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

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

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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)

CLAIMS, COMPENSATION AND LIABILITY ISSUES

1. Injuries sustained by a staff member in the crash of a helicopter which was not under contract with the United Nations—Character of the Board of Inquiry reports and the United Nations policy not to release them to private individuals or any other outside parties unless it is deemed warranted in an exceptional case—Circumstances of the case justifying release to the staff member in question of those parts of the Board of Inquiry reports which set forth a factual record of the helicopter crash—Claim for compensation under appendix D to the United Nations Staff Regulations and Rules

Memorandum to the Director of the Field Operations Division, Office of General Services

1. Reference is made to your notes of 9 and 18 February and 10 March 1993 in which you forwarded to this Office various letters from a United Nations staff member who was an Electoral Observer with the United Nations Angola Verification Mission in Angola (UNAVEM) and his attorney in connection with the (name of a company) helicopter crash.

2. We understand that the helicopter which crashed and in which the staff member in question was a passenger and sustained injuries was not under contract with the United Nations. Both the staff member and his attorney have requested from the United Nations copies of the insurance policy (we assume such request relates to third-party liability insurance maintained pursuant to the contract) and the accident report of the crash, and any other information, such as the party to the contract with the company in question. The stated reason for that request is to evaluate the possibility of bringing a claim against the company in question in an American court for the personal injuries sustained by the staff member in the crash. We have been in contact with UNAVEM officials in order to obtain information on this matter and set forth our findings below.

3. We understand that the subject helicopter was one of the helicopters under a contract between the company in question and the Government of

Angola for air transportation services for the National Electoral Council of Angola. The funding for that contract was provided by the European Communities.

4. Under the said contract, the company in question was obligated, *inter alia*, to indemnify the Government from and against all actions, claims, losses or damages arising out of the failure of the company in question to perform its obligations under the contract, subject to certain conditions, e.g., the company's liability is limited to the amount of the contract. In addition, the company was obligated to maintain, *inter alia*, third-party liability insurance up to the amount of the contract.

5. In regard to the request for a copy of such insurance policy, we suggest that the staff member concerned and his attorney be informed that the party to the contract with the company in question was the Government of Angola and that the United Nations does not have a copy of the insurance policy maintained by the company in question pursuant to that contract. You may wish to suggest that the attorney contact the company directly in order to obtain a copy of the insurance policy as well as a copy of the contract.

6. With respect to the accident report, we note that a Board of Inquiry report was prepared pursuant to the convening of such a Board on 20 September 1992 to investigate, *inter alia*, the circumstances of the helicopter crash. In this connection, we wish to point out that, even though the helicopter was not under contract with the United Nations, it contained the "UN" marking and was given number "UN-09". It is not completely clear to us why this occurred. However, we understand that it may be related to the coordination of air transportation in Angola which it appears was being carried out by UNDP pursuant to plans agreed to by UNAVEM and UNDP officials. We observe that UNDP seems to have authorized the particular flight in question on 19 September 1992.

7. As you know, a Board of Inquiry report serves to assist the Organization in determining the circumstances and cause of an injury or loss and in establishing whether there is any responsibility therefor on the part of the Organization. Insofar as BOI reports are internal and confidential documents relating to the official functions of the Organization, it is the policy of the United Nations not to release such reports to private individuals or any other outside parties unless it is deemed warranted in an exceptional case. Furthermore, all documentation belonging to or held by the United Nations is inviolable pursuant to article II, sections 3 and 4, of the Convention on the Privileges and Immunities of the United Nations;[1] therefore, outside parties cannot gain access to such documentation by subpoena or through other judicial action unless the Organization decides to provide the same on a voluntary basis.

8. We believe that it is important to maintain the Organization's general policy of non-disclosure of Board of Inquiry reports; however, we also consider that, when a staff member sustains injuries while serving in a United Nations peacekeeping mission, he/she should be able to obtain a factual record of the incident for the purposes of evaluating the possibility of pursuing a claim against a third party. We note that the staff member in question and his attorney have requested the accident report for such purpose. We further note that our understanding from UNAVEM officials is that no local police report giving a factual summary of the incident seems to have been prepared.

9. On the basis of the reasons set out in paragraph 8 above, it is our view that, in the interests of justice, the United Nations could release to the staff member in question and his attorney those parts of the Board of Inquiry report which set forth a factual record of the helicopter crash on 19 September 1992. However, the aspects of the Board of Inquiry report which present the opinions, conclusions and recommendations of the Board members, as well as the names and statements of the crew and of UNAVEM and the officials of the company in question, should not be released. We have reviewed the Board of Inquiry report and attach hereto copies of those parts which we consider could be released to the staff member in question and his attorney to provide a factual account of the crash without compromising the interests of the Organization. We would highlight, however, that the Organization in so acting would be exceptionally releasing the information on account of the particular circumstances of this case, and thus the release does not constitute a waiver of the privileges and immunities of the United Nations—a matter that should be emphasized in any communication with the staff member in question.

10. We understand that the staff member in question has submitted a claim for compensation under appendix D to the Staff Regulations and Rules and that, in connection with that claim, the Advisory Board on Compensation Claims has been investigating the circumstances under which the staff member in question was on the helicopter under contract with the Government. Since the staff member is contemplating bringing a claim against the company in question, we would advise that he and his attorney be informed that, in the event the staff member is awarded compensation under appendix D, the award will be subject to, *inter alia*, the provisions of section II, article 6, of appendix D. That article reads:

> "Article 6. Claims against third parties
>
> "(*a*) If a death, injury or illness for which compensation may be awarded under these rules is caused in circumstances which, in the opinion of the Secretary-General, create a legal liability in a third person to pay damages therefor, either to the staff member or to another person who is entitled to compensation under these rules in respect of the death, injury or illness, the Secretary-General may, as a condition to granting such compensation, require the member of the staff or such person to assign to the United Nations any right of action to enforce such liability, or to participate with the United Nations in prosecuting such action;
>
> "(*b*) The staff member or such person shall furnish the United Nations with such data and evidence as may be available to him for prosecuting such action and render the United Nations all other assistance which may be required for prosecuting such action. The staff member or such person shall not settle any claim or action against such third person without the consent of the United Nations, but the United Nations shall be entitled to settle or require the staff member or such person to settle any claim or action against such third person upon such terms as seem reasonable to the United Nations;
>
> "(*c*) If the staff member or such person, or the staff member or such person and the United Nations prosecute to judgement or settle any claim against such third person or make any settlement of such claim, the proceeds derived therefrom shall be used (i) to defray the costs of the suit or settlement, including reasonable attorney fees, and (ii) to reimburse the

United Nations for any compensation including expenses of medical services provided under these rules with respect to the death, injury or illness. The balance, if any, shall be paid over to the staff member or such person and the United Nations liability under these rules shall to that extent be reduced."

23 April 1993

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2. REQUEST FOR ADVICE ON CLAIM BY A MEMBER STATE TO THE UNITED NATIONS FOR REIMBURSEMENT OF THE COSTS OF ATTENDING THE UNITED NATIONS COMPENSATION COMMISSION MEETINGS—SECRETARY-GENERAL'S BULLETIN ST/SGB/107/REV.6

Memorandum to the Assistant Secretary-General, Department of Political Affairs

1. This is with reference to your memorandum of 23 July 1993, by which you requested our advice on the request, made by the Permanent Mission of (name of a Member State) to the United Nations, for reimbursement to the Member State of the costs incurred for attendance by its representative of the meetings of the United Nations Compensation Commission at Geneva. You explained that the State concerned had indicated that it would be unable, owing to financial constraints, to send a representative to the next session of the Commission unless it is assured of reimbursement of the accruing costs.

2. We understand that the State in question, a current member of the Security Council and, *ipso facto*, a member of the Governing Council of the United Nations Compensation Commission pursuant to Security Council resolution 692 (1991), does not have an accredited mission to the United Nations Office at Geneva, where the Governing Council meets, and therefore its representative in the Governing Council must travel from this State's Permanent Mission to the United Nations at New York.

3. It appears from the documentation enclosed with your memorandum that the Permanent Mission of (name of the Member State) relied on paragraphs (3) (*c*) (iii) and 5 of Secretary-General's bulletin ST/SGB/107/Rev.6 to support its request. These provisions read as follows:

"3. Travel and subsistence expenses shall be paid in the following cases:

". . .

"(*c*) In respect of the following persons regardless of whether they serve in their individual personal capacity or as representatives of Governments:

". . .

"(iii) One representative of a Member State or one alternate participating in a subsidiary organ instituted by the General Assembly or by the Security Council that is required, by a decision of the parent organ, *to work away from its assigned headquarters in the performance of a special task*;" (emphasis added)

". . .

"5. The lists of Member States designated as least developed countries, of continuing organs and subsidiary organs falling under paragraphs 2 and 3 above are given in annexes I, II and III, respectively, to the present bulletin."

4. Paragraph 3 (*c*) (iii) of Secretary-General's bulletin ST/SGB/107/Rev.6 is the implementing provision for paragraph 3 (*b*) (iii) of General Assembly resolution 1798 (XVII) of 11 December 1962, which provides for reimbursement of travel expenses to "one representative of a Member State or one alternate participating in a subsidiary organ instituted by the General Assembly or the Security Council and which is required, by a decision of the parent organ, *to work away from United Nations Headquarters in the performance of a special task*" (emphasis added). We note that bulletin ST/SGB/107/Rev.6 provides for payment of travel and subsistence expenses incurred for participation in a subsidiary organ required to work "away from its assigned headquarters", instead of "away from United Nations Headquarters", the latter being the phrase used in the General Assembly resolution and in the earlier issuances of the bulletin, until and including its revision 4.

5. It is our considered opinion that paragraph 3 (*c*) (iii) of Secretary-General's bulletin ST/SGB/107/Rev.6 gives the authentic interpretation of the above-quoted enabling provision of paragraph 3 (*b*) (iii) of General Assembly resolution 1798 (XVII), and does not constitute a valid basis for the request made by the State concerned, for the reasons given in paragraphs 6 and 7 below.

6. Under paragraph 3 (*c*) (iii) of bulletin ST/SGB/107/Rev.6, the payment by the United Nations of travel and subsistence expenses to a representative of a Member State participating in a subsidiary organ of the General Assembly or the Security Council is subject, *inter alia*, to the condition that the subsidiary organ "is required, by a decision of the parent organ, *to work away from its assigned headquarters in the performance of a special task*" (emphasis added). In this respect, we note that, pursuant to Security Council resolution 692 (1991), the Compensation Commission has its headquarters at the United Nations Office at Geneva,[2] which therefore corresponds to "its assigned headquarters" under paragraph 3 (*c*) (iii) of the bulletin.

7. It appears from your memorandum and the documentation enclosed therewith that the costs for which the State concerned requests reimbursement were not incurred for the participation of its representative in meetings of the Commission held "away from its assigned headquarters in the performance of a special task" but, on the contrary, for the participation of its representative in regular meetings of the Commission held at its assigned headquarters in Geneva. Therefore, the conditions for payment of travel and subsistence expenses under paragraph 3 (*c*) (iii) of the bulletin are not met.[3]

8. However, in view of the particular circumstances of this case, which you mentioned in your memorandum, your department may wish to explore with the Office of the Controller the possibility of an ex gratia payment being made to the State in question.

24 April 1993

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3. Release forms to be used when non-United Nations personnel are transported on United Nations aircraft in the context of peacekeeping missions—Field Administration Handbook guidelines for use of United Nations aircraft by non-United Nations personnel—United Nations liability for transportation of non-United Nations personnel

Memorandum to the Officer-in-Charge,
Office of Human Resources Management

1. This is in reference to correspondence concerning the release forms that this Office has recommended should be used when non-United Nations personnel are transported on United Nations aircraft in the context of peacekeeping missions.

. . .

4. The following paragraphs will address (*a*) the potential liability of the United Nations in connection with transport provided to non-United Nations personnel; (*b*) the advice given by this Office regarding the use of release forms; and (*c*) United Nations liability arising out of the MI-17 helicopter crash of 20 March 1993.

A. *Field Administration Handbook Guidelines for use of United Nations aircraft by non-United Nations personnel*

5. As you know, transportation of passengers on United Nations aircraft in the context of peacekeeping missions is regulated by the applicable provisions of the Field Administration Handbook. Those provisions delineate the scope of persons who may be authorized to travel on United Nations aircraft for purposes of both duty and non-duty travel and reflect that, in the peacekeeping context, the transport of non-United Nations personnel on United Nations aircraft (except for dependants of international United Nations staff members) is clearly an exceptional arrangement and requires the authorization of the Head of Administration of a peacekeeping mission on the basis that either (*a*) the passenger is "travelling on or in connection with United Nations business, including official guests of the United Nations" [4] or (*b*) the passenger has been "designated or named by the Secretary-General" to travel.[5]

B. *United Nations liability for transportation of non-United Nations personnel*

6. The liability of the Organization may be engaged in respect of injury, disability or death arising out of or related to transportation of non-United Nations personnel or United Nations aircraft. Pursuant to paragraph 3 (*c*), page D-49 of the Handbook, non-United Nations personnel being transported on United Nations aircraft "would have a claim against the Organization only *in cases where the Organization would be held responsible for injury or death caused to them in accordance with principles applicable to carriers offering free carriage to selected individuals in similar circumstances*" (emphasis added).

7. In view of the fact that, on occasion, the United Nations offers gratuitous carriage to third parties, it may be considered under some legal systems as a "private carrier".[6] As such, the United Nations would be bound to exercise "ordinary care and diligence"[7] to carry passengers safely.[8] However, the

terms under which such gratuitous carriage is offered may exonerate the carrier from liability for lack of ordinary care. It should be noted, however, that a carrier may not exclude its liability for gross negligence or wilful or wanton misconduct.[9]

C. *Use of release forms*

8. In the light of the above, this Office, on the occasion of giving advice as to the circumstances under which non-United Nations personnel may be authorized to travel on United Nations Advance Mission in Cambodia (UNAMIC) military aircraft, recommended that UNAMIC formulate a clear policy to govern air travel, in conformity with the Field Administration Handbook. Such policy should take into account: (*a*) the affiliation of the persons concerned (United Nations vs. non-United Nations), (*b*) the purpose of the proposed travel (official vs. non-official) and (*c*) the existence of passenger insurance coverage on the aircraft.

9. On that occasion, this Office further recommended that a release form should be executed by every individual prior to being provided with United Nations transportation, and we forwarded a model of a release form for that purpose.[10] We further pointed out that, while the use of that release form might not afford the United Nations full protection from legal liability, it could, in conjunction with adequate insurance coverage for passengers, at least serve to minimize the exposure of the Organization in respect of third-party claims.

D. *MI-17 helicopter crash*

10. We note that the correspondence refers to the crash of a United Nations Transitional Authority in Cambodia (UNTAC) MI-17 helicopter at Siem Reap on 20 March 1993 and indicates that all non-UNTAC passengers on that helicopter had executed the release form referred to in paragraph 9 above.

11. This Office contacted the Field Operations Division for the purpose of obtaining additional documentation and information on this matter. We were informed that the MI-17 helicopters are leased by the United Nations from (name of a company). We were further informed that an investigation in this matter is being conducted and that a final report on the results of such investigation will be ready by 27 May 1993. We expect that we will be informed of the outcome of the investigation.

12. Pending the receipt of the final investigation report, we have obtained information on a preliminary investigation carried out by UNTAC in this matter. This investigation indicates that part of the helicopter failed "owing to metal fatigue caused by a malalignment of the drive shaft between the 45 degree and the tail rotor gearboxes".

13. Under the terms of the aircraft lease agreement, the company in question undertook to carry out a major check of the helicopters prior to their arrival in Cambodia (see clause A.3) and is further responsible for maintaining the helicopters "in an airworthy condition" (see clause A.8). In the light of the above, and in the event that the final investigation report establishes that the crash was caused by a mechanical defect of the helicopter, it is conceivable, pending a more detailed investigation of the matter, that the company concerned could be held responsible therefor. In any event, the company has undertaken

to indemnify, hold and save harmless the United Nations from and against all suits, claims, demands and liability of any nature and kind, including costs and expenses arising out of acts or omissions of the company or its employees or subcontractors in the performance of the aircraft lease agreement (see clause H).

14. In addition to the above, clause A.9 of the aircraft lease agreement stipulates that the company in question is to provide and maintain, *inter alia*, adequate "comprehensive third-party liability insurance, including passenger legal liability, protecting the United Nations and the lessor against claims for bodily injury or death and property damage up to a combined maximum of US$ 20 million per occurrence". In that connection, we note that the company's insurance brokers addressed a letter to the Commercial, Purchase and Transportation Service dated 21 May 1993, confirming that the company in question and the United Nations "are fully insured (as joint insured)" for third-party liability, including passengers' liability, up to the amount specified in the aircraft lease agreement. It would therefore seem that the company concerned has conformed to its obligation in that respect.

15. We would also draw your attention to the communication dated 21 May 1993 from lawyers of the company in question, advising that, while no third-party claims have been submitted to the company's insurance brokers to date, the company concerned, its lawyers and its insurance brokers are prepared to work with us and assist us in the expeditious processing of any claims "to quickly effectuate proper compensation to any of those injured" as a result of the crash.

16. In the light of the above, and provided that the outcome of the investigation does not disclose any negligence on the part of the United Nations, it would appear, based on facts presently known to us, that the provisions of the aircraft lease agreement and the existence of third-party liability insurance, along with the releases that have been duly executed by the passengers, should sufficiently protect the United Nations in respect of third-party claims in this case. We would, however, reserve final judgement until we have been informed of the outcome of the investigation.

27 May 1993

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4. TRAVEL OF JOURNALISTS ON AIRCRAFT USED IN UNITED NATIONS PEACEKEEPING OPERATIONS—POLICY OF THE UNITED NATIONS WITH RESPECT TO THE CARRIAGE OF NON-UNITED NATIONS PERSONNEL ON UNITED NATIONS AIRCRAFT—INSURANCE POLICIES CARRIED BY OR AVAILABLE TO THE UNITED NATIONS—USE OF RELEASE FORMS

Memorandum to the Assistant Secretary-General for Peace-keeping Operations

1. This is in reply to your memorandum of 19 May 1993 seeking our advice on a request by the Chairman of the Committee to Protect Journalists that accredited journalists covering activities in the former Yugoslavia be permitted aboard United Nations Protection Force in the former Yugoslavia (UNPROFOR) flights in and out of Saravejo on a space-available basis. You

attached to your memorandum a copy of a release form presently being used by the United Nations Transitional Authority in Cambodia (UNTAC) in respect of non-United Nations personnel using UNTAC transportation and you requested our advice as to whether the execution of such a release by journalists in UNPROFOR's operational territory sufficiently protects the Organization against liability claims. You also forwarded a copy of your above-mentioned memorandum to UNPROFOR, and we have received a copy of the latter's comments on your memorandum set out in a cable of 31 May 1993.

2. In responding to your inquiry, we shall address the following issues: first, the policy of the Organization with respect to the carriage of non-United Nations personnel on United Nations aircraft; secondly, whether the insurance policies maintained by or available to the United Nations provide coverage for injuries or death sustained by such non-United Nations personnel; and thirdly, the execution of release forms by non-United Nations personnel.

A. *Policy of the Organization with respect to the carriage of non-United Nations personnel on United Nations aircraft*

3. As this Office has already pointed out in the memorandum of 27 May 1993 [see the legal opinion in section 3 above], transportation of passengers on United Nations aircraft in the context of peacekeeping missions is regulated by the applicable provisions of the Field Administration Handbook.[11] As pointed out in that memorandum, the transport of non-United Nations personnel on United Nations aircraft (except for dependants of international United Nations staff members) is clearly an exceptional arrangement and requires the authorization of the chief administrative officer of the mission to which the aircraft belongs on the basis that either (*a*) the passenger is "travelling on or in connection with United Nations business, including official guests of the United Nations"[12] or (*b*) the passenger has been "designated or named by the Secretary-General" to travel.[13]

4. In view of the fact that journalists would not be "travelling on or in connection with United Nations business" nor would they be "official guests of the United Nations", they could only be allowed aboard United Nations aircraft if they have been "designated or named by the Secretary-General" to so travel. Furthermore, according to the Field Administration Handbook, such travel can only be "on a space-available non-interference basis".

5. With reference to UNPROFOR, we note that the practice of UNPROFOR "has been to provide accreditation, briefings and security advice on routes, etc., to journalists but to deny them access to United Nations aircraft and vehicles because of the extreme security risks, the disruption of operations and insurance implications involved in carrying non-United Nations personnel". The rationale for this UNPROFOR practice, which is in full conformity with the Organization's policy as set out in the Field Administration Handbook, is cogently elaborated upon further in that cable.

6. We would also point out that, in implementing the foregoing policy, the Handbook requires, *inter alia*, that the chief administrative officer of the mission to which the aircraft belongs:

> ". . . shall become familiar with the passenger liability insurance coverage on the aircraft in his/her mission and *impose, where necessary, restrictions on passenger travel to avoid any undue liability to the United Nations*. He/She shall issue appropriate instructions for travel in United Nations aircraft"[14] (emphasis added).

7. As regards the possible liability of the Organization, indicated in the above-quoted provision, we would refer you to paragraphs 6 and 7 of the above-mentioned memorandum of 27 May 1993. The following section will address the need for adequate insurance coverage.

B. *Insurance policies carried by or available to the United Nations*

8. The Organization maintains six different insurance policies regarding liability arising out of aircraft accidents, and a general war-risk policy. The following paragraphs will examine those policies to assess whether they would cover injuries or death sustained by journalists transported in United Nations aircraft.

9. Policy No. PA7/0643 (Lloyd's of London) covers accidental death, dismemberment and permanent total disability of persons travelling on the instruction *and at the cost of the United Nations* aboard "civilian and non-military government-owned aircraft including aircraft owned, leased or operated by the Insured". We have been informed that the insurers interpret the term "at the cost of the United Nations" as covering any person who is on official business of the United Nations and whose services are paid for by the United Nations or who is provided with a per diem, etc., irrespective of whether travel is gratuitous or not. Thus, injury or death sustained by journalists who are not travelling "on instruction and at the cost of the United Nations" would not be covered by this policy.

10. The United Nations also maintains policy No. GW56-306354 (Associated Aviation Underwriters), which covers third-party bodily injury (and incidental medical expenses) as well as property damage liability. This policy applies *only* "to the use of non-owned aircraft by the Secretary-General of the United Nations or any of his representatives *excluding* any military or peace-keeping operations". This policy, therefore, would not cover injury or death sustained by journalists on board United Nations aircraft in the context of peace-keeping operations.

11. The United Nations also maintains four mission-specific aircraft insurance policies for United Nations-owned aircraft issued by Lloyd's of London (policy Nos. AW013591, AW0599391, AW602091 and AW603991). These policies cover hazards occurring *exclusively* in the operational territories of, respectively, the United Nations Interim Force in Lebanon (UNIFIL),[15] the United Nations Iraq-Kuwait Observation Mission (UNIKOM),[16] the United Nations Special Commission (UNSCOM),[17] and the United Nations Transitional Authority in Cambodia (UNTAC),[18] and they specifically exclude coverage for bodily injury or death to passengers. Under the terms of these policies, too, injury or death sustained by journalists on board United Nations aircraft would not be covered.

12. Lastly, the United Nations maintains a war risk insurance policy (policy No. 716/WKX921007783/402037) issued by Lloyd's of London, which covers accidents resulting in death or disability caused by or arising from war, invasion, riots, civil war, terrorist activities and other similar events occurring in the designated countries.[19] As the insured persons under this policy are defined to be the "employees" of the United Nations, the existence of a contractual link with the United Nations is a condition sine qua non for applicability of this policy. Therefore, under this policy, too, journalists would not be covered.

13. It is clear from the above that none of the insurance policies maintained by the United Nations would cover injury or death sustained by journalists permitted to travel on United Nations aircraft in the context of peacekeeping operations.

14. Apart from insurance taken out by the United Nations, the policy of the Organization, reflected in the United Nations General Conditions for Air Charter Agreements that should be attached to all aircraft charter agreements, is to require that the carrier maintain adequate insurance coverage.[20] It should be noted, however, that the terms of the aircraft charter agreements usually specify the individuals that are allowed to be taken on board the aircraft and the insurance taken out by the carrier of the aircraft would, accordingly, cover only those individuals. Should the aircraft charter agreements prohibit transportation of non-United Nations personnel, the carrier would have the right to reject any liability regarding injury sustained by such non-United Nations personnel on board the leased aircraft.

15. In that connection, we note that in paragraph 3 of your memorandum you state the following:

> "Some of the contracts with companies leasing aircraft to peacekeeping operations contain clauses preventing the transportation of non-United Nations personnel. Should it be decided to allow journalists to use United Nations aircraft, the respective clauses would have to be reviewed accordingly. In this context, it should also be assessed whether a change in policy would increase the cost of insurance coverage."

16. In the context of your statement, we would first point out that the contracting procedures for aircraft used in peacekeeping operations are currently under review by this Office, the Field Operations Division and the Office of General Services. The resulting new standard aircraft charter agreement will ensure that the insurance to be maintained by the carrier will cover all persons authorized by the United Nations to travel on the aircraft. However, the provisions in such new standard aircraft charter agreement will not affect the existing aircraft charter agreements. Therefore, it is of cardinal importance that the chief administrative officer of the mission to which the aircraft belongs be familiar with, and ensure conformity with, the terms of the existing aircraft charter agreements, in particular those provisions concerning the individuals that are allowed to be taken on board the aircraft.

C. *Use of release forms*

17. In the memorandum of 27 May 1993, this Office recommended that release forms be executed prior to the persons in question being provided with United Nations transportation. As indicated in paragraph 9 of that memorandum, such release forms would not, in and of themselves, provide complete protection to the Organization from third-party claims, and would therefore have to be accompanied by adequate insurance for passengers.

18. The above-mentioned cable from UNPROFOR of 31 May 1993 indicates, however, that UNPROFOR uses "a waiver form drafted by the Legal Adviser attached to office of the Deputy Chief of Mission. That "waiver form"

(hereinafter referred to as "the UNPROFOR version") significantly departs from the release form which had been prepared by this Office for use in peacekeeping operations, such as the one used by UNTAC which was attached to your memorandum ("the UNTAC release form"). In particular, we note that the text of the UNPROFOR version does not mention that transport is to be provided by UNPROFOR, nor, more importantly, does it set any limits to the possible liability of the United Nations in case of personal injury or death of the person executing the waiver or his/her dependants, heirs and estate. In our view, therefore, the text of the UNPROFOR version is totally insufficient for the purpose of limiting the Organization's exposure to third-party claims. In the light of our negative assessment of the UNPROFOR version, we recommend that the use of that version be discontinued immediately and that the UNTAC release form be used instead.

D. *Conclusion*

19. In considering requests for transport of journalists on United Nations aircraft in the context of peacekeeping operations, the following considerations must be borne in mind:

(*a*) travel by journalists covering UNPROFOR activities on United Nations aircraft must be in accordance with the policy of the Organization as set forth in the Field Administration Handbook (see paras. 3-7 above);

(*b*) none of the insurance policies currently maintained by the United Nations would cover injury or death sustained by journalists (see paras. 8-13);

(*c*) if the terms of the aircraft charter agreements prohibit transportation of non-United Nations personnel, the insurance taken out by the carrier of the aircraft would not cover any liability regarding injury or death sustained by journalists on board the leased aircraft (see paras. 14-16);

(*d*) the execution of release forms by journalists would be necessary but such releases cannot be a substitution for securing adequate insurance coverage (see paras. 17-18).

20. In the light of the foregoing, and as long as the above considerations remain unchanged, *we would strongly advise against allowing journalists on board United Nations aircraft*, unless sufficient passenger liability coverage exists. The chief administrative officer of the mission should first ensure that the transport of such individuals aboard United Nations flights would be in conformity with the terms of the aircraft charter agreements, and that adequate passenger liability insurance coverage has been obtained by the carrier. We further recommend that transport on United Nations aircraft of journalists covering UNPROFOR should be restricted to those journalists who are also covered by medical and personal injury insurance maintained either by themselves or by their employers and who submit proof, satisfactory to the United Nations, of the existence of such insurance prior to the flight.

29 June 1993

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5. Liability of the Organization for claims concerning loss of or damage to personal property of the members of the peacekeeping contingents—Report of the Secretary-General entitled "Review of the background and development of reimbursement to Member States contributing troops to peacekeeping operations (A/44/605/Add.1) of 12 October 1989—Financial arrangements with States contributing troops for UNIFIL and UNFICYP—Reimbursability of extra and extraordinary costs as they are incurred by the States as a result of their soldiers' participation in UNIFIL and UNFICYP—Loss of and damage to personal property fall within the category of extra and extraordinary costs

Memorandum to the Chief of the Field Finance and Budget Section, Field Operations Division

1. Please refer to your memorandum of 10 May 1993 on the liability for claims concerning loss of personal property of the members of the peacekeeping contingents transmitting to us such claims of certain members of the (names of the Member States) peacekeeping contingents in United Nations Interim Force in Lebanon (UNIFIL) and United Nations Peacekeeping Force in Cyprus (UNFICYP), which claims had been received by you from the permanent missions of those States to the United Nations. You requested our opinion as to whether the United Nations has a legal or financial liability for the loss of personal property of the members of peacekeeping contingents. We note that all above claims concern members of the peacekeeping contingents, and not military observers. We also note that, as indicated in paragraph 2 (*c*) of your memorandum, only a small part of the total claims represent the costs of personal effects, the rest being the cost of State-owned property. No claims for compensation have been received directly from contingent members.

2. Your question appears to raise a novel issue which this Office has not dealt with before, as our files do not contain information concerning specific cases of reimbursement by the Organization of expenses incurred by troop-contributing States as a result of loss of or damage to personal property of military members of their peacekeeping contingents. As a result, we have made an investigation *de novo* of the Organization's liability in this field.

3. The position that no claims made directly by the contingent members themselves are admissible is reflected in the draft United Nations Field Administration Manual[21] transmitted to the Office of Legal Affairs for comments by the Director, Field Operations Division, on 22 October 1992. Both chapter 3 "Delegation of authority" (sect. IV, para. 7.1) and chapter 10 "Claims Review Board" (sect. III, para. 1.0) of the Manual, which describe, *inter alia*, the authority and terms of reference of a Claims Review Board in a peacekeeping force, envision that the Board acts in cases involving "claims for loss and/or damage to personal effects of civilian members of the mission (and military observers if any), *but not of military members assigned to a mission on a national contingent basis. Any claims for the latter are dealt with on a national level*" (emphasis added).

4. The question, therefore, arises as to if and on what grounds the United Nations is obliged to compensate a troop-contributing State for expenses incurred by that State in reimbursing a member of its military contingent for loss of or damage to his or her personal property while on a peacekeeping mission in accordance with national laws or "State obligations".[22]

Reimbursement obligations prior to 1973

5. From the inception of peacekeeping operations, the consensus has been that troop-contributing countries should be paid for extra costs they are obliged to incur in putting their forces at the disposal of the United Nations. The basic idea was that the soldiers would remain on their national payroll and the troop-contributing Governments would seek reimbursement for certain expenses which they deem to be "extra and extraordinary costs". The background and development of the concept is more fully described, as follows, in paragraph 2 of the report of the Secretary-General entitled "Review of the background and development of reimbursement to Member States contributing troops to peace-keeping operations":

> "The reimbursement obligations of the United Nations to Governments for troops serving in a United Nations peace-keeping force were, prior to 1973, confined to all extra and extraordinary costs that Governments were obliged to incur in providing troops to the force. Consequently, costs such as basic pay and allowances, which Governments would normally be required to bear, were not reimbursable. The amounts to be reimbursed were subject, therefore, to negotiation between the United Nations and the respective Governments. Owing to the differences in national pay scales, there were marked disparities in such reimbursement obligations. These reimbursement arrangements were applied also to equipment and supplies furnished by Governments to their contingents, allowances paid for personal clothing and gear and payments based on national legislation or regulations for death, injury, disability or illness attributable to service with the force."[23]

Developments after 1973

6. In order to better understand the post 1973 development of the reimbursement arrangements and the reasons why UNFICYP and UNIFIL will have to be treated separately, the development of the financing methods of meeting the above expenses must briefly be recalled.

7. In the late 1940s and 1950s, the extra and extraordinary expenses of the first peacekeeping operations were charged to the regular United Nations budget according to the normal scale of assessment. Thus, even when the United Nations Emergency Force (UNEF I) and the Congo operation incurred very high costs, the expenses for the two operations continued to be regarded as "expenses of the Organization". Member States were assessed for their contributions to those accounts according to the existing scale of assessment determined by the General Assembly. When several Governments did not consider these peacekeeping expenses as legitimate expenses of the Organization and refused to pay their contributions, a major political and financial crisis arose. As a consequence, subsequent operations in the 1960s were either paid for by the interested parties to the conflict (e.g., for the organization and supervision of a plebiscite in West Irian in 1962/63) or exclusively financed from voluntary contributions (UNFICYP in 1964).

8. In 1973, when UNEF II was established, Member States finally arrived at a consensus and agreed that expenses for peacekeeping operations were to be regarded as legitimate expenses of the Organization. At the same time, a

new special scale of assessment was adopted by the General Assembly which has eventually been followed ever since for all operations except UNFICYP.

9. After the General Assembly had adopted the special scale of assessments, attempts were made to establish a standardized cost-reimbursement formula. The Secretary-General's report[24] of 1974 dealing with the question of cost standardization indicated that the elements of cost to be covered by the reimbursement formula were intended to provide reimbursement, *inter alia*, for pay and allowances, for a usage factor for personal clothing, gear, and equipment provided to soldiers, for readying troops for United Nations services and for costs in the home country connected with the service of the troops in the force. The Advisory Committee on Administrative and Budgetary Questions, in its report on this issue, indicated that:

> "the basic principle governing payments to troop-contributing countries has been that reimbursement should be made of the appropriate extra and extraordinary expenses which they incur. Departure from the basic principle of reimbursing extra and extraordinary expenses incurred by troop-contributing Governments would involve a political decision by the competent intergovernmental organ of the United Nations".[25]

Thereafter, the General Assembly on 29 November 1974 standardized certain rates of payment as follows:

> "The General Assembly, on the basis of the consideration by the Fifth Committee of the report of the Secretary-General on the financing of the United Nations Emergency Force and the United Nations Disengagement Observer Force and the report of the Advisory Committee on Administrative and Budgetary Questions thereon, decides that the rate of payment to troop-contributing countries for pay and allowances for their troops serving in these forces shall be standardized. Commencing 25 October 1973, these payments shall be established at the rate of $500 per man per month. The General Assembly further decides to establish at the standard rate of $150 per man per month a supplementary payment for a limited number of specialists serving with the various Force contingents; this payment shall be limited to a maximum of 25 per cent for the logistic contingents and to 10 per cent for other contingents of their actual total strength. The rates of payment shall be subject to review by the General Assembly."[26]

A new methodology for reimbursement, at least for pay and allowances, was thus instituted for the two above operations, and was later extended to subsequent peacekeeping forces, including UNIFIL.[27]

10. It is relevant to note that the General Assembly decided to standardize only the rate for reimbursement of the cost elements "pay and allowances" and made no specific mention of the remaining components and remained altogether silent on the question of the existing basic principle of reimbursing extra and extraordinary expenses. When a year later the General Assembly approved the principle of paying troop contributors for the usage factor for personal clothing, gear and equipment,[28] it again only addressed that particular cost element relating to peacekeeping which it had been decided should be reimbursed to Governments.

11. In the light of the foregoing, it appears that the introduction of a standard rate of reimbursement for pay and allowances and for the usage factor

was not intended to replace or eliminate the principle or reimbursement of extra and extraordinary costs which had evolved prior to 1973. This is supported by the fact that Government claims for damage to and loss of State-owned property incurred in the area of operations have been routinely reimbursed by the Organization without further questioning, on the basis, as we understand it, that they were extra and extraordinary costs. Therefore, it is not unreasonable to consider costs which troop-contributing States incur as a result of reimbursing, in accordance with national laws, those soldiers who suffer loss of or damage to personal property during peacekeeping missions as extra and extraordinary costs incurred by the States.

12. In order to affirm that the introduction of the above standard rates did indeed not replace the principle of reimbursing such extra and extraordinary costs, the specific financial arrangements between the United Nations and the troop-contributing States with respect to UNIFIL and UNFICYP, and their practical application, is examined below.

UNIFIL

13. Governments contributing troops for UNIFIL did not enter into any formal written bilateral agreements with the United Nations concerning the conditions of service (including financial arrangements) of their national contingents in the Force. The report of the Secretary-General on the implementation of Security Council resolution 425 (1978) of 19 March 1978 indicates that the general guidelines for UNEF I and the United Nations Disengagement Observer Force (UNDOF) would be considered to have practical application to UNIFIL:

> "Although the general context of UNIFIL is not comparable with that of the United Nations Emergency Force (UNEF) and the United Nations Disengagement Observer Force (UNDOF), the guidelines for those operations, having proved satisfactory, are deemed suitable for practical application to the new Force."[29]

Paragraph 11 of the Secretary-General's report indicated also that "the costs of the Force shall be considered as expenses of the Organization to be borne by the Members in accordance with Article 17, paragraph 2, of the Charter".

14. At present, Governments contributing troops to UNIFIL are reimbursed for pay and allowances according to the standard rates of reimbursement as established after further reviews by the General Assembly.[30] In addition, the troop-contributing Governments are also entitled to reimbursement, *inter alia*, for payments made by them based upon national legislation and/or regulations for death, injury, disability or illness of members of the Force attributable to service with UNIFIL.[31] In this connection, we note that UNIFIL administrative circular No. 4 of 19 June 1978, which described the authority and functions of the UNIFIL Claims Review Board, contains the following provision:

> "The Board is not authorized to examine claims by members of national contingents of UNIFIL for loss or damage of their personal effects as *the Governments of national contingents have been requested to receive and settle such claims and to submit thereafter a claim to the United Nations*" (emphasis added).

15. Thus, it appears that, after the introduction by the General Assembly of standard rates of reimbursement, the Organization continued to consider reimbursable the expenses in question incurred by UNIFIL troop-contributing States.

UNFICYP

16. As mentioned above, the method of financing UNFICYP is different from other peacekeeping operations since it was initiated to be financed exclusively from voluntary contributions as set out in Security Council resolution 186 (1964) of 4 March 1964 and reaffirmed in its subsequent resolutions extending the mandate of the Force. Paragraph 6 of Security Council resolution 186 (1964) reads as follows:

> "*Recommends* that the stationing of the Force shall be for a period of three months, all costs pertaining to it being met, in a manner to be agreed upon by them, by the Governments providing the contingents and by the Government of Cyprus. The Secretary-General may also accept voluntary contributions for that purpose".

17. The United Nations concluded bilateral agreements with all participating States, except Ireland, concerning the service of their respective national contingents in the Force. Those agreements took the form of an exchange of letters between the Secretary-General and a troop-contributing State. Paragraph 13 of the Secretary-General's letter to all participating States read as follows:

> "Finally, I suggest that questions involving expenses should be dealt with, in the light of the resolution of the Security Council, in a supplemental agreement. Such other supplementary arrangements concerning the service of your national contingent with the Force may be made as occasion requires."

However, only two participating States (Austria and Canada) actually entered into such supplemental agreements with the United Nations.

18. On 28 September 1967, by an exchange of letters between the Secretary-General and the Permanent Representative of Austria, a supplemental agreement was concluded between the United Nations and the Government of Austria on the expenses of the Austrian contingent in UNFICYP. That Supplemental Agreement sets out the United Nations position on the reimbursement of Austrian expenses as follows:

> ". . . I (the Secretary-General) should like to confirm that, subject to the availability of funds in the UNFICYP account, the United Nations will refund to the Government of Austria all extra costs incurred by Austria by reason of the service of its contingents with UNFICYP in accordance with the principles approved by the General Assembly with respect to UNEF . . . and in conformity with the practice which has been followed to date with respect to the Austrian contingents with UNFICYP. Claims for extra costs submitted by the Austrian Government will be duly certified by the competent Austrian authorities on behalf of the Austrian Court of Accounts."

19. The current applicable arrangements with Austria as well as with the other troop-contributing States concerning the financing of UNFICYP costs are summarized, as follows, in the annex to the letter[32] dated 21 November 1992

from the Secretary-General containing an appeal for voluntary contributions for the financing of the Force:

> "The United Nations is responsible for financing, entirely through voluntary contributions received from Governments, (*a*) the operational expenditures (i.e., administrative and logistic support) incurred by UNFICYP; and (*b*) certain extra and extraordinary costs incurred by the troop-contributing Governments for which they seek reimbursement."

20. With respect to the meaning of the term "extra and extraordinary costs", we note that in August 1991 at a United Nations meeting of the UNFICYP troop-contributing States attempts were made to define the above term. A working paper had been prepared by the Secretariat which indicated that "under present arrangements, the extra and extraordinary costs for which the troop-contributing Governments seek reimbursement *are determined by them*" (emphasis added). Correspondingly, the Deputy Secretary-General's speaking notes for that meeting described the United Nations policy as follows:

> "In the past, especially since many troop contributors were bearing a significant portion of the expenditures relating to their participation in UNFICYP themselves, *the United Nations did not question the claims they submitted for extra and extraordinary costs*. As a result, there are wide variations in what is claimed and how much is claimed by each contributor" (emphasis added).

21. We understand that the above consultations with the UNFICYP troop-contributing States were inconclusive, that a definition of "extra and extraordinary costs" was not agreed upon and that, therefore, the existing arrangements remain valid.

Conclusion

22. Based on the above review of the financial arrangements with States contributing troops for UNIFIL and UNFICYP and of the prevailing practice, *it is our opinion that loss of or damage to personal property of the members of* military contingents are reimbursable expenses because they fall within the category of extra and extraordinary costs as they are incurred by the States as a result of their soldiers' participation in the above-mentioned peacekeeping operations. These costs are payable by the Organization to the troop-contributing State under the basic principle of reimbursing extra and extraordinary expenses which has been followed from the inception of peacekeeping operations.

15 July 1993

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6. Applicability of the Warsaw Convention to United Nations air charter agreements—Question whether air charter companies engaged by the United Nations would be deprived of the liability limits provided for in the 1929 Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air if they fail to issue individual tickets to passengers—United Nations General Conditions for Air Charter

Memorandum to the Acting Chief of the Field Mission Procurement, Purchase and Transportation Service/Office of General Services

1. This is with reference to your memorandum of 16 September 1993 requesting our advice as to whether air charter companies engaged by the United Nations would be deprived of the liability limits provided for in the 1929 Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air[33] if they fail to issue individual tickets to the passengers. You attached to your memorandum a letter dated 10 September 1993 from a carrier, informing you that the carrier was advised by aviation lawyers to issue such individual tickets in order to enjoy the liability limit of the Warsaw Convention. In your memorandum you informed us that not all carriers are issuing tickets and that in some cases only a passenger manifest is issued.

2. We fully concur with the advice given to the carrier by the lawyers. In accordance with article 3, paragraph 1 of the Warsaw Convention, as amended by the Hague Protocol of 1995,[34] the carrier of persons shall deliver tickets to the passengers containing, essentially, the place and date of issue, the place of departure and destination, the agreed stopping places, the name and address of the carrier and the notice that the transportation is subject to the rules of liability established by article 22 of the Warsaw Convention. Article 3, paragraph (2) provides that "if, with the consent of the carrier, the passenger embarks without a passenger ticket having been delivered, or if the ticket does not include the notice required by paragraph 1(*c*) of this article, the carrier shall not be entitled to avail himself of the provisions of article 22".

3. Paragraph 4(*a*) of the United Nations General Conditions for Air Charter attached the standard Air Charter Agreement that provides that those agreements shall be governed by the rules of liability established by the Warsaw Convention. Paragraph 4(*c*) of the Convention further provides that the carrier shall bring the provision on the limitation of liability to the attention of the passengers for each carriage.

4. On the basis of the above, it is clear that compliance with the requirements of the Warsaw Convention is necessary for future reliance on the limits provided in paragraph 4(*a*) of United Nations General Conditions in the case of a claim. This means that individual passenger tickets should be issued by each carrier. I believe that to do so is immensely cheaper for both the carrier and the United Nations than the alternative of unlimited liability.

24 September 1993

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7. Claim of an airline company for compensation from the United Nations for additional costs resulting from the necessity of re-routeing its passenger aircraft allegedly attributable to resolutions of the Security Council placing an "embargo" on a Member State—Security Council resolution 748 (1992)

Letter to an airline company in a Member State

I refer to your letter of 22 July 1993 (received by us on 21 September 1993), the attachments thereto and to your letter of 20 August 1993 (received

by us on 4 November 1993), concerning your company's claim for $290,500 in compensation from the United Nations.

The basis for the claim is that the company has allegedly incurred additional costs resulting from the necessity of re-routeing its passenger aircraft on sectors Lusaka-Rome-Frankfurt and Lusaka-Rome-London to avoid flying over Libyan airspace. You state in your letters that the necessity for those flights to avoid Libyan airspace is allegedly attributable to the United Nations Security Council's adoption of a resolution placing an "embargo" on Libya.

The United Nations is an international organization established through the Charter of the United Nations. In accordance with the provisions of Chapter VII of the Charter, once the Security Council of the United Nations has determined that there exists a threat to the peace, a breach of the peace or an act of aggression, it shall decide what measures may be taken to maintain or restore international peace and security.

On 21 January 1992, and again on 31 March 1992, the Security Council adopted resolutions (respectively, 731 (1992) and 748 (1992)), in which it expressed deep disturbance about international terrorism and deep concern over the results of investigations which implicated officials of the Libyan Government. In adopting resolution 748 (1992), the Security Council expressly noted that it was acting under Chapter VII of the Charter. Paragraph 4 of that resolution reads as follows:

> "*The Security Council,*
>
> . . .
>
> 4. *Decides also* that all States shall:
>
> (*a*) Deny permission to any aircraft to take off from, land in or overfly their territory if it is destined to land in or has taken off from the territory of Libya, unless the particular flight has been approved on grounds of significant humanitarian need by the Security Council Committee established by paragraph 9 below;
>
> (*b*) Prohibit, by their nationals or from their territory, the supply of any aircraft or aircraft components to Libya, the provision of engineering and maintenance servicing of Libyan aircraft or aircraft components, the certification of airworthiness for Libyan aircraft, the payment of new claims against existing insurance contracts and the provision of new direct insurance for Libyan aircraft."

We note that under paragraph 4 of resolution 748 (1992), quoted above, the Security Council did not call upon Member States to prohibit or instruct their national airlines to avoid flying over Libyan airspace. Moreover, under international law it is clear that if the Security Council takes action under Chapter VII of the Charter, individuals or corporate entities that suffer financial loss as a consequence of such action do not have a claim against the United Nations.

In view of the foregoing, the United Nations cannot accept that it is responsible for your company's alleged losses.

19 November 1993

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8. CLAIM SUBMITTED BY THE GOVERNMENT OF A MEMBER STATE IN RESPECT OF THE DEATH OF A SOLDIER, MEMBER OF THE PEACEKEEPING FORCE—LEGISLATIVE FRAMEWORK GOVERNING PAYMENT OF COMPENSATION FOR DEATH/INJURY SUSTAINED BY MILITARY CONTINGENT PERSONNEL DURING SERVICE (UNPROFOR)

Memorandum to the Chief of the Field Finance and Budget Section, Field Operations Division

1. This responds to your memorandum of 10 August 1993 forwarding, for our advice, a note verbale of 19 May 1993 from the Permanent Mission of (name of a Member State) to the Secretary-General with an attached note of 5 May from the Ministry of Foreign Affairs of the State in question regarding the death of a Private on 16 April 1993, as a result of a mortar shelling incident that occurred while serving with the battalion of the State concerned attached to the United Nations Protection Force (UNPROFOR).

2. In its note, the Ministry of Foreign Affairs asks the Organization to make the necessary arrangements for reimbursement of the amount of US$ 120,000.00 which, it is stated, is the amount of compensation due to the deceased's beneficiaries under national regulations. In view of the following section of the note, it would appear that no compensation had been previously paid by the Government to the deceased's beneficiaries:

> "According to the national regulations, had this death of the serviceman been [*sic*] occurred on the national territory the sum of compensation by the Government of (name of the Member State) would have amounted to an equivalent of 120 (one hundred twenty) thousand of US dollars.
>
> "The Ministry has the honour to request the Secretary-General to make the necessary arrangements for proper reimbursement of the abovementioned payment due to the beneficiaries."

3. With respect to this compensation request, it is noted that you state in your memorandum that "[a]lthough certified by the Auditor-General of the Armed Forces of the State in question, the claim has been confirmed by the Deputy Representative to the United Nations of this State as exorbitant given that the annual income of the State military personnel is only $144."

Legislative framework governing payment of compensation for death/injury sustained by military contingent personnel during service with UNPROFOR

4. In assessing the issue of whether the requested compensation amount of US$ 120,000.00 in respect of the death of the soldier in question should be questioned, it is important to consider the provisions on compensation set out in the aide-mémoire entitled "Guidelines for Governments contributing troops to the United Nations Protection Force—Sarajevo".[35] Annex C to the aide-mémoire, entitled "Summary of provisions for reimbursement to the troop-contributing Governments and payments to the troops", refers in its preambular paragraph to established United Nations practice in stating:

> "The cost estimates of the operation will contain provision for reimbursement to troop-contributing Governments *at the same rates and in accordance with the same practices approved for the United Nations Dis-*

engagement Observer Force (UNDOF) and the United Nations Interim Force in Lebanon (UNIFIL) as outlined below: . . ." (emphasis added)

The annex goes on to present, under the subheading "Payments by the United Nations to the troop-contributing Governments through the permanent mission in New York", a breakdown of four categories of payments that include, *inter alia*, those relating to service-incurred death, injury, disability or illness. That paragraph provides:

"(*d*) Reimbursement for payments made by Governments based upon national legislation and/or regulations for death, injury, disability or illness attributable to service with the Force. In respect of death and disability awards, a Government claim is required to enable reimbursement of payments due or made by the Government concerned to beneficiaries in accordance with national legislation and/or regulations. This claim should be appropriately certified by the Auditor-General or an official of equivalent rank/position."

5. Although the above-cited paragraph states that "a Government claim is required to enable reimbursement of payments due or made by the Government concerned to beneficiaries", it is our view that this provision, when read in conjunction with the preambular paragraph, should be construed as requiring that a Government make payment of compensation to the respective beneficiaries of the injured or deceased contingent personnel *prior to submitting a claim for reimbursement to the United Nations*. In support of this interpretation, we would note that such a requirement is in accordance with long-established arrangements between the United Nations and Member States contributing military contingent personnel for United Nations peacekeeping operations. Pursuant to such arrangements, claims arising from death, injury or illness incurred by individual members of national military contingents while performing official duties with a peacekeeping mission are settled, in the first instance, by the respective national authorities of the State concerned on the basis of its national legislation. 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.

6. It is relevant to note that this established United Nations practice regarding reimbursement of compensation awards is referred to in the report of the Secretary-General dated 30 October 1974[36] on the financing of the United Nations Emergency Force and of the United Nations Disengagement Observer Force, which states in paragraph 21 as follows:

"The Secretary-General has continued the practice whereby a troop contributor [to a United Nations peacekeeping force] makes such payments [i.e., death and disability awards] to beneficiaries as are prescribed under the national legislation of its country and reimbursement is then claimed from the United Nations for such amounts."

In this regard, it should also be noted that the principle that compensation payments for service-incurred death or disability must be made in the first instance by the troop-contributing State concerned is embodied explicitly in the regulations respectively governing the United Nations Emergency Force (UNEF I) and the United Nations Force in Cyprus (UNFICYP).[37]

7. Furthermore, it should be noted that the United Nations Finance Manual, in chapter 13 entitled "Peacekeeping operations", similarly indicates that payment of compensation for death or disability in respect of contingent personnel must initially be made by the contributing Government concerned. Section 13.04 thereof indicates that:

> "(*d*) In cases of peacekeeping operations financed by assessed contributions, the provisions for reimbursing troop-contributing Governments are in accordance with the applicable rates and practices approved by the General Assembly . . .
>
> > "(4) Death and disability awards—provision is made for the reimbursement of payments made by troop-contributing Governments based upon national legislation and/or regulations for death, injuries, disability or illness of contingent members attributable to their service in a Force."

8. Within the context of this legislative framework, it is significant to observe that recent reports of the Secretary-General to the General Assembly on the financing of UNPROFOR confirm that the procedure for payment of death and disability compensation in respect of military contingent personnel adheres to established practice. In those reports, it is stipulated that the estimated costs pertaining to death and disability compensation in respect of contingent personnel provide "for the reimbursement to Governments for payments made by them to members of their military personnel for death, injury, disability or illness resulting from service with UNPROFOR, based on national legislation or regulations."[38]

9. On the basis of the above, and in view of the information provided by your office regarding the manner in which compensation claims submitted by troop-contributing Governments have generally been handled by your offices, we consider that the above-cited reports of the Secretary-General clearly reflect the procedure that should be applied (at least for the present time) for payment of death or disability awards in respect of military contingent personnel serving with UNPROFOR. As stated in those reports, the United Nations is expected to provide *reimbursement* to Governments of payments actually made by them to members of national military contingents or their beneficiaries for death or injury sustained while serving with UNPROFOR. Hence, in order to avoid any misinterpretation arising in respect of annex C to the aide-mémoire for States contributing troops to UNPROFOR/Sarajevo, we would suggest that the reference to "reimbursement of payments due or made by the Government concerned to beneficiaries" be amended to read "reimbursement of payments made by the Government concerned to beneficiaries"; we would also suggest that the reference in the preambular clause of that annex to "UNDOF and UNIFIL" be amended to read "UNFICYP, UNDOF and UNIFIL".

Action to be taken in respect of the claim submitted by the Mission of the Member State concerned

10. In your memorandum, you have raised the issue of whether the amount of the claim submitted in respect of the deceased soldier should be questioned on the basis that it may be "overstated" and may not be in accordance with national legislation of the State in question.

11. We have considered this issue in view of both the applicable reimbursement procedure in respect of Government-submitted compensation claims and the information that has been provided by the Government of the Member State in question in support of the subject claim. In this regard, we have noted that the note verbale of 5 May 1993 from the Ministry of Foreign Affairs of this State requests simply that the Organization provide "reimbursement" of compensation in the amount of US$ 120,000.00—which is alleged to be the "payment due to the beneficiaries" of the deceased soldier under national regulations—and does not present any computation or breakdown in respect of that figure to verify the amount of such entitlements. Furthermore, the note does not mention the specific provisions of the national regulations under which the Government is required to provide such a compensation payment to the beneficiaries of the deceased soldier. As mentioned above, the Government has also failed to provide any proof that such a payment has been made to the beneficiaries of the deceased.

12. In conjunction with the above, it is important to note that annex C to the aide-mémoire specifies that a Government claim "should be appropriately certified by the Auditor-General or an official of equivalent rank/position". Given that the note verbale from the Foreign Ministry of the State in question indicates only that it has been "Certified by the Auditor-General of the Armed Forces of (name of the Member State)" (whose signature is affixed thereunder), we consider that it would be appropriate to ask for precise certification specifying that the amount of the compensation award has been determined in accordance with national legislation and, in this connection, to require a detailed computation and substantiating documentation. Hence, it would seem warranted to ask the Mission of the State concerned to submit (*a*) a copy of the relevant national legislation and/or regulations setting forth the compensation entitlements and (*b*) an explanation as to how the requested sum was computed, including a breakdown of the respective entitlements included in that sum with supporting documentation. In general, it would also seem warranted to request that any such Government claim for reimbursement also be accompanied by proof that payment of the subject compensation amount had been made to the respective beneficiaries.

13. In line with the above, we have prepared a proposed note verbale to be sent from the Legal Counsel to the Permanent Mission of (name of the Member State) explaining the applicable procedure for submission of such compensation claims and requesting that additional information be submitted in respect of the subject claim. Once this additional information is received, we will hopefully be in a better position to verify whether the requested amount has been properly determined in accordance with national legislation and/or regulations.

Proposed modification of provisions for reimbursement of compensation awards in respect of death or injury incurred by national military contingents serving with United Nations peace-keeping operations

14. In your memorandum of 10 August 1993 and your follow-up memorandum of 9 November 1993, the issue is also raised as to whether modifications should be made to the current procedure for reimbursing Governments for compensation awards in respect of death, injury or disability incurred by

members of national military contingents serving with United Nations peacekeeping operations.[39] In this regard, you state that your Office "consider[s] the current procedures for remuneration based on 'national legislation and/or regulations for death, injury, disability or illness attributable to service with the Force' both imprecise and open-ended". It is noted that, as a possible alternative to such procedures, you suggest the following:

> "That remuneration for all categories of claimants excluding United Nations staff members not exceed $50,000. That the United Nations not be held accountable for casualties not *directly* attributable to service under the United Nations Command."

15. Given that a review of this matter would require extensive study on the part of this Office, and considering that any change to the current reimbursement procedure would have policy and financial implications, it is our view that this subject should be initially addressed in the context of a working group representing the offices concerned. After such a working group has been established and preliminary views have been exchanged regarding your proposal, this Office would be in a better position to provide advice on any legal issues relating thereto.

30 November 1993

COPYRIGHT ISSUES

9. QUESTION OF THE COMMERCIAL USE OF THE LOGO OF THE SYMPOSIUM ENDORSED BY THE GENERAL ASSEMBLY IN ITS RESOLUTION 47/183—ESTABLISHED UNITED NATIONS POLICIES AND PRACTICES, BASED ON GENERAL ASSEMBLY RESOLUTION 92 (I), DO NOT ALLOW GRANTING TO SPONSORS OF ANY ACTIVITIES THE RIGHT OF USE OF THE LOGO IN RETURN FOR FINANCIAL CONTRIBUTION

Memorandum to the Senior Legal Officer, United Nations Conference on Trade and Development

1. This is in response to your facsimile of 8 June 1993 requesting our advice on the commercial use of the logo of the Symposium on Trade Efficiency, to be held in 1994, to finance activities related to that Symposium.

2. We understand that the convening of the Symposium was endorsed by the General Assembly in its resolution 47/183 of 22 December 1992, paragraph 14 of which provides that it is to be convened *within existing resources*. In the light of that resolution, the activities to be undertaken by UNCTAD in the context of the Symposium should be financed by, and within, existing resources. Accordingly, we see no legal basis, nor any legislative authorization, allowing UNCTAD to enter into fund-raising arrangements to finance activities in respect of the Symposium from private sources.

3. The above notwithstanding, we proceed to consider below the various questions submitted to us in your memorandum. Initially, we wish to point out that we have not been informed of what the logo of the Symposium looks like. If it incorporates the United Nations name and/or emblem, its use on products and services of corporate sponsors would be in direct violation of Gen-

eral Assembly resolution 92(I) of 7 December 1946, which explicitly forbids any commercial use of the United Nations emblem. As you know, the United Nations emblem is protected free of charge under the Paris Convention[40] and under national laws, on the assumption that it is not used for commercial purposes.

4. Even if the logo of the Symposium bears no resemblance to the United Nations emblem and does not reproduce the United Nations name, granting to sponsors the right to use it in return for financial contributions would constitute a departure from our accepted policies and practices and in particular from the avoidance of any commercial entanglements that we have always aimed for in connection with the United Nations name. In addition, the granting of exclusivity to sponsoring corporations might generate complaints from other competing corporations. Therefore, though the use of a logo substantially different from the United Nations emblem would not constitute a direct violation of General Assembly resolution 92 (I), it would require at least clearance by the Secretary-General.

5. The Secretary-General's endorsement of the proposed fund-raising arrangements is especially important in view of the fact that he has decided to become personally involved in a major fund-raising effort in the corporate and private sector in relation to the fiftieth anniversary of the United Nations, as noted by you in the last paragraph of your letter. Furthermore, he has designated a Special Advisor to be the focal point for these efforts. The Secretary-General has made it clear that no separate fund-raising arrangements could, in any way, duplicate or compete with this effort. Any exception would have to be negotiated with and cleared by the Secretary-General's Special Adviser for Information and Public Policy. A non-profit foundation has in fact been established as a possible component of the fiftieth anniversary fund-raising efforts, but no final decision has been made as to the role of the foundation, in particular whether it will be licensing, or sub-licensing, the fiftieth anniversary logo. The establishment of a second foundation for United Nations fund-raising would, in any event, lead to duplication and confusion.

6. With respect to your inquiries on the logo for the United Nations Conference on Environment and Development, we advise that the licensing of that logo cannot be considered as a precedent for similar licensing of the Symposium logo. Effective licensing requires that the logo to be licensed be registered and so protected from imitation in countries where licensing is to be undertaken. This is a *very expensive* exercise which must be conducted through outside attorneys. In the UNCED case we understand that large sums were expended by the corporation to which the logo was licensed to obtain protection in fund-raising markets. The expenditure of such sums would hardly be justified in fund-raising for a one-week symposium.

23 June 1993

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10. Use of copyrighted commercial musical works as theme or transition music in Department of Public Information broadcast radio programmes—Legal principles set out in administrative instruction ST/AI/189/Add.9/Rev.2 apply to non–United Nations musical works protected by copyright

Memorandum to United Nations Radio, Department of Public Information

1. This is with reference to your letter of 8 September 1993 enquiring whether the Department of Public Information may use copyrighted commercial musical works, as theme or transition music, in its broadcast radio programmes without the authorization of the copyright owner.

2. Reproduction of copyrighted material without the consent of the copyright holder is, in general, a violation of the law. The United Nations is not exempt from seeking such authorization before reproducing copyrighted works. We note, for example, with respect to the use of copyrighted materials in United Nations publications and documents, that paragraph 14 of administrative instruction ST/AI/189/Add.9/Rev.2 provides that:

> "If copyrighted material is to be reproduced, the authorization of the owner of the copyright—publisher and/or author—may have to be obtained and acknowledged. Authorization must generally be obtained for the reproduction of a drawing, diagram, photograph or the like and of texts of substantial length and that authorization should be sought and retained on file by the author department."

3. The same legal principles set out in the administrative instruction apply to non-United Nations musical works protected by copyright. Consequently, in order to avoid any possible claims of copyright infringement against the United Nations, we would advise that before any copyrighted musical work is broadcasted by the Department of Public Information, a request be made to and obtained from the copyright holder thereof.

9 September 1993

FEES AND TAXES

11. FEES LEVIED BY A MEMBER STATE TO THE UNITED NATIONS FOR USE OF RADIOELECTRIC FREQUENCIES BY THE UNITED NATIONS INFORMATION CENTRE—ARTICLE III, SECTIONS 7(*a*) AND 9 OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

Memorandum to the Chief of the Information Centres Division, Department of Public Information

1. This is with reference to your memorandum dated 15 December 1992 on the fees levied for use of radio-electric frequencies by the United Nations information centre in a Member State. We note that the audited report of the information centre in the capital of the Member State dated 30 July 1992 indicates that the United Nations offices in the State in question, including the information centre, paid a certain fee, including delinquency charges, for the use of a radio-electric spectrum. The Internal Audit Division questions the validity of this charge.

2. From the available information, it appears that the practice of the United Nations with respect to paying fees for the allocation and use of radio frequencies is not entirely consistent. In the 1967 study on relations between

States and international organizations prepared by the Secretariat for the International Law Commission,[41] it is observed in this respect that "it appears that in no case has [the United Nations] paid taxes in respect of its telecommunications". We have no evidence that, for example, in New York the United Nations is charged any fees for the use of radio frequencies at Headquarters, nor does it pay such fees in Vienna. However, in the latter case, the Government of the host country had originally levied fees for the use of radio frequencies upon UNIDO, but waived them after some discussion with the Organization. In only one instance known to us, a small symbolic fee for the allocation of radio frequencies and corresponding service appears to be paid by the United Nations Office at Geneva.

3. In the absence of a host Agreement between the State concerned and all the offices of the United Nations system in this State, including the information centre, the fee in question can only be considered in the context of the appropriate provisions of the 1946 Convention on the Privileges and Immunities of the United Nations,[42] to which the State in question is a party.

4. The fee in question could be regarded as a "rate" or "tax" for communications under article III, section 9, of the Convention. Pursuant to that provision, the host Government should grant the United Nations for its official communications treatment not less favourable than that accorded to any other Government or its diplomatic missions. Therefore, if other diplomatic missions in the State concerned do not pay this type of fee, levying it on United Nations offices including the information centre would clearly constitute a breach of article III, section 9, of the Convention. Therefore, it would be justified to decline the payment of the fee.

5. Irrespective of the characterization of the fee in question as a "tax" or "rate" for communications under article III, section 9, it could be argued that it constitutes a direct tax under article II, section 7 (*a*), of the Convention, from which the United Nations is exempt. The relevant provisions of the latter section read:

> "The United Nations, its assets, income and other property shall be:
>
> (*a*) exempt from all direct taxes; it is understood, however, that the United Nations will not claim exemption from taxes which are, in fact, no more than charges for public utility services."

Although the fee at issue might be perceived to be in payment for a service rendered by the host Government, the service being the allocation of the spectrum frequencies and its protection from interference by other radio operators, the United Nations has consistently maintained a narrow definition of the expression "charges for public utility services" used in article II, section 7 (*a*). In particular, "charges for public utility services" must relate to concrete services that can be *specifically identified, described, itemized* and *calculated according to some predetermined unit*. As far as the fee in question is concerned, it is difficult to clearly identify and itemize the service being rendered by allocating a radio-electric spectrum. Moreover, the charge which is levied annually bears no relation to the amount of services rendered. Therefore, it appears that a fee for the use of a radio-electric spectrum does not constitute a charge for public utility services under article II, section 7 (*a*), of the Convention but rather *a direct tax* from which the United Nations is exempt.

6. It would seem to us advisable that the Government of the State in question be apprised of the foregoing observations. The United Nations offices operating in the country concerned should consider requesting the Government of the host State to waive those charges and recover the amounts already paid.

11 January 1993

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12. UNITED NATIONS PRACTICE CONCERNING VALUE-ADDED TAX—ARTICLE II, SECTION 8, OF THE 1946 CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS—CRITERIA TO DECIDE WHETHER PARTICULAR PURCHASES ARE "IMPORTANT PURCHASES" WITHIN THE MEANING OF THE ABOVE-MENTIONED PROVISION—STUDY ON PRIVILEGES AND IMMUNITIES PREPARED BY THE SECRETARIAT OF THE UNITED NATIONS FOR THE INTERNATIONAL LAW COMMISSION

Telegram to the Senior Legal Officer, Legal Liaison Officer, United Nations Office at Geneva

1. In United Nations practice, value-added tax (VAT) is deemed to be an indirect tax within the meaning of article II, section 8, of the 1946 Convention on the Privileges and Immunities of the United Nations,[43] which entitles the Organization to the remission or return of the amount of duty or tax when "making *important purchases* for official use of property on which such duties and taxes have been charged or are chargeable" (emphasis added).

2. According to criteria described in the study on privileges and immunities prepared by the Secretariat for the International Law Commission,[44] the question whether particular purchases are "important" within the meaning of article II, section 8, of the Convention has usually been determined by reference either to the quantity of goods purchased or to the amount paid. Purchases may be said to be important when they are made on a recurring basis or involve considerable quantities of goods, commodities or materials.[45]

3. Article II, section 8, of the Convention is designed to protect the assets of the Organization from such taxes whose incidence would be specifically heavy and constitute an undue burden upon it. While not providing for an explicit exemption from such taxes as VAT, article II, section 8, does oblige Members, whenever possible, to "make appropriate administrative arrangements for the remission or return of the amount of duty or tax". This principle reflected in the Convention has become a regular element in the customary practice of the States parties to the Convention. As to the State in question, according to the information available in our files, in a communication dated 15 March 1967, the United Nations was, *inter alia*, advised that value-added taxes would be levied upon purchases by the organizations but that reimbursement would be made on application to the competent authorities in cases of important purchases. An "important purchase" was defined as one where a tax of 250 French francs per invoice is charged, although in certain cases invoices relative to one operation from several suppliers may be grouped together as one purchase. It appears that the Foreign Ministry of the State in question has followed this policy vis-à-vis the organizations of the United Nations system.

4. As you know, the United Nations attaches special importance to the principle of remission of VAT because it is designed to equalize the procurement costs of the Organization throughout the world and the consequent charges upon Member States. Therefore, the VAT aspects of a contract with the firm of the country in question should be considered in the light of the foregoing observations. In our view, the United Nations Office at Geneva should seek the relevant remission of the VAT in the present case.

22 January 1993

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13. Health and social insurance introduced by a Member State made mandatory to officials of the United Nations—Article II, section 7 (*a*), of the Convention on the Privileges and Immunities of the United Nations—Regulation No. 1 approved by the General Assembly in its resolution 604(VI)—Chapter VI entitled "Social security" of the United Nations Staff Regulations and Rules

Memorandum to the Officer in Charge of the Information Centres Division, Department of Public Information

1. This is with reference to copies of communications dated 17 and 22 March 1993 submitted to this Office and containing, respectively, part of the report (para. 9) of the United Nations information centre in the capital of (name of a Member State) on a new system of health and social insurance introduced in this State, and circular note verbale issued by the Ministry of Foreign Affairs of the State concerned, on the same issue, dated 15 March 1993.

2. We note that in its note verbale the Ministry of Foreign Affairs of the State informs all members of the diplomatic missions accredited in the capital of the State (including the information centre) that, in accordance with recent national legislation:

> "The local staff of diplomatic missions, i.e., permanent residents of (name of the Member State), are subject to the above-mentioned Acts in full. Exempt from them are only individuals in employ of an agent enjoying diplomatic privileges and immunities who are not citizens of (name of the Member State) but only provided they are not permanent residents of (name of the Member State)."

In this connection, the Director of the information centre seeks our advice as to whether the relevant international agreements would exempt United Nations offices from participating in national social security schemes set out for local staff.

3. It has been consistent United Nations practice and policy, pursued by the Organization for more than four decades, that mandatory contributions for workman's compensation, social security and pension benefits schemes under national legislation should be considered as a form of direct taxation on the United Nations. Under article II, section 7(*a*), of the Convention on the Privileges and Immunities of the United Nations,[46] its assets, income and other property shall be exempt from all direct taxes.

4. The fundamental principle in this respect is reflected in regulation No. 1, approved by the General Assembly in its resolution 604(VI) of 1 February 1954, paragraph 2 of which reads as follows:

> "The provisions of the United Nations social security system shall constitute the sole provisions under which persons in the service of the United Nations shall be entitled to claim against the United Nations in respect of any risks within the purview of the United Nations social security system, and any payments made under the United Nations social security system shall constitute the sole payments which any such person shall be entitled to receive from the United Nations in respect of any such risks."

Pursuant to that principle, the United Nations provides for its own social security arrangements to cover medical and other health benefits, as well as compensation in case of work-related illness, injury or death, and a staff pension scheme for all staff members other than those recruited locally and assigned to hourly rates, in accordance with the Staff Regulations and Rules approved by the General Assembly. In particular, social security matters are set out in detail in chapter VI, entitled "Social security", of the United Nations Staff Regulations and Rules.

5. However, should United Nations officials, either internationally or locally recruited, employ domestic servants, then for these and any local persons employed on an hourly rate by the United Nations information centres, participation in the proposed social security schemes should be complied with. We think that the above-mentioned observations should be conveyed to the attention of the competent authorities of the State concerned with a view to requesting that they make the appropriate arrangements, exempting the United Nations information centre in the capital of the State concerned from mandatory participation in the proposed social security schemes adopted by that State. We would appreciate you keeping us informed of any further developments in this matter.

7 April 1993

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14. Income tax levied by the Government of a Member State on the owner of the vessel hired by the United Nations—Character of the tax in question

Memorandum to the Director of the Field Operations Division

1. This is with reference to the correspondence exchanged between this Office and the Permanent Mission of (name of a Member State) in connection with the "income tax" levied by the Government of the State in question on the owner of the vessel hired by the United Nations for the purpose of shipping the equipment of the national contingent contributed by the State to the United Nations Operation in Mozambique (ONUMOZ).

2. The request for payment of the tax made by the Government of the State in question from the vessel owner has been reviewed on the basis of the clarification provided by the Permanent Mission of the State in the note verbale dated 4 June 1993 and the provisions of the contract between the shipping com-

pany and the United Nations for provision of freight forwarding and related services for the United Nations worldwide, which applies to the service provided by a division of the company in the context of the transportation of the above-mentioned equipment.

3. On the basis of this review, we have reached the conclusion that the payment of such an income tax is a matter that does not involve the United Nations as it is one to be settled between the Government of (name of the Member State) and the vessel owner. As indicated in the above-mentioned note of the Permanent Mission of the State concerned, such an income tax is to be levied on "the assessed income to be earned by the owner of the vessel".

4. Since the tax in question is not a tax on freight or cargo, the provisions in the proposal submitted to the United Nations by the owner of the vessel for the purpose of transporting the above-mentioned equipment stipulating that "any taxes and/or dues on freight and/or cargo both ends to be for United Nations account" would not apply.

5. Therefore, in case the Government of the State concerned enforces the tax on the vessel owner, there is no basis under the provisions of the above-mentioned contract between the United Nations and the shipping company for the latter to seek reimbursement from the United Nations.

25 June 1993

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15. Question of payments of social security contributions by local United Nations Development Programme staff in a Member State—Exemption from such payments under relevant multilateral conventions and the Standard Basic Assistance Agreement

Memorandum to the Director of the Department of Administration and Management Services, United Nations Development Programme

1. This is in response to your memorandum seeking the advice of this Office with regard to the position which should be adopted by UNDP vis-à-vis the Government of (name of a Member State) on the payment of social security contributions by local staff in that State.

2. According to the note verbale of the Ministry of Foreign Affairs of the State in question, local UNDP staff members are supposed to pay social security contributions because they are not exempt from such payments under the provisions of the 1961 Vienna Convention on Diplomatic Relations[47] and the 1963 Vienna Convention on Consular Relations,[48] referred to in the note. In this connection, it could be brought to the attention of the competent authorities of the State concerned that those two Conventions do not apply to United Nations staff members. At the same time, the authorities should be reminded that in accordance with article V, section 18 (*b*), of the Convention on the Privileges and Immunities of the United Nations,[49] to which (name of the Member State) is a party, "officials of the United Nations shall be exempt from taxation on the salaries and emoluments paid to them by the United Nations". It should be noted in this regard that the General Assembly in its resolution 76 (I) of 7 December 1946 approved "the granting of the privileges and immuni-

ties referred to in article V . . . of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946, to all members of the staff of the United Nations, with the exception of those who are recruited locally and are assigned to hourly rates". In addition, with respect to UNDP in the State concerned, it is also worth mentioning that the Government of that State on 25 October 1991 signed the Standard Basic Assistance Agreement with UNDP, article IX of which makes the 1946 Convention on the Privileges and Immunities of the United Nations applicable to UNDP staff members in (name of the Member State).

3. The competent authorities of the State in question should be informed that requests under national law for mandatory contributions to social security and pension benefits schemes have always been considered by the United Nations as a form of direct taxation on the Organization. The United Nations is exempt from such taxation pursuant to the provisions of article II, section 7(*a*), of the aforementioned 1946 Convention.

4. It could also be brought to the attention of the competent authorities of the State in question that the United Nations has its own comprehensive social security scheme for staff members of the Organization. The establishment of such a scheme is required under regulation 7.2 of the United Nations Staff Regulations, which are established by the General Assembly in accordance with Article 101 of the Charter of the United Nations.

20 August 1993

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16. Tax on accommodation imposed on customers lodging in hotels and guest houses in a Member State—Applicability of this tax to the United Nations Transitional Authority in Cambodia—Agreement between the United Nations and the Supreme National Council of Cambodia on the status of UNTAC

Memorandum to the Director of Administration,
United Nations Transitional Authority in Cambodia

1. This is in response to your memorandum dated 25 August 1993 to the Acting Director of the Field Operations Division, in which you request the advice of this Office on the tax on accommodation imposed on customers lodging in hotels and guest houses in Cambodia. In the memorandum you seek clarification as to whether the accommodation tax established by Decree No. 88 of the "State Council of the State of Cambodia" should be paid by:

(*a*) UNTAC in respect of bills paid directly by the Finance Section to hotels/guest houses for lodging officially provided to certain military/civilian personnel;

(*b*) UNTAC members in respect of bills paid directly by such individuals to hotels/guest houses for their own private lodging.

2. Under paragraph 3, section III, of the Agreement between the Supreme National Council of Cambodia and the United Nations on the Status of the United Nations Transitional Authority in Cambodia,[50] its members, property, funds and assets shall enjoy the privileges and immunities specified in the Agree-

ment as well as those provided for in the Convention on the Privileges and Immunities of the United Nations,[51] to which Cambodia is a party. In paragraph 14, section IV, of the Agreement it is also stated that UNTAC, as a subsidiary organ of the United Nations, shall enjoy the status, privileges and immunities of the United Nations in accordance with the aforementioned Convention.

3. The Convention provides in article II, section 7 (*a*), that the United Nations, its assets, income and property shall be exempt from all direct taxes, it being understood, however, that the United Nations will not claim exemption from taxes which are, in fact, no more than charges for public utility services.

4. The 1967 Secretariat study regarding the practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities[52] contains the following clarification on the subject matter:

> "In view of the fact that the General Convention was drawn up for uniform application in all Member States of the United Nations, the meaning to be given to the term "direct taxes" cannot depend on the particular meaning given to that expression by the fiscal laws of a particular State. Thus, while the terms 'direct' and 'indirect' taxes are interpreted differently in the various national legal systems of Member States, according to the tax system or administration adopted, the meaning to be given to those terms in relation to the application of the General Convention must be found by reference to the nature of that instrument and to the incidence of the tax in question, that is to say, according to the party upon whom the burden of payment directly falls. Moreover, in interpreting the Convention, the United Nations and its Members must be guided by the overlying principles of the Charter, and in particular Article 105 thereof, which provides that the Organization shall enjoy such privileges and immunities as are necessary for the fulfilment of its purposes. In accordance with that provision, no Member State can hinder the working of the Organization or take any measure which might increase its financial or other burdens. Under article II of the Convention, therefore, the Organization is relieved of the burden of all direct taxes, and is to be granted the remission or return of indirect taxes where the amount involved is important enough to make this administratively possible."

5. The 1985 supplementary study,[53] prepared by the Secretariat on the same subject, in paragraphs 33 and 34, section 14 (v) ("Hotel taxes"), clearly states that "the exemption from direct taxes has also been applied to hotel charges paid directly by the United Nations". According to the study, "such was the view of the Legal Office in a memorandum of 9 January 1969 about taxes on hotel charges for room and board of United Nations personnel in Korea", and in another memorandum of 22 November 1976, where the question was whether the exemption from New York hotel occupancy tax was applicable to non-local short-term staff members whose remuneration consists of monthly allowance and subsistence allowance.

6. In reviewing the Cambodian "Law on the creation of lodging tax", promulgated by Decree No. 88, we took note of the fact that in accordance with article 2 of that Law "the loging tax shall be imposed *on customers* lodging in various hotels and guest houses". We also took into account that under article

5 of the Law the hotel and guest house owners or representatives shall be responsible only for bookkeeping as determined by the tax authority and that in accordance with article 4 the supervision of lodging tax collection is the competence of the tax department, under the supervision of the Ministry of Finance.

7. In the light of the clarifications provided above, this Office is of the view that the lodging tax represents a direct tax on the Organization and that, therefore, UNTAC should be exempt from this tax in respect of bills paid directly by the Finance Section of UNTAC to hotels/guest houses for lodging officially provided to certain military/civilian personnel.

8. With reference to bills paid by members of UNTAC directly to hotel/guest houses, we would like to point out that the Convention on the Privileges and Immunities of the United Nations does not contain provisions which could serve as a basis for the exemption from the lodging tax. However, as stated in paragraph 3, section III, of the Agreement referred to above, in addition to the privileges and immunities provided by the Convention, UNTAC members enjoy the privileges and immunities specified in the Agreement. Section 27 of the Agreement states that members of UNTAC shall be exempt, *inter alia*, "from all direct taxes, except for charges for public utility services rendered". Since, for the reasons stated above, hotel taxes, like the lodging tax, are considered by the Organization to be direct taxes, members of UNTAC, in our view, should be exempt from the Cambodian lodging tax in accordance with the provisions of section 27 of the UNTAC Agreement.

3 September 1993

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17. "EN-ROUTE CHARGES" IN A MEMBER STATE FOR FLIGHTS CONDUCTED BY THE UNITED NATIONS PROTECTION FORCE—CHARACTER OF THESE CHARGES—ARTICLE II, SECTION 7(*a*), OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

Memorandum to the Officer-in-Charge of the Logistics and Communications Section, Field Operations Division

1. This is in response to your memorandum of 15 September 1993 requesting our advice as to whether the United Nations is liable for payment of "en-route charges" in Croatia for flights conducted by the United Nations Protection Force in the former Yugoslavia (UNPROFOR).

2. By virtue of the special status of the United Nations, acting on behalf and with the support of the Governments of Member States, the Organization has always been released from charges for the use of airfields. According to our files, the United Nations has never paid any "en-route charges", equating to landing fees and overflight fees.

3. The Convention on the Privileges and Immunities of the United Nations,[54] to which the Government of Croatia succeeded on 12 October 1992 with effect from 8 October 1991, provides in article II, section 7(*a*), as follows:

> "The United Nations (. . .) shall be exempt from all direct taxes; it is understood, however, that the United Nations will not claim exemption from taxes which are, in fact, no more than charges for public utility services."

The charges under consideration, i.e., "en-route charges" for specific flights conducted by UNPROFOR, fall, in our view, in the category of "*direct taxes*".

4. The question, however, arises as to whether the en-route charges are "no more than *charges for public utility services*". The latter expression has been interpreted in the 1985 study prepared by the Secretariat for the International Law Commission[55] as follows: Public utility charges, in accordance with customary practice, must be for services that can be *specifically identified, described, itemized and calculated* according to some predetermined unit. The invoices received by UNPROFOR from the Government of Croatia, in varying amounts, do not seem to fulfil this condition.

5. Moreover, taking into consideration that the payment of the en-route charges is requested in the context of a peacekeeping operation, i.e., the United Nations Protection Force in Croatia, it is to be recalled that under the provisions of paragraph 14 of the model status-of-forces agreement,[56] which reflects the customary principles and practices of the United Nations peacekeeping operations, the Organization "may *use* roads, bridges, canals and other waters, port facilities and *airfields without the payment of dues, tolls or charges, including wharfage charges*. However, the United Nations peacekeeping operation will not claim exemption from charges which are in fact *charges for services rendered*" (emphasis added).

6. Identical provisions are contained in paragraph 13 of the draft agreement on the status of UNPROFOR in Croatia. Although that agreement has not yet been concluded, in the negotiations the Government of Croatia has not made any objections to paragraph 13. The Government is therefore aware that, under the draft agreement, UNPROFOR is to be exempted from any charges other than charges for "services rendered".

7. On the basis of the foregoing considerations, in our view UNPROFOR should claim exemption from the "en-route charges". In the case where the Government of Croatia insists on the payment of the "en-route charges", it would have to specifically identify, describe and itemize those charges on the basis of a predetermined unit, as well as indicate their nature.

12 October 1993

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18. Imposition by a Member State of the value-added tax—Value-added taxes in United Nations practice—Standard Basic Assistance Agreement of 1990—Applicability of the Convention on the Privileges and Immunities of the United Nations

Memorandum to the Executive Officer, Division of Administrative and Information Management, UNDP

1. Your inquiry of 3 November 1993 concerning the imposition by a Member State of the value-added tax has been referred to this Office for advice. The tax in question is a 5 per cent tax which is levied on certain types of businesses in respect of the turnover made by a person or business. In United Nations practice, business turnover and value-added taxes are deemed to be indirect taxes within the meaning of article II, section 8, of the Convention on

the Privileges and Immunities of the United Nations.[57] Although the State in question is not a party to that Convention, under article IX of the Standard Basic Assistance Agreement which it signed on 20 March 1990, the Member State concerned has undertaken to apply the provisions of the Convention to the United Nations and its organs.

2. In accordance with article II, section 8, of the Convention, the competent authorities of the State in question should, whenever possible, make the necessary administrative arrangements to remit or return any amount of tax charged on important purchases of goods and services. The question whether particular purchases are "important" within the meaning of article II, section 8, of the Convention has usually been determined by reference either to the purchases made on a recurring basis or to those involving considerable quantities of goods, commodities or materials. In furtherance of this objective, the authorities of the State concerned should be made aware of the following:

(*a*) Article II, section 8, of the Convention is designed to protect the assets of the Organization from such taxes whose incidence would be specifically heavy and constitute an undue burden on it. While it does not provide for an explicit exemption from such taxes, article II, section 8, does oblige Member States, whenever possible, to "make appropriate administrative arrangements for the remission or return of the amount of duty or tax". This principle, reflected in the Convention, has become a regular element in the customary practice of the States parties to the Convention. Thus, for example, following lengthy consultations and an exchange of notes between the Secretary-General or the Legal Counsel of the United Nations and representatives of the Governments of the following Member States, arrangements were reached whereby, pursuant to article II, section 8, of the Convention, the Organization was reimbursed for all indirect taxes on important purchases of goods and services above a low threshold price: in the United Kingdom of Great Britain and Northern Ireland, 50 pounds; in France, 250 francs; in Austria, 1,000 schillings; in Switzerland, 100 francs; in Denmark, 200 kroners; and in the Congo, 10,000 CFA. The United Nations attaches special importance to the principle of return or remission because it is designed to equalize the procurement costs of the Organization throughout the world and the consequent charges upon Member States.

(*b*) Pursuant to section 1 of article IX of the above-mentioned Standard Basic Assistance Agreement, "the Government shall apply to the United Nations and its organs, including UNDP and United Nations subsidiary organs acting as UNDP Executing Agencies, their property, funds and assets, and to their officials, the provisions of the Convention on the Privileges and Immunities of the United Nations". Under final article, section 34, of the Convention, the State concerned has an obligation to be "in a position under its own law to give effect to the terms of this Convention".

(*c*) Any interpretation of the provisions of the Convention on the Privileges and Immunities of the United Nations must be carried out within the spirit of the underlying principles of the Charter of the United Nations, and in particular Article 105 thereof, which provides that the Organization shall enjoy such privileges and immunities as are necessary for the fulfilment of its purposes. Measures which might, *inter alia*, increase the financial or other burdens of the Organization have to be viewed as being inconsistent with that provision.

(*d*) It is also important to point out that, until 1 February 1993, UNDP had been able to claim exemption from the tax in question and that businesses in the State in question had accepted UNDP's claim without official certification from the Government of the State concerned. Thus, by virtue of the practice that has so far prevailed, the authorities of the Member State in question would thus be reversing a long-standing practice.

23 November 1993

PEACEKEEPING

19. THE RIGHT OF SELF-DEFENCE OF UNITED NATIONS PEACEKEEPING FORCES AND THE EXERCISE OF THAT RIGHT—ARTICLE 51 OF THE CHARTER OF THE UNITED NATIONS

Memorandum to the Senior Political Adviser to the Secretary-General

1. This is with reference to the memorandum dated 7 July 1993 that the Special Representative of the Secretary-General for the former Yugoslavia addressed to the Secretary-General with regard to certain legal and policy questions and which you transmitted to us for comments and reply on 12 July. The question to be reviewed from a legal point of view concerns the right of self-defence of United Nations peacekeeping forces. The other questions are rather of a political and military nature.

2. At the outset, it is necessary to point out that the right of self-defence is well established in international law, both under customary international law and Article 51 of the Charter of the United Nations. The right of self-defence constitutes an exception to the basic principle in international law prohibiting the use of force, the other exception being Chapter VII of the Charter. The right of self-defence is not limited to States and applies as an inherent right also to the United Nations. United Nations forces have, accordingly, always been regarded as entitled to the right of self-defence and, expressly for this purpose, have been provided with light infantry weapons. This right has been consistently provided for in the rules of engagement established for each peacekeeping operation since their inception.

3. In this respect, it should also be pointed out that the use of force in self-defence is not limitless but must be proportional and may include, as indicated in the report of the Secretary-General to the Security Council dated 26 October 1973 on new arrangements for the second United Nations Emergency Force (UNEF),[58] ". . . resistance to attempts by forceful means to prevent it from discharging its duties under the mandate of the Security Council". This is a broader definition of the principle of self-defence which was initially laid down by Dag Hammarskjöld when the first United Nations Emergency Force was set up in 1956. In his report to the General Assembly dated 16 October 1958, the then Secretary-General stated that "a reasonable definition [of self-defence] seems to have been established in the case of UNEF, where the rule is applied that men engaged in the operation may never take the initiative in the use of armed force, but are entitled to respond with force to an attack with

arms, including attempts to use force to make them withdraw from positions which they occupy under orders from the Commander, acting under the authority of the Assembly and within the scope of its resolutions".[59]

4. The principle of the use of force in self-defence by the United Nations forces is closely linked with the circumstances under which an operation is established and develops. An operation established with the consent of all parties concerned must be provided with rules of engagement in which instructions on the use of force in self-defence may be different from those that are designed to suit an operation established under Chapter VII of the Charter which is, by definition, an enforcement action.

5. In the case of the United Nations operation in Bosnia and Herzegovina, the Security Council in its resolution 836 (1993) authorized the expansion of the mandate of the United Nations Protection Force (UNPROFOR) to include, under Chapter VII of the Charter of the United Nations, the protection of the safe areas referred to in resolution 824 (1993). In order to enable UNPROFOR to carry out its expanded mandate in such areas, the Security Council further authorized the Force, under paragraph 9 of resolution 836 (1993), "acting in self-defence, to take the necessary measures, including the use of force in reply to bombardments against the safe areas".

6. In the light of the above, the use of force in self-defence is an inherent right of United Nations forces exercised to preserve a collective and individual defence.

19 July 1993

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20. Financing of the United Nations Peacekeeping Force in Cyprus—Question whether the United Nations is liable, in the light of the terms of Security Council resolution 186 (1964), for the outstanding amounts due to the troop contributors to the UNFICYP operation prior to 16 June 1993—Report of the Secretary-General on the financing of UNFICYP—Regulations for the United Nations Force in Cyprus

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

1. I wish to refer to a memorandum of 25 August 1993 from the Acting Controller, requesting a legal opinion on whether the United Nations is legally liable for the outstanding amounts due to the troop contributors to the United Nations Peacekeeping Force in Cyprus (UNFICYP) prior to 16 June 1993.

2. It is pointed out in the memorandum that this request is submitted in connection with the discussion held by the Advisory Committee on Administrative and Budgetary Questions at the time of the consideration of the Secretary-General's report on the financing of UNFICYP.[60]

3. The aforementioned report was submitted by the Secretary-General as a result of the adoption by the Security Council on 27 May 1993 of resolution 831 (1993), introducing changes in the manner in which UNFICYP had been financed since its inception under Security Council resolution 186 (1964) of 4

March 1964. It is noted in paragraph 41 of the report that there is an accumulated deficit of over $200 million due to the troop-contributing countries and that this amount represents outstanding reimbursements of UNFICYP to the troop-contributing countries under the financing scheme heretofore in place. The Secretary-General, consequently, suggests in the report that the General Assembly may wish to consider necessary arrangements for financing the outstanding amount to UNFICYP troop contributors and make the required provisions.

4. According to your memorandum, during the course of the consideration of the Secretary-General's report, the Advisory Committee sought clarification of whether in the light of the terms of Security Council resolution 186 (1964) there is a legal liability on the part of the United Nations for the unpaid claims for extra and extraordinary costs submitted by the UNFICYP troop-contributing Governments for periods prior to 16 June 1993.

5. In response to the inquiries referred to above, this Office would like to state the following:

6. In connection with these inquiries, it should be first determined what are the conditions under which the troop-contributing countries have sought reimbursement by the United Nations for extra and extraordinary costs they incurred for providing troops for UNFICYP since its establishment.

7. UNFICYP was established in accordance with Security Council resolution 186 (1964) of 4 March 1964, in paragraph 4 of which the Council recommended the creation, with the consent of the Government of Cyprus, of a United Nations peacekeeping force in Cyprus. The mandate of the Force was for three months (paragraph 6 of the resolution) and it was extended for periods of three or six months by subsequent resolutions of the Security Council (192 (1964) of 20 June 1964, 194 (1964) of 25 September 1964, 198 (1964) of 18 December 1964, 201 (1965) of 19 March 1965, 206 (1965) of 15 June 1965, etc.).

8. At the time of the establishment of UNFICYP the Security Council also determined in resolution 186 (1964) the method of its financing. In paragraph 6 of that resolution the Council:

> "6. *Recommends* that the stationing of the Force shall be for a period of three months, all costs pertaining to it being met, in a manner to be agreed upon by them, by the Governments providing the contingents and by the Government of Cyprus. The Secretary-General may also accept voluntary contributions for that purpose."

9. Since the adoption of resolution 186 (1964), all subsequent resolutions of the Security Council extending the mandate of UNFICYP have stated that they reaffirm the provisions of resolution 186 (1964). Therefore, a conclusion can be drawn that until the approval by the Security Council of resolution 831 (1993) the method of financing of the Force has been determined by paragraph 6 of resolution 186 (1964).

10. Under the provisions of paragraph 6 of resolution 186 (1964), the Secretary-General has no authority to provide United Nations funds to meet the costs pertaining to the Force other than through voluntary contributions received for that purpose. This condition has been reiterated practically in every report of the Secretary-General on UNFICYP. It has been stressed in the Secretary-General's letters containing appeals for voluntary contributions for UNFICYP. This condition for the financial arrangements for UNFICYP was highlighted

in paragraph 26 of the above-mentioned report of the Secretary-General on the financing of UNFICYP, which was considered by the Advisory Committee.

11. Following the adoption of resolution 186 (1964), the Secretary-General on 25 April 1964 issued "Regulations for the United Nations Force in Cyprus". Article 16 of the Regulations provides the following:

> "16. *Authority of the Secretary-General.* The Secretary-General of the United Nations shall have authority for all administrative and executive matters affecting the Force and for all financial matters pertaining to the receipt, custody and disbursement of voluntary contributions in cash or in kind for the maintenance and operation of the Force. He shall be responsible for the negotiation and conclusion of agreements with Governments concerning the Force, the composition and size of the Force being established in consultation with the Governments of Cyprus, Greece, Turkey and the United Kingdom and the manner of meeting all costs pertaining to the Force being agreed by the Governments providing contingents and by the Government of Cyprus. Within the limits of available voluntary contributions he shall make provisions for the settlement of any claims arising with respect to the Force that are not settled by the Government providing contingents or the Government of Cyprus. The Secretary-General shall establish a Special Account for the United Nations Force in Cyprus to which will be credited all voluntary cash contributions for the establishment, operation and maintenance of the Force and against which all payments by the United Nations for the Force shall be charged. *The United Nations financial responsibility for the provision of facilities, supplies and auxiliary services for the Force shall be limited to the amount of voluntary contributions received in cash or in kind*" (emphasis added).

12. It was further clarified in article 19 of the Regulations relating to finance and accounting that "financial administration of the Force shall be limited to the voluntary contributions in cash or in kind made available to the United Nations and shall be in accordance with the Financial Rules and Regulations of the United Nations and the procedures prescribed by the Secretary-General".

13. With reference to the question raised by the Advisory Committee, one of the provisions of article 16 of the Regulations is of particular importance because it makes direct reference to agreements which the Secretary-General intended to negotiate and conclude with the troop-contributing Governments. That provision states, as mentioned above, that the Secretary-General shall make provisions for the settlement of any claims arising with respect to the Force that are not settled by the Governments providing contingents but that this will be done only within the limits of available voluntary contributions.

14. It should be emphasized that although in accordance with article 3 of the Regulations their provisions may be amended or revised by the Secretary-General, the key provisions of articles 16 and 19 of the Regulations may not and have not been amended so far because they are based on the condition set out in paragraph 6 of Security Council resolution 186 (1964).

15. As pointed out in the Secretary-General's report referred to above, from the inception of the Force, in accordance with the Regulations the Secretary-General established an account outside the regular budget covering all financial transactions pertaining to UNFICYP and has been informing the Security Council, prior to its decision to extend the mandate of UNFICYP, of

the cost estimate for maintaining the Force during the extension period, including the operational expenses to be borne by the Organization as well as the amounts required to reimburse the troop-contributing Governments for the extra and extraordinary expenses for which they would seek to be reimbursed by the United Nations (paras. 25 and 27).

16. All agreements which have been concluded by the United Nations with the troop-contributing countries in the form of exchanges of letters contain a reference to Security Council resolution 186 (1964) on the establishment of UNFICYP. Moreover, in all these agreements reference is also made to the above-mentioned Regulations, which are attached as an annex to the opening letter signed by the Secretary-General. To some of these agreements, supplementary agreements were concluded with respect to the questions involving expenses concerning the service of a national contingent with UNFICYP. Under such agreements the United Nations agreed to reimburse troop-contributing Governments for some of the extra and extraordinary costs they incurred for providing troops to UNFICYP, with the understanding that this would be done subject to the availability of sufficient voluntary contributions to the UNFICYP Special Account. Thus, an opening letter of the Secretary-General dated 28 September 1967 which constitutes a part of a supplementary agreement between the United Nations and Austria, *inter alia*, states that, "*subject to the availability of funds in the UNFICYP account* (emphasis added), the United Nations will refund to the Government of Austria all extra costs incurred by Austria by reason of the service of its contingents with UNFICYP".[61]

17. In the light of the above, the conclusion may be drawn that from the very inception of UNFICYP it has been understood by all the parties concerned, including the Governments of troop-contributing countries, that under the provisions of Security Council resolution 186 (1964), paragraph 6 of which sets out the conditions for financing of UNFICYP, the responsibility of the United Nations to reimburse the troop-contributing countries for their extra and extraordinary costs related to the Force is limited by the amount of voluntary contributions made to the UNFICYP Special Account. This conclusion can be illustrated by the fact that in his first report to the Security Council after the establishment of UNFICYP the Secretary-General made it clear that he had no assurances that the increased amount of financing of the Force, which was needed to meet the anticipated claims of certain Governments providing contingents to the Force, could be raised through the voluntary contributions.[62]

18. As mentioned in your memorandum, the Security Council on 27 May 1993 adopted resolution 831 (1993) containing provisions relating to the changes in the manner in which UNFICYP should be financed starting from 15 June 1993. In paragraph 4 of that resolution the Council:

> "4. *Decides* that, with effect from the next extension of the mandate of the Force on or before 15 June 1993, those costs of the Force which are not covered by voluntary contributions should be treated as expenses of the United Nations under Article 17, paragraph 2, of the Charter of the United Nations".

19. The resolution at the same time stresses in paragraph 3 the importance of the continuation of voluntary contributions to the Force and calls for maximum voluntary contributions in the future.

20. It appears from the text of Security Council resolution 831 (1993) that it sidesteps the issue of outstanding reimbursements of the United Nations to the troop-contributing countries. It is not clear from the resolution whether in its paragraph 4 the words "costs of the Force" mean only future costs of the Force or whether they also include the accumulated deficit due to the troop-contributing countries.

21. In this regard we took note of the fact that the Advisory Committee in its comments on the aforementioned report of the Secretary-General, submitted pursuant to Security Council resolution 831 (1993), pointed out that it was for the General Assembly to decide on how the expenditures of UNFICYP should be financed.[63]

22. Having reviewed the documents related to the financing of UNFICYP, this Office is of the view that in the light of the terms of Security Council resolution 186 (1964) the United Nations is responsible for the reimbursement of the outstanding amounts due to the troop-contributing countries in connection with the operation of UNFICYP prior to 16 June 1993 only within the limits of available voluntary contributions to the UNFICYP Special Account. However, since those expenses have been incurred by the troop-contributing countries for providing troops for UNFICYP, they do constitute a part of the costs of the Force. As stated in paragraph 20 above, it is not clear whether paragraph 4 of Security Council resolution 831 (1993) covers only future costs of UNFICYP or refers also to the costs of the Force that have been incurred in the past.

30 September 1993

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21. Draft report of the Secretary-General to the General Assembly on the use of civilian personnel in peacekeeping operations—Comments on the sections of the draft dealing with the use of United Nations Volunteers and the use of international contractual personnel

Memorandum to the Under-Secretary-General for Peacekeeping Operations

1. This is with reference to your memorandum of 29 October 1993 to the head of the Department of Administration and Management, which was also copied to this Office, seeking comments on the Secretary-General's draft report to the General Assembly on the use of civilian personnel in peacekeeping operations.

2. We note that the draft report surveys existing, as well as prospective, sources for obtaining the services of civilians for peacekeeping operations and that section VII thereof addresses specifically the provision of personnel by private contractors. Our comments and observations on the draft report submitted to us are set out below.

A. *Section VI: Use of United Nations Volunteers*

3. Paragraphs 15 to 17 of the draft report refer to the increasing use of United Nations Volunteers (UNVs) in peacekeeping operations.

4. UNVs are not United Nations staff members, and the activities entrusted to them have traditionally been in the area of development assistance.[64] However, we note that, in the past few years, UNVs have played an increasingly important role in, *inter alia*, assisting "national programmes of post-crisis rehabilitation and reconstruction" and in relief efforts.[65] In the light of the foregoing, it may be advisable to clarify the mandate of the UNVs, particularly by making reference to their new and expanded role. In addition, they should be given appropriate training in peacekeeping areas to which they are assigned. We further consider that, for the period of their assignment to peacekeeping operations, UNVs should only be accountable to the Chief of the Mission.

5. Furthermore, in order for UNVs to be covered by the status-of-forces agreement (SOFA), it would also be necessary that reports of the Secretary-General recommending the establishment of an operation specify that the structure of such an operation would include UNVs. On this basis, this Office would undertake to include the necessary provisions in the status-of-forces agreement.

6. In the light of the above, a clear mandate for the participation of UNVs in peacekeeping operations should be included in the report of the Secretary-General to the General Assembly (preferably including the suggested text to amend resolutions 2659 (XXV) of 7 December 1970). The report of the Secretary-General should also propose that UNVs should only be accountable to the Chief of the Mission for the duration of their assignment to peacekeeping operations.

B. *Section VII: Use of international contractual personnel*

7. As indicated in paragraph 2 above, we commented on this issue on 25 June 1993, and on that occasion we pointed out that no proper legal regime has been established by the General Assembly for personnel to be supplied by commercial contractors. We therefore recommended that the Secretary-General submit a report to the General Assembly requesting the latter's authorization and approval of the use of such personnel in peacekeeping operations. We are pleased to note that this issue has been included in the draft report submitted to us.

8. Unfortunately, the draft report does not address all the concerns set out in our memorandum of 25 June 1993 in a manner that would enable the General Assembly to establish a proper legal regime for the use of civilian personnel to be supplied by commercial contractors. Furthermore, the draft report contains somewhat misleading concepts which will require substantive revision, as explained below.

9. For example, the reference in the third sentence of paragraph 24 of the draft report to the Convention on the Privileges and Immunities of the United Nations in connection with the issues of security and privileges and immunities seems to imply that these two issues are covered by the Convention. As you know, although these issues are relevant to the matter under consideration, they are distinct from each other and the Convention covers only the issue of privileges and immunities. Moreover, the paragraph, as well as paragraph 38, refers only to the report of the Secretary-General on the security of United Nations operations,[66] but omits reference to Security Council resolution 868

(1993) of 29 September 1993, adopted following its consideration of the above-mentioned report. You will recall that, after the adoption of that resolution, this Office addressed a memorandum to you on the scope and effect of the resolution. As indicated in that memorandum, while resolution 868 (1993) makes it clear that security and safety measures extend to *all* personnel engaged in United Nations operations, it does not affect the issue of the privileges and immunities.

10. For the purpose of establishing a proper legal regime for civilian personnel supplied by commercial contractors, and for the reasons elaborated in our earlier memorandum, the Secretary-General's report to the Assembly should specifically include the following proposals:

(*a*) that the General Assembly, in its resolution endorsing the Secretary-General's proposal on the use of such personnel in peacekeeping operations, urge that the Governments concerned accord such personnel immunity from legal process in respect of words spoken and written and all acts performed by them in their official capacity, and entitlement to repatriation in time of international crisis. However, it should be noted that, in addition to the adoption of such a resolution by the General Assembly, it would also be indispensable that reports of the Secretary-General recommending the establishment of an operation specify that the structure of such an operation would include international contractual personnel with the necessary privileges and immunities. On such a basis, this Office would undertake to include the necessary provisions in the SOFA. Whether such provisions would be maintained in the SOFA would depend on the consent of the Governments concerned. You will recall that the importance of the consent of the Governments concerned was clearly pointed out in paragraph 12 of our earlier memorandum of 25 June 1993;

(*b*) that the General Assembly clearly define the status of such personnel as being contractor-supplied personnel and not staff members, employees or agents of the United Nations and not entitled to the salaries and benefits to which staff members are entitled;

(*c*) that such personnel will not perform core functions in peacekeeping operations.

11. In addition to the above, we consider that the draft report should submit for the Assembly's approval details on the contractual and administrative arrangements applicable to such personnel; it should, in particular, address the following:

(*a*) the respective responsibilities of the United Nations and the commercial contractors for the nomination, selection and recruitment of such personnel;

(*b*) the issue of who will exercise control and authority over the functions to be performed by these individuals. In our view, the report should clearly state that, although these individuals will remain employees of the contractors, they will be under the overall authority of the Chief of the Mission, who shall also be able to request the contractors to remove from the mission area those individuals whose performance has proved unsatisfactory;

(*c*) the report should also make clear that such personnel will not exercise supervisory functions over United Nations staff members;

12. We would further point out that paragraphs 23 and 25 to 31 of the draft report, dealing with the remuneration of personnel provided by commer-

cial contractors, in particular the principle of equal pay for equal work, are drafted in somewhat inconsistent and not very clear terms and contain statements on politically sensitive issues that might appear unnecessary.[67] In our view, these paragraphs ought to be revised taking due account of the discussions on this issue in the Advisory Committee on Administrative and Budgetary Questions, subsequently endorsed by the General Assembly at its forty-seventh session.

C. *Conclusion*

13. The draft report will need to be revised in order to enable the General Assembly to establish a clear mandate for the participation of UNVs in peacekeeping operations (see paras. 5 and 6 above) and a proper legal regime for the use of civilian personnel supplied by commercial contractors (see para. 10 above). We further suggest that a draft General Assembly resolution should be prepared in which the Assembly would explicitly endorse the proposals of the Secretary-General on the use of civilian personnel in peacekeeping operations. Such a draft resolution should be annexed to the draft report. This Office would be happy to assist you in the preparation of the draft resolution.

12 November 1993

PERSONNEL ISSUES

22. CONDITIONS OF EMPLOYMENT OF LOCALLY RECRUITED STAFF IN A MEMBER STATE—INTERNAL REGULATIONS OF FEBRUARY 1987 CONCERNING RECRUITMENT, TRANSFER AND DISMISSAL OF LOCAL STAFF EMPLOYED, *INTER ALIA*, BY THE UNITED NATIONS OPERATION IN THE MEMBER STATE—CONTRAVENTION OF THE REGULATIONS CONCERNING THE SECRETARY-GENERAL'S AUTHORITY AS CHIEF ADMINISTRATIVE OFFICER OF THE ORGANIZATION UNDER ARTICLE 101, PARAGRAPH 1, OF THE CHARTER OF THE UNITED NATIONS—OBLIGATION OF MEMBER STATES TO RESPECT THE EXCLUSIVELY INTERNATIONAL CHARACTER OF THE UNITED NATIONS STAFF MEMBER PURSUANT TO ARTICLE 100, PARAGRAPH 2, OF THE CHARTER

Memorandum to the Director of the Division of Human Resources Management, Office of the United Nations High Commissioner for Refugees

1. This is with reference to your facsimile dated 21 December 1992 bringing to our attention the case of a UNHCR guard in a Member State whose work permit was cancelled by the local governmental authorities in view of an incident of misconduct on duty. We note that the Government appears to be attempting to force UNHCR into terminating the staff member's contract with the Agency. In the context of this case, you also requested this Office to evaluate the regulations issued by the Ministry of Foreign Affairs of the State concerned in February 1987 concerning recruitment, transfer and dismissal of local staff employed, *inter alia*, by the United Nations agencies operating in this country.

2. According to the 1987 regulations, the assignment transfer and dismissal of locally recruited staff for United Nations agencies operating in the

State in question, including UNHCR, is conditional on governmental approval, and in particular requires the United Nations offices to notify the Ministry of Foreign Affairs of any planned dismissal of their locally recruited personnel. In our view, the above regulations are in contravention of the Secretary-General's authority as chief administrative officer of the Organization to appoint United Nations staff under Article 101, paragraph 1, of the Charter of the United Nations. Pursuant to Article 100, paragraph 2, of the Charter, Member States undertake to respect the exclusively international character of the United Nations staff and shall not seek "to influence them in the discharge of their responsibilities".

3. These principles are further developed in the United Nations Staff Regulations and Rules providing, *inter alia*, in regulation 1.2, that "staff members are subject to the authority of the Secretary-General" and are "responsible to him in the exercise of their functions". According to General Assembly resolution 76 (I) of 7 December 1946, United Nations officials are considered to include "all members of the staff of the United Nations with the exception of those who are recruited locally *and* are assigned to hourly rates" (emphasis added).

4. We consider it unfortunate that the regulations issued in early 1987 have been brought to our attention only at a point when the practical problem occurred. Nevertheless, it seems appropriate for the United Nations agencies operating in the State concerned to make a démarche to the Government of this State with a view to requesting the latter to bring the regulations into consistency with the applicable norms and principles governing the recruitment of staff by the United Nations in accordance with the Charter of the United Nations and the United Nations Staff Rules and Regulations.

5. A similar problem with the Government of the same State trying to impose restrictions on United Nations recruitment and employment of local staff arose in late 1987 early 1988, when United Nations agencies in the State concerned, including UNHCR, brought to our attention the regulations issued by the Government in question in December 1987. Those regulations would have required all locally recruited staff to conclude a "service contract" with the Department of Diplomatic Services, a branch of the Ministry of Foreign Affairs, converting them into employees of the Government of the Member State in question. In this instance, we sent a note verbale to the Permanent Representative of (name of the Member State) to the United Nations, protesting the proposed regulations. Our files do not indicate any official reaction by the Government to that note.

6. In view of the above observations, the staff member in question, being employed under a binding contract effective until the end of June 1993, should be unequivocally considered as a staff member in the meaning of applicable provisions of Article 101 of the Charter and the United Nations Rules and Regulations. Consequently, the Secretary-General is solely responsible for his appointment or dismissal. The infringement of the Government concerned on the Secretary-General's authority in this respect, therefore, constitutes a breach of its obligations under the Charter of the United Nations.

7. The case of the staff member concerned additionally raises questions concerning disciplinary proceedings. In our view, the disciplinary aspects of the case have been duly dealt with. Therefore, unless new elements are discovered, no further disciplinary proceedings should be instituted against the staff

member in respect of the incident involving his common-law wife. It is clear that the contract granted to the staff member by the High Commissioner must be honoured and that the decision to place the staff member on special leave without pay thus cannot be justified by reference to the misconduct for which he has already been reprimanded.

28 January 1993

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23. Surcharges to be imposed on United Nations Transitional Authority in Cambodia drivers negligently damaging UNTAC vehicles—Nature of the surcharges—Imposition of disciplinary measures must be consistent with procedures provided for in Chapter X of the United Nations Staff Regulations and Rules

Memorandum to the Secretary of the Headquarters Property Survey Board

1. This is in response to your memorandum regarding the recommendation from United Nations Transitional Authority in Cambodia (UNTAC) that a surcharge be imposed on drivers who negligently damage United Nations vehicles in traffic accidents. You have requested our advice whether this recommendation complies with the Staff and Financial Regulations and Rules.

2. UNTAC recommended the following surcharges:

> "(1) On-duty traffic accident damage involving gross negligence on the part of the UNTAC driver—50 per cent surcharge of cost of damage subject to a maximum of US$ 2,500.00 against the staff member;
>
> "(2) Off-duty traffic accident involving ordinary negligence—100 per cent surcharge for cost of damage subject to a maximum of US$ 2,500.00, plus 50 per cent of the remainder of cost of damage up to an assessment of US$ 5,000.00 in total against the staff member."

These surcharges were to be levied on "UNTAC members". We assume that these individuals are United Nations staff. If the individuals are members of contingents, or possess some other status, more information on what legislative or contractual authority is being relied on to impose a surcharge will be required for an analysis of this recommendation.

3. Any "surcharge" which goes beyond the recoupment of actual losses to the United Nations is in the nature of a fine or penalty. The imposition of fines or penalties is considered a form of disciplinary action under chapter X of the Staff Regulations and Rules and subject to the due process procedures therein set out. Indeed, staff rule 110.3 specifically defines "fines" as a disciplinary measure and no disciplinary measure may be imposed:

> "until the matter has been referred to a Joint Disciplinary Committee for advice as to what measures, if any, are appropriate . . . " (staff rule 110.4(*a*))

4. In our view the proposal of the local Property Survey Board is inconsistent with staff rules 110.3 and 110.4 and thus cannot validly be implemented.

12 April 1993

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24. Labour costs of a Member State granted jurisdiction over employment-related matters involving locally recruited employees of international organizations—Contradiction of this jurisdiction with article II of the 1946 Convention on the Privileges and Immunities of the United Nations—A party to the Convention may not invoke the provisions of its internal law as justification for its failure to implement the Convention—Article 27 of the 1969 Vienna Convention on the Law of Treaties

Memorandum to the Chief of the Legal Section, United Nations Development Programme

1. This is with reference to your memorandum dated 17 March 1993 to which was attached, *inter alia*, a note verbale dated 29 January 1993 circulated by the Ministry of Foreign Affairs of (name of a Member State) to consular and diplomatic representations accredited in that State.

2. The note verbale asserts that in accordance with article 114 of the 1988 Constitution of the State in question "acts of management such as labour relations established locally" are "within the competence of the labour court". It further states that in view of "the principle of independence of the branches of Government . . . it is forbidden to the executive branch any initiative which may be interpreted as an interference in the attributions of any other branch".

3. In his letter dated 4 February 1993 (copy of which was attached to your memorandum), the UNDP Resident Representative draws your attention to the contradiction between the contents of the note verbale and the 1946 Convention on the Privileges and Immunities of the United Nations.[68] He proposes that this Office contact, on behalf of the United Nations system, the Permanent Mission of the State in question to the United Nations in New York with a view to "pointing out that this local ruling has the above[-mentioned] contradictions".

4. The above-mentioned provision of the Constitution which granted to the competent labour courts of that country jurisdiction over employment-related matters involving locally recruited employees of international organizations was brought to the attention of this Office by the Inter-American Development Bank in 1988. In pointing out that constitutional law in the State in question had the same authority as an international agreement and that it would therefore be a matter for interpretation by the local courts, the Inter-American Development Bank at that time anticipated difficulties in the future and expressed in this connection its interest in joining any common approach that might be made by the United Nations system in that respect. In the absence of any controversy at the time, we did not consider it appropriate to take any common approach in the matter.

5. Since that time, however, we have become aware of two cases in which former locally recruited UNHCR staff members instituted legal proceedings in the local labour courts against UNHCR in (name of the Member State). Thus, in February 1991, UNHCR informed us that a former staff member had filed a lawsuit against the High Commissioner in the local labour court. We took the position that the competent authorities of the State in question and the plaintiff should be advised that the United Nations, in accordance with article II, section 2, of the 1946 Convention on the Privileges and Immunities of the

United Nations, to which the State in question has been a party since 15 December 1949, enjoys "immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity". It was decided not to waive the Organization's immunity in that case. We advised UNHCR to instruct the former staff member wishing to appeal an administrative decision alleging the non-observance of his terms of appointment that he should invoke the established appeal procedures in accordance with the applicable United Nations staff regulations and rules. We are not aware of the outcome of that case.

6. In late 1992, UNHCR brought to our attention the seizure of UNHCR funds for its branch office's bank account in the State in question in the context of legal proceedings instituted in the local courts against UNHCR by another former staff member. Our preliminary reaction on the matter was that we should make a démarche to the Permanent Mission of (name of the Member State) to the United Nations, in the form of a Legal Counsel's note verbale, with a view to clarifying the legal aspects of the matter in the light of the United Nations position of principle as outlined in the preceding paragraph. However, after additional information had been made available to us, we learned that the staff member had filed a legal action against UNHCR in November 1986. In connection with his complaint, a bank in the Member State concerned debited the UNHCR account on six occasions during 1987 and 1988 slightly in excess of US$ 3,000. In view of the fact that the case was more than 6 years old and that the interference with the UNHCR funds had taken place without timely notification to us of these violations of United Nations privileges and immunities, and in the light of the amounts involved, we decided that UNHCR should seek a solution to the problem directly with the competent authorities in the State concerned, rather than through a démarche with the Permanent Mission in New York. This view was conveyed to the attention of UNHCR on 13 January 1991. Since that time we have had no further information in this matter.

7. The principles and rules of the law of treaties are codified in the 1969 Vienna Convention on the Law of Treaties[69] which the Member State in question signed on 23 May 1969 (according to our records, it has not yet ratified the Convention). Concerning the issue of internal law in the context of the observance of international treaties, the Convention in its article 27, in particular, states: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." The United Nations cannot be sued in the local courts of (name of the Member State) without its express consent, in any particular case, pursuant to article II of the 1946 Convention. Furthermore, even if the local courts accept for their consideration labour disputes involving current or former staff members, without consent of the Organization, their orders cannot be executed in view of the provisions of article II, section 2, of the same Convention which stipulates that "no waiver of immunity is extended to any measure of execution". Any such disputes involving current or former staff members, either locally or internationally recruited, are subject to the relevant United Nations staff regulations and rules. We continue to maintain this position of principle in this matter.

16 April 1993

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25. Impermissibility of acceptance of a contribution from a State conditioned upon the recruitment of a national of the contributing State—Paragraph 5 of General Assembly resolution 47/168 does not permit a deviation from the settled interpretation of Article 101 of the Charter of the United Nations, staff regulation 4.2 or financial regulation 7.2—Meaning of the term "secondment" in the light of staff rule 104.12 (*b*) and a working document produced by the Office of Human Resources Management entitled "Terminology for movements of staff"

Memorandum to the Senior Legal Officer, United Nations Office at Geneva

1. This is in response to your memorandum of 23 March 1993 forwarding to us for our comments the texts of two draft agreements that the Department of Humanitarian Affairs wishes to use for the acceptance of contributions by a Government and a government agency, respectively, to finance one or several posts in the United Nations Department of Humanitarian Affairs. In respect of both these contributions, it is a condition that nationals of the contributing Government/government agency are to be recruited as staff members, to the post financed by the contribution.

2. The Department of Humanitarian Affairs wishes to enter into these agreements relying on General Assembly resolution 47/168 of 22 December 1992, in paragraph 5 of which the Assembly:

> "*Requests* the Secretary-General to continue to examine all possible ways and means to provide adequate qualified personnel and administrative resources to the Department of Humanitarian Affairs from within existing resources of the regular budget of the United Nations and, where appropriate, through the secondment of national humanitarian disaster relief experts".

We also note that the Office of Programme Planning, Budget and Finance is of the opinion that the above-quoted resolution provides the necessary mandate for the Department of Humanitarian Affairs to accept the aforementioned governmental contributions and to proceed, as requested by the Government/government agency, with the recruitment of their nationals as staff members. In the view of that Office, by reason of General Assembly resolution 47/168, the provisions of Secretary-General's bulletin ST/SGB/188 and, presumably, of the United Nations financial regulations and rules on which that bulletin is based are no longer binding on the Department of Humanitarian Affairs in so far as they prohibit it from accepting a contribution from a State conditioned upon the recruitment of a national of the contributing State.

3. In our view, for reasons more fully set out below, the provisions of the United Nations Financial Regulations and Rules continue to apply to voluntary contributions such as those offered to the Department. Under financial regulation 7.2, voluntary contributions may be accepted provided the purposes for which the contributions are made are consistent with the policies, aims and activities of the Organization. In this regard it has been the consistent policy of the Organization not to accept *tied* contributions, e.g., contributions which would limit the discretion of the Secretary-General in recruitment, or which in effect would be in violation of the provisions of the Charter of the United Nations regarding the independence of the Secretariat.

4. In the arrangements now under consideration and envisaged by the Department of Humanitarian Affairs, the donors offer their contributions subject to the condition that the Department recruit an individual or individuals identified by the donors for the posts financed by the contributions. Such recruitment would clearly be at variance with the exclusive responsibility of the Secretary-General with regard to the appointment of staff as set forth in Article 101 of the Charter of the United Nations and regulation 4.2 of the United Nations Staff Regulations and Rules. In this regard, we refer to the Legal Counsel's opinion of 3 March 1992, which we have previously faxed to you, which explains why the acceptance of contributions which are tied to the recruitment of a specified donor State national violates Article 101 of the Charter. The pertinent part of the opinion reads as follows:

> ". . . Article 101, paragraph 1, of the Charter of the United Nations states that the Secretary-General appoints staff under regulations established by the General Assembly . . .
>
> "Article 101, paragraph 3, of the Charter requires the Secretary-General . . . to treat as the paramount consideration in the employment of staff the necessity of securing staff of the highest standards of efficiency, competence and integrity. This provision is mirrored in staff regulation 4.2 of the Staff Regulations. It is obvious that a requirement that staff of only one nationality be appointed would seriously interfere with the obligation imposed on the Secretary-General."

We would also draw your attention in this connection to staff regulation 4.3, which reads as follows:

> "In accordance with the principles of the Charter, selection of staff members shall be made without distinction as to race, sex or religion. *So far as practicable, selection shall be made on a competitive basis*" (emphasis added).

5. The question arises therefore whether it was indeed the intent of the General Assembly to derogate from the prohibition against accepting tied contributions when adopting operative paragraph 5 of resolution 47/168. More specifically, the question arises whether in using the phrase "secondment of national humanitarian disaster relief experts" it was intended to override the staff regulations and rules on the appointment of staff.

6. The term "secondment", as reproduced in staff rule 104.12 (*b*) (i), is not defined. Staff rule 104.12 (*b*) (i) reads as follows:

> "The fixed-term appointment, having an expiration date specified in the letter of appointment, may be granted for a period not exceeding five years to persons recruited for service of prescribed duration, including *persons temporarily seconded by national Governments or institutions for service with the United Nations*" (emphasis added).

A working document produced by the Office of Human Resources Management entitled "Terminology for movements of staff" defines secondment as follows:

> "Secondment is the temporary movement of an individual from one employer (an international organization, a governmental institution or even a corporation) to another, for a fixed period of time, during which the individual will be paid by and subject to the rules of the receiving entity, but will retain employment rights in the releasing entity.

"Inter-organization secondment normally does not exceed two years, a period which may be reduced, or extended for a further fixed term, only by agreement between all three parties. During the period of secondment the staff member's contractual relationship with the receiving organization is that of a staff member on fixed-term appointment, and he/she becomes wholly subject to the rules and regulations of the receiving organization. The contractual relationship with the releasing organization is suspended for the period of the secondment."

7. It is important to note that where posts are filled by staff on secondment, the Organization does not dispense with the requirements for independent identification and selection of the candidates by it. It is only after the individual has been selected through normal competitive recruitment procedures that the question of his or her being released by his or her previous employer is addressed. If the previous employer agrees to the release of the selected individual on secondment, an appointment is then made on a fixed-term basis.

8. In our view, paragraph 5 of resolution 47/168 does not have the far-reaching consequences claimed for it, i.e., that it permits a deviation from the settled interpretation of Article 101 of the Charter and staff regulation 4.2, and indeed of financial regulation 7.2. An examination of the entire resolution shows that the General Assembly recommended measures to deal with a shortage of financial and personnel resources for emergency assistance. Thus, in paragraph 4 of resolution 47/168, the General Assembly calls upon donors to make financial and other resources available, whereas in the separate paragraph 5, the General Assembly requests the Secretary-General to consider obtaining qualified personnel not only from within the United Nations system but also from outside. Paragraph 4 contains no indication that the payment of contributions by a State in return for the recruitment of the donor State's nationals was envisaged. We have also examined the report of the Secretary-General entitled "Strengthening of the coordination of humanitarian emergency assistance of the United Nations",[70] which was considered by the General Assembly prior to its adoption of resolution 47/168, and we find nothing therein which might be a basis for the interpretation sought to be placed by the Department of Humanitarian Affairs on paragraph 5.

9. Explicit language in a General Assembly resolution would be needed to legalize the arrangements contemplated by the Department of Humanitarian Affairs. In the absence of any such language, such arrangements continue to be impermissible.

27 April 1993

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26. Use of volunteer personnel by the United Nations—Economic and Social Council resolution 849 (XXXII)—Agreements to be signed by the United Nations with donors providing volunteer personnel

Memorandum to the Acting Director of the Programme Support Division, Department of Economic and Social Development

1. This refers to your memorandum of 23 April 1993 on the use of volunteer personnel and the signing of agreements with donors providing such personnel.

2. The use of volunteer personnel (associate experts and junior professional officers) by the United Nations is governed by Economic and Social Council resolution 849 (XXXII) of 4 August 1961, which in its annex sets out the principles governing their use. Paragraph 1 of the annex provides:

> "The services of volunteers shall be utilized only in connection with programmes and projects certified as eligible for the assignment of volunteer personnel by the executing agencies. Volunteers *shall not be placed at the Headquarters of the United Nations or its related agencies* in any established post" (emphasis added).

This Office has consistently interpreted the above resolution to exclude the use of this category of personnel at Headquarters. Any change in this policy, in an administrative instruction, has required the concurrence of the Economic and Social Council or the General Assembly.

3. On the signing of associate experts agreements, we believe that, in the case of Secretariat units negotiating such agreements for projects funded from the United Nations regular budget as well as those falling within the arrangements made with UNDP for execution of its projects by the United Nations, the agreements should be signed on behalf of the United Nations by the Department of Economic and Social Development.

4. It should be noted, however, that the Economic and Social Council resolution, in paragraph 1, authorizes the use of such personnel by other United Nations voluntary programmes and funds, such as UNDP and UNICEF, as well as UNEP, UNCHS, UNCTAD and UNHCR, in respect of their own voluntary programmes. Also, the regional commissions, when executing projects funded by UNDP and other funding institutions, a power they have been accorded by the Economic and Social Council, have the authority to use this category of personnel. In such cases, these programmes and funds have delegated authority to sign agreements in their own names, without reference to the Department of Economic and Social Development. We agree, however, that the agreements they sign should be based on a model previously cleared by the United Nations Office of Legal Affairs. Consequently, the draft agreement to be signed with the (name of a Member State) Minister for Development Cooperation by the Department of Economic and Social Development should be distributed as the standard text to be used, *mutatis mutandis*, by the other United Nations programmes and funds.

30 April 1993

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27. APPLICATION OF THE STAFF RULES OF THE UNITED NATIONS AND ADMINISTRATIVE ISSUANCES TO THE STAFF OF THE UNITED NATIONS JOINT STAFF PENSION FUND—ARTICLE 101, PARAGRAPH 1, OF THE CHARTER OF THE UNITED NATIONS—REGULATIONS OF THE UNITED NATIONS JOINT STAFF PENSION FUND—STATUS OF THE STAFF APPOINTED BY THE SECRETARY-GENERAL TO UNJSPF AS CLARIFIED IN JUDGEMENT NO. 296 (SUN) OF THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL

Memorandum to the Secretary of the Joint Advisory Committee

1. In your memorandum of 27 May 1993 you seek our opinion concerning the following: "to what extent the Executive Secretary of the [United Na-

tions Joint Staff Pension] Fund may be exempt from applying to the staff in the Fund the Staff Rules and administrative issuances (Secretary-General's bulletins, administrative issuances, information circulars, personnel directives) applicable to the United Nations staff at large".

2. Article 101, paragraph 1, of the Charter of the United Nations provides: "The staff shall be appointed by the Secretary-General under regulations established by the General Assembly." Pursuant to that provision, the General Assembly has adopted the Staff Regulations of the United Nations which "embody the fundamental conditions of service and the basic rights, duties and obligations of the United Nations Secretariat. They represent the broad principles of personnel policy for the staffing and administration of the Secretariat" (Staff Regulations of the United Nations, "Scope and purpose"). The Secretary-General has promulgated the Staff Rules which, according to staff rule 100.1, "are applicable to all staff members appointed by the Secretary-General except technical assistance project personnel and staff members specifically engaged for conferences and other short-term services."

3. In addition, the General Assembly has adopted the Regulations of the United Nations Joint Staff Pension Fund (UNJSPF). The staff of UNJSPF is appointed by the Secretary-General in accordance with article 7 (*b*) of the Regulations of the UNJSPF, which states: "[t]he Secretary-General shall appoint such further staff as may be required from time to time by the Board in order to give effect to these Regulations."

4. The status of the staff appointed by the Secretary-General to UNJSPF was clarified in United Nations Administrative Tribunal Judgement No. 296.[71] This decision states, in pertinent part, that:

> "[A]part from the Secretary of the Board and the Deputy Secretary, who are in a special position, all staff 'appointed' by the Secretary-General [pursuant to article 7 (*b*) of the UNJSPF Regulations] have the status of United Nations staff members, and . . . the rules applicable to them are therefore drawn up by the competent United Nations organs . . . It follows from these provisions that in the exercise of his authority the Secretary-General, being bound by the Regulations of the Fund, may have occasion to draw up special provisions peculiar to its staff."

5. You have explained following a telephone inquiry by this Office that the wording of the request, asking "to what extent the Executive Secretary of the Fund may be exempt" from applying the Staff Rules and administrative issuances, seeks advice as to whether the Executive Secretary has discretion as to whether or not to apply particular staff rules and administrative issuances to staff members serving with the Fund. As noted by the Administrative Tribunal, the Secretary-General may draw up special provisions peculiar to such staff. Except as provided in such provisions, the staff is governed by the Staff Rules and relevant administrative issuances, and we find no discretion on the part of the Executive Secretary to grant exemptions therefrom.

23 June 1993

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28. Restructuring of the Secretariat requires that the internal law of the Organization be respected—Consideration by the United Nations Administrative Tribunal

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

1. During the Administrative Tribunal's current session, a staff member challenged an aspect of the restructuring of the Secretariat: the downgrading of a post from D-1 to P-5 without going through the classification procedures. We submitted a reply emphasizing the right of the Secretary-General, as the chief administrative officer of the Organization, to restructure the Secretariat and requested the Tribunal to take judicial notice of the fact that if all classification procedures were followed prior to changes in duties allocated to a post and its consequent grade, rapid restructuring would not be possible. The Tribunal, in the light of our response, has adjourned consideration of the case to the fall session.

2. Since submitting our answer, we have also received your memorandum of 16 June 1993 which emphasizes the need to respect "legal norms" during the current restructuring process. It of course goes without saying that the internal law of the Organization must be respected and, in this regard, you might find the following comments on the various categories of rules that exist in the United Nations of some use:

3. The Secretary-General is bound by the Staff Regulations and by General Assembly resolutions relating to the governance of staff (Article 101, paragraph 1, of the Charter of the United Nations).[72]

4. The Secretary-General is also bound by the Staff Rules,[73] which he promulgates after consultation with the staff[74] and which are submitted to the General Assembly for confirmation.[75] The Tribunal has permitted temporary suspension of particular rules to deal with emergency situations but the period of suspension must be related to the emergency and cannot extend beyond it.[76]

5. Administrative instructions are promulgated by the Administration under delegation from the Secretary-General, and are binding until they are amended.[77] They do not have to be submitted to the General Assembly. In addition, instructions can be amended quickly (unless they themselves implement General Assembly directives).

6. Thus, it may be possible to suspend certain specific staff rules and administrative instructions for a temporary period to facilitate restructuring of the Secretariat, for example, provisions requiring reclassification of posts when there is a change in assigned duties. However, such suspension *must* be temporary and the promulgated procedures must take effect when the suspension period is over and the personal grade and rights of the incumbent of any downward-classified post must be unaffected.

7. It would also be permissible to quickly amend administrative instructions containing procedures which impede efficient administration, for example, the totally discredited Performance Evaluation Report system, which permits interminable challenges to the managerial responsibility of assessment of performance.

9 July 1993

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29. Issue of the recruitment of fixed-term specialized staff for the Department of Humanitarian Affairs to posts financed by voluntary contributions from Governments or government agencies—Article 101 of the Charter of the United Nations and regulation 4.2 of the United Nations Staff Regulations and Rules—Interpretation of paragraph 5 of General Assembly resolution 47/168

Memorandum to the Chief of the Office of the Under-Secretary-General, Department of Humanitarian Affairs

1. Please refer to your memorandum of 25 June 1993 commenting on the issue of the recruitment of fixed-term specialized staff for the Department of Humanitarian Affairs to posts financed by voluntary contributions from Governments or government agencies.

2. The issue was first addressed by this Office when two draft agreements were submitted for our review which appeared to reflect arrangements under which the donor offered a contribution subject to the condition that the Department of Humanitarian Affairs recruit an individual identified by the donor for a post financed by its contribution.[78] Additional documentation relating to the recruitment of a national of a specific State, which was submitted together with the aforementioned draft agreements, reflected the view of an official of the Office of Programme Planning, Budget and Finance that paragraph 5 of General Assembly resolution 47/168 of 22 December 1992 could be interpreted as authorizing the acceptance of a contribution conditional upon the recruitment of a specific donor national.

Specific cases

3. The specific cases currently under consideration concern a memorandum of understanding which was to be concluded with the government agency of a Member State which identified two senior staff members for recruitment by the Department of Humanitarian Affairs whose staff costs would have been paid for by the agency.

4. In our memorandum of 27 April 1993,[79] which addresses the issue of tied recruitment in general terms, we reiterated that the acceptance of contributions tied to the recruitment of donor nationals is prohibited by United Nations financial regulation 7.2, which provides that "voluntary contributions . . . may be accepted by the Secretary-General provided that the purposes for which the contributions are made are consistent with the policies and activities of the Organization". In this regard, we observed that contributions which would limit the discretion of the Secretary-General in recruitment, because of the condition attached to the donor's offer, would be in violation of Article 101 of the Charter of the United Nations and regulation 4.2 of the Staff Regulations and Rules of the United Nations regarding the appointment of staff. We also found that paragraph 5 of resolution 47/168 could not be interpreted as legalizing "tied recruitment".

5. Based on the review of the additional material you have now submitted with your memorandum of 25 June 1993 and the information obtained subsequently, we understand that the case in question did not involve a contribution tied to the recruitment of particular individuals. We have taken note of the fact that an appropriate office of (name of the Member State) offered to finance

through the above-mentioned agency two posts in the Special Emergency Units of the Department of Humanitarian Affairs for which funding had ceased. Both posts had been occupied by two highly qualified staff members whom the Department wished to continue to employ. The memorandum of understanding to be concluded with the agency therefore only reflected the internal requirements of the Office and agency which had to account for the use of its funds. It is clear therefore that the proposed arrangements are legally unobjectionable.

General policy

6. As regards the proposed policy of the Department of Humanitarian Affairs with respect to recruitment of fixed-term specialized staff made available by Governments, we note with satisfaction that every effort will be made to adhere scrupulously to established United Nations selection procedures with a view to identifying independently the best possible candidate taking into account the specific requirements of each situation. We should like to reiterate in this connection that, whenever possible, the most serious consideration should also be given to the other existing modalities for the engagement of personnel.

7. As to the other modalities, we refer you to the newly devised cooperation service agreement, of which we believe you are aware. We also refer you to the possibility of extending non-reimbursable loan agreements beyond the area of technical cooperation, an issue which you could take up with the Office of the Controller. In our memorandum of 27 April 1993, we have expressed the view that paragraph 5 of General Assembly resolution 47/168 did not create a new modality for recruiting personnel. If, however, the intention was to do so, the General Assembly should be requested to clarify this.

13 July 1993

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30. CHANGE OF NATIONALITY OF A STAFF MEMBER—RULE 104.4 (*c*) OF THE STAFF REGULATIONS AND RULES—JUDGEMENT NO. 326 (FISCHMAN) OF THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL

Memorandum to the Personnel Officer, Staff Administration and Monitoring Service, Office of Human Resources Management

1. Please refer to your memorandum of 12 July 1993 requesting advice as to whether the Organization should recognize a staff member's nationality and, if so, when the effective date of such recognition should be.

2. It is noted that, according to information provided by you, the staff member in question joined the Organization as a Jordanian national. On 8 November 1992, the staff member informed the Administration of her intention to acquire Swedish citizenship by virtue of her marriage to a Swede. It is also noted and supported by the provided documentation that subsequently the staff member relinquished her Jordanian nationality, acquired Swedish nationality and received a Swedish passport. The staff member in question encumbers a language post, which is not subject to geographical distribution.

3. Staff rule 104.4 (*c*) requires that "a staff member who intends . . . to change his or her nationality shall notify the Secretary-General of that inten-

tion before the change . . . in nationality becomes final". We note that the staff member in question has satisfied that requirement. The Staff Regulations and Rules do not contain any other conditions to be met by a staff member in order to change his or her nationality.[80] Thus, the Secretary-General does not have any power under the existing Staff Regulations and Rules to prevent staff members from changing their nationality.

4. The question, however, arises whether the Secretary-General has the right *not* to recognize the legally acquired single new nationality of a staff member.

5. The United Nations Administrative Tribunal, in its Judgement No. 326 (Fischman), found that:

> "The conditions of employment in the United Nations do not a priori exclude any change in nationality during the period of service. The Staff Regulations and Rules leave it to the discretion of the Secretary-General, within the framework of such policy as may be laid down by the General Assembly, to act in a way which makes a change in nationality during the time of the service possible or not." (para. IV)

While the General Assembly has indicated such policy with regard to the staff member's acquisition of permanent resident status in the United States (which policy was reflected in administrative instruction ST/AI/294), it offered no firm guidelines with regard to the change of nationality issue. The Secretary-General, therefore, appears to have a wide discretion in deciding such issues, taking into account various circumstances and interests of the Organization (e.g., political aspects, fair geographical distribution of posts, financial implications of the change of nationality, etc.).

6. From the legal standpoint, there would be no objection to the Secretary-General's accepting the staff member's request concerning the change of her nationality for United Nations administrative purposes. The determination of the effective date of such acceptance would be within the Secretary-General's discretion and may be, for example, the date of the document communicating the decision to the staff member.

19 August 1993

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31. Rules governing the outside activities of United Nations staff members—Article 100, paragraph 1, of the Charter of the United Nations, regulation 1.4 of the United Nations Staff Regulations and the Standards of conduct in the international civil service

Memorandum to the Senior Legal Officer, Legal Liaison Office, United Nations Office at Geneva

1. This is with reference to your facsimile of 23 September 1993 requesting our views on the invitation addressed by the organizers of the "Rencontres environnementales de Genève", an association under Swiss law (*association*), to the Director-General of UNOG, inviting him to become a member of the Honorary Committee of the association.

2. We understand from the documentation you sent us, including the statute of the association, that the purpose of the association, among others, is to organize meetings in Geneva to discuss and promote the interaction between environmental and economic issues, and that the participants will include representatives of the economic, political and cultural sectors. The association further intends to disseminate its activities and the results thereof through publications, exhibitions and other events of a national or international character.

A. *Rules governing activities of United Nations staff members*

3. The rules governing the activities of United Nations staff members relevant to the issue currently under discussion are set out in Article 100, paragraph 1, of the Charter of the United Nations, in regulation 1.4 of the United Nations Staff Regulations and in the "Standards of conduct in the international civil service", re-promulgated by the Secretary-General on 26 February 1982[81] (hereafter "Standards of conduct").

4. Article 100, paragraph 1, of the Charter lays down the principle of the exclusive responsibility of the international civil service to the Organization. United Nations staff members are thus precluded from seeking or receiving instructions from any Government or authority external to the United Nations, and they are not to engage in "any action which might reflect on their position as international officials responsible only to the Organization".

5. Staff regulation 1.4 provides that:

> "Members of the Secretariat shall conduct themselves at all times in a manner befitting their status as international civil servants. They shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations. *They shall avoid any action and in particular any kind of public pronouncement which may adversely reflect on their status, or on their integrity, independence and impartiality* which are required by that status. While they are not expected to give up their national sentiments or their political and religious convictions, they shall at all times bear in mind the reserve and tact incumbent upon them by reason of their international status" (emphasis added).

6. The Standards of conduct provide, in relevant part, that:

> "20. It is . . . the duty of staff members to avoid any action which would impair good relations with Governments, or destroy confidence in the Secretariat—such as public criticism of or any kind of interference with the policies or affairs of Governments."

B. *Applicability of the rules governing activities of staff members to the present case*

7. We note that the envisaged activities of the Geneva association include the participation at its meetings of personalities from the economic, *political* and cultural sectors in order to promote the interaction between environmental and economic issues. As described in the letter of 16 September 1993 from the organizers, these meetings are intended to foster Geneva's role in the field of the environment. We also note that, since its inception, the association has benefited from the "patronage" of various Swiss Federal and Cantonal authorities. The organizers also indicate that the topic for the next meeting of the as-

sociation (1-3 June 1994) will be "Population, immigration and quality of life" and that this should constitute a contribution of *Geneva* and the association to the upcoming International Conference on Population and Development to be held at Cairo in September 1994.

8. In our view, the activities of the association would seem to stress the *national* character of the association and, in the circumstances, acceptance by the Director-General of the United Nations Office at Geneva of the invitation to serve on the Honorary Committee of the association might be perceived as a departure from the impartiality required of the United Nations. We also note that the subjects discussed by the association are controversial, and envisage that the association may at times have to publish reports and/or engage in activities at variance with, or critical of, United Nations operations in the areas discussed at the meetings of the association.

9. In view of the above, we would advise that it would not be appropriate for the Director-General of UNOG to accept the proposed invitation. The ultimate decision, however, rests with the Secretary-General.

29 September 1993

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32. DENIAL OF G-4 VISA FOR A STAFF MEMBER'S ADOPTED CHILDREN ON THE GROUND THAT THE CHILDREN DO NOT QUALIFY AS THE ELIGIBLE DEPENDANTS—DEFINITION OF "DEPENDENT CHILDREN" UNDER THE STAFF REGULATIONS AND RULES—ADMINISTRATIVE INSTRUCTION ST/AI/278/REV.1

Memorandum to the Officer-in-Charge of the Transportation Section, Purchase and Transportation Service, Office of General Services

1. This is in response to your memorandum of 2 November 1993, with enclosures, seeking the advice of this Office on the case of a UNDP staff member whose request for G-4 visas for her adopted children was denied by the United States authorities on the ground that the adopted children do not qualify as eligible dependants of a United Nations staff member.

2. On the basis of your memorandum and the documentation attached thereto, we understand that in June 1992 the staff member, a national of (name of a Member State), and her husband presented a petition to the Superior Court of New Jersey to adopt two nationals of the State in question, child A (born on 14 July 1973) and child B (born on 20 September 1976). On 7 May 1993, the Superior Court issued a final judgement in the matter of the adoption of the aforementioned adult and child, ordering and adjudging that the latter be adopted by the plaintiffs, the staff member and her husband. We further note that, on the basis of that judgement, UNDP has recognized child A and child B as the dependent adopted children of the staff member and that the latter is receiving a dependency allowance for them.

3. The following paragraphs will examine the preliminary question, i.e., whether the adopted children may be considered to be the staff member's legally adopted children and therefore qualify as her "dependent children" for the purposes of staff rule 103.24 (*b*) and administrative instruction ST/AI/278/Rev.1 of 25 May 1982. If it is concluded that these children are "dependent children",

they would be entitled to G-4 visas and representations to this effect would be made by this Office to the United States authorities.

Criteria for legal adoption

4. Pursuant to United Nations policy, the determination of the validity of an adoption for United Nations administrative purposes is generally made by reference to the law of the home country of the staff member concerned. Administrative instruction ST/AI/278/Rev.1, paragraph 3, subparagraphs (*b*) and (*d*), read together, clearly imply that a child should be regarded as legally adopted if the adoption had been effected under the laws of the staff member's home country or country of permanent residence.

5. In this case, the adoption was effected in the United States and not in the home country of the staff member. The said adoption, therefore, does not prima facie satisfy the United Nations requirements set out in paragraph 4 above. However, in our view, an adoption effected under the laws of another country should also be recognized by the Administration as a valid adoption *if it is regarded as a valid adoption by the law of the staff member's home country or country of permanent residence*. We therefore consider that, if the United States adoption is regarded as valid under the law of the staff member's home country, the individuals in question may be regarded as legally adopted for purposes of the Staff Regulations and Rules.

Definition of "dependent children"

6. The legality of the adoption, however, is not the sole precondition for the United Nations Administration to consider a legally adopted child as a "dependent child" under the Staff Regulations and Rules for purposes of granting dependency benefits. In this respect, staff rule 103.24 (*b*) provides, *inter alia*, as follows:

> "(*b*) A 'dependent child' shall be:
>
> (i) A staff member's natural or legally adopted child, . . .
>
> (ii) . . .
>
> under the age of eighteen years or, if the child is in full-time attendance at a school or university (or similar educational institution), under the age of twenty-one years, for whom the staff member provides main and continuing support . . . If a child over the age of eighteen years is physically or mentally incapacitated for substantial gainful employment, either permanently or for a period expected to be of long duration, the requirements as to school attendance and age shall be waived."

Administrative instruction ST/AI/278/Rev.1 of 25 May 1982 contains similar provisions.

7. In this case, on the assumption that the adoption has been legally effected (see para. 5 above) and in the light of the aforementioned staff rule and administrative instruction, child B, who is under 18 years old, might be regarded as a dependent child. However, child A, who is over 20 years old, might only be so regarded if he is in full-time attendance at a school, university or similar educational institution. The school attendance requirement in his case may, however, be waived if it is demonstrated that he is physically or mentally incapacitated for substantial gainful employment, either permanently or for a period expected to be of long duration.

Conclusion

8. In the light of the foregoing, this Office cannot conclude that these children are "dependent children" and therefore entitled to G-4 visas. More specifically:

(*a*) In the light of our comments in paragraph 5 above, we cannot conclude that a legal adoption, as determined pursuant to established United Nations policy, has been effected in this case. As already indicated in the aforementioned paragraph, if the staff member submits satisfactory proof that the United States adoption is recognized as a valid adoption under the laws of her home country, the individuals in question may be regarded as legally adopted for purposes of the Staff Regulations and Rules. To that end, the staff member might wish to seek the assistance of the Permanent Mission of (name of the Member State) to the United Nations for the purpose of ascertaining whether the adoption of the two nationals of a State effected in the United States is regarded as a valid adoption under the law of the State in question.

(*b*) Furthermore, as indicated in paragraph 7 above, we cannot consider the documentation submitted by the UNDP staff member in respect of child A as sufficient for purposes of granting dependency benefits. In this connection, we note that this Office was not consulted on the eligibility of the staff member in question to receive dependency allowances and that UNDP, on grounds that have not been disclosed to us, has already recognized that the adoption has been effected and dependency allowances are given to the staff member. We would be ready to reconsider our opinion if the staff member submits satisfactory evidence that the older individual under consideration is either in full-time school attendance or that he is physically or mentally incapacitated for gainful employment.

9. Once the staff member submits the evidence indicated above, this Office would be prepared to request the assistance of the United States authorities in the matter concerning the G-4 visas of her two dependent children.

7 December 1993

PRIVILEGES AND IMMUNITIES

33. Draft agreement on the status of the United Nations Operation in Mozambique—Proposal that internationally contracted personnel provided by civilian contractors in the context of United Nations peacekeeping operations be accorded privileges and immunities such as those accorded to United Nations officials—The 1946 Convention on the Privileges and Immunities of the United Nations, UNDP Standard Basic Assistance Agreement and UNICEF Basic Cooperation Agreement—Liability insurance (the hold harmless clause)—Report of the Secretary-General of 18 September 1990 to the Special Committee on Peacekeeping Operations on the use of civilian personnel in peacekeeping operations

Memorandum to the Deputy Director, Field Operations Division

1. This is with reference to your memorandum dated 11 January 1993

on the draft agreement on the status of the United Nations Operation in Mozambique (ONUMOZ) proposing, *inter alia*, that internationally contracted personnel provided by civilian contractors in the context of United Nations peacekeeping operations be accorded, as is the case of "persons performing services" under the UNDP Standard Basic Assistance Agreement (SBAA), privileges and immunities such as those accorded to United Nations officials.

2. The proposal made with respect to personnel provided by civilian contractors required a substantial review, which has been made on the basis of existing international agreements, documents and issues related thereto as follows:

(a) *1946 Convention on the Privileges and Immunities of the United Nations*[82]

3. The 1946 Convention provides specifically for the legal status of representatives of Member States, officials of the Organization and experts performing missions for the Organization. States parties thereto are, therefore, under no obligation to grant to any other category of personnel, such as internationally contracted personnel provided by civilian contractors, any privileges and immunities. Under such circumstances, any privileges and immunities which the United Nations would consider granting to civilian contractors or any other category of personnel not provided for in the Convention will have to be subject to the agreement of the State concerned and expressly provided for in a bilateral (international) agreement.

(b) *UNDP Standard Basic Assistance Agreement*

4. Accordingly, in the SBAA which UNDP concludes with recipient Governments, it is specifically provided, *inter alia*, that the Government shall grant to "persons performing services" on behalf of UNDP the same privileges and immunities as those granted to United Nations officials. Article IX (5) of the SBAA defines "persons performing services" as "operational experts, volunteers, consultants, and juridical as well as natural persons and their employees. It includes governmental or non-governmental organizations or firms which UNDP may retain, whether as an executing agency or otherwise, to execute or to assist in the execution of UNDP assistance to a project, and their employees." However, recent practice has shown that Member States have adopted a restrictive approach to the broad definition of "persons performing services" and to the scope of their privileges and immunities as provided for in the UNDP SBAA.

(c) *UNICEF Basic Cooperation Agreement*

5. This restrictive approach is clearly reflected in the UNICEF Basic Cooperation Agreement which has been adopted recently by the UNICEF Executive Board. Under the Agreement, the definition of "persons performing services" was limited to include only "individual contractors, other than officials, engaged by UNICEF to perform services in the execution of programmes of cooperation" and the privileges and immunities of such persons were limited to immunity from legal process and to repatriation facilities in times of international crisis.

(d) *Report of the Secretary-General dated 18 September 1990*[83] *to the Special Committee on Peacekeeping Operations on the use of civilian personnel in peacekeeping operations*

6. In the context of peacekeeping operations, the General Assembly in its resolution 44/49 of 8 December 1989 requested the Secretary-General to undertake a study to identify those tasks and services which could be performed by civilian personnel and to inform the Special Committee on Peacekeeping Operations of the conclusions of that study. Accordingly, the Secretary-General addressed to the Special Committee on Peacekeeping Operations the above-mentioned report, which was subsequently endorsed by the General Assembly in its resolution 45/258 of 17 May 1991. Referring to the functions that could be performed by civilian personnel provided by either Governments or civilian contractors, the Secretary-General specifically noted in his report that: "Indeed, the United Nations has in recent years made increasing use of civilian contractors . . . The United Nations experience to date has established that, provided the operational conditions are suitable, the use of civilian contractors can be a satisfactory and cost-effective way of providing certain types of services to peacekeeping operations . . ."

7. In acknowledging the value of using civilian contractors, the Secretary-General, however, did not contemplate granting to them any privileges and immunities as he did in the case of civilian personnel provided by Governments. With respect to the latter category of civilian personnel, the Secretary-General specified in paragraph 12 of his report that they "would assume the status of experts on mission for the United Nations in terms of article VI of the Convention on the Privileges and Immunities of the United Nations . . ." It is interesting to note, however, that without envisioning the granting of any privileges and immunities to civilian contractors, the Secretary-General had already indicated in his report that their use "can be a satisfactory and cost-effective way of providing certain types of services to peacekeeping operations".

. . .

(e) *Liability insurance (the hold harmless clause)*

9. As you have indicated in your memorandum that granting functional privileges and immunities to the category of civilian personnel under review would reduce the costs of obtaining insurance coverage by the contractor to indemnify the Organization from potential claims and lawsuits, we find it necessary to provide you with the following clarifications: The proposal to grant functional privileges and immunities to civilian contractors is distinct and unrelated to the question of liability for loss or damage caused by any acts or omissions of the contractor and for which the contractor agrees to hold the United Nations harmless, the rationale behind the hold harmless clause being the jurisdictional immunity of the United Nations and the need to ensure that the contractor, notwithstanding its contractual relationship with the Organization, would be held liable for acts or omissions committed in the performance of its services under the contract.

10. Thus, a hold harmless clause is included in the UNDP SBAA and the UNICEF Basic Cooperation Agreement, where the Government agrees to indemnify and hold UNDP or UNICEF harmless against all claims arising from or attributable to acts of the respective organizations or their employees in re-

lation to their activities in the country concerned. A hold harmless clause is also included in the "General conditions" attached to contracts concluded between the United Nations and corporate or institutional contractors. This is consistent with the provisions of paragraph 23 of administrative instruction ST/AI/327 of 23 January 1985 on institutional or corporate contractors, which reads as follows:

> "The contractor shall indemnify, hold and save harmless and defend at its own expense the United Nations, its officers, agents and employees from and against all suits, claims demands and liability of any nature or kind, including costs and expenses, arising out of acts or omissions of the contractor or its employees in the performance of services under a contract with the United Nations."

Thus, as noted above, the granting of privileges and immunities to personnel provided by civilian contractors would not exempt the contractors from the obligation to hold the United Nations harmless against any claims. It would still be necessary for contractors to purchase adequate insurance coverage to serve the purpose.

11. In the case of civilian contractors engaged in the context of the United Nations Protection Force (UNPROFOR) in the former Yugoslavia, we have noted that the provisions of the agreement between the United Nations and the contractor in question reflect the prevailing practice. Accordingly, under the provisions of that agreement, the contractor has the status of an independent contractor and its employees are not considered officials of the United Nations. This is consistent with administrative instruction ST/AI/327 of 23 January 1985, which set out detailed provisions for obtaining the temporary services of institutional or corporate contractors as follows:

> "The contractor shall be considered as having the legal status of an independent contractor. Agents or employees of the contractor shall not be considered in any respect as being officials or staff members of the United Nations."

Persons provided by the contractor are considered for the purposes of the above-mentioned agreement as employees of the contractor (article 15.1.1) (this provision is of particular importance since persons provided by international employment agencies are not necessarily regarded as employees of those agencies). The contractor agrees to indemnify and hold the United Nations harmless against all claims arising from the performance of the agreement by the contractor (article 9) and to purchase adequate liability insurance coverage for that purpose (article 10). Personnel provided by the contractor are entitled to be evacuated by UNPROFOR in an event or warlike action (article 16.1.3) and, under schedule IV of the agreement, the contractor agrees to purchase for its employees high-risk liability insurance, social services insurance and liability insurance.

12. In the light of the above, the Office of Legal Affairs would have no objection to introducing in the SOFAs and on an ad hoc basis provisions to the effect that internationally contracted personnel should be entitled to enjoy privileges and immunities along the lines of those approved in the UNICEF Basic Cooperation Agreement, namely, immunity from legal process and entitlement to repatriation in times of international crises. The granting of such privileges and immunities to this category of personnel will, of course, be subject to the consent of the State(s) with which SOFAs are negotiated.

13. Finally, we note that under the United Nations War Risk policy, the insurer agrees to compensate the insured (the United Nations) in respect of accidents resulting in death or disability caused directly or indirectly by events such as war, invasion, hostilities, civil war, explosion of war weapons, etc., for employees of the insured who are, among others, "Professional staff members, experts and consultants on mission/travel/daily subsistence allowance status and other official visitors in the designated countries". It may be advisable to verify with the insurer the terms under which such internationally contracted personnel could be covered under the above-mentioned policy as it would provide adequate insurance coverage to the contractor's personnel which is identical to that provided to United Nations staff. This may help defend against any claims against the United Nations in cases of death or disability of such personnel while performing services for the United Nations. This would show that the United Nations had taken the same measures as it took for its own staff who work alongside these personnel. The Security Coordination Officer of the Office of Human Resources and Management, who is responsible for the administration of this policy, could discuss this issue with the insurer.

14. Of course, the inclusion of additional beneficiaries in the insurance policy would entail additional premium, which will be borne by the Organization. Whether this is satisfactory and cost-effective to the Organization remains to be examined by the competent services.

15. In conclusion, we suggest that the privileges and immunities indicated in paragraph 12 above which could be granted to internationally contracted personnel provided by civilian contractors in the context of United Nations peacekeeping operations, subject to the consent of Member States, be further examined by the Field Operations Division taking into consideration that the insurance coverage purchased by the contractor is in any case necessary for the reasons indicated in paragraph 9 above and that the Special Committee on Peacekeeping Operations, the Office of Human Resources Management and other offices competent to review the implications of this proposal be consulted.

16. In the meantime, we assume that internationally contracted personnel provided by civilian contractors would, in the case of ONUMOZ, be used in accordance with the practice that has prevailed so far, including in the case of UNPROFOR.

3 February 1993

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34. STATUS OF INTERNATIONALLY CONTRACTED PERSONNEL PROVIDED BY CIVILIAN CONTRACTORS IN THE CONTEXT OF UNITED NATIONS PEACEKEEPING OPERATIONS—UNDERSTANDING OF THE TERM "EXPERTS ON MISSIONS"—ADVISORY OPINION OF THE INTERNATIONAL COURT OF JUSTICE OF 15 DECEMBER 1989 ON THE APPLICABILITY OF ARTICLE VI, SECTION 22, OF THE 1946 CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

Memorandum to the Deputy Director, Field Operations Division

1. This is with reference to your memorandum dated 25 January 1993 suggesting that personnel provided by civilian contractors in the context of

United Nations peacekeeping operations be granted the status of experts on missions for the United Nations. The personnel in question would perform functions such as those of vehicles mechanics, dispatchers, drivers, electricians, carpenters and plumbers.

2. Although the 1946 Convention on the Privileges and Immunities of the United Nations[84] does not define the term "experts on missions", the term is understood to apply to persons who are charged with performing specific and important functions or tasks for the United Nations. As indicated by the International Court of Justice in its advisory opinion of 15 December 1989 on the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*,[85] experts on missions "have been entrusted with mediation, with preparing reports, preparing studies, conducting investigations or finding and establishing facts". The Court's description of the scope of functions of experts, while not exclusive, conforms in a general sense to United Nations and State practice.

3. The functions performed by contracted personnel provided by civilian contractors in the context of United Nations peacekeeping operations as described in your memorandum do not fall within the scope of the understanding of the expression "experts on missions" which has evolved within the Organization and among its Member States.

4. Therefore, taking into consideration the increasing number and nature of the functions performed by the contracted personnel provided by civilian contractors in the context of United Nations peacekeeping operations, it would not, in our view, be appropriate to consider granting them the status of experts on missions for the United Nations.

11 February 1993

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35. Immunity for observers participating in identification/registration of voters in the framework of the United Nations Mission for the Referendum in Western Sahara—Status of the Identification Commission established by the United Nations for the purpose of assisting MINURSO—Article VI and article VII, section 26, of the 1946 Convention on the Privileges and Immunities of the United Nations—Status of officials of the Organization of African Unity participating as observers in the Identification Commission

Memorandum to the Assistant Special Representative of the Secretary-General for Western Sahara

1. This is with reference to your memorandum of 31 March 1993 on immunity for observers participating in identification/registration of voters in the framework of the United Nations Mission for the Referendum in Western Sahara (MINURSO). We note that the parties, i.e., Morocco and the Frente Popular para la Liberación de Saguia el-Hamra y de Río de Oro (Frente POLISARIO), "have agreed that, as envisaged in the settlement plan, it will be essential for the tribal chiefs of Western Sahara (*chioukhs*) from both sides to participate in the identification of voters; and for observers from both parties

and the Organization of African Unity to be present as observers". We further note that the parties have expressed their readiness "to provide written guarantees which would give diplomatic immunity to *chioukhs* and observers". In this connection you seek our advice and guidance as to the best way to handle this matter and in particular with a view to assisting your office in drafting a suitable text for the purpose of such guarantees.

2. The participation of the representatives of the two parties, as observers, and *chioukhs* in the Identification Commission is provided for under the provisions of the relevant reports concerning Western Sahara of the Secretary-General to the Security Council, and in particular in the annex to one of these reports, dated 19 December 1991.[86] In view of the status of the Identification Commission, i.e., a commission established by the United Nations for the purpose of assisting MINURSO in the discharge of its functions, the above-mentioned individuals will be performing official functions for the United Nations within the meaning of article VI of the Convention on the Privileges and Immunities of the United Nations[87] (except for the OAU personnel). It should be noted that article VI of the Convention provides for quasi-diplomatic status for United Nations experts on mission, which, *inter alia*, includes:

- immunity from personal arrest or detention and from seizure of their personal baggage;
- immunity from legal process of every kind in respect of words spoken and written or any act done by them in the course of the performance of their mission (this immunity shall continue notwithstanding that they are no longer performing a mission for the United Nations);
- inviolability for all papers and documents;
- the right to use codes and to receive papers or correspondence by courier or in sealed bags for the purpose of their communications with the United Nations;
- the same facilities in respect of currency or exchange restrictions that are accorded to representatives of foreign Governments;
- the same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys.

In this capacity, observers for the Identification Commission and the *chioukhs* could be issued, under article VII, section 26, of the Convention, a United Nations certificate if they are to travel on the business of the United Nations.

3. The above-mentioned privileges and immunities are almost analogous to diplomatic ones. We do not, however, see how at least one of the parties involved could guarantee full diplomatic privileges and immunities to the observers and the tribal chiefs which include, *inter alia*, immunity from criminal, civil and administrative jurisdiction of the host *State* and its residents, etc.

4. As to observers from the Organization of African Unity (OAU), it should be noted that if they are regular staff members of that organization, they are already covered by the constituent document of OAU and the corresponding legal instrument regarding the legal status of its officials. Therefore, it would not be appropriate to extend "expert on mission status" to officials of OAU participating as observers in the Identification Commission.

13 April 1993

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36. QUESTION WHETHER IT IS LEGALLY PERMISSIBLE FOR MEMBER STATES TO APPOINT EITHER NATIONALS OF THE HOST STATE OR NATIONALS OF A THIRD STATE, OR BOTH, AS MEMBERS OF THE DIPLOMATIC STAFF OF THEIR MISSIONS ACCREDITED TO THE UNITED NATIONS—ARTICLE IV, SECTION 15, OF THE 1946 CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS AND ARTICLE 7 OF THE 1961 VIENNA CONVENTION ON DIPLOMATIC RELATIONS—GUIDING CRITERIA IN AUTHORIZING THE ISSUANCE OF UNITED NATIONS GROUNDS PASSES TO MEMBERS OF THE STAFF OF PERMANENT MISSIONS

Memorandum to the Chief of Protocol

1. This is with reference to your memorandum dated 18 March 1993. In this connection you seek our advice as to whether it would be legally proper "for a Permanent Representative to the United Nations or even a government official, such as the Minister for Foreign Affairs, to bestow a diplomatic rank on an individual who is not a citizen of that country". In addition, you also wonder whether it would be correct for your service to grant a diplomatic United Nations grounds pass to "diplomats without diplomatic status, and thus directly assist them in misrepresenting themselves".

2. The question of the nationality of the members of the staff of the mission is not directly addressed in the 1946 Convention on the Privileges and Immunities of the United Nations[88] and the 1947 Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations.[89] The Convention, however, specifies in article IV, section 15, that the provisions on the privileges and immunities of representatives of members "are not applicable as between a representative and the authorities of the State of which he is a national or of which he is or has been the representative".

3. This question was further elaborated in the 1961 Vienna Convention on Diplomatic Relations.[90] According to article 7 of the Convention, the sending State may, with certain limitations, freely appoint the members of the staff of the mission. Article 8, paragraph 1, furthermore stipulates that "members of the diplomatic staff of the mission should, in principle, be of the same nationality as the sending State". Article 8, paragraph 2, of the Convention provides that "members of the diplomatic staff of the mission may not be appointed from among persons having the nationality of the receiving State, *except with the consent of that State* which may be withdrawn at any time" (emphasis added). In addition, the Convention specifies that the receiving State "may reserve the same right", i.e., the right to express its consent, with regard to nationals of a third State who are not also nationals of the sending State (article 8, paragraph 8).

4. The background and legislative history of these statutory provisions of the codified rules of diplomatic law may be found in the commentary of the International Law Commission on the then draft articles on diplomatic intercourse and immunities.[91] Referring to the principle to choose freely members of the mission of the sending State, the Commission referred to a few exceptions (limitations) to this principle. In paragraph 9 of its commentary, the Commission, in particular, stated that "concerning cases where the sending State wishes to choose as diplomatic agent a national of the receiving State or a person who is a national of both the sending and the receiving States . . . the Commission takes the view that such an appointment is subject to *the express con-*

sent of the receiving State, even though some States do not insist on this condition". The Commission, however, did not think that "the consent of the receiving State is a condition necessary for the appointment as a diplomatic agent of a national of a *third* State or for the appointment of a national of the receiving State to the administrative, technical or service staff of a foreign mission" (emphasis added).

5. The practice of States and international organizations in this respect has been codified in the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.[92] This Convention (not yet in force) embodies almost analogous principles and rules on the question of composition of missions and nationality of diplomatic staff accredited to international organizations. The question of nationality is generally addressed in article 73 of the Convention, which provides as follows:

> "1. The head of mission and members of the diplomatic staff of the mission, the head of delegation, other delegates and members of the diplomatic staff of the delegation, the head of the observer delegation, other observer delegates and members of the diplomatic staff of the observer delegation should in principle be of the nationality of the sending State.
>
> 2. The head of mission and members of the diplomatic staff of the mission may not be appointed from among persons having the nationality of the host State except with the consent of that State, which may be withdrawn at any time.
>
> 3. Where the head of delegation, any other delegate or any member of the diplomatic staff of the delegation or the head of the observer delegation, any other observer delegate or any member of the diplomatic staff of the observer delegation is appointed from among persons having the nationality of the host State, the consent of that State shall be assumed if it has been notified of such appointment of a national of the host State and has made no objection."

6. In paragraph 36 of his report to the International Law Commission on this subject,[93] the Special Rapporteur stated that "State practice and treaty and statutory provisions reveal that the consent of the host State is not required for the appointment of one of its nationals as a member of a permanent mission of another State. The problem is usually dealt with in terms of the immunities conceded to the member of the mission, and a number of States make a distinction between nationals and non-nationals in this regard."

7. The above-mentioned general principle on nationality of the members of the mission reflected in article 73 of the 1975 Vienna Convention was further elaborated in articles 37 and 67 of the Convention, which set out limitations on the privileges and immunities of nationals and permanent residents of the host State.

8. In the light of the foregoing observations, it is legally permissible for Member States to appoint members of diplomatic staff of their missions accredited to the United Nations, both nationals of the host State and/or those of the third State. However, in the former case, i.e., nationals or permanent residents of the host State, the consent of such State would seem to be a necessary prerequisite for such an appointment.

9. As to your second query, namely, whether it would be correct for the United Nations to grant diplomatic United Nations grounds passes to members

of missions who in your view do not have a diplomatic background or even do not have diplomatic passports, we would like to advise you as follows:

10. The possession of a diplomatic passport is not a constitutive element for diplomatic status. It is a sovereign right of States to decide whether and to whom to issue diplomatic passports. Consequently, some countries do not issue diplomatic passports at all; much more frequently, however, States give diplomatic passports to all kinds of high-ranking dignitaries, often far removed from the spheres of diplomacy. The diplomatic passport, in today's world, is nothing more than an expression of the desire of the issuing State that the bearer will be treated with courtesy and regard. It is not, however, the expression of an entitlement to diplomatic status. Therefore, it cannot be said that the bearer of a diplomatic passport is automatically entitled to diplomatic status; nor can it be said that the holder of a normal passport cannot be entitled to such status. In addition, neither the 1946 Convention on the Privileges and Immunities of the United Nations nor the 1947 Headquarters Agreement provides for precise characteristics of a diplomatic agent accredited to the United Nations. The 1961 Vienna Convention on Diplomatic Relations in its article 1 (*d*) defines members of the diplomatic staff simply as "the members of the staff of the mission having diplomatic rank". The Convention provides, however, for a definition of the members of the administrative and technical staff, according to article 1 (*f*), as "the members of the staff of the mission employed in the administrative and technical service of the mission". Almost identical provisions are to be found in the 1975 Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (article 1, subparagraphs 28 and 29). None of these conventions define in detail all the functions attributable to either diplomatic or technical and administrative staff of the mission.

11. Therefore, in authorizing the issuance of United Nations diplomatic grounds passes to members of the permanent mission's staff, your service should be guided by criteria according to which only those who genuinely fulfil diplomatic functions and tasks, and are not involved in the administrative and technical servicing of the mission, are entitled to such a type of pass. Should you have strong and reasonable doubts, and substantiated concerns that certain members of permanent missions do not in fact perform diplomatic functions and tasks, you may take these cases up with the missions themselves.

13 April 1993

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37. Closure of the permanent mission of a Member State to the United Nations—None of the existing legal instruments regulate in detail the procedures to be followed in such a case—Application *mutatis mutandis* of the provision of the 1967 UNIDO Headquarters Agreement, which concerns the procedure to be followed if the host country requests departure from its territory of a representative of a Member State

Memorandum to the Senior Legal Liaison Officer,
United Nations Office at Vienna

1. This is with reference to your memorandum dated 8 April 1993 to which was attached, for our comment, a copy of correspondence relating to the

question of the closure of the embassy and permanent mission of (name of a Member State) in Vienna.

2. In your memorandum you inquire as to any similar experience in New York regarding the closure of a permanent mission at the request of the host country, and seek our advice on the appropriate procedure for informing the Government of the Member State in question regarding the intended closure of its mission in Vienna.

3. There has been no case of the closure of a permanent mission at the request of the host country in New York.

4. None of the existing legal instruments, i.e., the 1946 Convention on the Privileges and Immunities of the United Nations,[94] the 1967 UNIDO Headquarters Agreement[95] or the 1961 Vienna Convention on Diplomatic Relations,[96] regulate in detail the procedures to be followed in the case of a closure of a mission on the initiative of the host country, nor is this matter regulated in the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character[97] (not yet in force).

5. It should be noted that article 40 of the 1975 Vienna Convention foresees that the functions of the *head* of mission shall come to an end, *inter alia*:

(*a*) on notification by the sending State that the functions of the permanent representative have come to an end;

(*b*) if the mission is finally or temporarily recalled.

In his commentary on these provisions,[98] the Special Rapporteur of the International Law Commission indicated that "this article does not contain a provision corresponding to subparagraph (*b*) of article 43 of the Vienna Convention on Diplomatic Relations, which provides as one of the modes of termination of the function of a diplomatic agent the notification by the receiving State to the sending State that, in accordance with paragraph 2 of article 9, it refuses to recognize the diplomatic agent as a member of the mission". The Special Rapporteur emphasized that since the members of the permanent mission are not accredited to the host State "they do not enter into direct relationship and transactions with the host State, unlike the case of bilateral diplomacy".

6. In the circumstances, it would seem to us that the provisions of the 1967 UNIDO Headquarters Agreement concerning the procedure to be followed if the host country requests departure from its territory of a representative of a Member State should be applied *mutatis mutandis*. This procedure requires the prior approval of the Federal Minister for Foreign Affairs of (name of a Member State), which could be given "*only after consultation* with the Government of the Member State concerned" (emphasis added). Therefore, it would seem to us that an appropriate procedure would be that you should inform the Government of the Member State concerned through the established channels of the intended action against its mission in Vienna. At the same time, the Government of (name of a Member State) should also be advised that the appropriate consultation should take place with the Government of the Member State concerned.

21 April 1993

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38. QUESTION OF THE RECOGNITION OF THE TITLE OF "AMBASSADOR" FOR THE HEAD OF DELEGATION OF AN INTERGOVERNMENTAL ORGANIZATION TO THE UNITED NATIONS—PRACTICE OF THE UNITED NATIONS IN THIS RESPECT—RELEVANT INTERNATIONAL AGREEMENTS DO NOT FORESEE THE TITLE "AMBASSADOR" FOR OBSERVERS FROM INTERGOVERNMENTAL ORGANIZATIONS

Memorandum to the Chief of Protocol

1. I have been informed that an intergovernmental organization has been raising the question of recognition of an ambassadorial rank and title for the head of that organization's delegation accredited to the United Nations by the organization at various levels.

2. As you know, our practice in principle in this respect is not to recognize the title of "ambassador" of permanent observers for intergovernmental organizations which have received a standing invitation to participate in the sessions and the work of the General Assembly and maintain permanent offices at Headquarters. We do not recognize such titles unless the representatives concerned nominated by the respective intergovernmental organizations hold the title "ambassador" under the law of a State Member of the Organization. In our view, the institution of "ambassador" belongs to the area of relations between sovereign States. The fundamental principles and norms governing that area are codified in the 1961 Vienna Convention on Diplomatic Relations,[99] which expressly recognizes "ambassadors" as a class of heads of mission in bilateral diplomacy. Permanent observers of international organizations, including those from an entity such as the organization in question, however, are not entitled to diplomatic status under the 1961 Vienna Convention or any other existing international agreement governing the legal status, privileges and immunities of representatives of Member States. In particular, neither the provisions concerning permanent representatives of Member States contained in the 1947 Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations[100] nor those of the 1946 Convention on the Privileges and Immunities of the United Nations[101] apply to observers of intergovernmental organizations; nor does the domestic legislation of the United States, namely, the 1945 International Organizations Immunities Act, foresee the title "ambassador" for observers from intergovernmental organizations. The status of observers for intergovernmental organizations follows from agreements specially concluded with those organizations, the direct application of Article 105 of the Charter of the United Nations and their status as "invitees" of the United Nations.

3. However, it should be noted that we are not legally prohibited from a purely protocollary recognition of the title "ambassador" for the representative of the organization in question, as is apparently done by many States. In that case, however, because of the trilateral character of accreditations to the United Nations which concern the Organization, the host country and the sending State, we have to be careful not to create misunderstandings. In order to prevent such a misunderstanding that recognition of such a title could create any separate grounds for claiming diplomatic privileges and immunities, it seems appropriate to insert a clarification in the United Nations "Blue Book" when it lists the representatives of intergovernmental organizations. The proposed clarification could cover all cases in which we recognize the title "ambassador" for

a representative of an intergovernmental organization and could read as follows: "The title 'ambassador', if used with respect to the representative of an entity other than a State, should not be understood as indicating in itself an entitlement to diplomatic privileges and immunities."

19 May 1993

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39. LEGAL STATUS OF SENIOR OFFICIALS OF THE UNITED NATIONS—IMMUNITY OF THE UNITED NATIONS AND ITS OFFICIALS FROM LEGAL PROCESS—ARTICLE II, SECTION 2, AND ARTICLE V, SECTIONS 18 (*a*) AND 19, OF THE 1946 CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS AND ARTICLE III, SECTION 9 (*a*), OF THE 1947 AGREEMENT BETWEEN THE UNITED NATIONS AND THE UNITED STATES OF AMERICA REGARDING THE HEADQUARTERS OF THE UNITED NATIONS

Letter to a judge of the host State court

We wish to refer to the Notice of Motion for Default Judgement dated 26 July 1993, with attachments, addressed to the United Nations and certain senior officers of the Organization with respect to the claim submitted against them.

In this connection, we wish to advise you that the above-mentioned officials are current or former senior officials of the United Nations. Their legal status is governed by the provisions of article V, section 19, of the 1946 Convention on the Privileges and Immunities of the United Nations,[102] to which the host State has been a party. Pursuant to those provisions, they enjoy "the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law", including the immunity from the criminal, civil and administrative jurisdiction of the host country. It is to be further noted, for your information, that lists of the senior officials of the United Nations entitled to diplomatic privileges and immunities are submitted annually to the host State; the sued officials appear on those lists.

We wish further to advise you that the United Nations itself and its officials are immune from legal process under article II, section 2, and article V, section 18 (*a*), of the Convention. The United Nations and its officials enjoy the same immunity under the host State International Organizations Immunities Act, Public Law 79-291 of 29 December 1945.[103]

The United Nations is maintaining its immunity and the immunity of the officials in question in this case. We are therefore returning to the court the said Notice of Motion for Default Judgement. Furthermore, it should be noted that, pursuant to article III, section 9 (*a*), of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations,[104] service of legal process within the Headquarters district may take place only with the consent of the Secretary-General; such consent has not been given in the present case.

Please note that the individuals named in the given case are either current or former officials of the United Nations, and in the event that additional Notices of Motion for Default Judgement are received by any of those individ-

uals, in addition to the above-mentioned senior officials, such notices will also be returned to the court in due course.

We should also like to remind you that, as stated in the letter of 18 May 1993 to you from the Legal Counsel in connection with this matter, the complainant should have adjudicated his claim through the appeal process available within the United Nations.

We are forwarding a copy of the present letter to the host State Mission to the United Nations. Should you require further information, please contact the Mission, which could provide verification of the immunity of the United Nations and its officials, including the senior officials of the United Nations who appear on the lists referred to above.

6 August 1993

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40. Visa requirements imposed on United Nations Protection Force personnel by a Member State—Relevant provisions of the 1946 Convention on the Privileges and Immunities of the United Nations

Memorandum to the Under-Secretary-General for Peacekeeping Operations

1. This is with reference to the fax dated 10 October 1993 addressed to you and to our Office for information by the Special Representative of the Secretary-General to the former Yugoslavia on issues relating to the visa requirements imposed by the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro).

2. According to the information provided in the above-mentioned fax, the Federal Republic of Yugoslavia (Serbia and Montenegro) is seeking to impose on members of the United Nations Protection Force (UNPROFOR) entry visas for both individuals with United Nations laissez-passer and individuals with national passports of countries which require entry visas for nationals from the Federal Republic of Yugoslavia (Serbia and Montenegro). These visa requirements would not, however, apply to UNPROFOR convoys transiting through the Federal Republic of Yugoslavia (Serbia and Montenegro), except for the leader of such convoys.

3. Accordingly, large movements of military personnel of UNPROFOR transiting through the State concerned would not be affected by the new visa requirements. This is all the more important since the provisions of the draft agreement with the Federal Republic of Yugoslavia (Serbia and Montenegro) on the status of UNPROFOR under which members of the Force are exempted from visa regulations are precisely intended to ensure that large movements of personnel proceed without any impediment to the area of operation.

4. As a general rule, the position of the United Nations in respect of visa requirements is to consider the mere visa requirement as unobjectionable as long as it is a formality which does not entail an impediment to the speedy travel and movement of United Nations personnel. This position is based on the provisions of the Convention on the Privileges and Immunities of the United Nations,[105] to which the Federal Republic of Yugoslavia (Serbia and Montenegro) is a party. Under article VII, sections 25 and 26, of the Convention, visa matters are regulated as follows:

"Section 25. Applications for visas (where required) from the holders of United Nations laissez-passer, when accompanied by a certificate that they are travelling on the business of the United Nations, shall be dealt with *as speedily as possible*. In addition, such persons shall be granted facilities for speedy travel. (emphasis added)

Section 26. Similar facilities to those specified in section 25 shall be accorded to experts and other persons who, though not the holders of United Nations laissez-passer, have a certificate that they are travelling on the business of the United Nations."

5. Accordingly, if applications for visas for personnel of UNPROFOR are dealt with "as speedily as possible", the Government would not be acting at variance with its obligations under the above-mentioned Convention. Although visa requests as such are not at variance with the international commitments of the Federal Republic of Yugoslavia (Serbia and Montenegro), it should be pointed out that the procedure relating to the issuance of these visas should not result in any restrictions which would impede the travel and movement of UNPROFOR members.

15 October 1993

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41. LEGAL PROVISIONS GOVERNING THE ISSUANCE OF THE UNITED NATIONS LAISSEZ-PASSER AND THE CATEGORIES OF OFFICIALS ENTITLED TO IT—THE 1946 CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS AND THE 1947 CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF SPECIALIZED AGENCIES

Letter to the Director of Personnel of the European Organization for the Safety of Air Navigation

This is in reference to your letter of 29 September 1993, by which you requested information concerning the United Nations laissez-passer, the legal provisions governing its issuance, the categories of officials entitled to it, special provisions which may exist in that respect for non-staff members and whether there is any standard agreement with Member States recognizing the validity of the United Nations laissez-passer as a valid travel document.

The issuance of United Nations laissez-passer is governed by article VII of the 1946 Convention on the Privileges and Immunities of the United Nations[106] (hereinafter referred to as the General Convention) and article VIII of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies[107] (hereinafter referred to as the "Specialized Agencies Convention").

Under article VII, section 24, of the General Convention, United Nations laissez-passer may only be issued to officials of the United Nations—a term which was interpreted by the General Assembly in its resolution 76 (I) of 7 December 1946 to mean all regular staff members of the Organization, with the exception of those who are recruited locally and are assigned to hourly rates. An official of the Organization is therefore any staff member who is given a letter of appointment under the United Nations Staff Regulations and Rules. Comparable officials of specialized agencies are also entitled, under article VII,

section 28, of the General Convention, to a United Nations laissez-passer if the agreements for relationship made under Article 63 of the Charter of the United Nations so provide. In that case, article VIII, section 26, of the Specialized Agencies Convention provides that United Nations laissez-passer shall be provided to these officials in conformity with administrative arrangements to be concluded between the Secretary-General of the United Nations and the competent authorities of the specialized agencies.

While only officials of the United Nations and of the specialized agencies are entitled to United Nations laissez-passer, article VII, section 26, of the General Convention and article VIII, section 29, of the Specialized Agencies Convention provide that similar facilities shall be accorded to experts and other persons who, though not the holders of United Nations laissez-passer, have a certificate that they are travelling on the business of the United Nations or of that of the specialized agency, respectively.

Article VII, section 24, of the General Convention and article VIII, section 27, of the Specialized Agencies Convention provide in similar terms that United Nations laissez-passer shall be recognized and accepted as valid travel documents by the authorities of the Member States. No additional agreement between the United Nations and a Member State for the recognition of a United Nations laissez-passer as a valid travel document is therefore necessary.

19 October 1993

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42. Host State restrictions of air transportation services to a Member State, their applicability to the in-house United Nations travel agency and effect on official travel of United Nations officials—Relevant provisions of the 1946 Convention on Privileges and Immunities of the United Nations and the 1947 Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations

Memorandum to the Acting Chief of the Travel Unit, Transportation Section

1. Reference is made to your note dated 2 July 1993 requesting our advice on the United States restrictions on air transportation to Lebanon and their applicability to the in-house United Nations travel agency, and the effect on official travel of United Nations officials. We set forth below our comments.

2. Pursuant to United States directives,[108] air transportation between the United States and Lebanon and the sale in the United States by any airline or its agent of tickets for passenger air transportation with a stop in Lebanon are prohibited. The United States Government has advised that the prohibition covers the taking of reservations, including reservations taken at a location outside the United States if the reservation communication originates in the United States.

3. We understand that in the past, the then United Nations travel agency had arranged for official travel by United Nations officials to Lebanon by issuing tickets to Amman or Damascus with a ticket change in Europe to Beirut (the agency would request a European affiliate to make reservations on the

European flight to Beirut). The agency also issued tickets to passengers for a Paris-Damascus flight with a stop in Beirut; passengers on such flights were at times detained at Kennedy Airport and questioned by United States authorities.

4. Your memorandum states that the agency has questioned whether the United States directives apply to it since it is operating "on the United Nations premises and not within the United States". Please note that the fact that the agency is operating within the United Nations Headquarters district does not automatically exempt it from the application of those restrictions. We draw your attention to article III, section 7 (*b*), of the 1947 Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations[109] (the "Headquarters Agreement"), which states:

> "Except as otherwise provided in this Agreement or in the General Convention, the federal, state and local law of the United States shall apply within the Headquarters district."

Article III, section 8, of the Headquarters Agreement provides that "no federal, state or local law or regulation of the United States which is inconsistent" with an overriding regulation operative within the Headquarters district promulgated by the United Nations "shall, to the extent of such inconsistency, be applicable within the Headquarters district". The United Nations has not promulgated any regulation on air transportation for United Nations officials. Therefore, the restrictions under United States law would apply to the agency. We note in this connection that by making reservations from New York for European flights to Beirut the agency would appear to be in violation of the United States restrictions.

5. However, having regard to the effect of the directives in question, we consider that such restrictions on flights to Lebanon *for official United Nations business* would be contrary to article IV, section 11, of the Headquarters Agreement, which states, in part:

> "The federal, state or local authorities of the United States shall not impose any impediments to transit to or from the Headquarters district of . . . officials of the United Nations . . ."

In addition, the restrictions would be contrary to article VII, section 25, of the 1946 Convention on the Privileges and Immunities of the United Nations (the "General Convention"),[110] to which the United States has been a party since 29 April 1970, which provides that staff members holding United Nations laissez-passer and travelling on official business shall be "granted facilities for speedy travel".

6. The restrictions would also appear to interfere with the ability of staff members, who, under United Nations staff regulation 1.2, are subject to the authority of the Secretary-General, to carry out assignments by the Secretary-General, and thus would pose an impediment to the official business of the United Nations and the fulfilment of the purposes of the Organization. We note, in this connection, Article 105 of the Charter of the United Nations which states, in part:

> "1. 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.
>
> "2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immu-

nities as are necessary for the independent exercise of their functions in connection with the Organization."

7. With respect to the detention and questioning at Kennedy Airport of United Nations staff members on official United Nations business, we note that, pursuant to article V, section 18 (*a*), of the General Convention, United Nations staff members are immune from legal process for acts performed in their official capacity. Therefore, those staff must not be detained or questioned by the United States authorities unless such immunity is expressly waived by the Secretary-General.

8. Consequently, the effect of the United States directives is to impose certain impediments to official travel of United Nations staff members and the performance of official business of the Organization. Such impediments are not consistent with the letter and spirit of the Charter of the United Nations, the Headquarters Agreement and the General Convention, or the operative functions of the Organization. Accordingly, it would be appropriate to request an exemption from the application of those directives to the United Nations in-house travel agency.

22 November 1993

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43. United Nations practice with respect to waiver of immunity concerning requests for staff members to testify before national judicial bodies—Article V, sections 18 (*a*), 19 and 20, of the 1946 Convention on the Privileges and Immunities of the United Nations—Circular memorandum of the Secretary-General of 8 August 1991 on the Organization's policy on testimony before parliamentary committees and congressional hearings

Letter to the Legal Adviser, Non-Refugee Matters, Office of the United Nations High Commissioner for Refugees

In your letter of 6 October 1993, you inform us that there have been several cases where UNHCR staff members have been requested to testify before national judicial bodies. In this connection you, *inter alia*, inquire about general guidelines, used by the United Nations, in order to regularize UNHCR practice in this respect.

As you correctly indicated in your letter, the nature of the privileges and immunities of United Nations staff members is functional. Pursuant to article V, section 20, of the 1946 Convention on the Privileges and Immunities of the United Nations,[111] officials are granted privileges and immunities in the interests of the Organization and not for the personal benefit of the individuals themselves. The right and the duty to waive the immunity of any official is vested in the Secretary-General.

The United Nations practice in this respect has developed in such a way that the United Nations agencies, in response to requests for their staff to testify in national judicial bodies, normally report such requests, with their recommendations, to the Legal Counsel. The Office of the Legal Counsel then examines the merits of any specific case and authorizes, on behalf of the

Secretary-General, the waiver of immunity if it would be without prejudice to the interests of the United Nations.

Pursuant to article V, section 18 (*a*), of the 1946 Convention, officials of the United Nations are immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity. Accordingly, requests for them to testify in cases of a private character do not necessitate a waiver of immunity.

Please note that in case of a doubt as to whether certain acts were performed by staff members in their official or unofficial capacity, such cases should be referred to this Office for determination. It is the Secretary-General's prerogative to decide what constitutes official or unofficial acts.

As to high-ranking officials of the Organization at the Under-Secretary-General and Assistant Secretary-General levels, these, pursuant to article V, section 19, of the 1946 Convention, are entitled to diplomatic privileges and immunities. Therefore, in respect of them, a waiver of immunity would be necessary for court proceedings, even of a private nature. The same requirement is applicable to certain other staff members who are accorded diplomatic privileges and immunities by virtue of separate agreements with, or unilateral decisions of, the host country.

In the context of your inquiry, it also seems appropriate to remind UNHCR of the long-standing policy of the Organization in relation to invitations to Secretariat officials to give testimony before national parliamentary committees or congressional hearings. In this connection please find attached hereto a self-explanatory circular memorandum of the Secretary-General dated 8 August 1991.

We hope that the aforegoing observations will be helpful in your consideration of requests of UNHCR staff members to testify before judicial bodies of Member States.

2 December 1993

Circular memorandum of the Secretary-General of 8 August 1991

TESTIMONY BEFORE PARLIAMENTARY COMMITTEES AND CONGRESSIONAL HEARINGS

I wish to reiterate the long-standing policy of the United Nations in relation to invitations to Secretariat officials to give testimony before national parliamentary committees or congressional hearings.

In view of their status as international civil servants, and the obligations attaching to such status, it has not been the practice for Secretariat officials to provide formal testimony in such forums, except on the rarest occasions and on matters of a purely technical nature. If Secretariat officials feel it necessary to give such testimony, the authorization of the Secretary-General must first be obtained.

At the same time, for reasons having to do with the interests both of States and of the Organization, officials may need to provide information to members of national governmental bodies on specific issues. This should be achieved by briefings, as and when appropriate, on an informal basis.

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44. DRAFT REPORT ON THE RULES OF PROCEDURE OF THE COMMISSION ON SUSTAINABLE DEVELOPMENT—COMMENTS ON THE GENERAL APPROACH OF THE DRAFT REPORT—GENERAL ASSEMBLY RESOLUTION 47/191—REPRESENTATION OF AND CONSULTATION WITH NON-GOVERNMENTAL ORGANIZATIONS—ARRANGEMENTS FOR CONSULTATION WITH NGOs ESTABLISHED BY THE ECONOMIC AND SOCIAL COUNCIL IN ACCORDANCE WITH ARTICLE 71 OF THE CHARTER OF THE UNITED NATIONS AND BY COUNCIL RESOLUTION 1296 (XLIV) OF 1968—PROPOSED AMENDMENTS TO THE RULES OF PROCEDURE OF THE FUNCTIONAL COMMISSIONS OF THE COUNCIL—QUESTION OF THE PARTICIPATION OF THE EUROPEAN ECONOMIC COMMUNITY IN THE COMMISSION ON SUSTAINABLE DEVELOPMENT

Memorandum to the Under-Secretary-General Designate for Policy Coordination and Sustainable Development

1. This is in reply to your memorandum of 18 January 1993 by which you requested our comments on the draft report on the rules of procedure of the Commission on Sustainable Development. Our comments on the general approach of the draft report, the representation of and consultation with non-governmental organizations (NGOs) and the participation of the European Economic Community (EEC) are set out below.

General approach

2. The report notes in paragraph 2 that the General Assembly, in paragraph 7 (*a*) of its resolution 47/191 of 22 December 1992, recommended that the Commission on Sustainable Development (hereinafter "the Commission") should provide for EEC, within its areas of competence, to participate fully—"as will be appropriately defined in *the rules of procedure of the Commission*—without the right to vote" (emphasis added). Paragraph 3 of the report refers to paragraph 8 of resolution 47/191 by which the Assembly requested the Secretary-General, in the light of paragraph 7 of the resolution, to submit for the consideration of the Economic and Social Council at its organizational session for 1993 "*his proposal on the rules of procedure applicable to the Commission*, including those related to participation of relevant intergovernmental and non-governmental organizations" (emphasis added), as recommended by the United Nations Conference on Environment and Development, taking into account various factors, including the rules of procedure of the Economic and Social Council and of its functional commissions and the rules of procedure of UNCED.

3. Thus, paragraph 7 (*a*) of resolution 47/191 seems to imply that the Secretariat should prepare a set of separate draft rules of procedure for the Commission alone. Paragraph 8 of the resolution, however, requests the Secretary-General to submit proposals on the rules of procedure of the Commission. The report concludes in its paragraph 5 that the Secretary-General is of the view that most provisions of the existing rules of procedure of the functional commissions of the Economic and Social Council "continue to be relevant to the Commission . . . and allow it to perform its functions effectively". In order to adjust those rules to the needs of the Commission, however, the report suggests that the Economic and Social Council could adopt interpretative state-

ments of those rules or adopt decisions applicable solely to the Commission (the latter option should be included in the summary contained in paragraph 6 of the report). The report also suggests that the functional commission rules concerning the consultation with the representation of non-governmental organizations, applicable to all functional commissions, should be amended.

4. This Office has no objection to the approach adopted in the report of continuing to apply, to the extent possible, the rules of procedure of the functional commissions to the new Commission. From the point of view of maintaining consistency and uniformity in the application of rules of procedure and practices among the functional commissions, such an approach is desirable and in line with the fact that, as of this date, the Economic and Social Council has not adopted separate rules for any of its functional commissions. It has, however, adopted separate decisions regarding procedures or practices to be followed in a particular functional commission. We would simply note that delegations may raise the question why the Secretariat opted for this approach, but we assume that the representative of the Secretary-General will reply along the lines indicated in the report.

5. As to the issue of amending the existing functional commission rules for NGO consultation and representation, which would be a change applicable to all functional commissions, that matter is addressed below in paragraphs 10 to 12.

6. In order to reflect this general approach in the rules of procedure of the functional commissions, the report should include a proposal (in paragraph 5 or 6) that the Economic and Social Council amend footnote 1 to those rules to include in the enumeration of functional commissions "the Commission on Sustainable Development".

Representation of and consultation with non-governmental organizations

7. The report suggests in its paragraph 14 that the Economic and Social Council may wish to decide that any NGO that was accredited to participate in the work of the Preparatory Committee for UNCED by the conclusion of its fourth session "can apply for and shall be granted Roster status, bearing in mind the provisions of Article 71 of the Charter of the United Nations". In line with the general approach, therefore, the NGOs would receive a status under the existing consultative procedures, not a special status applicable solely to the Commission. If included on the Roster, such NGOs would enjoy all rights afforded to such NGOs in the rules of procedure of the functional commissions of the Economic and Social Council (see, for example, rules 6 (1), 38, 75 and 76).

8. As you know, in accordance with Article 71 of the Charter of the United Nations, the Economic and Social Council has, by its resolution 1296 (XLIV) of 23 May 1968, established arrangements for consultation with NGOs. It provides principles to be applied in establishing consultative relations with international and national NGOs and establishes a "Roster" for NGOs which do not have general or special consultative status, but which the Economic and Social Council (or the Secretary-General, in consultation with the Council or with the Committee on NGOs) considers can make occasional and useful contributions to the work of the Council or its subsidiary bodies or other United Nations bodies within their competence (paragraph 19 of Council resolution 1296

(XLIV)). In this case, the Secretary-General is suggesting that the Economic and Social Council itself, for the reasons stated, decides to include various NGOs on the Roster.

9. The proposal is a matter of policy on which this Office has no comment, other than to note that the policy would be effected by using the principles and procedures set out in Economic and Social Council resolution 1296 (XLIV). However, the proposal should be amended to refer to NGOs which do not at present have consultative status with the Economic and Social Council. Secondly, it is understood by this Office that by proposing the inclusion of these NGOs on the Roster, the Secretary-General is of the view that they satisfy the criteria for such inclusion on the Roster as set out in Economic and Social Council resolution 1296 (XLIV). If such is not the case, then another procedure would have to be devised and suggested, applicable solely to the new Commission.

10. In paragraph 15 of the draft report, amendments to the rules of procedure of the functional commissions are proposed which set out rules governing the representation of and consultation with NGOs in the functional commissions. According to the report, the new rules have been suggested "bearing in mind the procedures related to the participation of NGOs developed in the UNCED process" and would be "in accordance with paragraph 4 of decision 1/1" of the Preparatory Committee of UNCED.

11. In view of the terms of General Assembly resolution 47/191, it may be appropriate to refer to decision 1/1 of the Preparatory Committee as a basis for devising rules or decisions governing the participation of NGOs in the new Commission. To what extent, however, such an approach requires amending the rules of procedure of the functional commissions of the Economic and Social Council is another matter. It may well be that decisions on this question should be made applicable solely to the new Commission, through an interpretative statement or other appropriate decision, and that decisions affecting NGOs in all functional commissions should not be taken without thorough study and comment by all functional commissions. On the other hand, from the point of view of maintaining consistency among the functional commissions as to NGO participation, it may be argued that a uniform approach is preferable and thus the rules should be amended accordingly. If the Secretary-General wishes to refer to this matter, we would advise that this policy question be put squarely before the Economic and Social Council. The report should highlight the differences between the treatment which NGOs receive under the current rules and how the amendments would affect that treatment. If the Economic and Social Council decides not to amend the rules at this time, it could nevertheless decide to adopt special decisions applicable solely to the new Commission.

. . .

Participation of the European Economic Community

13. Paragraphs 9 and 10 of the draft report address the issue of EEC participation in the new Commission. Paragraph 9 refers to the UNCED precedent of EEC "full participation" and states that the rules of that Conference "could not be applicable to the Commission . . . since, unlike the Conference, it would be a body with membership limited to the representatives of States elected by the Economic and Social Council". We agree with this statement and

would only suggest adding the number "53" before "States" and the phrase ", pursuant to paragraph 6 of General Assembly resolution 47/191".

14. Paragraph 10 suggests that the Economic and Social Council adopt a decision, applicable to the Council and all its subsidiaries, including the new Commission, that the EEC "would speak on behalf of the representatives of States members of the Council or its subsidiary bodies which are also members of EEC on issues that fall within the exclusive competence of EEC in accordance with the Treaty of Rome[112] and other relevant legal instruments adopted by EEC".

15. We have difficulty with that formulation and suggestion. As to the basic policy question, we see no need nor any legislative mandate to formulate a new decision specifically governing EEC participation in the Economic and Social Council and its subsidiaries. Its participation is at present covered by the relevant rules on the participation of intergovernmental organizations. Providing a separate decision relating only to the new Commission would indeed run counter to the overall approach of maintaining uniformity in the application of rules and practices among the Economic and Social Council and its subsidiaries, but as we mentioned in paragraph 4 above, this uniformity should be maintained to the extent possible. In the case of EEC, its substantive participation in meetings is a function of the competences which have been transferred to it. Paragraph 7 (*a*) of General Assembly resolution 47/191 explicitly refers to the "areas of competence" of EEC when requesting that provision be made for EEC to participate in the Commission fully, without the right to vote, as will be appropriately defined in the rules applicable to the new Commission.

16. As to the substance of the suggestion, we also have reservations. The established practice of the Organization is that, once given the floor, a speaker has every right to state that he is speaking on behalf of whomever he wishes. It is not for the Secretariat, nor in fact for any United Nations body, to prevent a speaker from stating for whom he speaks (of course, if the speaker is not in fact authorized to speak on behalf of others as purported, that is a different matter and would no doubt be the source of discussion). In effect, the text would not add anything new to rights already enjoyed by all representatives, including those of EEC. Moreover, the text would call into question the current practice by restricting the right to speak on behalf of both EEC and its members only on issues that fall within the *exclusive* competence of EEC. This is not the case at present, and with regard to environmental matters, you may recall the letter dated 11 March 1992 addressed to the Chairman of the UNCED Preparatory Committee from the Ambassador of Portugal, on behalf of the President of the Council of the European Communities, in which it is stated that: "In relation to environment policy, the European Economic Community *shares* its competence with its member States" (emphasis added). Finally, we would advise against unnecessary references to the Treaty of Rome or EEC "relevant legal instruments"; such matters are basically within the purview of EEC and its members. If and when the need arises, they will inform as to their various competences.

17. The issue remaining is what proposals the Secretary-General should make regarding the full participation of EEC in the work of the new Commission, without the right to vote. As indicated above, the recommendation of the Assembly is "to provide for the European Economic Community, within its

areas of competence, to participate fully—as will be appropriately defined in the rules of procedure of the Commission on Sustainable Development—without the right to vote".

18. In his letter to us of 15 January 1993, the Permanent Representative of Denmark, on behalf of EEC and its member States, communicated "one basic element" which in their view "should be included in the rules of procedure of the Commission on Sustainable Development on the basis of the rules of procedure of functional commissions of the Economic and Social Council". That basic element reads as follows:

"*Participation of the European Economic Community*

"EEC shall, within its areas of competence, participate fully in the work of the Commission. It shall have the same rights as members according to the rules of procedure, except the right to vote."

19. As is often recalled, the rules of procedure of UNCED were amended by the General Assembly in its decision 46/470 of 13 April 1992, "in order to allow the European Economic Community to participate fully" in UNCED. There is thus a frame of reference within which to examine proposals regarding the full participation of EEC in the new Commission.

20. First, it must be recalled that, as indicated in paragraph 9 of the draft report, the UNCED rules cannot, in and of themselves, be utilized for EEC participation in the new Commission. While the General Assembly decided to include EEC among the full participants at the Conference, it decided that the 53 members of the Commission would be States. EEC thus cannot be a member of the Commission. With the exception of chapter XII on "Participation of non-members of the Commission", the rules of procedure of the functional commissions throughout govern the rights of the elected members of the functional commissions. It would not, in our view, be appropriate to provide a general rule or decision by which a non-member of the new Commission could have the same rights as members according to the rules of procedure except the right to vote.

21. Moreover, such a general rule would not be in accord with the UNCED precedent with regard to EEC "full participation". It should be recalled that by decision 4/6 of the Preparatory Committee, subsequently approved by the General Assembly, the rules of procedure of UNCED were amended to provide for EEC rights under certain rules, but specifically not others. For example, EEC was explicitly excluded from holding office, from being counted for quorum purposes and from making such procedural motions as moving for adjournment of debate, closure of debate or suspension or adjournment of the meeting. There is no basis for the Secretary-General to go beyond the UNCED meaning of EEC "full participation" in the case of the new Commission.

22. In our view, EEC could be given rights of full participation as a non-member of the Commission, based upon the existing rules applicable to participation of non-members of the functional commissions, in particular rule 69 governing the participation of non-member States. The Economic and Social Council could accord similar rights to EEC by means of a separate decision along the following lines:

"Participation of the European Economic Community in the Commission on Sustainable Development

"The Commission on Sustainable Development or a subsidiary organ thereof shall invite the European Economic Community, within its areas of competence, to participate fully in its deliberations on any matter of particular concern to the Community. The Community shall not have the right to vote, but may submit proposals which may be put to the vote on request of any member of the Commission or of the subsidiary organ concerned."

23. A question might be raised as to the requirement that, before a proposal by EEC is put to the vote, it is necessary for a member of the Commission to so request. The argument would be that, in the case of exclusive competence, EEC would in fact have replaced any EEC member which had been elected to membership in the new Commission. But the question relates not to the competences of the EEC and its members, but rather to the procedural prerogatives of membership in the functional commission. A non-member of the commission, and particularly EEC in the light of the UNCED precedent, should not in our view be placed on the same level as members with regard to such procedural matters as the right to put proposals to a vote. If EEC members are elected to membership in the new Commission, the matter should not pose a problem, as presumably any EEC proposal which it wishes to be adopted by the Commission will be endorsed by its members serving on the Commission.

24. Finally, we should note that participation in informal meetings, consultations or negotiations is a matter falling outside the formal rules of procedure; it is a matter in the first instance for the convener of such meetings to determine. Thus, participation of EEC in such meetings will be a political matter, to be determined. Nevertheless, it is of course open to the Economic and Social Council to interpret the basic policy guidance from the General Assembly concerning EEC participation as also encompassing informal meetings, consultations or negotiations open to all members of the Commission. That is a policy matter on which we have no comment.

26 January 1993

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45. Question of the designation of the Economic Commission for Europe as an executing agency for certain activities of the Conference on Security and Cooperation in Europe—Applicable General Assembly and Economic and Social Council resolutions indicate that ECE does not have the mandate to act in this capacity

Memorandum to the Special Assistant to the Executive Secretary of the Economic Commission for Europe

1. This is with reference to your request, made on 24 February 1993 and confirmed by your facsimile of 25 February 1993, for our advice in connection with a recommendation made by a Member State that the Chairman of the Economic Commission for Europe (ECE) submit a written proposal to the Chairman of the Economic Forum of the Conference on Security and Co-

operation in Europe (CSCE) to designate ECE as an executing agency for certain CSCE activities.

2. The initial mandate of ECE, set out in Economic and Social Council resolution 36 (IV) of 28 March 1947, did not provide for the performance of executing agency functions by ECE.

3. The Economic and Social Council, by its resolutions 1896 (LVII) of 1 August 1974 and 1952 (LIX) of 23 July 1975, requested the Secretary-General to make arrangements for the delegation of executing agency functions to the regional commissions for regional, subregional and interregional projects financed by the United Nations Development Programme.

4. Subsequently, the General Assembly, by its resolution 33/202 of 29 January 1979, decided that the "regional commissions shall have the status of executing agencies, in their own right, in respect of the categories of projects described in, and in conformity with, paragraph 23 of the annex to resolution 32/197" of 20 December 1977. Paragraph 23 of the annex to resolution 32/197 provides for the strengthening of the relations "between regional commissions *and the organizations of the United Nations system*" (emphasis added) and asks for close cooperation of the regional commissions with UNDP in order to enable the commissions "to participate actively in operational activities carried out *through the United Nations system*" (emphasis added). In that context, the regional commissions are allowed under resolution 33/202 to act as executing agencies for the following categories of projects, which are enumerated in paragraph 23 of the annex to resolution 32/197: "intersectoral, subregional, regional and interregional projects and, in areas which do not fall within the purview of the sectoral responsibilities of specialized agencies and other United Nations bodies, for other subregional, regional and interregional projects".

5. You mentioned in your facsimile that a recent General Assembly resolution "has introduced a closer linkage between CSCE and the United Nations", and we understand that you were referring to General Assembly resolution 47/10 of 28 October 1992, in which the Assembly, *inter alia*, "stresses the need for enhanced cooperation and coordination between the Conference on Security and Cooperation in Europe and the United Nations". We note, however, that the resolution does not address the question of the performance of executing agency functions by ECE.

6. It appears from the above that, under the applicable resolutions of the Economic and Social Council and the General Assembly, the performance by ECE of executing agency functions is to be within the context of paragraph 23 of the annex to Assembly resolution 32/197, and in respect of the categories of projects enumerated therein. Since CSCE is not an organization of the United Nations system, ECE does not have the mandate to act as an executing agency for CSCE.

25 February 1993

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46. Request from a State member of the Conference on Disarmament to establish a permanent mission to the Conference—Legal character of the Conference on Disarmament and its links with the United Nations—Status of representatives to the Conference

Letter to the Senior Legal Officer, Legal Liaison Office, United Nations Office at Geneva

This is with reference to your telefax dated 14 June 1993, to which you attach a copy of a letter of the same date, addressed to you by the Permanent Mission of Switzerland in Geneva. The Mission submits a number of queries in connection with the request from a State member of the Conference on Disarmament to establish a permanent mission to the Conference, separate and distinct from the mission to the United Nations and the other international organizations.

At the outset, we wish to note that our records do not show any precedents for establishing separate permanent missions to international conferences convened by or under the auspices of the United Nations. The 1975 Convention on the Representation of States in Their Relations with International Organizations of a Universal Character,[113] which, even though not yet in force, represents a reliable codification of existing practice, makes a distinction between *missions* to international organizations and *delegations* sent to conferences "convened by or under the auspices" of such organizations.

Moreover, as far as the current practice of the Swiss Government is concerned, we have been advised that some States members of the Conference on Disarmament have in the past sought the establishment of separate permanent missions to the Conference, but the Swiss authorities have declined to accept such requests. As a consequence, delegates to the Conference on Disarmament are often members of their respective permanent missions to the United Nations, even though sometimes they are not in fact part of their national delegations to the United Nations. We are aware of the fact that some Governments maintain different office locations for their delegations to the Conference on Disarmament; however, the members of those delegations are listed among the staff of the permanent missions to the United Nations. Notwithstanding the foregoing, of course, nothing prevents the Swiss Government from acceding to the request mentioned in the letter from the permanent mission of Switzerland in Geneva.

We wish now to respond to each of the questions contained in the letter from the mission:

— First question: "What is the legal status of the Conference on Disarmament?" I wish to recall that the Conference on Disarmament, like its predecessors, is a multilateral negotiating organ on disarmament established by the States concerned outside the United Nations framework. The immediate predecessor of the current Conference, the Committee on Disarmament, was established as a result of the deliberations of the General Assembly at its tenth special session, held in 1978. In 1984, the Committee on Disarmament designated itself as the "Conference on Disarmament". Not having been established by the General Assembly, the Conference on Disarmament cannot be considered an organ of the United Nations. However, there are a number of elements which create close links between the Conference and the United Nations. Thus, *inter alia*, the Conference on Disarmament reports to the General Assembly; the Secretary of the Conference on Disarmament is appointed by the Secretary-General and serves as his personal representative in assisting the Conference and its Chairman; the Conference is serviced

by the United Nations Secretariat and meets on United Nations premises; and the budget of the Conference on Disarmament is part of the regular budget of the United Nations. The foregoing shows that the Conference is not an organ of the United Nations or a permanent conference established by it. At the same time, there are a number of links between the Conference on Disarmament and the United Nations that give the former a *sui generis* status and that warrant pragmatism in dealing with matters dealt with by the Swiss mission.

— Second question: "Given the links between the Conference on Disarmament and the United Nations (reports to the First Committee of the General Assembly, budget of the Conference, use of UNOG facilities, etc.), must the United Nations Office at Geneva be consulted and its agreement to the above-mentioned request obtained?" Since the Conference on Disarmament is not formally a United Nations body, there would not be a need to obtain the agreement of UNOG; at the same time, in view of the above-mentioned links and of obvious practical considerations, the Swiss authorities should consult with UNOG if they decide to accede to the request to establish a separate permanent mission to the Commission on Disarmament.

— Third question: "How could—or should—a "permanent representative to the Conference on Disarmament be accredited?" A "permanent representative to the Conference on Disarmament" would be the head of the delegation of a State member of the Conference and, as such, should be accredited by a letter on the authority of the Minister for Foreign Affairs of that member State addressed to the president of the Conference, as provided for in article II of its rules of procedure.

— Fourth question: "Is the host country obliged to accede to such a request or can it reject it, and on what legal grounds?" We are of the opinion that the Swiss authorities are not obliged to accept the request mentioned above. Pursuant to article IV of the Agreement on the Privileges and Immunities of the United Nations of 14 December 1946,[114] Switzerland recognizes privileges and immunities of, *inter alia*, representatives of Members of the United Nations at conferences convened by the United Nations. The Conference on Disarmament is not formally convened by the United Nations. We also wish to reiterate that, according to the information available to this Office, the Swiss Government has already refused such requests in the past.

— Fifth question: "What is the status of persons taking part in the Conference on Disarmament? Are they members of permanent missions accredited to the United Nations Office at Geneva with all that such accreditation implies, or are they legally delegates under the provisions of the Headquarters Agreement between the United Nations and the Swiss Federal Council?" As noted above, it has been reported to us that representatives to the Conference on Disarmament usually figure as members of their permanent missions to UNOG. As such, they would enjoy the status granted by the Swiss authorities in the Agreement on the Privileges and Immunities of the United Nations and the Decree of the Federal Council of 31 March 1948.

— Sixth question: "Are there other similar conferences to which perma-

nent missions have been established?" We would refer you to the considerations given in the second paragraph of the present letter.

16 July 1993

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47. CLAIM OF A PRIVATE ENTITY THAT IT IS ENTITLED TO ISSUE DOCUMENTS CALLED "PASSPORTS" PURSUANT TO ARTICLE 13, SECTION 2, OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS—MEANING AND LEGAL CHARACTER OF A TRAVEL DOCUMENT CALLED "PASSPORT" ISSUED BY COMPETENT STATE AUTHORITIES

Memorandum to the Officer-in-Charge of the Transportation Section, Purchase and Transportation Service, Office of General Services

1. We are writing in response to your memorandum of 11 August 1993 forwarding to this Office for review and comments a photocopy of a document entitled "passport" issued by the World Service Authority (WSA) located in Washington, D.C. WSA claims that it is "a governmental administrative service functioning in the public interest" and that it is entitled to issue "passports" for travel to all countries pursuant to the provisions of article 13, paragraph 2, of the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on 10 December 1948.[115]

2. We would like to point out from the outset that the text of article 13, paragraph 2, of the Universal Declaration of Human Rights, which states that "everyone has the right to leave any country, including his own, and to return to his country", was not intended to mean that any entity might be entrusted with the authority to issue passports or other types of travel documents; and the provision cannot therefore be so interpreted. Moreover, it may be noted that, although the Universal Declaration proclaimed the fundamental principles of human rights and has exerted a powerful influence on the development of international law, it was approved in the form of a General Assembly resolution and as such cannot be considered a legally binding instrument.

3. As mentioned above, WSA claims the authority to issue documents called "passports". We would like to comment in this regard that the issuance of passports is a convenient system which has developed and has been accepted by the international community of States to secure for their nationals a right to travel to, from and through foreign countries. The term "passport" means a travel document, issued by the competent authorities of a particular State to a national of that State, certifying origin, identity and nationality of the holder thereof and accrediting such holder in foreign countries as a national of the State that issues the passport. Passports remain the property of the State that issues them and they should not be the property of a holder, as suggested by WSA. Passports issued by one State are accepted by other States as prima facie evidence of nationality. WSA is not a competent authority of any State and it is not entitled by any State to certify origin, identity and nationality of its citizens. Therefore, WSA is not in a position to legally claim the authority to issue valid travel documents called "passports". It goes without saying that WSA does not have the authority to issue the so-called "international exit visas", because such visas do not exist and will not be accepted by any State.

4. With reference to the passport-like documents issued by WSA, I would like to draw your attention to the provisions of title 18, section 1541, of the United States Code, which states that "whoever, acting or claiming to act in any office or capacity under the United States, of a state or possession, without lawful authority grants, issues or verifies any passport or other instrument in the nature of a passport to or for any person whomsoever . . . shall be fined not more than $500 or imprisoned not more than one year, or both".

5. It appears that what WSA is doing is nothing but fraud. Since WSA issues its documents in Washington, D.C., you may wish to inform the United States Mission about the WSA activities.

20 August 1993

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48. QUESTION WHETHER THE ADVISORY COMMITTEE ON ADMINISTRATIVE AND BUDGETARY QUESTIONS IS BARRED FROM MEETING OUTSIDE ITS ESTABLISHED HEADQUARTERS, NEW YORK, SINCE IT WAS NOT LISTED AS AN EXCEPTION IN GENERAL ASSEMBLY RESOLUTION 40/243—INTERPRETATION OF THE TEXT OF THE RESOLUTION IN THE LIGHT OF THE PROVISIONS OF THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES

Statement made by the Principal Officer at the meeting of the Committee on Conferences held on 17 September 1993

The Advisory Committee on Administrative and Budgetary Questions was established by the General Assembly by its resolution 14 (I) of 13 February 1946. Its functions were set out in that resolution and are also spelled out in rule 157 of the rules of procedure of the General Assembly.

By its resolution 1437 (XIV) of 5 December 1959, the General Assembly authorized the Advisory Committee, "in fulfilment of its functions under rule 158 [now rule 157] of the rules of the procedure of the General Assembly, to meet as it deems necessary and appropriate at the various offices of the United Nations and at the headquarters of the specialized agencies and the International Atomic Energy Agency, and at the request of those agencies, to advise them on administrative and financial matters".

In its resolution 40/243 of 18 December 1985, the General Assembly reaffirmed "the general principle that, in drawing up the schedule of conferences and meetings, United Nations bodies shall plan to meet at their respective established headquarters", with certain specified exceptions, among which the Advisory Committee did not appear. In addition, the Assembly requested the Committee on Conferences and the Secretary-General to take account of certain principles in drawing up the draft calendar of conferences and meetings. One of those principles is that "United Nations bodies shall meet at their respective established headquarters, subject to the exceptions to this principle approved by the General Assembly".

The question has arisen whether the Advisory Committee is barred from meeting outside its established headquarters, New York, since it was not listed as an exception in resolution 40/243.

Legislative texts, following the established rules of international law for interpreting treaty texts, should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the text in their context and in the light of the object and purpose of the treaty (article 31, paragraph 1, of the 1969 Vienna Convention on the Law of Treaties[116]).

Furthermore, for the purpose of interpreting the text, there shall be taken into account, together with the context, any subsequent practice in the application of the text which establishes the interpretation to be given (article 31, paragraph 3, of the 1969 Vienna Convention).

In this case, it should first be noted that the General Assembly in its resolution 40/243 refers to a "general" principle; exceptions are provided.

The practice shows that, since 1985, the Advisory Committee has continued to meet outside New York, along the lines authorized by the General Assembly in its resolution 1437 (XIV). The Secretary-General has prepared his proposal for programme budgets on the same basis.

The first budget adopted following the adoption of resolution 40/243 continued to provide for the travel of the Advisory Committee outside of headquarters. The resolution approving that budget was adopted on 18 December 1985.[117] Subsequent budgets have continued to provide for the visits of the Advisory Committee to United Nations offices abroad and those of the specialized agencies.

Indeed, at its current session, the General Assembly had before it a report of the Advisory Committee[118] which describes its visits outside headquarters. The General Assembly in its resolution 47/219 of 23 December 1992 took note with appreciation of that report.

It should also be noted that all the resolutions to which I have referred have emanated from the same Main Committee of the General Assembly. It is our view that if the Fifth Committee and the General Assembly viewed the practice of the Advisory Committee as violative of the general principle contained in resolution 40/243, those bodies would not have authorized continued visits of the Committee outside of headquarters.

Given its subsequent practice, the General Assembly by adopting resolution 40/243 did not intend to bar the Advisory Committee from visiting offices outside headquarters, a practice which has been maintained since the authorization of such visits by the Assembly in resolution 1437 (XIV).

17 September 1993

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49. RULES OF PROCEDURE FOR THE MEETINGS OF THE PARTIES TO TREATIES—QUESTION WHETHER TO DELETE FROM THE RULES OF PROCEDURE FOR THE MEETINGS OF THE PARTIES TO THE MONTREAL PROTOCOL ON SUBSTANCES THAT DEPLETE THE OZONE LAYER THE PROVISION WHICH REQUIRES THAT THE CREDENTIALS SHALL BE ISSUED EITHER BY THE HEAD OF STATE OR GOVERNMENT OR BY THE MINISTER FOR FOREIGN AFFAIRS OR, IN THE CASE OF A REGIONAL INTEGRATION ORGANIZATION, BY THE COMPETENT AUTHORITY OF THAT ORGANIZATION

Memorandum to the Coordinator, Ozone Secretariat, United Nations Environment Programme

1. This is in reply to your facsimile of 8 September 1993. By that communication, you requested our advice on the question whether to delete from the rules of procedure for the meetings of the parties to the Montreal Protocol on Substances that Deplete the Ozone Layer[119] the provision which requires that "the credentials shall be issued either by the Head of State or Government or by the Minister for Foreign Affairs or, in the case of a regional integration organization, by the competent authority of that organization". You sought our advice in the light of our experience with the rules of procedure for the meetings of parties to other treaties.

2. We would advise against deleting the provision; it should be maintained as it stands. In virtually all rules of procedure for meetings of parties to treaties adopted under the auspices of the United Nations, provision is made for the issuance of credentials by the Head of State or Government or by the Minister for Foreign Affairs. This accords with the established international law and practice concerning accreditation in general and in particular concerning the issuance of full powers to diplomatic agents signing treaties. It would not be in accordance with that practice and law to state that the matter of who signs credentials is one to be decided by each Government. Furthermore, if decisions taken by the parties at the meetings bind their Governments, there is added reason why their representatives should be accredited pursuant to the established practice.

3. In your memorandum you expressed concern that the provision in question means that the bureau of the parties is "expected to reject a credential from a representative of a country if it is not signed" by one of the persons specified in the rule. That result does not obtain either in the practice of the General Assembly or in meetings of parties to treaties. As can be seen from the most recent report of the Credentials Committee of the General Assembly,[120] the practice of the Credentials Committee is to accept provisional credentials, i.e., those not signed by the Head of State or Government or by the Minister for Foreign Affairs, "on the understanding that formal credentials for representatives . . . would be communicated . . . as soon as possible".

28 September 1993

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50. Arrangements for the implementation of the provisions of article 11 of the United Nations Framework Convention on Climate Change concerning the financial mechanism—Legal capacity of the Conference of the Parties to the Convention and the Global Environment Facility to enter into an agreement or other arrangement with third parties and the legal nature of such agreement or arrangement

Memorandum to the Executive Secretary of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change

1. This is in response to your memorandum of 14 September 1993 in which you refer to a decision of the eighth session of the Intergovernmental

Negotiating Committee for a Framework Convention on Climate Change requesting the interim secretariat of the Committee to seek the opinion of this Office on appropriate arrangements which might be entered into between the Conference of the Parties to the Convention and the operating entity. It is also pointed out in your memorandum that it would be helpful if, in addition, this Office could also touch upon the following two points:

> "(*a*) the legal capacity of the Conference of the Parties and the Global Environment Facility (GEF) to enter into an agreement or other arrangement with third parties;
>
> "(*b*) the legal nature of such agreement or arrangement".

2. In international law, the term "third party" in relation to a treaty means a State or an international organization not party to the treaty in question (1969 Vienna Convention on the Law of Treaties,[121] article 2, paragraph 1 (*h*); 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations,[122] article 2, paragraph 1 (*h*)). Neither the Conference of the Parties nor GEF is at present a party to any treaties. Your Office explained that the words "third parties" should be understood in your memorandum as reference to other entities, such as international organizations. Therefore, we proceeded with the analysis of the questions raised in your memorandum on the basis of that explanation.

3. In order to answer the questions addressed to this Office in their logical sequence, the present paper first examines the issue of the legal capacity of the Conference of the Parties and GEF.

Legal capacity of the Conference of the Parties

4. The United Nations Framework Convention on Climate Change[123] was concluded on 9 May 1992 with the objective of achieving stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system (article 2). Once the Convention enters into force it will establish an international entity/organization with its own separate legal personality, statement of principles, organs and a supportive structure in the form of a secretariat (articles 3, 7, 8, 9 and 10).

5. In accordance with the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, the capacity of an international organization to conclude treaties is governed by the rules of that organization (article 6). Under article 2, paragraph 1 (*j*), of the Convention, the term "rules of the organization" means, in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization.

6. The United Nations Framework Convention on Climate Change of 9 May 1992 provides in article 7 that the Conference of the Parties is established as the supreme body of the Convention with the responsibility to keep under regular review the implementation of the Convention with the authority to make, within its mandate, the decisions necessary to promote the effective implementation of the Convention. In addition to the wide range of functions referred to in article 7, paragraph 2 (*a*) (1), of the Convention, including, *inter alia*, the establishment of cooperative relations with competent international organizations and bodies, the Conference of the Parties can also exercise such other

functions as are required for the achievement of the objective of the Convention (article 7, paragraph 2 (*m*)).

7. In the light of the above, as far as the question of the legal capacity of the Conference of the Parties is concerned, it may be concluded that in accordance with the relevant provisions of the Convention the Conference has the legal capacity, within the limits of its mandate, to enter into agreements and other arrangements with entities, such as States and intergovernmental and non-governmental organizations and bodies, which also have the authority to do so.

Legal capacity of GEF

8. With reference to the question of the legal capacity of GEF, it should first be pointed out that at present GEF is, from a legal point of view, a subsidiary body of the International Bank for Reconstruction and Development (the World Bank). GEF was established by resolution 91-5 adopted by the Executive Directors of the World Bank on 14 March 1991. Paragraph 1, section A ("Establishment of the Facility"), of that resolution states the following:

> "The Facility is hereby established, consisting of the Global Environment Trust Fund, Cofinancing Arrangements with the Global Environment Trust Fund, the Ozone Projects Trust Fund and such other funds and agreements as the Bank may from time to time establish or agree to administer within the Facility. The Bank will administer the Facility in accordance with the applicable provisions of the articles of the Agreement, by-laws, rules and decisions of the Bank, including this resolution (rules of the Bank), any agreement made pursuant thereto and such rules and regulations consistent therewith as the Bank may adopt as necessary or appropriate to achieve the purposes of the Facility. The Bank will exercise the same care in the discharge of its functions under this resolution as it exercises with respect to its own affairs and will have no further liability in respect thereof."

9. The Global Environment Trust Fund, referred to above, which is part of GEF under the present arrangement, is operated by the World Bank in co-operation with UNEP and UNDP in accordance with Procedural Arrangements for the Operational Cooperation under GEF concluded between the Bank, UNEP and UNDP pursuant to the provisions contained in paragraphs 19 and 20 of resolution 91-5. The text of that arrangement is attached as annex C to the resolution.

10. Resolution 91-5 of the World Bank does not provide GEF with the legal capacity to enter independently into agreements and arrangements with international organizations or States. The resolution is quite explicit in this regard. In paragraph 19, section D ("Other agreements"), it states that "the Bank is authorized to enter into other agreements and arrangements with countries party to international agreements for the protection of the global environment, international organizations and other entities in order to administer and manage the financing for the purpose of, and on terms consistent with, this resolution". It should further be noted that under paragraph 13 ("Global environmental cofinancing arrangements") of the resolution it is only the Trustee (the World Bank) which is authorized to enter into cofinancing arrangements with participants (donor countries) and others for the purposes of, and subject to the terms of, the resolution.

11. If the United Nations Framework Convention on Climate Change enters into force before GEF is restructured and, therefore, before resolution 91-5 is either rescinded or revised, the Conference of the Parties will not be able to enter directly with GEF into an agreement or other arrangement. Such an agreement or other arrangement will have to be concluded with the World Bank.

Restructuring of GEF

12. The above conclusion, however, may not be of any significance for the purposes of future arrangements between the Conference of the Parties and GEF because GEF is currently being restructured. It is also worth mentioning that article 21, paragraph 3, of the Convention also calls for the restructuring of GEF in order to enable it to meet the requirements of article 11 of the Convention, related to the financial mechanism. Therefore, the language of the Convention could be interpreted to mean that no arrangements of a permanent character between the Conference of the Parties and GEF should be considered until the latter is properly restructured.

13. It is not possible at this stage to predict with any certainty whether a restructured GEF will have the legal capacity to enter on its own into agreements or other arrangements with entities such as the Conference of the Parties. Agenda 21, adopted on 14 June 1992 by the United Nations Conference on Environment and Development,[124] in paragraph 33.14 (iii) calls for restructuring of GEF and formulates the main elements for such restructuring. However, these elements do not shed any light on the question of whether a restructured GEF would be an independent or autonomous entity with the legal capacity to enter into international arrangements.

14. It is our understanding that, starting in April 1992, negotiations have been conducted regarding the restructuring of GEF within the framework of the GEF Participants' meetings.

15. If as a result of those negotiations the restructured GEF is established through the conclusion by States of a new convention which creates a new institution with its own legal personality, then, depending on the internal structure of that institution, its main organ or organs, similarly to the Conference of the Parties, will have the legal capacity, within the limits of their mandate under that convention. It should be pointed out, however, that representatives of the Governments participating in the discussions on the restructuring of GEF (the Participants) at the very beginning of their work agreed on the principle (GEF working paper No. 1, May 1992, principle VI) which excludes the option of establishment of a new, independent institution. This principle reads as follows:

> "The GEF would build on proven institutional structures, such as the partnership among UNDP, UNEP and World Bank, thus avoiding the creating of new institutions".

16. If the restructured GEF is established by a resolution of the Executive Directors of the World Bank, as in the earlier case, but at the same time it has its own governing organs which are able to make decisions on various issues within their competence without review by the World Bank's Board of Governors or the Executive Directors, as is envisaged by some of the drafts,

then in legal terms GEF will be an autonomous but still subsidiary body of the World Bank. The restructured GEF under this arrangement may, drawing on the legal personality of the World Bank, have legal capacity, within the limits of its mandate, if it is implied or clearly stated in the constituent resolution. In such a case the resolution on the establishment of GEF may need to be submitted for endorsement to the Board of Governors of the Bank.

17. It is our understanding that some of the proposals for the restructuring of GEF provide for its establishment on the basis of an agreement to be concluded between the World Bank, UNDP and UNEP. In accordance with those proposals, it is envisaged that GEF will have substantial autonomy from the parent institutions and that its governing organs will have the authority to enter into cooperative arrangements and formal agreements within the limits of their mandate, in other words, they will have the legal capacity to do so. If the restructured GEF is set up under such an arrangement, then despite its substantial autonomy, in legal terms it will still be a joint subsidiary body of the World Bank and the United Nations. It should be noted in this regard that UNDP and UNEP are United Nations programmes established by the respective resolutions of the General Assembly. As such, they do not have their own legal personality and if they sign the agreement on the establishment of GEF they will act on behalf of the United Nations. Depending on the final structure of GEF, this action may require the approval of the General Assembly.

18. It is evident from the above that there is a great amount of uncertainty about a new structure of GEF and about its legal capacity to enter into agreements or other arrangements. Therefore, it is difficult to foresee at present the legal nature of possible arrangements between the restructured GEF and other entities.

Appropriate arrangements between the Conference of the Parties and the operating entity

19. With reference to the question concerning appropriate arrangements which might be entered into between the Conference of the Parties and the operating entity, this Office would like to make the following comments:

20. Under article 11, paragraph 1, of the United Nations Framework Convention on Climate Change, a financial mechanism is defined to provide financial resources for the implementation of the objective and the principles of the Convention. According to the article the financial mechanism shall function under the guidance of and be accountable to the Conference of the Parties and its operation shall be entrusted to one or more existing international entities. Article 11 also provides that the Conference of the Parties and such entity or entities should agree upon arrangements to give effect to the provisions of the Convention related to the financial mechanism. In article 21, paragraph 3, of the Convention it is stated that GEF should serve as the international entity entrusted with the operation of the financial mechanism on an interim basis. However, in accordance with article 11, paragraph 4, of the Convention, the Conference of the Parties at its first session should review these interim arrangements with a view to deciding whether they shall be maintained.

21. It is not possible to determine in general which arrangements should be considered as appropriate between the Conference of the Parties and a hypothetical operating entity. As stated above, article II of the Convention speaks

about arrangements between the Conference and one or more *existing* operating entities. However, the Convention makes reference only to one such entity—GEF. It appears from your memorandum that the Intergovernmental Negotiating Committee is also mainly interested in the issue of possible arrangements between the Conference of the Parties and GEF. Therefore, we must limit our comments to answering that question.

22. If the Conference of the Parties decides to maintain GEF as an entity entrusted with the operation of the financial mechanism, the answer to the question about the most appropriate arrangement which should be worked out for the purpose will depend on the status and structure of GEF. It goes without saying, in our view, that if, for example, the present structure of GEF were retained, the only possible solution would be the conclusion of an agreement between the Conference of the Parties and the World Bank. Should GEF, in the outcome of a restructuring, emerge as an institution with the legal capacity to enter into arrangements with other entities, the conclusion of an agreement still could be the most appropriate arrangement between the Conference of the Parties and GEF. It should be noted, however, that after GEF is restructured the choice of an arrangement may depend on the content of the document establishing a new GEF. A recent draft of that document, entitled "Elements for establishing the restructured Global Environment Facility",[125] provides that the restructured GEF, in partial fulfilment of its purposes, will operate the financial mechanisms for the implementation of the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity[126] in accordance with such [cooperative arrangements] [formal agreements] as may be made pursuant to the subsequent provisions of that document. It is also envisaged in the document that one of the functions of the Executive Council of GEF (according to the draft, GEF will have an Assembly, an Executive Council and a secretariat) will be to ensure that the GEF activities relating to the two aforementioned Conventions conform with the policies, programme priorities and eligibility criteria established by the Conferences of the Parties to those Conventions, and report to such Conferences of the Parties on relevant matters. Should these provisions be retained in the final text of the document on the establishment of GEF, there will probably be no need to conclude an agreement between the Conference of the Parties and GEF covering all aspects of their relationship. Practical questions related to the reporting procedures and exchange of information could be resolved at a working level. Arrangements for reciprocal representation in meetings of the Conference of the Parties and GEF could be worked out through the inclusion of necessary provisions in the respective rules of procedure. At the same time, the Conference of the Parties and GEF may need to agree upon a special arrangement which will spell out the procedures for determining jointly funded allocations for the purposes defined in the United Nations Framework Convention on Climate Change.

Conclusions

23. Having reviewed the questions raised by the Intergovernmental Negotiating Committee, this Office is of the opinion that, in accordance with the relevant provisions of the United Nations Framework Convention on Climate Change, the Conference of the Parties has the legal capacity, within the limits of its mandate, to enter into agreements and other arrangements with entities, such as States and intergovernmental and non-governmental organizations and

bodies, which also have the authority to do so. The Global Environment Facility, which was established on 14 May 1991 by resolution 91-5 of the Executive Directors of the World Bank, does not at present have the legal capacity to enter on its own into agreements or arrangements with other entities. If the Conference wanted to use the present GEF as an operating entity, it would have to enter into an agreement or an arrangement with the World Bank as the parent organization. It is not possible at this stage to predict with any certainty whether a restructured GEF will have the legal capacity to enter on its own into agreements or other arrangements with entities such as the Conference of the Parties. Likewise, it is not feasible to determine in general which arrangements should be considered as appropriate between the Conference of the Parties and a hypothetical operating entity. With regard to the question of the most appropriate arrangement between the Conference of the Parties and GEF, as an operating entity, the answer depends on the status and structure of the new GEF.

4 November 1993

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51. Request for information on the procedures applicable to the acquisition of membership in the United Nations—Article 4 of the Charter of the United Nations and the provisional rules of procedure of the Security Council and the rules of procedure of the General Assembly

Letter to an official of a private firm

I hereby acknowledge receipt of your letter of 4 October 1993, requesting information on the procedures applicable to the acquisition of membership in the United Nations. As you have correctly outlined, Article 4 of the Charter of the United Nations provides an opportunity for membership to "all other peace-loving States which accept the obligations contained in the present Charter and, in the judgement of the Organization, are able and willing to carry out these obligations". Article 4, however, further provides that "the admission of any such State to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council". Consequently, the question of admission is a question for the States Members of the Organization to determine, not the Secretary-General.

In addition to Article 4 of the Charter, the procedural mechanism for acquiring membership is also defined by chapter X of the provisional rules of procedure of the Security Council[127] and by chapter XIV of the rules of procedure of the General Assembly.[128] Please be advised of the following provisions:

1. In accordance with rule 58 of the provisional rules of procedure of the Security Council and with rule 134 of the rules of procedure of the General Assembly, the application for admission of any State desiring to become a Member of the United Nations shall be submitted to the Secretary-General and shall contain a declaration, made in a formal instrument, that the State in question accepts the obligations contained in the Charter. The requirement that it be "formal" means that it is to be signed by the Head of State, Head of Government or Minister for Foreign Affairs of the applicant State.

2. As stated in rule 59 of the provisional rules of procedure of the Security Council and in rule 135 of the rules of procedure of the General Assem-

bly, the Secretary-General will immediately circulate the application as an official document of the General Assembly and of the Security Council. The latter, unless it otherwise decides, will refer it to its Committee on the Admission of New Members. The Security Council shall decide whether, in its judgement, the applicant is a peace-loving State and is able and willing to carry out the obligations contained in the Charter and, accordingly, whether to recommend the applicant State for membership.

3. Pursuant to rule 60 of the provisional rules of procedure of the Security Council, after receiving the Committee's report, the Security Council will make its recommendation and forward it through the Secretary-General to the General Assembly not less than 25 days in advance of a regular session of the General Assembly, nor less than 4 days in advance of a special session.

4. A favourable recommendation by the Security Council involves a non-procedural decision requiring the affirmative vote of nine members including the concurring votes of the permanent members.

(*a*) If the Security Council recommends admission, the General Assembly then considers whether the applicant is a peace-loving State and is willing and able to carry out the obligations contained in the Charter. A General Assembly decision granting admission requires a two-thirds majority of the Members present and voting in the General Assembly. The Secretary-General informs the applicant State of the Assembly's decision.

(*b*) In accordance with rule 138 of the rules of procedure of the General Assembly, if the application is approved, membership becomes effective on the date on which the General Assembly takes its decision.

5. Pursuant to rule 60 of the provisional rules of procedure of the Security Council, if the Council does not recommend the applicant State for membership or postpones the consideration of the application, the Council shall submit a special report to the General Assembly with a complete record of the discussion. Pursuant to rule 137 of the rules of procedure of the General Assembly, after full consideration of the Council's special report, the Assembly may send the application back to the Security Council, together with a full record of the discussion in the Assembly, for future consideration and recommendation or report.

It should be noted that the Secretary-General may only accept applications for United Nations membership submitted by States responsible for their own international relations. Should any question or doubt arise in that regard, the Secretary-General consults with the members of the Security Council.

Furthermore, and without prejudice to the interest you expressed with regard to admission procedures, you may wish to note that States which are not members of the United Nations may establish observer missions at Headquarters, and in that event are provided observer status facilities in the General Assembly by the Secretary-General. However, the Secretary-General accords such observer facilities only to States generally recognized as sovereign independent States by the international community as evidenced by being States members of a specialized agency of the United Nations or parties to the Statute of the International Court of Justice.

9 November 1993

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52. Guidance on legal issues relating to non-governmental organizations associated with the Department of Public Information of the Secretariat of the United Nations—Criteria for the association of NGOs with the Department—Rights and responsibilities of NGOs associated with the Department—Questions regarding the issuance of certificates of association to newly admitted NGOs

Memorandum to the Chief of the NGO Section, Department of Public Information

With respect to your memorandum of 23 November 1993 concerning guidance on legal issues relating to non-governmental organizations (NGOs), please be advised of the following:

Criteria for NGOs associated with the Department

1. Our files indicate that the criteria for the association of non-governmental organizations with the Department of Public Information are as follows:

(*a*) An NGO must be of recognized national or international standing;

(*b*) An NGO must support the Charter of the United Nations;

(*c*) The principal purpose of an NGO must be to re-disseminate information in order to increase public understanding of the work and achievement of the United Nations and its bodies;

(*d*) An NGO should have a broadly based membership and the scope and resources to undertake effective information programmes;

(*e*) An NGO should have an established record of continuity of work and should show promise of sustained activity in the future.

While NGOs already in consultative status with the Economic and Social Council are granted automatic association with the Department of Public Information upon request, other NGOs must apply in writing on official stationery signed by the highest-ranking official of the organization. Applications for association must provide:

(*a*) Information concerning membership, basic purpose, and past and future programmes;

(*b*) Copies of annual reports, constitution and/or by-laws and proof of non-profit status;

(*c*) Evidence of active information programmes;

(*d*) Recommendation of the United Nations information centre if an NGO's headquarters is located in an area served by the centre.

Applications received are submitted to a small review committee composed of senior officials of the Department of Public Information. Sole responsibility for inclusion of an NGO on the Department's list rests with the Secretary-General.

2. As the Department of Public Information does not have the facilities or staff to conduct an "in-depth" investigation of any organization applying for inclusion on the Department's list, the decision whether or not to include a particular organization has to be taken on the basis of the information provided on the application. The Department is entitled to exclude NGOs from the list in the event an organization fails to fulfil the criteria described above. Accord-

ingly, if an organization does not continue to fulfil the criteria or fails to actively disseminate information on behalf of the United Nations, the Department is entitled to remove that organization from the list following consultations with the organization. Exclusion or removal is particularly warranted if, at any time, the Department concludes that the aims and purposes of the organization do not conform with the spirit, purposes and principles of the Charter of the United Nations.

Rights and responsibilities of NGOs

3. Once associated with the Department of Public Information, NGOs may designate persons to represent them at United Nations Headquarters in New York. Association with the Department entitles an NGO to name one principal representative and one alternative representative. Representatives are provided with a photo grounds pass which permits access to open meetings of the United Nations as well as to the Library and Secretariat Offices and to United Nations documentation, information material and public briefings. Unlike the organizations in consultative status with the Economic and Social Council, the NGOs listed with the Department of Public Information may not present written or oral statements to any United Nations bodies, commissions, committees or meetings. The Department's list is purely a means for securing the widest dissemination of information about the United Nations and does not confer the various rights, such as participation as observers, which may flow from consultative status.

4. The Office of Legal Affairs has previously determined that there is no provision either in the Charter of the United Nations or in the rules of procedure of the Assembly allowing NGO participation in the Main Committees of the General Assembly. However, on some occasions, Main Committees of the General Assembly have decided to allow an NGO to participate in the work of the Committee to the extent of providing information on a particular matter.

5. Primarily, the NGOs are deemed responsible for disseminating to the world community information about the United Nations and for promoting the widest possible public understanding of United Nations aims and activities. The responsibilities of an NGO listed with the Department of Public Information include:

(*a*) Appointing a representative in the vicinity of New York City to attend weekly departmental briefings and official United Nations meetings of interest to the organization, to collect press releases and documents, and to participate in other activities of special concern;

(*b*) Filing a report with the NGO Section of the Department of Public Information, at least annually and preferably quarterly, indicating how it is redisseminating United Nations information and how it is using its listing with the Department.

The latter reports facilitate the Department's annual review of the NGOs listed and enable it to monitor the level of activity conducted on behalf of the United Nations and to ascertain the propriety of the manner in which the various NGOs utilize their listing with the Department. In this regard, special attention should be drawn to preventing the unauthorized use of the United Nations logo by the NGOs. The United Nations logo shall only be used when a request has been made to and approved by the Office of Legal Affairs.

6. The issuance of certificates of association to newly admitted NGOs would entail serious problems that would outweigh the benefits intended by such a course of action. These problems include:

(*a*) Difficulties in distinguishing between NGOs with consultative status and other NGOs;

(*b*) Necessitating the withdrawal of certificates in the event an NGO is removed from the list; and

(*c*) Creating an impression that registration with the Department of Public Information creates a binding association with and recommendation of the NGO.

The terminology to be used by NGOs on the Department's list should merely refer to their registration with or association with the Department. As to the use of such terminology as "DPI/NGO" or "NGO/DPI", there is no legal distinction between the two.

7. We trust that the foregoing will assist you in preparing the new NGO brochure.

8 December 1993

PROCUREMENT

53. Application of the guidelines established by the Government of a Member State to contracts awarded by the United Nations Children's Fund—UNICEF financial regulations and rules—1946 Convention on the Privileges and Immunities of the United Nations

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

1. This is in response to your memorandum dated 4 March 1993. In that memorandum you requested our advice regarding a potential conflict between the UNICEF financial regulations and rules and certain bidding guidelines established by the Government of (name of a Member State).

2. The guidelines in question govern the activities of the (name of the Member State) National Bidding Committee, which supervises "the award of all *construction and engineering consultancy contracts*, funded by foreign institutions and/or the Government of (name of the Member State)". We note at the outset that the guidelines contain no provisions on the definition of terms. Entities referred to without definition include "foreign institution", "foreign financial institution" and "implementing agency". We cannot interpret these terms to include UNICEF, an organ and integral part of the United Nations, which requires no funding from "foreign institutions" or from the Government of the State in question.

3. The Government's guidelines, like the UNICEF financial regulations and rules, mandate competitive bidding. However, the application of these guidelines would undoubtedly conflict with the standard implementation of the

UNICEF financial regulations and rules. The UNICEF financial regulations and rules foresee that competitive bidding is required prior to the awarding of a contract. In particular, regulation 12.5 states:

> "Competitive tenders for equipment, supplies and other requirements shall be invited by distribution of formal invitations to bid, advertisements or requests for proposals, except where the Executive Director determines that a departure from the rule is necessary in the interests of UNICEF."

4. The procedures to be used in issuing invitations to bid and requests for proposal, as well as the procedures to be used in opening such bids or proposals are to be established by the Executive Director of UNICEF. In this connection, rule 112.28 states:

> "(*a*) Invitations to bid shall be advertised or otherwise issued in accordance with procedures established by the Executive Director. All bids shall be opened at the time and place specified in the invitation to bid and an immediate record made thereof. Bidders or their authorized representatives may attend the opening of bids.
>
> (*b*) Requests for proposals shall be advertised or otherwise issued in accordance with procedures established by the Executive Director, who shall also establish procedures for opening and recording all proposals received."

5. Although the guidelines in question contemplate competitive bidding, they require UNICEF to relinquish control over the selection process, an alteration to the process which would cause UNICEF to violate its Financial Regulations and Rules.

6. In addition, it should be noted that the 1946 Convention on the Privileges and Immunities of the United Nations[129] adopted by the General Assembly on 13 February 1946 to which the Member State in question has been a party since 14 March 1947, in article II, section 3, provides that:

> "The property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action."

The Government's agreement to apply to UNICEF as an organ of the United Nations the provisions of the Convention was confirmed by article VII of the Agreement concerning activities of UNICEF in the Member State in question, signed between UNICEF and the Government concerned on 8 June 1966.

7. In particular, the assets used by UNICEF for its contract activities are UNICEF assets. These guidelines would seem to impose restrictions on the use and application of these assets which are contrary to the 1946 Convention.

Conclusion

8. In our view, these guidelines do not apply to UNICEF, an organ of the United Nations funded by donors as opposed to "foreign institutions" or the Government of (name of the Member State). In the event that it is determined by the Government concerned that UNICEF is an entity subject to these guidelines, the Government should be reminded of UNICEF's obligation to follow strictly its financial regulations and rules. Furthermore, the Government should be advised that, consistent with the stated goals of its guidelines, UNICEF is committed to the practice of competitive bidding, but must retain

control over the process. Finally, the Government should be reminded of the privileges and immunities enjoyed by UNICEF as an organ of the United Nations, and, in particular, the immunity which thereby attaches to UNICEF's activities.

16 April 1993

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54. MANAGEMENT SERVICE AGREEMENTS IN REGARD TO PROJECTS FUNDED BY THE INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT—THE 1985 BANK PROCUREMENT GUIDELINES AND CASES WHERE PROCUREMENT IS CARRIED OUT BY THE UNITED NATIONS AND/OR ITS AGENCIES—UNITED NATIONS RESTRICTIONS IMPOSED ON SOUTH AFRICAN SUPPLIERS AND GOODS

Letter to an official of an intergovernmental organization

Following my conversation with you about the difficulties attending the proposed Management Service Agreement (MSA) between UNDP/Office for Project Services (OPS) and one of the Member States, an official of the World Bank has spoken to me. We have resolved one of the difficulties, but the two others—the choice of law and the United Nations' restrictions on South African suppliers and goods—remain outstanding. I am writing to the Bank's official in question in an attempt to meet him halfway on the choice of law provision. I have discussed the other point extensively both in our Office and with our counterparts in OPS, and it seems to us to go beyond a mere procurement issue, and really involve the basis of the relationship between the Bank and the United Nations. Hence we are addressing you again.

The Bank and the United Nations are both part of the United Nations family, and this relationship is cemented by the relationship Agreement between the International Bank for Reconstruction and Development and the United Nations, which entered into force on 15 November 1947.[130] Following therefrom, the heads of our organizations are associated, together with the heads of the rest of the United Nations family, in the Administrative Committee on Coordination, in the formation of common approaches to system-wide problems. Although the two organizations focus on different areas, their objectives are fully complementary. This is particularly true of the Bank and UNDP, which have for decades been partners in furthering world economic development. It is in the context of this special relationship, and the respect and accommodation for each other which it involves, that we would like to place our problem.

The South African restrictions placed on the United Nations by the General Assembly are in the nature of a constitutional limitation, and have, as we realize, no counterpart in the Bank. Despite this, the Bank and UNDP have followed procedures in the past which have permitted OPS to conclude many MSAs in regard to projects funded by the Bank. It is only the insistence of the Bank on the total application of the Bank's standard bidding documents drafted for borrowers in the implementation of the present MSA under which procurement is to be by UNDP which has led to difficulty. These bidding documents of course take no account of the special status of the United Nations as an international organization.

The same is true of the Procurement Guidelines under International Development Association (IDA) credits. The currently applicable 1985 Bank Guidelines do not satisfactorily address the case where procurement is carried out *by the United Nations*, and we believe this is at the core of the problem. Article 3.7, entitled "Procurement from United Nations Agencies", provides that:

> "There may be situations in which procurement through UNICEF, WHO or one of the other specialized agencies of the United Nations may be the most economical and efficient way of procuring goods and equipment, primarily in the fields of education, health and rural water supply and sanitation."

Firstly, literally interpreted, that provision does not cover UNDP, which is a major actor in administering the proceeds of the Bank and IDA's loans/credits, and is not a specialized agency, but a subsidiary organ of the United Nations.

Secondly, it is unclear whether that provision is intended to apply to procurement "from" a United Nations agency as suggested by its title, which would be the case when goods are procured directly from the UNICEF warehouse in Copenhagen, or to procurement *by* a United Nations agency, as would be suggested by the word "through" in the second line of the provision, and as is the case when UNDP carries out the procurement under a MSA.

Thirdly, and most important, the provision does not take account of the status of the United Nations and the fact that it cannot be assimilated to "one of the firms specializing in handling international procurement" (section III, 3.8 of the Procurement Guidelines). As a matter of fact, as we elaborate below, UNDP itself makes a clear distinction between international organizations such as the Bank acting as its executing agencies, and firms used in the execution of its projects.

In this regard, the corresponding article in the 1984 version of the Bank Guidelines, entitled "Procurement *by* United Nations Agencies", addressed that question in a more adequate manner. Under that provision, United Nations agencies carrying out procurement financed from proceeds of Bank loans/IDA credits were allowed to apply their own regulations and rules. It is unfortunate that that provision has been deleted and not been replaced by any other provision covering adequately the case where procurement is carried out by a United Nations agency.

It would seem that it is now article 3.8 of the Guidelines, entitled "Use of procurement agent", that is being applied in a strict manner to UNDP when carrying out procurement under MSAs. That provision reads as follows:

> "Where procurement is particularly complex, or borrowers lack the necessary organization and experience, borrowers may wish to consider employing as their agent one of the firms which specialize in handling international procurement. Procurement carried out under such an arrangement would be in accordance with the Bank's Guidelines".

The Bank, however, when acting as executing agency of UNDP projects, is allowed to apply its own regulations and rules under UNDP financial regulation 15.1, which reads as follows:

"The administration by executing agencies of funds obtained from or through UNDP shall be carried out under their respective financial regulations, rules, practices and procedures to the extent that they are appropriate. Where the financial governances of an executing agency do not provide the required guidance, those of UNDP shall apply."

Thus, UNDP recognizes that it cannot require an international organization to ignore the policies, regulations and rules deriving from its constitution or from mandatory decisions of its governing bodies. We believe that it would be appropriate that the Bank, when it entrusts UNDP with the administration of its funds, should similarly recognize that UNDP is subject to the same limitations.

Moreover, it would seem that once the MSA is signed with the Member State in question, it takes on the character of the Government's international law obligation to the United Nations (especially in this case since the Standard Basic Assistance Agreement is to be attached) and thus could well be viewed by the Bank as attracting the application of the exception contained in article 1.7 of the Bank's Procurement Guidelines. Indeed this article 1.7 is another example of the phenomenon referred to above: while providing an exception to a borrower country when its law imposes procurement restrictions, it provides no exception to the United Nations when United Nations law imposes such restrictions.

We see the problem, therefore, as one to be considered in relation to the comity between the Bank and the United Nations, and as something which puts in jeopardy the long-standing harmonious relations between the Bank and UNDP/OPS. Moreover, the South African limitation is a common system limitation. We hope you can reconsider our difficulty in the light of the foregoing considerations, and that a *modus vivendi* may be once more achieved.

We believe it is hardly necessary to mention that, in the activities envisaged under the MSA, OPS has shown itself to be thoroughly professional and competent, and as good, if not better, than any comparable entity.

20 August 1993

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55. MANAGEMENT SERVICE AGREEMENTS IN REGARD TO PROJECTS FUNDED BY WORLD BANK OR INTERNATIONAL DEVELOPMENT ASSOCIATION CREDITS—UNDER THE 1985 BANK GUIDELINES FOR PROCUREMENT UNDER INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT LOANS AND IDA CREDITS, UNITED NATIONS AGENCIES CANNOT CARRY OUT PROCUREMENT UNDER MSAs IN ACCORDANCE WITH THEIR OWN FINANCIAL REGULATIONS AND RULES AND USING THEIR OWN BIDDING DOCUMENTS—EQUATION OF THE UNITED NATIONS AND ITS AGENCIES WITH PRIVATE FIRMS

Letter to a senior official of an intergovernmental organization

We understand that it has been the practice for countries recipient of World Bank loans or International Development Association (IDA) credits to obtain services from UNDP, for the implementation of the project for which the loan

or credit is extended, under a Management Service Agreement (MSA) prepared on the basis of a standard MSA drafted in 1983-1984 in consultation between officials of UNDP, the United Nations Department of Technical Cooperation for Development and the World Bank, including representatives of our two legal offices.[131]

We also understand that, on the basis of the arrangements agreed at the time, as reflected in paragraph 3.7 of the 1984 version of the Bank "Guidelines for procurement under IBRD loans and IDA credits", which states that procurement by United Nations agencies "is carried out in accordance with the procedures of the particular agency involved", United Nations agencies have been carrying out procurement under MSAs in accordance with their own financial regulations and rules and using their own bidding documents.

In the currently applicable 1985 Bank Guidelines, the above-quoted provision of paragraph 3.7 of the 1984 version of the Guidelines has been omitted. Nevertheless, the practice of the Bank and the United Nations agencies has continued to be on the basis of the agreed arrangements referred to in the preceding paragraph.

The new version of paragraph 3.7 in the 1985 Guidelines limits the reference to United Nations agencies to situations where procurement is to be made *from* these agencies, instead of procurement *by* the agencies, as was the case in the 1984 Guidelines. Since only very few of these agencies, particularly UNICEF, provide supplies directly from their own stocks, United Nations agencies carrying out procurement for the Bank's Borrowers are now treated by the Bank in exactly the same way as private firms under paragraph 3.8 of the 1985 Guidelines, which reads as follows:

> "Where procurement is particularly complex, or Borrowers lack the necessary organization and experience, Borrowers may wish to consider employing as their agent one of the firms which specialize in handling international procurement. Procurement carried out under such an arrangement would be in accordance with the Bank's Guidelines."

Most recently, in March 1993, the Bank adopted a new policy requiring the mandatory use by its Borrowers and their agents of the Bank Sample Bidding Documents for International Competitive Bidding Procurement, which the Bank staff now interprets as applying also to the United Nations agencies, including UNDP, when they carry out procurement for the Bank's Borrowers.

This equation of the United Nations and its agencies with private firms ignores both the nature of the United Nations as an intergovernmental organization with specific competences and responsibilities, and its relationship with its Member States. Management Service Agreements, including those for the administration of Bank loans and IDA credits, are entered into by United Nations agencies on the basis of mandates accorded to them by their governing bodies and under a Basic Assistance Agreement which provides for specific privileges and immunities to be accorded to them. They do not, in providing such services, act as procurement agents of the Governments concerned for profit, in the framework of a purely commercial transaction, as do private firms.[132]

It is not surprising that, very soon after, the new policy resulted in difficulties that the UNDP and the World Bank's staff involved have not been able

to surmount, essentially because certain provisions of the Bank bidding documents differ in material respects from those of the United Nations, including on issues such as eligible source countries for procurement, applicable law, bidding procedures, contract awards and several provisions of their respective general conditions of contracts.

A particular case in point concerns the application of paragraph 1.5, entitled "Eligibility", of the 1985 Bank "Guidelines for procurement under IBRD loans and IDA credits", incorporated by reference in the Bank bidding documents, and which provides that "Funds from Bank loans may be disbursed only on account of expenditures for goods and services provided by nationals of, and produced in or supplied from, Bank member countries and Switzerland". This Office has been informed by the senior official of the World Bank that no contractor of a Bank member State may be excluded from bidding on Bank-funded projects unless the Borrower has expressly adopted legislation prohibiting commercial relations with that State under the exception in paragraph 1.7 of the Guidelines.

That particular interpretation causes difficulties for the United Nations and its organs, which are bound by the consistent resolutions of the General Assembly requesting the Secretary-General, as well as all agencies and organizations of the United Nations system, to refrain from any purchase, direct or indirect, of South African products.[133] That interpretation could also cause difficulties to member countries of the Bank and the United Nations, which are bound by the decisions of the Security Council, which has most recently imposed mandatory sanctions on such countries as the Libyan Arab Jamahiriya, Yugoslavia (Serbia and Montenegro) and Iraq.

In our view, therefore, the insistence on a rigid application of the Bank's Guidelines as currently drafted, without regard to the intergovernmental character of the United Nations and the need for comity between sister organizations, could result in unnecessary strain in the relations between the Bank and the United Nations and affect their ability to respond to the needs of their respective member countries.[134] We suggest, as a solution to the current impasse, the restoration in the Bank's Guidelines of a provision along the lines of that in paragraph 3.7 of the 1984 version of the Guidelines, with appropriate modifications to make accurate references to the United Nations bodies and agencies concerned.

Should you agree with this suggestion, our two offices could then work towards: (*a*) preparing appropriate language for use in the Bank's Guidelines and the Bank's Loan Agreements, and (*b*) agreeing on the text of the Model Management Services Agreement which would provide, *inter alia*, that such services shall be provided on the basis of the applicable regulations, rules and procedures of the United Nations or the United Nations agency concerned.

As an interim measure, and in order not to cause interruption in the implementation of ongoing projects, we propose that the Bank and the United Nations agencies concerned continue to operate on the basis of the arrangements previously agreed upon in 1984, under which United Nations agencies provided management services to the Bank's borrowers in accordance with their own regulations, rules and procedures.

This Office has advised UNDP to suspend action on several already-signed Management Service Agreements, pending a solution to the above issues. We should therefore be most grateful for your urgent consideration of this matter.

20 September 1993

SECURITY COUNCIL ISSUES

56. Security Council Committee established by resolution 661 (1990) concerning the situation between Iraq and Kuwait—Question whether, and if so under what conditions, Iraq's frozen assets may be used as payment for the sale or supply to Iraq of medicine and other supplies for essential civilian needs which have been approved by the Committee, within the scope of the pertinent Security Council resolutions—Security Council resolution 687 (1991)—Mechanism established by Security Council resolutions 706 (1991) and 712 (1991)

Letter to the Chairman of the Security Council Committee established by resolution 661 (1990) concerning the situation between Iraq and Kuwait

I wish to refer to your letter dated 19 May 1993, in which you inform me that the Security Council Committee established by resolution 661 (1990) concerning the situation between Iraq and Kuwait (the Sanctions Committee), at its 93rd meeting, held on 5 May 1993, has requested a legal opinion on "whether, and if so under what conditions, Iraq's frozen assets may be used as payment for the sale or supply to Iraq of medicine and health supplies, foodstuffs, as well as materials and supplies for essential civilian needs which have been approved by the Committee, within the scope of the pertinent Security Council resolutions".

The obligation for States to freeze Iraqi assets is contained in paragraph 4 of resolution 661 (1990). That obligation was confirmed in paragraph 9 of resolution 670 (1990), in which the Security Council reminded States of their obligations under resolution 661 (1990) with regard to the freezing of Iraqi assets. The only exception to this general prohibition is provided at the end of paragraph 4 of resolution 661 (1990) and concerns "payments exclusively for strictly medical or humanitarian purposes and, in humanitarian circumstances, foodstuffs".

On 3 April 1991, the Security Council adopted resolution 687 (1991), by which, *inter alia*, it maintained in force the economic and financial sanctions provided for in resolution 661 (1990). In paragraph 20 of resolution 687 (1991) the Council decided:

> ". . . that the prohibitions against the sale or supply to Iraq of commodities or products other than medicine and health supplies, and prohibitions against financial transactions related thereto, contained in resolution 661 (1990), shall not apply to foodstuffs notified to the Committee established by resolution 661 (1990) . . . or, with the approval of that Committee, under the simplified and accelerated "no-objection" procedure, to mate-

rials and supplies for essential civilian needs as identified in the report of the Secretary-General dated 20 March 1991,[135] and in any further findings of humanitarian need by the Committee".

By referring in general to resolution 661 (1990) and expressly mentioning financial transactions, the wording of paragraph 20 makes it clear that, under the conditions and within the limits indicated therein, the prohibitions contained in paragraph 4 of resolution 661 (1990), concerning the obligation to freeze Iraqi assets, shall not apply. Consequently, paragraph 20 of resolution 687 (1991) allows States to unfreeze Iraqi assets held within their jurisdiction in order to finance the sale or supply to Iraq of foodstuffs notified to the Sanctions Committee, and of material and supplies for essential civilian needs approved by it. The possibility of unfreezing Iraqi assets in connection with supplies intended strictly for medical purposes was already provided for in paragraph 4 of resolution 661 (1990), and is simply reconfirmed in paragraph 20.

The Sanctions Committee confirmed this interpretation of paragraph 20 of resolution 687 (1991) in identical letters dated 17 June 1991, addressed by the Chairman to a number of States allegedly holding frozen Iraqi assets.[136] In the relevant part of the letters, the Chairman states that:

> ". . . if your Government decides, in accordance with national policy and your particular national legislation or regulations, to unfreeze Iraqi assets for the purposes specified in paragraph 20 of resolution 687 (1991), such action, which is not obligatory, would not constitute a violation of the relevant Security Council resolutions. Any assets so unfrozen can be used by Iraq only for the purchase of medicine and health supplies, and the financing of foodstuffs notified to this Committee, or, with the approval of this Committee under the simplified and accelerated no-objection procedure, materials and supplies for essential civilian needs. . . . Unfreezing of assets for any other purpose remains forbidden."

With resolutions 706 (1991) and 712 (1991), the Security Council established a mechanism whereby States were authorized to import petroleum and petroleum products from Iraq for a limited period of time and under the supervision of the Sanctions Committee. The revenues generated by the sale of Iraqi oil were to be deposited in an escrow account to be established by the Secretary-General and utilized for the purposes provided for in paragraphs 2 and 3 of resolution 706 (1991), *inter alia*, to finance the purchase of foodstuffs, medicines and supplies for essential civilian needs. Paragraph 1(*c*) of resolution 706, which sets out some of the conditions for the implementation of the above-mentioned scheme, including United Nations monitoring and supervision to ensure the equitable distribution of humanitarian supplies inside Iraq, adds that such monitoring would be available "if desired for humanitarian assistance from other sources".

Paragraph 8 of resolution 712 (1991) confirmed that "funds, contributed from other sources may, if desired, in accordance with paragraph 1 (*c*) of resolution 706 (1991), be deposited into the escrow account as a sub-account and be immediately available to meet Iraq's humanitarian needs as referred to in paragraph 20 of resolution 687 (1991). . . " The expression "funds contributed from other sources" is quite general and can include voluntary contributions as well as frozen Iraqi assets. Thus, under paragraph 8 of resolution 712 (1991) the possibility introduced by paragraph 20 of resolution 687 (1991), of financ-

ing humanitarian supplies to Iraq directly through the release of Iraqi frozen assets, was complemented by the option to deposit those assets into the sub-account, as an alternative modality to direct release. Disbursements from the sub-account are subject to the requirements set out in section III.B of the decision of the Sanctions Committee of 14 October 1991,[137] i.e., in-country monitoring and biweekly statements by the Secretary-General to the Sanctions Committee, including outlines of anticipated future obligations.

In paragraph 1 of resolution 778 (1992) of 2 October 1992, adopted under Chapter VII of the Charter of the United Nations, the Security Council decided that States holding funds representing the proceeds of the sale of Iraqi petroleum shall, under certain conditions specified in the same paragraph, transfer them to the escrow account provided for in resolutions 706 (1991) and 712 (1991). Paragraph 5 (*c*) of the resolution provides that the funds shall be used, *inter alia*, "*. . . for the costs of United Nations activities* concerning the provision of humanitarian relief in Iraq, and the other United Nations operations specified in paragraphs 2 and 3 of resolution 706 (1991)" (emphasis added). The reference to the "costs of United Nations activities" seems to preclude this particular type of Iraqi frozen assets from being used to pay directly exporters of humanitarian supplies to Iraq.

In paragraph 11 of resolution 778 (1992), the Security Council decided that "no further Iraqi assets shall be released for purposes set forth in paragraph 20 of resolution 687 (1991) except to the sub-account of the escrow account established pursuant to paragraph 8 of resolution 712 (1991), or directly to the United Nations for humanitarian activities in Iraq". By referring to "further Iraqi assets", other than the proceeds of sale of petroleum or petroleum products which are subject to the different regime contained in paragraphs 1 to 10 of resolution 778 (1992), this provision is intended to cover frozen Iraqi assets of any other origin. These funds can be destined to the financing of humanitarian supplies to Iraq through their deposit into the sub-account of the escrow account. Alternatively, pursuant to paragraph 11, these funds can be released directly to the United Nations as a voluntary contribution to the Inter-Agency Humanitarian Cooperation Programme in Iraq. The language of paragraph 11 is unconditional, and amends correspondingly the legal regime established by paragraph 20 of resolution 687 (1991). The release of frozen Iraqi assets by States to pay directly exporters of medicines, foodstuffs or other "humanitarian" materials and supplies to Iraq is therefore prohibited.

In view of the foregoing, the views of this Office on the query contained in your letter of 19 May 1993 are as follows:

- Pursuant to resolution 778 (1992), Iraqi frozen assets representing the proceeds of the sale of petroleum or petroleum products may not be used as payment for the sale or supply to Iraq of medicine and health supplies, foodstuffs or materials and supplies for essential civilian needs approved by the Committee;
- Other Iraqi frozen assets may be used as payment for the sale or supply to Iraq of medicine and health supplies, foodstuffs as well as materials and supplies for essential civilian needs approved by the Committee;
- Such assets, however, can only be used for these purposes through their transfer into the sub-account of the escrow account, established pursu-

ant to paragraph 8 of resolution 712 (1991). Direct payment to exporters through the release of Iraqi frozen assets is prohibited by paragraph 11 of resolution 778 (1992). Disbursements from the sub-account will be subject to the requirements set out in section III.B of the decision of the Sanctions Committee of 14 October 1991.

We trust that you will find the advice set out in this letter to be helpful to the work of the Committee.

4 June 1993

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57. IMPLEMENTATION OF PARAGRAPH 5 OF SECURITY COUNCIL RESOLUTION 837 (1993)—QUESTION WHETHER THAT PARAGRAPH PROVIDES A MANDATE TO THE UNITED NATIONS OPERATION IN SOMALIA TO UNDERTAKE THE PROSECUTION, TRIAL AND PUNISHMENT OF THOSE RESPONSIBLE FOR THE ATTACKS AGAINST UNOSOM II PERSONNEL—MANNER IN WHICH THE PROSECUTION, TRIAL AND PUNISHMENT OF THOSE CONCERNED COULD BE CARRIED OUT

Memorandum to the Under-Secretary-General for Peacekeeping Operations

1. This is with reference to your memorandum dated 7 June 1993 requesting the guidance of this Office with regard to the implementation of paragraph 5 of Security Council resolution 837 (1993) and in particular whether that paragraph provides a mandate to United Nations Operation in Somalia (UNOSOM II) to undertake the prosecution, trial and punishment of those responsible for the attacks against UNOSOM II personnel on 5 June 1993.

2. Paragraph 5 of resolution 837 (1993) reaffirms that the Secretary-General is authorized under resolution 814 (1993) "to take all measures necessary against all those responsible for the armed attacks . . . to establish the effective authority of the Operation throughout Somalia, including to secure the investigation of their actions and their arrest and detention for prosecution, trial and punishment". As you state in your memorandum, you were unable to ascertain the intentions of those Member States proposing the inclusion of the paragraph with respect to prosecution, trial and punishment.

3. In examining paragraph 5, we have taken into consideration the pertinent report of the Secretary-General[138] dated 3 March 1993 outlining the operational concept of UNOSOM II and Security Council resolution 814 (1993) in which the Council authorized, under Chapter VII of the Charter of the United Nations, the mandate for the expanded UNOSOM (UNOSOM II).

4. In authorizing the mandate for UNOSOM II under resolution 814 (1993), the Security Council requested, *inter alia*, "the Secretary-General, through his Special Representative, to direct the Force Commander of the Operation to assume responsibility for the consolidation, expansion and maintenance of a secure environment throughout Somalia, taking account of the particular circumstances in each locality . . . in accordance with the recommendations contained in his report of 3 March 1993. . . ." That report, which contained the operational concept of UNOSOM II, provides in paragraph 57 that the military tasks of UNOSOM II include, *inter alia*:

—"To monitor that all factions continue to respect the cessation of hostilities and other agreements to which they have agreed, particularly the Addis Ababa agreements of January 1993;

— To seize the small arms of all unauthorized armed elements. . . .

— To protect, as required, the personnel, installations and equipment of United Nations and its agencies, ICRC as well as NGOs and *to take such forceful action as may be required to neutralize armed elements that attack*, or threaten to attack, such facilities and personnel. . . ." [emphasis added]

5. The operational concept of UNOSOM III, as outlined in the Secretary-General's report of 3 March 1993, is also based on the assumption that UNOSOM will assist in implementing the Addis Ababa agreements, under which the signatory factions and movements agreed, *inter alia*, to an immediate and binding ceasefire and to the immediate cessation of all hostile propaganda. Agreement was also reached on disarmament and on monitoring the ceasefire, as well as on the release of prisoners of war. In this respect, Unified Task Force (UNITAP)/UNOSOM was requested to assist these efforts and to apply strong and effective sanctions against those responsible for any violation of the ceasefire agreement of January 1993.

6. The investigation of those responsible for the armed attacks, as well as their arrest and detention, clearly falls within the existing mandate conferred upon UNOSOM II by resolution 814 (1993), as outlined in paragraphs 4 and 5 above, and resolution 837 (1993) reaffirms the authority of the Secretary-General to take all necessary measures to enforce the mandated tasks of UNOSOM II.

7. The question you have raised relates to the manner in which prosecution, trial and punishment should be carried out once those responsible have been detained. We concur in your view that prosecution, trial and punishment do not fall within the existing mandate of UNOSOM II nor do we find that paragraph 5 creates such a mandate. Paragraph 5 clearly contemplates that prosecution, trial and punishment should take place, but its language is neutral as to how it should take place.

8. We have given careful consideration to the manner in which the prosecution, trial and punishment of those concerned could be carried out. We are well aware of the difficulties that this poses given the present situation in Somalia, where for all practical purposes there is no effectively functioning judicial system. We note however, that as part of its overall mandate UNOSOM II is authorized, *inter alia*, as indicated in paragraph 91 of the Secretary-General's report of 3 March 1993 "to provide assistance to the Somali people in rebuilding their shattered economy and social and political life, *re-establishing the country's institutional structure*, achieving national political reconciliation, recreating a Somali State based on democratic governance and rehabilitating the country's economy and infrastructure" (emphasis added). The re-establishment of courts, including a criminal court, is within the mandate of UNOSOM II and consistent with the above-mentioned report of 3 March 1993, which states in paragraph 92: "Even if it is authorized to resort to forceful action in certain circumstances, UNOSOM II cannot and must not be expected to substitute itself for the Somali people. Nor can or should it use its authority to impose another system of governmental organization."

9. Notwithstanding the difficulties that this would entail, we are of the opinion that the prosecution of the individuals concerned should be carried out by a Somali tribunal applying Somali law. Given the complexities of the preparation of such a trial, there would be required in any event a period of several months during which the re-establishment of a Somali court could with vigorous assistance from UNOSOM be undertaken.

10. An alternative possibility would be the establishment of an ad hoc tribunal. Such a tribunal could, of course, be established on the basis of a further Security Council resolution. However, such a resolution would have to provide a clear mandate to the Secretary-General and indicate with some degree of precision how such a tribunal would be constituted and what law it would apply. The legal difficulties surrounding the establishment of such an ad hoc tribunal (not to mention the political difficulties, concerning which we are not competent to comment) would probably entail a delay of several months. This approach would not, therefore, appear to offer any comparative advantage over the approach outlined in paragraph 9 above.

10 June 1993

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

UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANIZATION

(*a*) RESIGNATION OF THE DIRECTOR-GENERAL OF THE UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANIZATION—NOTICE AND ACCEPTANCE OF RESIGNATION UNDER THE TERMS OF THE DIRECTOR-GENERAL'S CONTRACT OF APPOINTMENT AND THE STAFF REGULATIONS AND RULES—APPOINTMENT AND STATUS OF THE ACTING DIRECTOR-GENERAL

Memorandum to the President of the Industrial Development Board

1. I refer to your request for my opinion on the legal aspects of certain questions that may arise in connection with the resignation by the Director-General of UNIDO from his post as of 31 January 1993.[139] In accordance with your request, I have consulted the Director, Personnel Services Division, Department of Administration on those questions that involve personnel policies or the application of UNIDO's staff regulations and rules and obtained his concurrence with the views expressed below.

Notice and acceptance of resignation

2. In accordance with clause 7 of the contract for the appointment of the Director-General:

"the Director-General may at any time give six months' notice of resignation in writing to the Board, which is authorized to accept his resignation on behalf of the General Conference. . . ."

The contract was approved by the General Conference in its decision GC.3/Dec.8, to which it is annexed. Thus, although in accordance with article 11.2 of the Constitution it is for the General Conference to appoint the Director-General upon the recommendation of the Board, the Board is invested with competence and authority to accept the Director-General's resignation.

3. It is recalled that the Board further has the mandate to appoint an Acting Director-General, which is expressed in article 9.4(*f*) of the Constitution in the following terms:

> "4 . . . , the Board shall:
>
> (*f*) If the office of Director-General becomes vacant between sessions of the Conference, appoint an Acting Director-General to serve until the next regular or special session of the Conference."

4. Considering that the contract requires the Director-General to give six months notice, it might be asked whether the Board also can accept either a longer or a shorter notice of resignation. A strict interpretation limited only to the letter of clause 7 of the contract would not permit the Board to vary the notice period when accepting a resignation. Such strict interpretation, however, would ignore the following pertinent considerations:

(*a*) Clause 5 of the contract provides that "the Director-General shall be subject to the Staff Regulations . . . so far as they are applicable to him." In accordance with Staff Regulation 10.1 staff may resign upon giving "the notice required under the terms of their appointment." Since the Director-General gave due notice of his resignation with effect from 28 February 1993, he thereby became entitled to leave the post as of that date.

(*b*) During the tenth session of the Board, held 2-6 November 1992, consultations were held which led to the adoption of a decision[140] by which the Board accepted "the resignation of the Director-General with the effect from 31 March 1993." In introducing the draft decision the President of the Board[141] thanked "the Government of the Philippines and the Director-General for their understanding in agreeing that the Director-General's term of office should continue a further month, *in order to make possible the procedure proposed in the draft decision*" (emphasis added). Thus the notice period effectively was extended one month through a mutual understanding between the Board, the Government of the Philippines and the Director-General.

(*c*) While Staff rule 101.01 requires a notice period of 3 months for staff with permanent appointments and only 30 days notice for fixed-term staff, the Director-General's contract requires a significantly longer period of six months. The purpose of requiring such a long period would seem to be to safeguard the practical feasibility either of the Board exercising its mandate to appoint an Acting Director-General or of the Conference appointing another Director-General before the effective date of the resignation.

(*d*) Staff rule 110.01 (*b*) which stipulates the notice periods for resignation by staff members also provides that the Director-General may accept a resignation on shorter notice. It therefore is possible by analogy for the Board to accept a shorter written notice than six months in the case of the Director-General.

It follows that a broader view—which interprets clause 7 of the Director-General's contract in the light of the precedent set by the Board's decision,[142] the purpose of the notice period, the analogy from Staff rule 110.01 (*b*) and

the Board's mandate to appoint an Acting Director-General—confirms that it is legally acceptable for the Board to accede to the requests of the Government of the Philippines and of the Director-General to terminate the contract as of 31 January 1993, in particular if the Board is satisfied that an Acting Director-General will be, or has been, appointed, who can take over the post as of 1 February 1993.

5. It must be emphasized that from a legal viewpoint the contract is between the Organization, acting through the General Conference, and the Director-General and that it does not extend to the Government of which the Director-General is a national. It is not excluded by the contractual relationship, however, for the Board as a matter strictly of international courtesy to take into account the wishes expressed by the Government regarding the return of an incumbent Director-General to its service.

Appointment of an Acting Director-General

6. The rules of procedure of the Board do not encompass any rule that *expressively and specifically* is applicable to the appointment of an Acting Director-General. Rule 61 is entitled "Procedure for the appointment of the Director-General" and therefore—and also in view of its highly elaborate procedure—does not seem to be suitable. In the absence of any express reference, it therefore would appear in case more than one candidate is to be voted on that the Board must act under rule 59, Elections, and rule 60, Balloting. Rule 59 requires that a candidate be nominated by a representative of a member of the Board, but not necessarily by his or her own Government.[143] If on the other hand the Board decides to proceed on a single agreed candidate, there would be no need to invoke rule 60 on balloting, but the Board could either adopt a decision by consensus or by a vote for which a simple majority of those present and voting would be necessary to carry the proposal.

Status of the Acting Director-General

7. On the assumption that a serving staff member would be appointed, f.i. one of the five Deputy Directors-General, it would not be necessary to conclude a new contract since the staff member already would hold a contract and since the function of Acting Director-General could be considered an additional function for a temporary period until the next Director-General reports for duty. In that case the Board would adopt an appropriately worded decision, according to which the appointee—in analogy with Staff rule 106.12—would receive a non-pensionable special post allowance bringing the salary to the level enjoyed by the Director-General and which also would grant a representation allowance at the same level as for the Director-General. In view of the anticipated brief period of the function, it is not suggested that a housing allowance be paid.

8. The authority and responsibility of the Acting Director-General would be the same as that of the Director-General although—considering the relative brevity of his anticipated term in office—he would be expected not to take decisions which would deviate from established practice and disrupt the implementation of the approved work programme.

9. A Deputy Director-General appointed Acting Director-General would remain head of the department for which he was appointed Deputy Director-General. He could, if he deemed it appropriate, appoint an officer-in-charge of the department during the term he serves as Acting Director-General, after which time he will revert to only exercising the function of Deputy Director-General.

13 January 1993

(*b*) QUESTION OF ELIGIBILITY OF NON-MEMBER STATES FOR TECHNICAL ASSISTANCE

Memorandum to the Acting Director-General

1. I refer to the memorandum of 8 February 1992 asking for advice on whether UNIDO could invite persons from non-member States of UNIDO to participate in UNIDO's group training programmes in Turkey.

2. UNIDO has so far followed the practice of the United Nations and UNDP of not extending technical assistance to States, including enterprises and individuals in such States, which are not members of UNIDO. Thus, in 1992, the UNIDO Centre for International Industrial Cooperation in Moscow has been advised not to convene meetings in or extended assistance to those States belonging to the Commonwealth of Independent States (formerly the USSR) which have not yet become members of UNIDO. It also should be taken into account that if UNIDO were ready to assist non-member States in addition to Member States, this might be a disincentive for States considering to become members of UNIDO.

3. A review of section V, Special Topics, of the minutes of the ninth session of the joint Turkish/UNIDO Committee for Cooperation, held in Ankara 25-27 May 1992, shows that UNIDO's representatives took note of the interest expressed by the Turkish side in "collaboration with Central/East Europe and Former Soviet Republics with Emphasis on the Central Asia Design". In the preface to the minutes it is stated that "both sides would consider extending the joint programme of cooperation to the Central Asian states of the former USSR". It is therefore clear that no commitment to assist non-member States was given by UNIDO.

12 February 1993

(*c*) PROCEDURE FOR THE RESTORATION OF THE RIGHT TO VOTE OF A MEMBER STATE—ARTICLE 5.2 OF THE CONSTITUTION AND RULES 50 AND 51.4 OF THE RULES OF PROCEDURE OF THE INDUSTRIAL DEVELOPMENT BOARD

Memorandum to the President of the Industrial Development Board

1. I refer to your request for clarification of the voting majority required for a decision by the Industrial Development Board to restore the right of vote to a Member State that has lost its right to vote because it is in arrears with its

assessed contribution and the amount of arrears equals or exceeds the amount of the assessed contributions due from it for the preceding two years.

2. The fundamental provision is article 5.2 of the Constitution, which lays down the criterion for (automatic) loss of voting rights and further provides:

"Any organ may, nevertheless, permit such a Member to vote in that organ if it is satisfied that the failure to pay is due to conditions beyond the control of the Member."

3. Rule 50[144] of the rules of procedure of the Industrial Development Board provides:

"Each member of the Board shall have one vote, provided that if any Member, being also a member of the Board, is in arrears in the payment of its financial contributions to the Organization and the amount of the arrears equals or exceeds the amount of the assessed contributions due from it for the preceding two fiscal years, the right to vote of the member in question is suspended, unless the Board is satisfied that the failure to pay is due to conditions beyond the control of the Member and therefore decides to permit the member being also a member of the Board, to vote."

It follows that if the Board, in accordance with rule 50, adopts a decision to permit a Member State to vote, that Member State may vote in meetings of the Board. The General Conference and the Programme and Budget Committee may also adopt such decisions as far as the meetings of these organs are concerned.

4. Rule 51.4 of the rules of procedure of the Board provides as follows:

"4. *Simple majority of the members of the Board present and voting*—Decisions of the Board on matters other than those specified in paragraphs 1, 2 or 3 above or in rule 61, including the determination of additional questions or categories of questions to be decided by a two-thirds majority, shall be made by a majority of the members present and voting, in accordance with article 9.6 of the Constitution."

As decisions under rule 50 are not specifically referred to in rule 51.4 as requiring a qualified majority, it follows that a decision to restore the right to vote shall be made by a majority of the members present and voting.

24 March 1993

NOTES

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

[2]In paragraph 3 of its resolution 692 (1991), the Security Council decided:

"to establish . . . the Commission . . . in accordance with section I of the Secretary-General's report, and . . . that the Governing Council of the Commission will be located at the United Nations Office at Geneva and that the Governing Council may decide whether some of the activities of the Commission should be carried out elsewhere".

In section I, paragraph 9, of his report (S/22559), the Secretary-General recommended that:

" . . . the headquarters of the Commission should be in New York. Alternatively, it

might be located at the site of one of the two offices of the United Nations in Europe, i.e. Geneva or Vienna. . . ."

[3]Paragraph 5 of the bulletin, also cited by the State in question in support of its request, refers to the annexes to the bulletin containing the list of the least developed countries and of organs falling under paragraphs 2 and 3 of the bulletin. It does not require further comment for the purposes of the present legal opinion.

[4]Field Administration Handbook, p. D-50, para. 2(d).

[5]Ibid., p. D-51, para. 3(e).

[6]"A private carrier is one who, *without making it a vocation*, or holding himself out to the public as ready to act for all who desire his services, undertakes, by special agreement, *in a particular instance only*, to transport property or persons from one place to another either gratuitously or for hire." (American Jurisprudence, 2d, *Carriers*, para. 8, emphasis added)

[7]As distinct from the liability of a "common carrier", who has the duty to use the *greatest amount of care and foresight* which is reasonably necessary to secure the safety of the persons whom he undertakes to carry. A "common carrier" is a carrier who "either by his express written or oral statements, or by his course of conduct, holds himself out to the public as willing to carry at a fixed rate *all persons applying for air transportation* . . . so long as his plane or planes will carry them". (Speiser & Krause, *Aviation Tort Law*, vol. I, p. 389, footnote 10, emphasis added)

[8]Corpus Juris Secundum, *Carriers*, para. 510.

[9]Speiser & Krause, *Aviation Tort Law*, vol. I, p. 420; Corpus Juris Secundum, *Carriers*, para. 574; American Jurisprudence, 2d, *Carriers*, para. 951 (". . . it is held by most courts that a carrier cannot in that manner [by stipulation in a free pass] relieve itself from liability for acts done wantonly or wilfully or for acts of gross negligence"). While this Office cannot engage in research into the law of every legal system, we believe that the principles set forth herein are generally reflective of the law in many systems.

[10]The text of the release form reads:

"I, the undersigned, hereby recognize that my travel on the UNAMIC aircraft that is scheduled to depart from ________ for ________ on ________ 1991 is solely for my own convenience and benefit and may take place in areas or under conditions of special risk. In consideration of being permitted to travel on such means of transport, I hereby:

"(*a*) Assume all risk during such travel;

"(*b*) Recognize that neither the United Nations nor any of its officials, employees or agents are liable for any loss, damage, injury or death that may be sustained by me during such travel;

"(*c*) Agree, for myself as well as for my dependants, heirs and estate, to hold harmless the United Nations and all its officials, employees and agents from any claim or action of any such loss, damage, injury or death;

"(*d*) Agree, for myself as well as for my dependants, heirs and estate, that, in case of personal injury or death, the liability of the United Nations, if any, shall, as applicable, not exceed: (i) the amounts of the insurance coverage maintained for this purpose by the United Nations; (ii) the compensation payable to staff of the United Nations; or (iii) the limitations on the amounts recoverable by passengers under the provisions of the Warsaw Convention."

[11]See pp. D-50–D-51A of the Field Administration Handbook.

[12]See ibid., p. D-50, para. 2(d).

[13]See ibid., p. D-51, para. 3(e).

[14]Ibid., p. D-51A, para. 7.

[15]Syrian Arab Republic, Lebanon, Israel, Jordan, Islamic Republic of Iran, Dubai, Saudi Arabia, Egypt, Turkey and Cyprus.

[16]Iraq, Islamic Republic of Iran, Saudi Arabia and Kuwait.

[17]Middle East.

[18]Cambodia, Lao People's Democratic Republic, Thailand, Singapore, Hong Kong, Malaysia and Viet Nam, including adjacent waters.

[19]The countries designated as covered by this policy are those in which peacekeeping activities and/or risks of war to United Nations activities are present: Afghanistan, Angola, Algeria, Cambodia, Chad, Colombia, El Salvador, Ethiopia (including Addis Ababa), Haiti, Iraq, Israel (and occupied territories), Lebanon, Liberia, Mozambique, Myanmar, Mali, Nicaragua, Peru, Pakistan, Rwanda, Sierra Leone, Somalia, Sri Lanka, Sudan, Togo, Turkey, Uganda, Yugoslavia and Zaire.

[20]Paragraph 5 of the United Nations General Conditions for Air Charter Agreements (Liability of Charter) provides as follows:

"(*a*) This Charter shall be governed by the rules relating to liability established by the Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw, Poland on October 12, 1929, as amended by the Hague Protocol of 1955;

"(*b*) Notwithstanding the provisions of paragraph (a) of this article, the Carrier agrees to increase the limits of its liability for death or bodily injury to $75,000 per passenger and the Carrier agrees that, during the currency of this Charter, it shall arrange and maintain comprehensive insurance sufficient to cover this liability,

"(*c*) The Carrier shall indemnify and save harmless the United Nations against all liabilities or expenses arising from any bodily injury or death or damage to property attributed to the use of the aircraft or this Charter."

[21]The current Field Administration Handbook (which is being replaced by the Manual) deals with compensation for loss of personal effects of military observers only (ST/OGS/L.2/Rev.3, pp. F-31 and F-32), and does not refer to members of military contingents.

[22]See letter of 16 March 1992 from Quartermaster Generals Branch, (name of the Member State) Defence Forces Headquarters.

[23]A/44/605/Add.1.

[24]A/9822.

[25]See A/9870 of 21 November 1974, para. 6.

[26]See A/44/605/Add.1, para. 11.

[27]Ibid., paras. 11 and 12.

[28]*Official Records of the General Assembly, Thirtieth Session, Annexes*, Agenda Item 107, document A/10324/Add.3, para. 40.

[29]S/12611, para. 4.

[30]See report of the Secretary-General on "Administrative and budgetary aspects of the financing of the United Nations peace-keeping operations" (A/47/776).

[31]Report of the Secretary-General on the financing of UNIFIL (A/S-8/3), para. 10.

[32]S/24938.

[33]League of Nations, *Treaty Series*, vol. 137, p. 11.

[34]United Nations, *Treaty Series*, vol. 478, p. 371.

[35]As regards this aide-mémoire, it should be noted that the"Draft model agreement between the United Nations and Member States contributing personnel and equipment to the United Nations peace-keeping operations", which is annexed to the report of the Secretary-General to the General Assembly of 23 May 1991 (A/46/185), specifies in paragraph 14 that:

"The general administrative and financial arrangements applicable to the provision of military personnel shall be those set forth in the aide-mémoire for troop-contributing countries, the standard provisions applicable to military observers and other military personnel and/or the notes for guidance of military observers applicable to [the United Nations peacekeeping operation], which are annexed hereto."

[36]A/9822.

[37]Article 40 of the regulations for the United Nations Emergency Force, dated 20 February 1957 (ST/SGB/UNEF/1), provides:

"*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. . . ."

Article 39 of the regulations for the United Nations Force in Cyprus, dated 25 April 1964 (ST/SGB/UNFICYP/1) incorporates the exact wording of article 40 of the UNEF I regulations.

[38]See, e.g., A/46/236/Add.1, annex V, para. 23; A/47/741, annex V, para. 21; A/47/741/Add.1, annex V, para. 23, annex VII, para. 13. In like manner, the reports of the Secretary-General to the General Assembly on the financing of the United Nations Transitional Authority in Cambodia (UNTAC) indicate that cost estimates for death and disability compensation are based on the same reimbursement principle (see, e.g., A/46/903, annex II, para. 21; A/47/733, annex IV, para. 20; A/47/733/Add.1, annex IV, para. 24).

[39]In this context, it is noted that the General Assembly, in its resolution A/47/218 B of 21 October 1993, requested the Secretary-General, *inter alia*, to report at its forty-eighth session "on arrangements relating to the reimbursement to troop-contributing countries for death, injury, disability and illness resulting from service in the peacekeeping operations, as well as to submit recommendations on arrangements for standardization of compensation, including direct payment to the beneficiaries". We understand from you that the Field Operations Division, in conjunction with the Controller's Office, has been asked to prepare the requested submission.

[40]United Nations, *Treaty Series*, vol. 943, p. 178.

[41]See *Yearbook of the International Law Commission, 1967*, vol. II, document A/CN.4/195 and Add.1.

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

[43]Ibid.

[44]*Yearbook of the International Law Commission, 1967*, vol. II.

[45]Summary of practice relating to the status of privileges and immunities of the representatives of Member States to the specialized agencies and the International Atomic Energy Agency", para. 210 of the report cited in note 44 above.

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

[47]United Nations, *Treaty Series*, vol. 500, p. 95.

[48]Ibid., vol. 596, p. 261.

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

[50]United Nations registration No. 28913, dated 7 May 1992.

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

[52]A/CN.4/L.118 and Add.1 and 2.

[53]A/CN.4/L.383/Add.1, "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities".

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

[55]A/CN.4/L.383/Add.1.

[56]A/45/594, annex.

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

[58]S/11052, para. 3(d).

[59]A/3943, para. 179.

[60]A/47/1001.

[61]United Nations, *Treaty Series*, vol. 606, p. 402.

[62]S/5764, para. 126.

[63]A/47/1004, para. 9.

[64]The UNV programme was established "within the existing framework of the United Nations system" by the General Assembly in its resolution 2659 (XXV) of 7 December 1970, as an international corps of volunteers to provide an additional source of trained manpower for *development assistance activities*. Pursuant to that resolution, the UNV programme is administered by the Administrator of UNDP.

[65]See report of the UNDP Administrator on UNVs, DP/1992/37, para. 7.

[66]A/48/349-S/26358.

[67]For example, while paragraph 23 states that "cost has not been the prime criterion in selecting one [contractor] in preference to another", paragraph 29 states that "any

arrangements under which all contractual personnel performing equivalent tasks received the same pay would be incompatible with the competitive process described in [paragraph 28]".

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

[69]Ibid., vol. 1155, p. 331.

[70]A/47/595.

[71]*Judgements of the United Nations Administrative Tribunal, Nos. 231 to 300 (1978-1982)* (United Nations publication, Sales No. E.83.X.1), Judgement No. 296 (7 October 1982): *Sun v. the Secretary-General of the United Nations*, para. XI.

[72]See *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 325, para. 68.

[73]Ibid.

[74]Staff regulations 8.1 and 8.2.

[75]Staff regulation 12.3.

[76]See Judgement No. 537 (*Upadhya*), paras. XII-XVIII.

[77]Ibid., para. XII.

[78]See the opinion in section 25 above.

[79]Ibid.

[80]A waiver of the privileges and immunities of the United Nations required in cases of acquisition or retention by a staff member of permanent residence in the United States (administrative instruction ST/AI/294) is not applicable to the case under review and is therefore not reviewed in the present memorandum.

[81]ST/IC/82/13.

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

[83]A/45/502.

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

[85]*I.C.J. Reports 1989*, p. 177.

[86]S/2399.

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

[88]Ibid.

[89]Ibid., vol. 11, p. 11.

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

[91]*Yearbook of the International Law Commission, 1958*, vol. II, documents A/CN.4/116/Add.1 and 2.

[92]A/CONF.67/16; reproduced in *Juridical Yearbook, 1975*, p. 87.

[93]*Yearbook of the International Law Commission, 1968*, vol. II, document A/CN.4/203 and Add.1-5, p. 137.

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

[95]Ibid., vol. 600, p. 93.

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

[97]A/CONF.67/16; reproduced in *Juridical Yearbook, 1975*, p. 87.

[98]*Yearbook of the International Law Commission, 1969*, vol. II, document A/CN.4/218 and Add.1, p. 19.

[99]United Nations, *Treaty Series*, vol. 500, p. 95.

[100]Ibid., vol. 11, p. 11.

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

[102]Ibid.

[103]22 USC 288 et seq.

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

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

[106]Ibid.

[107]Ibid., vol. 33, p. 261.

[108]Presidential Determination 85-14 and Department of Transportation Order 85-7-45.

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

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

[111]Ibid.

[112]Ibid., vol. 294, p. 3.

[113]A/CONF.67/16; reproduced in *Juridical Yearbook, 1975*, p. 87.

[114]United Nations, *Treaty Series*, vol. 1, p. 163.

[115]General Assembly resolution 217 A (III).

[116]United Nations, *Treaty Series*, vol. 1155, p. 331.

[117]General Assembly resolution 40/253 A.

[118]*Official Records of the General Assembly, Forty-seventh Session, Supplement No. 7* (A/47/7 and Add.1-17), document A/47/7.

[119]*International Legal Materials*, vol. XXVI, No. 6, p. 1550.

[120]A/47/517/Add.1, para. 6.

[121]United Nations, *Treaty Series*, vol. 1155, p. 331.

[122]A/CONF.129/15; reproduced in *Juridical Yearbook, 1986*, p. 218.

[123]A/AC.237/18.

[124]*Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992* (A/CONF.151/26/Rev.1 (Vol. I and Vol. I/Corr.1, Vol. II, Vol. III and Vol. III/Corr.1)) (United Nations publication, Sales No. E.93.I.8 and corrigenda), Vol. I: *Resolutions Adopted by the Conference*, resolution I, annex II.

[125]GEF/PA/2/Rev.1.

[126]United Nations registration No. 30619, 29 December 1993; see also United Nations Environment Programme, *Convention on Biological Diversity* (Environmental Law and Institution Programme Activity Centre), June 1992.

[127]S/96/Rev.7.

[128]A/520/Rev.15.

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

[130]General Assembly resolution 124 (II).

[131]The principal provisions of the Standard MSA reproduced in operations policy note 9.02 dated 10 September 1984, sent to the World Bank's recipients of operations policy notes.

[132]See paragraph 117 of the Secretary-General's note (A/39/417) to the General Assembly which emphasizes that "the special characteristic and intergovernmental character of United Nations organizations, in contrast for example with private consulting firms, will need to be reflected in the arrangements being made for collaboration in bank-financed technical cooperation".

[133]See, e.g., General Assembly resolution 36/172 D, para. 11.

[134]See paragraph 23 of General Assembly resolution 38/171, in which the Assembly appealed to both UNDP and the World Bank to cooperate in development activities.

[135]S/22366.

[136]S/AC.25/NOTE/73.

[137]S/23149.

[138]S/25354.

[139]The secretariat of UNIDO is not aware of any precedent of resignation by an elected executive head of an organization in the United Nations system.

[140]IDB/10/Dec.22.

[141]IDB.10/SR 8, para. 70.

[142]IDB.10/Dec.22.

[143]A nomination by the Director-General would be excluded by rule 59.

[144]Identical provisions are contained in rule 91 of the General Conference's rules of procedure and Rule 42.1 of the rules of procedure of the Programme and Budget Committee.