, the obligation of UNDP in such circumstances is to be assimilated to that of a gratuitous bailee, who owes a lesser degree of care and is liable for gross negligence only.

12. In the present case the duty of care by which UNDP might be bound as a gratuitous bailee of the volunteer's car is to see to it that its driver, instructed to clear the car, service it and arrange for it to be passed and licensed, is a competent driver. From the documentation submitted to us it appears that the UNDP driver was indeed a competent one and consequently UNDP has discharged its obligation of due care, as is appropriate in cases of gratuitous bailment for the sole benefit, or convenience, of the bailor.

IV. *Conclusion*

13. It follows from the above that UNDP is not liable for the damages incurred in the above-mentioned accident for the following reasons: first, there is no judicial determination of fault on the part of the UNDP driver, in the absence of which UNDP cannot be held liable as its employer; and secondly, the duty of care owed by UNDP to the volunteer as a gratuitous bailee of his car is of the lowest degree, since the bailment, or the gratuitous services rendered, were for the sole benefit, or convenience, of the United Nations volunteer. UNDP discharged its obligation of due care by choosing and instructing a competent driver to perform the services.

*General comments*

14. As a matter of policy, however, and in order to avoid the recurrence of cases where UNDP drivers, while performing services for other staff members, are involved in road accidents entailing damages, you might wish to consider the issuance of proper instructions which would either forbid the provision of such assistance or, alternatively, inform the individual staff member whose personal effects are being cleared by an agent or employee of UNDP that such service is performed at the staff member's own risk, without any responsibility on the part of UNDP.

3 July 1991

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## 20. International Convention against Apartheid in Sports—Consequences of the non-payment by a State party to the Convention of its assessed contribution under the Convention—Possible consequences of developments in South Africa as regards the status of the Convention and relevant resolutions of the General Assembly

*Memorandum to the Assistant Secretary-General for the Centre against Apartheid, Department of Political and Security Council Affairs*

Reference is made to your memorandum of 17 October 1991 in which you raised several questions concerning the session of the Commission against Apartheid in Sports. Your questions, set out below, are followed by our answers:

(*a*) What is the consequence if a State party to the International Convention against Apartheid in Sports[18] fails to pay its assessed contribution under the Convention? If the Commission meets and there are delinquent States parties, are they obliged to pay later?

Article 11, paragraph 7, of the International Convention against Apartheid in Sports provides as follows: "States parties shall be responsible for the expenses of the members of the Commission while they are in performance of Commission duties." This provision of the Convention creates a legal obligation for the parties to the Convention. The obligation

continues to be valid as long as the Convention is in force, including, particularly, when the States parties have not met their obligations under the Convention.

Article 10, paragraph 4, of the Convention provides that "in cases of flagrant violations of the provisions of the present Convention, States Parties shall take appropriate action as they deem fit . . .".

Regardless of whether actions deemed fit are taken against a State pursuant to article 10, paragraph 4, of the Convention or otherwise, the State's obligation to pay remains and will obviously not be discharged by that State's refusal to pay.

(*b*) What is the status of the Convention in the light of the readmission of South Africa to the International Olympic Committee (IOC) and the possibility of South Africa's admission to international sporting federations and subsequent participation in world tournaments?

The International Convention against Apartheid in Sports in several places makes reference to South Africa and condemns the practice of apartheid in sports obtaining in that country; but the scope of the Convention is not limited to South Africa, as article 1 of the Convention makes plain:

> "(*a*) The expression "apartheid" shall mean a system of institutionalized racial segregation and determination for the purpose of establishing and maintaining domination by one racial group of persons over another racial group of persons and systematically oppressing them, *such as that pursued by South Africa*, and "apartheid in sports" shall mean the application of the policies and practices of such a system in sports activities, whether organized on a professional or an amateur basis." (emphasis added)

The readmission of South Africa to the IOC and the possibility of its admission to international sporting federations and participation in world tournaments have not changed the status of the Convention as regards its global reach nor even in South Africa, where apartheid has not yet ceased to exist.

(*c*) Since the sports boycott of South Africa was initiated by the General Assembly, is there a need for a specific resolution to end the boycott?

Resolutions of the General Assembly have a recommendatory rather than a mandatory character. The binding obligations assumed by States parties to the International Convention against Apartheid in Sports, although re-echoing General Assembly resolutions, derive their binding character from the Convention and not from the General Assembly resolutions. A General Assembly resolution to end the boycott would, therefore, no more create a legal obligation than did the resolution which called for the boycott in the first place. There is therefore no legal requirement for a specific General Assembly resolution to end the boycott.

(*d*) How could States parties reconcile their obligations under the Convention and their commitment to political decisions taken within re-

gional or other international organizations that may decide to lift the sports boycott of South Africa?

The obligations assumed by the States parties under the International Convention against Apartheid in Sports were not made conditional to decisions to be taken by other bodies. For this reason decisions taken by such other bodies would not in any way modify the legal obligations assumed by States parties under the International Convention.

(*e*) What is the role of the States parties in terminating the activities of the Convention? Does that require an amendment to the Convention?

Two approaches are possible: The States parties to the Convention could allow the activities of the Commission to fall into disuse—simply let the Commission cease to function. Alternatively, the States parties could wind up the Convention or amend it in whatever manner they considered to be desirable.

(*f*) Is it within the mandate of the Commission to oversee the eradication of apartheid in sports in South Africa?

Clearly an objective of the Commission is the eradication of apartheid in sports in South Africa—but, as the Commission has no authority in South Africa, it would be meaningless to require it to oversee the eradication of apartheid in sports in that country.

(*g*) What will be the status of the Convention when a new democratic and non-racial system of government is established in South Africa? Could it be considered that the Convention would have fulfilled its goals?

Article 10, paragraph 5, of the Convention states: "The provision of the present article [to ensure universal compliance with the Olympic principle of non-discrimination and the provisions of the present Convention] relating specifically to South Africa shall cease to apply when the system of apartheid is abolished in that country." This provision makes it clear that the scope of the Convention goes beyond South Africa and that the Convention would continue even after apartheid had been ended in South Africa.

30 October 1991

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## 21. Convention on the Elimination of All Forms of Discrimination against Women—Procedural options available to address the issue of violence against women—Practice of the Secretary-General as depositary concerning amendments to treaties—Advantages of an optional protocol—Difference between an amendment to and a revision of a treaty

*Memorandum to the Senior Legal Officer, Office of the Director General, United Nations Office at Vienna*

I refer to your memorandum of 9 October 1991 concerning procedural options available to the United Nations Ad Hoc Expert Group Meeting on Violence against Women (11-15 November 1991).

I. *Background paper*

1. First of all, the Office of Legal Affairs is requested to review the background paper submitted by the Government of (name of a Member State) in connection with the above-mentioned meeting.

2. The Office has come to the conclusion that, basically for the reasons indicated in the said background paper, the most appropriate international instrument for addressing the issue of violence against women would be an optional protocol to the Convention on the Elimination of All Forms of Discrimination against Women, adopted by the General Assembly of the United Nations on 18 December 1979[19] ("the Convention").

3. Indeed, it is felt that the subject to be addressed, while closely related to the issues covered by the Convention, is of such a nature as to warrant the adoption of a related but separate instrument.

4. The amendment approach would surely encounter procedural obstacles, which might well be daunting.

5. In accordance with the practice of the Secretary-General as depositary, and as stated in the *chapeau* to the amendment section in the background paper, where a convention is amended, ratification of the amendments is required and those States which do not ratify the amendments remain bound by the old instrument. The statement that follows under "Advantages" to the effect that as the amendment would be to a convention, it would be binding on States parties, would be applicable only if—as in the case of the Constitution of the World Health Organization[20]—the Convention contained a specific clause on the automatic binding effect of amendments in force for a State upon becoming a party to the Convention. The research we were able to conduct indicates that it is only in the case of treaties establishing organizations or unions that an amendment would be automatically binding *vis-à-vis* all parties. I wish to refer in this connection to article 73 of the Constitution of the World Health Organization, signed at New York on 22 July 1946, and to article 52 of the Convention on the International Maritime Organization, done at Geneva on 6 March 1948.[21]

6. In fact, an amendment to the Convention would result in two parallel regimes (see article 30, paragraph 4, and article 40 of the 1969 Vienna Convention on the Law of Treaties):[22] on the one hand, the contracting parties having accepted the amendment would be bound by the Convention, as amended, and by the unamended Convention with respect to the contracting parties not having accepted the Convention, as amended; on the other hand, a State having accepted the unamended Convention after the entry into force of an amendment, i.e., without accepting the said amendment, would be considered as a party to the amended Convention (as well as to the unamended Convention in relation to any party to the Convention not bound by the amendment), failing an expression of a different intention by that State, a situation which now obtains in the field of narcotic drugs and psychotropic substances. I wish to refer, in this connection, to article 47 of the Single Convention on

Narcotic Drugs, 1961, done at New York on 30 March 1961,[23] and to article 19 of the Protocol amending the Single Convention on Narcotic Drugs, 1961, concluded at Geneva on 25 March 1972.[24]

7. In addition, it should be understood that the word "immediately" in the second statement under "Advantages" should mean "upon entry into force" inasmuch as the amendment would have no legal effect prior to having entered into force.

8. The possibility of adopting a declaration has been dismissed from the outset since, as a non-legally binding instrument, it is felt that it would not meet the purpose as stated in the memorandum to you dated 8 October 1991.

9. It is further felt that the adoption of an altogether new convention would be equally inappropriate, especially taking into account financial considerations.

10. The advantages of an optional protocol, as correctly stated in the background paper, would be that "States that had signed, but not ratified [the Convention] could join the optional protocol". We would have difficulty envisaging—as indicated in the background paper—a State being precluded from signing at any time the optional protocol even though it had not as yet signed the Convention. On the other hand, it would appear anomalous for a signatory to the Convention to ratify or accede to the optional protocol without first ratifying or acceding to the Convention. This approach is in keeping with the statement under "Disadvantages" to the effect that "States not party to [the Convention] would not be able to join the optional protocol." In other words, a State should become a party to the Convention before becoming a party to the optional protocol or, alternatively, become a party to the Convention and to the optional protocol concomitantly. (We have taken for granted that the optional protocol would be subject to the same participation procedures as the Convention, i.e., signature, ratification and accession.) In this connection, you may wish to refer to the International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations on 16 December 1966,[25] and, in particular, the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty, adopted by the General Assembly on 15 December 1989,[26] which may be used as a precedent for a possible optional protocol to the Convention on violence against women.

II. *Article 26 of the Convention*

11. The Office of Legal Affairs is also requested in the memorandum to give its opinion "on the meaning of article 26" of the Convention, which reads as follows:

> "1. A request for the revision of the present Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations.
>
> 2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request."

12. The 1969 Vienna Convention on the Law of Treaties does not address the term "revision" *stricto sensu*. However, the research we were

able to conduct indicates that "revision" in keeping with the practice of the Secretary-General as depositary of multilateral treaties, and in particular of human rights treaties, refers to the examination at a special meeting of all the provisions of a treaty concerned "with a view to ensuring that its object and purpose are being realized". There have not been so far any revision meetings held in respect of the human rights treaties deposited with the Secretary-General. As an example of a provision for the revision of a treaty, I would mention article VIII of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, adopted by the General Assembly of the United Nations on 10 December 1976,[27] and to the *United Nations Disarmament Yearbook*,[28] which relates to the review conference held in 1984 on that Convention.

13. The terms "amendment" or "modification", on the other hand, would appear to be identical in meaning. An amendment usually entails changing one or several specific provisions of a treaty at the request of either a party or a group of parties to the treaty. Such changes, modifications or amendments are governed by the procedure set out in the treaty itself (i.e., request for a proposed amendment, adoption of the proposed amendment, entry into force of the proposed amendment, etc.). In rare cases, a treaty does not provide for an amendment procedure. In such a case, the parties may proceed on the basis of unanimous agreement.

14. Therefore, the basic difference between an amendment to and a revision of a treaty lies in the scope of these two procedures: an amendment consists in changes to one or several specific provisions of a treaty, while a revision generally consists in the examination of the entire text of the treaty or of several provisions thereof.

15. All human rights treaties deposited with the Secretary-General but one contain provisions concerning amendment and/or revision.

31 October 1991

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## 22. Financial obligations to the Federal Republic of Germany as a member of the International Cocoa Organization in the light of the accession of the former German Democratic Republic to the Federal Republic—Interpretation of the relevant provisions of the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts

*Letter to the Executive Director, International Cocoa Organization*

This is in reply to your letters of 3 April and 18 July 1991 concerning the financial obligations of the Federal Republic of Germany as a member of the International Cocoa Organization in the light of the accession of the former German Democratic Republic to the Federal Republic of Germany with effect from 3 October 1990. As you noted, the former German Democratic Republic was also a member of the International Cocoa Organization.

I should like to point out, first, that the reference in your letter of 18 July 1991 to the "former State" of the Federal Republic of Germany is incorrect. The Federal Republic of Germany has not ceased to exist and it continues to possess the same international legal personality as it did prior to 3 October 1990, the date when the accession of the former German Democratic Republic came into effect and the German Democratic Republic ceased to exist.

The United Nations has had occasion in the past to consider the argument that the financial obligations of the former German Democratic Republic, incurred towards an international organization of which it was a member, are not automatically assumed by the Federal Republic of Germany. We have not agreed to that assertion on the following grounds.

We are well aware that the incorporation of one State into a State which maintains its pre-existing international legal personality is different from the case of two States merging to create a new third State with its own distinct international legal personality. That difference does not, however, prevent the existence of a valid succession of States under international law. The manner by which the former German Democratic Republic was incorporated into the Federal Republic of Germany does not, in our view, alter Germany's assumption of rights and obligations as a successor State.

In that connection, it may be recalled that, by a letter to the President of the General Assembly dated 6 November 1990, the Permanent Representative of the Federal Republic of Germany stated with reference to the membership of the former German Democratic Republic in certain subsidiary organs of the General Assembly that "since the former German Democratic Republic, by its accession, has become part of Germany, it is up to the Government of Germany to decide whether it wishes to take its seat in those three bodies ... Germany wishes to occupy the seat in the Special Committee on Peace-keeping Operations."

Accordingly, Germany now occupies the seat of the former German Democratic Republic on the Special Committee on Peace-keeping Operations. We also understand that the title to the permanent mission of the former German Democratic Republic to the United Nations has passed to Germany. Similarly, in our view, the financial obligations of the former German Democratic Republic to the United Nations have passed to Germany.

This result is foreseen in various provisions of the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts.[29] While that Convention is not yet in force, its provisions represent the general *opinio juris* of the international community on the question. "State debt" as used in the Convention means "any financial obligation of a predecessor State arising in conformity with international law towards another State, *an international organization* or any other subject of international law" (article 33, emphasis added).

For the case of a uniting of States, article 39 of the Convention provides as follows:

"When two or more States unite and so form one successor State, the State debt of the predecessor States shall pass to the successor State."

In the case of the dissolution of a State, article 41 of the Convention provides as follows:

"When a State dissolves and ceases to exist and the parts of the territory of the predecessor State form two or more successor States, and unless the successor States otherwise agree, the State debt of the predecessor State shall pass to the successor States in equitable proportions, taking into account, in particular, the property, rights and interests which pass to the successor States in relation to that State debt."

While positions may vary as to whether or not either of the two above-quoted provisions would apply to the case of the accession by the former German Democratic Republic to the Federal Republic of Germany, the underlying legal philosophy of the provisions is clear: to the extent that property rights and interests of a predecessor State pass to a successor, so too pass the State debts of that predecessor.

In the context of the International Cocoa Organization, therefore, we would be of the view that whatever obligations were owed by the former German Democratic Republic to the Organization on 3 October 1990 are to be assumed by the Federal Republic of Germany.

As the contributions to be assessed Germany for the period following that date, that is a matter to be determined in accordance with the relevant provisions of the International Cocoa Agreement and the decisions and practices of the International Cocoa Council.

9 August 1991

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23. 1958 AGREEMENT CONCERNING THE ADOPTION OF UNIFORM CONDITIONS OF APPROVAL AND RECIPROCAL RECOGNITION OF APPROVAL FOR MOTOR VEHICLE EQUIPMENT AND PARTS—REQUIREMENT OF UNANIMITY FOR THE AMENDMENT OF THE AGREEMENT UNDER THE PROVISION OF ITS ARTICLE 12—POSSIBILITY OF SUBSTITUTING FOR UNANIMITY A WEIGHTED VOTING OR OTHER VOTING SYSTEM

*Memorandum to the Director, Transport Division, Economic Commission for Europe, Geneva*

This is further to my fax of 21 August 1991 responding to your fax of 19 August 1991, by which you ask our views on alternative voting methods in respect of amendment procedures with respect to the 1958 Agreement concerning the Adoption of Uniform Conditions of Approval and Reciprocal Recognition of Approval for Motor Vehicle Equipment and Parts.[30]

1. You particularly inquire, with reference to article 12 of the Agreement and the question of the unanimity required for the adoption of an amendment, about the possibility of substituting a weighted voting or other voting system which would "depart from the generally United Nations–accepted one country–one vote system".

2. It would appear that your query raises two distinct questions:

(*a*) Whether amendments must always be accepted unanimously by all parties;

(*b*) Whether it is possible to depart from the "one country–one vote system".

3. As concerns the first question, it is to be recalled that, generally speaking, unanimity is not always required for an amendment. Indeed, within the United Nations framework, Article 108 of the Charter provides that amendments to the Charter are to enter into force for all Members of the United Nations when they have been ratified by two thirds of the Members—including, however, all the permanent members of the Security Council. In this connection, you may be referred to a number of multilateral treaties deposited with the Secretary-General under which procedures other than "the unanimity (express or tacit) procedure" have in fact been adopted.

4. You will note, however, that in such cases the amendments do not always apply to all parties. In a number of instances, the amendments apply only to those parties which have approved the amendments. In other cases, parties may declare that they do not accept the amendment; in turn the relevant body (conference, etc.) may determine that the amendment is of such a nature that, as a consequence of its non-acceptance, the party concerned shall cease within a given period of time to be a party to the treaty (see, for example, the 1949 Convention on Road Traffic[31]).

5. As concerns the second question, it should be pointed out that the "one country–one vote system" does apply, according to the Charter, to decisions taken within the framework of the General Assembly (Article 18).

6. But this voting procedure need not apply to decisions taken under multilateral treaties, even if they have been adopted under United Nations auspices. Such treaties are indeed distinct from the Charter, having a different participation and varying embodiments of commitments agreed to by the parties in a particular domain.

7. Therefore, nothing would preclude the parties from adopting a different system of voting than the "one country–one vote" system, the more so where technical agreements are concerned.

8. As you probably know, practically all commodity agreements usually provide for a weighted-vote system (see, for example, articles 11 and 44 and annexes A and B of the International Sugar Agreement, 1987[32]).

9. We have also reviewed the terms of reference and the rules of procedure of the Economic Commission for Europe, which you mention.

They do not appear to shed any additional light or provide guidance on these matters.

10. However, for a "non-unanimity" procedure, or a weighted-voting system, to be included in a treaty, such procedure or system must be adopted by the parties either at the conclusion stage or, alternatively, in full compliance with the provisions of the treaty, if the treaty has entered into force.

11. Thus, in the case of the 1958 Agreement, the procedure provided for in article 12 for the amendment of the Regulations could only be modified in accordance with the provisions of article 13.

23 August 1991

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### 24. Decision of a court of a Member State refusing to grant UNICEF immunity—Suggestion that UNICEF should engage counsel to plead immunity on appeal or in any procedure to review the decision—Obligations of the Member State in question under the agreement it concluded with UNICEF and under the 1946 Convention on the Privileges and Immunities of the United Nations

*Memorandum to the Executive Director, United Nations Children's Fund*

1. I should like to refer to the memorandum of 14 January 1991 concerning a former UNICEF employee. Attached to the memorandum is a copy of a letter dated 14 January 1991 from a legal officer in the Ministry of External Affairs of (name of a Member State) to the representative of UNICEF in this country concerning the recent decision of the Industrial Court refusing to grant UNICEF immunity in a case brought by the person in question and entering a judgement in that person's favour.

2. We are pleased that the Ministry agrees with our position that UNICEF should neither submit to the jurisdiction of the Court nor contest the merits of the case absent a waiver of immunity.

3. We cannot, however, agree with the procedure suggested by the Ministry that UNICEF engage counsel to plead immunity on appeal or in any procedure to review the decision. We cannot agree either to the suggestion that UNICEF bring to the notice of the Court in question the certificate prepared by the Ministry of External Affairs affirming UNICEF's immunity.

4. In our view, the representative of UNICEF in the country in question should inform the Ministry of External Affairs at the highest possible level that the United Nations Secretariat is confident that the Government intends to honour its commitments to the United Nations and UNICEF contained both in the Agreement it entered into with UNICEF in 1978 and in the 1946 Convention on the Privileges and

Immunities of the United Nations.[33] The attention of the Ministry should be drawn in particular to the following provisions of article II of the 1946 Convention:

> "*Section 2.* The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.
>
> "*Section 3.* The premises of the United Nations shall be inviolable. The property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action."

5. In addition, the Ministry should be requested to take whatever measures are necessary to ensure implementation of the above-mentioned treaty obligations. Any attempt by the officials of the State in question to enforce the decision in question or extend any measures of execution against the United Nations or UNICEF would constitute a breach of those obligations. It is for the Ministry of External Affairs to communicate with other branches of the Government, including the judiciary, with regard to the Government's international legal obligations, not the United Nations.

6. You may also wish to inform the representative of UNICEF that we will also be contacting the Permanent Mission of the State concerned at Headquarters along the same lines.

29 January 1991

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## 25. STATUS OF A DIPLOMAT WHO WAS ALREADY A PERMANENT RESIDENT IN THE HOST STATE BEFORE BEING APPOINTED TO A PERMANENT MISSION TO THE UNITED NATIONS—ARTICLE 38 OF THE 1961 VIENNA CONVENTION ON DIPLOMATIC RELATIONS—QUESTION WHETHER THE UNITED NATIONS SHOULD REQUIRE CREDENTIALS FOR THE APPOINTMENT OF A CHARGÉ D'AFFAIRES OF A PERMANENT MISSION IN GENEVA—ARTICLE 19, PARAGRAPH 1, OF THE VIENNA CONVENTION

*Memorandum to the Senior Legal Officer, Office of the Director-General, United Nations Office at Geneva*

1. This is with reference to your cable dated 18 June 1991 concerning the status of the chargé d'affaires a.i. of the Permanent Mission of (name of a Member State) in Geneva.

2. In his letter of 13 June 1991, the Deputy Permanent Observer of Switzerland raised a question concerning the current Swiss policy with respect to diplomats whose residence in Switzerland was already of a permanent nature before being appointed to a permanent mission to the

United Nations. We note that, according to current Swiss practice, a diplomat such as the person in question who is a citizen of another State but holds an ordinary residence permit ("*permis C*") in Geneva does not receive a "*carte de légitimation*" issued by the Swiss Ministry of Foreign Affairs and does not enjoy diplomatic privileges and immunities in Switzerland.

3. The 1961 Vienna Convention on Diplomatic Relations[34] (the "Vienna Convention"), declared applicable by analogy to permanent missions in Geneva by the Swiss Federal Council, specifically addressed the issue of the privileges and immunities of permanent residents of the host State. Article 38 provides as follows:

> "1. Except insofar as additional privileges and immunities may be granted by the receiving State, a *diplomatic agent* who is a national of or *permanently resident* in that State shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions.
>
> "2. Other members of the staff of the mission and private servants who are nationals of or permanently resident in the receiving State shall enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission." (emphasis added)

The above provisions suggest that administrative, technical and service staff of a mission may be subject to Swiss jurisdiction under certain circumstances. However, a diplomatic agent who is a permanent resident in the receiving State is entitled to be accorded at least inviolability and immunity from jurisdiction during the performance of his official functions. A diplomatic agent in Geneva may not be denied these privileges and immunities because of his status as permanent resident of Switzerland. "Diplomatic agent" is defined in article 1 of the Vienna Convention as the head of the mission or a member of the diplomatic staff of the mission, a category which clearly includes the chargé d'affaires.

4. It should be noted that article 37 of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character of 14 March 1975[35] contains language identical to that of the 1961 Vienna Convention with respect to the privileges and immunities of diplomats who are permanent residents of the receiving State. The 1975 Vienna Convention, however, has not been ratified by Switzerland.

5. The Interim Arrangement on Privileges and Immunities of the United Nations concluded between the Secretary-General of the United Nations and the Swiss Federal Council on 11 June 1946[36] does not address the particular issue of privileges and immunities of diplomats who are permanent residents in the receiving State. In the absence of specific language on this point, the Vienna Convention is the governing authority.

6. The issuance of a residence permit or "*carte de légitimation*" is a matter of internal Swiss policy to be handled by the Swiss authorities. None the less, the Permanent Mission of Switzerland should be advised that diplomats such as the person concerned are entitled to a scope of privileges and immunities specified in the Vienna Convention and that the current Swiss practice with respect to such diplomats should be brought into consistency accordingly.

7. Your second inquiry in connection with this matter is whether the United Nations should require credentials for the appointment of a chargé d'affaires of a permanent mission in Geneva. Your cable of 20 April 1990 suggests that the United Nations currently does not request credentials in such a case.

8. According to article 19, paragraph 1, of the Vienna Convention, "[t]he name of the chargé d'affaires ad interim shall be *notified*, either by the *head of the mission* or, in case he is unable to do so, by the *Ministry of Foreign Affairs of the sending State* to the Ministry of Foreign Affairs of the receiving State or such other ministry as may be agreed" (emphasis added). In our view, full credentials are not required in a case where the chargé d'affaires has been appointed from among a mission's diplomatic staff. In such a case, the United Nations Office at Geneva could simply be notified by the head of the mission or the appropriate authority of the sending State. Where the newly appointed chargé d'affaires was not previously a member of the mission, formal notification is required.

16 August 1991

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### 26. Establishment in a Member State of a new tax on goods and services which includes United Nations publications — Question whether the United Nations could request, on the basis of article II, sections 7 and 8, of the 1946 Convention on the Privileges and Immunities of the United Nations, that United Nations publications purchased in that Member State be exempt from the new tax

*Memorandum to the Acting Chief, Sales Section, Department of Conference Services*

1. Your memorandum of 12 December 1990 concerning a goods-and-services tax in (name of a Member State) has been forwarded to this Office for advice. We understand that, as of 1 January 1991, a new tax will be levied in the country in question on goods and services, including imported goods and services such as United Nations publications. You requested that this Office review the information and advise whether United Nations publications purchased in this country could be exempt from such tax.

2. The new goods and services tax (GST) is described in the Guide enclosed with your memorandum as a tax "calculated at the rate of 7 per cent on sales of goods or the provision of services made and is generally payable by the recipient of the supply at the time the consideration is paid or becomes payable". As a destination-based consumption tax, GST is collected from the final consumer of goods and services subject to such tax. Thus, businesses which are initially charged GST on their supplies are subsequently entitled to a full credit for this tax through the input tax credit. GST is therefore a tax whose burden falls on the consumer of goods and services in the country in question. As such, it might, as far as United Nations publications are concerned, have a restrictive effect on their purchase in the country concerned. However, if we are to request relief from the payment of this tax, it is necessary to establish well-founded legal arguments to support such a request.

3. Since the tax falls on the purchaser of the publications and not on the United Nations itself, no claim for exemption or refund can be made on the basis of article II, sections 7 (*a*) and 8, of the Convention on the Privileges and Immunities of the United Nations.[37] It is true that, under section 7 (*c*) of the Convention, the United Nations is exempt from customs duties and prohibitions and restrictions on imports and exports in respect of its publications. However, the term "restrictions" in the abovementioned provision has been interpreted, in the practice of the United Nations, as a form of control by way of government censorship or licensing. It would not be legally correct to consider tax charges levied at a national level as a restriction consistent with the meaning of the abovementioned provision. As to the Agreement on the Importation of Educational, Scientific and Cultural Materials of 1950,[38] which provides special facilities for the importation of books and publications of the United Nations or of any of its specialized agencies, the State concerned is not a party to it and it would not, therefore, be possible to invoke the provisions of that Agreement in this case. We have also requested information on whether the sales of United Nations publications to our distributor(s) in that country are covered by a specific agreement but we were informed by your Section that no such agreement exists.

4. In the absence of any binding applicable arrangements, an exemption from GST cannot, in this particular case, be requested. However, you may wish to consider an approach to the competent authorities of the State in question which is based on practical rather than legal considerations. It might be pointed out that GST should not operate so as to affect United Nations publications which disseminate knowledge of the Organization's activities within the territory of a Member State. Since the Guide on GST describes in chapter 4 services which are exempt from this tax, e.g., health care services, educational services and legal aid services, it may be inferred from this that certain exemptions are possible and it should not be too difficult to make the case that United Nations publications can be assimilated to educational services.

7 January 1991

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## 27. SALE OF TAX-FREE IMPORTED MATERIALS IN THE UNITED NATIONS CHILDREN'S FUND GREETING CARD OPERATION—MEANING OF THE TERMS "OFFICIAL USE" AND "PUBLICATIONS" USED IN ARTICLE II, SECTION 7 (*b*) AND (*c*), OF THE 1946 CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS—GENERAL PRACTICE OF STATES IN THIS REGARD

*Memorandum to the Director, Greeting Card Operation, United Nations Children's Fund*

With regard to the recent inquiries by one of the National Committees for UNICEF on the sale of the UNICEF Greeting Card Operation products, please find a copy of a note for the file prepared by this Office on the past practice and interpretation of article II, section 7, of the 1946 Convention on the Privileges and Immunities of the United Nations.[39]

*Note for the file*

### SALE OF TAX-FREE IMPORTED MATERIALS IN THE UNICEF GREETING CARD OPERATION

I. *Introduction*

1. A question has arisen in relation to a sale of tax-free imported materials in the UNICEF Greeting Card Operation (hereinafter: UNICEF GCO), in the light of article II, section 7, of the 1946 Convention on the Privileges and Immunities of the United Nations (hereafter: the Convention), which conditions the sale of such tax-free imported articles upon agreement with the host country. In the language of section 7:

> "The United Nations, its assets, income and other property shall be:
>
> "(*a*) . . .
>
> "(*b*) Exempt from customs duties and prohibitions and restrictions on imports and exports in respect of articles imported or exported by the United Nations *for its official use*. It is understood, however, that articles imported under such exemption will not be sold in the country into which they were imported *except under conditions agreed with the Government of that country*; (emphasis added)
>
> "(*c*) Exempt from customs duties and prohibitions and restrictions on imports and exports in respect of its publications."

2. The question of whether the sale of tax-free imported materials in UNICEF GCO is subject to an agreement with the host country was originated in a request made by a National Committee for UNICEF to this State's Ministry of Finance to import free of customs duties 200,000 kilograms of material consisting of greeting cards, posters, stickers, writing paper, books, booklets, calendars, cotton T-shirts, products of porcelain, glass or plastics, video cassettes and slides, all of which materials were designed for sale for the purposes of fund-raising on behalf of UNICEF.

3. The legal issue is whether the sale of tax-free articles in UNICEF GCO and the use of the proceeds for fund-raising purposes of the Organization could be considered an "official use" within the meaning of article II, section 7 (*b*), of the Convention, or a sale of publications which would not necessitate an agreement with the host country on terms and conditions of sale; or whether the sale of such imported articles could only be effectuated upon conditions agreed upon between UNICEF and the country in question.

II. *The 1946 Convention in the practice of the United Nations*

4. The term "publications" has consistently been interpreted by the United Nations to include not only books, booklets or any other printed matter, but also films and sound recordings prepared by or at the request of the United Nations. Thus, in a memorandum prepared by the United Nations Office of Legal Affairs in 1953 on the question of importation of films for distribution and sale in Member States, it was advised that films should be considered "publications" within the meaning of article II, section 7 (*c*), of the Convention, and that their importation and distribution constituted "official use".[40] The sale of UNICEF greeting cards has likewise been considered a sale of United Nations publications. Thus, the study prepared by the United Nations Secretariat on the practice of United Nations agencies in respect of privileges and immunities concluded that:

> "One of the most regular, as well as the largest, sale of United Nations publications is the annual sale of UNICEF greeting cards. The great majority of the hundred or more countries in which these cards are now sold permit their entry and sale without imposing any duty."[41]

5. In his note of 4 January 1990 to the Permanent Representative of (name of a Member State) on the question of exemption from customs duties for articles imported into this country for sale by the National Committee for UNICEF,[42] the Legal Counsel surveyed the general practice of States in this regard and concluded that:

> "Governments in countries where cards are sold have generally recognized that it would be inappropriate, as a matter of principle as well as law, for a Member State to impose customs duties on UNICEF GCO projects which are internationally determined and financed by contributions from Governments and from private sources. In most cases where the issue has been raised at all, the term 'official use' has been interpreted to include UNICEF fund-raising activities, so as to exempt the cards and calendars under article II, section 7 (*b*), or such materials have been treated as 'publications' under article II, section 7 (*c*) of the Convention."

III. *Conclusion*

6. It follows from the above that the sale of publications is not conditioned upon an agreement between the United Nations and the host country, nor is the import of any material for official use of the Organization. In the case in point, the imported articles can either be considered "publications" within the meaning of article II, section 7 (*c*), of the

Convention, and thus could be sold by UNICEF without having to agree first with the Government on the terms and conditions of sale, or else be considered articles imported for the purpose of fund-raising activities of UNICEF, the proceeds of which would be designated exclusively for the official use of the Organization.

7. With a view to avoiding future misunderstanding, it was decided to include in the Model Basic Cooperation Agreement between UNICEF and the Governments an express provision exempting articles designed for sale in UNICEF GCO from taxes, customs duties and any import restrictions. Article XVII, entitled "Greeting Cards and other UNICEF products", accordingly provides:

> "Any materials imported or exported by UNICEF or by national bodies duly authorized by UNICEF to act on its behalf, in connection with the established purposes and objectives of the UNICEF Greeting Card Operation, shall be exempt from all customs duties, prohibitions and restrictions, and the sale of such materials for the benefit of UNICEF shall be exempt from all national and local taxes."

16 April 1991

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## 28. Question of the importation of automobiles, free of duty, by officials of the Economic and Social Commission for Asia and the Pacific—Section 17 (*i*) of the 1954 Agreement relating to the headquarters of ESCAP

*Note to the Permanent Representative of a Member State*

The Legal Counsel of the United Nations has the honour to refer to the Agreement relating to the Headquarters of the Economic and Social Commission for Asia and the Pacific,[43] concluded on 26 May 1954.

It has been brought to the Legal Counsel's attention that certain officials of ESCAP experience difficulties in importing, free of duty, automobiles to the host country. In this connection, the Legal Counsel wishes to take this opportunity to remind the competent authorities of the host State that matters relating to the importation, transfer and replacement of automobiles are regulated by the pertinent provisions of section 17 (*i*) of the 1954 Agreement which, in particular, stipulates the following:

> "Officials of [ESCAP] shall enjoy within and with respect to the territory of [the host State] the following privileges and immunities:
>
> "...
>
> "(*i*) The right to import, free of duty and other levies, prohibitions and restrictions on imports, their furniture and effects within six months after first taking up their post in [the host State]; *the same regulations shall apply in the case of importation, transfer and replacement of automobiles as are in force for the resident members of diplomatic missions of comparable rank.*" (emphasis added)

The above provisions clearly indicate that ESCAP officials are entitled, within six months after first taking up their post in the host State, to import free of duty and other levies and restrictions on imports their "furniture and effects". However, as far as the importation of automobiles is concerned, a different requirement is applicable, namely, an entitlement to the same regulations as are in force in the host State for the resident members of diplomatic missions of comparable rank.

Such an understanding is correctly reflected in the Regulation of the Ministry of Foreign Affairs on motor vehicles in relation to persons entitled to privileges, which came into force on 19 June 1989. According to article 5.4 of the Regulation, staff members of the office of an international organization of level and rank equivalent to that of a (article 5.1) diplomatic agent of ambassadorial rank or of a (article 5.2) diplomat of lower ranks or a career consular officer shall be entitled to the same number of motor vehicles as the above-specified individuals. The Regulation does not establish any time-limit for the above categories of individuals concerning the right to import a free-of-duty automobile after first taking up their posts in the host State. The six-month time-limit is specified by the Regulation, pursuant to article 5.3, only with respect to the administrative and technical staff of a diplomatic mission.

Therefore, in the view of the Organization, the provisions of the second part of subparagraph (*i*) of section 17 should not be considered as establishing a six-month time-limit for the importation of duty-free automobiles by ESCAP officials at the Professional level.

The Legal Counsel trusts that the host State will bring its treatment of ESCAP officials into complete conformity with its obligation under the 1954 Agreement with a view to ensuring the applicability to them of the same regulations concerning the importation of automobiles as are in force in the host State for resident members of diplomatic missions of comparable rank.

31 October 1991

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29. QUESTION WHETHER THE SECRETARY-GENERAL SHOULD WAIVE IMMUNITY OF A UNICEF STAFF MEMBER TO ENABLE HER TO TESTIFY BEFORE A NATIONAL COMMISSION OF INQUIRY—ARTICLE V, SECTIONS 18 (*a*) AND 20, OF THE 1946 CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS—ALERNATIVE WAYS FOR UNICEF TO COOPERATE WITH THE COMMISSION OF INQUIRY

*Memorandum to the Director, Division of Personnel, United Nations Children's Fund*

1. This is in response to your inquiry as to whether the United Nations should waive immunity in the case of a UNICEF staff member to enable her to testify before a commission of inquiry appointed by national

authorities to investigate an incident in which she was one of the unfortunate victims.

2. According to the information contained in the documents attached to your memorandum, the staff member was, at the time of the incident, travelling on official business of the Organization. In accordance with article V, section 18 (*a*), of the 1946 Convention on the Privileges and Immunities of the United Nations,[44] to which the State concerned became a party in 1948 without any reservations, officials of the Organization are immune from legal process, *inter alia*, in respect of all acts performed by them in their official capacity. The acceptance by the State in question of the application of that Convention to UNICEF was confirmed in article VII of the Agreement it concluded with UNICEF on 5 April 1978.[45]

3. Under article V, section 20, of the Convention, the Secretary-General "shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations". In this regard, we fully share the view expressed in your memorandum that, taking into account all relevant circumstances of this particular incident, the United Nations should not waive immunity in this case and, therefore, the staff member in question should not testify before the commission of inquiry.

4. It should be noted, however, that the commission of inquiry is entrusted with an important task and, among other things, should consider and recommend measures which may be adopted to prevent the recurrence of such incidents. Therefore, our Office is of the view that UNICEF should cooperate with the commission and provide it, to the extent possible, with the information that could facilitate its work. We would recommend that UNICEF should, in a note to the Ministry of Foreign Affairs, indicate its readiness to reply in writing to the questions which the Ministry would address to it on behalf of the Commission.

5. At this stage, in our view, it would be premature to approach the authorities concerned at the level of the Secretary-General. We would prefer the second alternative suggested in your memorandum, whereby the local representative of UNICEF will send a note to the Ministry of Foreign Affairs invoking immunity from legal process on behalf of the United Nations.

5 April 1991

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## 30. Provisions of the 1946 Convention on the Privileges and Immunities of the United Nations, granting United Nations officials exemption from taxation on the income they receive from the Organization—General Assembly resolution 76 (I) of 7 December 1946—Meaning of the term "officials"—Tax applicable to pensions and lump-sum commutation payments

*Note to the Permanent Representative of a Member State*[46]

The Legal Counsel of the United Nations has the honour to refer to the note verbale of 5 September 1991 from the Permanent Mission of (name of a Member State) requesting information concerning the provisions of the Convention on the Privileges and Immunities of the United Nations[47] (the Convention). The information specifically requested concerns:

(*a*) The practice of States parties to the Convention, with specific reference to the application of article V, section 18 (*b*), of the Convention;

(*b*) Legal opinions rendered by the Secretariat concerning the provisions of article V, section 18 (*b*), of the Convention, especially on the application of those provisions to pensions paid to retired United Nations officials;

(*c*) The list drawn up by the Secretary-General in accordance with the provisions of article V, section 17, of the Convention specifying the categories of officials to which the provisions of articles V and VII of the Convention shall apply.

In principle, the practice of States which have acceded to the Convention without reservation is to abide by its provisions.

For the purposes of article V, section 18 (*b*), of the aforementioned Convention, the General Assembly provided a definition of the term "official" in its resolution 76 (I) of 7 December 1946. In that resolution, the Assembly approved the granting of the privileges and immunities referred to in articles V and VII of the Convention (including the provision relating to exemption from taxes) "to all members of the staff of the United Nations, with the exception of those who are recruited locally and not assigned to hourly rates". Consequently, according to this definition, United Nations officials recruited locally and not assigned to hourly rates have the right, whatever their nationality, to be exempted from income tax on salaries paid to them by the Organization.

The purpose of this exemption is to guarantee equal treatment of all officials, whatever their nationality, and to ensure that funds paid by all Member States to the Organization's budget are not returned to the Treasury of a State in the form of taxes levied on salaries paid to officials. The General Assembly stated these principles clearly in its resolution 78 (I) of 7 December 1946, in which it decided: "In order to achieve full application of the principle of equity among Members and equality among personnel of the United Nations, Members which have not yet completely exempted from taxation salaries and all allowances paid out of the budget of the Organization are requested to take early action in the matter."

It should be noted that, with a few exceptions, States parties to the Convention exempt their nationals serving at the United Nations from taxation on income they receive from the Organization. When such exemption has been refused by a State, the United Nations has applied as far as possible the provisions concerning the Tax Equalization Fund, established by the General Assembly in its resolution 973 (X) of 15 December 1955, in such a way that the amounts reimbursed by the United Nations to the officials involved are charged against the State's credit to the Fund.

Regarding taxes on pensions paid to United Nations staff, a distinction must be made between lump sums paid by the United Nations Joint Staff Pension Fund when a retirement benefit is commuted and the annual amount of the benefit as such.

Lump sums paid by the Fund when a retirement benefit is commuted are considered separation payments to the official concerned and are, consequently, exempted from taxes in accordance with article V, section 18 (*b*), of the Convention. In this limited sense of the term, "emoluments" are considered to include pensions.

As for the annual pension, or the pension proper as distinguished from the lump-sum commutation payment, the question of taxes owed is not regulated by any international agreement or by any United Nations internal rules, but depends upon the national legislation of States. The issue of whether and to what extent a State imposes taxes on pensions paid to international civil servants on active duty or retired is a matter depending on the domestic law of a State.

Legal opinions concerning the provisions of article V, section 18 (*b*), of the Convention and taxation of retirement benefits paid to United Nations personnel are contained in the study prepared by the Secretariat on the subject of the practice concerning legal status, privileges and immunities of the United Nations, the specialized agencies and the International Atomic Energy Agency, issued as a General Assembly document in 1967 under the symbol A/CN.4/L.118 and Add.1 and 2, and updated in 1985 under the symbol A/CN.4/L.383 and Add.1-3.[48]

The lists of United Nations Secretariat staff communicated to Governments of Member States are drawn up in accordance with Secretariat practice. According to this practice, the names of officials holding contracts that would begin after the list was drawn up or those holding contracts of less than one year in duration, for example, would not be included in this type of list. This practice is clearly described in the introduction to the annual reports submitted to the General Assembly containing the list of United Nations Secretariat staff.

In this connection, it should be emphasized that the information contained in the lists sent to Member States constitutes neither the legal basis for the application of the Convention on the Privileges and Immunities of the United Nations nor a condition to which its application is subject. The lists are simply an administrative tool to facilitate the application of the Convention and, as mentioned above, they do not include all officials of the Organization.

12 September 1991

## 31. INTRODUCTION IN THE LEGISLATION OF THE HOST COUNTRY CONCERNING THE ISSUANCE OF G-4 VISAS TO THE IMMEDIATE FAMILY OF STAFF MEMBERS HAVING G-4 VISA STATUS AND ADDITIONAL REQUIREMENTS TO BE MET BY CLOSE RELATIVES OTHER THAN SPOUSES AND MINOR UNMARRIED CHILDREN OF SUCH STAFF MEMBERS—ARGUMENTS MILITATING AGAINST IMPOSING SUCH REQUIREMENTS ON THE ISSUANCE OF G-4 VISA STATUS TO THE CLOSE RELATIVES UNDER CONSIDERATION

*Note to the Permanent Representative of a Member State*

The Secretary-General of the United Nations presents his compliments to the Permanent Representative of the United States Mission to the United Nations and has the honour to raise with the Permanent Representative the changes which have recently been introduced by the United States authorities with respect to the issuance of G-4 visas to the immediate family of staff members holding G-4 visa status (referred to hereinafter as "staff members").

Under the United States immigration laws, the term "immediate family" includes close relatives other than spouses and minor unmarried children of staff members, provided that such other close relatives meet certain criteria.

Until the beginning of this year, these criteria were those enunciated in the Code of Federal Regulations of the United States, subpart C—Foreign Government Officials—paragraph 41.21, subparagraphs 3 (i), (ii) and (iii), on which are based the provisions of paragraphs 5 and 6 of the Secretariat administrative instruction ST/AI/294 of 16 August 1982 on "Visa status of non-United States staff members serving in the United States".

At the beginning of this year the United States Mission to the United Nations informed the Secretariat that additional criteria would have to be met by the close relatives in question to be eligible for G-4 visa status. The additional criteria are those provided for under subparagraphs 3 (iv) and (v) of that same part of the Code on Federal Regulations of the United States as mentioned above, which require, respectively, that such close relatives of staff members be:

> "(iv) ... recognized as dependents by *the sending Government* [emphasis added] as demonstrated by eligibility for rights and benefits, such as the issuance of a diplomatic or official passport and travel and other allowances, which would be granted to the spouse and children of the principal alien;"
>
> "(v) ... individually authorized by the Department."

Furthermore, the United States Mission made it clear to the Secretariat that, in the absence of the evidence provided for under (iv) above, "the applicant does not qualify as [a] close relative for G-4 visa purposes".

In imposing such requirements on the issuance of G-4 visa status to the close relatives under consideration, it does not seem that the United States authorities took into consideration the following points:

(i) Unlike foreign government officials, staff members do not have a "sending Government" within the meaning of the provisions quoted under (iv) above. In this respect, it is relevant to refer to the provisions of Article 100 of the Charter of the United Nations, which provides:

> "1. *In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any Government* [emphasis added] or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.
>
> "2. Each Member of the United Nations undertakes to respect *the exclusively international character of the responsibilities of the Secretary-General and the staff* [emphasis added] and not to seek to influence them in the discharge of their responsibilities."

(ii) Granting secondary dependants the same allowances awarded to spouses and dependent children entails a statement of budget and financial implications for consideration by the General Assembly. If approved, such a measure would require an increase in assessments for the Member States. However, it would not be realistic to expect Member States to authorize the United Nations to assume the costs that such requirements involve, e.g., repatriation travel, education grant or home leave. In this respect, it is necessary to point out that when staff members request a G-4 visa for a secondary dependant, they commit themselves to become financially responsible for such dependants.

(iii) Whether in the home country or at United Nations Headquarters, a staff member may be the only individual able to take care of and support an elderly parent or a minor sibling. A refusal of a derivative visa in these cases may force the staff member to choose between his/her career and filial or fraternal responsibilities. In this connection it should be recalled that Article 101, paragraph 3, of the Charter provides that "... Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible." Accordingly, international civil servants are recruited from quite different cultural environments and for some of them it might be totally unacceptable not to include elderly parents or young dependent siblings under the same household. A rigid policy which does not take into consideration the above-mentioned arguments will undoubtedly strain or limit the ability of the Secretary-General to recruit staff in accordance with the provisions of Article 101, paragraph 3, of the Charter.

(iv) While the posting of foreign government officials is usually limited to a term of duty averaging in general four years, this is not the case for the majority of staff members posted at Headquarters in New York. Therefore, they establish their residence and household in the United States for a prolonged period.

On the basis of the foregoing, it is therefore clear that the requirements applicable to foreign government officials cannot all be applicable to United Nations staff members.

The enforcement of such requirements *vis-à-vis* the United Nations since the beginning of this year eliminates any chance for staff members to

enjoy the possibility of reuniting with close relatives who, until recently, were granted G-4 visas and radically alters an established policy of the host country which was consistent with the relevant provisions of the 1946 Convention on the Privileges and Immunities of the United Nations.[49]

In this respect, it should be recalled that, in acceding to the above-mentioned Convention on 29 April 1970, the United States did not make any reservation to the provisions of article V, section 18 (*d*), according to which officials of the United Nations shall: "be immune, together with their spouses and *relatives dependent on them*, [emphasis added] from immigration restrictions and alien registration". The expression "relatives dependent on them" referred to above is as flexible as the expression "immediate family" referred to in the relevant part of the Code of Federal Regulations of the United States and embraces classes of relationship broader than spouses and minor unmarried children.

By virtue of section 34 of the final article of the above-mentioned Convention, the Government of the United States has undertaken to be "in a position under its own law to give effect to the terms of this Convention."

The Secretary-General would be grateful if renewed and urgent consideration could be given to this matter by the competent authorities with a view to reinstating the policy which prevailed prior to January 1991.

16 July 1991

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### 32. Legal basis of the United Nations authority to establish and operate telecommunications facilities on the territory of a State

*Memorandum to the Senior Security Coordination Officer, Office of Human Resources Management*

1. In connection with the questions raised by the Chief, UNDP Field Security Section, we would like to make the following comments.

2. Neither the Convention on the Privileges and Immunities of the United Nations[50] nor the Standard Basic Assistance Agreement contain provisions entitling the United Nations to install communications facilities without the prior approval of a given Government.

3. The authority of the United Nations to establish and operate telecommunications facilities comes from the International Telecommunication Convention[51] and the Agreement between the United Nations and the International Telecommunication Union.[52] Under article XVI of the Agreement, ITU "recognizes that it is important that the United Nations shall benefit by the same rights as the members of the Union for operating telecommunication services". Thus, as far as ITU is concerned, the United Nations has the rights of a member Administration, including, as to radio, that of registering the frequencies.

4. However, the United Nations can only operate as an Administration on the territory of a given State by virtue of an arrangement reached with its Government. This is usually done either through the inclusion of the relevant provisions in the text of a headquarters agreement or by special arrangement, frequently concluded in the form of an exchange of letters.

5. In seeking an arrangement with the particular Government, the United Nations usually emphasizes various factors and sometimes makes reference to Article 105, paragraph 1, of the Charter of the United Nations providing that the Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes. The United Nations also frequently brings to the attention of the Government that in order to exercise its functions efficiently it should have direct point-to-point contacts with its duty stations, which cannot be effectively exercised by ordinary communication channels.

6. In a number of cases, the United Nations has stressed the importance of radio communication facilities for ensuring the security and safety of its personnel and asked Governments to give quick and favourable consideration to a request to install communications facilities for these purposes.

29 May 1991

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## 33. Question of the ownership of the copyright in the design of a stamp created under a Special Service Agreement concluded with the United Nations—Question whether the designer was an "independent contractor" or an "employee" under the United States Copyright Act—Possibility under the Act of transferring ownership of a copyright

*Memorandum to the Chief, United Nations Postal Administration*

1. This responds to your memorandum of 11 June 1991 in which you asked this Office for assistance in the interpretation of the phrase "work made for hire" appearing in a form to be submitted by the United Nations to the United States Copyright Office for copyright registration of the design of a United Nations stamp. In particular, you ask whether the designer who created the design pursuant to a Special Service Agreement is an employee or whether this is a work made for hire under the United States Copyright Act.

2. For the reasons set out below we consider that:

(*a*) The designer has initial copyright in the design (see paras. 3-9);

(*b*) The United Nations Postal Administration (UNPA) has a contractual right to become copyright owner (see paras. 10-11);

(*c*) UNPA should immediately file a "recordation of transfer of copyright ownership" to protect its rights (see paras. 12-13).

(i) *The general rule*

3. The Federal courts have subject-matter jurisdiction over controversies arising from copyrights covered by the Copyright Act of 1976 (17 U.S.C. section 101—hereinafter, "the Act"), which replaced the 1909 version. However, until 1989, the "work made for hire" provisions of the Act were applied inconsistently by the different Federal District Courts. In 1989, the United States Supreme Court "granted *certiorari* to resolve a conflict among the courts of appeals over the proper construction of the 'work for hire' provisions of the Act" (*Community for Creative Non-Violence v. Reid*, 109 S.Ct. 2166 (1989)—hereinafter, "CCNV"). The opinion issued in that case has clarified and standardized the law in this area.

4. The Act provides that copyright ownership "vests initially in the author or authors of the work" (17 U.S.C. section 201 (*a*)). Thus, prima facie, the designer is copyright owner.

(ii) *Employment and work for hire exceptions*

5. The Act *allows an exception to the general rule if a work is made for hire by "an employee within the scope of his or her employment"* (emphasis added) (section 101 (1)); then "the employer or other person for whom the work was prepared is considered the author" and owns the copyright unless there is a written agreement to the contrary (section 201 (*b*)). The definition of the terms "employer" and "employee" are critical to the application of the statute, yet they are nowhere defined in the Act. This situation engendered much of the confusion among the Federal courts in deciding which works were "for hire" and which works were not.

6. The United States Supreme Court has decided in the CCNV case that "[t]o determine whether a work is a 'work made for hire' within the [section] 101 definition, a court should first apply general common law principles of agency to ascertain whether the work was prepared by an employee or an independent contractor, and, depending on the outcome, should then apply either section 101 (1) or section 101 (2)".

7. Works by independent contractors may be "for hire", *but only if they fit into one of nine categories, and were specially commissioned by a signed, written contract* (emphasis added) (section 101 (2)). The nine categories are as follows:

(1) A contribution to a collective work;

(2) A part of a motion picture or audiovisual work;

(3) A translation;

(4) A supplementary work;

(5) A compilation;

(6) An instructional text;

(7) A test;

(8) Answer material for a test;

(9) An atlas.

8. In the present matter, the "design" work for the S20 Vienna definitive stamp does not seem to fit into any of the nine categories of section 101 (2). The only other possibility to establish the work as "for hire" would be if the artist could be considered an "employee" of UNPA. Some of the factors under the common law of agency that determine "employee" status are as follows:

(1) Skill required;

(2) Source of instrumentalities, tools;

(3) Location of work;

(4) Duration of relationship between parties;

(5) Hiring party's right to assign additional projects;

(6) Extent of hired party's discretion over when and how long to work;

(7) Method of payment;

(8) Hired party's role in hiring and paying assistants;

(9) Regular business of hiring party;

(10) Provision of employee benefits;

(11) Tax treatment of hired party.

[CCNV]

9. Applying these legal parameters to the independent professional situation of the artist and the nature of the work that she performed, it is apparent that the artist was an "independent contractor" and not an "employee" within the meaning of the Act. Therefore, "authorship" and "initial copyrights" must be said to reside with the artist.

B. UNPA'S RIGHTS UNDER THE CONTRACT TO COPYRIGHT IN DESIGN

10. While UNPA has not acquired initial copyright as the "author", it does seem to be a "copyright owner" as a result of transfer of copyrights by the author, according to the "TITLE RIGHTS" [annex A, para. 3] provisions of the employment contract [CPTS/CON/04291]. Section 201 (*d*) (1) of the Act stipulates that "[t]he ownership of a copyright may be transferred in whole or in part by any means of conveyance" provided that it is "in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent" (section 204 (*a*)). These conditions appear to have been met.

11. Nevertheless, because there are many parts to a copyright and a copyright can be transferred "in whole or in part" (section 201 (*d*) (1)), the extent of ownership transferred must be ascertained. The language of the contract in this matter appears to have worked to convey to UNPA the entire copyright, including the five "exclusive" rights: reproduction, preparation of derivative works, public distribution, public performance and public display (section 106; 201 (*a*)).

C. PROTECTION OF UNPA'S COPYRIGHT INTEREST

12. Given the apparent relative status of the parties, the artist as "author" and the UNPA as "copyright owner" by virtue of transfer, the appropriate application to submit to the United States Copyright Office would be not "registration of copyright", but "recordation of transfer of copyright ownership".

13. The copyright claimant must give a brief "statement" summarizing the means by which the ownership of the copyrights was obtained. In this case, UNPA obtained ownership of the copyrights "by written contract", and such an entry should satisfy the "statement" requirement of the form. In addition, a copy of the document or work to be registered must be included and the registration fee paid.

14. UNPA should, therefore, apply immediately to the Copyright Office for recordation of transfer of copyright ownership (section 205 generally). The timing of application can affect copyright ownership *vis-à-vis* competing applications (section 205 (*e*)) and is a necessary prerequisite to litigation (section 205 (*d*)). However, the common law has established that lack of recordation does not necessarily invalidate a transfer of copyright ownership.

12 July 1991

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34. ADVICE ON THE USE OF INCOTERMS AND SIMILAR SHORTHAND EXPRESSIONS OF CONTRACTUAL TRADE TERMS IN UNITED NATIONS CONTRACTS

*Memorandum to the Director, Supply Division, United Nations Children's Fund, Copenhagen*

1. This is in response to your letter dated 10 July 1991 in which you requested clarification of the advice we provided in a previous memorandum, cautioning against excessive reliance on INCOTERMS and similar shorthand expressions of contractual trade terms. That advice is based upon the considerations discussed below.

*Background*

2. There have developed in commercial practice, both internationally and within domestic trading practice, shorthand means of referring to, and incorporating into sales contracts, contractual terms regulating certain rights and obligations of the parties to the contract. Such shorthand expressions are hereinafter referred to as "shorthand trade terms". Examples of traditional shorthand trade terms are "CIF" and "FOB". Shorthand trade terms may, for example, regulate such matters as the party that is responsible for arranging and paying for the carriage of the goods and insurance; the party that is responsible for obtaining export and import licences; and the place of delivery of the goods. Shorthand trade terms typically also establish the time when the risk of loss of or damage to the

goods passes from the seller to the buyer. Shorthand trade terms are used in sales contracts as a means of regulating such issues without having to do so expressly in sometimes lengthy contractual clauses.

3. Shorthand trade terms do not, of course, have intrinsic content or meaning, and do not in and of themselves indicate which rights and obligations of the parties they encompass or the way in which those rights and obligations are regulated. The terms must be given such content and meaning, either by definitions provided by the rules of the legal system that governs the contract or by reference in the contract to a set of definitions of the shorthand trade terms used, such as the International Chamber of Commerce (ICC) INCOTERMS, 1990,[53] which are generally accepted definitions in international trade.

*Definitions provided by rules of national legal systems*

4. Some national legal systems, such as that of the United States, define the meaning and content of shorthand trade terms. In the United States, such definition is contained in the Uniform Commercial Code (UCC). For example, article 2-319 defines the terms "FOB" and "CIF", and articles 2-320 and 2-321 deal with "CIF" and "C&F". In general, the meaning of such terms, if used in a contract that is governed by the law of states in the United States which apply the UCC, will be as set forth in those articles, unless the contract itself refers to some other applicable law or definitions.

*Reference in contract to set of definitions; INCOTERMS*

5. A sales contract that employs shorthand trade terms may, instead of relying on definitions provided by rules of national law, refer to a recognized set of definitions to provide the meaning and content of the shorthand terms used. Most legal systems permit the parties to a contract to refer to such sets of definitions to define the terms used.

6. A set of shorthand trade terms and definitions for use in international trade is provided by INCOTERMS. INCOTERMS were developed by the International Chamber of Commerce as a means of avoiding difficulties encountered by traders arising from the fact that different national legal systems give different meaning and content to the same or similar trade terms (e.g., CIF, FOB). Those disparities have led to uncertainties and disputes as to how particular trade terms used in international sales contracts should be defined. INCOTERMS were originally adopted by ICC in 1953 and were revised and updated in 1976 and again in 1990. When a contract uses a particular trade term and provides that it is to be defined in accordance with INCOTERMS, the INCOTERMS definition will normally govern the content and meaning of the trade term regardless of the international nature of the contract.

*Difficulties encountered in the use of trade terms in United Nations contracts*

7. Difficulties have arisen in the use of shorthand trade terms in United Nations contracts, owing essentially to a failure by those preparing the contracts to appreciate fully the nature, function, usage and limitations

of shorthand trade terms. We have encountered numerous cases where a shorthand trade term has been used in a contract without identification of the source of interpretation (e.g., ICC INCOTERMS or UCC); and in some cases the trade terms have been incorrectly used or countermanded by conflicting instructions. In those cases, the legal consequences were quite different from those originally intended. In particular, the problems discussed in the following paragraphs have arisen.

(a) *Insufficient awareness of legal consequences of use of shorthand trade terms*

8. Sometimes, shorthand trade terms are inserted in United Nations contracts without sufficient awareness of the legal consequences of the use of the terms. In one case, an automobile was purchased under INCOTERMS CIF for use in the field. It was to be shipped from the port of manufacture to the nearest port of destination but to be driven by road to the place of final destination. The automobile was damaged in transit when being driven to the place of final destination. The United Nations unit involved was surprised and disappointed to learn that it could not compel the manufacturer to replace the automobile; it had not realized that although, under CIF as defined by INCOTERMS, the seller was obliged to contract and pay for the cost of insurance and shipment of the automobile to the final destination, the risk of loss passed to the purchaser when the manufacturer delivered the automobile to the ocean carrier for shipment. Furthermore, although the automobile was insured, the insurance carrier was only prepared to repair but not to replace the automobile. The United Nations unit had to accept the automobile and the offer by the insurer to pay for the repairs.

(b) *Lack of definition of trade terms*

9. Trade terms have been used in United Nations contracts without giving any indication as to which rules are to define the meaning and content of the terms. As noted above, the legal consequences that arise from the use of a particular trade term depend upon the definition that applies to the term. In one case, a contract with a supplier outside the United States referred simply to the term "CIF". No indication was given as to whether that term was to be defined according to the definition in INCOTERMS or the definition contained in the rules of a particular national legal system. This led to uncertainty and confusion as to meaning and legal consequences of the term used.

(c) *Conflicting instructions*

10. When shorthand trade terms are used no other conflicting instructions or contract terms should be incorporated in the contract document; otherwise, uncertainty and ambiguity would result and the purpose of using the shorthand trade term would be defeated.

*Recommendations*

11. For the reasons explained above, this Office has in the past recommended caution in the use of shorthand trade terms. Although they

are and ought to be used for convenience in purchase orders, care should be taken to:

(*a*) Specify the definition authority (e.g., ICC INCOTERMS 1990);

(*b*) Include no conflicting or contradictory instructions.

12. Moreover, when INCOTERMS are used, they should be used unaltered, in their defined form. If those terms were to be deviated from, the advantages of using them would be lost: the meaning of such terms would be in doubt and the intent of the parties would have to be ascertained, making arbitral proceedings likely.

13. Furthermore, shorthand trade terms should be used only with a full understanding of their implications and legal consequences, the main one of which is to pass the risk of loss to the buyer upon the seller completing the shipping formalities (pay freight, effect insurance and hand over to carrier in CIF). The advice of this Office should be sought in any case of doubt.

14. We further recommend that, when shorthand trade terms are used, only the INCOTERMS version should be used, regardless of whether the contract is with a United States or a foreign firm. The dual approach which has hitherto been used by some agencies (i.e., using INCOTERMS in contracts with non-United States firms, and using the UCC trade terms in contracts with United States firms) has led to confusion and is undesirable, perhaps even unnecessary. The proper way to refer to INCOTERMS in the contract (and, in particular, to the most recent (1990) version) is to add, after the shorthand term, "ICC INCOTERMS 1990".

15. In more complex contracts, it would be preferable to elucidate verbally the relevant obligations of the parties and the contractual terms and conditions.

16. You may wish to know that ICC has published booklets containing the 1990 version of INCOTERMS, as well as a "user's guide" to INCOTERMS. It would be desirable for the substantive units of agencies preparing contracts or purchase orders using INCOTERMS to have those publications.

12 September 1991

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

### 1. INTERNATIONAL LABOUR ORGANISATION

#### LEGAL OPINION OF THE INTERNATIONAL LABOUR OFFICE[54]

Observations of the International Labour Office concerning the request for an opinion submitted to the Court of Justice of the European

Communities by the Commission with regard to the competence of the Community to "conclude the Chemicals Convention, 1990 (No. 170)"

*Note to member States*

1. The submission made by the Commission to the Court seeks to demonstrate, *inter alia*, the competence of the Community to "conclude" the Chemicals Convention, 1990 (No. 170).[55] The relevant arguments are based on considerations of Community law, which obviously fall outside the competence of the International Labour Office. It also concerns developments related to ILO's Constitution,[56] its constitutional practice and its standard-setting system (including more specifically Convention No. 170), for which certain States members of the Community have requested comments from ILO. It is fully in line with the latter's constitutional functions, as they have developed in practice, to provide member States or any other interested bodies with clarifications which they may consider useful as regards the meaning or scope of the provisions of the Constitution or of international labour conventions. However, these clarifications are given with the usual proviso that, in accordance with article 37 of the ILO Constitution, only the International Court of Justice is competent to give an authoritative interpretation of the obligations deriving from the Constitution or a subsequent convention.[57]

2. The matters brought before the Court by the Commission concern the relationships between two legal systems which have been established by treaty. Whatever internal differences there may be between these two systems, in international law they are placed on an equal footing, and the law of treaties, apart from the general principles which can be found in article 234 of the Treaty of Rome[58] itself, does not offer a clear-cut solution to establish an order of priority between them. Furthermore, and in contrast perhaps to the impression given by certain references to the Office's "pragmatism" (page 6 of the submission), the provisions of the Constitution of the International Labour Organisation are not more "flexible" than those of the Treaty of Rome. In this connection, as shown by the documents appended to the Commission's submission,[59] while the International Labour Office has admittedly spared no efforts to propose practical solutions to the various problems affecting the relations between ILO and the Communities (these proposals have not yet been endorsed by the representative bodies of the Organisation), these efforts were made solely to ensure that the rules of these two systems were applied and interpreted so as to reconcile as much as possible the obligations deriving from each of them.

3. From this point of view, in order to have a better understanding of the problem, it seems important to place the various specific questions raised in the request for an opinion in relation to a more general analysis of the nature and the particular characteristics of the obligations of member States under the ILO Constitution.

4. In this regard a distinction between the following four points would appear necessary: the obligations for member States deriving from their membership of ILO; tripartism; international labour conventions; and supervisory procedures.

A. *Nature of the obligations resulting from membership of ILO*

5. In accordance with article 1 of the Constitution, ILO is called upon to work towards the implementation of the programme set out in the preamble to the Constitution and in the Declaration concerning the aims and purposes of ILO which is annexed to it. This programme aims at the constant improvement of working conditions and social protection as well as the dissemination of information on progress in these fields throughout the world. "Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries"—here the Organisation seeks to achieve progress in social conditions by a system of "levelling upwards". From the outset article 19 of the Constitution was conceived as the key instrument in this approach. The obligations deriving from it should be considered from this point of view.

6. Thus, a State which becomes a member of the Organisation is not a more or less passive subject of particular rights and obligations. It agrees to participate, actively and in good faith, in the implementation of the program in question. With regard to standard-setting work, this means a substantive contribution, on the basis of national experience, to the technical preparation of conventions as well as the implementation of adopted standards once national conditions make this possible. Although the Constitution does not establish a formal duty to ratify conventions, States are still legally bound, particularly in the framework of article 19.5 of the Constitution, to help the Organisation fulfil its mission by endeavouring in good faith to ratify the conventions which can be implemented at the national level, without waiting for other States to do the same. It may be said in this regard that, in the interest of ensuring the greatest possible respect for the obligation incumbent on the Twelve by virtue of their ILO membership, the action of the competent body at the European level should not be such as to prevent States that are able to accept obligations under an international labour convention from doing so.

B. *Tripartism*

7. In accordance with the ILO Constitution, complemented by the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144),[60] as well as the specific provisions of the other Conventions, the social partners play a fundamental role at all stages of the Organisation's standard-setting activities. Thus, they are consulted during the technical preparation of standards (Convention No. 144); they participate fully in their adoption (articles 3, 4 and 19 of the Constitution); they are consulted on the proposals to be submitted to the competent authority in accordance with paragraph 5 (*b*) of article 19 of the Constitution (Convention No. 144); and they play an active part in the supervisory system (articles 23, 24 and 26 of the Constitution and Convention No. 144).

8. In doing so the representatives of the employers and workers act quite independently of their Governments. The statement, in paragraph 5 (*c*) of the Commission's request for an opinion, that when participating in the negotiation of international conventions the representative of the social partners are not acting as such, but as representatives of mem-

ber States, is in direct contradiction to the express stipulations of the Constitution. At the International Labour Conference, employers and workers are part of a national delegation, but they represent only their constituents (article 3, paragraph 1, of the Constitution); they are required to be chosen in agreement with the most representative industrial organizations (article 3, paragraph 5, of the Constitution) and are entitled to vote individually (article 4 of the Constitution). There are even cases where a non-governmental delegate to the Conference exercises his power under article 26, paragraph 4, of the Constitution to submit a complaint against the Government of his country.

9. Consultation with the social partners, as laid down by the Constitution, by Convention No. 144 or by the provisions of particular conventions (such as articles 3 and 4 of Convention No. 170), is not simply a formal requirement, as the request for an opinion suggests. Rather, it means regular and ongoing involvement of the social partners in the implementation of standards. The evolution of the terminology used over the years is significant in this regard: while the first few instruments of ILO foresaw that member States should take measures "following consultation" with industrial organizations, the current wording (see the example in article 4 of Convention No. 170) provides that measures should be taken "in consultation" with these bodies. Convention No. 144, by referring to "effective consultations", is along the same lines.

10. There is no doubt that the tripartite structure of ILO represents a major obstacle to the opening up of the Organisation to entities other than States, such as regional integration organizations, and that it gives rise to thus far unresolved difficulties with regard to the implementation at the supranational level of member States' obligations under the ILO Constitution.

C. *The specific nature of international labour conventions*

11. An outline of the principal aspects of this specificity seems indispensable in order to determine correctly to what extent a conflict may actually arise between the obligations to which one State may be subjected under an ILO convention and under derived Community law.

12. ILO conventions do not aim as such to promote the harmonization of the legislation of the various member countries (even if they contribute to this); they seek to establish standards that are intrinsically valid, taking into account the level of a country's development. As a rule the standards adopted are not an obstacle to the application of a higher standard in social terms. The Organisation's Constitution (article 19, paragraph 8) thus expressly safeguards what has already been gained at the national level in the form of more favourable conditions than those provided for in the conventions. Moreover, ILO conventions are only rarely considered "self-executing" and more often than not leave a wide margin of freedom to member States as to the manner in which they should attain the objective sought.

13. In these circumstances it is difficult to see from a strictly legal point of view how the ratification of a convention by States which are

members both of ILO and the Communities would be such as to "impair future advances in Community law". Indeed, it is by reason of article 19.8 that member States bound by ILO conventions may incorporate in their legal system advances resulting from Community law.

14. From a more practical point of view, it may be asked whether the (slight) risk of incompatibility with Community law really poses a problem. The case of the dispute concerning the night work of women in France, cited by the Commission, is instructive in this regard: there was no Community standard on the subject of night work, while the former ILO convention, by which France was still bound, protected working women. The Court of Justice of the European Communities, basing its opinion on the 1976 Directive concerning equality of treatment, considered that the aim of protection no longer justified a distinction between men and women in this field. At almost the same time ILO was adopting new standards in the field which applied to both sexes. Thus, the Court's decision will receive full effect with the denunciation of the former Convention and, if considered appropriate, the ratification of the new one.[61] And if, in the final analysis, it is the ILO standard which has to give way, at the appropriate time (that is, the time at which denunciation is possible), it may be asked to what extent Community law would really be "affected" by the adherence of a member of the Community to an ILO convention.

D. *The supervisory system*

15. A brief reminder of this system is necessary in order to have a precise appraisal of the implications of a possible ratification by the "competent authority" of the Community.

16. The ILO Constitution has established a very sophisticated system for the supervision of the application of standards within the Organisation. Even before a convention is ratified, every member is bound to submit the text to the competent authority and to inform the Director-General of ILO of measures taken in this regard. To avoid any misunderstanding it should be recalled that the constitutional practice of the Organisation recognizes that these obligations have a dual objective: that of mobilizing public opinion and that of taking measures to give effect to the standard in question. In this regard the Office has accepted that the "competent authority" under article 19, paragraph 5, of the ILO Constitution may, in the case of a regional integration organization, be the same as the body in the grouping to which legislative authority in this field has been transferred, but this does not mean that submission to such a body exhausts all the constitutional obligations of the member State under article 19.5 and having regard to this practice. It should also be emphasized that if a convention cannot be ratified in the short term, the member is still under an obligation to report periodically to the Director-General, stating the difficulties which prevent or delay this ratification. Once the Convention has been ratified, the member is obliged to report regularly on the measures taken to implement the convention. These reports are examined by a special Committee of Experts as well as by the General Conference. Moreover, articles 24 onwards of the Constitution provide for procedures for making representations and complaints concerning an alleged

failure by a member to secure the effective observance of a convention to which the member is a party.

17. In the context of a possible regionalization of adherence to a convention, under the formula envisaged by the Commission and the Office, several questions concerning the supervisory system would still have to be resolved. The responsibility for implementing the convention in the territory of a member State would no doubt remain essentially with that State. Similarly, the substantive content of the reports on the application of the convention, as well as the contribution of the social partners, should very likely continue to be prepared at the national level. Normally the "party accused" in any representation or complaint could be none other than the party at fault; that is generally the State. It is of course possible to envisage arrangements whereby any report and any procedure would go through the regional body, but it would then be necessary to ensure that this is not done at the expense of an excessive complication of the supervisory system or the weakening of its efficiency. Finally, it should be recalled that, under article 26, paragraph 1, of the ILO Constitution, only a member State that has ratified a convention is entitled to lodge a complaint alleging the non-observance of the Convention by another ratifying State.

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18. It can be seen from the foregoing observations that the matter is highly complex and it is no coincidence that it has been under consideration for some 10 years. This complexity should, however, not make one lose sight of two essential considerations which it seems useful to recall in conclusion.

19. First, the impasse in which the apparent conflict of obligations could place the Community members of the Organisation would not be in the interest of either organization:

—It would certainly not be in ILO's interest because the European States have traditionally played a catalytic role in the Organisation and it is important for the latter not to see a decline in ratifications from these countries;

—Nor does it seem to coincide with the interest which the Community should logically have, if only from the point of view of competition, to promote throughout the world social standards which bear as great a resemblance as possible to its own, as is precisely the case of the convention concerning safety in the use of chemicals at work, for which the Commission's submission rightly illustrates the relationship with certain Community directives. It is quite clear that the process of "levelling upwards" may very likely be hampered if the Community States are prevented from ratifying conventions as a result of such an impasse.

20. Secondly, in the light of the foregoing considerations, it seems that such an impasse can easily be avoided. Quite apart from the obligations which are binding on the States of the Community by virtue of their mem-

bership of ILO, these considerations in fact stress the very specific nature of ILO standards and suggest that it would not be possible to blindly extrapolate in their regard principles or methods of reasoning that have been developed in connection with international instruments of a very different nature and purpose.

12 November 1991

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## 2. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

Question whether membership of FAO by a member organization would entitle that member organization also to participate in joint subsidiary bodies at FAO—Interpretation of the so-called Vienna clause

*Opinion of the Legal Counsel given at the 99th session of the Council of FAO (June 1991)*

I have been asked to give an opinion on two questions:

(1) Whether membership of FAO by a member organization would entitle that member organization also to participate in joint subsidiary bodies of FAO, such as the Codex Alimentarius (a joint FAO/WHO body) and the CFA (a joint United Nations/FAO subsidiary body);

(2) If the answer to the first question is yes, how would this affect the interpretation of the Vienna clause, and in particular would this mean that a member organization of FAO would be assimilated to a member State for the purpose of eligibility for participation in other agreements outside FAO using that clause?

In answer to the first question, in my opinion membership by a member organization in FAO would entitle that member organization to participate in bodies operated jointly with other organizations such as the Codex Alimentarius, a joint FAO/WHO body, and the World Food Programme Committee on Food Aid Policies and Programmes (CFA), a joint subsidiary body of the United Nations and FAO. The basic documents establishing both of these joint bodies allow for membership by member nations, or member States of one of the parent organizations. The effect of the proposed assimilation clause in the amendments to the FAO Constitution, however, would be to allow regional economic integration organizations that are members of FAO, as one of the parent organizations, also to be eligible for membership in such bodies. This would be consistent, in the case of the Codex Alimentarius, with its status as a Joint Commission established under article VI of the FAO Constitution. Following the general principle set down in the proposed amendments to the Constitution, member organizations would not be eligible for election in their own right to such joint bodies, but would merely exercise the rights of membership of their member States that are elected, in accordance with the principle of the alternative exercise of membership rights. The issue of eligibility for

election to the Codex Alimentarius does not of course arise, since membership in the Codex is open to all member nations (and hence member organizations) that are interested in international food standards and that have notified the Director-General of FAO or WHO of their desire to be considered as members. However, I would point out that the exercise of rights of membership may involve changes in the Rules of Procedure and working methods of such joint bodies. Thus my opinion would be without prejudice to whatever procedural decisions may be required by the relevant intergovernmental bodies.

Turning to the second question, I should perhaps give a word of explanation about the so-called Vienna clause. This is the clause found at the end of most international agreements that specifies the states that are entitled to become parties to the agreement. The normal wording refers to States Members of the United Nations, any of the specialized agencies or IAEA. The question is, with regard to the assimilation clause in the proposed amendments to the FAO Constitution, that is, the provision that reads "Except as otherwise expressly provided, any reference to Member Nations in this Constitution shall include any Member Organization", how does this clause affect the Vienna clause? More particularly, the question is, as I understand it, if the Constitution of FAO indicates that references to member nations include member organizations, would this mean that the reference to any State that is a member of any specialized agency in the Vienna clause would automatically include any member organization of FAO?

The answer to this question is no. The assimilation clause is merely a drafting technique in order to avoid having to spell out in the Constitution the words "and Member Organizations" in every article of the Constitution. It does not mean that a member organization would be equated for all purposes with a member nation. Its scope of application is also specifically limited to the FAO Constitution itself. It would thus apply only within the framework of the Constitution and to any subsidiary or joint subsidiary body established within that framework. It would apply, as I have already mentioned, to the Codex Alimentarius and the CFA, which are joint subsidiary bodies of FAO. The effect of the assimilation clause, however, would not extend beyond the confines of the Constitution, and would thus have no effect on the Vienna clause, which would remain limited to States.

I wish to add that I have consulted the United Nations Legal Counsel on this matter, and the above opinion is shared by him.

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NOTES

[1] United Nations, *Treaty Series*, vol. 828, p. 305.

[2] See the report of the Preparatory Committee for the United Nations Conference on Environment and Development, *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 46* (A/45/46), annex I, para. 8.

[3] See para. 64 of the report (A/AC.237/6).

[4] *Juridical Yearbook, 1968*, p. 185.

[5] *1971 I.C.J. Reports*, para. 22.

[6] S/22508, paras. 3 and 4.

[7] S/22509.

[8] See *Repertory of Practice of United Nations Organs, Supplement No. 3*, vol. II.

[9] See for example the legal opinion of 26 November 1969 reproduced in *Juridical Yearbook, 1969*, p. 212.

[10] "The agreement between States as a criterion to distinguish public from private international organizations is widely used, and is officially accepted by the United Nations . . . an international agreement by States is needed to establish the separate legal personality of the new organization, and . . . as a separate entity". H. G. Schermers, *International Institutional Law* (Sijthoff, 1980), p. 11.

[11] The Republic of the Marshall Islands became a member of ESCAP at the forty-eighth session of the Commission; see *Official Records of the Economic and Social Council, 1992, Supplement No. 11*, E/1992/31 and E/ESCAP/889, p. 102.

[12] The Federated States of Micronesia became a member of ESCAP at the forty-eighth session of the Commission; ibid.

[13] For the list of these agencies, see *International Court of Justice, Yearbook 1990-1991*, pp. 60-62.

[14] See *Repertory of Practice of United Nations Organs*, vol. V, 1955, Article 96, pp. 90-91, and *Supplement No. 1*, vol. II, 1958, Article 96, pp. 330-333.

[15] UNV form 3a-E.

[16] As stated in paragraph 5 of article IX of the Standard Basic Assistance Agreement, "The expression 'persons performing services' as used in articles IX, X and XIII of this Agreement includes . . . volunteers . . ."

[17] United Nations Development Programme, Basic Documents Manual, chap. II-1.

[18] General Assembly resolution 40/64 G, annex.

[19] United Nations, *Treaty Series*, vol. 1249, p. 13.

[20] Ibid., vol. 14, p. 185.

[21] Ibid., vol. 289, p. 3.

[22] Ibid., vol. 1115, p. 331.

[23] Ibid., vol. 520, p. 151.

[24] Ibid., vol. 976, p. 3.

[25] Ibid., vol. 999, p. 171.

[26] General Assembly resolution 44/128, annex.

[27] United Nations, *Treaty Series*, vol. 1108, p. 151.

[28] *The United Nations Disarmament Yearbook*, vol. 9: 1984 (United Nations publication, Sales No. E.85.IX.4), pp. 453-468.

[29] *Juridical Yearbook, 1983*, p. 139.

[30] United Nations, *Treaty Series*, vol. 335, p. 211.

[31] Ibid., vol. 125, p. 3.

[32] Document TD/SUGAR/11/5.

[33] United Nations, *Treaty Series*, vol. 1, p. 15.

[34] Ibid., vol. 500, p. 95.

[35] *Juridical Yearbook, 1975*, p. 87.

[36] United Nations, *Treaty Series*, vol. I, p. 164.

[37] Ibid., vol. 1, p. 15.

[38] Ibid., vol. 131, p. 25.

[39] Ibid., vol. 1, p. 15.

[40] Study prepared by the Secretariat on the Practice of the United Nations, the Specialized Agencies and the International Atomic Energy Agency concerning their status, privileges and immunities. Documents A/CN.4/L.118 and Add.1 and 2, para. 195 (ILC Yearbook, 1967, vol. II, p. 251). The sale of United Nations publica-

tions was initially conceived of as the normal channel of distribution of United Nations publications (see ibid., paras. 196-197).

[41] Ibid., para. 198.

[42] *Juridical Yearbook, 1990*, p. 293.

[43] United Nations, *Treaty Series*, vol. 260, p. 35.

[44] Ibid., vol. 1, p. 15.

[45] Ibid., vol. 1257, p. 9.

[46] Translation from French prepared by the Secretariat of the United Nations.

[47] United Nations, *Treaty Series*, vol. 1, p. 15.

[48] Recent opinions on exemptions of officials of the United Nations from taxation are to be found in *Juridical Yearbook, 1990*, chap. VI, A, sections 35, 36 and 37.

[49] United Nations, *Treaty Series*, vol. 1, p. 15.

[50] Ibid.

[51] See *International Telecommunication Convention, Nairobi, 1982*, General Secretariat of the International Telecommunication Union, Geneva.

[52] United Nations, *Treaty Series*, vol. 30, p. 315.

[53] A/CN.9/348, annex.

[54] 1. On the basis of article 228, paragraph 1, clause 2, of the EEC Treaty, the Commission of the European Communities requested on 16 July 1991 an opinion of the Court of Justice of the European Communities concerning the competence of the Community to ratify ILO Convention No. 170 concerning Safety in the Use of Chemicals at Work (see No. 2191, *Official Journal*, No. 245/06, 20 September 1991).

2. In support of its request, the Commission noted that issues dealt with by Convention No. 170 were the subject of directives (89/393/EEC, 90/394/EEC, 88/379/EEC and 67/548/EEC) adopted on the basis of articles 100, 100 A and 118 A of the EEC Treaty. Consequently, following the case-law of the CJEC (Judgement of 31 March 1971, case 22/70, re E.R.T.A., *Reports of Cases before the Court of Justice*, 1971, p. 263), according to which member States may not assume international obligations *vis-à-vis* third parties once the Community has laid down Community standards in a specific field, only the Community would be entitled to ratify such a Convention.

3. After having examined the problems which would result from the ratification of the Convention by the Community itself and taking into account the specificity of ILO, the Commission concluded that they should not present any obstacle to the exercise by the Community of its exclusive competence in the field.

4. Following a request made to the International Labour Office by a certain number of States of the Community to make its eventual observations known on this latter point, the Office transmitted to member States the note on the issue.

[55] International Labour Office, *Official Bulletin*, vol. LXXIII, 1990, Series A, No. 2, p. 71.

[56] United Nations, *Treaty Series*, vol. 15, p. 40 (with the later amendments).

[57] In this connection it should be noted that, while it is generally up to the (tripartite) Governing Body of ILO to request an advisory opinion of ICJ in the framework of article 96 of the Charter of the United Nations, it has been maintained that in the framework of article 37 of the Constitution a member State which disagrees with the Organisation's position may submit a matter to the Court.

[58] United Nations, *Treaty Series*, vol. 298, p. 11.

[59] It should be pointed out in this connection that the documents which appear in annex 5 of the Commission's submission as "ILO documents to the Conference" are in fact a combination of a document prepared for the Governing Body's Committee on Standing Orders (where it had been the subject of some reservations) and a quite unofficial working paper prepared for a tripartite meeting of Community members held outside ILO's constitutional and organizational framework.

[60] *International Labour Conventions and Recommendations 1919-1991* (International Labour Office, Geneva), vol. II, p. 1106.

[61] A 1986 decision of the Italian Constitutional Court on the subject of night work of women demonstrates that a possible conflict with the Community standard is not the only circumstance in which a State may not be in a position to implement fully an ILO convention which it has ratified.