Extract from:

UNITED NATIONS JURIDICAL YEARBOOK

2004

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

Chapter VI

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

A. Legal opinions of the Secretariat of the United Nations

(Issued or prepared by the Office of Legal Affairs)

1. Privileges and immunities

(*a*) Letter to the Acting Chair of the Special Committee on Peacekeeping Operations, United Nations, regarding immunities of civilian police and military personnel

Privileges and immunities of civilian police and military personnel—Article VI of the Convention on the Privileges and Immunities of the United Nations, 1946*—Model status-of-forces agreement (A/45/594)—Status-of-mission agreements—Civilian police enjoy the status of experts performing missions—Civilian police enjoy functional immunity—Privileges and immunities are granted in the interest of the Organization and not for the personal benefit of the individual—Legal obligation of the United Nations to cooperate with local authorities to facilitate the administration of justice—Waiver of immunity when possible without prejudice to the interest of the Organization—Military personnel are subject to the exclusive criminal jurisdiction of the respective participating State—Customary principles and practices applicable to peacekeeping—Military personnel may be subject to local civil jurisidction for acts giving rise to civil liablity and committed otherwise than in the performance of their offical functions

This is in response to your letter of 12 April 2004 conveying a request from the Special Committee on Peacekeeping Operations, "for written information by the Office of Legal Affairs regarding immunities of civilian police and military personnel." You also attached a list of questions which you have requested that I use as guidance when responding.

As far as civilian police are concerned, you have requested that I use the following as guidance:

* United Nations, *Treaty Series,* vol. 1, p. 15, and vol. 90, p. 327 (corrigendum to vol. 1).

– "The nature of immunities enjoyed by civilian police personnel serving under [the] United Nations flag.

– Whether these immunities differ between different peace operations and why.

– The legal bases for the above immunities.

– The competent jurisdiction in cases of civil/criminal liability [and] basis for competence/jurisdiction."

United Nations civilian police officers enjoy the status of "experts performing missions" for the United Nations within the meaning of article VI of the Convention on the Privileges and Immunities of the United Nations, 1946, a copy of which I attach.* This status is also provided for in, *inter alia,* status-of-forces agreements (SOFAs) or status-of-mission agreements (SOMAs) that are concluded between the United Nations and Governments hosting peacekeeping operations, as well as the model status-of-forces agreement (A/45/594). SOFAs and SOMAs reviewed by this Office follow the model status-of-forces agreement and the Convention by consistently affording to United Nations civilian police the status of experts on mission. If no status-of-forces agreement has been concluded and the model status-of-forces agreement has not been made applicable by the Security Council resolution authorizing the operation, then the status of civilian police officers remains governed by the Convention.

The chapeau of article VI, section 22, of the Convention provides as follows:

"Experts (other than officials coming within the scope of [a]rticle V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions."

As experts performing missions for the United Nations, civilian police officers enjoy "functional immunity", that is, immunity for purposes of the official acts done by them in the course of the performance of their official functions. Their privileges and immunities, which include immunity from personal arrest and detention, are granted solely to enable them to perform their official functions. These privileges and immunities are granted in the interests of the Organization and are not for the personal benefit of the individuals themselves. United Nations civilian police officers may therefore be made subject to local civil and criminal jurisdiction for acts committed by them in the host country that are done by them *otherwise* than in the performance of their official functions.

In this regard, the United Nations has a legal obligation to cooperate with the appropriate local authorities to facilitate the proper administration of justice. Under article VI of the Convention, the Secretary-General has the right and duty to waive the immunity of any expert on mission, including civilian police officers, in any case where, in his opinion, this immunity would impede the course of justice, and it can be waived without prejudice to the interests of the United Nations. It is therefore possible and consistent with the Convention and the model status-of-forces agreement, that a United Nations civilian police officer be prosecuted in the host State for a criminal act, even if committed in the course of performing his or her functions, where immunity for that act would impede the course of justice and that immunity can properly be waived.

* The Convention is not reproduced herein.

As far as the military members of military components serving in a peacekeeping operation are concerned, you have requested that I use the following as guidance:

– "The nature of immunities enjoyed by military personnel serving under [the] United Nations flag.

– Whether these immunities differ between different peace operations and why.

– The legal bases for the above immunities.

– The competent jurisdiction in cases of civil/criminal liability [and] basis for competence/jurisdiction."

Military personnel of military components who serve in United Nations peacekeeping operations under the authority of the Secretary-General are, in accordance with the customary principles and practices applicable to peacekeeping, subject to the exclusive criminal jurisdiction of their respective national authorities, and so enjoy absolute and complete immunity from local criminal process in States hosting peacekeeping operations. This status is consistently provided for in, *inter alia,* Status-of-forces agreements that are concluded between the United Nations and Governments hosting peacekeeping operations, as well as in the model status-of-forces agreement, a copy of which I attach* and which provides as follows in article 47 (b):

"Military members of the military component of the United Nations peacekeeping operation shall be subject to the exclusive jurisdiction of their respective participating States in respect of any criminal offences which may be committed by them in [host country/territory]."

This immunity from criminal jurisdiction in a host State can be justified, *inter alia,* by the fact that military personnel, as a rule, are subject to their own distinct military judicial system, including for acts committed by them outside their own country. It may further be noted in this connection that paragraph 48 of the model Status-of-forces agreement provides that, "[t]he Secretary-General of the United Nations will obtain assurances from Governments of participating States that they will be prepared to exercise jurisdiction with respect to crimes or offences which may be committed by members of their national contingents serving with the peacekeeping operation."

However, consistent with the model status-of-forces agreement and specific Status-of-forces agreements reviewed by this Office and concluded with countries that host peacekeeping operations, military members of the military component of a United Nations peacekeeping operation may be subjected to local civil jurisdiction for acts that give rise to civil liability and that are committed by them in the host country *otherwise* than in the performance of their official functions.

I trust that the above is of assistance.

14 April 2004

* The model Status-of-forces agreement, document A/45/594, is not reproduced herein.

(*b*) Note verbale to a Permanent Representative of a Member State to the United Nations regarding the freezing of bank accounts of the World Food Programme

FREEZING OF THE WORLD FOOD PROGRAMME'S BANK ACCOUNTS AS A RESULT OF A LABOUR DISPUTE—WORLD FOOD PROGRAMME IS A JOINT SUBSIDIARY ORGAN OF THE UNITED NATIONS AND THE FOOD AND AGRICULTURE ORGANIZATION—CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS (CONVENTION), 1946*—PROPERTY AND ASSETS OF THE UNITED NATIONS ENJOY IMMUNITY FROM EVERY FORM OF LEGAL PROCESS AND FROM EXECUTION—NO WAIVER OF IMMUNITY SHALL EXTEND TO ANY MEASURE OF EXECUTION—A PARTY MAY NOT INVOKE PROVISIONS OF INTERNAL LAW AS JUSTIFICATION FOR ITS FAILURE TO PERFORM A TREATY—ARTICLE 27 OF THE VIENNA CONVENTION ON THE LAW OF TREATIES, 1969**—NATIONAL JURISDICTION OVER THE TERMS OF EMPLOYMENT OF UNITED NATIONS OFFICIALS WOULD CONTRAVENE THE PREROGATIVES OF THE SECRETARY-GENERAL AND THE GENERAL ASSEMBLY AND WOULD UNDERMINE THE OFFICIAL'S EXCLUSIVE INTERNATIONAL CHARACTER—ARTICLES 100 AND 101 OF THE CHARTER OF THE UNITED NATIONS—ANY INTERPRETATION OF THE CONVENTION MUST BE CARRIED OUT WITHIN THE SPIRIT OF THE UNDERLYING PRINCIPLES OF THE CHARTER AND, IN PARTICULAR, ARTICLE 105 THEREOF—REQUIREMENT OF THE ORGANIZATION TO PROVIDE APPROPRIATE MODES OF SETTLEMENT OF CONTRACTUAL DISPUTES OR OTHER DISPUTES OF A PRIVATE LAW CHARACTER TO WHICH THE UNITED NATIONS IS A PARTY

The Legal Counsel of the United Nations presents his compliments to the Permanent Representative of [State] to the United Nations and has the honour to refer to the attached joint note verbale*** from the United Nations and the Food and Agriculture Organization (FAO) to the Ministry of External Relations of the Government of [State] concerning recent judgements by the Supreme Court of Justice of [State] in labour case [number] filed by [name], against the World Food Programme (WFP), a joint subsidiary organ of the United Nations and the FAO. Further to current appeals by the United Nations Resident Representative in [State], the Legal Counsel has the honour to bring the following to the attention of the Permanent Representative of [State] to the United Nations.

The Legal Counsel wishes to recall that by Order of [date], the President of the Supreme Court of Justice, [name], struck out the decision issued by the lower courts on [date] on the basis of WFP's immunity from legal process pursuant to article II, sections 2 and 3, of the Convention on Privileges and Immunities of the United Nations, 1946. Nonetheless, on [date], [name] appealed against that Order and on [date], the Supreme Court accepted the application for review submitted by [name]. On [date], the new President of the Supreme Court of Justice, [name], annulled the Order of [date], basing his decision on the fact that "the Vienna Convention on Diplomatic Relations" does not provide for immunity from labour disputes under [State] law; based on the foregoing, the Supreme Court restored the lower court decision of [date]. On [date], WFP funds in two bank accounts in Citibank and the International Bank were frozen and a total of US$ 157,678.75 was embargoed by the Order of the Supreme Court of Justice.

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* United Nations, *Treaty Series,* vol. 1, p. 15, and vol. 90, p. 327 (corrigendum to vol. 1).

** United Nations, *Treaty Series,* vol. 1155, p. 331.

*** The note verbale is not reproduced herein.

The Legal Counsel wishes to inform the Permanent Representative of [State] that the FAO and the WFP had previously submitted several notes verbales in connection with this case to the Ministry for Foreign Affairs of the Government of [State]. The United Nations, FAO and WFP are deeply grateful for the continuing efforts of the Ministry for Foreign Affairs to ensure respect for WFP's immunity from legal process and are encouraged by its previous success in doing so. Unfortunately, the Legal Counsel regrets to note that in the light of the most recent decision by the Supreme Court, the Legal Counsel is compelled to call upon the Permanent Representative to request the Ministry for Foreign Affairs to intervene once again, and on an urgent basis, to ensure that the WFP's immunity from legal process and from execution is upheld, that the afore-mentioned order is nullified and that all frozen funds are returned as soon as possible.

To that end, the Legal Counsel has the honour to reiterate the applicable legal obligations and norms. The status of the WFP, as a joint subsidiary organ of the United Nations and the FAO, is regulated by the Convention on Privileges and Immunities of the Specialized Agencies, 1947,* to which [State] has been a party since [date] and the Convention on Privileges and Immunities of the United Nations, 1946, to which [State] has been a party since [date] (the Convention) promulgated in Official Registry [date]—not by the Vienna Convention on Diplomatic Relations, 1961.** Pursuant to section 2, article II, of the Convention, "the United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case, it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution." The United Nations and the FAO have maintained the WFP's privileges and immunities in respect of this case.

Pursuant to article V of the Food Assistance Programme of [date] entered into between the Government of [State] and the WFP as well as article V of the Long Term Agreement to the Food Assistance Programme entered into between the Government of [State] and the World Food Programme, the latter being published in Official Registry [date], the Government has an obligation to "apply the provisions of the Convention on Privileges and Immunities of the Specialized Agencies to the World Food Programme, its property, funds and assets and to its officials and experts".

In this connection, the Legal Counsel takes note that article 163 of the Constitution of [State], provides that "the norms contained in the treaties and international conventions, once promulgated in the Official Registry, will form part of the judicial ordinance of the Republic and will prevail over the laws and other norms of minor hierarchy." The latter is consistent with article 27 of the Vienna Convention on the Law of Treaties, 1969,*** which stipulates that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

Thus, based on the foregoing, national labour laws do not have primacy over the provisions of the Convention and the Charter to which [State] is a party. Moreover, pursuant to Article 101 of the Charter of the United Nations, officials of the United Nations, includ-

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* United Nations, *Treaty Series,* vol. 33, p. 261.

** United Nations, *Treaty Series,* vol. 500, p. 95.

*** United Nations, *Treaty Series,* vol. 1155, p. 331.

ing WFP, are appointed by the Secretary-General pursuant to regulations promulgated by the General Assembly. National jurisdiction over the terms of employment of United Nations officials would contravene the prerogatives of the Secretary-General and the General Assembly and would serve to undermine their exclusively international character as confirmed in Article 100 of the Charter.

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

In this connection, the competent judicial authorities should be assured that, notwithstanding the immunity of the Organization from legal process under the applicable provisions of the Convention and the Charter of the United Nations, [name] is not without a remedy to redress his complaint. Pursuant to article VIII, section 29 (a), of the Convention, the United Nations is required to provide appropriate modes of settlement of "[d]isputes arising out of contracts or other disputes of a private law character to which the United Nations is a party." Consistent with the provisions of the Convention, and as reflected in [name's] contract, the United Nations Staff Regulations and Rules set out the internal dispute settlement mechanisms available to staff members for redress of their grievances against the Organization. [Name] therefore has recourse to an internal appeals process, including review by a quasi-judicial body and subsequent consideration by the United Nations Administrative Tribunal, which performs judicial functions and delivers binding judgments on the parties. [Name] should be advised to avail himself of the remedies available to him under the Staff Regulations and Rules.

The Legal Counsel kindly requests that the Ministry for Foreign Affairs take the necessary steps to inform the competent judicial authorities, of WFP's immunity from every form of legal process and from execution, including the civil suit in question in accordance with the obligations of the Government of [State]. In particular, the Legal Counsel trusts that the case will be dismissed with prejudice in all its aspects, including the execution order, and expects that all embargoed funds will be returned as soon as possible.

The Legal Counsel avails himself of this opportunity to renew to the Permanent Representative of [State] to the United Nations the assurances of his highest consideration.

16 July 2004

(*c*) Interoffice memorandum to the Director of Investment Management Service, United Nations, regarding tax exemption

Refusal to reimburse withheld taxes to the Joint Staff Pension Fund (FUND)—All assets of the United Nations are exempt from direct taxation, including investments—Article II, section 7 (a), of the Convention on the Privileges and Immunities of the United Nations, 1946*—The Organization enjoys Privileges and immunities as necessary for the fulfilment of its purposes—Measures which may increase burdens, financial or other, of the Organization, are seen as inconsistent with Article 105 of the Charter of the United Nations—Assets of the Fund are considered property of the United Nations despite being held on behalf of the participants and beneficiaries—Article 18 of the Regulations, Rules and Pension Adjustment System of the Joint Staff Pension Fund

1. This is in response to your memorandum dated 21 July 2004 seeking our assistance in preparing an appropriate response to the [State] tax authorities in relation to a claim for tax exemption by the Investment Management Service for the sum of approximately 131,000 euros. You advise that in September 1993 the [United Nations Joint Staff Pension] Fund was granted a tax exempt status by the [Member State] authorities in accordance with the Convention on the Privileges and Immunities of the United Nations, 1946. You advise that since then the [State] authorities have refused to reimburse withheld taxes. You state that the reasons for this refusal are set forth in the letters of 12 June 1997 and 9 August 1995.

2. The attached letter from the [State's] [tax authorities] to [Bank] (the Fund's Custodian in Europe) of 12 June 1997 states that "payment of [State's] tax credits cannot be made to non-resident organizations unless provision for such payment is made in . . . an International Convention to which [State] is a signatory country".** It further states that "where a foreign [S]tate or one of its agencies engages in commercial activities in the market place, it cannot claim relief under Sovereign Immunity provisions contained in [State's] domestic legislation" and that "commercial activities would include investments made in [State's] Securities". The letter from the [State's] [tax authorities] to [name], Taxation Department dated 9 August 1995 requests an indication as to the basis for the exemption as under article 3 of the Regulations and Rules of the Fund, "the Fund would appear to extend to a wider range of organizations and to be open to specialized agencies other than would be covered by the Convention on the Privileges and Immunities."

3. The position of the United Nations is that *all* assets of the United Nations are exempt from direction taxation. This position derives from the obligations of Member States under the Convention on the Privileges and Immunities of the United Nations, 1946, (the Convention) to which [State] acceded without reservation on [date], and the Charter of the United Nations. Pursuant to article II, section 7 (a), of the Convention, "the United Nations, its assets, income and other property shall be exempt from all direct taxes; it is understood, however, that the United Nations will not claim exemption from taxes which are, in fact, no more than charges for public utility services." Article 105 of the Charter provides that "[t]he Organization shall enjoy in the territory of each of its members such

* United Nations, *Treaty Series,* vol. 1, p. 15, and vol. 90, p. 327 (corrigendum to vol. 1).

** The letter is not reproduced herein.

privileges and immunities as are necessary for the fulfilment of its purposes." Among these privileges and immunities is immunity from taxation of the assets, income and property of the Organization. Measures which may increase the burdens, financial or other, of the Organization are seen as inconsistent with the obligations under Article 105 of the Charter. It is clear that the assets of the United Nations include the assets of the United Nations Joint Staff Pension Fund. Article 18 of the Regulations, Rules and Pension Adjustment System of the Joint Staff Pension Fund (the Regulations and Rules) states that "[t]he assets shall be the property of the Fund and shall be acquired, deposited and held in the name of the United Nations". Although the assets are held on behalf of the participants and beneficiaries of the Fund, which may include the employees of non-United Nations bodies which meet the criteria for membership as set forth under article 3 (b) of the Regulations and Rules, the assets are nevertheless the property of the United Nations. They are accordingly entitled to exemption from taxation under the Convention on the Privileges and Immunities of the United Nations, 1946.

4. Should you encounter any further difficulties in recovering the withheld taxes, please notify our Office immediately and we will prepare a note verbale to the Government of [State] requesting it to ensure that its tax authorities respect the privileges and immunities of the United Nations.

14 September 2004

(*d*) Letter to a Permanent Representative of a Member State to the United Nations regarding the legal framework for the holding of a United Nations meeting away from Headquarters

Host country agreements—Legal framework governing the holding of United Nations meetings away from Headquarters—Articles 104 and 105 of the Charter of the United Nations—Convention on the Privileges and Immunities of the United Nations, 1946*—Administrative instruction ST/AI/342**—Privileges and immunities to all persons participating in or providing services for the event—Access and visas—Mandatory liability clause—Peaceful settlement of disputes—Need for legally binding agreements

I wish to refer to the meeting held on 2 July 2004 between [name] of [State authorities] and [names] of this Office regarding the legal framework for future United Nations meetings that may be held in [State].

The meeting enabled us to exchange views on a number of issues that have created difficulties in concluding host country agreements in a timely fashion.

As agreed during the meeting, I am providing you with a brief overview of our policy with regard to the legal framework governing the holding of United Nations meetings away from headquarters.

This legal framework is primarily determined by Articles 104 and 105 of the Charter of the United Nations, the Convention on the Privileges and Immunities of the United

* United Nations, *Treaty Series,* vol. 1, p. 15, and vol. 90, p. 327 (corrigendum to vol. 1).

** For information on administrative instructions, see note 4 in chapter V.

Nations, 1946, and relevant General Assembly resolutions. It is further determined by internal regulations and rules such as Bulletins and administrative instructions issued by the Secretary-General.

Guidelines for the preparation of the required agreements with the host country have been formulated in administrative instruction ST/AI/342 of 8 May 1987, a copy of which is attached for your ease of reference.* Depending on the size and duration of an event, a full-fledged "conference agreement" may be necessary. For small-scale seminars, symposia or workshops, referred to in this letter as "meetings", a simplified agreement (host country agreement) in the form of an exchange of letters is usually deemed sufficient. It is our understanding that our ongoing consultations relate only to the latter as no major deviations are contemplated from our standard conference agreement.

The model exchange of letters contained in ST/AI/342, on the basis of which several hundred host country agreements have been concluded with the vast majority of Member States, provides the Secretariat with a certain degree of flexibility. It also reflects a certain number of fundamental principles from which we cannot deviate. These principles include:

(*a*) The need to ensure that the necessary privileges and immunities are granted by the host Government to all persons participating in or providing services for the event—including individuals that may not be covered by the Convention on Privileges and Immunities of the United Nations, 1946. As you know, that Convention only covers representatives of States, United Nations officials and experts on mission. We note, in this regard, that the categories of participants in United Nations events have expanded significantly since the adoption of the Convention (they nowadays customarily include representatives of non-governmental organizations, civil society, as well as financial or private institutions).

(*b*) The need to ensure that all invitees to a United Nations event are granted unimpeded access to and from the meeting venue, and that no limitations of a domestic nature are placed on the granting of visas where the latter are necessary. Any limitation on the right to enter the country for the purpose of participating in a United Nations event would amount, in effect, to a veto power over any particular United Nations invitee.

(*c*) The need to ensure that the host Government will indemnify and hold the United Nations harmless for any injury or loss occurring within the premises or the transportation provided—by the host Government, or by the support personnel provided for the event by the Government. The inclusion of a liability clause to that effect in the standard host country agreement is mandatory under General Assembly resolution 47/202 of 18 December 1992 which provides that United Nations bodies may hold sessions away from established Headquarters, on the condition that the host countries agree "to defray the actual additional costs directly or indirectly involved." The financial liability which may be entailed for the United Nations in such an event is considered by the United Nations to be an "indirect additional cost".

(*d*) The need to provide for an effective provision on the peaceful settlement of disputes, consistent, in particular, with the Manila Declaration on the Peaceful Settlement of International Disputes.**

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* The Administrative instruction is not reproduced herein.

** General Assembly resolution 37/10 of 15 November 1982, annex.

(*e*) The need to conclude legally binding agreements, in particular—but not only—because conference and host country agreements set out rights and obligations for each party that modify and go beyond the framework of the Convention.

I would be most grateful if you would bring the above considerations to the attention of your authorities. As agreed during the meeting, we are also submitting, for your Government's consideration, a draft framework agreement for meetings held in [State].* I look forward to the further discussion of the draft framework agreement, the conclusion of which would greatly facilitate the holding of meetings in [State].

18 October 2004

(*e*) Facsimile to the Legal Adviser of the International Labour Organization, Geneva, regarding the refusal of a Member State to recognize the full immunities of international organizations

Refusal of State to recognize full immunities of international organizations—Non-intervention to assert immunities on behalf of organizations in national courts—Immunity from legal process—Privileges and immunities as necessary for the fulfilment of the Organization's purposes—Article 40, paragraph 1, of the Constitution of the International Labour Organization—Retention of local counsel

1. This is with reference to your facsimile of 13 October 2004 concerning the [State's] position that it does not recognize the full immunities of international organizations and that it would not intervene on behalf of such organizations in its national courts. Further to [our] discussions with members of your office as well as with representatives of the [State's] Mission to the United Nations in New York, we understand that, while the underlying divorce case giving rise to your original demarche to the [State's] authorities has been withdrawn, you would nonetheless appreciate our advice on how to assess the position maintained by the [State] Government. Our comments are as follows.

2. At the outset, we wish to note that the [State] is not a party to the Convention on the Privileges and Immunities of the Specialized Agencies, 1947. Nonetheless, as a member of the International Labour Organization (ILO), the [State] has obligations with respect to ILO's immunity from legal process under article 40, paragraph 1, of the ILO Constitution which provides that ILO "shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes".

3. The [State] maintains that ILO's status, privileges and immunities in the [State] are governed exclusively by the [national legislation] which has been made applicable to international organizations, including the ILO, pursuant to the [national legislation]. We can confirm that in accordance with its established policy and practice, the [State authority] does not intervene to assert the privileges and immunities of States or international organizations in [State] courts of first instance. Where it deems appropriate, it has intervened in such cases at the appellate level. Based on the foregoing, the competent [State]

* The draft agreement is not reproduced herein.

authorities have advised the ILO to retain local counsel to seek dismissal of cases lodged against it in the national [State] courts.

4. We would advise ILO against the retention of local counsel and would suggest alternatively, that the ILO Legal Adviser inform the competent judge, in writing, of the immunities enjoyed by ILO under the ILO Constitution as well as under the [national legislation] and the [national legislation]. Any such communication should be copied to the [State] Mission to the United Nations in Geneva as well as the [State] Mission to the United Nations in New York.

27 October 2004

(*f*) Letter to the Registrar of the International Court of Justice regarding privileges and immunities with respect to parking fees

Diplomatic immunity with regard to parking fees—Definition of public utility—Article 19 of the Statute of the International Court of Justice—Article 41, paragraph 1, of the Vienna Convention on Diplomatic Relations, 1961*—Agreement Relating to Privileges and Immunities of Members of the International Court of Justice, the Registrar, Officials of the Registry, Assessors, the Agents and Counsel of the Parties and of Witnesses and Experts concluded between the Court and the [State] of [date]—Duty to respect the laws and regulations of the host State

. . .

With respect to your query concerning the determination by the [City] authorities that parking fees constitute charges for public utility services and do not fall within the diplomatic immunities enjoyed by the members of the Court, you may wish to advise the [City] authorities that the United Nations has consistently maintained that the term "public utility" has a restricted connotation applying to particular supplies for services rendered by a Government or a corporation under Government regulation for which charges are made at a fixed rate according to the amount of supplies furnished or services rendered. As a matter of principle and as a matter of obvious practical necessity, charges for actual services rendered must relate to services which can be specifically identified, described and itemized. It would therefore be incumbent upon the [City] authorities to identify, describe and itemize the services rendered in order to maintain its position that such fees are charges for public utility services from which the members of the Court are not exempt.

Article 19 of the Statute of the Court provides that the members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities. The latter status is further confirmed in the Exchange of Letters Recording an Agreement Relating to Privileges and Immunities of Members of the International Court of Justice, the Registrar, Officials of the Registry, Assessors, the Agents and Counsel of the Parties and of Witnesses and Experts concluded between the Court and the [State] on [date].

The question whether individuals enjoying diplomatic status are immune from the payment of parking fees has been a subject of considerable debate in the United Nations Headquarters in New York and the Legal Counsels of the United Nations have had ample

* United Nations, *Treaty Series,* vol. 500, p. 95.

occasion to comment thereon (please see A/AC.154/358 and A/AC.154/307 copies attached for ease of reference*). My predecessors have consistently maintained that, in accordance with article 41, paragraph 1, of the Vienna Convention on Diplomatic Relations, 1961, diplomats have a duty to respect the laws and regulations of the host State and that such duty is without prejudice to their privileges and immunities. Thus, while the host State has an obligation to ensure that city, state and federal authorities respect the privileges and immunities of diplomats, in turn, the diplomats have an obligation to respect the local laws and regulations of the host city and State. Based on the foregoing, my predecessors have concluded that while diplomats are immune from legal process or other enforcement action for failure to do so, diplomats have an obligation to respect local parking regulations including the payment of parking fines and fees.

24 November 2004

(*g*) Letter to a Permanent Representative of a Member State to the United Nations regarding the levying of fees and taxes on the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC)

Levy of taxes and fees on MONUC—Article 105 of the Charter of the United Nations—Privileges and Immunities necessary for the fulfilment of the Organization's purposes—No Member State may hinder in any way the working of the Organization or take any measure the effect of which might be to increase its burdens financial or otherwise—MONUC as subsidiary organ of the United Nations—Article II, section 7(a), of the Convention on the Privileges and Immunities of the United Nations, 1946**—Exemption from direct taxes—Non-exemption from charges for public utility services—Definition of pulic utility services—Air navigation charges, landing and parking fees constitute direct taxes—Airport taxes constitute direct taxes—Exemption from direct taxes and fees applies with respect to all travel that is undertaken on official business of the United Nations—Exemption from requirements of visa and/or visa fees for all members of a peacekeeping operation—Paragraph 33 of the model status-of-forces agreement (A/45/594)

I have the honour to refer to certain taxes that are currently being levied on MONUC by the [State] Civil Aviation Authority for the use of [City] airport, specifically, an airport tax of US$ 10.00 that is levied on each MONUC passenger and air navigation charges, landing and parking fees that are levied on each MONUC aircraft.

I also have the honour to refer to the fee of US$ 60.00 that is being levied by the [State] Immigration Services for the issuance of [State] visas to passengers who are travelling on official business for MONUC and who are proceeding to, or transiting, [State].

I wish to set out the position of the United Nations as far as these various taxes and fees are concerned. I hope thereby to clarify the fiscal regime which is applicable to the United Nations, and so to MONUC as one of its subsidiary organs, and to draw your attention to the exemptions to which the Organization is entitled under and by virtue of

* The documents are not reproduced herein.

** United Nations, *Treaty Series,* vol. 1, p. 15, and vol. 90, p. 327 (corrigendum to vol. 1).

the Charter of the United Nations and the Convention on the Privileges and Immunities of the United Nations, 1946, to which your Government is party, having acceded thereto, without reservation, on [date].

The position of the United Nations is guided by the fundamental principles in the Charter of the United Nations, in particular in its Article 105, paragraph 1, which provides that the Organization is to enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.

The Report of the Committee of the San Francisco Conference that was responsible for the drafting of this Article of the Charter emphasized in this regard that "if there is one principle certain it is that no Member State may hinder in any way the working of the Organization or take any measure the effect of which might be to increase its burdens financial or otherwise" (*Documents of the United Nations Conference on International Organization,* vol. XIII, pp. 705 and 780).

This principle has been further elaborated in the Convention on the Privileges and Immunities of the United Nations, 1946; which was adopted by the General Assembly of the United Nations on 13 February 1946, in accordance with Article 105, paragraph 3, of the Charter, with a view to specifying the details of the application of Article 105, paragraphs 1 and 2, of the Charter.

In accordance with the Convention, the Organization is to be relieved of the burden of all taxes. Thus, article II, section 7, of the Convention provides that the United Nations is to be exempt from all direct taxes (though not from charges for public utility services), while article II, section 8, provides for the remission or return to the Organization of indirect taxes that may be paid by it as part of the price of property that it might purchase (where the amount involved is important enough to make this administratively possible and subject to the making of appropriate administrative arrangements).

Of these provisions, article II, section 7 (a), is directly relevant in the present connection. As you will be aware, that provision stipulates that:

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

As noted above, MONUC is a subsidiary organ of the United Nations. As such, it benefits from this exemption.

Air navigation charges, landing and parking fees

The United Nations has consistently taken the position that air navigation charges, landing and parking fees are direct taxes from which the Organization is exempt pursuant to the provisions of section 7 (a) of the Convention and are not regarded as "public utility services".

This longstanding position is reflected in the study of the practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities that was prepared by the Secretari-

at of the United Nations for the International Law Commission in 1967,* as well as in the supplementary study that the Secretariat prepared in 1985.** Relevant pages of both of those studies are attached for your ease of reference.*** There has been no relevant change in the practice of the Organization since that time. Indeed, the Organization's position on such matters has since been reiterated in at least one opinion of the Office of Legal Affairs that has been published in the *United Nations Juridical Yearbook*. **** A copy of that opinion is also attached.*****

As is noted in that opinion, as well as in the 1967 study, the position of the United Nations on this matter has been accepted by its Members States.

While landing fees, parking fees and other air navigation charges clearly fall within the category of "direct taxes" from which the United Nations is exempt, I also wish to take this opportunity to clarify what charges fall within the category of "charges for public utility services," from which the United Nations does not claim exemption pursuant to the Convention. The consistent practice of the United Nations in this regard, described in both of the studies and in the opinion cited above, has been to interpret the expression "charges for public utility services," as it appears in article II, section 7 (a), of the Convention, as applying to particular supplies or services rendered by a Government, or by a corporation under government regulation, for which charges are made at a fixed rate according to the amount of supplies furnished or services rendered. While the United Nations will pay charges which relate to actual services rendered, such services must be ones that can be specifically identified, described and itemized and that can be calculated according to some predetermined unit.

In light of these clarifications, I trust that your Government will exempt MONUC, as a subsidiary organ of the United Nations, from charges such as landing and parking fees and other air navigation charges which do not constitute charges for public utility services.

The United Nations, for its part, is prepared to examine other charges which may be presented to it by your Government, with a view to ascertaining whether they constitute "charges for public utility services" within the meaning of article II, section 7 (a), of the Convention.

Airport taxes

The United Nations has consistently taken the position that airport taxes, airport terminal taxes and airport departure taxes are direct taxes from which the Organization is exempt by virtue of article II, section 7 (a), of the Convention.

This position, which is also one of considerable longstanding, is reflected in the first of the two studies cited above (*loc. cit.* above, at page 243, paragraphs 156 and 157) and has been confirmed since that time in a number of opinions of the Office of Legal Affairs,

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* *Yearbook of the International Law Commission, 1967,* vol. II (United Nations publication, Sales No. E.68.V.2), p. 154 at pp. 247–248, para. 172.

** *Yearbook of the International Law Commission, 1985,* vol. II, Part One, Add. 1 (United Nations publication, Sales No. E.86.V.9 (Part 1/Add.1)), p. 145 at pp. 165–166, para. 36.

*** These studies are not reproduced herein.

**** *United Nations Juridical Yearbook, 1993* (United Nations publication, Sales No. E.97.V.13), p. 368.

***** The opinion is not reproduced herein.

several of which have been published in the *United Nations Juridical Yearbook*.* Copies of the relevant passages from the 1967 study and of these opinions are attached for your ease of reference.**

As appears both from the 1967 study and from these opinions, the United Nations has taken the position that this exemption applies with respect to all travel that is undertaken on the official business of the United Nations and so at its expense. It therefore applies regardless of whether that travel is undertaken by officials of the Organization, or by experts performing missions for the United Nations or by members of national contingents assigned to the military components of the Organization's peacekeeping operations. In all such cases, the tax would fall directly upon the Organization, in as much as it would be assessed directly against an individual who had been duly authorized by the Organization to travel on its business and in as much as the Organization would either itself be obliged to pay the tax or else would have to reimburse those travelling with its authorization and on its business who had themselves been obliged to pay it.

This position of the Organization has been recognized and accepted by Member States. In the present connection, it may be particularly relevant to recall that, even by 1967, the United Nations had already obtained exemption from airport terminal taxes imposed on several national contingents that were being flown from their home State for service with the Organization's peacekeeping operations (see the 1967 study, *loc. cit.* above, at paragraph 157).

In the light of these clarifications, I trust that your Government will accordingly exempt all members of MONUC, including Military Observers, Civilian Police, military personnel of national contingents and United Nations Volunteers, who are travelling on the official business of MONUC, including to take up service with MONUC or to return from service with it, from payment of the US$ 10.00 airport tax at [City] airport and at other airports in [State].

Visa fees

The position of the United Nations with regard to visa fees has, likewise, been guided by the fundamental principle in Article 105, paragraph 1, of the Charter of the United Nations, understood in the light of the explanation of its drafters that the practical significance of this principle is that "no Member State may hinder in any way the working of the Organization or take any measure the effect of which might be to increase its burdens financial or otherwise".

Pursuant to this principle, the agreements which the Organization has concluded with Member States to regulate the status of its various offices and operations around the world have consistently made provision either (i) for the complete exemption of the members of those offices or operations from national visa regulations or (ii) if the State concerned has not been prepared to grant such an exemption, for visas to be granted promptly, without restriction and—most importantly in the present regard—free of charge. The Govern-

* *United Nations Juridical Yearbook, 1973* (United Nations publication, Sales No. E.75.V.1), p. 132; *United Nations Juridical Yearbook, 1986* (United Nations publication, Sales No. E.94.V.2), p. 321; and *United Nations Juridical Yearbook, 1995* (United Nations publication, Sales No. E.01.V.1), p. 405.

** The opinions are not reproduced herein.

ment of [State] has agreed to both of these types of provisions in agreements that it has concluded with the United Nations.

An example of a provision of the first kind appears in the Organization's model status-of-forces agreement, which reflects the customary principles and practices of peacekeeping. Paragraph 33 of the model provides that *all members* of a peacekeeping operation shall be exempt from passport and visa regulations, as well as from immigration inspection and restrictions on entry and departure (see A/45/594, annex). This exemption applies not only to officials of the United Nations who are assigned to serve in its peacekeeping operations, but to all members of those operations, including Military Observers, United Nations Civilian Police and military personnel of national contingents assigned to the operation's military component. As you will recall, the Government of [State] concluded a status-of-forces agreement for the United Nations Assistance Mission for [State] incorporating just such a provision on [date].

As to the second type of provision, as you will also recall, the Government of [State] concluded an agreement with the United Nations Development Programme (UNDP), based on the Standard Basic Assistance Agreement, which provides in article X, paragraph 1 (b), that your Government shall issue visas promptly and "without cost". As appears from article IX, paragraph 5, this obligation applies, not only with respect to officials of UNDP, but also to experts, consultants, and volunteers that UNDP or its Executing Agencies may select to perform services on their behalf, as well as organizations and corporations and their employees that UNDP may retain to execute or assist in the execution of projects. Similarly, the Basic Cooperation Agreement that the Government of [State] signed with the United Nations Children's Fund (UNICEF) on [date] stipulates that visas shall be issued promptly and "free of charge" not only to UNICEF officials, but also to experts on mission and to contractors engaged by UNICEF to perform services in the execution of programmes in the country concerned.

Your Government has therefore, with respect to United Nations officials, experts on mission and all those travelling on the official business of the United Nations, followed a practice of either completely exempting such individuals from national visa regulations or of granting them visas promptly, without restriction and—most significantly, in the present connection—free of charge.

As to the visa facilities that have been granted to MONUC and its personnel by other States in the region, I would point out that the Memorandum of Understanding that was concluded between the United Nations and the Government of Uganda on 8 August 2003 concerning the activities of MONUC in Uganda* provides in article I, paragraph 3 (i), for "[p]rompt issuance by the Government to members of MONUC and United Nations contractors, free of charge and without any restrictions of all necessary visas, licenses or permits"; while the Memorandum of Understanding that was concluded between the United Nations and the Government of the United Republic of Tanzania on 19 May 2003 concerning the activities of MONUC in Tanzania** provides, in article I, paragraph 3 (i), for the "[e]xemption of members of MONUC from passport and visa regulations and prompt issuance by the Government to United Nations contractors, free of charge and

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* United Nations, *Treaty Series,* vol. 2221, p. 297.

** United Nations, *Treaty Series,* vol. 2215, p. 3.

without restrictions, of all necessary visas". Copies of these agreements are attached for your ease of reference.*

In the light of the practice outlined above, I trust that your Government will be prepared to grant all members of MONUC—including members of the United Nations Secretariat assigned to its civilian component, Military Observers, Civilian Police, military personnel of national contingents assigned to its military component and United Nations Volunteers—who are travelling on the official business of MONUC, including to take up service with MONUC or to return from service with it, exemption from payment of the US$ 60.00 visa fee.

In closing, I should like to take this opportunity of thanking your Government for the cooperation and assistance that it is extending to MONUC.

8 December 2004

2. Procedural and institutional issues

(*a*) Interoffice memorandum to the Acting High Commissioner for Human Rights on the tenure of office-holders of special procedures mandates

Commission on Human Rights—Applicability of rule on time-limit on tenure to all special procedures mandate-holders—Irrelevance of the mode of appointment—Decision 2002/114 of the Commission on Human Rights**—Decision 2002/279 of the Economic and Social Council

1. This is in reference to your memorandum of 20 January 2004, requesting our views on whether the rule adopted by the Commission on Human Rights limiting the tenure of office-holders of specific procedures mandates to six years and allowing for an additional three-year renewal for those having served more than three years when their current mandate expires, is applicable indiscriminately to all such special procedures mandate-holders regardless of their mode of appointment.

2. At the fifty-fifth session of the Commission on Human Rights, the Chairman, on behalf of the Commission, made the following statement with regard to special procedures mandates:

> "To help maintain appropriate detachment and objectivity on the part of individual office-holders, and to ensure a regular infusion of new expertise and perspectives, any individual's tenure in a given mandate, whether thematic or country-specific, will be no more than six years. As a transitional-measure, office-holders who have served more than three years when their current mandates expire will be limited to at most three years of further renewals in these posts." (E/1999/23-E/CN.4/1999/167, Chapter XX, paragraph 552).

3. In its decision 2002/114 on the expiration of office-holders' terms of appointment under special procedures, the Commission on Human Rights decided that "the six-year period of time referred to in paragraph a (ii) (Special Procedures mandates) of the Chair-

* The agreements are not reproduced herein.

** *Official Records of the Economic and Social Council, 2004, Supplement No. 3* (E/2002/23—E/CN.4/2002/200 and Corr.1), chap. II, sect. B.

person of the Commission's statement on enhancement of the effectiveness of the mechanism of the Commission, will not extend beyond the last day of the substantive session of the Council immediately following the relevant session of the Commission." The decision of the Commission was approved by the Economic and Social Council in its decision 2002/279.

4. The language of the Chairperson's statement and the resolutions of both the Commission on Human Rights and the Economic and Social Council is clear. The limitation on tenure of office-holders is all-inclusive and applies to "any individual's tenure in a given mandate, whether thematic or country-specific". There is no indication that the Commission intended to limit the tenure of only those office-holders of special procedures mandates appointed by the Commission, and exempt from the limitation those appointed by the Secretary-General. Had it been its intention, the Commission should have said so explicitly. For as long, therefore, as special rapporteurs, special representatives or independent experts, and other working groups are mandated by the Commission on Human Rights as special procedures mandate-holders, the actual appointing authority, for the purpose of the time limitation, is irrelevant.

5. We note in this connection that the list of "All Persons Mandated to Carry Out the Thematic and Country-Specific Procedures of the Commission on Human Rights" prepared by the Secretariat in accordance with paragraph 11 (b) of Commission resolution 2002/84,* contains the names of special rapporteurs of country-specific procedure, thematic procedures and technical cooperation programmes, some of whom are appointed by the Commission, others are appointed by the Secretary-General.

6. Beyond the literal interpretation of the rule, it has been the declared purpose of the limitation on the time period for special procedures mandate-holders, to ensure appropriate detachment and objectivity on the part of individual office-holders, and the regular infusion of new expertise and perspective. A discriminatory application of the rule to some but not all human rights mandate-holders will defeat the purpose of the rule. For all of the foregoing, both as a matter of law and policy, we concur with your conclusion that the rule on limitation of tenure applies to all special procedures mandate-holders without any distinction and regardless of the appointing authority.

23 February 2004

(*b*) Statement before the Economic and Social Council on the question of the power of the Council to override decisions of the Commission on Human Rights

Competence of the Economic and Social Council to override a decision of a functional commission—Commission on Human Rights decision 2004/117—Article 68 of the Charter of the United Nations—Inherent powers as parent organ—Rule 56 of the Rules of Procedure of the Economic and Social Council

* *Official Records of the Economic and Social Council, 2004, Supplement No. 3* (E/2002/23—E/CN.4/2002/200), chap. II, sect. A.

Mr. President,

In your letter of 19 July 2004 addressed to me yesterday, on behalf of the Economic and Social Council, you requested that the Office of Legal Affairs provide a legal opinion, in reference to paragraph 3 of draft resolution E/2004/L.21 "on the competence of the Council to adopt a resolution superseding a decision taken by a functional commission", in particular, Commission on Human Rights decision 2004/117.*

Article 68 of the United Nations Charter empowers the Economic and Social Council to set up commissions in the economic, social and human rights fields, and such other commissions "as may be required for the performance of its functions". In accordance with Article 68 of the Charter, the Council established the Commission on Human Rights as a functional commission in its resolution 5 (I) (1946). As the parent organ, the Economic and Social Council, in principle, retains the power to intervene and overrule the decisions of its functional commissions. While the power to control its functional commission is thus inherent in the Council, and may be exercised not only with regard to decisions submitted for its approval or action, but also with regard to those which are not submitted for its action, a review of the practice shows that the Council has used these powers sparingly. A recent example was last year when in the context of a 1503 procedure, Economic and Social Council decision 2003/58 turned down the Commission of Human Rights decision 2003/11.**

In the event of a challenge to the Council's competence to override a decision of a functional commission, a decision on competence must be taken in accordance with rule 56 of the Rules of Procedure of the Economic and Social Council.

20 July 2004

44th meeting of the Economic and Social Council

(*c*) Note to the United Nations High Commissioner for Human Rights regarding a resolution of the Commission on Human Rights on internally displaced persons

Commission for Human Rights resolution 2004/55*** on internally displaced persons—Replacement of the "Special Procedures" with a new "mechanism"—Applicability of rule on time-limit for tenure of office holders to the new "mechanism"—Definition of "Special procedures"—Discretionary power of the Secretary-General to appoint a Special Representative of his choice—Re-assignment of Special Representatives to other mandates may be allowed but not re-appointment under the same mandate

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* *Official Records of the Economic and Social Council, 2004, Supplement No. 3* (E/2004/23 and Corr.1—E/CN.4/2004/127 and Corr.1), chap. II, sect. B.

** *Official Records of the Economic and Social Council, 2004, Supplement No. 3* (E/2003/23—E/CN.4/2003/135), chap. II, sect. A.

*** *Official Records of the Economic and Social Council, 2004, Supplement No. 3* (E/2004/23 and Corr.1—E/CN.4/2004/127 and Corr.1), chap. II, sect. A.

1. This is in reference to [name's] e-mail to [the Office of Legal Affairs] of 16 July 2004, seeking guidance on the legal and practical implications of the recent resolution of the Commission on Human Rights (CHR) on internally displaced persons. Communications addressed to the Office of the High Commissioner for Human Rights (OHCHR) by the Office for the Coordination of Humanitarian Affairs and the [State] Ministry of Foreign Affairs were subsequently provided to this Office by [name] and the Director for Human Rights of the Federal Ministry of Foreign Affairs of [State], respectively.

2. The resolution in question is CHR resolution 2004/55 of 20 April 2004 on Internally Displaced Persons, which "requests the Secretary-General, in effectively building upon the work of his Representative, to establish a mechanism that will address the complex problem of internal displacement" (paragraph 23). The resolution also mandates the "mechanism" "to work towards strengthening the international response to the complex problem of situations of internal displacement, and engage in coordinated international advocacy and action for improving protection and respect of the human rights of the internally displaced, while continuing and enhancing dialogues with Governments, as well as non-governmental organizations and other related actors".

3. The communications addressed in this connection to OHCHR clarifying the "legislative history" of the resolution state clearly that in adopting resolution 2004/55, it was the intention of the Commission to replace the "Special Procedures" with a "mechanism" with respect to internally displaced persons, and in so doing exempt the "mechanism" and the current Special Representative, in particular, from the application of the six-year time limit, otherwise applicable under CHR decision 2002/114* of 26 April 2002 to all other office-holders of Special Procedures mandates.

4. In considering the legal and practical implications of resolution 2004/55, we have examined the nature of the new "mechanism" in its relationship to the "Special Procedures"; the applicability of the six-year rule to the "mechanism" and to [name], the Special Representative, in particular, and the implications of the above on the discretionary power of the Secretary-General to appoint a Special Representative of his own choice.

5. In its request that the Secretary-General establish a "mechanism" for internally displaced persons, the CHR resolution did not elaborate on the nature of the new mechanism, its composition, legal status or organizational structure, nor for that matter did it clarify its relationship to the existing "Special Procedures". The "mechanism" which has no defined meaning of its own other than denoting a modality, a system or a procedure, was thus left for the Secretary-General to devise. But while it is clear that the Commission intended that the new "mechanism" would be the *sole* mechanism for internally displaced persons, it is far less clear in what way the new "mechanism" differs substantially from the existing one to exempt it or its Representative from the application of the six-year rule.

6. The mandate entrusted to the new "mechanism" for internally displaced persons under resolution 2004/55 has evolved to take account of changing realities, new legal and political circumstances and the needs of the internally displaced. While different in some respects from the mandate originally conferred upon the Special Representative twelve

* *Official Records of the Economic and Social Council, 2004, Supplement No. 3* (E/2002/23—E/CN.4/2002/200), chap. II, sect. B.

years earlier in CHR resolution 1992/73,* it is not fundamentally different in its nature, subject-matter or thematic issue. It is for all intents and purposes, therefore, the "same mandate".

7. Like the current Special Representative for internally displaced persons mandated by the Commission and appointed by the Secretary-General, the new "mechanism" is mandated by the Commission and "established" by the Secretary-General. Like the existing mechanism also, the new mechanism is to be supported from within existing resources by OHCHR, and report, through the Secretary-General, to the CHR and the General Assembly.

8. Identical in all respects—other than in name—both the new and old mechanisms for internally displaced persons fall within the general description of "Special Procedures", defined generically as "a general name given to the mechanism established by the Commission on Human Rights to address either specific country situations or thematic issues. Special Procedures are either an individual—called a Special Rapporteur, Special Representative or independent expert—or a 'working group' usually composed of five independent experts." (A note prepared early this year by OHCHR). As the "mechanism" is only another form of "Special Procedures", there is no legal basis for the assumption that office-holders of a "mechanism" mandate are not subject to the six-year rule in the same manner as all other office-holders of Special Procedures mandates.

9. Quite apart, however, from the question of whether the resolution can be interpreted to exempt the "mechanism" or the Special Representative from the six-year rule, it cannot, in any event, be interpreted to limit the discretionary power of the Secretary-General to appoint a Special Representative of his own choice.

10. It is perhaps worth reiterating in this connection the reasoning behind the six-year rule as stated by the Chairman of the CHR during its fifty-fifth session:

> "To help maintain appropriate detachment and objectivity on the part of the individual office-holders, and to ensure a regular infusion of new expertise and perspectives, any individual's tenure in a given mandate, whether thematic or country-specific, will be no more than six years. As a transitional-measure, office-holders who have served more than three years when their current mandates expire will be limited to at most three years of further renewals in these posts. Reassignment of individuals to other mandates will be considered only in exceptional circumstances (E/1999/23—E/CN.4/1999/167, chapter XX, paragraph 552)."

11. This Office was not requested to advise on how to provide for [name's] re-appointment. It was argued, however, that under the Special Procedures system, in exceptional circumstances, Special Representatives could be re-appointed. Our interpretation of the Chairman's statement to that effect, however, is that exceptional circumstances may only allow for *re-assignment to other mandates* but not for *re-appointment under the same mandate*. Finally, it would seem to us that for [name], the Special Representative, to continue his appointment beyond his current term, the six-year rule will have to be explicitly abolished or waived in his regard by the Commission; a decision which like similar decisions of this kind, would have to be endorsed by the Economic and Social Council.

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* *Official Records of the Economic and Social Council, 1992, Supplement No. 2* (E/1992/22—E/CN.4/1992/84), chap. II, sect. A.

3 August 2004

(*d*) Letter to an individual regarding the procedure for admission of States to membership in the United Nations

PROCEDURES FOR ADMISSION OF STATES TO MEMBERSHIP IN THE UNITED NATIONS—CHARTER OF THE UNITED NATIONS—PROVISIONAL RULES OF PROCEDURE OF THE SECURITY COUNCIL—RULES OF PROCEDURE OF THE GENERAL ASSEMBLY

This is with reference to your letter to the Legal Counsel of 6 August 2004 requesting information on the procedure for admission of States to membership in the United Nations. Attached please find a non-paper setting out the applicable provisions of the Charter of the United Nations, the Provisional Rules of Procedure of the Security Council and the Rules of Procedure of the General Assembly.

12 August 2004

PROCEDURE FOR ADMISSION OF STATES TO MEMBERSHIP IN THE UNITED NATIONS

Summary of procedure

In accordance with Article 4 of the United Nations Charter and rule 58 of the Provisional Rules of Procedure of the Security Council and rule 134 of the Rules of Procedure of the General Assembly, any State which desires to become a Member of the United Nations shall submit an application in a letter signed by the Head of State, Head of Government or the Minister of Foreign Affairs to the Secretary-General, which application shall contain a declaration required by rule 58 of the Provisional Rules of Procedure of the Security Council and rule 134 of the Rules of Procedure of the General Assembly. The declaration, made in a formal instrument, confirms that the State in question accepts the obligations contained in the Charter. Upon receipt of the original texts of the documents, the Secretary-General will, after verifying that they are in due and proper form, take the steps provided for in rule 59 of the Provisional Rules of Procedure of the Security Council to transmit the application to the Security Council and rule 135 of the Rules of Procedure of the General Assembly to transmit the application to the General Assembly.

The application is considered by a Committee on the Admission of New Members of the Security Council which submits its recommendation to the Security Council. The Security Council then takes a decision and makes a recommendation to the General Assembly. The President of the Security Council then transmits that recommendation to the President of the General Assembly. The General Assembly then takes a decision at an open meeting of the Assembly.

This procedure is described in more detail below.

The Charter

Article 4 of the United Nations Charter provides as follows:

> "1. Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.

2. The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council."

The Charter envisages an application from a State. That application will first be considered by the Security Council and subsequently by the General Assembly.

Provisional Rules of Procedure of the Security Council

Rules 58 to 61 of the Provisional Rules of Procedure of the Security Council set out the procedure which is to be followed in the case of admission of new members.

Rule 58 requires the application to contain a declaration that the applicant State accepts the obligations required by the Charter.

Rule 59 requires the Secretary-General to place the application before the Security Council as soon as it is received and requires the President of the Security Council to refer it to a Committee of the Security Council which shall examine the application and report not less than 35 days prior to the start of a regular session of the General Assembly. This time limit is normally waived if the General Assembly is in session.

Rule 60 requires the Security Council to decide whether in its opinion the applicant is a peace-loving State and is able and willing to carry out the obligations in the Charter and accordingly whether to recommend the applicant State for membership. Under Article 27, paragraph 3, of the Charter this decision shall be made by an affirmative vote of at least nine members including the concurring votes of the permanent members.

Rule 60 also sets out the procedures for communication of the decision of the Security Council to the General Assembly.

Rules of Procedure of the General Assembly

Rules 134 to 138 set out the procedure to be followed by the General Assembly.

Rule 134 is in substance identical to rule 58 of the Security Council.

Rule 135 requires the Secretary-General to send a copy of the application to the General Assembly.

Rule 136 provides that if the applicant State is recommended by the Security Council, the General Assembly shall decide by a two-thirds majority of members present and voting upon the application.

Rule 137 provides that if the Security Council does not recommend the applicant State for membership, or postpones the consideration, the General Assembly may after full consideration of the report of the Security Council send the application back to the Security Council together with a full record of the discussion in the General Assembly for further consideration and recommendation or report.

Rule 138 deals with the effective date of membership of the applicant State which is the date on which the General Assembly takes a decision on the application.

(*e*) Facsimile to the Director of the Transport Division, United Nations Economic Commission for Europe, Geneva, regarding draft amendments to the rules of procedures of the TIR Executive Board

AMENDMENT TO THE RULES OF PROCEDURES OF THE TIR EXECUTIVE BOARD—AMENDMENT TO THE CUSTOMS CONVENTION ON THE INTERNATIONAL TRANSPORT OF GOODS UNDER COVER OF TIR CARNETS, 1975*—INTRODUCTION OF REPLACEMENT MEMBERS—*AD LITEM* JUDGES—REMOVAL FOR LACK OF REGULAR PARTICIPATION BY MEMBERS—MEMBERS ELECTED IN THEIR PERSONAL CAPACITY

1. This is with reference to your memorandum of 19 August 2004 which we received on 8 October 2004 concerning the draft amendments to the rules of procedure of the TIR Executive Board (TIRExB). In particular, you seek our advice on the proposal to amend the rules of procedure of the TIRExB to introduce the election of replacement members in order to fill vacancies arising out of the resignation of members, their removal by their respective Governments and/or their lack of regular participation in the work of the TIRExB. In the event that the rules can be amended as proposed, you also seek our advice whether such amendments would necessitate amendments to annex 8, article 9, of the Customs Convention on the International Transport of Goods under Cover of TIR Carnets, 1975. Our comments are as follows.

2. At the outset, we wish to point out that the election of replacement members may raise financial and other implications that need to be addressed and clearly understood prior to the adoption of any such amendments. For instance, if such replacement members were expected or invited to attend TIRExB meetings prior to assuming actual membership, their travel and per diem costs would need to be approved and allocated. If that is not the intention of the proponents of the amendment, it should be clearly specified that such replacement members would have no official functions, duties or rights unless and until they become actual members.

3. The concept of replacement members is relatively unheard of in the United Nations system. The only possibly related precedent could be the election of *ad litem* judges of the International Criminal Tribunals for the former Yugoslavia and for Rwanda. The latter judges are elected as a pool from which the two Tribunals could draw in the event that the proceedings require replacement or additional judges. Such judges as indicated in paragraph 2 above have no functions, duties or rights unless and until they are called upon to serve. It should be noted that the introduction of *ad litem* judges was effectuated by a Security Council resolution amending the statutes of the two Tribunals, respectively. The introduction of replacement members onto the TIRExB would similarly require amendment of the Convention.

4. In the event of the death or resignation of any of the nine members of the TIRExB, the usual procedure would be to convene the TIR Administrative Committee (TIRAC) to fill the casual vacancy arising from such death or resignation. The application of such procedure would be automatic and would not require the amendment of the Convention or the rules of procedure.

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* United Nations, *Treaty Series,* vol. 1079, p. 89.

5. As for the replacement of those members whose Government or organization inform the TIRExB that they no longer hold office, we wish to confirm that the members of the TIRExB are elected by the TIRAC in their personal capacity and not as representatives of their respective Governments or organizations. If that is indeed the case, a member of TIRExB, once elected by TIRAC, could not be removed by his or her Government or organization.

6. The proposal to remove a member for lack of regular participation is unprecedented in the practice of the United Nations system and, as such, raises serious concern. If accepted, the proposal would empower the TIRExB to remove an existing member and replace him or her with an elected replacement leaving the TIRAC merely with the right, indeed the obligation, to endorse that replacement. As the members are elected by TIRAC, it should be for TIRAC not TIRExB to remove any such members from office. In any event, the exercise of such power by the TIRExB was clearly not envisaged under the Convention and would clearly require amendment of annex 8, article 9, thereof. While we understand the concerns and frustrations expressed in respect of those who do not fully perform their obligations as members of TIRExB, given the relatively short term of office, it is preferable to deny such members re-election than to amend the Convention and rules of procedure in such an unprecedented manner. Moreover, given that, according to the TIRExB rules of procedure, only five members constitute the required quorum for decision-making; the absence of up to four members would not impede the TIRExB from conducting its business.

7. Based on the foregoing, and as indicated in paragraph 4 above, we would recommend that the TIRExB rely on existing rules and practices of the United Nations system to fill vacancies if and when they arise. If despite the foregoing comments, the TIRAC or TIRExB decide to proceed with the proposed amendments to the rules of procedure, it would be equally necessary to amend the Convention in which case reference should be made to the applicable amendment procedures and entry into force provisions of articles 59 and 60 of the Convention.

11 October 2004

(*f*) Note to the Director, Security Council Affairs Division, Department of Political Affairs, regarding the meeting of the Security Council in Nairobi, Kenya

Relocation of the Security Council as an organ—Emergency sessions—Prohibition of simultaneous meetings at two different locations—Prohibition of representation by alternates at Headquarters while Council is meeting elsewhere, though not simultaneous—Article 28 of the Charter of the United Nations—Rule 5 of the Provisional Rules of Procedure of the Security Council—Duty to be able to function continuously—Preservation of the unity of the Security Council as an organ

1. This is in reference to your note of 27 October 2004 regarding Security Council resolution 1569 (2004) by which the Council has decided to hold meetings in Nairobi on 18 and 19 November 2004 on the agenda item "The reports of the Secretary-General on the Sudan". You seek our advice on whether in case of an emergency while the Security Council is in or *en route* to and from Nairobi, meetings of the Council could be held in

New York at a level other than Permanent Representatives, provided they are not held simultaneously in both places.

2. We recall that while on a number of occasions the Council has met away from Headquarters, and notably in Addis Ababa in 1972 and in Panama City in 1973, the need to convene the Council in an emergency session while it met at a location other than the seat, has never arisen. Our advice is, therefore, based on an analysis of the relevant provisions of the United Nations Charter and the Provisional Rules of Procedure of the Security Council.

3. Article 28, paragraphs 1 and 3, of the United Nations Charter provide, respectively, as follows:

> "1. The Security Council shall be so organized as to be able to *function continuously.* Each member of the Security Council shall for this purpose be represented at all times at the seat of the Organization" (emphasis added).
>
> . . .
>
> 3. The Security Council may hold meetings at such places other than the seat of the Organization as in its judgment will best facilitate its work."

4. Rule 5 of the Provisional Rules of Procedure of the Security Council provides that:

> "Meetings of the Security Council shall normally be held at the seat of the United Nations.
>
> Any member of the Security Council or the Secretary-General may propose that the Security Council should meet at another place. Should the Security Council accept any such proposal, it shall decide upon the place and the period during which the Council shall meet at such place."

5. In providing for the possibility of holding meetings away from Headquarters, Article 28, paragraph 3, of the Charter foresees the "relocation" of the Security Council *as an organ,* and not merely of the gathering place of its fifteen member States. As an organ, therefore, the Council cannot meet simultaneously in two locations, not even at different levels of representations.

6. The practice of representation by an accredited alternate or deputy in a situation where the Permanent Representative is temporarily unavailable at the seat, is likewise inapplicable in the present case, where all Permanent Representatives are in fact present at the "relocated" seat. To suggest that the Security Council can meet at a level of accredited alternates or deputies in New York, while meeting—though not simultaneously—at the level of Permanent Representatives in Nairobi, would lead to a situation where for the duration of the emergency meeting at Headquarters, the Council in Nairobi would be practically paralyzed, unable to discuss the emergency situation which is debated in New York, nor the agenda item for which it was convened away from Headquarters.

7. The holding of meetings away from Headquarters nevertheless raises the question of the relationship between Article 28, paragraph 3, of the Charter which provides for meetings of the Council to be held away from Headquarters, and Article 28, paragraph 1, whereby the Council is duty bound to be "so organized as to be able to function continuously", or otherwise maintain a state of constant readiness to enable it to convene at any time. This question was discussed at the Committee on Council Meetings away from Headquarters, established in 1972 to examine all aspects of Security Council meetings in an African capital and to draft "general guidelines that could be applied in all similar

situations that might arise in the future application of Article 28, paragraph 3". In its 1972 report, the Committee said:

> "One of the first considerations raised . . . was the amount of time which the Council should contemplate spending away from Headquarters. Several representatives drew attention to the importance of the principle contained in paragraph 1 of Article 28 of the Charter which stipulates that in view of its primary responsibility for the maintenance of international peace and security, the Security Council shall be so organized as to be able to function continuously. A number of points were raised in this connection, *including the importance of immediate access to the Council by all Members of the United Nations at all times, the necessity of having rapid communications readily available at all times, the possibility of the occurrence of unforeseen emergencies, which might oblige the Council to return urgently to Headquarters,* and the importance of ensuring the success of the Council's first meetings in an African capital" (emphasis added).

8. While the question of how to deal with emergencies when the Council is away from Headquarters was not conclusively determined by the Committee, the option that the Council would meet at a level of accredited deputies or alternates in New York while meeting at the level of Permanent Representatives in Africa, was not even envisaged. It was rather foreseen that rapid means of communications put at the disposal of the Council and facilities for an urgent flight back to Headquarters would enable it to deal with the situation effectively, either at its temporary location or at Headquarters.

9. In conclusion, Article 28, paragraph 3, of the Charter foresees the "relocation" of the Council *as an organ.* Any emergency situation which may arise at any time must be dealt with by the Council at its location at the time the question arises. In the present circumstances, therefore, an emergency situation would be dealt with by the Council in, or on its way to or from Nairobi. Article 28, paragraph 3, should thus be interpreted in a manner which would preserve the unity of the Security Council as an organ. Any interpretation which would lead to an artificial "split" of the Council, or worse still, its paralysis, should be avoided.

4 November 2004

3. Other issues relating to United Nations Peace Operations

(*a*) Note to the Assistant Secretary-General for Peacekeeping Operations regarding the United Nations Mission in Kosovo (UNMIK) and the protection of cultural heritage

PROTECTION OF CULTURAL AND RELIGIOUS SITES IN KOSOVO—QUALIFIED APPLICABILITY TO KOSOVO OF THE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT, 1954*—WILLINGNESS TO APPLY RELEVANT PROVISIONS OF THE CONVENTION TO THE EXTENT OF THEIR APPLICABILITY IN THE CIRCUMSTANCES—PROTECTION OF CULTURAL AND RELIGIOUS HERITAGE BEING PART OF A GENERAL OBLIGATION TO PROVIDE PROTECTION AND SECURITY THROUGHOUT KOSOVO—COMMON DOCUMENT—STANDARDS FOR KOSOVO—INTERNATIONAL RESPONSIBILITY OF UNMIK—NON-APPLICABILITY OF OBLIGATION TO ESTABLISH SERVICES OR SPECIALIST PERSONNEL TO SECURE RESPECT FOR CULTURAL PROPERTY (ARTICLE 7 OF THE CONVENTION)

1. Reference is made to your note of 30 December 2003 to which a letter dated 25 December 2003 from [name], the Serbian Deputy Prime Minister to the President of the Security Council was attached for our comments.

2. In his letter, [name] alleges that UNMIK has failed to protect and preserve Serbian cultural and religious sites throughout Kosovo and Metohija. Recalling that annex 2 of Security Council resolution 1244 (1999) providing for Serb presence at Serb patrimonial sites has not been implemented, [name] alleges that UNMIK did not comply with its obligations under the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954, the "Common Document" and the "Standards for Kosovo". Pending the examination of the facts of the allegations, we set out below our observations on the applicable legal norms.

3. The applicability of the Hague Convention, in the case of Kosovo, needs qualification. The Hague Convention applies in situations of armed conflict, in cases of total and partial occupation, and in peacetime (to the extent of the parties' obligation to refrain from use which may expose the property to destruction or damage in the event of armed conflict (article 4)). The present situation in Kosovo, however, is neither one of armed conflict, nor one of occupation. The "Common Document", therefore, describes correctly the qualified applicability of the Hague Convention in confirming "the *will to apply* the *relevant provisions of the Hague Convention* (1954) regarding the protection of cultural sites and property in Kosovo" (emphasis added). UNMIK is accordingly bound to apply the relevant provisions of the Convention with the necessary modifications flowing from the nature of UNMIK and the legal status of Kosovo.

4. The "Standards for Kosovo" document provides in its relevant part that all communities are entitled to preserve their cultural, historical and religious heritage "*with the assistance of relevant authorities (PISG), in accordance with European standards*". As a policy document and a statement of intent, UNMIK may be held to the standards it has

* United Nations, *Treaty Series,* vol. 249, p. 240.

set in the document to provide for assistance in the preservation of cultural heritage "in accordance with European standards".

5. Quite apart, however, from the specific undertakings under each of the foregoing instruments, the obligation to preserve and protect cultural and religious property is part of a more general obligation binding upon the United Nations Administration to provide for protection and security throughout Kosovo. While its practical implementation may be delegated to the Provisional Institutions within their respective competencies, the international responsibility, in case of failure, lies ultimately with UNMIK.

6. In the light of the foregoing, we suggest that any briefing to the Security Council should reaffirm not the applicability of the Hague Convention, as such, *but our willingness to apply its relevant provisions to the extent of their applicability in the circumstances*. We also suggest that while undertaking to take all necessary measures to protect cultural and religious property we should not necessarily undertake to be bound by article 7 of the Hague Convention to establish "services or specialist personnel whose purpose will be to secure respect for cultural property", as suggested in the letter.

5 January 2004

(*b*) Note verbale to a Permanent Mission to the United Nations regarding the legal personality and treaty-making power of the United Nations Interim Administration Mission in Kosovo (UNMIK)

International legal personality and treaty-making capacity of UNMIK—Security Council resolution 1244 (1999)—Secretary-General's report on UNMIK (S/1999/799)—Assumed treaty-making power by UNMIK to conclude bilateral agreements on behalf of Kosovo—Non-applicability of the European Convention on Extradition, 1957,* in Kosovo by virtue of Serbia and Montenegro's accession

The Assistant Secretary-General for Legal Affairs of the United Nations presents his compliments to the Permanent Mission of [State], and has the honour to refer to its note verbale [number] of 25 February 2004, attaching a draft agreement between the United Nations Interim Administration Mission in Kosovo (UNMIK) and the Government of [State] on the transfer of residents of Kosovo to [State]. The advice of the Office of Legal Affairs was sought on: (i) whether UNMIK disposes of an international legal personality and treaty-making power; (ii) if, in the judgment of the Secretariat, UNMIK does not enjoy such treaty-making power, would the United Nations consider concluding the agreement on behalf of Kosovo; and (iii) whether the European Convention on Extradition of 13 December 1957, to which Serbia and Montenegro have acceded on 29 December 2002 and on which the draft bilateral agreement is largely based, could be made applicable in the territory of Kosovo.

UNMIK was established by Security Council resolution 1244 (1999) of 10 June 1999, as the "international civil presence in Kosovo in order to provide an interim administration for Kosovo". Its authority and competencies in matters of civil administration were further elaborated in the Secretary-General's report on the Interim Administration Mis-

* United Nations, *Treaty Series*, vol. 359, p. 273.

sion in Kosovo (S/1999/779 of 12 July 1999) to include all legislative and executive powers, including the administration of the judiciary.

While not expressly vested with treaty-making power, the power to conclude bilateral agreements with third States and organizations on behalf of Kosovo has in practice been assumed by UNMIK with regard to matters falling within the scope of its responsibilities under Security Council resolution 1244 (1999), and to the extent necessary for the administration of the territory. A number of agreements have thus been concluded over the years on a variety of practical matters relating to economic development assistance and cooperation, road transport and police cooperation with the Republic of Albania, Italy, the United States, Switzerland, Iceland and the former Yugoslav Republic of Macedonia, among others. Bilateral agreements have also been concluded between UNMIK and international organizations, and notably the International Civil Aviation Organization and Interpol. We note in this connection that a similar treaty-making power has been exercised by the United Nations Transitional Administration in East Timor (UNTAET) in matters affecting the territory of East Timor.

The answer to the first question obviates the need to reply to the second.

The question of the applicability of the European Convention on Extradition, 1957, in Kosovo is unrelated to the question of the accession thereto by Serbia and Montenegro. As a general principle, international conventions ratified by or acceded to by Serbia and Montenegro after 10 June 1999 are not automatically applicable to Kosovo, although they can be made applicable thereto by incorporation through a bilateral agreement between UNMIK and a third State. The present draft agreement, however, does not purport to apply the European Convention on Extradition, 1957, by incorporation, although it generally draws upon it. For these reasons, therefore, the European Convention on Extradition, 1957, cannot be considered to apply, either directly or by incorporation, in the territory of Kosovo; the similarities between the draft agreement and the European Convention, notwithstanding.

12 March 2004

4. Responsibility of international organizations

Interoffice memorandum to the Director of the Codification Division, Office of Legal Affairs and Secretary of the International Law Commission regarding the topic Responsibility of International Organizations

Responsibility of international organizations—Attribution of conduct by reference to "the rules of the Organization"—Definition of the "rules of the Organization"—Acts of peacekeeping forces, as subsidiary organs, are in principle imputable to the Organization—United Nations command and control—Delineation of respective responsibilities of the Organization and contributing States with respect to third party liability—Liability in compensation is, in the first place, entailed for the Organization—Imputability of acts of Chapter VII operations, conducted under national command and control, to the conducting State(s)—International responsibility in joint operations lies where effective command and control is vested and practically exercised

1. This is in reference to your memorandum of 29 September 2003 transmitting the request of the International Law Commission (ILC) for our views and comments on chapters III (A) and IV of its report to the 2003 Session,* pertaining to the topic of Responsibility of International Organizations. While we have no comments on chapter IV of the report, our views on the questions raised by the Commission in chapter III (A) are set out below. A set of documents reflecting the practice of the United Nations in matters of international responsibility and third party liability, in particular, is also attached.**

2. The questions put to the Secretariat by the ILC are as follows:

(*a*) Whether a general rule on attribution of conduct to international organizations should contain a reference to the "rules of the organization";

(*b*) If the answer to (*a*) is in the affirmative, whether the definition of "rules of the organization", as it appears in article 2, paragraph 1 (j), of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986,*** is adequate; and

(*c*) The extent to which the conduct of peacekeeping is attributable to the contributing State and the extent to which it is attributable to the United Nations.

A. Attribution of conduct by reference to the "rules of the organization"

3. A general rule on attribution of conduct to an international organization should contain a reference to the "rules of the organization"—the equivalent of "the internal law of the State" under article 4, paragraph 2, of the draft articles on Responsibility of States for Internationally Wrongful Acts.**** It is indeed by reference to the rules of the organization, that an organ, a person or entity of the organization whose conduct engages the responsibility of the organization, is defined.

B. Definition of the "rules of the organization"

4. The definition of the "rules of the organization" contained in article 1, paragraph 1 (j), of the Vienna Convention, 1986, is, for the purpose of this study, adequate. It is particularly so in connection with peacekeeping operations where principles of international responsibility for the conduct of the Force have for the most part been developed in a fifty-year practice of the Organization.

C. The attribution of the conduct of a peacekeeping force to the United Nations or to contributing States

5. The question of attribution of the conduct of a peacekeeping force to the United Nations or to contributing States is determined by the legal status of the Force, the agreements between the United Nations and contributing States and their opposability to third States.

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* *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10).

** The documents listed in paragraph 11 below are not reproduced herein.

*** Doc. A/CONF.129/15.

**** General Assembly resolution 56/83 of 12 December 2001, annex.

6. A United Nations peacekeeping force established by the Security Council or the General Assembly is a subsidiary organ of the United Nations. Members of the military personnel placed by Member States under United Nations command, although remaining in their national service, are, for the duration of their assignment to the Force, considered international personnel under the authority of the United Nations and subject to the instructions of the Force Commander. The functions of the Force are exclusively international and members of the Force are bound to discharge their functions with the interest of the United Nations only in view. The peacekeeping operation as a whole is subject to the executive direction and control of the Secretary-General, under the overall direction of the Security Council or the General Assembly as the case may be.

7. As a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the Organization and its liability in compensation. The fact that any such act may have been performed by members of a national military contingent forming part of the peacekeeping operation does not affect the international responsibility of the United Nations *vis-à-vis* third States or individuals.

8. Agreements concluded between the United Nations and States contributing troops to the Organization contain a standard clause on third-party liability delineating the respective responsibilities of the Organization and contributing States for loss, damage, injury or death caused by the personnel or equipment of the contributing State. Article 9 of the Model Memorandum of Understanding between the United Nations and [Participating State] contributing resources to [The United Nations Peacekeeping Operation] provides in this regard:

> "The United Nations will be responsible for dealing with any claims by third parties where the loss of or damage to their property, or death or personal injury, was caused by the personnel or equipment provided by the Government in the performance of services or any other activity or operation under this memorandum. However if the loss, damage, death or injury arose from gross negligence or willful misconduct of the personnel provided by the Government, the Government will be liable for such claims" (A/51/967, annex).[1]

9. While the agreements between the United Nations and contributing States divide the responsibility in the relationship between them, they are not opposable to third States. *Vis-à-vis* third States and individuals, therefore, where the international responsibility of the Organization is engaged, liability in compensation is, in the first place, entailed for the United Nations, which may then revert to the contributing State concerned and seek recovery on the basis of the agreement between them.

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[1] A similar provision is contained in article 6 of the model agreement used by the Organization to obtain gratis personnel (ST/AI/1999/6, annex). It reads:

> "The United Nations shall be responsible for dealing with claims by third parties where the loss of or damage to their property, or death or personal injury, was caused by the actions or omissions of the . . . personnel in the performance of services to the United Nations under the agreement with the Government. However, if the loss, damage, death or injury arose from the gross negligence or willful misconduct of the . . . personnel provided by the donor, the Government shall be liable to the United Nations for all amounts paid by the United Nations to the claimants and all costs incurred by the United Nations in settling such claims".

10. The principle of attribution of the conduct of a peacekeeping force to the United Nations is premised on the assumption that the operation in question is conducted under United Nations command and control, and thus having the legal status of a United Nations subsidiary organ. In authorized chapter VII operations conducted under national command and control, the conduct of the operation is imputable to the State or States conducting the operation. In joint operations, namely, those conducted by a United Nations peacekeeping operation and an operation conducted under national or regional command and control, international responsibility lies where effective command and control is vested and practically exercised (see paragraphs 17–18 of the Secretary-General's report, A/51/389).

D. Materials on the practice of the United Nations regarding third-party claims

11. To assist in the study on the Responsibility of International Organizations, we attach a series of documents which provide further information on the practice of the Organization with regard to third-party claims.* They include:

(*a*) The report of the Secretary-General, "Review of the efficiency of the administrative and financial functioning of the United Nations; 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" (A/C.5/49/65).

(*b*) The Secretary-General's reports on third-party liability arising from peacekeeping operations, A/51/389 (in particular section II) and A/51/903, as well as General Assembly resolution 52/247 of 26 June 1998, which established temporal and financial limitations on the liability of the Organization arising from peacekeeping operations (now incorporated in status-of-forces and status-of-mission agreements). It is important to note that the resolution was adopted without a vote (see A/52/PV.88).

(*c*) With regard to the arbitration and settlement of claims of a private law nature against the Organization, reference should also be made to the report of the Secretary-General on "Procurement-related arbitration" (A/54/458).

(*d*) A legal opinion addressed by the Legal Counsel on 23 February 2001 to the Controller, advising on the basis for the settlement and payment of claims against the Organization. This opinion discusses, among other things, the capacity of the Organization to incur obligations and liabilities of a private law nature, the procedures for settling such claims and the internal legal framework under the United Nations Financial Regulations and Rules.

(*e*) General Assembly resolution 49/37 of 9 December 1994 on the comprehensive review of the whole question of peacekeeping operations in all their aspects.

(*f*) "An Agenda for Peace" 1995 (A/50/60–S/1995/1).

(*g*) Model Memorandum of Understanding between the United Nations and States contributing resources to a United Nations peacekeeping operation (A/51/967).

(*h*) Report of the Secretary-General on the command and control of United Nations peacekeeping operations (A/49/681).

* These documents are not reproduced herein.

(*i*) For an earlier practice see the study prepared by the Secretariat for the International Law Commission on the practice of the United Nations, the Specialized Agencies and the International Atomic Energy Agency concerning their status, privileges and immunities.*

3 February 2004

5. Treaty law

(*a*) Letter to a Permanent Representative to the United Nations regarding the registration of treaties pursuant to Article 102 of the Charter of the United Nations

Challenge regarding the authenticity and validity of an agreement submitted for registration pursuant to Article 102 of the Charter of the United Nations—Obligation to register treaties pursuant to Article 102 of the Charter—Administrative role of the Secretariat—Requirements relating to registration—Regulations to give effect to Article 102 of the Charter—Certified true copies—Registration of subsequent actions—Registration as a prerequisite of a treaty to be invoked before any organ of the United Nations—Registration does not add or detract from the legality or value of a treaty—A dispute relating to the validity of a treaty should be determined by an appropriate tribunal and not by the Secretariat

I refer to your letter to the Secretary-General dated 10 March 2004, transmitting a letter of the same date from the [Minister of Foreign Affairs of State A], stating that it had come to your Government's attention that [State B] was attempting to register a Convention from 1974 on the delimitation of the boundary between [State B] and [State A] (the Convention). The Minister's letter asserts that by attempting to register the Convention thirty years after its apparent conclusion [State B] was acting in bad faith. In your further letter of [date] 2004 you stated that "[State A] does not recognize the existence of such agreement."

In the letter of 10 March, the [Minister of Foreign Affairs of State A], referring to a mediation process involving the border between [State B] and [State A], formally protested the continuation of the registration process.

In this connection, I note that on 2 March 2004, [State B] submitted the Convention for registration to the Treaty Section of the Office of Legal Affairs pursuant to Article 102 of the Charter of the United Nations. The submission consisted of the following:

(*a*) Copies of the French and Spanish texts of the Convention; and

(*b*) Certification specifying, *inter alia,* that (i) the Convention was a certified true copy; (ii) the parties did not formulate any reservations or objections to the agreement; and (iii) it had entered into force on the date of signature, i.e., [date] 1974.

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* *Yearbook of the International Law Commission, 1967,* vol. II (United Nations Publication, Sales No. E.68.V.2); *Yearbook of the International Law Commission, 1985,* vol. II (United Nations Publication, Sales No. E.86.V.5 (Part I)); and *Yearbook of the International Law Commission, 1991,* vol. II (United Nations Publication, Sales No. E.93.V.9 (Part I)).

Following a review of the submission, the Treaty Section noted that the texts submitted by [State B] were not legible and requested [State B] to resubmit clearer copies. This is not an unusual practice when illegible texts are submitted for registration by Member States. On 10 March 2004, [State B] submitted the re-typed texts as an attachment to an e-mail.

Article 102 of the Charter states that:

> "Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.
>
> No party to any such treaty or international agreement, which has not been registered in accordance with the provisions of paragraph 1 of this Article, may invoke that treaty or agreement before any organ of the United Nations."

Accordingly, it is an obligation mandated by the Charter that Member States register treaties or international agreements entered into by them. The role of the Secretariat, which is purely administrative, is to verify that a treaty or international agreement submitted for registration meets the requirements for registration stipulated in the Regulations to give effect to Article 102 of the Charter (Regulations)[1]. Once it is registered, the relevant information is included in the electronic database and subsequently published in the United Nations *Treaty Series*. The detailed requirements relating to registration are contained in article 5 of the Regulations:

> "A party or a specialized agency, registering a treaty or international agreement under article 1 or 4 of these regulations, shall certify that the text is a true and complete copy thereof and includes all reservations made by parties thereto.
>
> The certified copy shall reproduce the text in all the languages in which the treaty or agreement was concluded and shall be accompanied by two additional copies and by a statement setting forth, in respect of each party:
>
> (*a*) The date on which the treaty or agreement has come into force;
>
> (*b*) The method whereby it has come into force . . ."

In most bilateral treaties, the date of entry into force is the date of signature. (Please see attached copy of the *Treaty Handbook** for the practice of the Secretariat, page 31).

Once these requirements are satisfied, a treaty or agreement submitted is duly registered by the Secretariat. In this matter, the Secretariat has no choice. The Secretariat relies on the certification submitted by the party.

So long as such certification is in proper form, the Secretariat does not question the authenticity of an agreement.

It is the long-standing practice of this Office to accept copies of agreements, including photocopies, submitted for registration, as long as the submitters certify that such copies are "certified true copies" of the originals. The submitter State did so in this case.

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[1] *Registration and Publication of Treaties and International Agreements: Regulations to give effect to Article 102 of the Charter of the United Nations,* General Assembly resolution 97 (1) of 14 December 1946, and subsequent revisions in United Nations, *Treaty Series,* vol. 859/860, p. XII; see also *Repertory of Practice of United Nations Organs.*

* United Nations Publication, Sales No. E.02.V.2. The *Treaty Handbook* is not reproduced herein.

I also note that the Secretariat, pursuant to article 2 of the Regulations, registers any subsequent actions relating to a treaty. Your communication of [date] 2004 appears to meet the requirement for article 2 as a relevant notification.

Accordingly, it will be recorded in the Secretariat database as such and published in the United Nations *Treaty Series*.

Registration is the prerequisite for a treaty or international agreement to be capable of being invoked before the International Court of Justice or any other organ of the United Nations.

It is also noted that registration does not add or detract from the legality or value of a treaty. The practice of the Secretariat in this regard could be summarized as follows:

> "Where an instrument is registered with the Secretariat, this does not imply a judgment by the Secretariat of the nature of the instrument, the status of a party, or any similar question. Thus, the Secretariat's acceptance for registration of an instrument does not confer on the instrument the status of a treaty or an international agreement if it does not already possess that status. Similarly, registration does not confer on a party to a treaty or international agreement a status that it would not otherwise have." (See *Treaty Handbook,* section 5.3.1, page 27.)

Should there be a dispute relating to the validity of a treaty, such dispute must be determined by an appropriate tribunal, not by the Secretariat. It would not be proper for the Secretariat to involve itself in such a role.

A copy of this letter will be provided to the Government of [State B].

22 March 2004

(*b*) Facsimile to the Executive Secretary, Secretariat of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989, regarding the entry into force of amendments to the Convention

Legal effect of a decision of the Conference of State Parties regarding the interpretation of a treaty provision—Interpretation of treaties—Article 31 of the Vienna Convention on the Law of Treaties, 1969[*]—Concurrence of all parties—Conclusion of a subsequent agreement between the parties clarifying a treaty provision—Simplified entry into force provision—Provision dealing with future parties to the Convention and a subsequent agreement

I refer to your facsimile dated 18 October 2004 concerning the above matter in which you request the opinion of the Office of Legal Affairs as to the legal effect, if any, of a decision adopted by a Conference of the Parties specifying a particular interpretation of article XVII, paragraph 5, of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989.[**] We note the resolution adopted by the parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 1973,[***] interpreting the amendment provision of that Convention in a "narrow" sense to facilitate the entry into force of any amendments. As mentioned in your

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

[**] United Nations, *Treaty Series,* vol. 1673, p. 57.

[***] United Nations, *Treaty Series,* vol. 993, p. 243.

facsimile, CITES is deposited with the Government of Switzerland. The Secretary-General, as you are aware, is not obliged to follow the practice of any other depositary.

The Secretary-General, in the performance of his depositary duties, is guided by (1) the provisions of a treaty; (2) his practice as depositary; (3) customary treaty law (including as it may be deemed codified by various conventions on the matter); and (4) the general principles flowing from pertinent resolutions or decisions of the General Assembly and other organs of the United Nations (*Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties,* chapter II, section b, paragraph 14*).

With regard to the matter you raised, the Vienna Convention on the Law of Treaties (VCLT), 1969, may provide some guidance on the question. The VCLT, in its article 31, sets out the general rules for interpreting treaty provisions. Article 31, paragraph 3, provides that together with the context, any *subsequent agreement* between the parties regarding the interpretation of the treaty or the application of its provisions shall be taken into account. Although the VCLT makes no reference to a resolution adopted at a Conference of the Parties, a broad interpretation of this provision might accommodate such a resolution if it had the *concurrence of all the parties*. We note in this context that article 31, paragraph 3 (a), refers to an "agreement between the parties" which suggests a need for an agreement among all the parties.

A resolution adopted at the Conference of the Parties, however, would not necessarily guarantee the concurrence of all the parties. The adoption of resolutions is governed by rule 40 of the Rules of Procedure for Meetings of the Conference of the Parties which provides that in the absence of consensus a decision shall be adopted by a majority of two thirds of the parties present and voting. Under rule 30 of the rules of procedure, however, the required participation for a decision to be taken is only two thirds of the parties of the Convention. A resolution on the interpretation of article XVII of the Convention may thus be adopted by only two thirds of two thirds of the parties, and as such, could not constitute "an agreement between the parties" within the meaning of article 31, paragraph 3 (a), of the VCLT.

In the circumstances, the best solution would be for the parties to the Basel Convention to conclude a subsequent agreement which clarifies the amendment provision of the Basel Convention as contained in its article XVII. This agreement can be a simple and straightforward instrument, however, it must be drafted in such a manner as to ensure the consent of all parties. As such, only two options are possible. The first option would be for the parties to consent to be bound in the usual fashion, i.e., by depositing instruments consenting to be bound by the agreement. However, to ensure that the subsequent agreement actually has the agreement of all the parties, the agreement would only enter into force upon the deposit of instruments by each and every party. The other option, which we would recommend, would be to use a simplified procedure whereby the agreement enters into force for all parties if within six months, for example, from its date of circulation to the parties, no objections to it are received by the depositary. Once the agreement enters into force, the depositary, guided by the VCLT, would be obliged to take the agreement into consideration in interpreting the context of article XVII.

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* United Nations Publication, Sales No. E.94.V.15.

If the simplified procedure is utilized, it would also be necessary to include an additional provision. This provision would deal with the situation whereby a State becomes a party to the Convention between the time that the subsequent agreement is circulated for approval and its entry into force. In such cases, these States would be obliged to object to the proposed subsequent agreement, if they so desire, within the same timeframe as the other States to ensure that the agreement enters into force for all parties at the same time. In addition, it would also be necessary to include a provision to make certain that the Convention and the subsequent agreement are mutually binding on future parties. Such a provision would specify that a State that becomes party to the Convention after the entry into force of the subsequent agreement is also deemed to have consented to be bound by the subsequent agreement, the subsequent agreement and the Convention entering into force for that party on the same date, in accordance with the provisions of the Convention. If the need arises, we can assist in drafting the above provisions.

26 October 2004

(*c*) Interoffice memorandum to the Director of the Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, regarding a declaration by [State] pursuant to article 21, paragraph 4, of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, (the Agreement), 1995

The role of the Secretary-General as depositary—Depositary functions as opposed to administrative functions of the Secretary-General as chief administrative officer of the Organization—Circulation of notifications by States under a treaty—Role of substantive offices in the performance of administrative functions under a treaty—Review by the Treaty Section of treaties intended to be deposited with the Secretary-General prior to their finalization—ST/SGB/2001/1*

1. I thank you for your memorandum of 3 December 2004 (reference 04–01685) concerning the above matter.

2. In your memorandum, you refer to article 21, paragraph 4, of the Agreement ** which states, *inter alia,* that "[a]t the time of becoming a Party to this Agreement, a State shall designate an appropriate authority to receive notifications pursuant to this article and shall give due publicity of such designation through the relevant subregional or regional fisheries management organization or arrangement".

3. You also note that article 49 of the Agreement designates the Secretary-General of the United Nations as the depositary of the Agreement and any amendments or revisions thereof. Due note is also taken of your reference to article 77, paragraph 1 (e), of the Vienna Convention on the Law of Treaties, 1969,*** relating to the functions of the depositary.

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* For information on Secretary-General's bulletins, see note 11 in chapter V.

** United Nations, *Treaty Series,* vol. 2167, p. 3.

*** United Nations, *Treaty Series,* vol. 1155, p. 331.

4. It is our view that a notification made pursuant to article 21, paragraph 4, of the Agreement does not fall within the scope of the depositary functions of the Secretary-General. The Secretary-General in his capacity as depositary of multilateral treaties performs a legal function and not an administrative function. The notification under article 21, paragraph 4, appears to be an administrative matter. It would be inconsistent with his role as depositary to assume the role of performing administrative functions. Administrative functions assigned to the Secretary-General in his capacity as chief administrative officer of the Organization are entrusted to the relevant substantive offices. Only in exceptional circumstances in the absence of an appropriate substantive office to which administrative functions can be entrusted, will such functions be performed by the Treaty Section of the Office of Legal Affairs, which is entrusted with the performance of the Secretary-General's depositary functions. (See paragraph 31, *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties,* ST/LEG/7/Rev. 1.*)

5. Moreover, the Secretary-General, as depositary, could not fulfill the requirements of article 21, paragraph 4, from a practical perspective. This provision requires that due publicity be given of such designation through the "relevant subregional or regional fisheries management organization or arrangement". Depositary notifications are sent to the Permanent Missions in New York and treaty secretariats through a standardized process. Locating regional and subregional fisheries management organizations for the purposes of article 21, paragraph 4, would not be feasible for the depositary. In addition, we note that the obligation contained in article 21, paragraph 4, appears to be addressed to the States concerned and not to the depositary. There seems to be no reason for the depositary to get involved in this function.

6. Pursuant to ST/SGB/2001/7 of 28 August 2001, drafts of treaties intended to be deposited with the Secretary-General of the United Nations are required to be submitted to the Treaty Section for review and comment prior to finalization. In this process, the Treaty Section ensures that responsibilities assigned to the Secretary-General, as depositary, are, in fact, depositary functions and not administrative functions. This procedure not only accords with the long-standing practice of the Secretary-General, as depositary, but also reflects the reality that the Treaty Section, which currently administers the depositary functions on behalf of the Secretary-General for over 500 treaties, simply does not have the resources to effectively handle all of the functions assigned to the Secretary-General in a treaty deposited with him.

7. I would also like to draw your attention to the attached memorandum dated 9 February 1998 entitled "Functions entrusted to the Secretary-General by the United Nations Convention on the Law of the Sea and DOALOS [Division for Ocean Affairs and the Law of the Sea]—Treaty Section arrangements," and to the meeting of 20 May 1994 between the Treaty Section and DOALOS (see Treaty Section, Note for the file, copy attached**).

8. With regard to the above, it was acknowledged that many of the functions entrusted to the Secretary-General by the United Nations Convention on the Law of the Sea, 1982, are not depositary *stricto sensu* but pertain to the operation of the Convention or to the implementation of the substantive provisions thereof. Such functions were accordingly to

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* United Nations Publication, Sales No. E.94.V.15.

** These documents are not reproduced herein.

be performed by DOALOS. In the same vein, the notification of designation of authorities in article 21, paragraph 4, relates to the operation of the Agreement. As such, DOALOS may wish to discharge this function as well. (But see paragraph 10 below.)

9. In the light of the above, the Treaty Section does not intend to circulate the declaration by the Government of [State] pursuant to article 21, paragraph 4, of the Agreement.

10. We also note that the communication of the notification in question may not fall upon the Secretary-General, as chief administrative officer, as none of the functions contained in the article are specifically entrusted to the Secretary-General. Article 21, paragraph 4, obliges inspecting States, prior to boarding and inspecting fishing vessels for the purpose of ensuring compliance, to inform all States whose vessels fish on the high seas in the subregion or region of the form of identification issued to their inspectors. States are also mandated to designate an authority to receive notifications pursuant to this article and give due publicity of such designation through the "relevant subregional or regional fisheries management organization or arrangement." In all such cases, it appears that the States concerned are responsible for discharging the relevant obligations.

13 December 2004

6. International Humanitarian Law

(*a*) Interoffice memorandum to the Chief, Legal Affairs Section, Executive Office, Office of the United Nations High Commissioner for Refugees, regarding the Voluntary Repatriation (Tripartite) Agreement

Treaty-making and legislative capacity of an occupying power and of entities estabished by the occupying power—Applicability of agreements concluded during occupation beyond the period of occupation—Conditioning an agreement's continued applicability on the consent of the newly independent State

1. This is in reference to [name's] e-mail message of 6 February 2004, requesting our views on the draft Voluntary Repatriation Agreement between the Office of the United Nations High Commissioner for Refugees (UNHCR), the Government of [State A], and the so-called "Authorities in [State B]" comprising the Council of Ministers of [State B] and/or the Coalition Provisional Authority (CPA). The question put to us was "under what conditions and with what restrictions the United Nations/UNHCR may sign agreements with the [State C] as occupying power".

2. The draft Agreement raises, however, a number of other issues relating to the treaty-making power of the CPA and the Governing Council, and the applicability of the Agreement beyond the period of occupation.

3. The CPA as the Occupying Power in [State B] is the sole authority having legislative or treaty-making power, however limited, for the duration of the occupation. Agreements on the operational activities of the United Nations in [State B] during the period of occupation should, therefore, be concluded with the CPA. While [State C] is a leading member of the Coalition and it would probably be advisable to secure its political support, [State C] Government, as such, is not, nor should it be a party to this Agreement, not at least as representing the [State B] authorities or the CPA. The Governing Council, on the

other hand, as an entity established by the Occupying Power to assist in the administration of [State B] lacks an international treaty-making power, a power which cannot be delegated to it by the CPA.

4. The question of who represents [State B] for the purpose of this Agreement relates also to the question of the duration of the Agreement, and its applicability beyond the period of occupation. It is a well-established principle of the law of occupation that legislative acts enacted by an Occupant, and international agreements concluded by it on behalf of the occupied territory do not automatically survive the occupation, and may continue to apply only with the consent of the newly independent Government.

5. In the circumstances, UNHCR may either await the "transfer of powers" and sign the Agreement with the newly independent Government of [State B] (as was done for example in the case of East Timor when the agreement on the Timor Gap negotiated during the period of the United Nations administration was signed eventually between Australia and independent East Timor*). If, however, the conclusion of the Agreement is at this point a matter of urgency, it should be signed between the UNHCR, [State A] and the CPA (with or without the Governing Council). On the understanding that the operation of voluntary repatriation would survive the occupation, a provision should be inserted in the Agreement conditioning its continued applicability on the consent of the newly independent Government of [State B].

19 February 2004

(*b*) Letter to the Representative/President of the Unification and National Security Central Council in the Freedom Centre (Tongil Anbo Joongang Hyeopuih) in Seoul, Republic of Korea, regarding the eligibility of prisoners of war for payments for their labour in war camps during the Korean war

Korean war—Eligibility of prisoners of war for payments under articles 60 and 62 of the Third Geneva Convention Relative to the Treatment of Prisoners of War, 1949**—Legal Status of the military operation in Korea—Security Council resolution 84 of 7 July 1950—United Nations Command—Unified command under the United States

I refer to your letter of petition addressed to the Secretary-General dated 1 March 2004, in which you wish to verify whether certain categories of prisoners of war from the Korean War are eligible for payments under articles 60 and 62 of the Third Geneva Convention Relative to the Treatment of Prisoners of War, 1949, in respect of labour performed by them during their internment in prisoner of war camps. You also seek information with respect to any wages which may have been paid to such prisoners, including details with respect to the dates thereof, the country in which payment may have been made, and the names of the individual payees.

The Secretary-General has referred your letter to the Office of Legal Affairs. We regret to advise you that the United Nations is not in a position to provide you with the informa-

* Australian Treaty Series [2003] ATS 13.

** United Nations, *Treaty Series,* vol. 75, p. 135.

tion you have requested. Although the forces in Korea may have been known as "United Nations Forces", the operation was not in fact under the control of the United Nations. The legal status of the military operation in Korea is set forth by Security Council resolution 84 (1950). By that resolution, the Security Council "recommend[ed] that all Members providing military forces and other assistance . . . make such forces and other assistance available to a *unified command under the United States of America* (emphasis added)". It further "requeste[d] the United States to designate the commander of such forces; authorize[d] the unified command at its discretion to use the United Nations flag in the course of operations against North Korean forces concurrently with the flags of the various nations participating"; and "requeste[d] the United States to provide the Security Council with reports as appropriate on the course of action taken under the unified command". As such, the Security Council did not establish the "unified command" as a United Nations body, but rather recommended a unified command under the United States.

Although the United States announced on 25 July 1950 the establishment of the "United Nations Command," this expression was used interchangeably with that of "unified command" to designate the military command of the operations. Accordingly, despite the existence of certain links between the United Nations and the armed forces operating in Korea, such as the use of the United Nations flag and use of the terms "United Nations Command" or "United Nations Forces", there was no direct involvement of the United Nations in the military operations. Rather, it was an operation conducted by the United States, which reported periodically to the Security Council on its activities.

As we do not have information on the practice which the Unified Command followed with respect to either a working pay or advances for prisoners of war under articles 62 and 60 respectively of the Third Geneva Convention Relative to the Treatment of Prisoners of War, 1949, or any records with respect to payments that may have been made, we wish to advise that we have forwarded your letter to the Permanent Mission of the United States to the United Nations so that they may direct your request to the appropriate body. We have also forwarded your letter to the International Committee of the Red Cross, which as the guardian and promoter of the Geneva Conventions, may be in a better position to advise with respect to the question of eligibility of payments under articles 60 and 62 of the Third Geneva Convention.

28 April 2004

7. Human Rights and Refugee law

Note to the members of the Senior Management Group of the United Nations regarding conditions for the granting of political asylum

Universal Declaration of Human Rights* —Customary international law—Declaration on Territorial Asylum of 1967—An individual has a right to seek asylum but not to be granted asylum—Discretion of the State to grant asylum in its territory to any person—The right of a State to grant asylum constitutes the normal exercise of territorial sovereignty—The granting of asylum is not an unfriendly act against the country of origin nor interference in its internal affairs—Discretion of States to condition the granting of asylum—Minimum human rights standards and minimum standard of the Convention relating to the Status of Refugees, 1951, must however be afforded to the asylee—States must respect the principle of *non-refoulment*—Grounds for the denial of asylum

1. Although article 14, paragraph 1, of the Universal Declaration of Human Rights sets out that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution", an individual cannot claim a "right" to be granted asylum and no State is obliged to grant asylum under current customary international law.[1]

2. However, there is a general rule of customary international law that a State may grant asylum in its territory to any person at its own discretion.[2] The right of a State to grant territorial asylum implies, to use the words of the International Court of Justice, "only the normal exercise of territorial sovereignty".[3] This right is subject only to the provisions of those conventions or treaties, notably extradition treaties, to which the State is a party.

3. The granting of political asylum by a State cannot be seen as an unfriendly act against the country of origin of the asylum seeker nor does it constitute an interference with that country's internal affairs. In the Preamble to the Declaration on Territorial Asylum of 1967,[4] the General Assembly recognizes "that the grant of asylum by a State . . . is a peaceful and humanitarian act and that, as such, it cannot be regarded as unfriendly by any other State." Article 1, paragraph 1, of that Declaration reads: "Asylum granted by a State . . . shall be respected by all other States."

4. States are relatively free to enact national legislation that subjects the granting of political asylum to conditions. Under current international law the asylee must only be provided with the minimum human rights standard and the minimum standard of the

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* General Assembly resolution 217 A (III) of 10 December 1948.

[1] Hailbronner in: Bothe/Dolzer/Hailbronner/Klein/Kunig/Schröder/Graf Vitzthum, *Völkerrecht* 2nd ed., 2001, De Gruyter Recht, Berlin, p. 252; *Oppenheim's International Law,* R. Jennings and A. Watts, eds., vol. 1—Peace, 9th ed., Harlow: England, Longman, 1992, p. 901.

[2] Grahl-Madsen, Atle, "Territorial Asylum", 1985 in: R. Bernhardt ed., *Encyclopedia of Public International Law,* vol. 1, Amsterdam, Elsevier Science Publisher, 1992, p. 286.

[3] *I.C.J Reports 1950,* p. 274.

[4] General Assembly resolution 2312 (XXII) of 14 December 1967.

Geneva Convention relating to the Status of Refugees.[5] In particular, States must respect the principle of "*non-refoulement*" contained in article 33 of the Geneva Convention.[6] However, Jennings and Watts write in *Oppenheim's International Law* about the asylee, that "it might be necessary to make his entry subject to conditions, to place him under surveillance, or even to intern him in some place".[7]

5. Grounds for the denial of asylum can result from extradition treaties or from treaties dealing with aspects of terrorism. Article 1, paragraph 2, of the Declaration on Territorial Asylum stipulates: "The right to seek and enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity, as defined in the international instruments drawn up to make provision in that respect."

6. In sum, States are free to attach any conditions to granting political asylum as long as the asylee is provided with the minimum human rights standard and the minimum standard of the Geneva Convention.

5 March 2004

8. United Nations emblem and flag

Interoffice memorandum to the Senior Legal Adviser, Office of the Secretary-General, World Meteorological Organization, on guidelines on the use of the United Nations emblem

USE OF UNITED NATIONS EMBLEM—GENERAL ASSEMBLY RESOLUTION 92 (I) OF 7 DECEMBER 1946—PARIS CONVENTION FOR PROTECTION OF INDUSTRIAL PROPERTY* —ADMINISTRATIVE INSTRUCTION ST/AI/189/ADD.21** —PROHIBITION OF THE USE OF UNITED NATIONS NAME AND EMBLEM FOR COMMERCIAL PURPOSES—ANY USE REQUIRES PRIOR AUTHORIZATION OF THE SECRETARY-GENERAL—DEVELOPMENT OF GENERAL PRINCIPLES FOR THE USE OF THE EMBLEM IN THE CONTEXT OF PARTNERSHIPS WITH THE PRIVATE SECTOR—RESTRICTED USE OF DISTINCTIVE ELEMENTS OF THE EMBLEM—DEVELOPMENT OF SPECIFIC EMBLEMS OR LOGO FOR CONFERENCES AND INTERNATIONAL YEARS

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[5] Hailbronner in: Bothe/Dolzer/Hailbronner/Klein/Kunig/Schröder/Graf Vitzthum, *Völkerrecht,* 2nd ed. 2001, p. 252; *Oppenheim's International Law,* R. Jennings and A. Watts, eds., vol. 1—Peace, 9th ed., Harlow: England, Longman, 1992, p. 901; Grahl-Madsen, Atle, "Territorial Asylum," 1985 in: R. Bernhardt ed., *Encyclopedia of Public International Law,* vol. 1, Amsterdam, Elsevier Science Publisher, 1992, p. 286.

[6] Convention relating to the Status of Refugees, adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950. United Nations, *Treaty Series,* vol. 189, p. 137.

[7] *Oppenheim's International Law,* R. Jennings and A. Watts, eds., vol. 1—Peace, 9th ed., Harlow: England, Longman, 1992, p. 903.

[*] The Convention was adopted on 20 March 1883, and later revised at Brussels on 14 December 1900, at Washington on 2 June 1911, at The Hague on 6 November 1925, at London on 2 June 1934, at Lisbon on 31 October 1958, and at Stockholm on 14 July 1967, United Nations, *Treaty Series*, vol. 828, p. 306.

[**] For information on Administrative instructions, see note 4 in chapter V.

1. This is in reference to your email of 19 January 2004, requesting a copy of regulations or guidelines on the use of the United Nations emblem. The following is a summary of the guidelines on the use of the United Nations emblem.

2. The use of the United Nations emblem and name, and any abbreviation thereof, is reserved for official purposes of the Organization in accordance with General Assembly resolution 92 (I) of 7 December 1946. Furthermore, that resolution expressly prohibits the use of the United Nations name and emblem for commercial purposes or in any other way without the prior authorization of the Secretary-General, and recommends that Member States take the necessary measures to prevent the unauthorized use thereof. (For general information on the United Nations guidelines, please see www.un.org/depts/dhl/maplib/flag.htm and Administrative instruction ST/AI/189/Add.21 of 15 January 1979, providing the rules concerning the use of the United Nations emblem in documents and publications, attached.*)

3. The United Nations name and emblem are protected world-wide under article 6 *ter* of the Paris Convention for the Protection of Industrial Property on the assumption that they are not used for commercial purposes. Accordingly, the long-standing policy of the Organization is not to authorize commercial use of its name and emblem.

4. Recently, due to the United Nations' evolving relationship with the business community, the United Nations has developed general principles on the use of the name and emblem of the United Nations and its Funds and Programmes by the business community in the context of partnerships with the private sector. According to these guidelines, the private sector may, in principle, be authorized to use the United Nations name and emblem based on the following conditions:

(*a*) The use is on a non-exclusive basis;

(*b*) It is based on express approval in advance in writing, clearly stating the terms and conditions of the use;

(*c*) The principal purpose of such use is to show support for the purposes and activities of the United Nations, including the raising of funds for the Organization, and the generation of profit by the business entity is only incidental;

(*d*) Subject to certain conditions and appropriate written approval, the use of a modified United Nations emblem may be exclusively authorized to a limited number of business entities in connection with the promotion of a special event or initiative, including fund-raising for such event or initiative. (See "The United Nations and Business, Guidelines on Cooperation between the United Nations and the Business Community", at: www.un.org/partners/business/otherpages/guide.htm, attached.**)

5. Based on the established strict policy prohibiting commercial use of the United Nations name and emblem, the Organization has prohibited individuals or entities doing business with the Organization from publicizing contracts with the Organization. For this purpose, the consistent practice of the United Nations has been to include in its commercial contracts a standard clause preventing any entity contracting with the United Nations from using the United Nations name (or its abbreviation), emblem, or official seal for any

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* The Administrative instruction is not reproduced herein.

** The Guidelines are not reproduced herein.

purpose, and from advertising or making public the fact that the entity provided services to the Organization. The aim of such clauses is to prevent public solicitation for business on the basis of connection with the United Nations.

6. If an outside entity, normally a reputable non-governmental organization such as the United Nations Association, is authorized to include the United Nations name in its title, it may also be authorized to use the United Nations emblem on stationery and publications in addition to its own logo. However, the Organization routinely requires that the emblem be modified by adding the words "United Nations" or "UN" above and the words "We believe" or "Our hope for mankind" below the emblem. The appearance of those words together with the emblem makes it clear that no official use of the United Nations emblem is involved and that it is being reproduced as a demonstration of support for the United Nations. The emblem should appear separately and some distance away from the insignia of the outside body.

7. In general, however, it has been the practice of the United Nations to refrain from authorizing the use of the United Nations emblem in any manner which might imply that a non-United Nations entity is part of the United Nations or that activities being carried out by a non-United Nations entity are being carried out by the United Nations or subject to its control. The two crossed olive branches are one of the essential distinctive elements of the United Nations emblem, and several Funds and Programmes of the United Nations use as their emblems or logos the crossed olive branches with various symbols amid them. In addition, a number of United Nations specialized agencies have incorporated the United Nations emblem or part thereof into their own logos. Therefore, the Office of Legal Affairs has taken the position that the use, by non-United Nations entities, of logos displaying two crossed olive branches of the same design as those displayed on the United Nations emblem are inappropriate, as it could create the misleading impression that such entities are organs of the United Nations, or are operating under the auspices of the United Nations.

8. In some instances, distinctive emblems or logos are developed for United Nations conferences and international years. These are selected in accordance with the annex and appendix to ST/AI/189/Add.21, referred to in paragraph 2 above, which states that the responsibility for the final selection and approval of such emblems/logos is vested in the Publications Board (see paragraph 2 thereof). When a distinctive emblem/logo is selected, guidelines are developed concerning its use, including use by non-United Nations entities (e.g., the Guidelines for use of the United Nations World Summit on Sustainable Development, in Johannesburg, South Africa, August 2002). Normally, the responsibility for authorizing the use of such a distinct emblem is vested with the secretariat for the United Nations conference or the international year concerned and, therefore, requests for the use thereof should be submitted to that secretariat. Normally, the use of such emblem is restricted in time.

9. In all other cases, requests for authorization to use the United Nations emblem or name or any abbreviation thereof should be referred to the Office of Legal Affairs.

19 February 2004

9. Personnel questions

Interoffice memorandum to the Recruitment Officer of the Department of Economic and Social Affairs, United Nations, on the reimbursement of United States taxes and nationality for United Nations administrative purposes

STAFF MEMBERS WITH DUAL NATIONALITY—ONLY ONE NATIONALITY IS RECOGNIZED BY THE ORGANIZATION FOR ADMINISTRATIVE PURPOSES—STAFF RULES AND REGULATIONS—DISCRETIONARY DECISION OF THE SECRETARY-GENERAL TO DETERMINE THE NATIONALITY WITH WHICH THE STAFF MEMBER IS THE MOST CLOSELY ASSOCIATED—RELEVANT CRITERIA TO DETERMINE THE NATIONALITY—JURISPRUDENCE OF THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL (UNAT)—DELEGATION OF AUTHORITY TO MAKE SUCH A DETERMINATION OF THE NATIONALITY

1. I refer to your memorandum of 1 August 2003 to me, with attachments, regarding the above-mentioned matter. I also refer to telephone conversations between you and [name] of this Division . . .

BACKGROUND

2. [Name], a staff member of the Department of Economic and Social Affairs (DESA), has both Italian and United States (US) nationality, and you seek advice as to which of [name's] two nationalities should be recognized by the Organization for United Nations administrative purposes, and whether her US income taxes should be reimbursed. You have also asked for advice as to how to "proceed with [name] and others in this situation with regard to choosing their nationality for appointment purposes."

3. I note that [name's] first appointment with the Organization was made on 1 September 1998, when she was appointed for one year under the 200 series of staff rules as an Italian Associate Expert in the Associate Experts Programme of DESA. In November 2001, she received an appointment in the Office of Human Resources Management (OHRM) and as of 1 April 2003 she has been engaged by DESA under the 200 series of the staff rules. Whilst she was engaged as an Associate Expert, [name's] nationality for United Nations administrative purposes was considered to be Italian and when [name] was re-engaged by the Organization in November 2001, her Italian nationality for United Nations administrative purposes was retained as this is "the nationality with which she is most closely associated."

ANALYSIS

(I) [NAME'S] CASE

4. The issue of a staff member being eligible for reimbursement for US taxation and at the same time being entitled to international benefits was addressed in an opinion in the 1983 *United Nations Juridical Yearbook*.[1] This opinion states, *inter alia,* as follows:

[1] Opinion entitled "Determination for the purpose of the staff rules of the nationality of a staff member with dual Italian/United States nationality—implications as regards the tax liability of such determination." *United Nations Juridical Yearbook 1983* (United Nations Publication, Sales No. E.90. V.1), pp. 207–208.

"[i]f the staff member were to be considered as an Italian national for purposes of the Staff Rules, United Nations Development Programme (UNDP) would, as is perfectly proper in such cases, bear the financial consequences of Italian nationality (e.g., home leave) as well as of United States nationality (e.g., tax reimbursement). *Such financial consequences are the result of the factual determination to be made under rule 204.5*[2] *and ought not to be the deciding factor*". (Emphasis added).

5. In this regard, please find attached a copy of our memorandum* of 24 November 1999 on the case of an Associate Expert who had both US and German nationality. In that memorandum we set out the legal issues pertaining to the appointment of dual nationals to the Organization. We noted that nothing in the Staff Regulations and Rules prohibits the appointment of a dual national and that any staff member who is subject to national income taxation in respect of such staff member's official salary and emoluments must be reimbursed for such taxes by the Organization pursuant to staff regulation 3.3 (f).[3] However, we additionally noted that, in the case of Associate Experts, the sponsoring Government of such Expert "must agree to reimburse all expenses borne by the Organization in respect of that incumbent, including any obligation to provide reimbursement in respect of national income taxes."

(ii) Criteria for recognition of nationality of staff members

6. The determination of the nationality with which staff members are most closely associated, under staff rules 104.8 or 204.5, requires the exercise of the Secretary-General's discretion upon review of all the facts of each particular case in order to determine with which State a staff member has the closest ties. In 1953, the then Legal Counsel, Mr. A. B. Feller, suggested that the following criteria be taken into account in selecting the nationality to be recognized under staff rule 104.8, which criteria have been applied since that time:

(*a*) The staff member's passport;

(*b*) The country in which the staff member resided and the length of that residence prior to joining the United Nations;

(*c*) The country in which the staff member was recruited; and

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[2] Staff rule 204.5 states that:

"(a) In the application of these Rules, the United Nations shall not recognize more than one nationality for project personnel.

(b) When project personnel have been legally accorded nationality status by more than one State, nationality for the purpose of these Rules shall be the nationality of the State with which, in the opinion of the Secretary-General, the individual is most closely associated."

[3] Staff regulation 3.3 (f) states that:

"[w]here a staff member is subject both to staff assessment . . . and to national income taxation in respect of the salaries and emoluments paid to him or her by the United Nations, the Secretary-General is authorized to refund to him or her the amount of staff assessment collected from him or her provided that: . . . "

Although staff regulation 3.3 (f) states that the Secretary-General is "authorized to refund" such income taxes, the Administrative Tribunal long ago held that this requirement was intended to be mandatory to preserve equality among staff members. See Judgement No. 88, *Davidson* (1963); Judgement No. 237, *Powell* (1979).

* The memorandum is not reproduced herein.

(*d*) Such other date as would be further indicative of the country with which the staff member has the closest ties (i.e., place of birth, reimbursement by the United Nations of US income taxes paid by staff member, nationality of spouse and native language).

7. In UNAT Judgement No. 62, *Julhiard* (1955), the Tribunal dealt with the question of the Secretary-General's power to decide on the State with which a staff member with dual nationality is most closely associated pursuant to staff rule 104.8. The Tribunal did not find that it was called upon to express an opinion as to the State with which, having regard to all circumstances, the Applicant was most closely associated, but the Tribunal found that it was appropriate for it to consider whether, having regard to the circumstances, it was reasonable for the Secretary-General to conclude that the Applicant was most closely associated with one State rather than with another. The Tribunal also stated that the purpose of staff rule 104.8 "is to provide a solution to the administrative problems created by possession of more than one nationality and not to bring indirect pressure on staff members to renounce one of their nationalities."

8. In the *Julhiard* case, the Tribunal recognized the relevance or validity of certain criteria while expressly rejecting others. The criteria accepted in this manner by the Tribunal are included in the criteria set out in paragraph 9 above, and the criteria expressly rejected by the Tribunal are as follows:

(*a*) Nationality specified by the Respondent in the Applicant's contract.

(*b*) Actions taken by national authorities in granting passports or exercising their powers of taxation.

(*c*) Avoidance of obligation for the United Nations to pay for home leave and reimburse US income taxes.

(*d*) Omission of staff member to renounce citizenship of the State of which the staff member did not wish to be considered a national.

9. Pursuant to annex II of ST/AI/234/Rev.1,* the authority to make a decision as to which nationality a staff member is most closely associated in respect of staff in the professional and general service staff has been delegated to the Assistant Secretary-General for OHRM. However, in offices away from Headquarters this authority in respect of general service staff has been delegated to heads of office who in turn may delegate this authority to the chief of administration or other officials responsible for the administration of staff.

10. Should you require any further advice on this matter please do not hesitate to contact [name] of this Division.

19 January 2004

* For information on Administrative instructions, see note 4 in chapter V.

10. Miscellaneous

(*a*) Note to the Secretary-General's Special Representative for Western Sahara regarding the question of a referendum

WESTERN SAHARA—PRINCIPLE OF THE RIGHT OF SELF-DETERMINATION—GENERAL ASSEMBLY RESOLUTION 1541 (XV) OF 15 DECEMBER 1960—MECHANISMS TO EXCERCISE SELF-DETERMINATION MAY VARY ACCORDING TO THE CIRCUMSTANCES OF THE CASE AND THE AGREEMENT OF THE PARTIES—REQUIREMENT OF AN INFORMED AND DEMOCRATIC PROCESS BY WHICH THE FREE AND VOLUNTARY CHOICE OF THE PEOPLE OF THE TERRITORY CONCERNED IS EXPRESSED—REFERENDUM—*ADVISORY OPINION ON WESTERN SAHARA**—ENFORCEMENT OF THE RESULTS OF A REFERENDUM

1. This is in reference to your note of 21 July 2004, referring to the statement made by [State A] that a referendum for Western Sahara without a political agreement will be highly destabilizing. You state that by implicitly setting aside the Baker plan, [State A] is now advocating a political agreement prior to the exercise of self-determination and de-emphasizing the referendum. You also recall that [State B] has rejected the Baker plan, or any other plan for that matter, which includes the option of "independence"; and that POLISARIO insists that as a decolonization matter, the Western Saharan problem can only be resolved by a referendum.

2. You seek our views on whether POLISARIO is right in suggesting that the question of Western Sahara must be solved by a referendum, and referendum only, or whether there are other ways in which the "free and genuine expression of the will of the people", can be exercised. More specifically, whether a referendum can be conducted as a measure of confirmation or rejection of a political agreement previously reached, and whether the lack of options somehow mars the "free and genuine expression"?

3. The right of self-determination as the right of peoples to freely determine their political status, and pursue their social, economic and cultural development, is enshrined in the United Nations Charter, the International Covenants on Economic, Social and Cultural Rights** and on Civil and Political Rights 1966,*** General Assembly resolutions 1514 (XV) of 14 December 1960, 1541 (XV) of 15 December 1960 and 2625 (XXV) of 24 October 1970, and the practice of States. While the right of self-determination is recognized as a well-established principle of international law, the means of its implementation might vary according to the circumstances of the case and the agreement of the parties. The essence of the principle of self-determination, however, is an informed and democratic process by which the "*free and voluntary choice of the people of the territory concerned*" is expressed (General Assembly resolution 1541 (XV), principle VII (a)), or, in the words of the International Court of Justice in its *Advisory Opinion on Western Sahara,* the "*free and genuine expression of the will of the peoples concerned*" (paragraph 55). In underscoring the importance of the process rather than its outcome, Judge Dillard said in his Separate Opin-

* *Western Sahara, Advisory opinion, I.C.J. Reports, 1975,* p. 12.

** United Nations, *Treaty Series,* vol. 993, p. 3.

*** United Nations, *Treaty Series,* vol. 999, p. 171.

ion that " . . . self-determination is satisfied by a free choice not by a particular consequence of that choice or a particular method of exercising it" (page 123).

4. In practice, self-determination has been achieved through any of the following means: *a referendum* (e.g., the case of East Timor and Eritrea); *an agreement,* when the parties were willing to negotiate (the Oslo Accord between Israel and the Palestinian Liberation Organization), and in the absence of an agreement on the process of exercising the right (indeed on the right itself), *by war* (successfully in the case of Bangladesh and unsuccessfully in the case of Biafra). In his report on the situation concerning Western Sahara of 23 May 2003 (S/2003/565), the Secretary-General recalled that "there were many ways to achieve self-determination. It could be achieved through war or revolution; it could be achieved through elections, but this requires good will; or it could be achieved through agreement, as had been done by parties to other disputes" (paragraph 33).

5. A referendum is thus one of several consensual means of achieving self-determination, and if agreed to, in principle, it would also require an agreement on the territorial and personal scope (voters' eligibility), the questions put to the voters, and more importantly, perhaps, an agreement to abide by its results and a mechanism to enforce it, if necessary.

6. As long as the "referendum" reflects the "free and genuine expression of the will of the people," it can be conducted at any point in time and for any given purpose, including as a confirmation or rejection of a political agreement previously negotiated. The lack of a variety of options, in itself, does not mar "the free and genuine expression of will", on the understanding that the single option pursued is genuinely and freely agreed upon. It is on this condition also that a "popular consultation" could be dispensed with. In his Declaration in the *Advisory Opinion on Western Sahara,* Judge Singh, said in this connection the following:

> " . . . the principle of self-determination could be dispensed with only if the free expression of the will of the people was found to be axiomatic in the sense that the result was known to be a foregone conclusion or that consultations had already taken place in some form or that special features of the case rendered it unnecessary".

7. In reality, however, the choice of the process in many ways determines its outcome. While legally, therefore, a referendum is only one, and by no means the only, mechanism to achieve the right of self-determination, in the circumstances of Western Sahara, in the absence of any other agreed measure, it is the only means by which the Saharawi people can freely express their genuine will. It remains a fact, however, that the question of how to enforce the results of the referendum in the absence of a political agreement is still open.

25 August 2004

(*b*) The establishment of an International Commission of Inquiry for Darfur

I

Note to the Secretary-General regarding the establishment of an International Commission of Inquiry for Darfur: Interim advice

THE ESTABLISHMENT OF AN INTERNATIONAL COMMISSION OF INQUIRY FOR DARFUR—LEGAL AND INSTITUTIONAL FRAMEWORK FOR ITS ESTABLISHMENT AND OPERATION—ESTABLISHMENT UNDER CHAPTER VII OF THE CHARTER OF THE UNITED NATIONS AS A SUBSIDIARY ORGAN OF THE UNITED NATIONS—APPLICATION OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS, 1946* —TERMS OF REFERENCE—COOPERATION WITH THE GOVERNMENT—INSTITUTIONAL STRUCTURE AND COMPOSITION—REPORTING REQUIREMENTS

1. In the Interdepartmental Meeting that was chaired by the Deputy Secretary-General on 10 September 2004, the Office of Legal Affairs was tasked with taking the lead on preparing the legal and institutional framework for the establishment and operation of the International Commission of Inquiry for Darfur, should the draft resolution on the Sudan be adopted.

2. In paragraph 12 of the draft resolution,** as revised on 16 September 2004, the Security Council requests "that the Secretary-General rapidly establish an international commission of inquiry in order immediately to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable". It also "calls on all parties to cooperate fully with such a commission".

3. Set out below, on an interim basis, is an outline of the legal and institutional framework for the establishment and operation of the Commission, should the draft resolution be adopted in its present form. It might be necessary to make some adjustments to this framework in the event that the draft resolution is adopted with further changes.

A. THE LEGAL BASIS OF THE COMMISSION

4. The International Commission would be established by a Security Council resolution adopted under Chapter VII of the Charter, and would have the legal status of a United Nations subsidiary organ.

5. As a subsidiary organ of the United Nations, the Commission would be financed through assessed contributions, and the Convention on the Privileges and Immunities of the United Nations, 1946, would apply to the members and other personnel of the Commission, its premises, documents and operational activities.

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* United Nations, *Treaty Series,* vol. 1, p. 15, and vol. 90, p. 327 (corrigendum to vol. 1).

** The Security Council adopted on 18 September 2004 resolution 1564, requesting the Secretary-General to establish an international commission of inquiry for Darfur.

B. The terms of reference of the International Commission

6. The terms of reference of the International Commission that would be established pursuant to the resolution, as it is currently drafted, should be expanded in two respects. First, the Commission should be able not only to determine whether acts of genocide have been committed in Darfur, but also to characterize the crimes as war crimes, crimes against humanity or genocide. Secondly, United Nations commissions of inquiry are normally required to make recommendations for further actions, whether by their parent organs or by Member States.

7. With these proposed additions, the terms of reference of the International Commission should include:

(*a*) Investigation of reports of serious violations of international humanitarian law and human rights law committed in Darfur;

(*b*) Qualifying the crimes and determining whether acts of genocide have been committed;

(*c*) Identifying the perpetrators with a view to ensuring that those responsible are held accountable; and

(*d*) Making recommendations to the Security Council, through the Secretary-General, on future actions to halt or prevent further violations and address impunity.

C. Cooperation with the Government of Sudan

8. While a Commission of Inquiry, founded in a Chapter VII resolution, may, in theory, be imposed upon the Sudan regardless of its consent, in reality, unless the Council is ready to take measures to enforce compliance with its resolution, the cooperation of the Government would be required at almost every stage of the operation of the Commission. The Commission should, in particular, be guaranteed:

(*a*) Freedom of movement, including facilities of transport;

(*b*) Freedom of access to all sources of information, including contact with governmental authorities, non-governmental organizations and other institutions, and in principle, any individual whose testimony is considered necessary for the fulfilment of its mandate;

(*c*) Access to all documentary material and physical evidence;

(*d*) Privileges and immunities necessary for the independent conduct of the inquiry;

(*e*) Appropriate security arrangements for its personnel and documents;

(*f*) Protection of victims and witnesses collaborating with the Commission against any act of intimidation, ill-treatment and reprisals.

D. The institutional structure and composition of the Commission

9. The Commission would be composed of three members appointed by the Secretary-General. To command respect and credibility, in particular in the characterization of the crime of genocide, the members of the Commission would have to be eminent personalities known and recognized for their impartiality, objectivity, competence, and

their authority and expertise in human rights law, international humanitarian law and criminal law.

10. The Commissioners would be assisted by legal experts in international humanitarian law, human rights and criminal law, criminal investigation and genocide-based violence, and by administrative and technical support staff.

11. The Commission would be serviced by the Office of the High Commissioner for Human Rights (OHCHR). The budget estimates for the work of the Commission would be prepared by OHCHR.

E. Reporting requirements

12. The Commission should submit its report within a reasonable period of time and not later than thirty days from the onset of its activities, taking into account the urgency of the situation and the need to conduct a thorough investigation and make recommendations in full knowledge of the legal and practical implications involved.

17 September 2004

II

*Letter from the Secretary-General to the President of the Security Council regarding the establishment of an International Commission of Inquiry for Darfur**

Members of the Council will recall that, in its resolution 1564 (2004) of 18 September 2004, the Security Council requested me, *inter alia,* to "rapidly establish an international commission of inquiry in order immediately to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable".

I have the honour to inform you that, pursuant to the request of the Council, I have appointed a five-member Commission, to be chaired by Antonio Cassese (Italy), former President of the International Criminal Tribunal for the Former Yugoslavia (ICTY). In addition to Mr. Cassese, the other members of the Commission are: Therese Striggner Scott (Ghana), Mohamed Fayek (Egypt), Hina Jilani (Pakistan) and Diego García-Sayan (Peru).

Dumisa Ntsebeza (South Africa) will be the Executive Director of the Commission and head of the technical and administrative team providing support to the Commission.

The International Commission of Inquiry for Darfur shall:

(*a*) Investigate reports of serious violations of international humanitarian law and human rights law committed in Darfur by all parties in the current conflict;

(*b*) Qualify crimes and determine whether or not acts of genocide have occurred or are still occurring;

(*c*) Determine responsibility and identify the individual perpetrators responsible for the commission of such violations, and recommend accountability mechanisms before which those allegedly responsible would be brought to account.

* S/2004/812.

In the conduct of its inquiry, the Commission shall enjoy the full cooperation of the Government of the Sudan. It shall be provided with the necessary facilities to enable it to discharge its mandate and shall, in particular, be guaranteed freedom of movement throughout the territory, freedom of access to all sources of information, both testimonial and physical evidence, and all documentary material. Appropriate security arrangements for the personnel and documents of the Commission shall be provided, and protection of victims and witnesses and all those appearing before the Commission in connection with the inquiry shall be guaranteed.

I have asked the Commission to submit a report to me within 90 days from the start of its activities.

4 October 2004

III

Letter from the Secretary-General to the President of the Sudan regarding the establishment of an International Commission of Inquiry for Darfur

Excellency,

I have the honour to refer to Security Council resolution 1564 (2004) adopted on 18 September 2004, by which I was requested to "rapidly establish an international commission of inquiry in order immediately to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable".

I have accordingly appointed a five-member Commission to be chaired by Mr. Antonio Cassese (Italy), former President of the ICTY. In addition to Mr. Cassese, the other members of the Commission are: Justice Therese Striggner Scott, (Ghana), Mr. Mohamed Fayek (Egypt), Ms. Hina Jilani (Pakistan), and Mr. Diego Garcia-Sayan (Peru).

Mr. Dumisa Ntsebeza (South Africa) will be the Executive Director of the Commission and the head of the technical and administrative team supporting the Commission.

The International Commission of Inquiry for Darfur shall have the mandate to:

(*a*) Investigate reports of serious violations of international humanitarian law and human rights law committed in Darfur by all parties in the current conflict;

(*b*) Qualify the crimes and determine whether or not acts of genocide have occurred or are still occurring;

(*c*) Determine responsibility and identify individual perpetrators responsible for the commission of such violations, and recommend accountability mechanisms before which those allegedly responsible would be brought to account.

In this connection, I wish to recall that in paragraph 12 of its resolution, the Security Council called "on all parties to cooperate fully with such a commission". The Government of Sudan is thus requested to extend its full cooperation to the Commission and provide it with the necessary facilities to enable it to discharge its mandate. It shall, in particular guarantee the Commission:

(*a*) Freedom of movement throughout the territory of the Sudan, including facilities of transport.

(*b*) Unhindered access to all places and establishments, and freedom to meet and interview representatives of governmental and local authorities, military authorities, community leaders, nongovernmental organizations and other institutions, and any such person whose testimony is considered necessary for the fulfilment of its mandate.

(*c*) Free access to all sources of information, including documentary material and physical evidence.

(*d*) Appropriate security arrangements for the personnel and documents of the Commission.

(*e*) Protection of victims and witnesses and all those who appear before the Commission in connection with the inquiry; no such person shall, as a result of such appearance suffer harassment, threats, acts of intimidation, ill-treatment and reprisals.

(*f*) Privileges, immunities and facilities necessary for the independent conduct of the inquiry. In particular, members of the Commission shall enjoy the privileges and immunities accorded to experts on missions under article VI of the 1946 Convention on the Privileges and Immunities of the United Nations, and officials of the United Nations shall enjoy the privileges and immunities of officials under articles V and VII of the Convention.

The Commission is expected to submit to me a report within 90 days from the start of its activities.

Please accept, Excellency, the assurances of my highest consideration.

7 October 2004

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

1. International Labour Organization

(Submitted by the Legal Adviser of the International Labour Conference)

(*a*) Provisional Record No. 16, ninety-second session, Report of the Standing Orders Committee[1]

Modifications to article 5, paragraph 2, of the Standing Orders of the International Labour Conference (Mandate of the Credentials Committee)—Possibility to examine objections relating to the failure to deposit credentials of an Employers' or Workers' delegate—Objective basis for the calculation of the commencement of the 72 hours time limit for the submission of objections to nominations of delegates or advisors—Prerogative of the Conference to accept or reject a referral by the Credentials Committee to the Committee on Freedom of Association—Examination of credentials of "any other person" accredited to the Conference

The Legal Adviser of the International Labour Conference, representing the Secretary-General, explained that the Governing Body had examined two distinct means to

[1] ILC92-PR16–181-En.doc.

attain the objectives that were submitted to the Conference: the first are modifications to the Standing Orders of the Conference; and the second are practical measures that could be carried out without modification to the existing Standing Orders framework. The Governing Body considered that, account being taken of its practical importance, this reform should be carried out on a temporary basis. Consequently, the proposals would be evaluated after a "probationary" period before they could be definitively adopted. At the end of this period, the provisions would automatically lapse unless the Conference takes a decision to renew them. If the Conference adopts the proposed provisions they would come into effect from the ninety-third session (2005) and would remain in force, in the absence of any decision to the contrary by the Conference, until the ninety-sixth session (2007). Thereafter, the Governing Body would have to evaluate the system with a view to reporting to the Conference in June 2008. It being understood that the Conference reserves the possibility to modify or annul, at any time, the provisions and practical measures that are not pertinent or that reveal themselves to be inefficient.

The Legal Adviser summarized the proposed amendments to the Standing Orders. The modification proposed to the second paragraph of article 5 of the Standing Orders concerned the mandate of the Credentials Committee. In addition to the three elements of its mandate that are contained in the initial paragraph, two had been added: firstly, in paragraph 2 (b) the possibility to examine objections relating to the failure to deposit credentials of an Employers' or Workers' delegate; and, secondly, in paragraph 2 (d) the monitoring of any situation with regard to the observance of the provisions of article 3 or article 13, paragraph 2 (a), of the Constitution* that the Credentials Committee would be able to follow up at the request of the Conference.

The Legal Adviser confirmed the necessity of an objective basis for the calculation of the commencement of the 72 hours.** The formulation of the current article 26, paragraph 4 (a), offered a certain amount of flexibility to fix the commencement of the 72-hour period, which had in turn permitted the Governing Body to request the advancement of the publication of the first official list of delegations by one week for the present session of the Conference that would serve as the basis for the submission of objections.

The Legal Adviser explained that the International Labour Conference can either accept or reject a referral by the Credentials Committee to the Committee on Freedom of Association and that it could request a vote under the Standing Orders of the Conference. Where a vote takes place, any delegate who so requests to explain his or her vote may do so, briefly, immediately after the voting.

Regarding the information to be contained in the data bank, the Legal Adviser drew the Committee's attention to the Governing Body's recommendation that the data bank be comprised of the reports of the Credentials Committee of recent sessions of the Conference. The data bank would be public and could provide constituents, through the jurisprudence of the Committee, with useful information as to good and bad practices as pertaining to credentials. In this respect, it also addresses the concern for transparency.

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* United Nations, *Treaty Series,* vol. 15, p. 40; *ibid.*, vol. 191, p. 143; and *ibid.*, vol. 958, p. 167.

** The Standing Orders provide for a 72 hours time-limit within which objections may be made to the nomination of any delegate or advisor.

Regarding the increased clarity of article 5, paragraph 2 (a), the Legal Adviser noted that if [the wording] " . . . persons accredited to the Conference" were primarily intended for the delegates and advisers nominated by the Governments, the Credentials Committee also examines the credentials of any other person accredited to the Conference as is done for the representatives of intergovernmental organizations and international non-governmental organizations.

Concerning the practical effect of the proposed provision regarding article 5, paragraph 2 (a), the Legal Adviser explained that, as compared to the current version of the Standing Orders, this modification was intended to conform the Standing Orders with the ongoing practice of the Credentials Committee, which in addition to examining the objections and complaints regarding the Employers' and Workers' delegates also examines the credentials of any person accredited to the Conference.

In view of the concerns raised in the Standing Orders Committee, the Legal Adviser proposed that article 5, paragraph 2 (a), be deleted and that in article 5, paragraph 2 (b), it be reworded as "The Credentials Committee shall examine, in accordance with the provisions of section B of Part II: (a) the credentials as well as any objection relating to the credentials of delegates and their advisers or to the failure to deposit credentials of an Employers' or Workers' delegate." The Employer and Worker members endorsed the Legal Adviser's proposal.

(*b*) Provisional record No. 20, ninety-second session, Report of the Committee on Human Resources[2]

Amendment procedure for text submitted to a committee by its drafting committee—Article 67 of the Standing Orders of the International Labour Conference

The Legal Adviser summarized the procedure by which an amendment, as subamended, had been adopted. He explained that it would not be possible, after the examination of the text by the drafting committee of a commission, to reopen a discussion on a paragraph of a recommendation text. A possible solution could be found in article 67 of the Standing Orders of the International Labour Conference: "Amendments to a text submitted to a committee by its drafting committee may be admitted by the Chairman after consultation with the Vice-Chairmen". If the Committee decided that there was a problem of comprehension, it could amend any portion of the text prior to final adoption of the full instrument. At the present time, paragraph 5 [of the proposed Recommendation] had to be adopted or rejected. If rejected, the entire paragraph would be deleted.

[2] ILC92-PR20–261-En.doc.

(*c*) Report of the Technical Committee No. 1 of the Preparatory Technical Maritime Conference, Geneva, 13–24 September 2004[3]

Legal consequences of a reference to the four categories of "fundamental rights" in a draft convention—Promotional character of the Declaration on Fundamental Principles and Rights at Work* (Declaration)—Reference to fundamental rights in draft article III does not create reporting obligations on the Declaration—Adoption of necessary national legislation to implement obligations under the future convention—Requirement to carry out treaty obligations in good faith—Legal consequences of including a reference to the Declaration in the preamble of a draft convention

The Legal Adviser has been requested by the Chairperson of the Committee to put in writing his replies to the issues raised concerning article III** of the draft [consolidated maritime labour] Convention:

1. With regard to the legal status and the consequences of including the "wording" of the International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work in the provisions of article III [of the draft Convention], as proposed by the President of the Conference, the Legal Adviser observed that the "wording" of the Declaration was not included in the proposal; rather there was reference to the fundamental rights together with an obligation for members who ratify the future Convention to satisfy themselves that the provisions of their national legislation respect those fundamental rights in the context of the future Convention. The status of the Declaration and its "wording" reflect, through reference to the fundamental principles and rights, the promotional character of that instrument, which varies significantly from an international labour convention.

2. The reference to the fundamental rights in the text of article III of the future Convention would not create any reporting obligations on the content of the Declaration to the ILO supervisory bodies. The two instruments are different and the ILO supervisory bodies have no competence to examine the implementation of the Declaration, which has its own follow-up mechanism.

3. Article III will be, as all obligatory provisions of the Convention, subject to examination by the bodies responsible for the supervision of the implementation of ILO standards. The important issue is to identify the obligation that will be the focus of this supervision. Each member who ratifies the future Convention will be obliged, in accord-

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[3] PTMC-2004–12–0172–1-En-doc.

* The Declaration was adopted by the General Conference of the International Labour Organization at its eighty-sixth session on 18 June 1998.

** The text reads as follows:

"Each Member shall satisfy itself that the provisions of its law and regulations respect, in the context of this Convention, the fundamental rights to:

(a) freedom of association and the effective recognition of the right to collective bargaining;

(b) the elimination of all forms of forced or compulsory labour;

(c) the effective abolition of child labour; and

(d) the elimination of discrimination in respect of employment and occupation."

ance with article III, to satisfy itself that its legislation respects, in the context of this Convention, the four categories of fundamental rights. As with all obligations arising out of international labour Conventions, this should be carried out in good faith. Subject to what the ILO Governing Body may decide concerning the details to be requested in the report form in the framework of article 22 of the ILO Constitution, examination by the supervisory bodies will concern this specific obligation. This provision does not impose any additional obligation on States that have ratified one or more of the fundamental Conventions, because those Conventions already cover, without exception, the workers who are the subject of the future Convention.

4. With regard to the issue of whether the reference to the four categories of fundamental rights in article III would create a reporting obligation under the ILO Declaration outside the scope of its follow-up mechanism, the reply is that it would not, as explained above.

5. Finally, on the consequences of including a reference to the Declaration in the preamble to the future Convention, the Legal Adviser recalled that the inclusion of a preambular clause referring to the Declaration, similar to that which exists in the preambles to the Worst Forms of Child Labour Convention, 1999 (No. 182),* and the Maternity Protection Convention, 2000 (No. 183),** would not result in any legal obligation for Members. The preambles to international labour Conventions do not create any legal obligations.

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* United Nations, *Treaty Series,* vol. 2133, p. 161.

** The Convention will be published in the United Nations, *Treaty Series,* vol. 2181.