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

Chapter VI. Selected legal opinions of the Secretariat 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)

PEACEKEEPING

1. Release of Board of Inquiry report to next of kin of deceased military personnel

Memorandum to the Military Adviser, Department of Peacekeeping Operations

This refers to your memorandum dated 10 November 2000, seeking our advice in connection with the request of the Permanent Mission of a Member State to the United Nations to release the report of the United Nations Interim Force in Lebanon (UNIFIL) Board of Inquiry in the above case to the next of kin of Private X.

With your memorandum, you forwarded to us, inter alia, a letter dated 30 October 2000 from the Military Adviser to the Permanent Mission, addressed to you. In that letter, the Permanent Mission recognized the Organization's policy pursuant to which a United Nations Board of Inquiry report is an internal document of the United Nations and may not be made public either in whole or in part. Nevertheless, the Permanent Mission inquired whether there are exceptions to this policy which would permit the [Member State] Department of Defence to release a copy of the report of the Board or part thereof to the next of kin of the late Private X. The Mission stated that solicitors for Mrs. Y, mother of Private X, had requested the [Member State] authorities to make available a copy of the UNIFIL Board of Inquiry report on Private X's death.

We note that Private X was killed in a shooting incident while serving as part of the [Member State] military contingent in UNIFIL. In that connection, we wish to recall that the policy concerning the release of Board of Inquiry reports involving personnel of a troop-contributing State is set out in the Note to Directors dated 26 April 1995, on the subject "Guidelines concerning Boards of Inquiry". Pursuant to the Note to Directors, a Board of Inquiry report may be released to the Government of a troop-contributing State in cases where the incident under investigation involves the personnel or equipment of that State and may have implications for the procedures, training or otherwise of that State. Furthermore, the Note to Directors makes it clear, inter alia, that a Board of Inquiry report is an internal document of the United Nations which has no particular legal standing and that, even when shared with a troop-contributing State, the report "remains nevertheless an internal docu-

ment of the United Nations and is for official use only and not to be made public in any way, including judicial or legislative proceedings".

Furthermore, the Note to Directors requires that when a Board of Inquiry report is provided to a Government in such cases, it be accompanied by a note verbale which includes the following sentence:

> "This report is an internal document of the United Nations and is being made available for official use only; it is not to be made public in any form either in whole or in part."

The Note to Directors also states, however, that exceptions concerning the release of Board of Inquiry reports "may be considered on a case-by-case basis (for example, in the interest of justice) in consultation with the Office of Legal Affairs".

The Organization has made exceptions to this policy in some recent cases by releasing to the families of victims of serious incidents the factual portion of the Board of Inquiry reports, which in most Board reports bears the title "Description of the incident" or "Narrative of events".

In the present case, the Board of Inquiry report was transmitted to the Permanent Mission of [Member State] under cover of a letter from your predecessor, dated 15 December 1999. In accordance with the Note to Directors, that letter advised the [Member State] Permanent Mission about the internal and confidential nature of the Board of Inquiry report, using the essence of the language from the sentence to be included in a note verbale, as quoted above.

In addition, we are aware that the [Member State] contingent conducted its own investigation, the results of which were contained in a Military Police report. We are also aware that the [Member State] contingent declined requests of cooperation with the UNIFIL Board of Inquiry and refused to allow that Board of Inquiry to interview a key witness from the Irish Contingent. Thus, the report of the UNIFIL Board of Inquiry relies entirely on and restates the [Member State] Military Police report.

Under these circumstances, consistent with the recent exceptions to the general policy, we suggest that the United Nations agree to the release to Private X's mother a copy of the part of the UNIFIL Board of Inquiry report entitled "Description of the incident", which gives a factual description of the circumstances of Private X's death. However, such copy of the "Description of the incident" should be accompanied by a letter from the [Member State] authorities informing Private X's mother that the UNIFIL Board of Inquiry relied entirely on the investigation conducted by the [Member State] Military Police.

28 November 2000

2. Question whether a State's air force and navy assisting in the deployment of that State's contingent in the United Nations mission area can be granted "experts on mission" status—Article 5.1 and article 7 of annex A to the Model Memorandum of Understanding—Security Council resolution 1320 (2000)

Memorandum to the Assistant Secretary-General for Peacekeeping Operations

I wish to refer to your memorandum of 29 November 2000 attaching a note verbale from the Permanent Mission of [Member State] to the United Nations, dated 28 November 2000. The note verbale states that a transport ship of the [Member State] navy and a transport aircraft of the [Member State] air force are going to assist in the deployment of the [Member State] contingent for the United Nations Mission in Ethiopia and Eritrea (UNMEE). The Permanent Mission has requested that the transport ship's company and the crew of the transport aircraft be granted the status of "Experts on missions for the United Nations" under article VI of the Convention on the Privileges and Immunities of the United Nations ("the Convention").

You seek our advice on the legal status of the above-mentioned ship's crew and the transport aircraft's aircrew in the light of the fact that these personnel, who are performing tasks in support of the [Member State] contingent in the mission area, are serving as national support elements above the requirements and authorized strength for UNMEE.

The Model Memorandum of Understanding between the United Nations and States contributing resources to United Nations peacekeeping operations establishes the administrative, logistic and financial terms and conditions which govern the contribution of personnel, equipment and services provided by a Government in support of a United Nations peacekeeping operation (see the annex to the note by the Secretary-General, A/51/967, of 27 August 1997, which contains the Model Memorandum of Understanding).

The Model Memorandum of Understanding in article 5.1 provides for the number of regular personnel to be provided by a contributing State and further states that "any personnel above the level indicated in this Memorandum shall be a national responsibility and thus not subject to reimbursement or other kind of support by the United Nations".

The principle that excess personnel is a national and not a United Nations responsibility is further elaborated upon in section 3 of annex A to the Model Memorandum of Understanding, which contains the general conditions for personnel. Paragraph 7 provides, inter alia, that excess personnel "may be deployed to the [United Nations peacekeeping mission], with the prior approval of the United Nations, if it is assessed by the troop-contributing country and the United Nations to be needed for national purposes". Significantly, paragraph 7 further provides that "this personnel shall be part of the contingent, and as such enjoy the legal status of members of the [United Nations peacekeeping mission]".

Provided that the conditions set out in paragraph 7 of annex A to the Model Memorandum of Understanding have been met, the [Member State] excess personnel would enjoy the legal status that members of the military contingent enjoy and which is provided for in the draft status-of-forces agreements currently being negotiated with the Governments of Eritrea and Ethiopia. By virtue of that status, members

of the military component of UNMEE shall be subject to the exclusive jurisdiction of their respective participating States in respect of any criminal offences that may be committed by them in Eritrea or Ethiopia as the case may be (article 51 (*b*) of both draft status-of-forces agreements).

It should also be recalled that the Security Council by its resolution 1320 (2000) provided in paragraph 6 that "pending the conclusion of [status-of-forces agreements], the model status-of-forces agreement of 9 October 1990 (A/45/594) should apply provisionally". The model status-of-forces agreement, which provides for the privileges and immunities of military contingents, specifically states in paragraph 47(*b*) that members of a military contingent of a peacekeeping mission are "subject to the exclusive jurisdiction of their respective participating States in respect of any criminal offences which may be committed by them in the [host country/territory]".

It would therefore be advisable that an agreement between the United Nations and the Government of the [Member State], on the basis of the Model Memorandum of Understanding, be concluded for the purposes of the personnel and equipment contributed by the Government to UNMEE. In accordance with paragraph 7 of annex A to the Model Memorandum of Understanding, should excess personnel have been approved by the United Nations and assessed by the Government of [Member State] and the United Nations be needed for national purposes, then this should also be addressed in the above-mentioned agreement.

4 December 2000

PERSONNEL

3. Request for dependency benefits—Eligibility of children for dependency status (staff rule 103.24 and ST/IC/1996/40)

Memorandum to Chief, Operational Services Division, Office of Human Resources Management

This refers to your memorandum of 3 December 1999 in which you seek our advice in connection with the request of Ms. X, a staff member of United Nations information centre in Dakar, for dependency benefits in respect of her niece, Y. You have explained that Ms. X, who has held a fixed-term contract since 11 December 1997, first submitted, in support of her request, a certificate which indicated that Y resided with her. However, the Office of Human Resources Management considered that certificate insufficient to establish the child as a dependant and requested the staff member to present adoption papers.

On 5 November 1999, the staff member submitted a *procès-verbal de délégation de puissance paternelle avec charges*, and a *certificat de vie individuelle et de charge de famille*. You have requested us to advise whether, based on these latest documents submitted by the staff member, the Organization may recognize Y as Ms. X's dependent child.

The conditions of eligibility of children for dependency status are set out in staff rule 103.24. Those conditions are spelt out in greater detail in ST/IC/1996/40. Paragraph 5 of the annex to ST/IC/1996/40 lists children who may be eligible for dependency status as the following:

"(*a*) A staff member's natural child;

(*b*) A staff member's legally adopted child;

(*c*) A staff member's stepchild, if residing with the staff member;

(*d*) If legal adoption of the child is not possible because there is no statutory provision for adoption or any prescribed court procedure for formal recognition of customary or de facto adoption in the staff member's home country or country of permanent residence, then a child in respect of whom the following conditions are met:

(i) The child resides with the staff member;

(ii) The staff member can be regarded as having established a parental relationship with the child;

(iii) The child is not a brother or sister of the staff member;

(iv) The number of children for which dependency benefits arebeing claimed by the staff member under this subparagraph does not exceed three."

In all cases, the staff member must provide main and continuing support for the child before the child can be recognized as that staff member's dependant.

In the present case, Y cannot qualify as Ms. X's dependant under paragraph 5(*a*) of ST/IC/1996/40 as she is not Ms. X's natural child, or paragraph 5(*c*) thereof as she is not Ms. X's stepchild. The issue, therefore, is whether Y is Ms. X's legally adopted child as provided in paragraph 5(*b*) of ST/IC/1996/40, or Ms. X's child by virtue of customary or de facto adoption as set out in paragraph 5(*d*) thereof, both of which could qualify her for dependency status.

The document "*Procès-verbal de délégation de puissance paternelle avec charges*" provided by the staff member was issued by the Court of Appeal in [Member State] pursuant to an application by Y's mother, Z, and the staff member. By that document, Z delegates parental authority over Y, as well as the related obligations of support for that child. The reason for the delegation is stated as Z's inability to carry out her responsibility vis-à-vis her children. The document thus provides that Ms. X shall exercise all parental rights and duties over Y, including the responsibility for expenses relating to the child's "maintenance, needs and education", pursuant to article 289 of the "*Code de la Famille*" (the law on the family).

In our view, however, this delegation of parental authority is not a legal adoption. If legal provisions for adoption exist in [Member State], the staff would have to adopt Y in accordance with those provisions in order for Y to be eligible for dependency status. If no such provisions exist, however, the only other avenue for Ms. X to have Y recognized by the United Nations as her dependent child is for Ms. X to produce evidence of Y's customary or de facto adoption. We are not in a position to ascertain what provisions for legal, de facto or customary adoption exist in [Member State]. Moreover, it is not clear to us whether Y's mother intends to give the child up for adoption by Ms. X and to relinquish all parental rights over Y, or merely to obtain financial support for the child from Ms. X.

If Ms. Z's intention is to give the child up for adoption, the child's recognition by the United Nations as Ms. X's dependant would depend on the staff member providing sufficient information that the child meets the criteria stipulated in ST/IC/1996/40. In that connection, Ms. X would have to provide proof that she has legally adopted the child. If legal adoption is not possible in [Member State] and the staff member asserts that the child is her dependant by virtue of de facto or custom-

ary adoption, then the staff member would have to produce proof of compliance with the statutory provisions, if any, for the recognition of such methods of adoption or produce a valid court order recognizing such adoption. In this respect, if the staff member relies on the provisions of the "*Code de la Famille*", we would also request that she submit copies of articles 289 to 292 of that code which are cited in the document from the [Member State] Court of Appeal. Moreover, the intention of Y's mother to give the child up for adoption would have to be clearly established before Y could be recognized as Ms. X's dependant on the basis of a customary or de facto adoption.

26 January 2000

4. QUESTION WHETHER THE JOINT APPEALS BOARD AND THE JOINT DISCIPLINARY COMMITTEE CAN REVIEW THE FILES OF THE OFFICE OF INTERNAL OVERSIGHT SERVICES—PROVISION OF CONFIDENTIALITY FOR STAFF MEMBERS REPORTING TO OIOS

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

This is in response to your request for advice as to whether members of the Joint Appeals Board (JAB) and the Joint Disciplinary Committee (JDC) can review files of the Office of Internal Oversight Services (OIOS) in connection with their consideration of appeals or disciplinary cases.

The General Assembly, in its resolution 48/218 B of 29 July 1994, requested that the Secretary-General ensure that OIOS procedures provide confidentiality and protection against repercussions for staff members and others making reports to OIOS. It also requested that the Secretary-General ensue that procedures are in place to protect the anonymity of staff members.

The Secretary-General, in ST/SGB/273, "Establishment of the Office of Internal Oversight Services", sets forth provisions on confidentiality applicable to OIOS investigations and documents. Paragraphs 18(*b*) and (*c*) of ST/SGB/273 describe the specific instances in which suggestions and reports ("complaints") made to the OIOS by staff members and others, as well as other information, can be disclosed. Those paragraphs read as follows:

> "(*b*) The Under-Secretary-General for Internal Oversight Services shall designate the officials authorized to receive such suggestions and reports. The designated officials shall be responsible for safeguarding the said suggestions and reports from accidental, negligent or wilful disclosure, as well as for ensuring that the identity of the staff members and others who have submitted such reports to the Office is not disclosed, except as otherwise provided in the present bulletin. Unauthorized disclosure of the said suggestions and reports shall constitute misconduct, for which disciplinary measures may be imposed. Except in regard to subparagraph (*e*) below, the identity of staff members and others submitting suggestions and reports to the Office may be disclosed only where such disclosure is necessary for the conduct of proceedings, whether administrative, disciplinary or judicial, and only with their consent.
>
> "(*c*) The above procedures and requirements for the protection of the identity of staff and others making the suggestions and reports shall also apply to staff and others who provide information to or otherwise cooperate with the Office".

ST/SGB/273 makes it clear that: (*a*) OIOS files containing complaints are confidential; (*b*) OIOS has discretion to determine when such files can be disclosed; and (*c*) disclosure of the identity of a complainant may only be done with the complainant's consent and only if necessary for administrative, disciplinary and judicial proceedings. The latter provision does not imply any automaticity: the formulation of the relevant provision ("may be disclosed") indicates the discretionary authority of OIOS in this matter.

These rules are reiterated in the OIOS Investigations Section Manual. According to paragraph 3 of operating procedure B of the OIOS Manual, disclosure of a complainant's identity requires the consent of the OIOS Section Chief. Paragraph 5 of operating procedure B further stipulates that "complaints provided to [OIOS] are not subject to disclosure" except under the circumstances outlined above. In addition, operating procedure A of the OIOS Manual notes that the United Nations offices with disciplinary and administrative authority may use the reports of OIOS on its findings, but contains no similar remarks regarding OIOS files used in preparing reports.

As far as paragraph 18(*c*) of ST/SGB/273 is concerned, the Manual clarifies, in paragraph 4 of operating procedure B, as follows:

> "Confidentiality provisions . . . do not apply to witnesses who provide information in response to questions and inquiries to an investigator during an OIOS Investigations Section (OIOS/IS) investigation. Witnesses who are United Nations staff members are obliged to cooperate with OIOS/IS and must reply honestly and truthfully to questions (ST/SGB/273, para. 4; Article 101, paragraph 3, of the Charter of the United Nations; staff regulation 1.2 and staff rule 104.4 (*e*)). As a consequence of this obligation, witnesses cannot condition their cooperation with OIOS/IS on the basis that their identities or their oral or written testimony remain confidential. Finally, a full confidentiality privilege for witnesses—whether United Nations staff members or others—would stifle any investigation or subsequent administrative, disciplinary or judicial proceedings and was therefore clearly not the intention of the General Assembly when it adopted resolution 48/218 B on [29 July] 1994."

With respect to the authority of the JAB and JDC to obtain documents pertaining to their cases and their obligation to maintain confidentiality, we note the following.

Joint Appeals Board

Staff rule 111.2(*l*) provides:

> "The panel shall have authority to call members of the Secretariat who may be able to provide information concerning the issues before it and shall have access to all documents pertinent to the case. Notwithstanding the preceding sentence, should the panel wish to have information or documents relating to the proceedings of the appointment and promotion bodies in questions involving appointment and promotion, it shall request such information or documents from the Chairperson of the Appointment and Promotion Board, who shall decide on the panel's request, taking into account the interests of confidentiality. This decision of the Chairperson is not subject to appeal. The Chairperson of the panel shall determine which documents are to be transmitted to all members of the panel and the parties."

Joint Disciplinary Committee

Staff rule 110.7(*b*) provides:

> "Proceedings before a Joint Disciplinary Committee shall normally be limited to the original written presentation of the case, together with brief statements and rebuttals, which may be made orally or in writing, but without delay. If the Committee considers that it requires the testimony of the staff member concerned or of other witnesses, it may, at its sole discretion, obtain such testimony by written deposition, by personal appearance before the Committee, before one of its members or before another staff member acting as a special master, or by telephone or other means of communication."

Regarding confidentiality of JDC documents, paragraph 19 of ST/AI/371, entitled "Revised disciplinary measures and procedures", provides:

> "The Chairperson shall direct that all persons involved in Joint Disciplinary Committee proceedings, whether as members, parties, counsel or witnesses, observe strict confidentiality . . .".

Thus, the JAB is authorized to have access to all documents pertinent to a case, but need only hold in confidence information or documents relating to appointment and promotion. The JDC is authorized only to obtain testimony of a concerned staff member or witnesses in addition to the written presentation of a case, and must direct that all persons involved in JDC proceedings observe confidentiality.

In our view, the issues of access to documents and confidentiality must be carefully considered in the light of the important functions served by OIOS, JAB and JDC. We consider that the rules pertaining to the JDC clearly do not establish a JDC right to obtain OIOS files, as staff rule 110.7(*b*) only provides for the JDC to obtain testimony.

Access of the JAB to OIOS files raises a more difficult question. On the one hand, staff rule 111.2(*l*) provides that the JAB shall have "access to all documents pertinent to the case", and there are requirements of confidentiality for both OIOS and the JAB. On the other hand, in our view, the confidentiality requirements on OIOS documents are far more stringent than for the JAB. As explained above, OIOS files containing complaints and the identity of the complainants may only be disclosed pursuant to a discretionary decision by OIOS. This confidentiality requirement is intended to protect whistle-blowers and is essential to the proper functioning of OIOS. In contrast, staff rule 111.2(*l*) does not require broad confidentiality of JAB documents. Rather, it requires only that information or documents relating to appointment and promotion be held in confidence. In effect, the broad confidentiality requirements on OIOS documents could be defeated if OIOS documents containing complaints or the identity of complainants were disclosed to the JAB and were not adequately protected in view of the narrower confidentiality requirements of JAB.

It should also be noted that the above administrative issuances concerning JAB and JDC were formulated and promulgated long before the General Assembly established OIOS. Therefore, relevant provisions of those issuances should be analysed, for purpose of the present inquiry, bearing in mind the letter and spirit of General Assembly resolution 48/218 B, which established OIOS. In particular, paragraph 5(*a*) of that resolution stipulates that OIOS "shall exercise operational independence under the authority of the Secretary-General in the conduct of its duties". In paragraphs 6 and 7 of the resolution, the General Assembly requested the Secretary-

General to ensure that procedures were in place "that provide for direct confidential access of staff to [OIOS] and for protection against repercussions", and that it was necessary to "protect individual rights, the anonymity of staff members, due process for all parties concerned and fairness during any investigations".

It should further be noted that OIOS, acting within its mandate and in the interests of protecting rights of staff, has the right to assign confidential status to documents which may not be specifically referred to either in General Assembly resolution 48/218 B or in ST/SGB/273.

As far as JAB and JDC proceedings are concerned, it is our understanding that, pursuant to operating procedure A of the OIOS Manual, OIOS reports of its findings are routinely made available to the JAB and JDC in cases where OIOS conducted an initial inquiry. However, as for OIOS files, in view of the above considerations, in particular OIOS operational independence and confidentiality requirements, it is our view that OIOS files may be provided to members of JAB and JDC only pursuant to a discretionary decision by OIOS.

27 January 2000

5. Employment of former United Nations procurement officers by United Nations suppliers and vice versa—Sanctions against former staff members and companies that hire offending staff members—Conflicts of interest

Memorandum to the Assistant Secretary-General for Human Resources Management, Department of Management

I refer to your memorandum of 9 February 2000 seeking our advice on the legal aspects of paragraph 28 of General Assembly resolution 52/226 A of 31 March 1998, whereby the Assembly requested the Secretary-General:

> "to submit proposals on possible amendments to the Financial Regulations and Rules of the United Nations and the Staff Regulations and Rules of the United Nations in order to address issues of potential conflict of interest, such as the employment of former United Nations procurement officers by United Nations suppliers and vice versa".

In that connection, you have transmitted a memorandum dated 19 January 1999 to you from the Chief, Procurement Division, Office of Central Support Services, on the same subject.

I also refer to the memorandum of 17 February 2000 addressed to you by the Controller, which has been copied to this Office. In the memorandum, the Controller expressed his concern regarding amendments to any legislative issuances which would further complicate the Organization's procurement regime. The Controller indicates that he favours a "broader approach" to the conflict of interest question, which would pertain to all staff members and not just procurement officers.

A. *The current regulatory framework*

1. *General*

Staff regulation 1.2 comprehensively focuses on the issues of basic rights and obligations of staff and aims at ensuring that the highest standards of efficiency, competence and integrity are upheld. Staff regulation 1.2 (*b*) states that "the concept

of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status". Therefore, staff members are bound to adhere to these standards at all times and they must not allow conflicts of interest to arise between their United Nations employment and their former employment. Accordingly, the existing regulatory framework provides only very general rules on conflict of interest with regard to pre-and post-United Nations activities.

(*a*) *Limitations on recruitment by the United Nations of former employees of United Nations contractors*

Section 7 of ST/AI/1997/7 provides for limitations on recruitment of certain types of personnel and states that:

> "Interns, consultants, individual contractors and personnel provided to the Organization on a non-reimbursable basis, including any gratis personnel, shall not be eligible to apply for, or be appointed to, any post in the Secretariat for a period of six months following the end of their service."

As pointed out in your memorandum of 9 February, these restrictions are limited because individuals working for United Nations contractors are not included.

(*b*) *Limitations on employment of former staff members by United Nations contractors*

Staff regulation 1.2 (*i*) pertains to the obligations of former staff members. It provides as follows:

> "Staff members shall exercise the utmost discretion with regard to all matters of official business. They shall not communicate to any Government, entity, person or any other source any information known to them by reason of their official position that they know or ought to have known has not been made public, except as appropriate in the normal course of their duties or by authorization of the Secretary-General. *These obligations do not cease upon separation from service*". (emphasis added)

B. *Application of the rules*

Breaches of the Staff Regulations and Rules by staff members are dealt with within the internal disciplinary framework. Former staff members, however, are no longer subject to the internal disciplinary measures of the Organization. Therefore, the only recourse that the Organization has, if staff regulations and rules are breached by a former staff member, is to bring a civil action in a national court or to ban future United Nations employment of the individual concerned or the company that has employed the former staff member and which seeks to or may have benefited from such breaches. National Governments have recourse to criminal action for breaches of post-employment conflict of interest and they also have recourse to civil law. The United Nations could only resort to civil action in respect of breaches by former employees and this course of action would be problematic, as outlined below.

We have had the occasion recently to address a breach of staff regulation 1.5[1] in a case which involved a staff member who had left the Organization and had used restricted information to write an article.

In that case, the Under-Secretary-General for Political Affairs asked whether any action could be taken against the former staff member for violation of the Staff Regulations and Rules, in particular, for having used restricted information to write an article. The Legal Counsel, in a note of 15 August 1995, advised as follows:

"The obligations in staff regulation 1.5 not to use information that has come into the hands of a staff member because of his official duties is stated to survive separation from service. However, enforcement of that obligation against a former staff member would be rather difficult".

"Enforcement of staff regulation 1.5 against Mr. X in a national court would have to be based on the notion that the Staff Regulations were part of a contractual commitment by Mr. X to the United Nations that is enforceable by that national court. The problem is that the United Nations has consistently resisted attempts by former staff to sue the Organization and its officials in national courts and has obtained a number of decisions at the highest levels in this and other countries holding that national courts do not have jurisdiction. For the United Nations now to waive its immunity and submit this matter to the national courts would expose the Organization to a ruling by such courts on the internal regulations of the Organization that may not be compatible with the views or practices of the Organization."

Therefore, the only real sanction that can be imposed by the Organization on former staff members in breach of the obligation relating to confidentiality and "discretion with regard to all matters of official business" appears to be an indication in their official status file, which may prevent their re-engagement by the Organization and inhibit their consideration by other United Nations–related organizations with which we might share such information. This indication in the file would become part of a former staff member's official record and so could affect any references.

It may also be possible to impose sanctions on the companies which employ former staff members. One possible sanction would be to ban the company that employs such former staff member that engages in such objectionable conduct from any dealings with the United Nations, and this ban could apply for a specified period of time. If the Organization wishes to pursue such a remedy, we recommend that the Organization warn prospective contractors of this prohibition and possible sanction. This could be done in the Request for Proposal or as an added provision to general conditions of contract.

C. *Comments on the proposals of the Office of Human Resources Management*

In your memorandum of 9 February, you made three proposals in relation to this topic. First, in paragraph 5 you suggested that the following provision be added to section 7 of ST/AI/1997/7:

"In order to avoid conflicts of interest in respect of staff discharging procurement functions, no candidate formally associated, directly or indirectly, with a contractor providing goods or services to the Secretariat may be appointed to discharge any procurement-related functions in the Secretariat for a period of [one] [two] [three] years after the end of their association with the contractor."

In principle, there would be no legal objections against this provision. However, the phrase "formally associated, directly or indirectly", is rather broadly stated, and defining which candidate is "formally associated, directly or indirectly, with a contractor" may prove difficult in practice, if not impossible. Accordingly, the proposed provision may prove unfair to candidates who, for example, when employed by the contractor, had no involvement with United Nations contracts. Therefore, if it is decided to add the above provision, it would be advisable to define more precisely which candidates will be precluded from discharging procurement-related func-

tions. As to the duration of such limitation (e.g., "[one], [two] or [three] years"), we suggest you seek the views of the Procurement Division on the matter.

Secondly, in paragraph 7 of your memorandum, you suggest "the introduction of a special condition in the offer letter and letter of appointment relating to procurement functions, placing the staff member on notice that their appointment is subject to the staff member's undertaking that he or she will not seek or accept employment with a United Nations contractor within a certain period of separation from the United Nations". You sought our advice as to "the validity and enforceability of such a restriction under national law(s)".

It is our understanding that in many national jurisdictions, former governmental employees are subject to post-employment restrictions by means of restrictive covenants in their contracts and by national law. The type of restrictions differ from jurisdiction to jurisdiction, as do the time limits for which the restrictions remain in force. For example, the Canadian Conflict of Interest and Post-Employment Code for Public Office Holders prohibits former public office holders, for a year after leaving office, from accepting "appointment to a board of directors of, or employment with, an entity with which they had direct and significant official dealings during the period of one year immediately prior to the termination of their service in public offices".[2]

United States legislation contains a comprehensive variety of restrictions on former governmental employees with more stringent requirements pertaining to former senior officials and procurement officers. Section 207, of 18 U.S.C., which is a criminal statute, provides for a lifetime restriction on representation on particular matters with which former employees dealt. A former governmental employee is prohibited from "representing any other person before any United States department, agency or court in any particular matter involving specific parties (e.g., a contract, procurement, claim, litigation, investigation or negotiation) in which the United States is a party or has a direct and substantial interest and in which the employee participated personally and substantially as a government official".

British legislation, on the other hand, takes a different approach. Pursuant to the Business Appointment Rules,[3] in their first two years after leaving the Government certain former senior civil servants must obtain Government approval before taking any full, part-time or fee-paid employment. These rules, inter alia, also apply to former civil servants who have had any "official dealing with their prospective employer during the last two years of their government employment" as well as former civil servants who "have had access to commercially sensitive information of competitors of their prospective employer in the course of their official duties".[4]

Thus, the requirement that a former staff member undertakes not to seek or accept employment with a United Nations contractor within a period of one year following separation from the United Nations may in principle be introduced. However, in view of the enforceability problem (see above), it is unclear whether the introduction of the above requirement would be effective in avoiding issues relating to conflicts of interest.

Thirdly, your suggestion in your memorandum that bids or proposals will not be considered when a supplier has hired a former staff member previously engaged in procurement-related activities, while more easily enforced in principle, would not be effective in those instances where a former staff member is not dealing with his or her former colleagues and thus, could not be identified. If a decision is made to pursue this approach, a tightly drafted restriction pertaining to the hiring of former

United Nations procurement officers could be inserted into the general conditions of contract. We would recommend that these restrictions only apply for a specified number of years after a staff member has left the Organization.

D. *Amendment to the Staff Regulations and Rules*

In your memorandum, you expressed concern over whether it would be appropriate to amend the Staff Regulations and Rules to address the conflict of interest issue in relation to procurement officers. Your concern was based on the fact that the provisions of the code of conduct for staff, which is contained in the Staff Regulations and Rules, are applicable to all staff members and are not intended to apply to a particular group of staff members.

In this respect, however, we would note what was stated by the Secretary-General when he was presenting the proposed revisions to article I of the Staff Regulations and chapter I of the Staff Rules (formerly referred to as the "proposed United Nations Code of Conduct") to the General Assembly:

> "It may be that, once the Code of Conduct is adopted, various subsidiary administrative issuances may be adopted . . . [that deal with] particular occupational categories of staff whose activities may require special rules. It is not appropriate to deal with such specialized matters in a Code of Conduct applicable to all United Nations staff without exception."[5]

We would also note the action taken by the General Assembly in its resolution 52/252 of 8 September 1998, in adopting the revisions to article I of the Staff Regulations and chapter I of the 100 series of the Staff Rules of the United Nations. In paragraph 10 of the resolution, the Assembly requested the Secretary-General

> ". . . to prepare, as a matter of priority, additional rules for particular groups of staff such as finance officers, procurement officers and staff of separately funded organs, in accordance with paragraph 10 of his report [A/52/488]."

Finally, we would note paragraph 4 of the annex to the Secretary-General's bulletin (ST/SGB/1998/19) of 10 December 1998, which provides:

> ". . . it is envisaged that additional rules for particular groups of staff such as finance officers, procurement officers and staff of separately funded organs will be prepared and promulgated by administrative issuances dealing with their status, rights and obligations. It is not appropriate to deal with such specialized matters in the Staff Regulations and Rules."

Your suggestions concern only procurement officers. Therefore, we share your view that it might not be appropriate (or necessary) for any amendments to be inserted into the Staff Regulations and Rules and that, therefore, such provisions should be included in implementing administrative issuances.

In the light of the above, if the conflict of interest issue in respect of procurement officers is going to be addressed, it would appear that the issue would be most appropriately addressed in an administrative instruction. These subsidiary rules, which would refer to the Staff Regulations and Rules, could be formulated to address the particular issues of conflict of interest which arise in relation to procurement officers.

26 May 2000

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6. ILLEGAL SEIZURE OF UNICEF PROPERTY TO SATISFY COURT ORDER—IMMUNITY OF THE UNITED NATIONS FROM CIVIL SUIT—ARBITRATION—ARTICLE VIII, SECTION 29(*a*), OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

Note verbale to the Permanent Representative of [Member State] to the United Nations

The Under-Secretary-General for Legal Affairs, the Legal Counsel of the United Nations, presents his compliments to the Permanent Representative of [Member State] to the United Nations and has the honour to refer to the notes verbales of 13 January 2000 and 16 November 1999 presented by the United Nations Children's Fund to the Ministry of External Relations of the Government of [Member State], in connection with a claim by Dr. X that has been brought against UNICEF in the [City of Member State] Local Court 1998. The Legal Counsel notes that the honourable court had issued an order in which it purported to hold UNICEF liable for a payment to Dr. X, and has entered subsequent orders relating to execution of the aforesaid order. The Legal Counsel has now learned, with great concern, that on 1 February 2000, the competent [Member State] authorities have seized, by force and without authority or permission, a number of motor vehicles belonging to UNICEF. This illegal seizure of UNICEF property has apparently been conducted in an effort to levy execution of the court's order.

The Legal Counsel recalls that in its notes verbales, UNICEF set out the United Nations legal position as well as the obligations of the Government of [Member State]. In particular, as a subsidiary organ of the United Nations, UNICEF is entitled to the privileges and immunities provided for in the Convention on the Privileges and Immunities of the United Nations (hereinafter "the Convention"), to which [Member State] has been a party since 1977 without reservation. Pursuant to article II, section 2, of the Convention, "the United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution". Moreover, section 3 provides that "the premises of the United Nations shall be inviolable. The property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action". The United Nations has maintained its privileges and immunities in respect of the present case.

In accordance with section 34 of the Convention, the Government of [Member State] has a legal obligation to "be in a position under its own law to give effect to the terms of this Convention". Any interpretation of the provisions of the Convention must be carried out within the spirit of the underlying principles of the Charter of the United Nations, and in particular Article 105 thereof, which provides that the Organization shall enjoy such privileges and immunities as are necessary for the fulfilment of its purposes.

In the light of the provisions of the Convention and the Charter of the United Nations, the contention that there is no immunity from civil suit would have no legal basis whatsoever either in the Convention on the Privileges and Immunities of the

United Nations or in the Charter of the United Nations. Moreover, as the Government has a legal obligation to give effect to the terms of the Convention, the Government of [Member State] has a legal obligation to advise the competent judicial authorities, including the civil court concerned, of the immunity of UNICEF from every form of legal process, including the civil suit in question and all orders issued therein, including orders of execution of judgement.

The Legal Counsel has the honour to refer to a recent advisory opinion of the International Court of Justice, dated 29 April 1999, on the subject of *Difference relating to immunity from legal process of a Special Rapporteur of the Commission on Human Rights*, in which the Court confirmed the obligation of government authorities of a party to the Convention to convey the findings of the Secretary-General concerning immunity to the concerned national courts.

Notwithstanding the immunity of the Organization from legal process under the applicable provisions of the Convention and the Charter of the United Nations, Dr. X is not without a remedy to redress his complaint. Pursuant to article VIII, section 29(*a*), of the Convention, the United Nations, of which UNICEF is an integral part, is required to provide 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". Thus, Dr. X must be provided "an appropriate mode of settlement" in cases such as this, where the dispute concerns his contractual relationship with the Organization. In the absence of an agreed settlement, it has been the established practice of the Organization to submit such claims to arbitration on the basis of an arbitration clause in a contract or a separate arbitration agreement. The Legal Counsel has been informed that the UNICEF office in [City of Member State] has already attempted to pursue a negotiated resolution of this matter with Dr. X, and that it has indicated to the Government of [Member State] its readiness to meet further with Dr. X in conjunction with the Ministry of External Relations.

The Legal Counsel recalls that UNICEF has requested the Ministry of External Relations of the Government of [Member State] to take all steps necessary to advise the competent judicial authorities of the privileges and immunities of UNICEF, including the immunity from all orders of execution of judgement, in accordance with the obligations of the Government of [Member State] under the Convention on the Privileges and Immunities of the United Nations and the Charter of the United Nations.

Despite the foregoing, the competent [Member State] authorities have illegally seized UNICEF property in contravention of the Convention and the Charter of the United Nations. The Legal Counsel must protest these violations in the strongest terms and is compelled to demand that the Government of [Member State] take immediate steps to return UNICEF property and to provide adequate assurances that UNICEF, its premises and its staff shall be afforded the protection of the Government against any further violations of international law and all threats of the use of force or violence.

2 February 2000

7. Status of research assistants with the United Nations Institute for Disarmament Research

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

1. This is with reference to your memorandum of 28 March 2000 concerning the status of research assistants engaged by the United Nations Institute for Disarmament Research (UNIDIR). In particular, you have inquired whether the UNIDIR research assistants are "staff members" and/or "officials" within the meaning of Article 105 of the Charter of the United Nations and of the Convention on the Privileges and Immunities of the United Nations (hereinafter "the Convention"). Our comments are as follows.

2. The revised "letter of appointment" indicates that such assistants "have the status of an official of the United Nations in accordance with Article 105 of the Charter of the United Nations". Article IV, paragraph 6, of the UNIDIR statute provides that "the Director and the staff of the Institute are officials of the United Nations and are therefore covered by Article 105 of the Charter of the United Nations and by other international agreements and United Nations resolutions defining the status of such officials". The UNIDIR research assistants are therefore clearly officials of the United Nations within the meaning of the Charter and of the Convention and are entitled to the privileges and immunities provided for under article V of the Convention.

3. As to whether the research assistants are "staff members", the "letter of appointment" provides that they are "subject to the authority and direction of the Director of the Institute and to the obligations set forth in article 1 and chapter I of the Staff Regulations and Rules of the United Nations". In accordance with article IV, paragraph 3, of the UNIDIR statute, "the staff of the Institute shall be appointed by the Director under letters of appointment signed by him in the name of the Secretary-General and limited to service with the Institute. The staff shall be responsible to the Director in the exercise of their functions." The Staff Regulations of the United Nations explicitly define the expressions "staff members" and "staff" as meaning all the staff members of the Secretariat, within the meaning of Article 97 of the Charter of the United Nations, whose employment and contractual relationship are defined by letter of appointment subject to regulations promulgated by the General Assembly pursuant to Article 101, paragraph 1, of the Charter. Rule 100.1 of the Staff Rules provides that the staff rules are applicable to all staff members appointed by the Secretary-General except technical assistance project personnel and staff members specifically engaged for conference and other short-term services. Thus to the extent that that their employment is defined by a letter of appointment in the name of the Secretary-General and that, pursuant to such letter of appointment, they are subject to the Staff Regulations and Rules of the United Nations, the UNIDIR research assistants are staff members of the United Nations.

4. In this connection reference should also be made to General Assembly resolution 76 (I) of 7 December 1946, wherein "officials" are "all members of the staff of the United Nations, with the exception of those who are recruited locally and are assigned to hourly rates".

5. The "letter of appointment" also provides that "subject to the provisions in this letter, the general conditions of . . . service will be governed by the United Nations Staff Regulations and Rules". Article IV, paragraph 4, of the UNIDIR statute provides that "the terms and conditions of service of the Director and the staff

shall be those provided in the Staff Regulations and Rules of the United Nations, subject to such arrangements for special rules or terms of appointment as may be proposed by the Director and approved by the Secretary-General". Although special terms of appointment for UNIDIR staff have not been approved by the Secretary-General and despite the fact that both the letter of appointment and the UNIDIR statute provide that the conditions of service shall be governed by the Staff Regulations and Rules of the United Nations, we note with concern that the research assistants are, inter alia, placed under a separate remuneration modality, are not subject to staff assessment and are excluded from participation in the United Nations Joint Staff Pension Fund. In the light of the foregoing, and until such time as the Secretary-General approves different conditions of service for UNIDIR staff, the UNIDIR letter of appointment and the conditions of service mentioned therein could be challenged in the Administrative Tribunal.

3 April 2000

PROCEDURAL AND INSTITUTIONAL ISSUES

8. Participation of observers in the Ad Hoc Committee to elaborate international conventions for the suppression of terrorist bombings and acts of nuclear terrorism—The right to attend or participate as observers in the sessions and work of the General Assembly

Note to the Director of the Codification Division, Office of Legal Affairs

This is with reference to your note of 14 February 2000, concerning the participation of observers in the Ad Hoc Committee to elaborate international conventions for the suppression of terrorist bombings and acts of nuclear terrorism established by the General Assembly in its resolution 51/210 of 17 December 1996. You have indicated that, in paragraph 9 of resolution 51/210, the Assembly decided that the Ad Hoc Committee would be "open to all States Members of the United Nations or members of the specialized agencies or of the International Atomic Energy Agency". Although the latter formula, known as the "all States formula", extends full membership in the Ad Hoc Committee to all States as opposed to States Members of the United Nations, it does not affect the participation of observers in the subsidiary organ concerned.

The entities, intergovernmental organizations and other entities which have received a standing invitation to participate as observers in the sessions and work of the General Assembly have the right to participate in the General Assembly and its Main Committees, the Economic and Social Council and their subsidiary organs and all meetings and conferences convened by them unless specifically decided by the principal or subsidiary organ concerned. As such, the entities, intergovernmental organizations and other entities which have received a standing invitation are entitled to participate as observers, if they so desire, in the sessions and work of the Ad Hoc Committee unless the General Assembly or the Ad Hoc Committee specifically decide otherwise. In particular, please note that by its resolutions 45/6 of 16 October 1990 and 51/1 of 15 October 1996, the General Assembly granted permanent observer status to the International Committee of the Red Cross (ICRC) and to Interpol.

By virtue of reciprocal representation provisions in the relationship agreements concluded between the United Nations and each of the specialized agencies and IAEA, the latter have the right to attend meetings of the General Assembly and its subsidiary organs. Thus, unless the General Assembly or the Ad Hoc Committee specifically decide otherwise, the specialized agencies and IAEA also have the right to attend the meetings of the Ad Hoc Committee if they so desire. The right and obligation of IAEA to assist the Ad Hoc Committee in its deliberations, in accordance with paragraph 10 of General Assembly resolution 52/165 of 15 December 1997, is over and above the Agency's right to attend in accordance with the relationship agreement between the United Nations and IAEA.

In the absence of a specific resolution or decision inviting them to do so, non-governmental organizations do not have the right to attend or participate as observers in the sessions and work or the meetings of the General Assembly or its subsidiary organs. As there is no specific invitation in General Assembly resolutions 51/210, 52/165, 53/108 or 54/110, non-governmental organizations do not have the right to attend the meetings of the Ad Hoc Committee.

Based on the foregoing, unless the General Assembly or the Ad Hoc Committee specifically decide otherwise, the entities, intergovernmental organizations and other entities which have received a standing invitation to participate as observers in the sessions and work of the General Assembly, including ICRC and Interpol, and the specialized agencies and IAEA are entitled, if they so desire, to attend the sessions of the Ad Hoc Committee. Unless they are specifically invited, non-governmental organizations do not have such a right.

15 February 2000

9. Status of members of the Advisory Committee on Administrative and Budgetary Questions—Experts on mission travel certificates

Memorandum to the Executive Secretary, Advisory Committee on Administrative and Budgetary Questions

1. This is in response to your memorandum dated 23 February 2000 which seeks our advice on whether members of the Advisory Committee are entitled to the status of experts on mission for the purposes of the application of the Convention on the Privileges and Immunities of the United Nations.

2. The Convention on the Privileges and Immunities of the United Nations (hereinafter "the Convention") does not define experts on mission other than noting that they perform missions for the Organization and that they are neither representatives of Member States nor officials of the Organization. However, the context and practice of the Organization is clear that experts on mission are individuals with particular expertise who have been entrusted with tasks by the Organization and who must therefore have the privileges and immunities necessary to carry out those tasks in an independent manner (see *Yearbook of the International Law Commission*, 1967, vol. II, para. 341, and the advisory opinion of the International Court of Justice in *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, 15 December 1989, *I.C.J. Reports, 1989*, p. 177 and pp. 192-196).

3. Rule 155 of the rules of procedure of the General Assembly provides that the General Assembly shall appoint an Advisory Committee on Administrative and

Budgetary Questions consisting of at least 16 members, including at least three financial experts of recognized standing. Rule 156 provides that the members are elected for three years on the basis of broad geographical representation and on the basis of their personal qualifications and experience. It is clear from these provisions that the General Assembly has selected and mandated members of the Advisory Committee to perform a defined task or mission for the United Nations and consequently Committee members who are not representatives of Member States may be considered as experts on mission while performing those duties for the United Nations.

Privileges and immunities of experts on mission

4. The privileges and immunities accorded by the Convention to experts on mission are "quasi-diplomatic" in nature and are set out in the Convention as follows:

> "*Section 22*. Experts (other than officials coming within the scope of article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular they shall be accorded:
>
> (*a*) Immunity from personal arrest or 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 from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations;
>
> (*c*) Inviolability for 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 missions;
>
> (*f*) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys.
>
> "*Section 23*. 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 interests of the United Nations."

Travel certificates

5. Your memorandum also raises the related issue of travel certificates for members of the Advisory Committee.

6. Section 26 of the Convention on the Privileges and Immunities of the United Nations enables the Secretary-General to issue a travel certificate to experts on mission. This certificate identifies them as experts on mission for the United Nations and sometimes assists the experts in obtaining a visa. As members of the

Advisory Committee are elected for a period of three years, there would be no legal objection to the issue of such a certificate to members for the period of their elected term on the basis that they have expert-on-mission status only when performing services for the United Nations, i.e., when the Advisory Committee is in session. Indeed, we understand that, since 1991, the actual policy has been to issue such certificates for a maximum period of up to three years.

7. We should add that members of the Advisory Committee who are members of a Permanent Mission would have the privileges and immunities of representatives under article IV of the Convention.

24 February 2000

10. Proposal for participation of the Office of the United Nations High Commissioner for Refugees as founder of a trusteeship in Mexico

Memorandum to the Legal Officer, Office of the Director and Controller, Division of Resources Management, UNHCR

1. This is further to our memorandum to you of 29 November 1999 and in response to your facsimile of 3 March 2000 concerning the above-mentioned matter. You have forwarded to us additional information provided by the UNHCR Branch Office in Mexico regarding the proposal for UNHCR to participate as founder of a trusteeship in Mexico. Please find below our comments in response to the additional information provided by the UNHCR Branch Office. We discussed in our 29 November 1999 memorandum the background of the matter and will not reiterate the background in the present memorandum.

Information and proposal of UNHCR Branch Office

2. The UNHCR Branch Office indicates that, under Mexican law, which would govern the trusteeship, inter alia:

(*a*) Trusteeships are "ordinary commercial transactions in which any person . . . can participate as founder. Nevertheless, in those situations in which the Federal Government assumes this role, its participation will necessarily be through the Ministry of Finance. In case the Federal Government does not participate directly in the creation of the trusteeship, any other person or organization could replace it";

(*b*) In the event "UNHCR participates as founder of the trusteeship . . . this should be seen strictly as a private commercial transaction regulated through private law, therefore, no different from any other type of commercial contracts necessary to run an operation";

(*c*) The trusteeship "does not lead to the creation of an entity or organization which might have legal personality. The trusteeship is about an agreement through which one party (UNHCR) transmits certain funds/resources for an already earmarked objective/goal, ensuring that funds are exclusively used for the objectives set". The trusteeship "implies a legal mechanism which permits UNHCR to carry out the process of transferring the land to the refugee beneficiaries".

3. The Branch Office proposes that "UNHCR establishes itself as founder of the trusteeship, thus replacing the Mexican Government, and therewith making unnecessary the participation of the Ministry of Finance". The Branch Office also proposes that UNHCR participate in the "Technical Committee" which the Branch

Office states "is a way of ensuring that the best interests of the refugee population are served according to UNHCR criteria and norms". The Branch Office indicates that UNHCR has already been serving as a member of the Technical Committee and that "no decision made in this Technical Committee has led to conflicts of interest". The Branch Office further indicates that "in case conflicts of interest would arise, it would be better for UNHCR to be part of the Technical Committee and be able to vote and take decisions that would actually favour the programme and its beneficiaries according to the UNHCR mandate and programmes".

Analysis and recommendation

4. We continue to have concerns and questions regarding the proposal for UNHCR to "establish itself as founder of the trusteeship". The UNHCR Branch Office refers to the conclusion of an agreement under which UNHCR would transmit "funds/resources for an already earmarked objective/goal, ensuring that funds [resources] are exclusively used for the objectives set". It is not clear how UNHCR could be a founder of the trusteeship and "transmit" the assets of the trusteeship since, as we understand it, UNHCR does not have ownership over the assets of the trusteeship. We understand that the goal of the trusteeship is to provide for the transfer of ownership of land to the Guatemala refugees in Mexico. The Branch Office indicates in that regard that the trusteeship "implies a legal mechanism which permits UNHCR to carry out the process of transferring the land to the refugee beneficiaries".

5. We would not consider it advisable for UNHCR to enter into any "legal mechanism" providing for UNHCR to transfer land, without UNHCR first having ownership of the land, including free and clear title to the land. However, the UNHCR Branch Office has indicated that "UNHCR does not have the right to own real estate in Mexico".

6. Furthermore, we continue to believe that the status of UNHCR as founder of the trusteeship could make UNHCR subject to the national laws and authorities, since the trusteeship would be governed by Mexican law. We point out in this connection that even if the trusteeship instruments do not create "an entity or different legal party", as referred to by the Branch Office, and even if those instruments include the standard no waiver of privileges and immunities clause, we consider that local courts could misconstrue the participation of UNHCR as founder of the trusteeship as a waiver of the privileges and immunities that UNHCR enjoys, should any legal actions be brought against the trusteeship. We also continue to believe that the status of UNHCR as founder of the trusteeship could expose UNHCR to financial liability, as UNHCR could be held responsible for the activities carried out by the trusteeship.

7. In addition to the above, we note that the information that you provided to us on 20 October 1999 indicated that the trusteeship was originally set up by the Mexican Commission for Assistance to Refugees (COMAR) and that, "in the plan outlined for the trusteeship, it is the Mexican Government which, through COMAR, holds its control". Since, as we understand it, the Mexican Government has participated in the trusteeship from its inception, albeit through COMAR, rather than the Ministry of Finance, it would seem appropriate for the Mexican Government to remain involved in the matter, rather than attempt to conclude intricate legal instruments to have UNHCR replace or bypass the Government as founder of the trusteeship.

8. As far as the proposal for UNHCR to participate as a member on the Technical Committee relating to the trusteeship, we recognize the value that UNHCR would bring to the Committee, as discussed by the Branch Office. However, we believe that such participation poses a risk of subjecting UNHCR and/or its staff to the national laws and authorities as well as potential liability arising out of the activities of the trusteeship. We also continue to believe that there is a risk that UNHCR and/or its staff could be placed in conflict with policies of the Organization, as a result of participating in the affairs and decision-making of the trusteeship. As discussed below, rather than being a member on the Technical Committee, UNHCR could provide assistance to the Technical Committee, e.g. by providing advisory services to the Committee.

9. Taking into account the above and consistent with the long-standing practice in these matters, we believe that authorization from the General Assembly or other appropriate legislative body would be required in order for UNHCR to participate as the founder of the trusteeship and a member of its Technical Committee. We consider that the best course of action would be for the Government to remain as founder of the trusteeship and for UNHCR to cooperate with the Government and provide assistance in support of the trusteeship. In such case, UNHCR could conclude a cooperation agreement with the Government setting out the manner in which it would cooperate with the Government and provide assistance for the activities of the trusteeship.

23 March 2000

11. Definition of "United Nations affiliated bodies" in relation to the statute of the Joint Inspection Unit—United Nations subsidiary organs and bodies—Question whether such bodies must abide by the provisions of the statute

Memorandum to the Executive Secretary, Joint Inspection Unit

Introduction

This is in response to your memorandum of 14 March 2000, in which you seek the opinion of this Office with regard to the following three questions:

(*a*) In the light of the provisions of paragraph 2 of article 1 of the statute of the Joint Inspection Unit (JIU), what is the meaning of the term "United Nations affiliated bodies" used in the latest report of JIU?

(*b*) Did the General Assembly by adopting the JIU statute commit all "United Nations affiliated bodies" to abide by the provision of the Statute?

(*c*) Is the JIU list of "United Nations affiliated bodies" comprehensive?

The JIU statute was approved by the General Assembly in its resolution 31/192 of 22 December 1976. Paragraph 2 of article 1 of the statute, which defines the authority of JIU vis-à-vis the organizations of the United Nations system, states that:

> "2. The Unit shall perform its functions in respect of and shall be responsible to the General Assembly and similarly to the competent legislative organs of those specialized agencies and other international organizations within the United Nations system which accept the present statute (all of which shall hereinafter be referred to as the organizations). The Unit shall be a subsidiary organ of the legislative bodies of the organizations."

The latest report of JIU, submitted to the General Assembly at its fifty-fourth session,[6] in chapter II entitled "Participating organizations", states that the organizations which "*have accepted* the statute of the Joint Inspection Unit" (emphasis added) encompass the United Nations, including its affiliated bodies, ILO, FAO, UNESCO, ICAO, WHO, UPU, ITU, WMO, IMO, WIPO, UNIDO and IAEA. The report further clarifies in a footnote to the term "affiliated bodies" that such bodies include UNICEF, UNCTAD, UNDP, UNEP, UNFPA, UNDCP, WFP, UNRWA, Habitat and UNHCR.

The United Nations and its subsidiary organs are not required to adopt a special decision accepting the statute of JIU

First, we would like to observe that the introductory wording of chapter II does not quite adequately reflect what transpires from paragraph 2 of article 1 of the JIU statute. Under that paragraph, JIU is, first of all, responsible to the General Assembly, which is the organ of the United Nations that established JIU by resolution 31/192 and can either amend its statute, or, if necessary, dissolve JIU. Under paragraph 2 of article 1 of the statute, in addition, JIU is authorized by the General Assembly to perform its functions in respect of and be responsible to the competent legislative organs of those specialized agencies and other organizations within the United Nations system which accept its statute.

The term "the United Nations" is defined by the Charter of the United Nations, the preamble to which states that the respective Governments "do hereby establish an international organization to be known as the United Nations". Thus, the term "the United Nations" refers to the international organization established by the Charter, including all the principal and subsidiary organs provided for by the Charter or established on the basis of the authority conferred by the Charter. This term excludes organizations established by other intergovernmental agreements as separate entities with their own legal personality. The term "the United Nations system", although it has no definition based on a formal legal source, is usually understood to encompass the United Nations, its specialized agencies and other related organizations. The term "the organizations within the United Nations system", which is used in resolutions of United Nations organs and other official documents as an addressee, does not include the United Nations proper as an organization.

It follows from the foregoing that, strictly legally speaking, the United Nations should not be listed as an organization which has accepted the statute of JIU in accordance with its provisions. The United Nations and its subsidiary organs are bound by the statute of JIU through General Assembly resolution 31/192 which approved the statute and established JIU. Unlike specialized agencies and other intergovernmental organizations, the United Nations and its subsidiary organs are not, therefore, required to adopt any additional decisions stipulating that they accept the JIU statute. For the reasons explained below, we suggest that the introductory phrase of chapter II of JIU reports in the future be revised to read as follows: "In accordance with its statute, the Joint Inspection Unit performs its functions with respect to the United Nations, including its programmes, funds and offices, and with respect to the following organizations which have accepted its statute in accordance with its provisions".

United Nations subsidiary organs and bodies

We do not have any information in our files as to why JIU in its reports uses the term "United Nations affiliated bodies" with reference to entities which are "sub-

sidiary bodies of the United Nations". Article 7 of the Charter, which establishes the six principal organs of the United Nations, in paragraph 2 grants general authority to establish subsidiary organs. The paragraph provides that "such subsidiary organs as may be found necessary may be established in accordance with the present Charter". In Article 22, the Charter gives the General Assembly specific authority to set up "such subsidiary organs as it deems necessary for the performance of its functions". Article 29 of the Charter stipulates that the Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions.

Although the term "subsidiary body" is not defined in the Charter or in General Assembly or Security Council resolutions or their rules of procedure, it has always been understood in United Nations practice—and this Office has always advised to that effect—that one body is a "subsidiary" of another if it has in fact been established by the other body. As noted in the *Repertory of Practice of United Nations Organs* (1955, vol. I, Article 7, para. 9), in the practice of the United Nations such expressions as "Commissions", "Committees", "subsidiary organs", "subsidiary bodies" and "subordinate bodies" have been used interchangeably. However, for the purposes of the *Repertory*, all such bodies are treated as falling within the scope of the term "subsidiary organs", which is used in Article 7 of the Charter.

As pointed out in the *Repertory*, subsidiary organs of the United Nations vary widely with respect to their membership, structure, scope of activity, powers, method of reporting and duration. Subsidiary organs are most frequently composed of States. Their membership may include all Member States, as in UNCTAD, or a number of specified Member States, as in the case of UNDP or UNICEF. Some subsidiary organs are composed of individuals, appointed in their individual capacity, for example, the Investment Committee, the Advisory Committee on Administrative and Budgetary Questions or JIU. In some instances, as in the case of the Administrative Committee on Coordination, a subsidiary organ is composed of the executive heads of all organizations of the United Nations system as well as the executive heads of United Nations programmes, funds and offices. There are also subsidiary organs which are judicial bodies and as such have substantial independence within the scope of their responsibilities. One example is the United Nations Administrative Tribunal, established by the General Assembly. Other examples are the two International Tribunals, for the former Yugoslavia and for Rwanda, established by the Security Council. Basic information about United Nations subsidiary organs may be found in chapter III of the *Repertory* which relates to Article 7 of the Charter and contains the analytical summary of practice concerning subsidiary organs. Additional information about subsidiary organs may be found in volume I of Supplements 1 to 5 to the *Repertory*. Volume I of *Supplement 6* has not been published yet. Volume I of the *Repertory* and of its Supplements also contains information regarding Article 22 of the Charter, which gives the General Assembly the authority to establish subsidiary organs. This information includes lists of the subsidiary organs established by the General Assembly.

What is the meaning of the term "United Nations affiliated bodies"?

With reference to your first question, we would like to point out that, with the exception of the World Food Programme, all entities listed in the report of JIU as "United Nations affiliated bodies" are subsidiary bodies of the United Nations. WFP was established by resolutions of the General Assembly and the FAO Conference. Therefore, it is a joint subsidiary body of both the United Nations and FAO. Unlike

other subsidiary organs of the United Nations, the entities listed in the JIU report belong to the category of United Nations subsidiary bodies which enjoy a considerable degree of autonomy from their parent organ or, in the case of WFP, organs. Although these subsidiary bodies are still not completely independent, since their parent organ or organs can always change their structure or even terminate their activities (for example, by resolution 48/162 of 20 December 1993, the General Assembly decided that the then governing organs of UNDP, UNICEF and WFP, subject to the agreement of the FAO Conference, should be transformed into Executive Boards and should have 36 members each), they have substantial operational independence in the areas of their mandated activities and in financial matters since most of them are financed through voluntary contributions. Since these subsidiary bodies carry out much of their substantive work in the limited area of their mandated activities, such as caring for refugees (UNHCR and UNRWA), nurturing children (UNICEF) etc., their activities closely resemble those of specialized agencies. There is no official definition of this type of United Nations subsidiary body which would formally distinguish them from other United Nations subsidiary organs. However, because of their special nature these subsidiary bodies have always been treated differently within the United Nations, which is reflected by the fact that the executive heads of special secretariats of these bodies are invited to participate in the work of the Administrative Committee on Coordination. In United Nations practice these subsidiary bodies are usually referred to as "United Nations programmes, funds and offices". Therefore, if for any particular reason JIU in its reports wants to single out the United Nations subsidiary organs which have substantial operational autonomy, we suggest that the term "United Nations affiliated bodies" be replaced with "United Nations programmes, funds and offices".

Should "United Nations affiliated bodies" abide by the provisions of the JIU statute?

Since, pursuant to paragraph 2 of article 1 of its statute, JIU is entrusted with the authority to perform its functions in respect of the General Assembly, the Unit, undoubtedly, also has the authority to perform its functions in respect of the subsidiary organs of the Assembly, as well as with regard to such other subsidiary bodies of the United Nations, whose scope of activities falls within the purview of the power of the General Assembly as it is defined in Chapter IV of the Charter. The statute, thus, is binding on all United Nations subsidiary bodies, without distinction between the various types, in respect of which the General Assembly may exercise its authority. Consequently, United Nations programmes, funds and offices must abide by the provisions of the JIU statute. Acceptance of the statute, as a condition for the exercise by JIU of its authority, under the statute is only required in the case of specialized agencies and other international organizations within the United Nations system. This condition does not apply to United Nations programmes, funds and offices despite their substantial operational autonomy from the General Assembly.

Is the JIU list of "United Nations affiliated bodies" comprehensive?

We would like first to reiterate our observation that the use of the term "United Nations affiliated bodies" in JIU reports is not correct because the entities listed under this term cannot be called affiliated bodies. As to the question whether the JIU list is comprehensive on the basis of other criteria, we are not in a position to answer this question, since JIU does not specify in its request the criteria on the basis

of which the composition of the list of a special group of United Nations subsidiary bodies is be determined. Should JIU consider it advisable to include in the list only the United Nations subsidiary bodies that have substantial operational autonomy, it may wish to place on the list the United Nations programmes, funds and offices that are invited to participate in the work of the Administrative Committee on Coordination.

5 April 2000

12. AUTHORITY OF THE SECRETARY-GENERAL IN AMENDING THE UNITAR STATUTE—QUESTION WHETHER FULL-TIME UNITAR SENIOR FELLOWS CAN BE GRANTED THE STATUS OF UNITED NATIONS OFFICIALS

Letter to the Executive Director of UNITAR, Geneva

In your letter of 13 March 2000 concerning amendments to the UNITAR statute, you refer to the fact that the General Assembly in its resolution 43/201 of 20 December 1988 takes note of the report of the Secretary-General contained in document A/43/697/Add.l, but does not explicitly endorse the amendments to the UNITAR statute proposed in that report. As also noted in your letter, the same resolution introduced an additional provision which grants the full-time UNITAR senior fellows the status of officials of the United Nations. Following the adoption of the resolution this provision became article VI, paragraph 2, of the UNITAR statute. In the light of the foregoing, you inquire whether, in the absence of any formal acceptance by the Assembly of the amendments to the UNITAR statute set forth in the Secretary-General's report, it may be taken for granted that these amendments should be incorporated in the statute.

With reference to your inquiry, please be advised as follows.

UNITAR was established by the Secretary-General following the adoption on 11 December 1963 by the General Assembly of its resolution 1934 (XVIII). By paragraph 2 of that resolution, the Assembly requested the Secretary-General to take the necessary steps to establish the Institute, taking account of its frame of reference, as defined in paragraph 3 of General Assembly resolution 1827 (XVII) of 18 December 1962 and of the views expressed at the eighteenth session of the Assembly and at the thirty-sixth session of the Economic and Social Council. Thus, the General Assembly vested the Secretary-General with the authority to establish the Institute. In pursuance of that authority the Secretary-General approved the statute of UNITAR and, as provided for in article XI of the statute, may amend it after consultations with the Board of the Institute.

By resolution 42/197 of 11 December 1987, the General Assembly, without undermining the authority of the Secretary-General to amend the statute, requested the Secretary-General to restructure the Institute as specified in paragraph 4 of the resolution. This request was implemented by the Secretary-General through the adoption of a set of amendments to the UNITAR statute which were brought to the attention of the General Assembly at its forty-third session in the Secretary-General's report on the subject. As pointed out in the report, the amendments to the statute adopted by the Secretary-General incorporated the proposals of the Board of Trustees of the Institute, which had been consulted on the amendments. It appears that the Assembly was satisfied with the implementation of its request, because in

paragraph 1 of its resolution 43/201 of 20 December 1988 the Assembly took note of the Secretary-General's report without expressing any reservations.

It follows from the above that the Secretary-General has the authority to amend the statute of UNITAR without seeking the approval of the General Assembly, when it relates to matters which fall within his competence as the Secretary-General of the United Nations. Therefore, the amendments to the UNITAR statute which were mentioned in the aforementioned report of the Secretary-General to the General Assembly at its forty-third session did not require formal approval by the Assembly.

With regard to the full-time UNITAR senior fellows, it should be observed that only the General Assembly has the competence to decide which categories of employees can be granted the status of officials of the United Nations and, therefore, enjoy the privileges and immunities granted under the Convention on the Privileges and Immunities of the United Nations. Consequently, this proposal could not have been implemented without a decision by the General Assembly, and the Secretary-General in his report sought the concurrence of the Assembly on this issue. This was done in paragraph 10 of resolution 43/201, which stipulates that the full-time UNITAR senior fellows should be granted the status of officials of the United Nations.

27 April 2000

13. Status, privileges and immunities under international law of the Permanent Observer Mission of Palestine to the United Nations

Letter to the Permanent Observer of Palestine to the United Nations, New York

I have the honour to refer to your letter of 1 May 2000 in which you requested a legal statement on the status, privileges and immunities under international law of the Permanent Observer Mission of Palestine to the United Nations.

As you know, the representation of Palestine to and in the United Nations derives from General Assembly resolution 3237 (XXIX) of 22 November 1974, in which the Assembly:

> "1. [*Invited*] the Palestine Liberation Organization to participate in the sessions and the work of the General Assembly in the capacity of observer;
>
> "2. [*Invited*] the Palestine Liberation Organization to participate in the sessions and the work of all international conferences convened under the auspices of the General Assembly in the capacity of observer;
>
> "3. [*Considered*] that the Palestine Liberation Organization is entitled to participate as an observer in the sessions and the work of all international conferences convened under the auspices of other organs of the United Nations;
>
> "4. [*Requested*] the Secretary-General to take the necessary steps for the implementation of the present resolution."

The resolution did not address the question of the status, privileges and immunities of the Palestine Liberation Organization, nor did it refer to the establishment by the Palestine Liberation Organization of a permanent office in New York. The decision to establish an office of the Permanent Observer of the Palestine Liberation Organization was, however, communicated to the Secretary-General by the Palestine Liberation Organization shortly after the adoption of the resolution in February

1975, and was taken note of in a letter of acknowledgement signed on behalf of the Secretary-General by the then Under-Secretary-General for General Assembly Affairs, Mr. Bradford Morse, dated 3 March 1975.

In its resolution 3375 (XXX) of 10 November 1975, the General Assembly invited the Palestine Liberation Organization to participate, inter alia, in all efforts, deliberations and conferences under United Nations auspices.

Subsequently, in its resolution 42/210 B of 17 December 1987, the General Assembly:

> "*Guided* by the purposes and principles of the Charter of the United Nations and its relevant provisions, . . .
>
> "*Having been apprised* of the action being considered in the host country, the United States of America, which might impede the maintenance of facilities of the Permanent Observer Mission of the Palestine Liberation Organization to the United Nations in New York, which enables it to discharge its official functions,
>
> "*Recalling* its resolutions 3237 (XXIX) of 22 November 1974 and 3375 (XXX) of 10 November 1975,
>
> "*Taking note* with appreciation of the Secretary-General's position on the Permanent Observer Mission of the Palestine Liberation Organization to the United Nations, as described in the statement of 22 October 1987, which reads: 'The members of the Palestine Liberation Organization Observer Mission are, by virtue of resolution 3237 (XXIX), invitees to the United Nations. As such, they are covered by sections 11, 12 and 13 of the Headquarters Agreement of 26 June 1947. There is therefore a treaty obligation on the host country to permit Palestine Liberation Organization Observer Mission personnel to enter and remain in the United States to carry out their official functions at United Nations Headquarters.',
>
> "1. [*Reiterated*] that the Permanent Observer Mission of the Palestine Liberation Organization to the United Nations in New York is covered by the provisions of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations and should be enabled to establish and maintain premises and adequate functional facilities, and that the personnel of the Mission should be enabled to enter and remain in the United States to carry out their official functions . . . ".

In its resolutions 42/229 A of 2 March 1988 and 42/230 of 23 March 1988, the General Assembly again reaffirmed "that the Permanent Observer Mission of the Palestine Liberation Organization to the United Nations in New York is covered by the provisions of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations and that it should be enabled to establish and maintain premises and adequate functional facilities and that the personnel of the Mission should be enabled to enter and remain in the United States of America to carry out their official functions".

Finally, in its resolution 43/177 of 15 December 1988, the General Assembly:

> "*Recalling* its resolution 3237 (XXIX) of 22 November 1974 on the observer status for the Palestine Liberation Organization and subsequent relevant resolutions,

"1. [*Acknowledged*] the proclamation of the State of Palestine by the Palestine National Council on 15 November 1988;

"2. [*Affirmed*] the need to enable the Palestinian people to exercise their sovereignty over the territory occupied since 1967;

"3. [*Decided*] that, effective as of 15 December 1988, the designation 'Palestine' should be used in place of designation 'Palestine Liberation Organization' in the United Nations system, without prejudice to the observer status and functions of the Palestine Liberation Organization within the United Nations system, in conformity with relevant United Nations resolutions and practice".

It should also be noted that in its resolution 52/250 of 7 July 1998, the General Assembly decided "to confer upon Palestine, in its capacity as observer, and as contained in the annex to the present resolution, additional rights and privileges of participation in the sessions and work of the General Assembly and the international conferences convened under the auspices of the Assembly or other organs of the United Nations, as well as United Nations conferences". While pursuant to that resolution Palestine now enjoys several of the rights and privileges of participation otherwise exclusively enjoyed by States Members of the United Nations, General Assembly resolution 52/250 did not explicitly affect the legal status, privileges and immunities of Palestine in the United Nations.

Based on General Assembly resolutions 3237 (XXIX), 42/210 B, 42/229 A, 42/230 and 43/177, the General Assembly has, however, repeatedly confirmed that the maintenance of the facilities of the Permanent Observer Mission of Palestine to the United Nations in New York is a necessary requirement to enable it to discharge its official functions and that it is covered by sections 11, 12 and 13 of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations (Public Law 80-357 vol. 11 UNTS, p. 11) (hereinafter, "the Headquarters Agreement").

It is widely accepted that certain functional privileges and immunities flow by necessary intendment from the Charter of the United Nations and the Headquarters Agreement, without which the invited entity would not be in a position to carry out its functions. The latter is explicitly confirmed in the aforementioned General Assembly resolutions.

Functional privileges and immunities certainly extend to immunity from legal process in respect of words spoken and written or any act performed in the exercise of the observer functions. Moreover, since the Permanent Observer Mission of Palestine to the United Nations in New York is a direct result of General Assembly resolution 3237 (XXIX) and is restricted to United Nations matters, that presence should be considered as not covering the receipt of service of legal process both personally and in rent in regard to matters completely unrelated to that presence. Any measure which might impede the maintenance of facilities of the Permanent Observer Mission of Palestine to the United Nations in New York or its ability to discharge its official functions would contravene the Charter of the United Nations, the Headquarters Agreement and the relevant General Assembly resolutions.

5 May 2000

14. Accreditation of non-governmental organizations by regional preparatory meetings—Economic and Social Council resolution 1996/31

Facsimile to Senior Legal Officer, Legal Liaison Office, United Nations Office at Geneva

This is with reference to your facsimile of 19 July 2000 concerning the review of paragraph 49 of Economic and Social Council resolution 1996/31 of 25 July 1996, concerning the accreditation of non-governmental organizations by regional preparatory meetings. Our comments are as follows.

Part VII of Economic and Social Council resolution 1996/31 sets out the procedures for the accreditation of non-governmental organizations to international conferences convened by the United Nations and their preparatory process. As the resolution is a resolution of the Economic and Social Council, it cannot bind the General Assembly or international conferences convened by the General Assembly unless the Assembly so decides. In this case, however, the General Assembly has in its resolution 54/154 of 17 December 1999 confirmed that Economic and Social Council resolution 1996/31 governs the accreditation of non-governmental organizations to the Preparatory Committee and the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance. The procedures set out in paragraphs 41 to 54 of resolution 1996/31 govern the accreditation of non-governmental organizations to the Preparatory Committee and the World Conference.

Pursuant to paragraph 49 of resolution 1996/31, it is explicitly stated, however, that "a non-governmental organization that has been granted accreditation to attend a session of the preparatory committee, including related preparatory meetings of regional commissions, may attend all its future sessions, as well as the conference itself". As such, a non-governmental organization which has been accredited by a regional preparatory meeting may attend all meetings of the Preparatory Committee and the World Conference itself unless the Preparatory Committee or the World Conference decide otherwise. While it is acknowledged that paragraph 49 accords the regional preparatory meeting unusual prerogatives in this regard, the regional groups and organizations are nonetheless bound by Economic and Social Council resolution 1996/31, and in particular the relevance and competence criteria provided for in paragraph 44, in accrediting non-governmental organizations to their preparatory meetings.

Based on the foregoing, if a regional preparatory meeting accredits a particular non-governmental organization to attend its meetings, that non-governmental organization, in accordance with paragraph 49 of Economic and Social Council resolution 1996/31, may attend future meetings of the Preparatory Committee and the World Conference itself. In this regard, it should be recalled that, pursuant to paragraph 41 of Council resolution 1996/31, accreditation is ultimately the prerogative of the Preparatory Committee. Moreover, paragraph (*f*) of Preparatory Committee decision 1/5 provides that "in the event that a Government raises questions concerning the accreditation of a non-governmental organization, the final decision on those cases shall be taken by the Preparatory Committee, in accordance with the standard process set out in Council resolution 1996/31". Thus, if a Government objects to a non-governmental organization which has been previously accredited by a regional preparatory meeting, a final decision on the accreditation of the non-governmental

organization to the Preparatory Committee and to the World Conference shall be taken by the Preparatory Committee, in accordance with the standard process set out in Council resolution 1996/31.

21 July 2000

15. Observer status in the General Assembly for the Inter-Parliamentary Union—Procedures for obtaining observer status with the United Nations for intergovernmental organizations—Question whether the Secretary-General may intervene in the process

Memorandum to the Assistant Secretary-General for External Relations

This is with reference to your memorandum of 28 September 2000 regarding the request of the Inter-Parliamentary Union (IPU) for observer status in the General Assembly. In particular, knowing that it is ultimately a Member State's decision, you indicate that the Secretary-General has requested a "creative" approach to bolster the Union's efforts in this regard and inquire whether we would be willing to consider a "common strategy" and to meet with IPU. Our comments are as follows.

With respect to observer status in the General Assembly, neither the Charter of the United Nations nor the rules of procedure of the General Assembly address the question of observers. In practice, however, the General Assembly has adopted resolutions according observer status to various entities and intergovernmental organizations. The first step is for a Member State or States to request the inclusion of an appropriate item in the agenda of the General Assembly. Pursuant to the relevant rules, the request must be accompanied by an explanatory memorandum and, if possible, by basic documents or a draft resolution. The General Committee of the General Assembly then reviews the request and recommends to the General Assembly whether or not to include the item in the agenda. Assuming the item is inscribed on the agenda, the next step is for the Member State or States to sponsor a draft resolution by which the Assembly would decide that the intergovernmental organization concerned is invited to participate in the sessions and the work of the General Assembly in the capacity of observer. It is then a matter for the States Members of the United Nations to take a decision on the proposed resolution, if necessary by a majority vote of the Members present and voting.

Moreover, in its decision 49/426 of 9 December 1994, the General Assembly decided that the granting of the observer status in the General Assembly should be confined to States and to those intergovernmental organizations whose activities cover matters of interest to the Assembly. In paragraphs 2 and 3 of General Assembly resolution 54/195 of 17 December 1999, the Assembly also decided that any request by an organization for the granting of observer status in the General Assembly would be considered in plenary session after the consideration of the issue by the Sixth Committee of the General Assembly and requested the Secretary-General to take appropriate measures to bring to the attention of all the Member States of the General Committee and General Assembly the criteria and procedures laid down by the General Assembly whenever a request is made by an organization seeking observer status in the General Assembly.

Generally speaking, the question of granting observer status is therefore exclusively the prerogative of Member States. Moreover, as the Secretary-General is called upon, pursuant to resolution 54/195, to remind the Member States of the General Committee and General Assembly of the criteria and procedures laid down by the General Assembly whenever a request is made by an organization seeking observer status in the General Assembly, he is equally if not more so bound to respect those criteria and procedures.

With respect to IPU, in particular, it is important to note that it is not deemed to be an intergovernmental organization. As indicated above, in its decision 49/426, the General Assembly decided to limit observer status to States and intergovernmental organizations. It should also be kept in mind that, pursuant to article 3 of the Cooperation Agreement between the United Nations and the Inter-Parliamentary Union, the Union merely has the right, upon its request, to be invited to send its representatives to be present during the plenary sessions of the General Assembly. Subject to the decisions of the convening or subsidiary organ concerned, it may also be invited to participate in conferences convened under the auspices of the United Nations or in the Main Committees and subsidiary organs of the General Assembly. The Cooperation Agreement was welcomed by the General Assembly in its resolution 51/7 of 25 October 1996. Since then, the Assembly has adopted several resolutions (52/7, 53/13, 54/12 and 54/281) which, although calling for continued close cooperation and for increased and strengthened cooperation between the two organizations, have not provided for enhanced participation rights or observer status for IPU. The item on "Cooperation between the United Nations and the Inter-Parliamentary Union" has been included in the agenda of the General Assembly annually since the fiftieth regular session and will be considered under agenda item 26 during the fifty-fifth regular session.

In the light of the foregoing, it is clearly for Member States to consider the question of according observer status to IPU. Given the criteria and procedures established in General Assembly decisions and resolutions in this regard, it would be legally inappropriate for the Secretary-General to intervene. In the absence of a mandate from the Assembly, either through the annual agenda item or through the inscription of a new item on observer status for IPU, the Secretary-General should inform the Union that this is a matter for the General Assembly and that its efforts to obtain observer status should therefore be directed at the Member States and not at the Secretariat.

2 October 2000

16. Meaning of "officials" of the Economic and Social Commission for Western Asia

Memorandum to the Chief, Administrative Services Division, Economic and Social Commission for Western Asia

I refer to your request to review the proposal put forward by the Government of Lebanon as to the meaning of the expression "officials of the Commission" in article 1, subsection (i), of the Agreement between the United Nations and the Government of [Member State], concerning the headquarters of the United Nations Economic and Social Commission for Western Asia, signed at Beirut on 27 August 1997 ("the ESCWA Headquarters Agreement").

Article 1(i) of the ESCWA Headquarters Agreement currently defines "officials of the Commission" as "the Executive Secretary and all members of the staff of the Commission, irrespective of nationality, with the exception of those who are locally recruited and assigned to hourly rates". Thus the definition excludes staff members who are "locally recruited and assigned to hourly rates". The Government of Lebanon has proposed the amendment of article 1(i) of the ESCWA Headquarters Agreement so that the expression "officials of the Commission" will mean "the Executive Secretary and all members of the Commission, irrespective of nationality, with the exception of those who are locally recruited". The proposed amendment thus purports to exclude all locally recruited staff members of the Commission as officials of the Commission, irrespective of whether they are assigned to hourly rates.

For the purposes of articles V and VII of the Convention on the Privileges and Immunities of the United Nations ("the General Convention"), a definition of the term "officials" was established by the General Assembly in resolution 76 (I) of 7 December 1946. By that resolution, the General Assembly approved "the granting of the privileges and immunities referred to in articles V and VII of the Convention on the Privileges and Immunities of the United Nations . . . to all members of the staff of the United Nations, with the exception of those who are recruited locally and are assigned to hourly rates". This definition allows for no distinction among staff members of the United Nations on the basis of nationality or residence, or according to whether they are internationally or locally recruited.

As the proposed amendment would contravene General Assembly resolution 76 (I) and article V of the General Convention, the Government of Lebanon's proposal is unacceptable. In addition, the Government of Lebanon should be advised that any interpretation of the provisions of the General Convention 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 in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.

7 December 2000

17. Applicability of local laws to United Nations premises—1947 United Nations Headquarters Agreement—Building codes

Facsimile to the Inspector, Report Coordinator, Joint Inspection Unit

I refer to your facsimile of 28 November 2000 in which you seek our advice as to the applicability of local laws to the premises of the United Nations. Our comments are as follows.

The status of the Headquarters district in relation to local, state and federal law is dealt with in the 1947 Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations ("the Headquarters Agreement").

Section 7(*b*) of the Headquarters Agreement states that, "except as otherwise provided in this agreement or in the General Convention [Convention in the Privileges and Immunities of the United Nations], the federal, state and local law of the United States shall apply within the Headquarters district". Section 8 of the Agreement provides:

"The United Nations shall have the power to make regulations, operative within the Headquarters district, for the purpose of establishing therein conditions in all respects necessary for the full execution of its functions. No federal, state or local law or regulation of the United States which is inconsistent with a regulation of the United Nations authorized by this section shall, to the extent of such inconsistency, be applicable within the Headquarters district . . .".

To date, four regulations have been adopted under the above-mentioned exception from federal, state and local law. These concern (*a*) the United Nations social security system, (*b*) qualifications for professional and other special occupational services with the United Nations, (*c*) the times and hours of operation of services within the Headquarters district and (*d*) the limitation of damages in respect of acts occurring within the Headquarters district. As such, United States local, state and federal law not inconsistent with the aforementioned General Assembly regulations or the Convention on the Privileges and Immunities of the United Nations applies to United Nations premises. As there are no regulations enacted by the Organization in the area of building codes, the New York building codes apply to United Nations premises.

The "inviolability" of United Nations premises is governed by section 9(*a*) of the Headquarters Agreement. Section 9(*a*) provides: "The Headquarters district shall be inviolable. Federal, state or local officers or officials of the United States, whether administrative, judicial, military or police, shall not enter the Headquarters district to perform any official duties therein except with the consent of and under conditions agreed to by the Secretary-General." Access to United Nations premises by local authorities is subject to the consent of the Secretary-General. As such, the City of New York does not have the authority to enter United Nations premises and conduct routine inspections without the consent of the Secretary-General. Legally speaking, the Secretary-General would not withhold such consent in the absence of a compelling reason.

It is not for the Office of Legal Affairs to comment on the financial implications of the steps necessary to achieve compliance with the law or on the consequential financial burden on Member States. This is a matter for the Controller and/or the Advisory Committee on Administrative and Budgetary Questions and the Fifth Committee.

It is important to note that the United Nations seeks to ensure compliance with architectural and safety standards in a number of different ways. These may include: (*a*) inspections upon appointment, when the United Nations permits inspections by local authorities upon request and prior appointment; (*b*) the use of contractors/consultants, when the United Nations hires consultants to inspect and monitor mechanical or electrical devices and prepare reports on their status and compliance with the code; (*c*) inspections by United Nations staff employed to ensure compliance; and (*d*) by provisions in a contract, when the United Nations requires that construction contractors comply with all local codes and the contract is drafted accordingly.

11 December 2000

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

[No legal opinions of secretariats of intergovernmental organizations to be reported for 2000.]

NOTES

[1] Under the current staff regulations, staff regulation 1.2 (*i*) generally reproduces the text of former staff regulation 1.5.

[2] Section 30(*a*), Conflict of Interest and Post-Employment Code for Public Office Holders, June 1994.

[3] See: Civil Service Management Code, 10 April 1996 (annex A).

[4] The aim of these rules is twofold. The first aim is to avoid any suspicion that the advice and decision of a civil servant might be influenced by the hope or expectation of future employment with a particular firm or organization. The second aim is to avoid the risk that a particular firm might gain an improper advantage over its competitors by employing someone who has had access to technical or other information which may affect that firm or its competitors.

[5] Report of the Secretary-General entitled "Review of the efficiency of the administrative and financial functioning of the United Nations: proposed United Nations Code of Conduct" (17 October 1997), A/52/488, para. 10.

[6] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 34.*