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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)

PRIVILEGES AND IMMUNITIES

1. PRIVILEGES AND IMMUNITIES OF SPECIAL RAPPORTEURS WITHIN THE FRAMEWORK OF THE COMMISSION ON HUMAN RIGHTS, FOR INCLUDING IN A MANUAL – ARTICLE VI, SECTIONS 22, 23 AND 26, OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS[1]

Facsimile to the Chief of the Special Procedures Centre for Human Rights, United Nations Office at Geneva

Special rapporteurs representatives experts and members of working groups of the Commission on Human Rights, as long as those persons are neither the representatives of a State nor staff members (i.e. officials) of the Organization, are deemed, for the purposes of article VI, section 22, of the 1946 Convention on the Privileges and Immunities of the United Nations[1] (the General Convention), to be experts performing missions for the United Nations. In order to enable such persons to exercise their functions in an independent manner, the General Convention entitles experts, during the period of, and the time spent on journeys in connection with, their missions to the following functional privileges and immunities:

(*a*) Immunity from personal arrest and detention and from seizure of their personal baggage;

(*b*) In respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity is to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations;

(*c*) Inviolability of all papers and documents;

(*d*) For the purpose of their communications with the United Nations, the right to use codes and to receive papers or correspondence by courier or in sealed bags;

(*e*) The same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign Governments on temporary official mission;

(*f*) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys.

However, experts on missions, unlike officials of the United Nations, enjoy no tax exemption on their official emoluments; no immunity from national service obligations; no immunity from immigration restrictions and registration requirements; and no rights on duty-free imports. The above-mentioned limited privileges and immunities are strictly designed to protect the interests of the United Nations in the privacy of its papers and communications and in preventing any coercion or threat thereof in respect of the performance of the experts' missions.

Experts on missions are not entitled to United Nations laissez-passer. But pursuant to section 26 of the General Convention, experts who have a certificate stating that they are traveling on official United Nations business are entitled to" similar facilities" normally accorded under the General Convention (section 25) to the holders of United Nations laissez-passer, i.e., officials of the Organization. The latter facilities, in particular, include (*a*) processing of visa applications (where required and when accompanied by a certificate stating that they are traveling on the business of the United Nations) as speedily as possible, and (*b*) granting other facilities for speedy travel.

The International Court of Justice, in its advisory opinion of 15 December 1989 on the applicability of article VI, section 22, of the General Convention in the case of Mr. D. Mazilu, Special Rapporteur of the Subcommission on Prevention of Discrimination and Protection fo Minorities (who had been denied travel to Geneva by the former Romanian Government to attend the Subcommission in order to present a report prepared in his capacity as Special Rapporteur), inter alia, confirmed that:

> "Section 22 of the General Convention is applicable to persons (other than United Nations officials) to whom a mission has been entrusted by the Organization and who are therefore entitled to enjoy the privileges and immunities provided for in this section with a view to the independent exercise of their functions. During the whole period of such missions, experts enjoy these functional privileges and immunities whether or not they travel. They may be invoked as against the State of nationality or of residence unless a reservation to section 22 of the General Convention has been validly made by that State."[2]

According to section 23 of the General Convention, privileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interest of the United Nations.

26 April 1996

2. Question regarding the imposition of a price equalization tax by the European Union on articles imported or exported by the United Nations and affiliated for its official use – Article II, sections 7(a) and section 8 and 34 of the Convention on the Privileges and Immunities of the United Nations

Facsimile to the Chief of Procurement and Contracts of the World Food Programme

1. This is with reference to your facsimile of 21 May 1996 concerning the imposition of a price equalization tax by the European Union.

2. Please be advised that all States members of the European Community, with the exception of Portugal, are parties to the Convention on the Privileges and Immunities of the United Nations (the Convention).

3. Pursuant to the provisions of article II, section 7(*a*) of the Convention, "the United Nations, its assets, income and other property shall be exempt from all direct taxes". In accordance with section 7(*b*) of the Convention, "the United Nations, its assets, income and other property shall be exempt form customs duties and prohibitions and restrictions on imports and exports in respect of articles imported or exported by the United Nations for its official use."

4. Section 8 of the Convention provides that "while the United Nations will not, as a general rule, claim exemption from excise duties and from taxes on the sale of movable and immovable property which form part of the price to be paid, nevertheless when the United Nations is making important purchases for official use of property on which such duties and taxes have been charged or are chargeable, Members will, whenever possible, make appropriate administrative arrangements for the remission or return of the amount of duty or tax."

5. As a subsidiary of the United Nations, the World Food Programme enjoys the aforementioned privileges and immunities. Accordingly, it is clearly exempt from all direct taxes and from all customs duties and from prohibitions and restrictions on imports and exports in respect of articles imported or exported for its official use. It is entitled to remission or return of any amount paid for excise duties and indirect taxes.

6. Thus, if the tax in question is a direct tax on wheat/wheat flour in the European market or if it constitutes a customs duty on wheat/wheat flour imported or exported by WFP for official use, WFP is automatically exempt from payment thereof. If, however, the tax in question is charged as an excise duty or as part of the price to be paid, WFP is entitled to remission or return of any amounts paid for such duty or tax on important purchases of wheat/wheat flour.

7. Under section 34 of the Convention, States members of the European Community that are parties to the Convention have an obligation to be "in a position under [their] own law to give effect to the terms of this Convention."

8. Finally, 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 fulfillment 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 this provision. The tax in question would clearly and wrongfully impose a heavy financial burden on the Organization and would, therefore, be inconsistent with the Charter of the United Nations.

9. To the extent that WFP is a joint organ of both the United Nations and the Food and Agricultural Organization of the United Nations, it should be pointed out that the above-outlined position also applies to the specialized agencies on the basis of the corresponding provisions of the Convention on the Privileges and Immunities of the Specialized Agencies.[3]

10. The foregoing should be brought to the attention of the competent authorities of the European Community, who should be requested to resolve this matter in a manner consistent with the privileges and immunities of the United Nations and its specialized agencies.

22 May 1996

3. Obligations of the United Nations with respect to income tax levied by a Member State – article II, section 2, and article V, section 18, of the Convention on the Privileges and Immunities of the United Nations – Status of consultants

Facsimile to the Chief, Field Services, Division of Finances, Administration and Management, United Nations Children's Fund

1. This is with reference to your facsimile of 29 July 1996 concerning the obligations of the United Nations in [a Member State] with respect to the new income tax law. Our comments are as follows.

2. Based on the information provided, the new income tax law in [the Member State] requires every company or organization with employees to automatically deduct the income tax from the salaries paid and every person to submit an income tax declaration.

3. As a subsidiary organ of the United Nations, UNICEF enjoys the privileges and immunities provided for in the Convention on the Privileges and Immunities of the United Nations[4] (the Convention), to which [the Member State] is a party.

4. Article II, section 2, of the Convention provides that the United Nations, its property, funds and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process. Furthermore, pursuant to article V, section 8 (*a*) and (*b*) of the Convention, the officials of the United Nations shall be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity and exempt from taxation on the salaries and emoluments paid to them by the United Nations.

5. In accordance with the foregoing, the new income tax law dos not apply to the United Nations, its organs and subsidiary organs and subsidiary organs – their property, funds and assets, or their officials. Therefore, UNICEF should neither deduct the income tax from the salaries and emoluments paid to its officials nor provide any income declaration to the competent authorities of [a Member State]. With the exception of those who are recruited locally and assigned to hourly rates, officials of the United Nations in [that Member State] are exempt from taxation and should neither pay the new income tax on the salaries and emoluments paid to them by the United Nations nor declare such income for purposes of taxation.

6. Consultants, however, are neither "staff members" under the Staff Regulations of the United Nations nor "officials" for the purposes of the Convention. It is for UNICEF to determine the terms of appointment under which each of the consultants in question was engaged by UNICEF. Consultants may be accorded the status of "experts on missions" within the meaning of article VI of the Convention, or they may be engaged as independent contractors, in which case they may not have any status under the Convention. It should be noted, however, that, pursuant to the Convention, "experts on missions" are not exempt from taxation on the salaries and emoluments paid to them by the United Nations. To the extent that [the Member State's] law requires every person to submit an income declaration, it is for each consultant/independent contractor to determine whether he or she falls within the scope of the new income tax law and to fulfil his or her obligations in accordance with that law. In any case, standard special services agreements (SSAs) and other contractual arrangements provide that the United Nations undertakes no liability for taxes, duty or other contribution payable on payments made by the Organization under the SSA or contract. As such, UNICEF should neither deduct the income tax from payments made to consultants/independent contractors nor provide any declaration or statement of earnings on their behalf.

7. In the event that the Government of [the Member State] takes a different position than the United Nations on this matter, the Government should be advised of the privileges and immunities enjoyed by the United Nations, including, inter alia, those mentioned in paragraph 4 above. Moreover, pursuant to section 34 of the Convention, the Government of [Member State} has an obligation to be "in a position under its own law to give effect to the terms of this Convention."

8. Finally, 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 fulfillment of its purposes. Measures such as the new income tax law which might, inter alia, increase the financial or other burdens of the Organization have to be viewed as being inconsistent with that provision.

8 August 1996

4. GEOGRAPHICAL GROUPS AND CONTRIBUTIONS BY MEMBER STATES TO THE EXPENSES OF THE ORGANIZATION – ARTICLES 17 AND 19 OF THE CHARTER OF THE UNITED NATIONS – RULES 158 AND 160 OF THE RULES OF PROCEDURE OF THE GENERAL ASSEMBLY

Letter to the Senior Legal Adviser of the Universal Postal Union

This is with reference to your facsimile of 16 February 1996 to the Legal Counsel, requesting information on provisions of the Charter of the United Nations on geographical groups and on contributions by Member States to the expenses of the Organization.

As to your first query, membership in the United Nations, pursuant to Article 4 of the Charter of the United Nations, is open to all peace-loving States which accept the obligations contained in the Charter and, in the judgement of the Organization, are able and willing to carry out those obligations. The only explicit provisions of the Charter on geographical distribution concern the election of the 10 non-permanent members of the Security Council (Article 23, para. 1) and the recruitment of the staff of the Organization (Article 101, para. 3). It should be noted in this context that, since 1963, the General Assembly has adopted geographical distribution patterns for electing officers and members of various organs. While there is no classification based upon formal membership in a geographical group, Member States are characterized in these geographic patterns as African States, Asian States, Eastern European States, Latin American States, and Western European and other States.

In the practice of the United Nations, regional groups corresponding to the aforementioned geographic patterns have evolved as informal arrangements among Member States. The latter groups are based entirely on the agreement of Member States and serve as a mechanism for consultation and coordination among them, particularly on matters relating to elections and candidatures, in the light of the requirement for equitable geographical balance or regional rotation and distribution in United Nations organs and bodies. The members of certain regional groups also use the groups for discussion and consultation on policy issues. Moreover, since groupings of Member States by geographical region have evolved as an informal arrangement for a number of practical purposes, different groupings are sometimes used for different purposes, or in the context of different United Nations bodies.

The composition of the various groups is entirely in the hands of the groups themselves, and as such, is not a matter for the Secretariat. The current chairman of a specific group informs the Secretariat about changes in the composition of the group. As you may know, a country may belong to different groups for different purposes. For example, Turkey is a member of the Asian Group except for electoral purposes, in which case it is a member of the Group of Western European and Other States. It derives from the foregoing that it is up to the regional group concerned to decide whether a particular State should be included among the members of that group. The practice shows that a State cannot unilaterally decide to be considered as a member of a regional group without having obtained the assent of the group.

With respect to our second query, pursuant to Article 17, paragraph 2, of the Charter, "the expenses of the Organization shall be borne by the Members as apportioned by the General Assembly". For this purpose, rule 158 of the rules of procedure of the General Assembly provides that the Assembly "shall appoint an expert Committee on contributions consisting of eighteen members." In accordance with rule 160, "the Committee on Contributions shall advise the General Assembly concerning the apportionment of the expenses of the Organization among Members, broadly according to capacity to pay" (emphasis added). Further to rule 160, "the scale of assessments, when once fixed by the General Assembly, shall not be subject to a general revision for at least three years unless it is clear that there have been substantial changes in relative capacity to pay". The Committee also advises the Assembly on the assessments to be fixed for new Members, on appeals by Members for a change of assessments and on the action to be taken with regard to the application of Article 19 of the Charter.

It should be pointed out in this context that, pursuant to Article 19 of the Charter, "a Member of the United Nations which is in arrears in the payment of its financial contributions to the Organization shall have not vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contribution due form it for the preceding two full years. The General Assembly may, nevertheless, permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member" (emphasis added).

26 February 1996

5. EXECUTING AGENCY AND IMPLEMENTING AGENCY STATUS AS DETERMINED BY THE UNITED NATIONS DEVELOPMENT PROGRAMME

Memorandum to the Director of the Division for Environment and Social Development

1. This is with reference to your memoranda of 19 December 1995 and 25 January 1996.

The United Nations as the executing agency[5]

2. In the context of United Nations Development Programme programme/project execution, the granting of executing agency status to entities is normally made by the deliberative bodies of the United Nations competent in UNDP affairs, the General Assembly, the Economic and Social Council or the UNDP Executive Board. In this regard, the United Nations was designated by the General Assembly as a partner and executing agency in the Expanded Programme of Technical Assistance, the predecessor of UNDP, and continued in this capacity after the Expanded Programme was merged with the Special Fund for the United Nations Development Programme. The United Nations is thus one of the original and main executing agencies of UNDP. The executing agency functions of the United Nations are carried out on the basis of specific arrangements between UNDP and the United Nations, based on the Standard Basic Executing Agency Agreement with the Specialized Agencies.[6] These arrangements are established by an

Exchange of Letters dated 23 October 1989 signed by the Administrator of UNDP and the Under-Secretary-General for the Department of Technical Cooperation for Development, the predecessor of the Department for Development Support and Management Services, on behalf of the United Nations.

The Department for Development Support and Management Services as the executing arm of the United Nations

3. The Department of Technical Cooperation for Development was established on 23 March 1978 by the Secretary-General (ST/SGB/162) to carry out the executing functions of the United Nations Secretariat in the field of technical cooperation as mandated by the General Assembly in its resolution 32/197 of 20 December 1977. The framework of such functions was outlined in paragraph 61 (*d*) (ii) of the annex to the resolution, which stipulated, inter alia, that the United Nations Secretariat shall conduct "(*d*) management of technical cooperation activities carried out by the United Nations in respect of:

(i) Projects under the regular programme of technical assistance;

(ii) Projects of the United Nations Development Programme for which the United Nations is the executing agency;

(iii) Projects financed by voluntary contributions from Governments and other external donors including funds in trust".

4. In establishing the Department of Technical Cooperation for Development, the Secretary-General stated in paragraph 2 of Secretary-General bulletin, ST/SGB/162 that the Department was "to manage the United Nations regular programme of technical cooperation and implement UNDP projects and projects financed from extrabudgetary resources for which the United Nations is the executing agency".

5. The name Department of Technical Cooperation for Development was changed to Department for Development Support and Management Services in 1993 without altering the executing agency responsibilities of the body. In his note to the General Assembly dated 3 December 1992 on the Restructuring and revitalization of the United Nations in the economic, social, and related fields (A/47/753), the Secretary-General reported that the Department would carry out two sets of related functions. The first will be to serve as a focal point for the provision of management services for technical cooperation. The second will be to act as an executing agency in selected cross-sectoral areas, with emphasis on the twin concepts of institutional development (including activities aimed at human capital formation and at enhancing the contribution of different social groups to development)".[7]

6. Aside from the regional commissions, which were designated by Economic and Social Council as executing agencies for UNDP regional projects, no other unit of the United Nations Secretariat has been designated as a UNDP executing agency in its own name. Accordingly, all other units of the United Nations Secretariat wishing to participate in UNDP programmes must do so under or thorough DDSMS.

Department of Humanitarian Affairs as implementing agency[8]

7. The UNDP rules permit an executing agency to use another United Nations entity as an implementing agency, to carry out certain activities of the project, where the entity has specialized expertise. The use of an implementing agency is usually determined by eh executing agency at the project formulation stage, after consultation with UNDP and the Government concerned, when it is found that such use is necessary and is in the best interests of the project because the implementing agency possesses specific expertise relevant to the project. The use of an implementing agency does not detract from the overall responsibility of the executing agency for the successful execution of the project.

8. In the present case, the determination that the Department of Humanitarian Affairs should be the implementing agency was made and approved through the signing of the project document by UNDP, the Department for Development Support and Management Services and the Governments concerned (see page 19 of project document (RAS/92/360)). Therefore, we do not see any legal impediment for the Department of Humanitarian Affairs to act as the implementing agency of this project for which the Department for Development Support and Management Services is the executing agency, and to carry out the activities specified under the project document.

Agency support cost[9]

9. The agency support costs related the execution of the project are calculated at the rate applicable to the executing agency concerned, as determined by the Executive Board of UNDP. In this case, the rate is that applicable to the United Nations Department for Development Support and Management Services, which is considered as one of the major UNDP executing agencies. When the executing agency is not the entity that actually carries out the project activities, the distribution of the agency support costs between the executing agency and its implementation agency is determined by the two agencies concerned. In the present case, we understand that a memorandum of understanding was concluded between the Department for Technical Cooperation for Development and the Office of the United Nations Disaster Relief Coordinator in 1986, setting out the terms and conditions applicable when UNDRO, now the Department of Humanitarian Affairs, carried out activities of a project for which the Department for Technical Cooperation for Development was the executing agency. The arrangements under the memorandum, in our view, continue to be applicable notwithstanding the change of name of Department for Technical Corporation for Development to Department for Development Support and Management Services and UNDRO to Department for Humanitarian Affairs, since the new entities are successors to the original signatories.

10. In conclusion, we do not see any legal impediment to the Department for Development Support and Management Services assigning the responsibility of implementing the activities under the project, for which that Department is the executing agency, to the Department of Humanitarian Affairs. The Department for Development Supply and Management Services continues to assume the overall responsibility for the project as the executing agency of the project. The apportionment of the agency support costs under the project should be governed primarily by the memorandum of understanding concluded by the parties in 1986 and by any other arrangements which the parties may agree to for this specific project.

10 April 1996

6. RULE 13 OF THE RULES OF PROCEDURE OF THE UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT AUTHORITIES ISSUING CREDENTIALS

Letter to the Senior Legal Officer, UNCTAD, Geneva

This is in reply to your facsimile by which you attached a letter from the mead of the delegation of [a Member State] to UNCTAD IX addressed to the Secretary of the Conference. In that letter, the [Member State] representative proposed amending rule 13 of the rules of procedure of the Conference to provide that credentials may be issued by authorities other than one of the three following authorities: Head of State or Government or Minister for Foreign Affairs. The representative stated that her delegation found the existing rule "somewhat burdensome". She also referred to a recently approved relevant rule in the context of the law of the sea.

With regard to the procedure to be followed for amendment, as you are no doubt aware, according to rule 83 of the rules of procedure of UNCTAD,[10] rule 13 "may not be amended until the Conference has received a report on the proposed amendment from the Bureau of the Conference".

As to reference to recent decisions in the context of the law of the sea, the relevant rule approved by the International Seabed Authority in March 1995 provides that credentials may be issued not only by the three authorities mentioned above, but also by any "person authorized by him". This rule is unclear in many respects, but what is most important to point out is that the law of the sea body concerned is a treaty body, not a United Nations body, and decisions taken by that body may not be cited as precedents in favour of United Nations bodies taking similar decisions.

It is true that often at international conferences of a short duration, more delegations submit only provisional credentials than is the case at the annual sessions of the General Assembly. But it is the established practice for the credentials committees of such conferences to approve such provisional credentials on the understanding that the formal credentials will be submitted in due course. This practice has not, to our knowledge, led to difficulties.

As concerns the proposal, it is our view that it would be inadvisable for the Conference to adopt it because it would lead to confusion and is at variance with the established practices and rules of United Nations bodies, including those of the General Assembly.

To add an additional authority who may issue credentials if "authorized" by one of the three existing authorities would, in our view, lead to confusion. For example, it is unclear which authority could "authorize" issuances, whether the authorization issued by one authority could supersede an authorization issued by another authority, and what is the length of time during which an authorization would remain valid. In addition, in the event of unstable or rival regimes, adding another possible credentials-issuing authority would increase the possibility for competing claims of accreditation.

UNCTAD is a subsidiary body of the General Assembly, whose rules provide that only the three authorities mentioned above may issue credentials. If UNCTAD adopted the envisaged amendment it would approve a rule at variance with the rule followed by its parent organ, the General Assembly. UNCTAD would be in the position of accrediting representatives on the basis of an autho-

rization considered "formal" by UNCTAD, but which could not be accepted as "formal" by the Assembly itself. As the General Assembly noted in its resolution 396 (*V*) of 14 December 1950, "difficulties may arise regarding the representation of a Member State in the United Nations and...there is a risk that conflicting decisions may be reached by its various organs". The Assembly by that resolution decided that its attitude concerning such difficulties should prevail.

2 May 1996

7. STATUS OF A MEMBER BETWEEN THE ELECTIONS OF THE MEMBERS OF A UNITED NATIONS SUBCOMMISSION AND THE COMMENCEMENT OF THE SESSION OF THAT SUBCOMMISSION — ECONOMIC AND SOCIAL COUNCIL DECISIONS 16 (LVI) AND 1987/102

Memorandum to the Chief of the Legislation and Prevention of Discrimination Branch, Centre for Human Rights, Geneva

1. This is with reference to your facsimile of 6 May 1996 concerning the status of Mr. X between April 1996, the date of the elections of the members of the Subcommission on Prevention of Discrimination and Protection of Minorities, and 5 August 1996, the commencement of the session of that Subcommission, with respect to his membership in the Working Group on Contemporary Forms of Slavery.

2. Pursuant to Economic and Social Council decision 16 (LVI) of 17 May 1974, the Working Group on Contemporary Forms of Slavery is composed of five members of the Subcommission on Prevention of Discrimination and Protection of Minorities. Accordingly, members of the Working Group must also be members of the Subcommission. If an individual ceases to be a member of the Subcommission, he or she therefore also ceases to be a member of the Working Group.

3. In accordance with Economic and Social Council decision 1987/102 of 6 February 1987, newly elected members of the Subcommission begin to exercise their mandate immediately following their election. Accordingly, since the term of office of the newly elected members of the Subcommission begins on the date of election, the term of office of former members who are not re-elected ends on the date of election.

4. Based on the foregoing, since Mr. X was not re-elected as a member of the Subcommission in the most recent election, held in April 1996, Mr. X ceases to be a member of the Subcommission and of the Working Group as of that date of that election.

5. The newly elected Subcommission must therefore choose a fifth member of the Working Group from among the members of the Subcommission so that the Working Group may be fully constituted. Pending that decision, the Working Group consists of only four members.

8 May 1996

8. Status of the United Nations Institute for Training and Research

Letter to the Acting Executive Director of UNITAR

This is in response to your letter of 19 March 1996 wherein you seek the views of this Office on various questions posed in a letter to UNITAR. In the letter, the following questions are raised:

- Whether UNITAR is an autonomous institution within the framework of the United Nations;
- Whether it is correct to state that UNITAR does not have an independent and separate juridical personality from the United Nations and that legal capacity accorded to UNITAR is an extension of the legal capacity of the United Nations;
- Who is ultimately liable for acts done by UITAR;
- Whether it would be correct to state that the Secretary-General of the United Nations is ultimately responsible for acts done by UNITAR.

At its eighteenth session, the General Assembly took note of the endorsement by the Economic and Social Council of the Secretary-General's plan for the its training and research institute, and by resolution 1934 (XVIII) of 11 December 1963 it instructed the Secretary General to establish the United Nations Institute for Training and Research. Pursuant to that resolution, the Secretary-General in November 1965 promulgated the statute of the Institute, which defines its legal status, functions, administrative structure, sources of finance, location, etc. The statute has subsequently been amended several times by the Secretary-General in the light of the decisions concerning the restructuring of the Institute adopted by the General Assembly. The statute of the Institute was last amended in December 1989.

The statute defines UNITAR as an autonomous institution within the framework of the United Nations, established for the purpose of enhancing the effectiveness of the United Nations in achieving the major objectives of the Organization.

In accordance with the statute, the activities of UNITAR are governed by the Board of Trustees, whose members are appointed by the Secretary-General (article III).

The Institute has its own staff headed by the Executive Director, appointed by the Secretary-General after consultations with the Board (article IV). According to the statute, the staff of the Institute are officials of the United Nations and their terms and conditions of service are regulated by the United Nations Staff Regulations and Rules. However, under the statute, the Secretary-General may approve, on the recommendation of the Board, additional arrangements for special rules or terms of appointment of the staff of the Institute. Thus, where letters of appointment of persons holding contracts with the Institute are restricted to UNITAR service, the United Nations has no obligation to absorb and reassign such persons to other positions within the United States Secretariat, if UNITAR posts of such staff members are abolished.

The expenses of the Institute are not met from the United Nations regular budget. The Institute operates on the basis of paid-in voluntary contributions and such other additional resources as may be available (article VIII). The statute provides in this regard for the establishment of the General Fund and the Reserve Fund. The budget of the Institute is adopted by the Board of Trustees on the basis of proposals submitted by the Executive Director of the Institute. Although the United Nations Financial Regulations and Rules apply to the financial operations of the Institute, under the statute the Executive Director of UNITAR, in agreement with the Secretary-General and after consultations with the Advisory Committee on Administrative and Budgetary Questions, may issue additional special rules and procedures for that purpose.

It appears from the foregoing that as an institution established by the Secretary-General pursuant to General Assembly resolution 1934 (XVIII), UNITAR is a subsidiary body of the United Nations, which has the autonomy within the United Nations as defined by its statute. The autonomous character of the Institute means that although UNITAR constitutes an integral part of the United Nations and is bound under the Charter by the relevant decisions of its principal organs, the Institute, as provided for in its statute, undertakes its activities with sufficient autonomy and financially is not dependent on the regular United Nations budget.

As a subsidiary body of the United Nations, UNITAR is not an international organization established by an intergovernmental agreement. Therefore, it does not have its own legal personality. However, in order to facilitate the implementation of its functions, the Institute as an autonomous institution of the United Nations was provided under its statute with the authority to enter into contracts with organizations, institutions or private firms (article X, para. 2). Thus, the Institute has limited legal capacity which is drawn on the legal personality of the United Nations.

As noted in article X, paragraph 1, of the statute, as part of the United Nations UNITAR enjoys the privileges and immunities of the Organization provide under the Charter of the United Nations and other international agreements, in particular, the 1946 Convention on the Privileges and Immunities of the United Nations. However, as an autonomous institution of the United Nations whose expenses, according to the statute, shall be met form voluntary contributions, UNITAR is liable for its activities. Consequently, any liability arising from acts by UNITAR in the exercise of this function and legal capacity shall be met by the Institute from its own resources and cannot constitute a liability on other funds of the United Nations.

In accordance with Article 97 of the Charter of the United Nations, the Secretary-General is the chief administrative officer of the Organization. Therefore, as far as the administration of staff is concerned, the Secretary-General is responsible for overall compliance with the relevant policy decisions of the General Assembly and for consistent implementation and interpretation of the United Nations Staff Regulations and Rules.

The Secretary-General is not responsible under the Charter for acts done by United Nations subsidiary bodies or organs in the exercise of their functions. The fact that UNITAR was established by the Secretary-General does not imply

that he is responsible for acts done by that Institute, with the exception of those related to administrative matters, where the ultimate authority rests with the Secretary-General. As noted above, a decision to establish UNITAR was taken by the General Assembly and the Secretary-General subsequently acted on the instruction of the Assembly.

15 May 1996

9. Legal status of members of the national military contingents serving in United Nations peacekeeping operations — Model status of forces agreement

Memorandum to the Director of the Peacekeeping Financing Division

1. This is in reference to your memorandum of 19 April 1996, seeking our advice on the views of the Advisory Committee on Administrative and Budgetary Questions on the Secretary-General's report of 2 June 1995 (A/49/906) concerning death and disability benefits to members of national military contingents participating in United Nations peacekeeping operations.

2. You have indicated that, in its report on the death and disability benefits, the Advisory CHCE had stated, inter alia, that a necessary prerequisite for reviewing and possibly altering the current procedures on death and disability benefits "is an understanding and agreement on the precise legal status of contingent personnel and of the nature of their legal, administrative and operational relationship with the Organization and their Government".[11] You have accordingly requested us to provide a legal opinion on the legal status of contingent personnel, as recommended by the Advisory CHCE in its report.

Legal status of contingent personnel

3. Once the deployment of national contingents in peacekeeping operations is authorized by the Security Council, the contribution of such contingents by Member States to peacekeeping operations is made at the request of the Secretary-General. While assigned to a peacekeeping operation, military personnel of national contingents are an integral part thereof. Although they remain administratively attached to their respective national army, military personnel are, for the duration of their assignment, international personnel under the authority of the United Nations and subject to the authority of the Force Commander through his chain of command. Like all other members of a peacekeeping operation, they are expected to discharge their functions and regulate their conduct with the interest of the United Nations only in mind. While the Force Commander has general responsibility for the good order and discipline of the operation, responsibility for disciplinary action in national contingents rests with the commander of each of the national contingents.

4. Given the status of military personnel of national contingents in their home country and the fact that they are contributed by their respective Governments, there can be no direct contractual or statutory link between each individual military staff member and the United Nations. The terms and conditions under which they are contributed are agreed to between the United Nations and

the Government concerned. Such terms and conditions are set out in the model agreement between the United Nations and Member States contributing personnel and equipment to United Nations peacekeeping operations (A/46/185). The troop-contributing countries thus pay the basic salaries and allowances to all their contingent personnel in accordance with their own national legislation, subject to reimbursement by the United Nations of standard rate for pay and allowances for contingent personnel.[12]

5. The above-mentioned model agreement provides also for the legal status of military personnel of national contingents though such status is more elaborated in the model status of forces agreement (sofa) (A/45/594). Under that document, military personnel enjoy privileges and immunities which include immunity from criminal jurisdiction in respect of any criminal offences which may be committed by them in the mission area.[13] They also enjoy functional immunity and are not therefore subject to the civil jurisdiction of local courts or to other legal process in any matter relating to their official duties.

6. In the light of the foregoing, it is clear that, while members of national military contingents discharge international functions and serve in United Nations peacekeeping operations under the operational control of the Organization, no direct contractual or statutory relationship exists between them and the United Nations.

The terms and conditions of their assignment to United Nations peacekeeping operations are set out in bilateral agreements/understandings entered into between the Organization and their Governments.

24 May 1996

10. Authority of the Special Committee on Decolonization to hold meetings outside Headquarters – General Assembly resolutions 1654 (XVI), 46/181 of 1991 and 50/39

Memorandum to the Director of Conference Services

1. This is with reference to your memorandum of 3 June 1996 concerning the addition of the Pacific Region Seminar in [a Member State of that region] to the calendar of conferences and meetings to held in 1996 and 1997.

2. From a legal point of view, prior to addressing the addition of the seminar to the calendar of conferences and meetings, it is necessary to establish the legal basis for holding the seminar in the Pacific region.

3. It should first be recalled that, when the General Assembly decided to establish the Special Committee on the situation with regard to the Implementation of the Declaration on the Recruiting of Independence to Colonial Countries and Peoples pursuant to Assembly resolution 1654 (XVI) of 27 November 1961, it authorized the Special Committee "to meet elsewhere than at United Nations Headquarters, whenever and wherever such meetings may be required for the effective discharge of its functions, in consultation with the appropriate authorities". Furthermore, in its resolution 2621 (XXV) of 12 October 1970 containing the programme of action for the full implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, the

General Assembly directed the Special Committee "to hold meetings at places where it can best obtain first-hand information on the situation in colonial territories, as well as to continue to hold meetings away from Headquarters as appropriate".

4. In its resolution 46/181 of 19 December 1991, the General Assembly adopted the proposals contained in the annex to the 13 December 1991 report of the Secretary-General[14] to serve as a plan of action for the International Decade for the Eradication of Colonialism. In paragraph 22 (*c*) of the aforementioned annex it is proposed that the Special Committee, with the cooperation of the Administering Powers, should "organize during the Decade seminars in the Caribbean and Pacific regions alternately, as well as at United Nations Headquarters, to review the progress achieved in the implementation of the plan of action, with the participation of the peoples of the Non-Self-Governing Territories, their elected representatives, the Administering Powers, Member States, regional organizations, specialized agencies, non-governmental organizations and experts".

5. Pursuant to General Assembly resolution 50/39 of 6 December 1995, the Assembly approved the report of the Special Committee of covering its work during 1995, including the programme of work envisaged for 1996. Paragraph 97 of the report (A/50/23, Part I) provides that "the Special Committee will continue to fulfil the responsibilities that have been entrusted to it in the context of the Plan of Action for the International Decade for the Eradication of Colonialism approved by the General Assembly in its resolution 46/181 of 19 December 1991. The activities to be undertaken in this connection include a seminar in the Pacific region to be organized by the Committee in 1996, to be attended by representatives of all the Non-Self-Governing Territories".

6. In this context, subsection 3 of section 2 of the programme budget for the biennium 1996-1997 concerning the Special Committee includes provision for the travel, general operating expenses, and supplies and materials requirements "for two regional seminars (one per year) to be held in the Caribbean and Pacific regions".

7. Based on the foregoing, the General Assembly has clearly authorized the Special Committee to hold a seminar in the Pacific region in 1996.

8. Accordingly, the Pacific Region Seminar of the Special Committee should have been placed on the calendar of conferences and meetings of the United Nations issued in March 1996 (A/AC.172/1996/2). This oversight does not outweigh the fact that the proposed activities of the Special Committee, including the seminar in the Pacific region, were brought to the attention of, and considered and approved by, the General Assembly.

9. Thus, to the extent that the Pacific Region Seminar of the Special Committee has been authorized by the General Assembly and included in the approved programme budget for the biennium, it is clear that the substantive department should have included the seminar in its information on all meetings scheduled to be held in 1996 and 1997 and that, consequently, there can be no difficulties of a procedural nature in placing the seminar on the calendar at this point in time. What would have been a perfectly valid notification for the issuance of the calendar in March 1996 is certainly no less valid today.

3 June 1996

11. Dispute settlement procedures in United Nations agreements – Article VIII, section 29, of the Convention on the Privileges and Immunities of the United Nations

Letter to the Legal Counsel of the World Health Organization

This is in response to your letter of 7 June 1996 wherein you inquire whether the United Nations Legal Office has agreed that agreements may be concluded with the European Commission containing a dispute settlement clause, providing that these agreements shall be governed by Belgian law and that all disputes relating to their application, in the absence of an agreement by both parties to settle the disputes by arbitration, shall be brought before the competent national court in Brussels. According to your letter, you have been informed that dispute settlement clauses containing the above provisions have already been included in agreements signed by "several United Nations organizations".

This Office is not aware of any agreement signed by the United Nations, its programmes, funds or agencies which included, the dispute settlement clause referred to in your memorandum. Should such a clause have been suggested by the European Commission or any other entity for inclusion in an agreement with the United Nations, this Office would have been opposed to it.

United Nations agreements with public entities usually contain a dispute settlement provision, providing that any dispute relating to their interpretation or implementation which is not settled by negotiation or other agreed mode of settlement shall be submitted to arbitration at the request of either party. This provision is followed by a standard arbitration clause which reads as follows:

> "Each Party shall appoint one arbitrator, and the two arbitrators so appointed shall appoint a third, who shall be the chairman. If within thirty (30) day of the request for arbitration either party has not appointed an arbitrator, or if within fifteen (15) days of the appointment of two arbitrators the third arbitrator has not been appointed, either party may request the President of the International Court of Justice to appoint an arbitrator. The procedure for the arbitration shall be fixed by the arbitrators. The arbitral award shall contain a statement of the reasons on which it is based and shall be accepted by the parties as the final adjudication of the dispute."

As for United Nations agreements of a commercial nature, they do not normally mention the applicable law. The legal basis for not specifying a particular national law as the governing law is the immunity of the United Nations form every form of legal process under article II, section 2, of the Convention on the Privileges and Immunities of the United Nations.15

At the same time, pursuant to article VIII, section 29, of the Convention, the United Nations is required to make provisions for appropriate modes of settlement of disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party. As a matter of policy, and absent of practical alternative to judicial proceedings, the United Nations offers arbitration to its contractors. The standard settlement of disputes clause currently used in United Nations contracts read as follows:

Amicable settlement

The parties shall use their best efforts to settle amicably any dispute, controversy or claim arising out of or relating to this contract or the breach, termination or invalidity thereof. Where the parties wish to seek such an amicable settlement through conciliation, the conciliation shall take place in accordance with the UNCITRAL Conciliation Rules then obtaining, or according to such other procedure as may be agreed between the parties.

Arbitration

Any dispute, controversy or claim between the parties arising out of or relating to this contract or the breach, termination or invalidity thereof, unless settled amicably under the preceding paragraph of this article within sixty (60) days after receipt by one party of the other party's request for such amicable settlement, shall be referred by either party to arbitration in accordance with the UNCITRAL Arbitration Rules then obtaining. [Either party may, at its option, request the American Arbitration Association to provide administrative services for such arbitration and/or serve as the Appointing Authority under the Rules, in which case the American Arbitration Association shall be deemed to have been so designated.] The arbitral tribunal shall have no authority to award punitive damages. The parties shall be bound by any arbitration award rendered as a result of such arbitration as the final adjudication of any such controversy, claim or dispute." (Please note that the wording in brackets is optional.)

26 June 1996

12. PROCEDURES FOR THE ELECTION OF THE MEMBERS OF THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS – ARTICLES 16, 21 AND 22 OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS ECONOMIC AND SOCIAL COUNCIL RESOLUTIONS 1988 (LX) AND 1985/17 AND DECISION 1978/10

Memorandum to the Acting Secretary of the Economic and Social Council

1. This is with reference to your letter of 11 July 1996 concerning [a Member State's] intention to submit a draft resolution to the Economic and Social Council on changing the procedures for the election of the members of the Committee on Economic, Social and Cultural Rights. Our comments are as follows.

2. Based on the information provided, [the Member State] has indicated that it intends to submit a draft resolution pursuant to which the Council would recommend to "the States parties to the 1966 International Covenant on Economic, Social and Cultural Rights[16] that they consider articles 21 and 22 relating to the follow-up of the Covenant with a view to amending it in order to establish a monitoring body such as those created by similar human rights bodies so that the States parties may elect the members of the Committee on Economic, Social and Cultural Rights".

3. Under articles 16 through 22 of the Covenant, the Economic and Social Council is given various responsibilities. In particular, pursuant to article 16, the Council is to consider the reports submitted by the States parties to the Covenant. No article in the Covenant mentions, establishes or provides for the establishment of the Committee on Economic, Social and Cultural Rights. The Committee is a subsidiary neither of the Covenant nor of the States parties to the Covenant.

4. Paragraph 9 of Economic and Social Council resolution 1988 (LX) of 11 May 1976 provides that a "a sessional working group of the Economic and Social Council, with appropriate representation of States parties to the Covenant, and with due regard to equitable geographical distribution, shall be established by the Council whenever reports are due for consideration by the Council, for the purpose of assisting it in the consideration of such reports". In its decision 1978/10 of 3 May 1978, the Council established the Sessional Working Group on the implementation of the International Covenant on Economic, Social and Cultural Rights for the purpose of assisting the Council in the consideration of reports submitted by States parties to the Covenant, in accordance with Council resolution 1988 (LX). Pursuant to its resolution 1985/17 of 28 May 1985, the Council decided that the Working Group established by Council decision 1978/10 should be renamed "Committee on Economic, Social and Cultural Rights". It is clear from the foregoing that the Committee is a subsidiary of the Council established by the Council for the purpose of assisting the Council in the consideration of the reports received from the States parties.

5. Accordingly, while the States parties to the Covenant are free to amend the Covenant in accordance with the procedure set out in article 29 of the Covenant, it is the sole prerogative of the Economic and Social Council to determine the organization and composition of its own subsidiaries, including, inter alia, the Committee on Economic, Social and Cultural Rights. Furthermore, in the event that the States parties wish to amend the Covenant in order to create monitoring body of its own, such monitoring body, like the States parties themselves, would not automatically have authority over the Economic and Social Council or any subsidiary thereof.

6. As to the election of the members of the Committee paragraph (*c*) of the Economic and Social Council resolution 1985/17 provides that the members of the Committee shall be elected by the Council by secret ballot from a list of persons nominated by States parties to the Covenant. As such, it is for the States parties to nominate and for the Council to elect. No member of the Committee can therefore be elected without the endorsement of at least one of the States parties.

7. It would be inadvisable for the Economic and Social Council to recommend that the States parties to the Covenant or a subsidiary of the States parties to the Covenant or a subsidiary of the States parties should elect the members of its own subsidiary. As the parent organ, the Council should retain the right to elect eh members of its own subsidiaries which are entrusted with assisting it in carrying out its responsibilities. In this context, it should be noted that article 16 of the Covenant provides that reports from States parties to the Covenant shall be submitted to the Secretary-General, who shall transmit copies "to the Economic and Social Council for consideration in accordance with the provisions of the present Covenant". While it is clear that reports are sub-

mitted only by the States parties to the Covenant, nowhere in the Covenant is it indicated or implied that consideration by the Council should in the first instance be made only by those members that are States parties.

8. In the event that the Economic and Social Council agrees to recommend that the States parties elect the members of the Committee, it would be for the Council to determine the effect that such a change in the election procedures would have on the status and entitlements of the Committee and its members. Currently, in accordance with paragraphs (*b*) and (*e*) of the Economic and Social Council resolution 1985/17, the members of the Committee shall, respectively, serve in their personal capacity and receive travel and subsistence expenses from United Nations resources. The latter is consistent with the United Nations system of travel and subsistence allowance, whereby such expenses shall be paid in respect of members of organs and subsidiary organs who serve in an individual capacity and not as representatives of Governments. Accordingly, as long as the Committee remains a subsidiary of the Economic and Social Council and as long as the members of the Committee continue to serve in their personal capacity, and unless otherwise decided by the Council or the General Assembly, the members or the Committee will continue to receive travel and subsistence allowance.

18 July 1996

13. ECONOMIC AND SOCIAL COUNCIL RESOLUTIONS 1986/35 AND 1992/8–STATUS OF SPECIAL RAPPORTEURS IN UNITED NATIONS BODIES

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

1. This is in response to a request of the Centre for Human Rights seeking the opinion of this Office on the present status of Ms. X, a former member of the Subcommission on Prevention of Discrimination and Protection of Minorities who at the forty-seventh session of the Subcommission was appointed as Special Rapporteur and entrusted with the task of undertaking an in-depth study of the situation of systematic rape, sexual slavery and slavery-like practices during periods of armed conflict. It is our understanding that the Centre is interested in knowing, in particular, whether Ms. X, who is no longer a member of the Subcommission, should be invited to attend the forthcoming forty-eighth session of the Subcommission and whether a report prepared by Ms. X on the aforementioned subject at the request of the Subcommission should be processed as a document of the Subcommission.

2. Pursuant to Economic and Social Council resolution 1986/35 of 23 May 1986, members of the Subcommission are elected by the Commission on Human rights for a term of four years as experts in their individual capacity (emphasis added). Ms. X was elected a member of the Subcommission in 1992 and her term expired in April 1996.

3. In accordance with the practice followed by many United Nations bodies, the Subcommission from time to time appoints rapporteurs or special rapporteurs entrusted with the task of studying specific subjects.

4. By its resolution 1992/8 of 26 August 1992, the Subcommisssion adopted the guidelines concerned its methods of work. Guideline 4 contains provisions regulating the appointment by the Subcommisision of its rapporteurs.

5. Paragraph 2 of that guideline provides that the duties of rapporteur are in principle (emphasis added) exercised by members of the Subcommission. The inclusion of the words "in principle", in our view, implies that in some exceptional cases the Subcommission may appoint rapporteurs who are not members of the Subcommission.

6. It is further stated in paragraph 3 of guideline 4 that, when the rapporteur for an ongoing study is no longer a member of the Subcommission, he or she may be retained in the post of rapporteur for more than one year after the date on which his or her mandate expires, unless the Subcommission decides otherwise. It appears from this provision that, if necessary, a former member may be retained by the Subcommission as its rapporteur for one or even more years and that a decision to that effect can be taken only by the Subcommission.

7. It is worth noting in this regard that 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,[17] the International Court of Justice made the following observation with reference to the past practice of the Subcommission concerning the appointment of rapporteurs:

> "55. ...These rappoeteurs or special rapporteurs are normally selected from among members of the Subcommission...Furthermore, in numerous cases, special rapporteurs appointed from among members of the Subcommission have completed their reports only after their membership of the Subcommission had expired."[18]

8. The advisory opinion also refers to the letter, which was sent on 1 July 1988 by the then Under-Secretary-General for Human Rights after consulting this Office, to the Permanent Representative of Romania to the United Nations, stating that if a member of the Subcommission was mandated by the Commission to prepare a report on a particular subject, it was only the Subcommission or a superior body that would be competent to change that designation.

9. Ms. X was appointed by the Subcommission as Special Rapporteur at its forty-seventh session on 18 August 1995. She was requested to prepare an in-dept study on an important subject referred to above and to submit a preliminary report to the Subcommission at its forty-ninth session. At the time of the adoption by the Subcommission of its decision concerning the appointment of Ms. X as Special Rapporteur, members of the Subcommission were of course aware of the fact that term of office of Ms. X. would expire before the forty-eighth and forty-ninth sessions of the Subcommission, scheduled for August 1996 and August 1997, respectively, and that there was no guarantee that Ms. X would be re-elected for another term.

10. It is also interesting to note that the decision of the Subcommission on the appointment of Ms. X was reconfirmed by the Commission on Human Rights at its fifty-second session on 19 April 1996, only three days before the Commission on 22 April held an election of Subcommission members. That means that eh Commission proceeded with the endorsement of the appointment of Ms. X as Special Rapporteur in spite of the fact that she had not been nominated by the

Government and therefore could not be re-elected as a member of the Subcommission. Moreover, a draft decision to that effect is currently under subcommission by the Commission to the Economic and Social Council for approval. It is anticipated that the Council will act on this proposal no later than 23 July 1996.

11. In the light of the foregoing, we believe that Ms. X remains Special Rapporteur of the Subcommission entrusted with the responsibility of preparing a report referred to in Subcommission resolution 1995/14. We are also of the view that Ms. X will retain her current status until the Subcommission or one of its superior bodies decides otherwise. Consequently, Ms. X, in our opinion, should be invited to the forthcoming session of the Subcommission and the report prepared by Ms. X on the subject assigned to her by the Subcommission should be processed as a document of the Subcommission.

19 July 1996

14. PUBLIC INFORMATION ACTIVITIES OF THE UNITED NATIONS GENERAL ASSEMBLY RESOLUTION 595 (VI)

Facsimile to the Director of the United Nations information centre in Paris

1. This is with reference to your memorandum of 2 September 1996 concerning the proposed "partnership" between the United Nations information center for [a Member State] and a high school [of the State]. Our comments are as follows:

2. In accordance with the basic principles underlying the public information activities of the United Nations, approved by the General Assembly in its resolution 595 (VI) of 4 February 1952, the basic policy of the United Nations, approved by the General Assembly in its resolution 595 (VI) of 4 February 1952, the basic policy of the United Nations, in the field of public information, is to promote an informed understanding of the work and purposes of the Organization among the peoples of the world. To this end, the Department of Public Information should primarily assist and rely upon the services of existing official and private agencies of information, educational institutions and non-governmental organizations.

3. In order to implement this basic policy, the Department of Public Information and its branch offices should, inter alia, "maintain a reference and inquiry service, brief and arrange for lecturers, and make available appropriate materials for use by national information services, education institutions and other governmental and non-governmental organizations".[19]

4. Based on the aforementioned principles, while they should primarily assist and rely on the services of educational institutions, United Nations information centres should not enter into formal relationships therewith. Accordingly, the proposed draft agreement between the United Nations and the high school should not be concluded.

17 September 1996

15. Interpretation of rule 160 of the rules of procedure of the General Assembly, regarding the reassessment of a Member States contribution

Memorandum to the Secretary of the Committee on Contributions

1. This is with reference to your memorandum of 22 October 1996 by which you requested our advice on a question raised by a Member State of the Committee on Contributions, regarding the interpretation of rule 160 of the rules of procedure of the General Assembly [with respect to a request by a Member State for a reassessment of its contribution based on new per capita income data].

2. The relevant part of rule 160 reads as follows:

> "The Committee on Contributins shall advise the General Assembly concerning the apportionment, under Article 17, paragraph 2, of the Charter, of the expenses of the Organization among Members, broadly according to capacity to pay. The scale of assessments, when once fixed by the General Assembly, shall not be subject to a general revision for at least three years unless it is clear that there have been substantial changes in relative capacity to pay. The Committee shall also advise the General Assembly...on appeals by Members for a change of assessments..."

Accordingly, a distinction must be drawn between a general revision due to substantial changes in relative capacity to pay and an appeal by a Member for a change of its own assessment.

3. The member of the Committee raised the question whether the relative capacity to pay of more than one Member State would have to change in order to justify a general revision. He concluded that "the scale cannot be subject to general revision unless the changes have taken place widely". From our reading of the text, the member's interpretation is logical and correct. The rule refers to a general revision affecting all States. The phrase "substantial changes in relative capacity to pay" not only includes the requirement that the changes be substantial, but also that they relate to the "relative" capacity to pay among the membership. The relativity in question refers to each State's capacity to pay as compared to every other State. Thus, a general revision could take place if the substantial changes in relative capacity to pay affected States generally, not limited to one State alone.

4. The Member State in question has requested a reassessment of its own contribution and not a general revision. If, in the view of one State, changes in its assessments are required, the procedure is set forth in the provision of rule 160 which indicates that Members may appeal to the Committee for a change of assessments. For example, a State may claim that owing to a change in circumstances affecting its capacity to pay, its assessment should be changed and, thus, it may appeal to the Committee for a change in its own assessment without necessarily affecting the assessments of other States already fixed by the Assembly. In this connection, it is our understanding that just as newly admitted Members are assessed without entailing a general revision changing the assessments already fixed for other Members, the assessment of one Member may be revised without affecting the fixed assessments of other Members, should the Committee and the General Assembly so decide.

8 November 1996

16. QUESTION WHETHER THE UNITED NATIONS HAS AN INSURABLE INTEREST IN UNITED NATIONS-OWNED PROPERTY AND CONTINGENT-OWNED CARGO FOR WHICH THE ORGANIZATION ARRANGES SEA SHIPMENT

Memorandum to the Director of the Field Administration and Logistic Division, Department of Peacekeeping operations

1. This is in response to your memorandum of 21 November 1995, requesting our advice on whether the United Nations has an insurable interest in United Nations-owned property and contingent-owned cargo for which the United Nations arranges sea shipment.

2. It is of course clear that the United Nations has an insurable interest in United Nations-owned property. This memorandum will therefore only address the question of whether the United Nations has an insurable interest in contingent-owned property.

3. In this connection, you have informed us of an interdepartmental meeting held on 20 October 1995, comprising representatives from the United Nations Insurance Section, Purchase and Transportation Service, and Field Administration and Logistics Division, and have forwarded to us a copy of the minutes of that meeting. As indicated in those minutes, "the general consensus by the attendees was that the United Nations has a responsibility to insure the cargo when it accepts responsibility for arranging the movements of both United Nations-owned cargo (UNOE) and cargo owned by the contributing countries (COE)".

4. We note that, in his report on reimbursement for COE, THE secretary-General stated that:

> "The responsibility of the United Nations with respect to loss an damage incurred during shipping when the United Nations makes the transportation arrangements is recognized and arrangements are being made to obtain adequate insurance coverage."[20]

While the General Assembly has not yet taken action on the Secretary-General's report, the Secretary-General has already accepted the need for insurance of COE for which the Organization is responsible for transportation.

5. The general rule, customarily followed, is that "an insurable interest exists when the insured derives pecuniary benefit or advantage by the preservation or continued existence of the property or will sustain pecuniary loss from its destruction[21] (emphasis added). In this connection, it is worth noting that when goods are entrusted in the United Nations for shipment, the United Nations is in the position of consignee or bailee. A consignee, or bailee, has a responsibility to the owner, or bailor, to account for all goods received and it is this responsibility that gives the consignee, or bailee, an insurable interest[22].
It would therefore seem that, having accepted the responsibility for shipment of COE, the United Nations, either as consignee or bailee of such COE until delivered to the contingent, has an insurable interest in such goods.

6. In conclusion, since as indicated above the United Nations is exposed to liability for loss or damage of contingent-owned equipment for which it arranges sea transportation, it has an insurable interest in such equipment.

9 February 1996

17. QUESTION OF WHETHER A DISCLAIMER OF LIABILITY IS SUFFICIENT FOR EXEMPTION OF FINANCIAL LIABILITY IN THE ABSENCE OF MEDICAL CLEARANCE

Memorandum to the Chief, Personnel Section, International Trade Centre UNCTAD/WTO (ITC)

1. This is in response to your memorandum of 26 July 1996, seeking my advice on a proposed exemption from medical clearance of an individual who is being considered by ITC for a short-term consultancy assignment, under a reimbursable loan arrangement with his employer. The expert will travel to various countries in Africa and Asia for ITC. The individual, who is 66 years of age, refuses to undergo a medical examination. You seek my advice on retaining the individual without a medical examination but with a disclaimer of liability.

2. Exempting an individual from a medical examination would, for the reasons set out below, expose ITC to significant financial liability. Accordingly, we recommend that ITC should not hire this individual unless he is medically cleared.

3. Paragraph 26 of administrative instruction ST/AI/297 of 19 November 1982 provides, in relevant part, that:

> "26. A subscriber [to a special service agreement] who is expected to work in any office of the Organization shall complete a statement of good health. Subscribers may not be authorized to travel outside the country of their normal residence at the expense of the United Nations unless the subscriber concerned submits a statement from a recognized physician certifying that eh subscriber is in good health, is fit to travel and has had the required inoculations for the country or countries to which the subscriber is to travel. If the appropriate statement is qualified in any way or cannot be provided, the appropriate United Nations medical service must be consulted" (emphasis added).

4. The first reason why the individual must have a medical clearance is simple: it is required by the rules. Moreover, the rule has an important basis: it is to ensure that eh Organization does not send an individual into an area, or assign him or her duties, for which he or she is not fit. Should the Organization do so, it would be responsible for illness or death caused by the individual's presence in an area caused by the performance of duties for which he or she was not fit.

5. Viewed from a different perspective, the United Nations routinely makes provision for service-incurred injury, illness or death in its consultancy contracts, and Appendix D to the Staff Rules applies these benefits to its staff. Indeed, this responsibility is accepted because such responsibility is inherent in

its relationship with not only staff but also with individuals who perform services for it (experts on mission). Should the Organization attempt to obtain a disclaimer, it is apparent that such disclaimer would, at a minimum, if it is not simply declared invalid, be interpreted against the Organization. Indeed, it is interesting to note that the United Nations Administrative Tribunal has stated that even if an individual consents to the Organization breaking one of its own rules this does not enable the Organization to use that consent to defend a claim by the staff member based on the rule (Judgement No. 508, Rosetti, para. XV). The same principle may well be held to apply to claims by survivors of experts on mission.

6. Secondly, as a practical matter, should the expert be hospitalized or otherwise require medical attention in the field during the course of performing services for the Organization, the United Nations will as a matter of practice have to guarantee payment for admission to a hospital or treatment facilities. Medical clearance is thus crucial.

9 August 1996

18. INSURANCE FOR ACTS OR OCCURRENCES AT UNITED NATIONS HEADQUARTERS – GENERAL ASSEMBLY RESOLUTION 41/210

Memorandum to the Director of the Promotion and Public Services Division, Department of Public Information

1. This responds to a memorandum of 27 August 1996 form the Officer-in-Charge of the Guided Tours Unit. In connection with an upcoming tour by students of a school, the Guided Tours Unit has been asked to provide the school authorities with a certificate of insurance. Our advice concerning what guidelines were available was requested so that a response to the school could be prepared.

2. As you may know, since 1986, the United Nations has provided "self-insurance" in respect of all acts or occurrences at Headquarters.[23]

3. In connection with the arrangements for self-insurance for acts or occurrences at Headquarters, the General Assembly moved to limit the liability of the Organization. Thus, by its resolution 41/210 of 11 December 1986, the General Assembly enacted Regulation No. 4 of the United Nations Headquarters district. Pursuant to that resolution, the liability of the United Nations for damages sustained by third parties (e.g., visitors) in respect of acts occurring within the Headquarters district is limited to: (*a*) a maximum of $100,000 per occurrence for non-economic losses (e.g., pain and suffering), and (*b*) the maximum prescribed compensation set forth in the Rules Governing Compensation to Members of Commissions, Committees or Similar Bodies in the Event of Death, Injury or Illness Attributable to Service with the United Nations per occurrence for economic losses. Additionally, no compensation is payable in respect of punitive, exemplary or moral damages.

4. In the light of the foregoing, you may wish to inform the school that the United Nations is self-insured for all acts or occurrences giving rise to injury or losses to third parties, such as visitors, within the United Nations Headquarters district. Accordingly, the United Nations cannot provide the requested certificate of insurance.

4 September 1996

FINANCIAL ISSUES

19. LEGAL FRAMEWORK FOR THE UNITED NATIONS DEVELOPMENT PROGRAMME'S USE OF DONATIONS FROM NON-GOVERNMENTAL SOURCES UNDP FINANCIAL REGULATIONS AND RULES

Memorandum to the Assistant Administrator and Director, Bureau for Finance and Administration, of the United Nations Development Programme

1. This is in reference to your recent request for our review of the legal framework for the United Nations Development Programme's use of non-governmental donations.

2. You have indicated that UNDP would like to increase participation by the private sector in operational activities in developing countries and, in particular, to facilitate donations by individuals and corporations in donor countries by ensuring that their donations receive tax deductions status under national laws, where such status is not already enjoyed.

Legal basis

3. The legal basis for UNDP's acceptance of donations from non-governmental sources can be traced to the mandate provided to the predecessor of UNDP, the Special Fund. The Special Fund was established by the General Assembly as a new administrative and operational machinery to spearhead the enlargement of the scope of technical assistance and, in particular, "to facilitate new capital investments of all types – private and public, national and international – by creating conditions which would make such investments either feasible or more effective.[24] The Fund was merged with the Expanded Programme of Technical Assistance by the General Assembly in its resolution 2029 (XX) of 22 November 1965 to form the United Nations Development Programme. In that resolution, the General Assembly stipulated that "the special characteristics and operations of the two programmes, as well as two separate funds, will be maintained." (para. 1).

4. One such characteristic of the Special Fund was its authority to receive contributions from non-governmental sources. The General Assembly stipulated in its resolution 1240 (XIII) of 14 October 1958 that the financial resources

of the Fund shall be derived from "voluntary contributions by Governments of States Members of the United Nations or members of the specialized agencies or of the International Atomic Energy Agency, and further stated that the Fund "is also authorized to receive donations from non-governmental sources" (part B (VI), para. 45).[25] Thus, in line with the General Assembly's decision to maintain the special characteristics of the two programmes and funds, UNDP from its earliest beginnings has been authorized to receive donations from non-governmental sources.[26]

5. Moreover, as a result of diminishing government contributions, the General Assembly has repeatedly called for new ways of mobilizing increased resources. In its resolution 35/81 of 5 December 1980, for example, the General Assembly invited:

> "the governing bodies of the relevant organs, organizations and bodies of the United Nations system, as appropriate, to consider new and specific ways and means of mobilizing increased resources for operational activities for development on an increasingly predictable, continuous and assured basis" (para. 7).[27]

6. The requirements of the UNDP Financial Regulations and Rules must be viewed in the light of UNDP's basic mandate and the General Assembly's entreaties to governing bodies in favour of new ways of mobilizing increased resources.

UNDP Financial Regulations and Rules

7. We have reviewed the UNDP Financial Regulations and Rules, in particular, regulations 4.14 to 4.16 on "Donations". Regulation 4.14 provides that donations form "intergovernmental and non-governmental sources" may be accepted by UNDP, for purposes consistent with those of UNDP; but the Regulations then go on to impose restrictions on the amounts of donations which UNDP may accept and the manner of their reporting. Regulation 4.15 stipulates that donations for the general support of UNDP shall be credited to the UNDP Account and that donations for specific purposes are to be treated under the provisions for cost-sharing (article IV) or trust funds (article V), as appropriate. Regulation 4.16 provides that individual donations of a value in "excess of $25,000 shall be accepted only with the prior approval of the Executive Board".

8. Thus, while under the present Regulations UNDP can already directly accept donations under $25,000 from non-governmental sources, including individual and corporate sources, as long as they are for purposes consistent with those of UNDP donations in excess of that amount require the approval of the Executive Board.

9. In addition to the requirement for approval by the Executive Board of donations in excess of $25,000, rule 105.6 requires the Administrator to report contributions (donations) to trust funds from non-governmental sources in excess of $100,000 to the Board.[28] The rule reads:

> "Contributions to trust funds accepted by the Administrator form non-governmental sources of value in excess of $100,000 shall be reported annually to the Executive Board."

10. It is clear that the Financial Regulations are too restrictive on receipt of private donations of UNDP programmes and do not reflect the initial mandate provided to the Special Fund or the more recent exhortations by the General Assembly for governing bodies to mobilize new sources of funding, as a result of diminished government contributions. In this regard, we note that the United Nations Population Fund already requested, and received on 1 July 1988, authorization of individual donations of up to $100,000 without the prior approval of the Council.[29]

11. It would seem to us that UNDP's Financial regulations and Rules will need to be revised to reflect the need to attract private capital contributions to the UNDP programmes. As a start, there may be a need to eliminate the distinction between "contributions" and "donations" and treat both as part of UNDP financial resources to be credited as general resources of UNDP. This would entail, inter alia, the elimination of the monetary limit for the Executive Board's approval of donations, and establishment of specific modalities for private fund-raising, including those discussed below. Should you decide to undertake this revision of the Regulations and Rules, we remain available to assist as required.

Tax deductibility of such donations under United States Law

12. Concerning the tax deductibility of donations from non-governmental sources from donor countries, we illustrate the complexities of certain systems by using the United States as an example. Under United States law, the Internal Revenue Code of 1954 (IRC), section 170, cfr. Subsection (*a*), allows a tax exemption for certain charitable contributions. Pursuant to subsection (*c*), paragraph 2 (*A*), only entities created under United States law enjoy tax-exempt status. Public international organizations in which the United States participates by treaty or executive agreement, such as the United Nations, are not included in the definition of entities eligible to receive a "charitable contribution" under section 170 (*c*). Thus, direct contributions to the United Nations and its subsidiary organs, including UNDP, are not considered deductible for income tax purposes.

13. Contributions from United States citizens and corporations for UNDP activities may, however, be tax-deductible if made to a properly established United States foundation (as further explained in para. 14 below) which is authorized to transfer the contributions to UNDP. Such an organization must itself satisfy the requirements of section 170 (*c*) of the IRC. The United Nations Association of the United States of America and the United Nations Association of the United States Committee for UNICEF are both organizations of this nature, through which channeling of donations is accepted according to United States law.

14. United States law does not, however, permit, a charitable organization to function solely as a channel for contributions from individuals to an organization not recognized by the Internal Revenue Service as a proper recipient of contributions. Such an entity would then be regarded as a mere "conduit" of funds to a non tax-exempt recipient. It would therefore be necessary for the charitable organization to have substantial outside activities in addition to the channeling of contributions to UNDP.

15. Should UNDP wish to purse this further, the Executive Board could then be requested to establish the terms and conditions for cooperation with such tax-exempt entities and to approve a model agreement for such cooperation.

8 April 1996

20. ALLOWANCES AND BENEFITS FOR INTERNATIONALLY RECRUITED STAFF UPON CHANGE IN IMMIGRATION STATUS GENERAL ASSEMBLY RESOLUTION 49/241 – STAFF RULES 104.7, 104.9 9 (*c*) AND 107.27 (*a*) – TRAVEL EXPENSES, REMOVAL COSTS AND REPATRIATION GRANT

Memorandum to the Operational Services Division
Office for Human Resources Management

1. By a memorandum dated 13 December 1995, you requested that we provide you with advice concerning the benefits to which Mr. X is entitled upon his separation from service, following his retirement from the Organization in January 1996.

Background

2. Your memorandum indicated that Mr. X is a [Member State] national and that [the Member State] was the country from which Mr. X was recruited. Your memorandum also stated that Mr. X recently obtained permanent residency status ("green card" status) in the United States from the United States immigration authorities and that Mr. X's change in immigration status was approved by the Office for Human Resources Management in view of his imminent retirement. Your memorandum noted that, prior to Mr. X's obtaining a change in immigration status, the Office for Human Resources Management had authorized an advance shipment of his personal and household effects at the expense of the Organization.

Finally, your memorandum stated that the Assistant Secretary-General for Human Resources Management has, in one form or another, agreed to Mr. X's request that he retain his "international benefits" upon retirement and separation from the service of the Organization despite his change in immigration status.

General principles

3. You have asked about "international benefits" to which Mr. X may be entitled in the light of the change in his immigration status. Staff rule 104.7 (*a*) states, in pertinent part, that "allowances and benefits in general available to internationally recruited staff include: payment of travel expenses upon initial appointment and on separation for themselves and their spouses and dependent children, removal of household effects...and repatriation grant." In connection with the designations of "internationally recruited" staff, staff rule 104.7 (*c*) provides that "(*a*) staff member who has changed his or her residential status in such a way that he or she may, in the opinion of the Secretary-General, be deemed to be a permanent resident of any country other than that of his or her nationality may lose entitlement" to one or more of such benefits "if the Secretary-General considers the continuation of such entitlement would be contrary to the purposes for which the allowance or benefit was created". Finally, staff rule 104.7 9(c) indicates that the "conditions governing entitlement to international benefits in the light of international status are shown in appendix B to (the Staff) Rules applicable to the duty station".[30]

4. Staff rule 104.7 thus contemplates the possible loss of some "international benefits" upon a change in permanent residency status, as would be the case with Mr. X. However, discretion is given to the Secretary-General, or his delegate, to determine whether or not continuation of one or more of such benefits would be warranted in an individual case. Unless a specific staff regulation or rule applicable to "international benefits" were to prohibit the Secretary-General from exercising discretion over making such a benefit or allowance available to Mr. X, the Assistant Secretary-General for Human Resources Management would have discretion in granting "international benefits" to Mr. X upon his retirement and separation from service, provided that doing so is consistent with "the purposes for which the allowance or benefit was created".

5. In order to determine whether and in which circumstances the Administration may have discretion in providing "international benefits" to Mr. X, we have reviewed the Staff Regulations and Rules to determine the applicable criteria and discretion concerning the allowances and benefits which may be affected by a change in his United States immigration status from G-4 to permanent residency (green card).

Repatriation grant

6. Pursuant to staff regulation 9.4, staff members may be entitled to a repatriation grant upon their separation from the service of the Organization "under the conditions specified in annex IV" to the Staff Regulations. The question is whether, in view of the change in Mr. X's immigration status in the country of his duty station, he is entitled to this benefit.

7. By its resolution 49/241 of 6 April 1995, the General Assembly promulgated a number of changes to the Staff Regulations to ensure that "repatriation grant and other expatriate benefits are limited to staff who both work and reside in a country other than their home country" (emphasis added). In particular, the Assembly amended annex IV of the Staff Regulations to provide as follows (additions are italicized):

> "In principle, the repatriation grant shall be payable to staff members whom the Organization is obligated to repatriate and who at the time of separation are residing, by virtue of their service with the United Nations, outside their country of nationality. The repatriation grant shall not, however, be paid to a staff member who is summarily dismissed. Eligible staff members shall be entitled to a repatriation grant only upon relocation outside the country of the duty station. Detailed conditions and definitions relating to eligibility and requisite evidence of relocation shall be determined by the Secretary-General."

8. The amended text plainly states that only staff who meet, at the time of separation, the condition of living and residing in a country other than their home country are entitled to a repatriation grant, in whole or in part. Given this clear and express directive of the General Assembly, promulgated as an annex to the Staff Regulations, the Administration cannot justifiably pay a repatriation grant to a separating staff member who does not meet such criteria, particularly as the General Assembly took this action to reverse the contrary jurisprudence of the Tribunal.[31]

9. Mr. X has, prior to his separation from service, established residency in the United States, the country of his duty station. Mr. X's recent application for permanent residency status in the United States is inconsistent with any intention to relocate outside the country of his duty station, the fundamental prerequisite for the payment of the repatriation grant. Accordingly, pursuant to the explicit criteria established by the General Assembly, Mr. X cannot be eligible for repatriation grant. Moreover, given the express mandate of the General Assembly concerning eligibility for repatriation grant, there is no discretion available to the Secretary-General, or his delegate, by which the repatriation grant may be given to Mr. X in these circumstances. Accordingly, unless Mr. X can establish that he is relocating from the country of his duty station (and this would seem to require his surrendering his green card), he will not be entitled to a repatriation grant upon his retirement and separation from service.

Payment of travel expenses by the Organization

10. Staff regulation 7.1 provides that "subject to conditions and definitions prescribed by the Secretary-General, the United Nations shall in appropriate cases pay the travel expenses of staff members, their spouses and dependent children". Thus, whether Mr. X is entitled to reimbursement of travel expenses upon his retirement and separation is dependent children". Thus, whether Mr. X is entitled to reimbursement of travel expenses upon his retirement and separation is dependent on the conditions and definitions specified by the Secretary-General for such reimbursement.

11. Staff rule 107.1 (*a*) (vi) provides, in pertinent part, that "subject to the conditions laid down in [the Staff] Rules, the United Nations shall pay, in the case of service at an established office, the travel expenses of a staff member's eligible family members...on separation of a staff member from service", provided such service was longer than one year.

12. Neither staff rule governing reimbursement of travel expenses of a staff member and his or her eligible family members upon the staff member's separation is expressly dependent on the immigration or nationality status of the staff member. Staff rule 104.7 (*a*) implies that such a benefit is payable only to internationally-recruited staff with the apparent purpose that such reimbursement should be paid in order to assist the staff member and his or her family in departing from the duty station and returning to the country from which he or she was recruited. However, as noted above, staff rule 104.7 (*c*) provides for discretion in granting entitlement to such a benefit in cases in which the benefit could be paid consistently with its purpose.

13. Accordingly, if the Assistant Secretary-General for Human Resources Management may have found that, notwithstanding Mr. X's change in immigration status, it is appropriate for Mr. X and his eligible family members to travel to the Member State from which he was recruited upon his retirement and separation from service, perhaps because it is not unreasonable to expect that Mr. X may retain a separate residence in [the Member State] as well as in the United States. In any event, the Assistant Secretary-General for Human Resources Management has decided to reimburse Mr. X for such travel expenses, and as he had discretion to take such a decision, Mr. X is entitled to rely on that decision.

Payment of removal costs by the Organization

14. Staff regulation 7.2 provides that "subject to conditions and definitions prescribed by the Secretary-General, the United Nations shall in appropriate cases pay the removal costs for staff members". Thus, whether Mr. X is entitled to reimbursement of removal costs upon his retirement and separation is dependent on the conditions and definitions specified by the Secretary-General for such reimbursement.

15. Staff rule 107.27 (*a*) (iv) provides, in pertinent part, that "when an international recruited staff member is to serve at an established office for a continuous period that is expected to be two years or longer, the Secretary-General shall decide whether...to pay costs for the removal of the staff member's personal effects and household goods...upon separation from service". The terms of the staff rule governing reimbursement of removal cost thus expressly links the benefit to "internationally recruited" staff. Staff rule 104.7 (*a*) implies that such a benefit is payable only to internationally recruited staff, again with the apparent purpose that such reimbursement should be paid in order to assist the staff member and his or her family in relocating to the country from which he or she was recruited. However, staff rule 104.7 (*c*) provides for discretion in granting entitlement to such a benefit in cases which the benefit could be paid consistently with its purpose.

16. The Assistant Secretary-General for Human Resources Management has apparently found that, notwithstanding Mr. X's change in immigration status, it is appropriate for Mr. X to ship household and personal effects to [the Member State from which he was recruited] upon retirement and separation from service, perhaps because it is not unreasonable to expect Mr. X to maintain a residence in [that State] as well as in the United States. As the Assistant Secretary-General for Human Resources Management has discretion to take such decision and has apparently done so, Mr. X is entitled to rely on that decision.

17. Pursuant to staff rule 104.7 (*c*), the Assistant Secretary-General for Human Resources Management has, in individual cases, undisputed authority to grant travel and removal costs to retiring staff members who have changed their immigration status. However, the over riding purpose of these benefits seems to us to be reimbursing internationally recruited staff for the costs of relocating to the country from which they have been recruited.

17 January 1996

21. Rules concerning the eligibility of staff to receive education grant – Staff regulation 3.2 – Staff rule 103.20 (*b*)

Memorandum to the Chief of the Rules and Regulations Unit Specialist Service Division, Office of Human Resources Management

1. This is in response to your memorandum of 28 December 1995, forwarding to us and seeking our views on a draft administrative instruction on dependents in no-family missions. Pursuant to a provision in the draft administrative instruction, staff members serving in no-family missions would become ineligible to receive education grant for their children if those children attend a school within a no-family mission area.

Executive summary

2. For the reasons set out below, we think that the Secretary-General has authority to prevent payment of education grant to staff who bring dependants into a no-family mission and send them to school in that area.

Rules concerning eligibility of staff to receive education grant

3. The payment of education grant is subject to the provisions of staff regulation 3.2, which reads, which reads, in relevant part, as follows:

> "(*a*) The Secretary-General shall establish terms and conditions under which an education grant shall be available to a staff member residing and serving outside his or her recognized home country whose dependent child is in full-time attendance at a school, university or similar educational institution..."

The terms and conditions for payment of the education grant, referred to in the above staff regulation, as set out in staff rule 103.20 (*b*) and in administrative instruction ST/AI/181 and its revisions. Staff rule 103.20 (*b*), entitled "Eligibility", also stipulates exceptions to this entitlement. Those exceptions comprise, inter alia, attendance at a kindergarten or nursery school; attendance at a free school or one charging only nominal fees; correspondence courses; private tuition; and vocational training.

4. As we understand it, because staff rule 103.20 (*b*) does not expressly prohibit eligibility for the grant if dependents attend schools in the area of no-family missions, some staff members, and notably the Field Service Staff Union, consider that they are eligible to receive the education grant in respect of their dependents attending schools in the area of those missions in direct contravention of express instructions directing staff members not to bring their dependents into the area.

5. In our view, staff rule 103.20 (*b*) does not contain an express reference to such cases because it presupposes that staff members would act in accordance with, and not in violation of, such express instructions. Having violated the direct order not to bring their dependents into the area of a non-family missions, they can hardly expect the Secretary-General to reward their action by paying education grant, particularly as the Administration notifies staff members in writing, prior to their deployment to non-family missions, that they should not be accompanied by their dependants. Notably, this express instruction is accepted by the staff member concerned, and such acceptance is attested to by the staff member signing the notification from the Administration containing the terms and conditions of the staff member's assignment to such a field mission.

6. Having regard to the foregoing, we are of the view that the Organization could refuse to pay education grant to staff members who bring their dependants into the area of no-family missions provided that such staff had been notified and had accepted, in writing, that the mission to which they are assigned is a no-family mission.

21 March 1996

22. ENFORCEMENT OF A MEMBER STATE'S LABOUR LAW WITH REGARD TO LOCAL PERSONNEL RECRUITED BY UNITED NATIONS CHILDREN'S FUND – ARTICLE 101 OF THE CHARTER OF THE UNITED NATIONS – USE OF SPECIAL SERVICE AGREEMENTS

Memorandum to the Deputy Director of the Office of Administrative Management of UNICEF

1. This is in response to your memorandum dated 16 February 1996.

Background

2. By its note, which is dated 30 November 1995, Government of [the Member State] informed international organizations, diplomatic and consular missions in [the Member State] of the applicability of [the Member State's] labour law with respect to local personnel recruited by those institutions.

3. The note points out, in particular, that fixed-term appointments do not exist under the labour law. As a result, the natural expiration of a fixed-term appointment would be treated as an early termination of an indefinite appointment by the court of [the Member State]. In addition, rules regarding social security payments would apply to the employer, were the labour law of [the Member State] to apply.

4. UNICEF's activities in [the Member State] are governed by the Convention on the Privileges and Immunities of the United Nations of 1946[32] and by an Agreement with the Government of [the Member State] signed on 20 May 1954. The only reference to personnel in the agreement is made in article VI ("Relationship between the Government and the Fund in the carrying out of this Agreement"), paragraph C. The paragraph states that the Government would facilitate employment by UNICEF of citizens and residents in [the Member State] as may be required.

Analysis

5. In accordance with Article 101 of the Charter of the United Nations, staff of the United Nations, including its subsidiary organs, such as UNICEF, whether international or locally recruited, are appointed by the Secretary-General under regulations established by the General Assembly.[33] Such regulations are set out in the United Nations Staff Regulations and Rules, which embody the fundamental conditions of service and the basic rights, duties and obligations of the staff of the Organization.

6. Therefore, the terms and conditions of employment of staff members are exclusively set out in the United Nations Staff Regulations and Rules. According to this principle, which has become widely upheld by national courts of Member States, no national legislation is applicable to the terms and conditions of employment of UNICEF staff members, and thus the employment relationship between UNICEF and its staff, even if locally recruited, cannot be subject to national labour legislation.

7. In respect of non-staff members performing services for UNICEF, we understand that they are normally engaged either under special service agreements (SSAs)[34] or as employees of a contractor.[35] In both cases, such personnel

are to be considered as independent contractors, and thus it appears clear that there is a non-employee-employer relationship with UNICEF. Moreover, the functions performed by them are not those usually assigned to "employees", i.e., staff members, of the Organization. Therefore, we assume that [the Member State's] labour legislation should not apply to such personnel, as employees of UNICEF, since they are independent contractors vis-à-vis UNICEF.

8. However, we understand that in some places it has become a normal practice for UNICEF to use SSAs for individuals who are in reality performing staff or employee services. In other words, despite the nature of SSAs, some personnel are engaged under SSAs, indicating that they have the legal status of independent contractors, but in reality they are employees, being engaged on a full-term basis during an extended period of time, sometimes beyond that set out in UNICEF's instruction, and performing functions controlled by UNICEF supervisors, which in law may indicated that an employee-employer relationship exists with UNICEF (the so-called "control test").

9. This practice raises three problems:

(*a*) National courts may consider that such personnel are employees of UNICEF in respect of whom national labour legislation applies. While UNICEF is immune from every form of legal process, the SSA holder may be found in violation of national labour law by not having contributed to social security schemes, etc. Furthermore, the Government may take a dim view of such actions.

(*b*) Such improper use of SSAs may have unexpected financial consequences, as stated by the United Nations Administrative Tribunal in its Judgement No. 281, Hernandez de Vittorioso:

> "While the Tribunal is not unaware of reasons why the Administration may wish on occasions to use the special service agreement rather than to employ on fixed-term appointments, long-term and repeated use of the special service agreement may produce unintended consequences where work performed is full-time, continuous and in other important respects indistinguishable from the work of individuals in the same office who have the status of staff members." (emphasis added)

Furthermore, in Judgement No. 480, Lopez, it has been held that in such circumstances, the individual should be paid the difference between what she/he would have earned had she/he been employed as a staff member and what she/he earned as a consultant under the SSA, plus interest.

(*c*) The creation of two disparate regimes of employees, one subject to the United Nations Staff Regulations and Rules and the other not, but doing similar work, may result in labour unrest. Furthermore, not being part of either the social security scheme in the country or the United Nations system, such personnel may have no social security protection, thus opening UNICEF up to claims in the event of illness or death of a SSA holder.

10. In the light of the above, we would caution against the use of SSAs for situations and activities for which they are were not designed, e.g., for periods longer than 11 months without a break in service (see clause 24 of UNICEF instruction) and any of the situations set forth in clauses 17 to 20 of the UNICEF instruction. If the administrative rules for local staff do not provide for suffi-

cient flexibility, UNICEF should seek to have the issue raised in the Consultative Committee on Administrative Questions, with a view to developing a rational and effective policy to retain local staff, as we would assume that the problems faced by UNICEF must also be faced by other field-oriented and separately financed organs.

3 July 1996

23. Recovery of misappropriated funds from former staff members — Staff rule 103.18 (*b*) (ii) — General Assembly resolutions 47/211 and 48/218

Memorandum to the Personnel Officer, Administrative Reviews of United Nations Children's Fund

1. This is with reference to your memorandum dated 5 August 1996, requesting an opinion as to what remedies are available to UNICEF for recovery of misappropriated funds from staff members in two specific instances: (*a*) when staff members have been dismissed for fraud and the amounts owed by them far exceed the amount UNICEF may recover from their final entitlement; and (*b*) when fraud is discovered after a staff member has been separated from the Organization. Our comments are set out below.

Internal action: The Organization's current practice

(*a*) Accrued salary

2. Staff rule 103.18 (*b*) (ii) enables deductions to be made from salaries, wages and other emoluments for indebtedness to the United Nations. In cases where it is established that United Nations funds were misappropriated by a staff member, the first course of action is to attempt to recover the amounts involved from any accrued salary and other emoluments, including terminal payments, of the staff member. Where a staff member has received all final payments before the presumptive fraud is discovered, such administrative action is not possible unless the individual was found to be employed by another organization of the United Nations system. In such circumstances, it has sometimes been possible to make arrangements with the other organization to effect recovery on our behalf.

(*b*) Pension benefits

3. Attempts by the Administration to obtain direct recovery of indebtedness from the pension entitlements of staff members have been rejected by the United Nations Administrative Tribunal, which held that the regulations of the United Nations Joint Staff Pension Fund, promulgated by the General Assembly, precluded recovery of amounts due to the Organization from the pension benefits of separated staff. The Tribunal held, furthermore, that the Administration could not refuse to issue the documentation of the basis of which a staff member's pension benefits are processed, in an attempt to induce the former

staff member to repay to the Organization the sums misappropriated. The Tribunal considered, however, that the Administration and the Pension Fund should seek an appropriate solution in similar situations.

4. As a result, the Secretary-General amended the administrative instruction on the subject of the personnel payroll clearance action, to provide for the non-issuance of documents necessary for the processing of pension benefits following separation from service. The relevant provisions of the amended administrative instruction ST/AI/155/Rev. 2 now read as follows:

> "11. Staff members separating from service, in accordance with their contractual obligations to the United Nations, are responsible for:
>
> (*a*) Settling all indebtedness to the United Nations;
>
> . . .
>
> (*d*) Providing, in accordance with staff rule 104.4, the necessary documentary evidence as verification of the fulfillment of the responsibilities set out above.
>
> "12. The Under-Secretary-General for Administration and Management may refuse to issue the P.35 form [Personnel Payroll Clearance Action form] or may delay its issuance until a staff member has satisfactorily fulfilled the requirements set out in paragraph 11 above.
>
> "13. Staff are reminded that non-issuance of a P.35 form will prevent them from receiving their pension benefits since this form is required by the Pension Fund for the processing of those pension benefits. Staff are also reminded that failure to comply with the obligations set out in paragraph 11 above may result in the suspension of the separation procedure, which may delay any payments otherwise due to the staff member..." (emphasis added).

The experience of the Administration with S/AI/155/Rev. 2 has been positive. We consider that, should the matter be tested before the Tribunal, the procedures in the instruction would be upheld.

External action: suits in national courts

(*a*) Report of the Secretary-General of 9 November 1993

(i) Civil actions

5. The General Assembly, over the years, has expressed increasing concern over the issue of fraud or presumptive fraud within the United Nations. A report on "recovery of misappropriated funds from staff members and former staff members" A/48/572 was submitted to the General Assembly by the Secretary-General on 9 November 1993 pursuant to a request contained in General

Assembly resolution 47/211 of 23 December 1992.[36] In the report, the Secretary-General described the difficulties faced by the Organization in instituting civil action for recovery of misappropriated funds, where such misappropriation consisted of fraud in connection with United Nations entitlement:

> "12. Civil action for recovery of misappropriated funds requires proof of fraud by staff members. In this connection, a general problem arises if the alleged fraud consisted of breach of international United Nations regulations or rules (i.e., claiming and obtaining from the United Nations excessive or unwarranted reimbursement for medical expenses, education grant or income taxes.) In such cases, in order to determine whether the staff members' acts were fraudulent, the national court would have to interpret and apply those provisions of the internal regulations and rules of the Organization allegedly violated by the staff member concerned.
>
> "13. However, in many legal systems, a national court may find difficulties in, or even a legal impediment to, applying internal rules of an intergovernmental organization which do not have the force of law in that national legal system, unless they are the few regulations promulgated pursuant to Headquarters Agreements to the express exclusion of local law. Furthermore, the submission of disputes involving internal regulations or rules to national courts could result in interpretations conflicting with those given by United Nations organs or inconsistent with the policies and interest of the Organization."

6. The Secretary-General proposed to the General Assembly that the statute of the United Nations Administrative Tribunal should be amended to give it jurisdiction to adjudicate claims submitted by the Organization against staff members so that proceedings before national courts would be required only for enforcement of the judgement.

7. In section III of its resolution 48/218 of 23 December 1993, the General Assembly decided, inter alia, to study the possibility of the establishment of a new jurisdictional and a procedural mechanism, or the extension of mandates and improvement of the functioning of existing jurisdictional and procedural mechanisms. To that end, the General Assembly decided that an ad hoc intergovernmental working group of 25 members (the "Group of Experts") should be established to examine those questions and submit a report with specific suggestions to the Assembly.

8. In its final report, the Group of Experts recommended, inter alia, that eh statute of the Administrative Tribunal should be amended to give it jurisdiction to adjudicate financial claims submitted by the Secretary-General against staff members.[37] However, the Assembly has not acted on the report of the Group of Experts does not seem to have addressed the question of enforcement of judgements of the Tribunal by Member States, should this become necessary.

(ii) Criminal actions

9. In his report,[38] the Secretary-General also described the difficulties faced by the Organization in instituting criminal actions, as follows:

"20. The Secretary-General has on a number of occasions requested that national authorities investigate cases of alleged fraud against the United Nations, both by third parties and by former staff members. However, audit findings which lead to the dismissal of staff members are rarely supported by the type of evidence required under national law to secure criminal conviction, because the Secretary-General does not have the investigatory police powers needed to establish proof of guilt beyond reasonable doubt (such as subpoena power to obtain bank or financial records of the accused or his or her family, to obtain testimony on oath of witnesses, etc.) In addition, national authorities are often unwilling to undertake criminal action unless the amount of the fraud is significant.

"21. In general, a criminal action may be successfully pursued only if the former staff member or any possible outside accomplice is physically present, at the time of the action, within the jurisdiction where the crime was committed. This requires, of course, that the fraud be discovered by the Organization before the individual leaves the country.

"22. If the staff member concerned has left the jurisdiction where the fraud was committed before the prosecution commences, serious difficulties will arise because of the need for extradition of the accused. The laws of the extraditing State may prohibit extradition on a variety of grounds...Despite existing measures for international assistance and cooperation, the delays in extradition procedures usually are considerable.

"23. The courts of certain countries may entertain a prosecution even if the alleged crime was not committed within the jurisdiction (e.g., if the accused is residing within the jurisdiction). However, it will then be necessary to record evidence abroad or obtain the testimony of witnesses living in other countries. This can be a complex and time-consuming exercise that national authorities may be unwilling to undertake.

"24. In summary, effective criminal prosecution of those who defraud the United Nations requires the full cooperation of the Member States and, to be viable, it usually requires that the accused, or at least his or her accomplices, be physically present at the time the prosecution is initiated in the State where the fraud was committed."

10. There have been two occasions in recent years in which the Secretary-General has sought the assistance of national authorities at Headquarters to investigate cases of possible fraud by United Nations staff members or former staff members, one of which was successful.

11. Generally, the assistance of the local law enforcement authorities – obtained through the United States Mission – has been satisfactory in fraud and similar cases. No major problems have been encountered.

Conclusion

12. From the above, it can be seen that recovery of funds is facilitated if there is a criminal conviction since sentencing is normally influenced by restitution. If there is no criminal conviction, the Organization would have to prove the former staff member's indebtedness and this may be very difficult or costly, especially if the fraud occurred in a country separate from the country of residence of the former staff member.

14 August 1996

PROCUREMENT

24. LEGAL FORCE OF LETTER OF AWARD

Memorandum to the Audit and Management Consulting Division, Office of Internal Oversight Services

1. This is in response to your request for a legal opinion on whether a letter of award is an adequate basis for the provision of services. More specifically, you would like to know if a letter of award binds both parties in a contractual relationship, and if it does not, to what extent it binds, the parties.

2. In order to address your query, we must first outline the documents normally used in the Organization's procurement and contracting activities. These documents are the following:

(*a*) Invitation to bid (ITB) or request for proposal (RFP), which set forth the terms and conditions required by the Organization for the performance of specific services or the purchase of certain goods;

(*b*) Bid of proposal, which contains the conditions under which a potential contractor is willing to provide the required services or goods;

(*c*) Letter of award, which informs a potential contractor that its bid or proposal has been selected;

(*d*) Written contract or purchase order, which represents the definitive legally binding agreement between the Organization and the successful candidate in the bidding process and sets forth the terms and conditions under which the services will be performed or the goods purchased.[39]

3. The standard format of ITB and RFP used by the Organization contains clear language to indicate that it does not constitute an offer and that any bid or proposal will be regarded as an offer by the bidder or proposer and not as an acceptance of an offer made by eh Organization. The standard format of ITB or RFP further states that no contractual relationship will exist except pursuant to a written contract between the parties.[40] Thus, potential contractors participating in the bidding process are put on notice that eh procurement system of the Organization is designed to be a "process" which culminates with the conclusion of a written contract or a purchase order.

4. In this process, the letter of award is designed to be only a notification to the selected candidate that its bid or proposal has been evaluated and found acceptable by the Organization. The letter of award usually contains language making it clear that the "award" is contingent upon the satisfactory conclusion of a written contract. The letter of award, therefore, is not intended to create legal obligations between the parties, except imposing an obligation on the Organization to negotiate in good faith, with a view to concluding a formal contract with the successful bidder or proposer. The obligation to negotiate in good faith is, of course, a mutual obligation also imposed upon the other party.

5. We note that a letter of award could be worded so that it would be construed as an acceptance of the offer received. For instance, if the working making the "award" subject to the satisfactory conclusion of a contract were to be omitted, the letter of award might be construed as the Organization's acceptance of the bid or proposal.

6. If, however, services are rendered by the successful candidate with the Organization's consent (or if goods are delivered and accepted by the Organization) prior to the conclusion of a formal contract on the basis of the terms and conditions set forth in the RFP and the proposal or the ITB and the bid, as the case may be, the parties would in all likelihood be legally bound by such terms (even if a contract was never concluded or a dispute arose before a final contract was concluded). In such a situation, a tribunal would likely find that both parties had proceeded on the understanding that these terms would be incorporated into the formal contract. Discrepancies or gaps would then have to be filled in by the tribunal if the parties were unable to resolve them between themselves.

12 August 1996

COMMERCIAL ISSUES

25. USE OF THE UNITED NATIONS PREMISES – ARTICLES 104 AND 105 OF THE CHARTER OF THE UNITED NATIONS

Memorandum to the Director of the Buildings and Commercial Services Division

1. This refers to a proposal to establish a revenue-producing activity for the Organization by leasing the display showcases in the basement of the General Assembly building to commercial entities for advertising purposes.

2. We understand that the proposal, which is set out in a brochure untitled "A New Revenue Producing Opportunity" (the proposak) is as follows:

> The Organization will lease "display showcases" located in the public area of the basement of the General Assembly building to outside entities so that non United Nations entities, including commercial and private interests, might use the space for advertising purposes. It is envisaged that an advertising firm will be contracted "on a commission basis to handle the entire process, from soliciting prospective advertisers to preparing the art

work and billing invoices", and that all advertisements will be subject to approval by a committee consisting of representatives from various departments and offices of the Secretariat, in order to "ensure that the advertisements are not controversial, are tasteful, and consistent with the image and ideals of the United Nations."

3. For the reasons set out below, we consider that this advertising scheme requires specific legislative endorsement by the General Assembly.

Detailed reasons for opinion

A. FUNCTIONS AND PURPOSES OF THE ORGANIZATION

4. Articles 104 and 105 of the Charter of the United Nations provide as follows:

"Article 104

"The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.

"Article 105

"1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.

"2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

"3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose."

5. On 13 February 1946, pursuant to Articles 104 and 105 of the Charter to the United Nations, the General Assembly adopted the Convention on the Privileges and Immunities of the United Nations (the Convention).

6. It is noted that there is no reference in either the Charter or the Convention to the United Nations engaging in commercial activities of the type envisaged in the proposal. Thus, it is far from clear that such an activity is an activity "necessary for the exercise of its functions and the fulfillment of its purposes".[41] It would of course be possible for the General Assembly to decide that placing commercial advertising at selected locations of the Headquarters district was essential to the fulfillment of the purposes of the United Nations, and if this were done, it would be clear that such an activity was a proper activity of the Organization and would be covered by the privileges and immunities of the United Nations.

B. CURRENT GUIDELINES ON THE USE OF UNITED NATIONS PREMISES

7. The current guidelines relating to the use of United Nations premises are consistent with the non-commercial use of its premises and are contained in administrative instruction ST/AI/416 of 26 April 1996. The instruction provides that the use of United Nations premises "must be consistent with the purpose and principles of the United Nations, and must be non-commercial in nature"[42] (emphasis added). This provision appears entirely consistent with the role envisaged for the United Nations in the Charter. It is further provided that "outside entities, including non-governmental organizations, may not hold meetings or events on United Nations premises to conduct their own organizational business or to advance their own purposes or aims"[43] (emphasis added).

8. In addition, administrative instruction ST/AI/376 of 1 June 1992, which contains the guidelines relating to exhibits on United Nations premises, provides that "United Nations facilities will be available to support substantive United Nations activities only...All exhibits must be compatible with the character, purposes and principles of the United Nations, in both content and presentation...Proposals honouring a specific individual, religion, country or non-governmental organization normally will not be permitted".[44] Again this is consistent with the functions and purposes of the Organization as envisaged in the Charter.

9. We also note that this basic philosophy of the United Nations not being involved in commercial advertising is reflected in the standard condition which the United Nations insists must be included in every contract that it concludes, i.e., the prohibition on contractors from advertising their association with the United Nations.

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

INTERNATIONAL LABOUR ORGANIZATION

1. QUESTION WHETHER INTERNATIONAL LABOUR CONVENTIONS CAN BE ABROGATED AND BY WHICH MEANS (INSTITUTIONAL AMENDMENT)

Reports of the Working Party on Policy regarding the Revision of Standards of the Committee on Legal Issues and International Labour Standards of the Governing Body of the International Labour Office

Abrogation or extinguishment of international labour Conventions[45]

Introduction

The present document has been drafted to comply with the request made by the Working Party, after making a preliminary examination of the general document BG.264/LILS/WP/PRS/1 (para. 51-57), "to prepare...a paper concerning abrogation or extinguishment of some Conventions".

The subject matter of this request and the manner in which it is examined need a little explanation.

Abrogation or extinguishment of a Convention is used here to refer to the process enabling the legal effects of an instrument to be terminated.

There is no provision for such a process in the present standard-setting system of ILO; the body of standards is updated by the juxtaposition of the original text of the Convention and the revised text which continues to have some, if not all, of its legal effects. It has traditionally been acknowledged that this has several practical advantages – in particular that of not automatically releasing any parties from the revised Convention who might refuse to accept the obligations ensuing from a revising Convention from any obligation in the area covered.

However, as the body of standards has continued to grow, the coexistence of revised and revising instruments has accumulated disadvantages; and this has given rise to the question of whether the advantage of maintaining obligations, of which some are outdated, still justifies such an increase in complexity. Only an examination on a case-by-case basis could provide an answer to this question for a specific Convention. The present document does not set out in any way to pre-empt this case-by-case examination; it is merely trying to provide the Governing body, as requested, with the whole range of technical possibilities so that it might be able to choose, in full knowledge of the facts, the necessary course of action if, and only if, it concluded that there was a need to take action. The factors determining these courses of action are described in two parts. The first examines the reasons and implications of the fact that the ILO Conference, while having the power to adopt Conventions, does not have that of nullifying the legal effects. The second part envisages possible ways of remedying this situation.

Limits of the Organization's power to nullify the legal effects of Conventions if has adopted

(*a*) Legal theory behind these limits and practical consequences

The Conference very soon found itself faced with the need to remedy the shortcomings, failure or outdated nature of instruments it had adopted at its first sessions. But neither the Constitution nor the first ILO Conventions foresaw the possibility of amending them. However, given that nothing prevented the Conference from adopting a new Convention on a particular subject already covered, the question of what to do with the former Convention was raised.

This is not the place to review in detail the theoretical discussions to which this problem gave rise in the years 1928-1929. It should merely be recalled that the Conference's refusal to accept that it had the power to abrogate a revised Convention was based on an overall approach to the legal nature of these Conventions. According to this approach, initially put forward by the Legal Adviser, it was not possible to take the "quasi-legislative" character of international labour Conventions too far, although it was acknowledged to have "exercised a certain influence on the creation of the International Labour Organization".[46]

Once adopted, international labour Conventions took on a life of their own, independent to a great extent of the Conference which had given birth to them; indeed, because they had been ratified, they became an "actual contract between States" which the Conference had no authority to change.

However, another school of thought opposed this "contractual" approach, believing that Conventions should rather be considered as "conditional international laws"[47] whose ratification created first and foremost obligations towards the Organization. After a scholarly and in-depth discussion, the Governing Body and then the Conference tacitly came round to the first approach, for reasons that had as much to do with its practical repercussions as with its intrinsic merits.

What matters for the purposes of the present study is to understand that the practical consequences of this "contractual" approach are twofold. Not only does it prevent the Conference from directly altering the effects, in other words the obligations derived from the revised Convention, but it also restricts the Conference's prerogatives with respect to the Convention as the source of possible new obligations. This distinction needs to be explained.

Inability to alter the obligations created by the revised instrument

Under the reasoning of the contractual approach, the obligations ensuing from the ratification of a Convention cannot be nullified by the will of the Conference, but only by the will of the parties to the "contract", who may express this will in two ways:

- By denunciation, which can only occur at the time and under the conditions provided for under the Convention;
- By the ratification of a revising Convention, but only if the revised Convention had provided for the possibility and the revising Convention has decided on such termination.

Both these ways of proceeding are uncertain because although the Organization may encourage States to denounce a Convention to terminate obligations that it no longer considers contribute to any real progress (a rather clumsy, if not paradoxical, way of coping with the problem), it cannot oblige them to do this or remove the various obstacles or red tape that might stand in the way.

Limits on the Conference's power to dry up the source of future obligations

Even it all effects, i.e. the obligations created by a Convention, could be brought to an end at a given moment by the parties, this would not prevent the instrument from "being revived"[48] by new ratifications. Contractual theory nevertheless acknowledges that the Convention for the future by closing it to ratification. But this sterilization can only be as a result of a Convention which revises the Convention to be sterilized; and such a revision is not always possible for two sets of reasons:

- Reasons of a legal nature in the case of Conventions adopted before 1929 which do not contain a revision clause. Given that, according to the contractual approach, they became "the property of the States ratifying them", they are supposed to be completely outside the Conference's control and cannot therefore in principle even be closed to ratification. In order to circumvent this situation, the Minimum Age Convention, 1973 (No. 138), resorted to a very complex procedure, based on article 54 of the 1969 Vienna Convention on the Law of Treaties,[49] to ensure that Conventions on minimum age predating 1929 would be closed to ratification; under this procedure, the various Conventions relating to minimum age "shall be closed to further ratifica-

tion when all the parties thereto have consented to such closing by ratification of this Convention or by a declaration communicated to the Director-General" (article 10, para. 3);

— Reasons of a practical nature or expediency in so far as, even for Conventions adopted after 1929 which contain a revision clause, it might be unwise or inappropriate to proceed with revision because the fact that the original text is outdated might be attributed to its subject matter rather than its actual content (sometimes even to the fact that the Convention has fulfilled its objective), in which case a revision would have no sense. Two examples suffice to illustrate this point. The first arose recently with respect t to the proposed revision of the Wages, Hours of Work and Manning (Sea) Convention (Revised), 1958 (No. 109). It was thought preferable, to avoid condemning the revising text to the same fate as the text it would revise, to limit it to the matter of hours of work and manning to refer the issue of wages to a Recommendation. The second example concerns specific Conventions applying to non-metropolitan territories (understood as colonies); their amendment by way of revision would be to no purpose.

The table enclosed in the appendix gives a clearer picture of the cumulative aspect of the problem. The section "left dormant" also reflects the adjustments that have had to be made in practice, the scope of which must be dealt with separately.

(*b*) Attempts to extend ways of dealings with outdated Conventions and their limitations: the solution of leaving "dormant"

It may be seen from the concepts described above that the legal effects of any Convention in force are in principle the following:

— First of all, the revised Convention, provided that it is not the subject of a Convention revising it and closing it to ratification, may continue to be ratified. As the enclosed table shows, this has occurred quite frequently even for Conventions left dormant, and not only in the event of succession of States;

— From a more basic standpoint, the Convention makes it compulsory for all parties to apply its provisions, failing which they are subject to constitutional procedures under article 24 or article 26 of the Constitution;

— Finally, it contains the obligation to report under article 22 of the Constitution.

This latter obligation is the one – the only one – which is subject to certain adjustments when a Convention is left dormant. In 1959, the Committee of Experts put forward the proposal that as article 22 only provided for an annual report and not necessarily an annual report on each Convention, reports should not be requested on all ratified Conventions every year. This left the "door wise open" for further adjustments in 1976 and 1993, which introduced a "periodicity of reporting" varying according to the importance attached to the Convention, while also allowing for reports to be requested outside such periodicity as well as exemptions (GB.258/LILS/6/1).

It may be observed from this that practical adjustments have this their limitations. First, they do not cancel the basic obligations derived from the instrument: secondly, although they might lessen on procedural obligations, this might be at the expense of an interpretation undermining the inviolability of constitutional obligations. It is therefore up to the Governing body to examine whether, in cases when the Organization has truly reached the conclusion that the obligations deriving from a given Convention no longer have any real influence on social progress, it might not be preferable from the standpoint of the credibility and clarity of the standard-setting system, to be able to take all the steps that follow from that conclusion. It must of course be considered whether this involves resorting to measures which are out of proportion to the actual problem in hand. This matter is examined below.

Possible solutions

The first part of the present report has shown that within the framework of the contractual approach, the legal effects of a Convention can only be totally eliminated by a combination of two actions: one is the "sterilization" of the Convention, which must necessarily take the form of a revision, to render the Convention inoperative as a source of future obligations; the other action is to nullify the existing effects through denunciation of the Convention or ratification of a revising one.

It might of course be ventured that the simplest way of addressing the complications and vicissitudes of this dual operation would be to review and perhaps replace the "contractual" approach, which is the cause of this operation, by the "quasi-legislative" approach already advocated before the Second World War, with weighty arguments to recommend it. Such a course would however be neither desirable nor realistic particularly given that the role of the Governing Body is not to decide between various legal theories. This having been said, two approaches might logically be envisaged; that of adjusting more efficiently the measures available to deal separately with the Convention and its effects; and that of delegating power to the Conference, which, without taking a position in favour of one or other theory, would allow the Conference to deal simultaneously with the source and the effects referred to.

(*a*) Adjustment of measures to nullify the effects and source separately in the case of outdated Conventions

With respect to the effects, by stepping up the "exit" procedure in force

It seems scarcely feasible to change the principle whereby only parties to a Convention can cancel the effects of their ratification by denouncing the Convention, or whenever possible, by ratifying the Convention revising; but it might be possible to speed up the procedure at least on a point of detail. A Convention for which the number of ratifications has fallen below the necessary number for its entry into force (two for all the non-maritime Conventions) is still considered to be in force. However, this situation seems to be the result of an oversight. Article 55 of the 1969 Vienna Convention on the Law of Treaties does indeed provide that "unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number

necessary for its entry into force", but this text reflects the practice of multilateral treaties, which generally require a large number of ratifications to enter into force; it certainly does not envisage the case when the required number being two as for international labour Conventions the lower number is one and the application of the rule would lead to a situation which was in accordance with neither the usual interpretation of the term "Convention" nor the contractual theory itself, which implies at least two parties. Consequently, nothing would prevent the Conference from confirming that a Convention ceases to be in force when the number of ratifications falls below that prescribed for its entry into force.

By varying the methods of "sterilization" of the Convention as a source of obligations

According to current theory and practice, this sterilization is only possible, as seen above, by means of (*a*) a revising Convention and then (*b*) only with respect to Conventions adopted after 1928. It was only from that date onwards that Conventions contained a standard revision clause. The question might have been raised – and there was no shortage of people opposing the contractual approach – as to how this revising clause could authorize the Conference to close the revised Convention to ratification while, under the reasoning inherent in this approach, the parties were supposed to become "owners" of the Convention. However, if the view is taken that the standard revision clause is tantamount to an advance delegation given by the ratifying States to the Conference of the power to change the content of their rights, there is no contradiction. Be that as it may, the matter raises two questions which affect the possibility of relaxing or making more flexible the constraints of this theory.

First, it is worth bearing in mind that, without detracting from the "contractual" theory and practice, it is highly questionable to conclude that Conventions are the "property" of the parties. The fact that the ratification of a Convention creates rights and obligations between them does not mean that they become owners and can demand that the instrument be kept open with a view to further ratifications whatever the Organization's opinion as to its actual utility. What is more, the approach seems to take scant account of the fact that membership of the Organization is a prerequisite for adhering to an international labour Convention, thus implying rather that the Convention can have no effect outside the fold – and therefore independent of the will – of the Organization. Finally, there is nothing in the general law of treaties to suggest that a Convention must be maintained, particularly since the 1969 Vienna Convention on the Law of the Treaties, which may apply also to treaties adopted within an international organization, stipulates that it is without prejudice to any relevant rules of the organization.

While continuing to consider that obligations deriving from a Convention remain, in spite of its revision, outside the control of the Conference, it would therefore seem perfectly acceptable that the Conference acknowledge that it has the right to decide by an acte contraire i.e. an instrument to undo what it has done, adopted in conformity with the established procedures and majority requirement, that a Convention is no longer apt to serve as a basis for new obligations. This decision to abrogate for the future would be tantamount to instructing the Director-General not to register any new ratifications of this Convention. It would also settle the case of Conventions predating 1929 considered obsolete which, according to current doctrine, are doomed to be self-perpetuating.

If the Working Party is not prepared to accept this conceptual aggiornamento of limited scope, it could, at least for Conventions after 1928 ensure that they are neutralized while strictly adhering to the "contractual" approach, through a "killer Convention". This would be a revising Convention limited to closing eh revised Convention to further ratifications, without replacing any of substantive provisions. This "killer Convention" (which could, as the case might be, cover several Conventions at once) would enter into force under the same conditions as other Conventions (two ratifications) and, similar to any other revising Convention, would also close the revised Convention to further ratifications.

(*b*) Solutions for simultaneously nullifying the obligations under a Convention and their source

A Convention-related solution

In the current constitutional set-up, an operation of this nature is, for the reasons given above, impossible in the case of Conventions in force. However, it would be perfectly feasible for future Conventions on the basis of an additional final clause stipulating as in the case of revision, that States, when ratifying the instrument, would agree in advance to the Conference having the power to abrogate, for the future as for the past, the effects of the Convention. Indeed, given that States party to a Convention may agree that the Conference has the right to change the alleged property rights ensuing from ratification there is no reason why they should not a fortiori delegate to the Conference in advance the authority of releasing them from the Convention under a specific clause to this effect. Moreover, this theoretical possibility was expressly brought up in the discussion before the War.[50] This suggestion was not taken up merely because at the time the practical advantages of retaining the former Convention seemed to outweigh the disadvantage. Looking back, this decision seems even more regrettable given that such a clause would have been limited to enabling the Conference to proceed with such an abrogation after a case-by-case analysis; it would have in no way implied the automatic abrogation of the revised Convention by the mere fact of its revision. In other words, by failing to go ahead with this idea, the Conference deprived itself of the possibility, which it might find extremely useful today, of canceling all the legal effects of a Convention in cases where it concludes that the Convention had failed to attain its objective or, on the contrary, that it had fully attained that objective.

Abrogation on the basis of a new constitutional provision

The only way to cancel both the effects and cause at the same time – existing Conventions as well as future Conventions – would be to authorize the Conference to do so by amending the ILO Constitution. This solution is far less drastic than might seem at first.

From the technical and political standpoint, this solution might appear a considerable task because, according to article 36 of the present Constitution, it would require a majority of two thirds of the votes cast by the delegates at the Conference for its adoption, as well as a majority of two thirds of ratification including those of five of 10 Members of chief industrial importance. The general impression that these conditions would be almost impossible to meet is based on experi-

ences which, however, are completely unrelated and occurred in an entirely different context. In the case in point, the amendment would not aim at restricting rights or increasing obligations; it would rather create the possibility of all members to extricate themselves from the obligations deriving from ratified Conventions without having to go through all the manoeuvres and vicissituedes of denunciations at the Organization's instigation or of "killer Conventions". If the Conference embarked on this course, the Office could regularly ensure the follow-up by carrying out appropriate ratification campaigns at certain intervals.

From the legal standpoint, this solution would make it possible to circumvent the obstacles inherent in the contractual approach without, however, having to give it up. In fact, the contractual approach was only able to prevail because the Constitution as indeed the Conventions themselves, was silent as to the Conference's possibility of abrogating instruments. If this gap were to be filled, it would also lose its raison d'etre.

If the fear of carrying out a sort of retroactive "expropriation" makes the Conference hesitate to accept that it has such a power with respect to Conventions already adopted and in force, it could easily assuage these misgivings by adopting an "opting -out" clause giving the States parties to the Convention the possibility of remaining bound by the instruments provided that they express their wishes to this effect within a specific time limit after the decision to abrogate. In a nutshell, such an amendment could, for instance, provide that: "With respect to a specific item included in its agenda under the conditions provided for by this Constitution, the Conference may, by a decision adopted by a majority of two thirds of the delegates present, abrogate any Convention, including the obligations it has created for all the Members having ratified it, with the exception of those Members which, within 12 months from the date of abrogation, shall have informed the Director-General of their wish to remain bound by the Convention." (A drawback in having such a clause is that it might be tantamount to indirectly and gratuitously consecrating the "contractual" approach in the Constitution.)

When making an overall assessment of the merits as well as the difficulties inherent in this constitutional approach, it is important to bear in mind the symbolic value that the power conferred on the Conference would have on the image of international labour Conventions; they would cease to seem a mere juxtaposition of more or less disparate treaties and be viewed as a real body of international labour "legislation".

12 February 1996

Possible amendments to the Constitution and Conference Standing Orders to enable the Conference to abrogate or otherwise terminate obsolete international labour Conventions[51]

Introduction

At the 261st session of the Governing Body, the Working Party on Policy regarding the Revision of Standards, on the basis of an Office document, examined the legal problems posed by the abrogation or termination of international labour Conventions considered obsolete and the possible methods of procedure.

Of the various policy options which had been presented to resolve these problems without disrupting the long-established constitutional practice of the Organization, the Working Party expressed its preference in principle for the solution of a constitutional amendment authorizing the Conference to proceed to such an abrogation, since this appeared to be both the most correct from the legal point of view and the most effective.[52] When they entrusted the Office with drawing up more specific proposals with a view to such an amendment, however, members on various sides expressed the concern that the proposed amendment should be accompanied by a number of guarantees (the need for which, moreover, had already been mentioned in the Office document) so that the abrogation of a Convention could occur only at the end of a carefully considered process, and to ensure that it benefited from the broadest possible support.

The proposals indicated below have been drafted to give effect to this policy agreement with account being taken of these concerns. They are grouped around three points: the purpose and scope of the constitutional amendment; the procedure for its application (and the implementation of the abrogation itself); the proposed texts as they result from an analysis of the two preceding points.

Purpose and scope of the constitutional amendment

As appears form the preceding document, proposed constitutional amendment does not seek as such to abrogate Conventions which have become or are recognized as obsolete; it simply seeks to authorize the Conference to proceed to such abrogation in cases in which it considers appropriate. The precise purpose of this amendment (i.e. the Conventions to which the abrogation could be applied) as well as the scope of its effects should, however be carefully indicated.

(*a*) Concerning the purpose of the abrogation: instruments recognized as obsolete

Conventions in force and Conventions not in force

Under the term "abrogation" the constitutional practice of the Organization and the previous documents on the subject have tended to lump together the abolition of all Conventions considered as obsolete, whether or not they are in force. Although the Constitution does not make such a distinction or, more exactly, does not say anything about the conditions of entry into force of Conventions (these conditions appear in the final provisions of Conventions), the situation is not at all the same in each case. Beyond the obligation of placing an instrument before the competent authority, a Convention which has not come into force does not create legal obligations either with regard to other member States or to the Organization itself. If it is not closed to ratifications, it most specific legal effect is that it may receive other ratifications (even if such ratifications have been discouraged, the Director-General does not, however, have the power to refuse them) and thus enter into force at any time.

The fact that a Convention is meant to enter into force exists, however, only through the will of the Conference, expressed in the final clauses of the Convention. This is why, even within the framework of the orthodox contractual doctrine of the pre-war period, it had been noted that the Conference could,

by an acte contraire, decide to withdraw a Convention from further ratification if, in the absence of the required number of ratifications, it would not or no longer result in obligations between States.[53]

If is clear that if a constitutional amendment which authorizes the Conference to abrogate Conventions in force is adopted, this pint will no longer have any importance at all since it would be subsumed by such an amendment. It would, however, be regrettable if the impression were inadvertently given that this amendment is also necessary to authorize the Conference to withdraw Conventions which have not entered into force, in particular if the constitutional amendment in question took a long time to come into effect. This is why it seems timely to indicate in an appropriate manner that this amendment does not in any way prejudice the power of the Conference to close to any further ratification a Convention which has not come into force and to thus cancel that Convention's capacity to produce its legal effects. Since the concept of coming into force does not appear in the Constitution, it would seem preferable to establish an appropriate distinction between abrogation and withdrawal in the Standing Orders.

Conventions recognized as obsolete

To meet the concern expressed during the preliminary discussion, the amendment should be conceived in such a way that the attribution to the Conference of the power to abrogate Conventions in force does not appear as discretionary, but strictly limited to obsolete Conventions. To reflect more specifically this idea, it would appear useful to stipulate that the amendment should concern Conventions which have lost their purpose (including cases in which their objective had been fully met) or which no longer contribute to promoting the goals of the Organization. Furthermore, it must be perfectly clear that this evaluation should be made for each Convention taken separately. This matter will be examined in more detail in the discussion on procedure.

Recommendations

There has been a tendency so far to set aside this question since as Recommendations do not create an obligation in the strict sense for either States or the Organization (since the supervisory machinery is not applicable and article 19.6(*d*) is discretionary), their obsolescence does not have any practical consequences. However, once the problem of the abrogation of Conventions is examined, it is no longer possible to avoid raising the question of obsolete Recommendations. Within the logic of the considerations set forth in document GB.265/LILS/WP/PRS/2 as well as those given above, it may however be considered that a constitutional amendment is not necessary for this purpose, since the Recommendation does not create any obligations between States, and a simple acte contraire would be sufficient to withdraw it if it became obsolete. This process could thus be regulated in the Standing Orders.

(*b*) As regards effects: The possibility and limits of a "contracting out" clause

The question as outlined in the preceding document concerns whether the amendment may or should cancel the obligations created by the Convention even for members which wanted to remain bound by it or whether at least pro-

vision should be made for a "contracting out" clause for such members. A related concern was expressed concerning the question of whether to some extent such an abrogation would not infringe the will of national parliaments (or other competent authorities in the matter) which have made the very positive effort of giving their approval to the ratification act.

Even if a large majority seemed at any event to favour a full abrogation power without any "contracting out" clause, it would appear useful to introduce a distinction between the effects of abrogation between the parties bound by the Convention and its effects with regard to the Organization. This distinction would seem to be able to satisfy the concerns expressed and allow the widest possible consensus to be achieved.

The full abrogation of the Convention could be seen as covering two elements: the abrogation of the Convention as an international labour Convention comprising, under the Constitution, certain machinery for its application, and the abrogation of substantial obligations created by the Convention, including the parties which wish inter se to remain bound by it.

Now it must be clear in this respect that there is nothing in treaty law which allows ILO, even through recourse to a constitutional amendment, to prevent States parties to a Convention which wish to remain bound inter se by the obligations resulting from this Convention to decide to do so. It must also be clear that the abrogation of the Convention is not at all supposed to affect the national legislation which gives it effect if the member does claim in this respect the rights granted under the Constitution in its current wording, and to participate with all other members in the adoption of a constitutional amendment to alter these procedures.

In the light of this distinction between the two kinds of procedure, it may now be possible to determine in a manner which is more easily acceptable to members as a whole the purpose and content of the "contracting out" clause, the purpose of which would not be one of purely and simply maintaining abrogated Conventions for members which wish to remain bound by them, but to stipulate that the abrogation of a given Convention would not prevent those States which formally expressed the desire to do so to remain bound inter se by the obligations resulting from this Convention without its application mechanism. Such a solution would, it is import to emphasize, be very close to that already provided by article 21 of the Constitution, whereby if any Convention fails to secure the support of a two-thirds majority, any of the States accepting it may agree "to such Convention" among themselves; in this case, the Director-General shall merely transmit the Convention thus concluded for registration to the Secretary-General. Thus, it can be said that the situation in which a Convention is abrogated, insofar as this means that the Convention no longer has the support of two thirds of the Conference, is not unlike that in which a Convention does not achieve the majority of two thirds of the votes of the Conference for its adoption.

(*c*) As regards the conditions for the adoption and entry into force of the amendment: alternative standard clause

If the Working Party confirms its interest in the solution of a constitutional amendment, it should at the appropriate time recommend the Committee to propose to the Governing Body to place the matter on the Conference agenda.

It goes without saying that the conditions for the adoption of the amendment instrument by the Conference and its entry into force will be those prescribed by article 36 of the Constitution, respectively at the time of the said adoption and when, and the said adoption, the threshold(s) required by the article for entry into force is reached.

As indicated in the document previously placed before the Working Party, these conditions should not, given the purpose of the amendment and provided that it is supported by an appropriate campaign, create insurmountable problems. It may however be asked whether, as a measure of precaution, it might not be appropriate to provide all Conventions adopted in the further (following the adoption of the amendment instrument and until its entry into force) with a clause authorizing the Conference to abrogate them. This clause would provide a kind of insurance against the risk of future Conventions lengthening the list of Conventions which have become obsolete and yet which have remained in force in the – rather unlikely – event that the amendment did not prosper. This standard clause could reflect in substance the elements of the procedure applicable within the framework of the constitutional amendment. For information purposes an example is given in the appendix.

Procedures and methods for applying the power of abrogation

The guarantees required by the Working Party may be sought at two levels: that of procedure and that of the majorities required for abrogation.

(*a*) Procedure

It appears from the document, as well as its discussion, that there is broad agreement on the idea that the abrogation of a Convention is an act as serious and important as its adoption and that it should not be decided lightly; it must be inspired by the principle of the parallelism of forms and procedures. This has a number of specific consequences.

First, the act of abrogation must be individualized (even if it is, of course, conceivable that several Conventions could be grouped together within the same abrogation process). This means that for each Convention the abrogation of which is being envisaged, the Governing Body must, as in the case of a new Convention, decide whether the matter should be placed on the Conference agenda on the basis of an Office report, which would be the equivalent of the "law and practice" report for a new Convention.

Once the obsolete nature has been recognized, the Governing Body should proceed to the placing of the item on the Conference agenda and the Offices should prepare a report based, as for the adoption of a new Conventions, on consultations with all members as well as a proposal for discussion and decision; since there would be no need to weigh carefully the content of the proposed provisions one after the other, but to confirm the obsolete nature of a text as a whole, the discussion procedure of the report and propsal could take the form of a simplified version of the single-discussion procedure, it being understood that the Conference could make use, much more so than in the case of adoption of the option to proceed directly to a plenary examination of the question, without sending it to a technical committee.

To apply this procedure, it would be necessary to complete the relevant provisions of the Standing Orders of the Governing Body and of the Conference Standing Orders. As regards the latter, these additional provisions could logically be placed after the specific provisions (articles 44 and 45) concerning the revision of Conventions and Recommendations in a new article, which could be entitled "Abrogation and withdrawal of Conventions and Recommendations".

It should be emphasized in this respect that the withdrawal of a Convention which has not come into force would follow the same procedure, the only difference being, as noted above, that legally the Conference would not need any constitutional authority to proceed. As a simple solution to the problem mentioned in the first part, it would be sufficient for the Conference, by adopting the corresponding amendments in part III, to note that as regards abrogation, this amendment will take effect only at the time of entry into force of the constitutional amendment authorizing the Conference to proceed.

(*b*) Required majorities

In order to strengthen the guarantee that abrogation decisions will not be taken lightly, the Working Party has discussed the possibility, mentioned in the previous document, of providing for a conditional majority, or even consensus; this concern reflects the quite legitimate desire (even if it may at first sight seem theoreticak) to prevent a Convention being abrogated against the unanimous opinion of a group. This desire may however be perfectly taken into account without affecting the constitutional provisions and the very delicate balance which they establish concerning important decisions. This system combines the requirement of a two-thirds majority with the equally very important requirement of a record vote.

While abrogation is an act as serious as that of adoption, it is not a more serious act, and subject to what is proposed in the following paragraph, there does not seem in the end to be any reason to require a conditional majority. Furthermore, since it is a serious act, each government and non-government delegate must be committed individually. This is why it appears important to maintain the record vote rather than the anonymous system of consensus during the final vote at the Conference.

That being said, the legitimate desire to prevent the possibility of a coalition of two groups proceeding to abrogation against the desire of the third may and must be taken into account. The simplest and most economic means of doing so and one which would be most consistent with the constitutional balance mentioned above would be to introduce this guarantee of consensus at the upstream stage, i.e. when the Governing Body must decide to place the matter on the Conference agenda.

The Standing Orders of the Governing Body stipulate that when the Governing Body discusses for the first time the inclusion of an item on the Conference agenda, it cannot, "without the unanimous support of the members present, take a decision until the following session". It could be stipulated in a new provision, which would follow the current article 12, that when the matter on the agenda concerns the abrogation of a Convention, the decision should as far as possible have to be taken by consensus or, failing that (during the second

discussion of the proposal), by a three-quarters majority of the members of the Governing Body with the right to vote. This formula would seem preferable to that of a pure and simple consensus; it would encourage without the risk of the latter becoming a veto.

8 October 1996

2. INTERNATIONAL LEGAL STATUS OF THE INTERNATIONAL SERVICE FOR NATIONAL AGRICULTURE RESEARCH FOR THE PURPOSES OF ARTICLE III, PARAGRAPH 5, OF THE STATUE OF THE ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL LABOUR ORGANIZATION

Note to the Programme, Financial and Administrative Committee of the Governing Body of the International Labour Office[53]

By a letter dated 29 November 1995, the Director-General of the International Service for National Agriculture Research (ISNAR) notified ILO of the recognition by ISNAR of the jurisdiction of the Administrative Tribunal of ILO, in accordance with article II, paragraph 5, of the Tribunal's Statute.

Under its Statute, the Tribunal is competent to hear complains against any other intergovernmental organization approved by the ILO Governing Body which recognizes the Tribunal's jurisdiction and Rules of Procedure.

ISNAR was established by a Memorandum of Understanding, dated 31 October 1979, between an intergovernmental organization and a subsidiary body of the United Nations, the International Bank for Reconstruction and Development and the United Nations Development Programme. Under the Memorandum, ISNAR forms an integral part of (Consultative Group on International Agricultural Research (CGIAR) system, whose members comprise 34 States, four foundations and 11 international and regional organizations. Its purpose is to promote the development and strengthening of national agricultural research capacities in developing countries. Its principal organs are Board of Trustees, consisting of one member appointed by the host country, four members appointed by the CGIAR after consultation with the Board, eight members elected by the Board, having regard to certain criteria, and the Director-General as a member ex officio; and the Director-General. According to the Constitution, the members of the former, except the Director-General, serve in their a personal capacity and are not considered, nor do they act, as official representatives of Governments or organizations. On 2 June 1980, the organization concluded a Headquarters Agreement with the Netherlands, an international treaty registered with the United Nations, recognizing its juridical personality and, as it does for its staff, the privileges and immunities normally recognized for intergovernmental organizations and their staff. It is expected to employ some 95 officials.

Given the above-mentioned special institutional features ISNAR (the composition of its Board of Trustees and the fact that is was established by an "inter-organizational" agreement), the Office has sought additional information from

the Legal Adviser of the Foreign Ministry of the host country in order to ascertain that it could be considered as an organization under public international law which meets the requirements of the Tribunal's Statue. The categorical reply was that ISNAR does indeed possess full international juridical personality and that the host country considers it to be an "intergovernmental organization" within the meaning of the Statue of the Administrative Tribunal.

In view of the commonly accepted meaning of the term "intergovernmental organization", as opposed to organizations established by economic integration agreements, as referring to organizations set up by an agreement concluded among States and in which "decision-making powers are in fact exercised by representatives of Governments" (H.G. Schermers and N. Blokka, International Institutional Law (The Hague, Nijhoff, 1995), para. 59.), the latter affirmation, even if it is made by the authority which, a priori, is most competent to express an opinion on the matter, cannot be accepted without first clarifying certain points in the light of the origin and raison d'etre of the above-mentioned provision of the Tribunal's Statute, since the present case could become a precedent, given the likelihood of such atypical models of International organizations proliferating in the future.

Access to the Administrative Tribunal of ILO was introduced for intergovernmental organizations other than the ILO following a specific request by WHO in 1949, two years after the International Labour Conference accepted the "legacy" of the Administrative Tribunal of the League of Nations. The preparatory work does not shed any particular light on what was meant by the expression "intergovernmental organization" ("organization interetatique" in French). However, in the light of subsequent practice, two considerations would seem to be particularly relevant in clarifying the intended meaning.

First, ILO tacitly agreed – and this was to a certain extent consistent with its calling as perceived by other organizations – to take on the role of a sort of international public service dispensing international administrative justice for organizations and their officials which, because of their own status, had no other way of settling their disputes, in particular before national jurisdictions. It should be pointed out in this respect that the Governing Body accepted one organization (Interpok) whose intergovernmental character was the subject of some debate and had to be verified at the time by referring the matter to the Legal Counsel of the United Nations.

Second, as a corollary, these organizations provide sufficient guarantees of reliability and dependability to ensure that the decisions handed down are properly enforced. Seen from this viewpoint, the concept of an intergovernmental organization as it is traditionally understood, i.e. to mean an organization composed of States, takes on a special meaning in so far as it provides such guarantees in principle (even if they are not always absolute, as was unfortunately clear from the way in which the last judgement of the Tribunal of the League of Nations in the Mayras case was handled).

It would appear to be possible, however, to reconcile these considerations without initiating the procedure for the amendment by the Conference of the Tribunal's Statue in order to clarify the situation. When ISNAR was established on its territory, the host State made sure in the Headquarters Agreement that, on one hand (article 19), any disputes arising out of the contracts concluded by ISNAR would be submitted to arbitration and, on the other (article 17), that

ISNAR would cooperate with the authorities of the host State in order to facilitate the proper administration of justice. In the light of its recent consultations with eh host State, the Office is of the opinion that these commitments, coupled with the host country's affirmation of the intergovernmental nature of the organization in question, appear to provide sufficient guarantees, even if they are not those that would arise out of a more classic intergovernmental structure. In the unlikely event that difficulties might arise in enforcement, nothing would prevent the Office or the complainant form referring the case to the authorities of the host country with a view to applying article 17 mentioned above in respect of a judgement handed down by the Administrative Tribunal of ILO, in the same way as any other applicable judicial decision.

6 November 1996

3. PARTICIPATION OF THE SPECIAL ADMINISTRATIVE REGION OF HONG KONG IN ILO ACTIVITIES – APPLICATION OF ILO CONVENTIONS AND RECOMMENDATIONS TO HONG KONG SAR

In reply to your request, I should like to refer to previous correspondence to the Government (bearing the dates of 27 March 1996, 15 June 1995 and 21 April 1995), as well as to the exchange of communications published in the Official Bulletin of ILO in 1990 (vol. LXXIII, Series A, No. 1). These include the Declaration of the Government of the People's Republic of China communicated on 1 September 1989, which was notified to the States member of ILO.

The most immediate question concerns the participation of Hong Kong SAR in the Asian Regional Meeting that is to be held in the second half of 1997. As you know, the draft Standing Orders for the new regional meetings, which the Committee on Legal Issues and International Labour Standards has referred for approval by the Governing Body, contain a provision on the composition of regional meetings which is identical to the one governing the composition of regional conferences; both provide for "two Government delegates, one Employers' delegate and one Workers' delegate for each State or territory invited by the Governing Body of the International Labour Organization to be represented" at the meeting. In relation to this, the Declaration of the Government of China referred to the continuation of the participation of the Hong Kong Special Administrative Region in International Labour Organization activities. As I think we had occasion to explain orally to the Chinese delegation, the practice has been in the past, and in particular at the Eleventh Asian Regional Conference (Bangkok, 26 November – 2 December 1991), that a tripartite delegation from Hong Kong, invited through the Government of the United Kingdom (which itself had no delegation), attended. A copy of the pertinent page form the Final List of Members of Delegations from that event is enclosed for reference. As indicated in earlier correspondence, the tripartite delegation form Hong Kong has been included within the United Kingdom delegation to the International Labour Conference. Since the Declaration states that, "With effect from 1 July 1997 the Hong Kong Special Administrative Region, as an inseparable part of the territory of the People's Republic of China, will not be and should not be

deemed to be a 'Non-Metropolitan Territory'", the Office will be issuing an invitation to the Government of China. It would then be up to the Government, in the light of the exchange of communications which appeared in the Official Bulletin, to take steps regarding the participation of a tripartite delegation from Hong Kong SAR, within its delegation to the Asian Regional Meeting and sessions of the International Labour Conference in accordance with this exchange.

The second matter raised concerns government reports regarding the application of Conventions and Recommendations to Hong Kong SAR. The Declaration refers in this regard to continuing to have international labour Conventions applied to the Hong Kong Special Administrative Region and for this purpose having the relevant articles of the Constitution of the International Labour Organization applied, by analogy, to it. In the light of the Government's Declaration as regards the status of the Hong Kong Special Administrative Region as from 1 July 1997, any comments which might be made by the Committee of Experts on the Application of Conventions and Recommendations in relation to the application of Conventions in Hong Kong SAR for a period after 1 July 1997 would appear under "China" in section I of part two of the Committee's report to the International Labour Conference, with an appropriate footnote referring to the above-mentioned Official Bulletin. In its letter 27March 1996, the Office provided the Government of China with a list of the Conventions that had been declared applicable to Hong Kong by the Government of the United Kingdom.

21 November 1996

NOTES

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

[2] ICJ Reports, 1989, Applicability of article VI, section 22 of the Convention on the Privileges and Immunities of the United Nations, para. 52.

[3] United Nations, Treaty Series, vol. 33, p. 261.

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

[5] "Executing agency" is defined in UNDP financial regulation 2.1(h) to mean an entity to which the Administrator (of UNDP) has entrusted the overall management, by national government authorities or by a United Nations agency, of a programme/project, along with the assumption of responsibility and accountability for the production of outputs, achievement of programme/project and for the use of UNDP resources.

[6] United Nations, Treaty Series, vol. 33, p. 261.

[7] See also Report of the Secretary-General on the review of the efficiency of the administrative and financial functioning of the United Nations, "(A/C.5/47/88).

[8] An "implementing agency", if other than the executing agency, shall mean an entity engaged by an executing agent and accountable to the executing agency to procure programme/project outputs (UNDP financial regulation 2.1 (*i*)).

[9] "Agency support cost" shall mean the expenses incurred by an executing agency as a result of its administration of programme activities financed from UNDP funds (UNDP financial regulation 2.1.A. (*i*)).

[10] TD/63/Rev. 2

[11] See A/50/684, para. 19.

[12] See the report of the Secretary-General on the "effective planning, budgeting and administration of peacekeeping operations (A/48/945 (Coor.1) and, para. 67; see also A/ 46/185, para. 13.

[13] See A/45/594, para. 47 (*b*). For the purpose of ensuring that the immunity of the contingent personnel from the criminal jurisdiction of the host State does not result in a jurisdictional vacuum, the bilateral agreement between the United Nations and the troop-contributing country ensures that the latter is prepared to exercise this jurisdiction as to any crime or offence with might be committed by a member of its military contingent. See A/46/185, paras. 24 and 25; see also A/3943, para. 136.

[14] A/46/634/Rev. 1.

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

[16] Ibid., vol. 993, p. 3.

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

[18] ICJ Reports, 1989, Applicability of article VI, section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion of 15 December 1989, para. 55.

[19] Official Records of the General Assembly, Sixth Session, Annexes, agenda item 41, document A/C.5/L.172, para. 13.

[20] See report of the Secretary-General dated on 8 December 1995 reform of the procedure for determining reimbursement to Member States for contingent-owned equipment (A/50/807) of, para. 22.

[21] See Appleman, J.A., Insurance Law and Practice, vol. 4, rev. ed. (St. Paul, Minn., 1969) sect. 2123, p. 35.

[22] Ibid, sect. 2213, p. 135 and sect. 2211, p. 128.

[23] See report of the Advisory Committee on Administrative and Budgetary Questions dated 7 November (A/41/7/Add. 6), recommending adoption of the self-insurance programme; see also General Assembly resolution 41/209 of 11 December 1986, confirming the recommendations of the Advisory to adopt the self-insurance programme.

[24] General Assembly resolution 1219 (XII) of 14 December 1957, entitled Financing of economic development."

[25] The Expanded Programme, on the other hand, was only authorized to receive government contributions (see, e.g., Economic and Social resolution 222 (IX) of 14 August 1949 (paras. 8 and 9), approved by the General Assembly in its resolution 304 (IV) of 16 November 1949).

[26] The present organizational structure and activities of UNDP are defined in General Assembly resolution 2688 (XXV), of 11 December 1970. In that resolution, the Special Fund and Technical Assistance components of the programme were completely merged (see, e.g., para. 13).

[27] See also General Assembly resolution 37/226 of 20 December 1982 on the "Operational activities for development of the United Nations system".

[28] The word "contributions" in this rule is used in the general sense and should be understood to mean a contribution in the form of a donation as provided in regulations 4.14 and 4.16.

[29] See, e.g., UNDP Governing Council decision 88/36, para. 22.

[30] Appendix B provides that staff at Headquarters who give up permanent resident status are entitled "to such of the allowances and benefits stipulated in rule 104.7" form such time as the non-immigrant status is acquired. This does not clearly indicate what is to be done in the case of a staff member who gives up non-immigrant status and acquires permanent residency status.

[31] In its resolution 49/241, the General Assembly also decided that it would "re-examine the issue of entitlement to repatriation grant and other expatriate benefits to staff members living in their home country while stationed at duty stations located in another country, in the light of the report by the International Civil Service Commission requested in section IID of [Assembly] resolution 48/224".

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

[33] The Secretary-General, in the case of UNICEF, delegated this authority to the Executive Director.

[34] The rationale behind engaging personnel under SSAs is the need for their expertise by the Organization and the temporary character of their services. In the case of UNICEF, the current administrative rules governing all types of SSAs are set out in UNICEF administrative instruction CF/AI/1991-11 of 23 December 1991. The SSAs explicitly set out that the legal status of experts on mission is that of independent contractors and cannot be considered in any respect as being staff members and employees of the United Nations, or UNICEF as the case may be.

[35] It is to be noted that the clause entitled "Legal status" of the UNICEF General Conditions for Contractors, which should be attached as part of the contract with any contractor, reads as follows: "The Contractors shall be considered as having the legal status of an independent Contractor vis-à-vis UNICEF. The contractor's personnel and subcontractors shall not be considered in any respect as being the employees or agents of UNICEF."

[36] By the resolution, the General Assembly requested the Secretary-General to make proposals to the Assembly on: (*a*) establishing legal and effective mechanisms to obtain recovery of misappropriated funds as recommended in paragraph 53 of the report of the Advisory Committee on Administrative and Budgetary Questions; and (*b*) seeking criminal prosecution of those who had committed fraud against the Organization.

[37] A/49/418, para. 32 (*d*).

[38] A/48/572.

[39] Although contracts also could be entered into "orally", we consider only contracts in written form. In this connection, we note that financial rule 110.22 requires that contracts and purchase orders for US $2,500 or more from single contractor be in writing.

[40] The Organization usually includes a provision in the RFP authorizing the United Nations to alter the conditions set forth in the RFP at any time during the procurement process. We do no address the enforceability of that provision in the present response.

[41] Charter of the United Nations, Article 104.

[42] ST/AI/416, para. 7

[43] Ibid, para. 11.

[44] ST/AI/376, para. 2.

[45] GB.265/LILS/WP/PRS/2.

[46] ILO, International Labour Conference, Twelfth Session, Geneva, 1929, vol. I, part III (annexes), pp. 733-734.

[47] Ibid., p. 763.

[48] According to the expression used by Mr. Morellet. See ILO; International Labour Conference, Twelfth Session, Geneva, 1929, vol. 1, part III (annexes). p. 743.

[49] United Nations, Treaty Series, vol. 1155, p. 331.

[50] See in this respect the Office proposals in ILO, International Labour Conference, Twelfth Session Geneva, 1929, vol. I, (annexes), pp. 755-756.

[51] GB.267/LILS/WP/PRS/1.

[52] GB.265/LILS/5, GB.265/8/2.

[53] See International Labour Conference, Twelfth Session, Geneva, 1929, Record of Proceedings, p. 743; the term abrogation refers to Conventions which have come into force; for Conventions which have not entered into force, such a procedure should not be described as abrogation but as "withdrawal". This is the term that is used in this connection below.

[53] GB.267/PFA/15/1.