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

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

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Chapter VI

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

A. Legal opinions of the Secretariat of the United Nations

(Issued or prepared by the Office of Legal Affairs)

LIABILITY ISSUES

1. Payment of settlement claims—Liabilities of a private law nature—Procedures for settlement—Budget considerations

Memorandum to the Controller

I. *Introduction and summary conclusion*

1. I refer to your query regarding the settlement of claims and the making of settlement payments.

2. You have sought advice as to the regulatory basis for the payment of claims settlements that have been recommended by this Office and the payment of such settlements. In that connection, you noted that the United Nations Financial Regulations and Rules do not expressly provide for payments of such settlements. You also referred to financial rule 110.1, which requires that "the expenditures of the Organization remain within the appropriations as voted and are incurred only for the purposes approved by the General Assembly."

3. The question you raise is an important one. The answers are found not only in the inherent authority of the Organization to incur liabilities of a private law nature and the obligation to compensate for such liabilities, but are also reflected in various specific authorities and in the long-standing practice of the Organization. Notably, the General Assembly has been made aware of and taken note of this practice.

II. *Background*

A. *Juridical status of the Organization*

4. As a point of departure, I should like to observe that, as an attribute of the international legal and juridical personality of the United Nations,[1] it is established that the Organization is capable of incurring obligations and liabilities of a private law nature.[2] Such obligations and liabilities may arise, for example, from contracts entered into by the Organization. The capacity of the Organization to contract is specifically provided in the Convention on the Privileges and Immunities of the United Nations, article I, section 1.[3] The authority of the United Nations to resolve claims arising under such contracts and other types of liability claims, such as those arising from damage or injury caused by the Organization to property or persons, is reflected in article 29 of the Convention on Privileges and Immunities and the long-standing practice of the Organization in addressing such claims.[4] This prac-

tice has been reported to and endorsed by the General Assembly; see paragraphs below. Further evidence of the Organization's recognition that it may incur, and that the Administration may address, liabilities of a private law character is derived from the establishment by the General Assembly of limits to various types of such liabilities. Thus, in Headquarters regulation No. 4 on "Limitation of damages in respect of acts occurring within the Headquarters district", adopted by the General Assembly in its resolution 41/210 of 11 December 1986, the Assembly established limits to its liability for tort claims arising from injuries incurred by third parties in the Headquarters district. In its resolution 52/247 of 26 June 1998, the General Assembly established temporal and financial limitations on its liabilities to third parties resulting or arising from peacekeeping operations.

B. Procedures for the settlement of private law claims

5. Pursuant to the Convention on the Privileges and Immunities of the United Nations, article VIII, section 29, the United Nations is required to make provisions for appropriate modes of settlement of, inter alia, "disputes arising out of contracts or other disputes of a private law character, to which the United Nations is a party". In a study prepared for the International Law Commission in 1967 on the practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities, the Secretariat reported that claims against the United Nations arising from commercial contracts were settled by negotiation and arbitration, and that other claims of a private law nature, for example, personal injury claims, were settled amicably, e. g., by means of insurance coverage in the case of injuries arising from the operation of United Nations vehicles or by discussions between the Organization and the injured party.[5]

6. In 1995, the Secretary-General submitted to the General Assembly a comprehensive report on the procedures employed by the Organization for implementing that obligation in a wide variety of contexts, including claims arising from contracts and leases, third-party claims for personal injury outside the peacekeeping context and claims arising from peacekeeping operations.[6] As elaborated in that report, while specific procedures have been devised for particular types of claims, the central features of the modes of settlement used by the United Nations pursuant to article VIII, section 29, of the Convention are the amicable resolution of such claims, where possible, such as through negotiation or, in certain cases, insurance, and, if amicable settlement cannot be achieved, the submission of claims to formal dispute resolution procedures, usually arbitration. Claims are submitted to arbitration pursuant to arbitration clauses contained in contracts entered into by the United Nations or, for claims that do not arise from such contracts, pursuant to arbitration agreements negotiated and entered into by the United Nations with the claimant. The General Assembly took note of the report.[7]

7. Procedures for the settlement of third-party claims arising from peacekeeping operations were reported by the Secretary-General to the General Assembly in 1996,[8] in a study prepared in response to a recommendation of the Advisory Committee on Administrative and Budgetary Questions (ACABQ),[9] endorsed by the General Assembly,[10] calling upon the Secretary-General to develop and propose "appropriate measures and procedures which would provide for a simple, efficient and prompt settlement of third-party claims" and for limits to the liabilities of the United Nations in respect of such claims. Part of the study prepared by the Secretariat reported on the current procedures for handling third-party claims.[11] Those proce-

dures, too, involve amicable settlement in the first instance, where possible, failing which formal dispute resolution procedures may be employed. Although the status-of-forces agreements concluded by the United Nations with host countries provide for a standing claims commission as the formal claims resolution procedure, as reported in the Secretary-General's study, this mechanism has not been used to date. Instead, third-party claims that could not be settled amicably have been submitted to arbitration.

8. The study was commended by ACABQ[12] and was endorsed by the General Assembly in its resolution 51/13 of 4 November 1996, in which it requested the Secretary-General to develop specific measures for implementing the principles outlined in the study, which included measures to limit the liability of the Organization. The Secretary-General recommended such measures in a follow-up report in 1997.[13] The recommended measures were adopted by the General Assembly in its resolution 52/247 of 26 June 1998.

III. *Analysis*

A. *Roles of Secretariat units with respect to settlements*

9. The roles and mandates within the Secretariat for negotiating settlements were reported by the Secretary-General to the General Assembly in 1999.[14] As stated in paragraph 11 of that report, the Office of Legal Affairs, after analysing the relevant factual and legal issues, may "recommend a settlement range based on an assessment as to the degree to which the Organization is exposed to liability in the case and the costs in terms of money, time and effort to arbitrate the matter. Authority from the Under-Secretary-General for Management/Controller to settle for that amount is generally sought before negotiations are undertaken with the contractor . . . if agreement in principle can be reached between the United Nations and the contractor, the formal documentation settling the claim is prepared by the Office of Legal Affairs and submitted to the Under-Secretary-General for Management/Controller and to the contractor for signature." While that portion of the report referred to handling contract claims, essentially the same process is used with respect to other types of private law claims. In addition to the above report, the practice whereby authorization to negotiate settlements recommended by this Office is sought from the Controller, and the Controller signs the documentation finalizing such settlements, such as settlement agreements and releases, had been previously reported to the General Assembly.[15] This practice is consistent with financial rule 106.1 which provides: "No commitments, obligations or expenditures against any funds may be incurred without the written authorization of the Controller."

10. As noted above, settlements recommended by the Office of Legal Affairs are based on its assessment as to the Organization's exposure to legal liability in the case and the costs that the Organization would incur if it had to arbitrate the matter in the absence of an amicable settlement. It should be noted that the liability of the Organization to a third party is independent of its internal financial regulations and processes. In this regard, the International Court of Justice has ruled in two advisory opinions that, although the General Assembly has the authority under the Charter of the United Nations to approve the budget of the Organization, it has no alternative but to honour obligations incurred by the Organization; see *Effects of Awards of Compensation made by the United Nations Administrative Tribunal, Advisory Opinion*, *I.C.J. Reports 1954*, p. 47; *Certain Expenses of the United Nations*,

Advisory Opinion, *I.C.J. Reports 1962*, p. 151. This obligation also follows from general principles of law.

B. *Financial Regulations and Rules*

11. Financial rule 104.1 provides: "An outstanding legal obligation is to be based on a contract, purchase order, agreement or other form of undertaking by the United Nations or *based on a liability recognized by the United Nations*, which obligation is supported by an appropriate obligating document . . ." (emphasis added). It is our understanding that the "obligating document" referred to in this provision is dealt with in financial rule 110.2 (*a*), requiring certifying officers to submit to the Controller "the appropriate documents in support of proposed obligations and expenditures", and financial rule 110.3 (*a*), providing that "every obligation or proposal for the incurring of expenditure shall require: (*a*) certification by a certifying officer designated for the purpose by the Controller before the expenditure is actually incurred, *provided that the Controller shall have authority to certify obligations and expenditures under all accounts* . . ." (emphasis added). The practice whereby a submission by the relevant substantive unit (e. g., the Field Administration and Logistics Division, Department of Peacekeeping Operations, in cases arising from peacekeeping operations or the Procurement Division in cases arising from contracts) of the analysis of a claim by the Office of Legal Affairs and a recommendation of settlement, and the written approval of the Controller of such a recommendation, is consistent with those provisions.

12. Some of the liabilities of a private law nature discussed in the present memorandum arise from contracts, purchase orders, leases and other agreements. Other liabilities arise from property damage, injury or death caused by or legally attributable to the United Nations. Such liabilities that are recognized by the United Nations, for example, on the basis of a legal analysis and recommendation of the Office of Legal Affairs and approval of any settlement of such liability by the Controller, are precisely of the kind that fall within the terms of financial rule 104.1.

13. As pointed out in your memorandum of 19 April 2000, financial rule 110.1 requires that "the expenditures of the Organization remain within the appropriations as voted and [be] incurred only for the purposes approved by the General Assembly". It is explained above that once the Organization incurs a legal liability, it is legally obligated to pay that liability. It is for the appropriate financial officials of the Organization to take the necessary steps to do so.

14. Some settlements recommended by the Office of Legal Affairs involve payments that, as concluded by this Office, the Organization is obligated to make under contracts, purchases orders, leases and other agreements. If funding for those contracts or other agreements has already been provided for in a budgetary appropriation approved by the General Assembly, this would, in our view, constitute sufficient authorization under financial rule 110.1 to make such settlement payments. If for some reason a legal liability arising under a contract or other agreement exceeds the amount that the General Assembly has appropriated for that contract, additional funding would have to be obtained (although the "purpose" of the payment—satisfaction of an obligation under a contract—would already have been approved by the General Assembly in its original budgetary appropriation for that contract).

15. With respect to other liabilities, such as liabilities arising outside contracts (for example, tort liabilities to third parties), the appropriate steps would have to be taken to obtain funds and pay those liabilities. In the context of peacekeeping operations, we have been informed by the Field Administration and Logistics Division, Department of Peacekeeping Operations, that the current practice is for the budgets of peacekeeping operations to contain a line item, "claims and adjustments", to cover potential third-party claims. In addition, we have been informed that the budgets for the pre-liquidation phase of peacekeeping operations typically include a line item to cover outstanding or anticipated third-party claims. The approval of these budgets by the General Assembly would, in our view, constitute the required authority under financial rule 110.1 to pay settlements of such claims. To the extent that the amounts of such payments exceed the amounts budgeted, additional funds would have to be obtained.

16. As discussed above, the fact that funds have not been appropriated to pay legal obligations is not an excuse for failing to pay these obligations. This has been recognized in two advisory opinions of the International Court of Justice and it follows from general principles of law.

IV. *Conclusion*

17. As a matter of international law, it is clear that the Organization can incur liabilities of a private law nature and is obligated to pay in regard to such liabilities. It is equally clear that the Administration has the obligation and the authority to resolve claims of a private law nature, and that there is a long practice of the Administration in exercising that authority. It is also true that the practice has been presented to the General Assembly and that it is aware of that practice.

18. With respect to the exercise of that authority within the framework of the Financial Regulations and Rules, it is clear that in all but a handful of cases the money to satisfy the liability will come from funds specifically authorized by the General Assembly for a particular activity, for example, for a particular peacekeeping mission or a particular contract.

19. In this connection, it would be useful for the budgets for those activities which may give rise to claims to include a line item to cover potential claims or "unforeseen expenses". We understand that this is currently the practice in peacekeeping budgets.

20. In the rare instance where there are no funds (or insufficient funds) specifically authorized for the particular activity, we believe that, in the light of the authorities and practices relating generally to the settlement of disputes of a private law nature, discussed above, financial rule 104.1, particularly the reference to "liability recognized by the United Nations", and financial rule 110.2 (*d*), authorizing the Controller to transfer funds between allotments, provide the authority to you to use funds not specifically authorized for the activity at issue if such funds are available for that purpose and the use of those funds would not prevent or interfere with a mandated activity or operation. Of course, this may require the Administration to seek additional funding from the General Assembly to replace this amount so that funds would be available to meet the purpose for which such funds originally were authorized.

23 February 2001

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2. LIABILITY FOR DAMAGE CAUSED BY A TROOP-CONTRIBUTING COUNTRY TO EQUIPMENT PROVIDED BY ANOTHER COUNTRY TO A UNITED NATIONS PEACEKEEPING OPERATION—"NO-FAULT INCIDENT" FACTOR—GROSS NEGLIGENCE OR WILFUL MISCONDUCT—MEMORANDA OF UNDERSTANDING

Memorandum to the Director, Field Administration and Logistics Division, Department of Peacekeeping Operations

1. This refers to your memorandum dated 7 February 2001 requesting our advice in connection with "the current policies and procedures" regarding the resolution of liability issues when damage is caused by troops from one country to equipment provided by another country to a United Nations peacekeeping operation. You explained that this issue had arisen in connection with arrangements in United Nations Assistance Mission in Sierra Leone (UNAMSIL) and United Nations Interim Force in Lebanon (UNIFIL).

2. Subsequent to your memorandum, your office provided us, by telephone, with further clarifications on the matter. On 14 March 2001, your office forwarded to us, by electronic mail, the draft report of the Post-Phase V Working Group on the Reform of Procedures for Determining Reimbursement of Contingent-owned Equipment ("the Working Group"), which you requested us to take into account in providing our advice. You also requested Office of Legal Affairs advice specifically in connection with the text in paragraph 3 of your memorandum, which, you indicated, would be added as an appendix to annex B (Major equipment), of memoranda of understanding to be signed with countries involved in such arrangements.

3. The essential features of the principles outlined in the text proposed in paragraph 3 of your memorandum are as follows. First, the United Nations would be responsible for training personnel of the contingent that would operate the equipment. Secondly, the Organization's Board of Inquiry and Property Survey Board procedures would be followed to investigate, and to determine financial responsibility for, damage to the equipment while being used pursuant to the proposed arrangements. There would be no other recourse outside this mechanism for resolving claims arising from equipment damage or losses. Thirdly, the Government providing the equipment would be reimbursed only in case of damage or loss due to the gross negligence or wilful misconduct of the contingent responsible for operating the equipment. For that purpose, the United Nations would make deductions from amounts owed to the Government whose personnel had caused the damage.

Practice concerning reimbursement for contingent-owned equipment

4. At the outset, we note that there are no guidelines concerning the liability of one troop-contributing country for damage that its troops may cause to the equipment of another country participating in a United Nations peacekeeping operation. Current United Nations guidelines have not contemplated such damage because equipment operated by military contingents in United Nations peacekeeping operations traditionally falls into two categories, namely, (*a*) United Nations-owned equipment and (*b*) contingent-owned equipment provided by Governments and operated by their respective contingents.

5. Under the procedures applicable to incidents arising prior to 1 July 1996 ("the old procedures"), the United Nations reimbursed a troop-contributing country in respect of damage to its contingent-owned equipment unless such damage was caused by the gross negligence or wilful misconduct of the country's personnel. Under the procedures concerning incidents arising on or after 1 July 1996 ("the new procedures"), no such reimbursement takes place, since the troop-contributing country is compensated for the risk of damage to its equipment by the inclusion of a "no-fault incident" factor into the monthly wet lease or dry lease rates (A/C.5/49/70 para. 33 (*a*), and appendix VI, p. 68, para. 1).

6. We understand that in view of the recent developments involving the provision of equipment by one country for use by personnel from another country, it has become necessary for the Organization to adopt policy guidelines that would apply with respect to such arrangements. The guidelines would form the basis of agreements to be entered into by the United Nations with countries providing and those operating such equipment. In that connection, we note that the Working Group has made recommendations for consideration by the General Assembly, as set out in its draft report (A/C.5/55/39, paras. 41-50), which you forwarded to us.

7. The two important issues that arise in connection with the possible damage to contingent-owned equipment provided under such arrangements are, on the one hand, the liability of the Government whose personnel operate the equipment' and on the other, the entitlement of the Government providing the equipment to receive compensation. We discuss those issues below.

Liability of the Government whose personnel operate the equipment

8. Since, traditionally, equipment used by contingents in peacekeeping operations is owned either by the contingent operating it or by the United Nations, the issue of the liability of contingents for equipment damage has arisen mostly in connection with United Nations-owned equipment. The general practice, under the old procedures, was to hold the contingent liable, and to require it to reimburse the United Nations, for damage to United Nations-owned equipment arising from the gross negligence or the wilful misconduct of contingent personnel. In less serious cases of negligence on the part of contingent personnel, the United Nations would normally absorb the resultant loss.

9. This principle has been incorporated into the model Memorandum of Understanding concerning contribution of resources by Member States to peacekeeping operations under the new procedures (i.e., procedures applicable to incidents occurring on or after 1 July 1996, as referred to above—document A/51/967, dated 27 August 1997, entitled "Reform of the procedures for determining reimbursement to Member States for contingent-owned equipment"). Paragraph 10 of the model Memorandum of Understanding provides:

> "10. The Government will reimburse the United Nations for loss of or damage to United Nations-owned equipment and property caused by the personnel or equipment provided by the Government if such loss or damage (*a*) occurred outside the performance of services or any other activity or operation under this Memorandum or (*b*) arose or resulted from gross negligence or wilful misconduct of the personnel provided by the Government."

10. Thus, the requirement that a Government assume financial responsibility for damage caused by the gross negligence or wilful misconduct of its personnel to equipment provided by another country, as proposed in your memorandum, would

be consistent with the established practice of the Organization and with the model Memorandum of Understanding in respect of damage to United Nations property. However, in order to ensure greater consistency with the model Memorandum of Understanding, the Government whose contingent operates another Government's equipment would also have to assume financial liability for damage caused by its personnel "outside the performance of services or any other activity or operation" under the Memorandum of Understanding concerning that equipment.

Reimbursement to the country providing the equipment in case of damage

11. You have stated that the country providing the equipment would not be entitled to reimbursement for damage to the equipment attributable to the ordinary negligence of the contingent operating the equipment, in view of the inclusion of the "no-fault incident" factor in the monthly wet lease rates, as referred to above. We note that this is consistent with the provisions of the model Memorandum of Understanding relating to damage to contingent-owned equipment as a result of ordinary negligence on the part of the personnel of the country providing such equipment (see A/51/967, annex B, "Major equipment provided by the Government", para. 17(*a*), and the definition of "no-fault incident", annex F, "Definitions", para. 19).

12. Currently, this principle applies to situations in which the damage or loss has been caused by the personnel of the country providing the equipment, but not by the negligence of personnel from other contingents. This view finds support in financial rule 110.32, as amended by ST/SGB/1998/15, section 3.1. That section provides, inter alia, that when considering contingent-owned equipment cases, the Headquarters and Local Property Survey Boards will assess "whether, on the basis of the facts of the loss or damage, the Government is responsible for the loss of or damage to the contingent-owned equipment owing to, inter alia, the negligence or wilful misconduct of *its* personnel" (ST/SGB/1998/15, sect. 3.1 (*c*)) (emphasis added).

13. Pursuant to financial rule 110.32, as amended by ST/SGB/1998/15, the United Nations has the responsibility to reimburse a Government whose contingent-owned equipment is damaged through the "fault" of "United Nations personnel", unless there is an agreement to the contrary (cf. ST/SGB/1998/15, sect. 3.1, paragraph (*b*)). "United Nations personnel", vis-à-vis the Government providing equipment to the Organization, would seem to include the personnel provided by other Governments to the United Nations peacekeeping mission. Thus, under the Financial Rules, a Local Property Survey Board could conceivably determine that the United Nations is at fault and has the responsibility to pay compensation in case of damage caused by the (ordinary) negligence of personnel from one Government to equipment provided by another Government. However, the provisions in your memorandum, if adopted, would eliminate the possibility of such liability for the United Nations, as the "no-fault incident" factor in the monthly wet lease reimbursements would be deemed to cover the risk of damage caused by the negligence of the contingent operating the equipment.

Procedures for dealing with cases relating to damage to equipment

14. In case of loss of or damage to equipment provided pursuant to the proposed arrangements, we note that investigations would be conducted by Boards of Inquiry, and that financial responsibility would be determined by the Local Property Survey Boards. According to your memorandum, the Board of Inquiry would follow the procedures and guidelines in chapter 16 of the Field Administration Manual

(1992). However, unlike your memorandum, the draft report of the Working Group makes no reference to chapter 16 of the Field Administration Manual or to any other procedures or guidelines to be followed by a Board of Inquiry. To ensure a common understanding between the United Nations and Governments involved in the proposed arrangements, we would suggest that the reference to chapter 16 of the Field Administration Manual or to any other agreed Board of Inquiry procedures be included in Memoranda of Understanding relating to those arrangements.

15. Moreover, we would suggest that the language of such Memoranda of Understanding take into account the different terms of reference of a Board of Inquiry as spelled out in the Field Administration Manual (1992), on the one hand, and of the Local Property Survey Board as provided in financial rules 110.32, as amended by ST/SGB/1998/15. Pursuant to the Field Administration Manual, while a Board of Inquiry shall "establish the responsibility of individuals or groups" when conducting its inquiry (Manual, chap. 16, part IV, para. 3.3 (*b*)), it "does not consider questions of compensation or legal liability" (ibid., para. 3.8). The role of the Board of Inquiry, as stated in the Manual, is to investigate and establish the facts of serious incidents occurring in a peacekeeping mission. On the other hand, pursuant to the Financial Rules, the function of the Local Property Survey Board, in the case of property damage, is to make a determination concerning culpability based on the facts of the case, and to make recommendations to the Controller with respect to financial liability.

Suggested changes to the draft provisions in your memorandum

16. We have the following suggestions concerning the text in paragraph 3 of your memorandum, which are necessarily limited as we do not know what other provisions would be in the Memorandum of Understanding. In paragraph 3*b*., we suggest that the second sentence be redrafted as follows:

> "If, having duly considered the recommendations of the Property Survey Board, the Controller determines that there was gross negligence or wilful misconduct on the part of the personnel of the user Government, the user Government will be liable for the damage and the related cost of repair or, in case of write-off of the equipment, its generic fair market value less the dry lease payments already made by the United Nations, will be deducted from amounts owed by the United Nations to the user Government."

We suggest that the entire paragraph 3*c*. be rewritten as follows:

> "*c*. The provider Government agrees that if major equipment that it has provided is damaged by the personnel of the user Government, the United Nations will convene a Board of Inquiry to determine the facts, and will also establish fault and the cost of damage based on the recommendations of the Property Survey Board. The provider Government agrees to accept the determination of the United Nations in accordance with this procedure as final in such cases. If, pursuant to these procedures, the United Nations determines that the damage was due to gross negligence or wilful misconduct on the part of the personnel of the user Government, the provider Government will be reimbursed the cost of repair or, in case of write-off of the equipment, its generic fair market value less the dry lease rates already paid by the United Nations."

We also suggest the addition of the definition of "the Controller" in paragraph 3*d*., as follows:

> "The Controller: the Controller of the United Nations".

Conclusion

17. Finally, we believe that the proposed arrangements raise complex liability issues and must be based on a clear common understanding among all three parties, namely, the United Nations, the Government providing the equipment and the Government operating the equipment, concerning their respective rights and responsibilities. This requires that all three parties sign the same Memorandum of Understanding. However, such a Memorandum of Understanding would have to indicate those provisions which would concern all three parties together, those that would apply between the United Nations and each Government separately and those (if any) that would apply directly between the two Governments.

29 March 2001

3. United Nations reimbursement of salaries paid to troops during sick leave attributable to United Nations service—Common law remedy of *per quod servitium amisit*—Reimbursement by United Nations based on two criteria

Memorandum to the Director, Field Administration and Logistics Division
Department of Peacekeeping Operations

1. This refers to your memorandum dated 18 April 2001 forwarding to us, for advice, the letter dated 10 January 2001 from the Permanent Mission. In its letter, the Permanent Mission requests the Organization to reconsider its decision declining reimbursement of salary paid to troops during sick leave arising from injury or illness attributable to service with the United Nations. Following your memorandum of 18 April, there have been further telephone discussions between staff of our respective offices in an attempt to clarify the grounds upon which the Government seeks reimbursement.

2. We note that, in essence, the arguments raised by the Government in support of its request are the same as those advanced in the Government's earlier letter, dated 10 December 1998. After considering advice provided by this Division on 10 May 1999, the Field Administration and Logistics Division replied to that letter on 26 May 1999, declining the Government's request. In the letter dated 10 January 2001, the Permanent Mission suggests that, because the injured soldiers could not perform any duties for the Government while on sick leave, the salaries they received during that period represent a "real and direct cost" to the Government arising from the soldiers' service with the United Nations.

3. The Organization's position on the salary payments to soldiers who are on sick leave is that such payments do not constitute compensation for injury or illness, and that they are not expenses arising from injury or illness. Such salary payments are due by the Government by virtue of the contract of employment between the Government and the soldier concerned. The Organization fulfils its obligations by reimbursing compensation paid by the Government pursuant to national law, in respect of death or disability sustained in United Nations service by troops provided by that Government to a United Nations peacekeeping mission. Moreover, in appropriate cases, the Organization also bears the reasonable costs of medical treatment of such troops for injuries or illness attributed to United Nations service.

4. The Permanent Mission's letter of 10 January also refers to the view expressed by the national legal officials that, under national law, the common law remedy of *per quod servitium amisit* would normally be available to the Crown and would thus allow the Government to recover damages from "the wrongdoer/tortfeasor" responsible for the injuries caused to the members of the national forces.

5. In our view, wrongdoing or tort on the Organization's part has never played any role in determining the reimbursement by the Organization of compensation paid by Member States to their troops for injury or illness incurred in United Nations service. Reimbursement to the Government is based on two criteria. First, the injury or illness must be attributable to United Nations service and must not have been caused by the gross negligence or wilful misconduct of the victim. Secondly, there must be certification by a designated official of the Government that the Government has paid compensation in accordance with the applicable national law. Thus, the fact that the United Nations makes a reimbursement does not imply that the related injury or illness was caused by any wrongdoing or tortious act on the part of the Organization. Indeed, reimbursement is made even when the facts of a case show that the injury or illness was caused by the soldier's own negligence, as long as such negligence does not amount to gross negligence or wilful misconduct.

6. Accordingly, in our view, the latest arguments made by the Permanent Mission are not sufficient to warrant a change to the Organization's decision to decline reimbursement of salary payments made by the Government to its soldiers while they were on sick leave. The reasons for this conclusion, which are discussed above, are twofold and may be summarized as follows. In the first instance, as stated in previous memoranda from this Office, salary payments to personnel on sick leave are not compensation for injury or illness and are therefore the sole responsibility of the Government as the employer of such personnel. Secondly, the common law remedy of *per quod servitium amisit*, cited by the Permanent Mission, does not apply to the arrangements between the Organization and Member States concerning the reimbursement of compensation payments by the Member States for injuries or illnesses sustained by their troops while serving with the United Nations.

24 July 2001

PERSONNEL

4. Release of UNRRA personnel files—Agreement between United Nations and United Nations Relief and Rehabilitation Administration regarding transfer of assets and activities to United Nations—Restrictions on certain documents does not preclude access of son of deceased staff member to official status file

Memorandum to the Assistant Secretary-General for Human Resources Management

1. I refer to your memorandum of 5 December 2000, together with attachments, seeking the advice of the Legal Counsel regarding a request from the son of a deceased employee of the United Nations Relief and Rehabilitation Administration (UNRRA) to gain access to the official status file of his father. We understand that the father was killed on duty in an accident for which he was declared responsible,

and that the official status file also contains other unflattering information about the deceased.

Background and applicable rules

2. UNRRA was created on 9 November 1943 as an organization entirely independent from the United Nations. In 1948, UNRRA, having completed its operational phase, initiated a process to close its operations. On 27 September 1948, the United Nations entered into an agreement with UNRRA concerning the transfer to the United Nations of the residual assets and activities of UNRRA. Through that agreement, the United Nations took over the latter's accounting functions, supervision of a history project and maintenance of records and also accepted some of the claims against UNRRA. UNRRA was terminated on 31 March 1949.

3. Part III of the 1948 transfer agreement contains provisions regarding the transfer of UNRRA records and archives, including provisions regarding personnel records. The provisions in question stipulate as follows:

> "1. In accordance with the provisions of this part, UNRRA will transfer to the United Nations sufficient funds to enable UNRRA records and archives to be placed in a proper condition for preservation for future use in accordance with the general agreement previously reached and recorded in letters from the Director-General of UNRRA, dated 26 January 1948, and the Acting Secretary-General of the United Nations, dated 2 February 1948 (attached as appendix II), and will transfer to the United Nations custody of UNRRA's records and archives subject to the provisions of this part, save that those retained by UNRRA for use during the liquidation period will be transferred to the United Nations at such subsequent date as the UNRRA Administrator for Liquidation may determine.
>
> ". . .
>
> "3. The United Nations will complete work on the UNRRA records and archives in accordance with whichever of the two alternative plans set out below may be accepted by the UNRRA General Committee.
>
> "4. *Plan A*
>
> (*a*) The United Nations will assume complete responsibility for custody and administration of the UNRRA records and archives as from the effective date of this agreement, and will also assume financial responsibility for their custody and maintenance after 31 December 1949.
>
> . . .
>
> "5. *Plan B*
>
> (*a*) The United Nations will assume complete responsibility for custody and administration of the UNRRA records and archives as from the effective date of this agreement.
>
> ". . .
>
> "7. The United Nations will ensure that the UNRRA archives and records transferred in accordance with this part will be used only in accordance with the conditions specified in the aide-mémoire attached to the letter from the Director-General of UNRRA, dated 26 January 1948, referred to in paragraph 1, and attached as appendix II.

“. . .

“12. The personnel records of individual UNRRA employees not retained on the staff of the Administrator for Liquidation will be transferred by UNRRA to the United Nations in New York on or before 31 December 1948. The personnel records retained shall be transferred to the United Nations by the Administrator for Liquidation at such time as he may determine. The United Nations will, from the date on which such records are transferred, assume full responsibility for custody and administration of these records and for answering inquiries concerning personnel formerly employed by UNRRA. The special conditions attaching to such retention, administration, use and location of these records will be separately agreed.”

4. Although no information is available in Office of Legal Affairs files on whether it was plan A or plan B that, in the end, was accepted by the UNRRA General Committee, both plans provide for the United Nations to assume complete responsibility for the custody and administration of the UNRRA records and archives as from the effective date of the 1948 transfer agreement.

5. Appendix II to the transfer agreement between UNRRA and the United Nations contains certain correspondence between the Director-General of UNRRA and the Acting Secretary-General of the United Nations, and an aide-mémoire setting forth the conditions and restrictions under which the UNRRA archives and records would be kept by the United Nations. In his letter addressed to the Secretary-General, dated 26 January 1948, the Director-General of UNRRA stated the following:

“. . . [T]he main objective in this respect is to ensure that UNRRA records will be freely available for authorized and proper use but that, at the same time, their use, inspection or publication will be subject to such restrictions as are necessary to discharge UNRRA’s obligations to member Governments and to its staff.

“Attached hereto is an aide-mémoire setting forth the conditions and restrictions under which it is contemplated that the UNRRA archives and records would be kept by the United Nations, it being understood that these restrictions and conditions would be enforced through the exercise by the United Nations of its control over archives in its possession and through the immunities and other rights and privileges which it possesses. Any archives and records not referred to in the aide-mémoire are to be considered unrestricted. Prior to the transfer, the Administration will have organized, screened and established its files in proper form for permanent archives, including the segregation and identification of all records subject to restriction, to the maximum extent possible.”

6. On 2 February 1948, the Acting Secretary-General acknowledged receipt of this letter, and confirmed that the United Nations Secretariat would be prepared to take over the UNRRA records and archives, and that the United Nations Secretariat would retain those records and archives on the understanding that inspection or publication or other use would be subject to the conditions and restrictions specified in the aide-mémoire attached to the letter.

7. The aide-mémoire attached to the letter from the Director-General of UNRRA contains restrictions regarding the following types of archives: records relating to member or recipient Governments of UNRRA, records concerning personnel security investigations, and records dealing with internal UNRRA matters

involving the investigation of UNRRA offices or individuals in connection with the performance of their functions. Archives and records not referred to in the aide-mémoire were to be considered unrestricted. Accordingly, the omission from the aide-mémoire of personnel records of individual UNRRA employees could be interpreted as an acknowledgement that those records are unrestricted.

8. However, according to the above-cited paragraph 12 of the transfer agreement, an agreement concerning special conditions attaching to the retention, administration, use and location of the personnel records of individual UNRRA employees was to be drawn up separately. We have not been able to locate such an agreement in our files and are not aware that such an agreement was in fact ever drawn up.

Legal analysis and advice

9. Since the above-cited transfer agreement provides that the United Nations has assumed complete responsibility for the custody and administration of the UNRRA records and archives, they are now part of the United Nations archives. As long as the UNRRA records and archives are not used in a manner contrary to the conditions stipulated in the aide-mémoire, the United Nations should be able to decide on their release. Since the use of the UNRRA personnel records is not restricted in the conditions stipulated in the aide-mémoire, a request for access to the official status file of a deceased former UNRRA employee should, in my view, be handled in the same manner as a request for access to the official status file of a deceased United Nations staff member.

10. We understand that such a request is normally addressed to the Personnel Officer of the deceased staff member's last department, who approves the release of the official status file. If that department cannot be determined, such requests should be directed to the Assistant Secretary-General for Human Resources Management. Since UNRRA was terminated on 31 March 1949, it would be for the Assistant Secretary-General for Human Resources Management to determine whether the official status file in this case can be released.

11. Finally, I note that the last provision of the aide-mémoire which concerns records dealing with internal UNRRA matters involving the investigation of UNRRA offices or individuals in connection with the performance of their functions, stipulates, inter alia, that "any document or other paper adversely reflecting or commenting on an individual employee of UNRRA against whom no action has been taken by UNRRA with respect to the matter referred to in the document, shall not be made available without the consent of the individual concerned." I understand that the official status file in question may contain exactly the type of information referred to in the above-cited provision. However, for obvious reasons, the condition that "the consent of the individual concerned" should be secured for making the file "available" cannot be satisfied. Although lack of consent of the individual concerned could provide a legal justification for denying access to the file to a third party, i.e., an individual or entity not related to the deceased, in the current case, the requester is the son of the deceased UNRRA staff member and the apparent successor of his rights. Accordingly, the above limitation per se should not preclude access for the requester to the file in question.

2 March 2001

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5. Application for international patent protection for United Nations University's Universal Network Language—Patent Cooperation Treaty application process—Status of United Nations University and its Rector

Memorandum to the Director, United Nations University, Office at the United Nations, New York

Background

1. This responds to the letter of 22 March 2001 addressed to me from the Rector of the United Nations University (UNU) concerning patent protection. We understand that the Institute of Advanced Studies at UNU has developed an "electronic language" known as the Universal Network Language for which UNU seeks to establish patent protection in (a Member State) and internationally. According to the UNU Rector's letter, the purpose of establishing patent protection for the Universal Network Language in the name of and for the benefit of the Organization is to ensure that the Universal Network Language can be made freely available to all peoples and can be protected from commercial exploitation by third parties.

2. In his letter, the UNU Rector stated that UNU had applied to the Member State's Patent Office in order to secure a patent for the Universal Network Language. The Member State Patent Office, however, has taken the position that UNU lacks the juridical capacity to obtain a patent for the Universal Network Language and has informed UNU that a patent for the Universal Network Language would have to be obtained in the name of the United Nations itself. The UNU Rector stated that a formal patent application had been made by UNU to a Patent Office of the Member State in November 1999 but that, in view of the issue concerning the entity in whose name the patent for the Universal Network Language should be obtained, that application is pending. We understand that the deadline for amending the patent application in the name of the Organization is 31 March 2001, after which the ability to obtain the patent will be forever barred in the Member State, and possibly internationally.

3. The UNU Rector stated that UNU had retained the services of a law firm of the Member State for the purpose of submitting the patent application. Attached to the UNU Rector's letter was a copy of an institutional contractual agreement between UNU and the firm, pursuant to which UNU had retained the services of the firm. For the purpose of filing the patent application for the Universal Network Language in the name of the Organization, the firm has prepared two forms of a power of attorney by which the Organization would empower two of the firm's lawyers to act on behalf of the Organization in filing a patent application for the Universal Network Language with the Member State's Patent Office and for all matters relating to an international application under the Patent Cooperation Treaty.

Analysis and recommendation

4. As an initial matter, we are not aware of any international legal regime that requires States Members of the Organization to extend patent protection in respect of ideas, inventions or processes, such as the Universal Network Language, created by the Organization. This is in contrast to the Paris Convention for the Protection of Industrial Property, which expressly requires States parties to protect the name and emblem of

the Organization, and the Universal Copyright Convention, which provides copyright protection for publications of the United Nations. The Patent Cooperation Treaty, done at Washington, D.C., in June 1970, 1160 U.N.T.S. 231 (1970), 28 U.S.T. 7645, [1970] TIAS No. 8733, does not provide for specific patent protection for the intellectual property of the United Nations. However, the Patent Cooperation Treaty does provide a means for filing for protection of patents such that the protection extended is valid in all States that are members of the International Patent Cooperation Union, established by that Treaty. Accordingly, in order to obtain worldwide patent protection in respect of the Universal Network Language, we understand that it would be sufficient to register a patent for the Universal Network Language in a Member State while at the same time filing an international application under the Patent Cooperation Treaty in a Member State, a Contracting State to the Treaty.

5. For purposes of completing the patent application process for the Universal Network Language in a Member State and under the Patent Cooperation Treaty, the firm seeks a power of attorney by an authorized official of the United Nations granting the firm's principal attorneys power to act on behalf of the Organization. We have reviewed the forms for power of attorney prepared by the firm, and we do not consider that it is necessary that this Office execute the forms granting the attorneys the power to act on behalf of the Organization. Instead, we consider that the Rector of UNU, an official appointed by the Secretary-General, has the authority to take all action necessary with respect to the patent application process, including, if necessary, executing such forms for power of attorney.

6. In this regard, we note that article XI, paragraph 1, of the Charter of the United Nations University ("UNU Charter") provides that the University is an "autonomous organ of the General Assembly and shall enjoy the status, privileges and immunities provided in Articles 104 and 105 of the Charter of the United Nations and in other international agreements and United Nations resolutions relating to the status, privileges and immunities of the Organization." Article XI, paragraph 3, of the UNU Charter further provides that the "University may enter into agreements, contracts or arrangements with Governments, organizations, institutions, firms or individuals for the purpose of carrying out its activities." Finally, article V of the UNU Charter provides that the Rector of the University is "appointed by the Secretary-General" and further provides, in paragraph 3 thereof, that the "Rector shall be the chief administrative officer of the University" and shall have the authority, inter alia, to "[m]ake arrangements with Governments and international as well as national public and private organizations with a view to offering and receiving services related to the activities of the University."

7. In our view, the UNU Charter provides sufficient authority for the Rector of UNU to take any and all appropriate action and make any and all appropriate arrangements with the patent authorities of the Government of a Member State to apply for and obtain both national and international patents in respect of the Universal Network Language in the name of and for the benefit of the United Nations. Thus, we consider that, rather than having an official of the United Nations at Headquarters in New York complete the forms for power of attorney submitted by the firm, the Rector of UNU should sign all patent applications and/or complete and sign all necessary forms and take any and all other action necessary and appropriate to apply for and obtain national and international patent protection for the Universal Network Language. Of course, if the Rector were away from the office, then the authority of the Rector would extend to the official whom the Rector has designated to act on his behalf during such absence.

8. This Office intends to contact the firm and to liaise with the firm in the prosecution of the patent application process. We will, of course, keep your office informed about our coordination with the firm. In the future, UNU should be sure to coordinate with this Office in connection with the retention and use of outside legal counsel for matters that affect the Organization generally.

29 March 2001

6. Joint IPU/United Nations publication on Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol—Administrative instruction ST/AI/189 governs United Nations publications—Requirements to be met if published by IPU, by the United Nations

Memorandum to the Chief, Women's Rights Unit, Division for the Advancement of Women, Department of Economic and Social Affairs

1. This is with reference to your memorandum dated 1 June 2001, requesting advice on the proposal for a joint publication between the United Nations and the Inter-Parliamentary Union (IPU) for parliamentarians on the Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol ("the handbook").

2. You attached to your memorandum the copy of the title and cover pages of the publication entitled *Respect for International Humanitarian Law* issued jointly by IPU and the International Committee of the Red Cross (ICRC). We assume that your office and IPU intend to prepare a similar publication. We note that IPU and ICRC publish this publication jointly and that it is copyrighted in the name of both organizations.

3. United Nations publications are governed by the ST/AI/189 series of administrative instructions on publications ("Regulations for the control and limitation of documentation"). In the light of its special status, i.e., as an international intergovernmental organization with certain privileges and immunities, the United Nations does not enter into arrangements with a non-United Nations entity to prepare and issue a joint publication, such as the one attached to your memorandum, i.e., publications for which the United Nations and a non-United Nations entity are jointly responsible and for which the copyright is being held in the name of both entities. Indeed, within the context of ST/AI/189/Add.2 and ST/AI/189/Add.6/Rev.4, the term "joint publication" is limited to publications for which the United Nations and a United Nations specialized agency or agencies are jointly responsible. Therefore, a joint publication between the United Nations and IPU, which is not a specialized agency, with a joint copyright, would be prohibited under United Nations rules and policies.

4. Under the circumstances, and given that a joint copyright is not permissible, we recommend that the intended handbook be published either by the United Nations or by IPU. The decision whether the handbook is to be published by IPU or by the United Nations is, in our view, a policy decision based on several factors, such as funding, scope of contributions by the United Nations vis-à-vis IPU, timing, etc. If you decide that IPU will publish the handbook, you may wish to consider that IPU should also be given the copyright to the handbook.

Published by IPU

5. In case the handbook will be published by IPU, and the copyright of the handbook will remain with IPU, the United Nations should be provided with the unlimited right to use the handbook free of royalties or other charges. The United Nations should also be provided with a certain number of free copies. Furthermore, the handbook may not bear the United Nations emblem and seal. The contribution of the United Nations in the preparation of the publication should be acknowledged. The cooperation may be given appropriate mention in the foreword or preface or on the title page in the following terms:

> "Prepared in cooperation with the Women's Rights Unit, Department of Social and Economic Affairs, United Nations".

6. Under this scenario, we would like to point out the following with respect to your specific questions mentioned in paragraph 3 of your memorandum:

- We believe that the approval of the UN Publication Board would not be required. We understand that the handbook is not part of the regular publication programme of the Department of Economic and Social Affairs and, given that the United Nations will only partially contribute to its contents, the approval of the Publication Board does not seem necessary;
- IPU is free to translate the handbook into any other language;
- The determination as to whether costs should be charged or whether the handbook should be published free of charge is not subject to United Nations rules or regulations, and this matter would be for IPU to decide, presumably in consultation with your Office.

Published by the United Nations

7. The requirements for a United Nations publication prepared together with IPU would be very similar to the requirements mentioned above. The United Nations should be the exclusive holder of the copyright for the publication, while providing IPU with an unlimited right to use the publication free of charge. In accordance with ST/AI/189/Add.2 and ST/AI/189/Add.21, the cover page of the publication shall bear the United Nations emblem only. However, we consider the appearance of the IPU logo on the title page acceptable in connection with the acknowledgement of the contribution of IPU for the publication. The rules for acknowledgements and/or attribution in United Nations publications are set forth in ST/AI/189/Add.6/Rev.4; in accordance with those rules, the acknowledgement could read as follows:

> "Prepared in cooperation with the Inter-Parliamentary Union" [followed by the IPU emblem].

8. The approval of the United Nations Publication Board would be required for this project. IPU may be provided with a certain number of copies free of charge. The translation of the publication from English into other languages could be done by IPU. However, this should be indicated in the versions published in those other languages. ST/AI/189/Add.15/Rev.1 governs the pricing of United Nations publications. Under rule 1 of ST/AI/189/Add.15/Rev.1, the responsibility for determining prices for publications rests with the Sales Section, Publishing Division. In this connection, you may wish to note that while there are no legal objections to distributing the handbook free of charge, the General Assembly has expressly approved the principle that, whenever it is desirable and possible, the sale of public informational

material should be encouraged not only because the proceeds go to the Working Capital Fund, but also because publications that are sold rather than freely distributed usually command greater respect and are more likely to be read and hence have a greater impact (see ST/AI/189/Add.15/Rev.1, para. 1).

9. Finally, you may wish to consider the following in case the handbook will be published by the United Nations. If there are any parts or chapters in the publication clearly recognizable as having been prepared by IPU, you may wish to add a disclaimer to the effect that the positions expressed in those chapters are those of IPU and do not necessarily reflect the position of the United Nations. Furthermore, you may wish to consider that IPU should be required to obtain permission from the authors for the inclusion of their work in the handbook and to indemnify and hold the United Nations harmless from and against all suits, proceedings, claims and liability of any kind arising from or relating to allegations or claims that the IPU contribution to the publication constitutes an infringement of any copyright or other intellectual property.

10. In the light of the above, we recommend that you enter into a contract with IPU. Given the variables in how the project will be implemented, we are not yet in a position to provide you with a model contract. However, once the modalities have been agreed upon by your Office and IPU, this Office is available to assist in the preparation or review of a contract. Please do not hesitate to contact us if you have any further questions in this matter.

19 June 2001

7. Declaration on Cities and Other Human Settlements in the New Millennium with respect to mandate and status of Commission on Human Settlements and the mandate, role and function of Habitat—Options for reviewing and strengthening those bodies—Compatibility of standing committees and functional commissions establishing subsidiary bodies

Facsimile to the Executive Director, United Nations Centre for Human Settlements

1. This is with reference of your inquiry to the Legal Counsel of 13 June 2001 concerning the Declaration on Cities and Other Human Settlements in the New Millennium with respect to the mandate and status of the Commission on Human Settlements (the Commission) and the status, role and function of the United Nations Centre for Human Settlements (Habitat). Our comments are as follows:

2. The long-standing status of the Commission as a standing committee of the Economic and Social Council derives from the manner in which the Commission was established. In part II of General Assembly resolution 32/162 of 19 December 1977, the Assembly decided that the Economic and Social Council should transform the Committee on Housing, Building and Planning into a Commission on Human Settlements. In so doing, the Assembly did not request the Council to establish the Commission as a functional commission and as such the Commission retained the status of its predecessor, the Committee on Housing, Building and Planning.

3. While we are not in a position to comment on the political differences or the budgetary differences between a standing committee and a functional commission, the only legal differences between the two lie in the rules of procedure applicable thereto. Standing committees are governed by the rules of procedure of the Economic and Social Council, whereas functional commissions are governed by the rules of procedure of the functional commissions of the Economic and Social Council.

4. As for options to achieve the General Assembly's request to the Secretary-General, it is important to recall that, in the Declaration on Cities and Other Human Settlements in the New Millennium,[16] the General Assembly, inter alia, invited the Secretary-General to report to the Assembly at its fifty-sixth session on options for reviewing and strengthening the mandate and status of the Commission and the status, role and functions of Habitat in accordance with the relevant resolutions of the General Assembly and the Economic and Social Council and decisions of the Habitat II Conference. With respect to the status of the Commission, there are, of course, several options, including recommending that the General Assembly consider transforming the Commission into (*a*) a functional commission of the Economic and Social Council, or even (*b*) a subsidiary organ of the General Assembly itself. In accordance with the Declaration, however, it is the prerogative of the Secretary-General to formulate and submit options for consideration and possible adoption by the General Assembly. In formulating options, the Secretary-General may, of course, take into account proposals and comments made by the Economic and Social Council and concerned Secretariat units, including Habitat.

5. With respect to a new denomination for Habitat, it should be recalled that in its resolution 32/162, the Assembly also established Habitat and specifically named it the "United Nations Centre for Human Settlements (Habitat)". Any recommendation to change the denomination should therefore be presented to the General Assembly for its consideration and approval. It would again be a matter within the discretion of the Secretary-General to include such a recommendation in the report he is invited to submit pursuant to the Declaration on Cities and Other Human Settlements in the New Millennium.

6. As to the compatibility of standing committees establishing subsidiary bodies, we wish to refer to rule 24, paragraph 2, of the rules of procedure of the Economic and Social Council, which provides that "except for the regional commissions, the commissions and committees of the Council shall not create either standing or ad hoc intersessional subsidiary bodies without prior approval of the Council". As such, both standing committees and functional commissions must obtain the prior approval of the Council in order to establish subsidiaries. Therefore, as long as the Committee obtains the prior approval of the Council, standing committees may establish subsidiary bodies. Accordingly, given that in its resolution 18/1 the Commission has submitted the recommendation to establish a Committee of Permanent Representatives (the Committee) to the Economic and Social Council for its approval, there is no legal objection to the establishment of the Committee as a subsidiary of the Commission provided that the Council approves.

7. We are not in a position to comment on the political ramifications or possible negative perceptions of a "piecemeal" decision by the Council that a specific decision on the establishment of a subsidiary body of the Commission might have on the general role of the Council vis-à-vis the status and mandate of the Commission. In

any event, in the light of the provisions of rule 24 mentioned above, the Commission is legally obliged to obtain the prior approval of the Council in order to establish the Committee as its subsidiary body. Such action by the Council does not prevent the Council from making recommendations on the status and role of the Commission directly to the General Assembly and/or to the Secretary-General for inclusion in the report he has been invited to submit to the General Assembly at its fifty-sixth session.

8. The Council's review and approval of the recommendation contained in resolution 18/1 does not preclude its involvement in the elaboration of options for reviewing and strengthening the mandate and status of the Commission and the status, role and functions of Habitat in accordance with the outcome of the twenty-fifth special session of the General Assembly. As indicated above, the Council, if it so desired, could provide its recommendations and comments either directly to the General Assembly or to the Secretary-General for inclusion in the report he has been invited to submit to the General Assembly at its fifty-sixth session.

20 June 2001

8. Status of World Tourism Organization in United Nations system—Deemed to be a "related organization" of the United Nations—Suggested formulation: WTO (Trade) and WTO (Tourism)

Memorandum to the Under-Secretary-General for General Assembly Affairs and Conference Services

1. This is with reference to your memorandum of 16 October 2001 to the Legal Counsel concerning the status of the World Tourism Organization in the United Nation system. Our comments are as follows.

2. In its resolution 32/156 of 19 December 1977, the General Assembly approved the Agreement on Cooperation and Relationships between the United Nations and the World Tourism Organization. In accordance with article IV, paragraph 2, of that Agreement, the World Tourism Organization "shall be invited to send representatives to attend in an observer capacity meetings of the Economic and Social Council or its subsidiary organs, conferences convened by it and meetings of other United Nations bodies which deal with matters of common interest and to participate, with the approval of the body concerned and without the right to vote, in debates on questions of concern to the World Tourism Organization". In paragraph (*c*) of its decision 109 (LIX) of 23 July 1975, the Economic and Social Council had similarly designated the World Tourism Organization to participate, on a continuing basis, in the work of the Council. In its resolution 36/41 of 19 November 1981, the General Assembly similarly decided "that the World Tourism Organization may participate, on a continuing basis, in the work of the General Assembly in areas of concern to that Organization".

3. Based on General Assembly resolutions 32/156 and 36/41 and Economic and Social Council decision 109 (LIX), the World Tourism Organization may be deemed to be a related organization of the United Nations system, a status currently enjoyed by the International Atomic Energy Agency, the Preparatory Commission

for the Comprehensive Nuclear-Test-Ban Treaty Organization, the Organisation for the Prohibition of Chemical Weapons and the World Trade Organization.

4. As the Agreement on Cooperation and Relationships between the United Nations and the World Tourism Organization does not contain reporting provisions, and as General Assembly resolution 36/41 does not accord an explicit right to make statements, the World Tourism Organization does not enjoy an automatic right to address the General Assembly. In the absence of a decision by or a specific request to report to, the General Assembly, the World Tourism Organization may not address the Assembly. We note that, on at least one prior occasion, in paragraph 6 of its resolution 36/41, the General Assembly requested the Secretary-General of the World Tourism Organization to submit to the General Assembly at its thirty-eighth session, through the Economic and Social Council, a report on the progress made in the implementation of the Manila Declaration.[17]

5. In the light of the conclusion reached above, the World Tourism Organization should be added to the list of organizations in the correspondence unit worksheet. Incidentally, the Preparatory Commission for the Comprehensive Nuclear Test Ban Treaty Organization and the Organisation for the Prohibition of Chemical Weapons should also be added.

6. All related organizations, including the World Tourism Organization, should be provided seating after the specialized agencies in the General Assembly Hall.

7. We note with satisfaction that the World Tourism Organization has been invited to the fifty-sixth regular session of the General Assembly and its special session on children. The World Tourism Organization should be invited to all meetings and conferences of the General Assembly, the Economic and Social Council and their subsidiary organs to which the other related organizations are invited. In this connection, we wish to refer to the footnote contained in the rules of procedure of meetings and conferences concerning the participation of specialized agencies and related organizations. In the future, that footnote should also include the World Tourism Organization.

8. Provided that the World Tourism Organization does indeed maintain a liaison office at Headquarters, it should be listed among the specialized agencies and related organizations listed in part VI of the "Blue Book".

9. As for the acronym, in order to avoid any confusion, we would suggest the following formulations: WTO (Trade) and WTO (Tourism). The matter should of course be discussed with the two organizations concerned.

10. By copy of this memorandum, we intend to bring this matter to the attention of the Office of Inter-Agency Affairs to ensure, if such is not already the case, that the World Tourism Organization and its status as a related organization of the United Nations system are properly reflected in the meeting of the Administrative Committee on Coordination, the Directory of senior officials of the United Nations system of organizations and the United Nations system chart.

18 October 2001

9. CONSTITUTION OF A QUORUM OF PREPARATORY COMMISSION FOR THE COMPREHENSIVE NUCLEAR-TEST-BAN TREATY ORGANIZATION—RULES OF PROCEDURE OF PREPARATORY COMMISSION—"MEMBERS PRESENT AND VOTING"

Facsimile to the Director, Legal and External Relations Division, Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization, Vienna

1. This is with reference to your facsimile of today's date to the Legal Counsel concerning the rules of procedure of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization with respect to the quorum. At the outset, we note that, in accordance with paragraph 5(*a*) of the Text on the Establishment of the Preparatory Commission, the costs of the Commission and its activities shall be met annually by all States signatories in accordance with the United Nations scale of assessments with certain adjustments. As the Text explicitly applies the United Nations scale of assessments to the Preparatory Commission, such application is not subject to a decision by the Commission itself. In any event, our comments on the questions set out in your facsimile are as follows.

2. On the first question, rule 12 of the rules of procedure of the Preparatory Commission provides that "a majority of the members of the Commission shall constitute a quorum". Rule 12 speaks only in terms of membership, not in terms of eligibility to vote. As there are 161 States signatories, you are correct in concluding that 81 States signatories constitute the required quorum. As such, whether or not a particular State signatory has fully discharged its financial obligations within the meaning of paragraph 5(*b*) of the Text on the Establishment of the Preparatory Commission, that State, if present, is counted for purposes of determining the existence of a quorum.

3. With respect to your second question, quorum is based solely on a member's presence at the meeting; quorum is not related to that member's eligibility to vote.

4. In response to your third question, please be advised that, if it is determined that a quorum does not exist prior to the opening of a meeting, the meeting should not be opened until such time as a quorum is obtained. If during the course of a meeting a representative calls for or challenges the existence of a quorum and it is determined that indeed there is no quorum, the presiding officer should immediately suspend or adjourn the meeting. While rule 67 of the rules of procedure of the General Assembly similarly provides that the presence of a majority of the members is required to take a decision, rule 67 provides that "the President may declare open and permit a debate to proceed when at least one third of the members of the General Assembly are present". Rule 12 of the rules of procedure of the Preparatory Commission does not provide separate quorum requirements for debate and decision-making purposes. As such, in our view, it would not even be possible to continue the debate in the absence of a majority of the members of the Commission. Therefore, once it is determined that there is no quorum, the meeting should be suspended or adjourned. When the meeting is resumed or reconvened, it is not necessary—but would be advisable—to inform the members present that there is a quorum.

5. The absence of a quorum does not invalidate the proceedings that have taken place at the meeting or conference up to the point when the absence of a quorum is ascertained. The absence of a quorum also does not invalidate any decisions that have been taken prior to that point. Any challenges to the quorum should be raised prior to a decision being taken; ex post facto challenges are not receivable, as many members may have been at the meeting at the time a vote was taken but either chose not to participate in the vote or left the room after voting. Once a decision has been taken, it cannot be overturned unless there is a motion to reconsider in accordance with rule 24 of the rules of procedure of the Preparatory Commission.

6. Pursuant to rule 28 of the rules of procedure of the Preparatory Commission, "the phrase 'members present and voting' means members casting an affirmative or negative vote. Members who abstain from voting shall be regarded as not voting". In accordance with paragraph 5(*b*) of the Text, States signatories that have not fully discharged their financial obligations do not have a right to vote. Accordingly, while members who do not have the right to vote may be present for quorum purposes, by definition they cannot vote and therefore cannot be counted among the members "present and voting".

7. Finally, we concur with your conclusion that, depending on the number of States signatories that have lost their right to vote, the number of States signatories present for quorum purposes may be much larger than the actual number of States "present and voting". It should also be kept in mind that the number of States signatories that are present for quorum purposes and that enjoy the right to vote but choose to abstain from voting will, in accordance with rule 28, further reduce the number of members "present and voting".

31 October 2001

10. Legal status of Global Ministerial Environmental Forum—Relationship between Forum and Governing Council of UNEP—Relationship between membership of Governing Council of UNEP and membership of (or modalities of participation in) Global Ministerial Environmental Forum

Letter to the Executive Director, United Nations Environment Programme

This is in response to your letter of 19 October 2001. In that letter you ask this Office to clarify the three issues that were raised by Member States with regard to the adoption by the Governing Council of UNEP at its twenty-first session of decision 21/21 of 9 February 2001, concerning governance of UNEP and the implementation of General Assembly resolution 53/242 of 28 July 1999. According to your letter, those issues are as follows:

(*a*) Legal status of the Global Ministerial Environmental Forum;

(*b*) Relationship between the Global Ministerial Environmental Forum and the Governing Council of UNEP;

(*c*) Relationship between the membership of the Governing Council of UNEP and the membership of (or modalities of participation in) the Global Ministerial Environmental Forum.

Introduction

As noted in your letter, a decision concerning the institution of a Global Ministerial Environmental Forum was taken by the General Assembly at its fifty-third session in its resolution 53/242 of 28 July 1999. In that resolution, the Assembly took note of the report of the Secretary-General on environment and human settlements and the report of the United Nations Task Force on Environment and Human Settlements annexed thereto, containing recommendations on reforming and strengthening the activities of the United Nations in the field of environment, and human settlements. The Assembly also took into account in the resolution the views on the Secretary-General's report of the Governing Council of UNEP, as contained in its decision 20/17 of 5 February 1999, and in paragraph 6 of the resolution, which relates to the institution of the Global Ministerial Environmental Forum, the Assembly:

> "*Welcomes* the proposal to institute an annual, ministerial-level, global environmental forum, with the Governing Council of the United Nations Environment Programme constituting the forum in the years that it meets in regular session and, in alternative years, with the forum taking the form of a special session of the Governing Council, in which participants can gather to review important and emerging policy issues in the field of the environment, with due consideration for the need to ensure the effective and efficient functioning of the governance mechanisms of the United Nations Environment Programme, as well as possible financial implications, and the need to maintain the role of the Commission on Sustainable Development as the main forum for high-level policy debate on sustainable development".

Analysis of paragraph 6 of General Assembly resolution 53/242

(a) *Interrelation between the institution of the Global Ministerial Environmental Forum and universal membership of the Governing Council of UNEP*

It follows from paragraph 6 of resolution 53/242 that the General Assembly, on the one hand, decided that the Global Ministerial Environmental Forum should be instituted as a global forum, which implies that participation in it must be universal, and, on the other, stipulated that the Governing Council of UNEP, whose membership is limited to 58 member States, should constitute the Global Ministerial Environmental Forum with the latter taking the form of either regular or special sessions of the Governing Council.

It appears from the legislative history of resolution 53/242 that recommendation 13 of the Task Force, which related to the institution of the Forum, contained two interrelated parts. In subparagraph (*a*) of recommendation 13 it was suggested that the Governing Council of UNEP should constitute the Forum and in subparagraph (*c*) it was recommended that the membership of the Governing Council should be changed to make it universal (see A/53/463, annex, para. 47). The Secretary-General in his report supported recommendation 13 of the Task Force in its entirety, including the proposed change in the membership of the Governing Council of UNEP. Since the Governing Council is a subsidiary body of the General Assembly and subparagraph (*c*) of recommendation 13 contained

a proposal with significant institutional implications, the Secretary-General pointed out in his report that the implementation of that recommendation would require action by the General Assembly.

The Governing Council of UNEP in its decision 20/17 of 5 February 1999 on the report of the Secretary-General expressed its support for the proposal that an annual ministerial-level global environmental forum should be instituted and that the UNEP Governing Council should constitute that forum. However, with reference to subparagraph (*c*) of recommendation 13, the Council only took note of the proposal concerning universal membership of the Governing Council of UNEP and the ongoing debate in that regard.

As noted above, the General Assembly in paragraph 6 of its resolution 53/242 did not endorse the proposal concerning universal membership of the Governing Council of UNEP either.

(b) *Concept of the Global Ministerial Environmental Forum as a different format of United Nations meetings*

Analysis of the legislative history of resolution 53/242 further indicates that a recommendation of the Task Force regarding the institution of the Forum was based on the conviction of its members that the current intergovernmental forums, including the Governing Council of UNEP and the Commission on Sustainable Development, were inadequate to give the kind of guidance that was needed in the environmental field. Members of the Task Force were of the view that the traditional United Nations format for intergovernmental meetings did not fully meet the need for high-level consideration of environmental issues because it featured formal discussion leading to agreement on the exact wording of a text. The Task Force believed that to achieve the purposes which intergovernmental meetings on environmental and human settlements should fulfil, a format was needed that would allow for actual debate, more in-depth discussions, more interaction with major groups to produce innovative strategies that could meet tomorrow's challenges. The Task Force concluded that such a format could be realized through the institution of an annual ministerial-level global environmental forum (see A/53/463, annex, para. 47). The Secretary-General echoed these arguments by stating in his report that institutional adjustments are needed to "provide a forum in which high-level debate on global issues is informed by a comprehensive approach to the international environmental agenda" (A/53/463, para. 41).

It appears from the above clarifications that although the Task Force and the Secretary-General proposed in their respective reports that the membership of the Governing Council should be made universal, they did not view the Governing Council as an organ that would perform the functions of the Global Ministerial Environmental Forum. The latter, in their view, is supposed to be a *forum*, as opposed to being an organ, for in-depth discussions and interaction with major groups, and its main task should be the development of new, innovative strategies rather than adoption of concrete decisions.

The General Assembly, in its resolution 53/242, did not decide on the establishment of a new organ. It stated that an arrangement was needed at the ministerial level to provide for a forum "in which participants can gather to review important and emerging policy issues in the field of the environment" and that the Governing Council of UNEP should constitute such a forum.

Conclusions

It follows from the foregoing that the Governing Council of UNEP should organize its work in a way which would allow it to act at its sessions as a global forum in which its participants can review important and emerging policy issues in the field of the environment. Under the resolution, however, that should be done "with due consideration for the need to ensure the effective and efficient functioning of the governance mechanisms of the United Nations Environment Programme, as well as possible financial implications".

Therefore, with reference to your first question, we are of the view that the Global Ministerial Environmental Forum does not have its own independent legal standing or status because under paragraph 6 of General Assembly resolution 53/242 it is merely a forum for discussions and dialogue. As provided in the resolution, the Governing Council of UNEP, when it acts as the Forum, should adjust and modify its working methods in a way that should allow it to serve as a forum with universal participation at the ministerial level to review policy issues in the field of environment. Thus, as to your second question, we believe that, in accordance with paragraph 6 of General Assembly resolution 53/242, the Governing Council of UNEP constitutes the Global Ministerial Environmental Forum when it acts like a forum which performs the tasks defined in that paragraph of the resolution. As to the relationship between the membership of the Governing Council of UNEP and the Forum, it should be governed by the functions assigned by the General Assembly to the Council in the respective resolutions. The Governing Council of UNEP has the membership and mandate which are defined by General Assembly resolution 2997 (XXVII) of 15 December 1972 concerning the establishment of UNEP. Under General Assembly resolution 53/242, the Governing Council of UNEP, when it acts as the Global Ministerial Environmental Forum, is supposed to have universal participation and its mandate is limited to the tasks defined in paragraph 6 of that resolution.

20 November 2001

11. Role of High Representative for Bosnia and Herzegovina—General Framework Agreement for Peace in Bosnia and Herzegovina—United Nations International Police Task Force—United Nations Mission in Bosnia and Herzegovina—Relationship between High Representative and United Nations

Note to the Under-Secretary-General, Department of Political Affairs

1. This refers to your note dated 16 November 2001 seeking our views on issues concerning the relations between the High Representative for Bosnia and Herzegovina and the United Nations, particularly, the High Representative's reporting/briefing obligations to the Security Council, as well as other statutory obligations, if any.

2. The General Framework Agreement for Peace in Bosnia and Herzegovina and the annexes thereto (collectively the Peace Agreement) covered military and civilian aspects of the settlement and provided for a complex set of arrangements. The implementation of the civilian aspects of the peace settlement involved the assistance of numerous international organizations such as the United Nations, the Organization for Security and Cooperation in Europe, the World Bank and other specialized agencies, the International Committee of the Red Cross as well as non-

governmental organizations. As far as the High Representative and the United Nations are concerned, their respective roles are set out in annexes 10 and 11 to the Peace Agreement.

The High Representative

3. Pursuant to annex 10 to the Peace Agreement, containing the "Agreement on Civilian Implementation of the Peace Settlement", the Parties requested the designation of a High Representative, to be appointed consistent with relevant United Nations Security Council resolutions, to facilitate the Parties' own efforts and to mobilize and, as appropriate, coordinate the activities of the organizations and agencies involved in the civilian aspects of the peace settlement by carrying out, as entrusted by a United Nations Security Council resolution, tasks described in article II of annex 10. In addition to coordinating the activities of the civilian organizations and agencies to ensure the efficient implementation of the civilian aspects of the peace settlement, the tasks of the High Representative included: respecting the autonomy of the civilian organizations and agencies in Bosnia and Herzegovina within their spheres of operation while as necessary giving general guidance to them about the impact of their activities on the implementation of the peace settlement; providing guidance to, and receiving reports from, the Commissioner of the International Police Task Force (IPTF), the establishment of which was requested by the Parties pursuant to annex 11 of the Peace Agreement; and reporting periodically on progress in implementation of the Peace Agreement to, inter alia, the United Nations. Furthermore, the Parties designated the High Representative as "the final authority" in theatre regarding the interpretation of the civilian implementation of the Peace Agreement (annex 10, article V).

4. On 8 December 1995, the Peace Implementation Conference in London approved the designation of the first High Representative, Mr. Carl Bildt, and invited the Security Council to agree to such designation.

5. The Security Council, in its resolution 1031 (1995) of 15 December 1995, endorsed the establishment of a High Representative, following the request of the Parties, who, "in accordance with annex 10 on the civilian implementation of the Peace Agreement, will monitor the implementation of the Peace Agreement and mobilize and, as appropriate, give guidance to, and coordinate the activities of, the civilian organizations and agencies involved" (para. 26). By that same resolution, the Council agreed to the designation of Mr. Carl Bildt as High Representative and confirmed that the latter was "the final authority in theatre regarding the interpretation of annex 10 on the civilian implementation of the Peace Agreement" (para. 27). The Council also requested the Secretary-General to submit to it reports from the High Representative, in accordance with annex 10 of the Peace Agreement and the conclusions of the London Conference, on the implementation of the Peace Agreement (para. 32).

United Nations Mission in Bosnia and Herzegovina (UNMIBH)

6. Pursuant to annex 11 to the Peace Agreement, concerning the "Agreement on International Police Task Force", the Parties requested the United Nations to establish, by a decision of the Security Council, a "UN International Police Task Force" (IPTF) to carry out a programme of assistance allowing the monitoring, observing and inspecting of law enforcement activities and facilities throughout Bosnia and Herzegovina, as described in article III of annex 11. Under the same annex, the Parties agreed that any obstruction of IPTF activities would constitute a

failure to cooperate with IPTF and that the IPTF Commissioner would communicate such failure to the High Representative.

7. While annex 11 provides that the IPTF is autonomous with regard to the execution of its functions, it specifically provides that its activities shall be coordinated with the High Representative. Furthermore, the IPTF Commissioner shall receive guidance from the High Representative and periodically report on matters within his responsibility to the High Representative and the Secretary-General of the United Nations.

8. Annex 11 of the Peace Agreement applies to the United Nations/United Nations Mission in Bosnia and Herzegovina by virtue of a decision made by the Security Council pursuant to its resolution 1035 (1995). By that resolution, the Council established IPTF to be entrusted with the tasks set out in annex 11 to the Peace Agreement and a United Nations civilian office and endorsed the arrangements set out in that regard in the Secretary-General's report of 6 February 1996 (S/1996/83). Under such arrangements, IPTF and the United Nations civilian office, known as the United Nations Mission in Bosnia and Herzegovina (UNMIBH), were placed under the authority of the Secretary-General through the United Nations Coordinator, who is the Special Representative of the Secretary-General and Head of Mission of UNMIBH and who, in turn, coordinates with the High Representative.

Relationship between the High Representative and the United Nations

9. The complexity of the arrangements concerning the civilian implementation of the Peace Agreement required a close and effective coordination between the numerous civilian organizations and agencies involved. To that end, the Peace Agreement assigned the leading political role to the High Representative, a role which was confirmed by the Security Council. In that connection, the High Representative also enjoys the assistance of UNMIBH. However, such assistance is clearly intended to facilitate the execution of his responsibilities and not to put under his authority UNMIBH or any such organizations and agencies. The Peace Agreement makes clear that the High Representative is to respect "their autonomy within their spheres of operation" (annex 10, article II, para. 1(*c*)).

10. At the same time, the High Representative is not under the authority of the United Nations or its Secretary-General. He does, however, have certain obligations vis-à-vis the United Nations, which include, in particular, providing guidance to UNMIBH and reporting to the Secretary-General on the civilian implementation of the Peace Agreement. Accordingly, the High Representative has on a regular basis provided reports to the Secretary-General, who in turn submits them to the Security Council. The first such report was submitted to the Security Council under cover of a letter dated 13 March 1996 from the Secretary-General addressed to the President of the Security Council (S/1996/190). Since then, the High Representative has submitted 19 other reports, the latest having been submitted by the Secretary-General to the Council by a letter dated 20 July 2001 (S/2001/723).

11. While pursuant to annexes 10 and 11 of the Peace Agreement and relevant Security Council resolutions the Commissioner of IPTF and the Special Representative of the Secretary-General are under the obligations to coordinate their activities with and report, as appropriate, to the High Representative, the latter is also under the obligation to provide them with the necessary guidance, respect their autonomy in their spheres of operation and report to the Secretary-General on the

civilian implementation of the Peace Agreement. Unless otherwise decided by the Security Council, these same obligations should continue to apply.

27 November 2001

12. Legal status of Cine and Video Club—Proposed donation of audio-visual equipment to Organization—United Nations financial regulations 7.2 to 7.4 and financial rules 107.5 to 107.7—Option of Organization purchasing new audio-visual equipment

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

1. This is with reference to your memorandum dated 29 October 2001, forwarding a memorandum from the Controller dated 10 July 2001, a memorandum from the United Nations Staff Recreation Council Cine and Video Club dated 28 June 2001 and a note from the Office of Central Support Services dated 9 July 2001, with attachment, all addressed to the Under-Secretary-General for Management, Department of Management. These documents relate to the proposed upgrade of the technical facilities, i.e., the donation and installation of new audio-visual equipment, in the Dag Hammarskjöld Library Auditorium.

2. From the documentation received and our discussions with some of the officers involved in the project, our understanding of the matter is as follows. The Film Society (formerly known as the Cine and Video Club) has obtained a commitment from a major United States film company to provide to the Film Society, at no costs to the Society, state-of-the-art audio-visual equipment to be used for future showings of movies in the context of the Film Society's mandate. We understand that the gift to the Film Society will be in the form of a donation and contribution in kind, as the United States film company will essentially pay for the acquisition and installation of the new audio-visual equipment. We note that the Dag Hammarskjöld Library Auditorium is currently being refurbished and understand that it would be desirable for the installation of new audio-visual equipment to take place during the refurbishment process, rather than following its completion. We further understand that the United States film company willing to finance the acquisition and installation of the new audio-visual equipment is seeking, in return, a commitment by the Film Society to show a certain number of films in the Auditorium over the next two years or so using the new equipment acquired through the United States film company. We further understand that it will be up to the Film Society and the film company to agree on the titles and dates of the showing of these films.

3. We note that other departments have expressed a need for an upgrade of the existing audio-visual equipment in the Dag Hammarskjöld Library Auditorium and welcomed the initiative from the Film Society in this respect. We further note that other departments intend to use the audio-visual equipment in the Auditorium and that the Broadcast and Conference Support Section, Information Technology Services Division, suggests that it be consulted during the process of acquiring the new equipment. In this respect, we understand that the United States film company has no specific views or demands as to the future use of the audio-visual equipment, except that a certain number of films be shown over the next two years, and concurs with the equipment being used by other departments or offices.

4. As you indicated in the first paragraph of your memorandum of 29 October 2001, this initiative raises a number of questions, including the issues mentioned in the Controller's memorandum of 10 July 2001 regarding the legal status of the Film Society and the overall responsibility with respect to the implementation of the arrangements to be made with the United States film company. Also, the Controller questions the approach to upgrading the current equipment in the proposed way and suggested that new audio-visual equipment should be purchased through the regular budget, in particular since there seems to be a general agreement among various offices that the existing equipment is outdated.

Donation to the Film Society

5. We understand that this is an initiative by the Film Society and that the discussions with the United States film company are being conducted by the President of the Film Society. Nevertheless, the proposed donation to the Film Society raises several problems. As you are probably aware, the United Nations Staff Recreation Council was established for the benefit of the United Nations staff members and the United Nations community as a subsidiary body of the United Nations. However, with respect to the individual clubs, this Office has consistently taken the view that the clubs, while being members of the United Nations Staff Recreation Council, are not regarded as extensions of the United Nations in the same way as the Council. Their membership may or may not consist of United Nations staff members (under article II of the United Nations Staff Recreation Council Constitution, there exists only a minimum requirement of 10 staff members necessary for the creation of a club), and each club is governed by its own officials or committee elected or appointed from among its own members. We understand that these clubs are unincorporated associations and therefore do not constitute legal entities independent of their members. Accordingly, any arrangement entered into, for example, by the President of the Film Society would make the President of the Film Society ultimately responsible for the implementation of such an arrangement.

6. Given that the intention of the project is to permanently install the equipment in the Auditorium and that other departments and offices intend to use it in connection with their official functions, we believe that an arrangement between the Film Society and the United States film company would not be in the interest of the Organization and we would advise against it. Such an arrangement would raise various problems, including overall responsibility for maintenance or repair, in particular if damages occurred during the use of the equipment by other departments and not by the Film Society.

Donation directly to the United Nations Staff Recreation Council

7. However, we understand that it is indeed the intention of the President of the Film Society not to limit the use of the equipment to the showing of movies by the Film Society, but rather to obtain the new state-of-the-art equipment for its use by the Secretariat. Under the circumstances, it seems appropriate to have the donation made vis-à-vis the Organization itself and we therefore recommend that the United Nations Staff Recreation Council enter into the arrangement with the United States film company regarding acquisition and installation of the new audio-visual equipment. As stated above, the Council is a subsidiary body of the Organization and any donation to that body would consequently be considered to be a donation to the Organization itself.

Conditions for acceptance of a donation to the Organization

8. The policy of the United Nations regarding acceptance of donations is based on United Nations financial regulations 7.2 to 7.4 and financial rules 107.5 to 107.7 promulgated under them. Financial regulation 7.2 provides that:

> "Voluntary contributions, whether or not in cash, may be accepted by the Secretary-General provided that the purposes for which the contributions are made are consistent with the policies, aims and activities of the Organization, and provided that the acceptance of such contributions which directly or indirectly involve additional financial liability for the Organization shall require the consent of the appropriate authority."

9. Given that financial regulation 7.2 specifically declares voluntary contributions to be acceptable "whether or not in cash", in-kind donations, such as the proposed donation to assist in the acquisition of the new audio-visual equipment, are permitted under the United Nations Financial Regulations and Rules. Financial rules 107.5 to 107.7 provide that:

> "*Rule 107.5*
>
> "In cases other than those approved by the General Assembly, the establishment of any trust fund or the receipt of any voluntary contribution, gift or donation to be administered by the United Nations requires the approval of the Secretary-General, who may delegate this authority to the USG/AM [Under-Secretary-General for Administration and Management]."
>
> "*Rule 107.6*
>
> "No voluntary contribution, gift or donation for a specific purpose may be accepted if the purpose is inconsistent with the policies and aims of the United Nations."
>
> "*Rule 107.7*
>
> "Voluntary contributions, gifts or donations which directly or indirectly involve an immediate or ultimate financial liability for the Organization may be accepted only with the approval of the General Assembly."

10. The administration of the above financial rule 107.5 has been delegated to the Controller (see ST/AI/270/Rev.1 dated 12 April 1989, entitled "Delegation of authority under the Financial Rules"). From our view, the purpose of the intended donation would seem consistent with the policies and aims of the Organization and we refer in this respect to the reactions from other departments in relation to the initiative (see above). However, this decision is ultimately a policy decision to be made by your Office. In this regard, we believe that the Information Technology Services Division should be consulted in the overall process, in particular inasmuch as it relates to the needs of other offices intending to use the new equipment and, possibly, to the technical aspects of the new equipment.

11. The other issue is whether the intended donation will result in additional financial liabilities for the Organization, which would require the approval of the General Assembly, in accordance with the above provisions. We note that the proposed donation may result in maintenance and possibly repair obligations to the Organization. It is not clear whether these obligations entail additional financial liability for the Organization, the determination of which is to be made by the Controller. Therefore, we recommend that the Controller be consulted on this point. Subject to the acceptance of the intended donation by the Controller under financial rule 107.5, we have no legal objection to the

donation provided that it will be implemented as described above. I am copying this note to the Controller for his appropriate action under rule 107.5. In this regard, please note that we consider that the obligation to show a certain number of movies does not constitute an additional financial liability. The mandate of the Film Society is to show movies to United Nations staff and guests and this obligation, therefore, does not require any action by the Film Society that it would not do otherwise.

Purchase of new audio-visual equipment by the Organization

12. Finally, and with respect to the Controller's question as to whether it would not be advisable to purchase the new audio-visual equipment from the regular budget, we note that this would, of course, be an option available to the Organization. From a legal point of view, there would be no objection to such an approach; however, in the light of the "window of opportunity" created by the current refurbishment of the Dag Hammarskjöld Library Auditorium, it seems to be in the Organization's interest to acquire the equipment at this point and have it installed during the ongoing refurbishment of the Auditorium, rather than purchase new equipment in accordance with the usual procedures which would be more expensive and, in all likelihood, more time-consuming as, among other things, such purchase would have to include a competitive bidding process. While this is essentially a policy decision to be taken by your Office, in conjunction with other offices and the President of the United Nations Staff Recreation Council, under the circumstances, and given that we consider a proposed donation to the Council to be legally acceptable, we recommend that the Organization obtain the new equipment as suggested by the Film Society. Should your Office, in conjunction with the President of the United Nations Staff Recreation Council, decide to proceed as outlined above, and provided that the Controller confirms that the acceptance of the new equipment would not entail any additional financial liabilities for the Organization, this Office would be available to assist in drafting the arrangements between the United Nations Staff Recreation Council and the United States film company, if necessary. In any event, please do not hesitate to contact us if you have any additional questions in this matter.

10 December 2001

PROCUREMENT

13. United Nations practice concerning acceptance of voluntary contributions from its contractors—Actual and potential FAO contractors—United Nations financial regulations 7.2 to 7.4 and rules 107.5 to 107.7—Guidelines on cooperation between United Nations and business community

Letter to the Legal Counsel, Food and Agriculture Organization of the United Nations

. . .

This refers to your electronic mail of 26 April 2001, requesting information concerning the practice of the United Nations with respect to the acceptance of proposed contributions from its contractors.

You have indicated that under the FAO principles and guidelines for cooperation with the private sector, "under no circumstances may a contribution be accepted if, by way of its acceptance, a contributor appears to be gaining or is led to believe he or she is gaining an inside track to the decision-making process of FAO, whether on policy or internal administrative matters, including procurement and tenders". (We note that we have a copy of the "Principles and guidelines for FAO cooperation with the private sector" dated 3 March 1999.) You further indicated that, as a corollary, the principles and guidelines provide, in particular, that:

> "Contributions should not normally be solicited from FAO contractors but, if offered, it must be made clear that acceptance of a contribution will not affect renewal of contracts, treatment in tender, etc.
>
> "The acceptance of major contributions should generally be avoided in circumstances where tenders are being made and the contributor is likely to be a bidder. If accepted on an exceptional basis, it must be made clear to the contributor that acceptance of the contribution will not affect any decisions relating to the tender. Any such exception must be cleared by the Office of the Director General."

You have indicated the view that while special attention should be given to proposed contributions from *actual* FAO suppliers or concessionaires, contributions from *potential* suppliers and concessionaires may be accepted if, in the near future, no tender is envisaged in which they may likely participate. You have further indicated that, on the other hand, the Procurement Services of FAO is of the view that all companies which provide goods or services which may be requested by FAO, regardless of whether or not a plan exists to proceed with the procurement of such goods and services, should be automatically excluded, with the only exception of those operating in a monopolistic situation or at predetermined and publicly known tariffs available to all clients.

Taking into account that the latter view would de facto exclude most, if not all, possible sponsors, you seek our comments and information concerning the practice of the United Nations on this matter and, in particular, with respect to potential contractors.

The acceptance of voluntary contributions by the United Nations is regulated by United Nations financial regulations 7.2 to 7.4 and financial rules 107.5 to 107.7 promulgated under them. Financial regulation 7.2 provides that:

> "Voluntary contributions, whether or not in cash, may be accepted by the Secretary-General provided that the purposes for which the contributions are made are consistent with the policies, aims and activities of the Organization, and provided that the acceptance of such contributions which directly or indirectly involve additional financial liability for the Organization shall require the consent of the appropriate authority."

Financial rules 107.5 to 107.7 provide that:

> "*Rule 107.5*
>
> "In cases other than those approved by the General Assembly, the establishment of any trust fund or the receipt of any voluntary contribution, gift or donation to be administered by the United Nations requires the approval of the Secretary-General, who may delegate this authority to the USG/AM [Under-Secretary-General for Administration and Management]."

"*Rule 107.6*

"No voluntary contribution, gift or donation for a specific purpose may be accepted if the purpose is inconsistent with the policies and aims of the United Nations."

"*Rule 107.7*

"Voluntary contributions, gifts or donations which directly or indirectly involve an immediate or ultimate financial liability for the Organization may be accepted only with the approval of the General Assembly."

You will note that the above financial regulation and rules, or other provisions in the Financial Regulations and Rules, do not include any specific provisions prohibiting acceptance of voluntary contributions from actual or potential United Nations contractors. However, we believe that the word "policies" referred to in financial regulation 7.2 and rule 107.6 includes the policy against unfair competitive bidding. Therefore, should a proposed contribution by an actual or potential United Nations contractor appear to suggest that its purpose or effect would be for the contributor to gain inside information concerning the United Nations or any other unfair advantage, such contribution would be rejected on the ground that it is not consistent with United Nations policy.

Furthermore, we believe that the above-referenced policy is also reflected in the "Guidelines on Cooperation between the United Nations and the Business Community" ("the Guidelines"), issued by the Secretary-General on 17 July 2000 (see A/56/323, annex III). One of the general principles in the Guidelines is "no unfair advantage", stating, inter alia, that "cooperation should not imply endorsement or preference of a particular business entity or its products or services" (see Guidelines, sect. IV, para. 14(*d*)). Moreover, the Guidelines include a reminder that entering into cooperation arrangements with the business community is "distinct from procurement activities" (see para. 18 of the Guidelines, on modalities). That reminder, together with the principle against unfair advantage, in the Guidelines, directly addresses your concern about the acceptance of voluntary contributions from actual or potential United Nations contractors.

In this connection, in a recent case involving a proposed in-kind contribution (telecommunications equipment) by a private sector entity, this Office advised that one of the conditions for accepting the contribution should be that the equipment had to be based on an open standard which would allow parts and related pieces for the equipment to be non-proprietary. We raised this issue to ensure that by accepting the contribution we would not be tied down to that company's products when procuring parts and other related pieces for the equipment.

It may be that this issue will be raised more frequently in view of the increasing number of cooperation arrangements between the United Nations and the private sector involving, inter alia, voluntary contributions from private sector partners. In that event, the concerned organization may wish to establish more specific rules or guidelines on this issue.

17 May 2001

14. Legal requirements for United Nations concert productions involving commercial and non-profit promoters or entities

Memorandum to the Director, News and Media Division, Department of Public Information

1. I am writing as a follow-up to a telephonic discussion that took place yesterday among the Chief of the Public Liaison Service, Legal Officers of the Office of Legal Affairs, and the Department of Information. During the discussion, the Chief of the Service requested that we specify the legal requirements for United Nations concert productions in order to provide your office with guidance in dealing with various proposals of a commercial or non-profit nature from individuals or entities to stage this year's United Nations Day concert. The Chief also stated that your office had received approval from the Secretary-General and the Chief of Staff to consider such proposals.

2. We understand that in prior years Member States have sponsored United Nations Day concerts under agreements (or Memoranda of Understanding) with the Organization. However, as no Member State thus far has agreed to sponsor the upcoming United Nations Day concert, the Department of Public Information is exploring alternative proposals for staging the concert. In one case, the chief executive officer of a company proposed to arrange for a rock band to perform. In addition, he suggested that the groups could perform together both for United Nations Day and for Disarmament Week, which occurs this year at the same time. Apparently, he also suggested that such performances could be webcast and that funds garnered from such a broadcast and from sales of recordings would cover the costs to the Organization for staging the concert. The Chief also mentioned that another group, which she believed to be a non-profit organization based in Washington, D.C., was interested in staging a joint concert.

3. Based on the Organization's unfortunate prior experience with concerts staged by private promoters and in the light of the applicable financial regulations, rules and administrative issuances governing such activities, we would recommend that, at a minimum, your office take into account the following requirements when considering acting on proposals such as those described above:

(*a*) The Organization must enter into a binding written agreement with one person or entity (i.e., the concert promoter or producer) who is obligated by such agreement to: (i) take all necessary action, including subcontracting with all performers and suppliers; (ii) coordinate all activities with the Organization that are required in order to stage the concert; (iii) bear all financial responsibility for the costs of staging such concert; and (iv) account to the Organization for all revenue garnered from the concert, as well as any broadcasts or any rebroadcasts or other performance or reproduction thereof in any medium;

(*b*) The concert promoter or entity must pay the Organization's costs for staging the concert in advance thereof and, in this regard, must be prepared to guarantee such payment through an appropriate form of payment or performance bond delivered at the time of the conclusion of the written agreement referred to above;

(*c*) To the extent that any such written agreement contemplates income to the Organization (whether from royalties, performance fees or otherwise) in excess of $40,000, prior to execution, the agreement must be submitted to the Headquarters Committee on Contracts for review and subsequent approval by the Assistant Secretary-General, Office of Central Support Services;

(*d*) Normally, the Organization retains all copyright to concert performances and any rebroadcast or other reproduction thereof in any medium and thus, to the extent that the concert promoter or any performer desires a licence of such rights or proposes other copyright arrangements, this Office will have to be consulted;

(*e*) Any named performers or performing groups whom the concert promoter or producer plans to have perform must sign a written commitment to do so, and such written commitment(s) must be provided to the Organization prior to the conclusion of a written agreement with the concert promoter or producer;

(*f*) Any promotional activities involving the use of or reference to the United Nations or its emblem must be consistent with the policies and practices of the Organization and, thus, should be reviewed by this Office; and

(*g*) The Organization must be satisfied that such promoter or producer, whether an individual or an entity, is fully qualified and is ready, willing and able to undertake all obligations required to produce and stage such a concert.

4. With regard to the Chief's request for guidance on how to respond to the most recent communication, we suggest that the points set out in subparagraphs (*a*) to (*g*) above be included verbatim in such a reply. In this regard, such a reply should emphasize that any promotional activities proposed to be undertaken by such means as a letter of introduction should occur only after a written agreement with the Organization has been concluded and following review by this Office and the Department of Public Information of the content and nature of such proposed promotional activities.

9 August 2001

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

[No legal opinions of secretariats of intergovernmental organizations to be reported for 2001.]

NOTES

[1] See Article 104 of the Charter of the United Nations; Convention on the Privileges and Immunities of the United Nations, article I, section 1; *Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174.

[2] See, generally, "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: study prepared by the Secretariat" (hereinafter referred to as "the Secretariat study"), *Yearbook of the International Law Commission, 1967*, vol. II, document A/CN.4/L.118 and Add.1 and 2, part two, sect. A, chap. I, sects. 1-4. A supplement to the study was prepared in 1985: A/CN.4/L.383 and Add.1-3. See also Convention on the Privileges and Immunities of the United Nations, article VIII, section 29.

[3] See also the Secretariat study, part two, sect. A, chap. I, sect. 1.

[4] See, generally, Convention on the Privileges and Immunities of the United Nations, article VIII, section 29; "Procedures in place for implementation of article VIII, section 29, of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946: report of the Secretary-General", A/C.5/49/65; the Secretariat study, part two, sect. A, chap. I, sect. 4 (*c*); discussed in section III, below.

[5] See the Secretariat study, part two, sect. A, chap. I, sect. 4 (*c*), para. 44.

[6] A/C.5/49/65 (see note 4 above).

[7] Decision 50/503 of 17 September 1996.

[8] "Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: financing of the United Nations peacekeeping operations: report of the Secretary-General", A/51/389, paras. 20-25.

[9] A/50/903/Add.1, para. 20.

[10] General Assembly resolution 50/235 of 7 June 1996, paragraph 16.

[11] A/51/389, paras. 20-25.

[12] A/51/491, para. 3.

[13] "Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: financing of the United Nations peacekeeping operations: report of the Secretary-General", A/51/903.

[14] A/54/458.

[15] See A/C.5/49/65, para. 12 (with respect to tort claims settled under Headquarters regulation No. 4) (the General Assembly took note of this report in decision 50/503 of 17 September 1996); A/51/389, para. 24 (with respect to third-party claims arising from peacekeeping operations) (ACABQ and the General Assembly endorsed this study: see A/51/491, para. 3, and General Assembly resolution 51/13 of 4 November 1996).

[16] General Assembly resolution S-25/2, annex.

[17] Manila Declaration on World Tourism, adopted by the World Tourism Conference, Manila, 27 September-10 October 1980.