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

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

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Chapter VI

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

A. Legal opinions of the Secretariat of the United Nations
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1. FLAG ETIQUETTE CODE TO BE FOLLOWED ON NAVAL VESSELS PROVIDED BY A TROOP-CONTRIBUTING COUNTRY TO THE UNITED NATIONS OBSERVER GROUP IN CENTRAL AMERICA — PRACTICE CONCERNING THE USE OF THE UNITED NATIONS FLAG ON VESSELS, PURSUANT TO THE 1958 GENEVA CONVENTION ON THE HIGH SEAS, STATUS AGREEMENTS CONCLUDED BETWEEN THE UNITED NATIONS AND HOST COUNTRIES AND THE UNITED NATIONS FLAG CODE AND REGULATIONS

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

1. By your memorandum of 4 April 1990 you have sought the advice of this Office concerning the appropriate flag etiquette code to be followed on naval vessels provided by a troop-contributing country to the United Nations Observer Group in Central America (ONUCA). In responding to your request, it is necessary in the first instance to consider the legal basis for, and the existing practice concerning, the use of the United Nations flag on vessels, and to clarify the purpose for which the United Nations flag will be displayed.

2. The possibility for intergovernmental organizations to fly their flags on ships while in the service of the organizations is provided for in general terms in article 7 of the 1958 Geneva Convention on the High Seas,[1] which states as follows:

> "The provisions of the preceding articles [on the right of States to sail ships under their flag, on the conditions for granting nationality to ships, etc.] do not prejudice the question of ships employed in the official service of an intergovernmental organization flying the flag of the organization."

As far as vessels contributed to peace-keeping operations of the United Nations are concerned, the status agreements concluded between the United Nations and host countries in connection with some of these operations (e.g., United Nations Suez Canal Clearance Operation (UNEF), United Nations Operations in the Congo, United Nations Transition Assistance Group (UNTAG)) contain more detailed provisions on the right of the peace-keeping forces to fly the United Nations flag on vessels participating in that operation. Section 15 of the UNTAG status agreement,[2] for example, provides *inter alia* as follows:

"UNTAG shall display the United Nations flag at or on its headquarters, camps and other premises, vehicles, *vessels* and otherwise as agreed to in consultation between the Special Representative and the Government." (emphasis added)

A further legal document which provides guidance on the use of the United Nations flag is the United Nations Flag Code and Regulations.[3] As far as peace-keeping operations are concerned, the relevant provision is section 4(2) of the Flag Code which provides the following:

"The Flag shall be used by any unit acting on behalf of the United Nations such as any Committee or Commission or other entity established by the United Nations in such circumstances not covered in this Code as may become necessary in the interests of the United Nations."

3. As far as the practice of the Organization is concerned, the United Nations flag has been displayed on vessels on a number of occasions. The most notable examples have been in the context of UNEF and the United Nations Interim Force in Lebanon (UNIFIL). Apart from peace-keeping operations, the flag of the United Nations has been used, for example, on vessels owned by the United Nations Korean Reconstruction Agency, in the United Nations Special Fund Caribbean Fishery Project and in the 1972 United Nations Relief Operation in Dacca. In addition, the Secretary-General has occasionally authorized the use of the United Nations flag, alongside the flag of registration, on private ships which wanted to show in this way their support for the United Nations. In the case of peace-keeping operations, vessels employed by the Organization were authorized to fly the United Nations flag sometimes alone, sometimes together with the flag of the country of registration, and this both in the case of vessels chartered by the United Nations or contributed by participating States. The vessels in question were authorized to fly the United Nations flag alone generally only in exceptional cases and when journeys of short length and duration were involved.

4. It is important in the context of your request to consider the purposes for which flags are displayed on vessels. Generally speaking, flags are displayed for three different purposes: (1) to show the country where the vessel is registered, i.e., its nationality; (2) to make known a particular status enjoyed by that ship in virtue of the services it is performing; (3) for purposes of courtesy in accordance with maritime law and practice. According to international law, the maritime flag flown by a ship indicates its nationality. This has far-reaching consequences because it identifies the law and jurisdiction applicable to events taking place aboard the ship, including criminal jurisdiction. International law further requires a ship to show its national flag when entering or leaving a port or when it is challenged on the high seas. The purpose of flying flags such as the United Nations flag is entirely different. International organizations are not States and would not be in a position to exercise jurisdiction on a ship, except in a very limited sense. The flag of the United Nations, or of other organizations such as the International Committee of the Red Cross, rather serves the purpose of identifying those vessels which are performing certain functions on behalf or in the service of the organization, and of showing that their special status entitles them to the privileges and immunities accorded to those organizations under the applicable international instruments.

5. Turning to the specific questions raised in your memorandum, international law, United Nations rules and the Organization's practice should be utilized in determining which flags should be flown aboard the patrol vessels contributed to ONUCA

and how those flags should be flown. As to the first question, on the basis of the foregoing we are of the view that the only flags to be flown are the flag of the country of registration, the United Nations flag and the courtesy flag of the country in whose territorial waters the ship is sailing. We would suggest that no other flags such as the flags of contributing countries, nationals of which are aboard the vessels as observers, be flown. There is no legal requirement that these flags be flown; they would not serve any meaningful purpose and could even generate confusion during operation. Secondly, the applicable rules of international law and the Flag Code and Regulations provide guidance regarding the manner of display of the flags. In this connection, I would like to draw your attention to section 3 (1) of the Flag Code which provides: "The flag of the United Nations shall not be subordinated to any other flag". In addition, section II 1 (*d*) of the Flag Regulations states the following:

> "On no account may any flag displayed with the United Nations Flag be displayed on a higher level than the United Nations Flag and on no account may any flag so displayed with the United Nations Flag be larger than the United Nations Flag."

The above-mentioned rules on the nationality of ships lead to the conclusion that the United Nations flag cannot be a substitute for the "civil ensign" of the ship, which remains the flag of the country of registration. Therefore, the United Nations flag must not be displayed in such a way as to create confusion as to the nationality of the ship. Following what appears to be the general maritime practice, the national flag should fly from the stem of the ship. In order to clearly differentiate the two flags, and at the same time respect the above-mentioned provisions of the Flag Code, the United Nations flag should be longer than or of the same size as the national flag and should fly from the top of the mainmast. As far as the courtesy flag is concerned, we understand that as a custom it is smaller than the flag of registration, and it should also be smaller than the United Nations flag. As far as the exact arrangement of the flags is concerned, we would leave that to the experts on the understanding that the United Nations Flag Code is respected both with regard to size of flags and their height.

12 April 1990

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2. INVITATION TO THE UNITED NATIONS TO OBSERVE PRESIDENTIAL ELECTIONS IN A MEMBER STATE — GENERAL RULE THAT THE ORGANIZATION DOES NOT MONITOR ELECTIONS IN MEMBER STATES — BASIS FOR THE SECRETARY-GENERAL'S AUTHORITY TO SEND OBSERVER TEAMS

Memorandum to the Under-Secretary-General for Sepcial Political Questions, Regional Cooperation, Decolonization and Trusteeship

1. Further to our discussion on the invitation to the United Nations to observe presidential elections in a Member State, I have the following observations to make concerning the recommendations contained in your note of 18 January 1990 to the Secretary-General. In your note you state that it is necessary to ascertain (*a*) whether

the Secretary-General has the authority to send observer teams to monitor elections in independent countries; (*b*) whether supplementary funds would be needed to be approved or whether there are existing funds which can provide for such a contingency; (*c*) what would be the exact role of United Nations observers in the process; and (*d*) whether the Secretary-General would be obliged to prepare and submit an independent report.

2. With regard to the question of the Secretary-General's authority, the general rule is that the United Nations does not monitor elections in Member States because this would infringe upon Article 2, paragraph 7, of the Charter of the United Nations. Over the years, this policy has been consistently maintained wth very few exceptions. In 1977, the United Nations sent an observer team to observe (not monitor) the plebiscite held in Panama on the Panama Canal Treaties. Authority for this observer mission, however, was derived from General Assembly resolutions and the plebiscite was not a national presidential election but a vote concerning an important international treaty. The current observation being undertaken in Nicaragua (United Nations Observer Mission to Verify the Electoral Process in Nicaragua) which is in relation to a legislative election is justified as an exception to the rule because general authority to send an observation group derives from General Assembly resolutions and the election is deemed to be an integral part of the Central American peace process under the Esquipulas Agreement[4] concerning which both the General Assembly and the Security Council have mandated the Secretary-General. In the case of [name of a Member State], the Secretary-General has no authority to send observer teams under any provision of the Charter and, as far as we are aware, no authority exists on the basis of any General Assembly or Security Council resolution or decision.

3. With regard to the question of funding, while this is not, strictly speaking, a legal question, it is clear that such an operation would require substantial funding and that, therefore, some provision would have to be made. The necessary provision of funds might be covered by the allocation for unforeseen and extraordinary expenses which is approved by the General Assembly in the regular budget. This is a matter to be taken up with the Secretary-General and the Controller.

4. As far as the role of United Nations observers is concerned, we note that the request received from the Acting President of the State concerned appeals to the Secretary-General "to certify the fairness" of the election. Broadly speaking, this would mean that the United Nations would be called upon to certify that the conduct of the election, in all its phases, meets internationally recognized standards. As you know from our experience in Namibia, this is a complex and difficult task. In any event, before deciding to send observer teams, the exact role of such observers would have to be defined as clearly as possible and, as pointed out above, mandated by a legislative organ.

5. Finally, you asked whether the Secretary-General would be obliged to prepare and submit an independent report. In our view, such a report would be necessary since the sending of an observer team would be meaningless unless the Secretary-General is in a position to certify the results.

25 January 1990

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3. QUESTIONS WHETHER THE UNITED NATIONS CHILDREN'S FUND OR THE UNICEF GREETING CARD OPERATION COULD BE A SHAREHOLDER IN A PRINTING COMPANY AND WHETHER UNICEF STAFF MEMBERS COULD SERVE ON THE BOARD OF DIRECTORS OF THE COMPANY — INCOMPATIBILITY OF THESE ACTIVITIES WITH THE CHARACTER AND STATUS OF THE UNITED NATIONS, OF WHICH UNICEF IS A SUBSIDIARY ORGAN

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

1. Reference is made to your memorandum of 16 August 1990, whereby we were requested to advise on whether UNICEF or the UNICEF Greeting Card Operation (GCO) could be a shareholder in a printer's company in a Member State — which, as we note, is to become an independent shareholder company under the laws of that State — and whether UNICEF staff members could serve on the Board of Directors of the company, once it is incorporated.

2. Our comments set out below are equally applicable to UNICEF and to UNICEF GCO, since both are one and the same legal entity. "Greeting Card Operation" (GCO) is, as you know, defined in article I of the UNICEF Financial Regulations and Rules[5] as an "*organizational entity established within UNICEF* to generate public support and funds for UNICEF, mainly through the production and marketing of greeting cards and other products" (emphasis added).

UNICEF as a shareholder in the printer's company

3. The participation of UNICEF as a shareholder in a private company would submit the Organization to the regulations and rules of the national law governing corporate entities, and would thus be incompatible with the character and status of the United Nations, of which UNICEF is a subsidiary organ. As a United Nations organ, UNICEF enjoys, under Article 104 of the United Nations Charter and the Convention on the Privileges and Immunities of the United Nations, certain privileges and immunities, including immunity from legal process. Yet, as a shareholder in a private corporation, UNICEF would be subject to any legislative controls imposing fiduciary duties and liabilities for the acts of the corporation.

Participation of UNICEF's representatives on the Board of Directors of the printer's company

4. From the excerpts of the company's rules and regulations submitted to us, we note that two out of the five directors on the Board are proposed to be UNICEF's representatives. Under the said rules and regulations the Board of Directors would be involved in a variety of supervisory, managerial and financial activities, among which are the drawing and/or receipt of monies, bills of exchange, promissory notes and the execution of any dealings relating to money transaction (article 41 of the company's rules and regulations). Thus, the participation of UNICEF's representatives on the Board of Directors could subject them, and possibly UNICEF itself which they would represent, to the national law of the State in question for the regularity of the operational and financial activities of the corporation. Furthermore, it would seem to us that the participation of UNICEF's representatives on the Board of Directors would not be compatible with their status as international civil servants.

Suggested alternative

5. We understand that the proposed participation by UNICEF as a shareholder in the printer's company is intended to ensure the proper and efficient continuation of a project supported by UNICEF. We consider that these objectives could still be accomplished by establishing a national committee for UNICEF in the country concerned, if one does not already exist, to represent UNICEF's interests in the printer's company and to perform the functions now proposed to be carried out by UNICEF staff.

24 April 1990

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4. ADVISABILITY OF THE UNITED NATIONS ENTERING INTO A PROFIT-MAKING JOINT VENTURE WITH A PRIVATE PUBLISHING FIRM — PURPOSE OF THE CURRENT COMMERCIALLY ORIENTED ACTIVITIES OF THE UNITED NATIONS — PARTICIPATION IN A PROFIT-ORIENTED COMMERCIAL JOINT VENTURE COULD PUT THE STATUS AND CHARACTER OF THE ORGANIZATION IN QUESTION

Memorandum to the Executive Officer, Department of Public Information

1. This responds to your memorandum of 8 May 1990 requesting our opinion on the advisability of the United Nations entering into a profit-making joint venture with a private publishing firm which would manage and market the United Nations publication *Development Business*. It is envisaged that this joint venture would compete with private-sector publishing firms marketing similar publications inside and outside the United States.

2. While in some paragraphs of your memorandum you ask a number of very specific questions arising out of the proposed joint venture, all these rest on the assumption that a joint venture of the kind contemplated can or would be entered into. In view of our conclusions on this basic issue, we do not see the need to deal with those questions. In addressing the basic issue, our understanding is that the joint venture would be run on commercial lines with a view to profit.

A. CURRENT COMMERCIALLY ORIENTED ACTIVITIES OF THE UNITED NATIONS

3. Apart from the philatelic sales by the United Nations Postal Administration which has been established by the General Assembly expressly in order to issue and sell United Nations postage stamps and various postal stationery items, outside United Nations activities of a commercial nature, such as publication of books and magazines, or film productions, have been undertakings in which the main function was to publicize United Nations causes and objectives. If the United Nations entrusts such projects to a contractor, the Organization takes careful measures to maintain editorial and financial control over the enterprise and to avoid the impression of endorsing the services of the contractor. A close examination of United Nations film production, for example, reveals that the commercial element is not predominant. Normally, the production is financed by the United Nations which in turn retains the copyright. While the producer may be given the right to distribute the film commercially and be obligated in return to pay royalties on the revenue received from such distribution, the primary purpose of such an arrangement would be the publicizing of a United Nations theme or cause and not revenue gathering.

4. It is also relevant to note that guidelines (e.g., Joint United Nations Information Committee guidelines, external publishing guidelines, etc.) and control mechanisms (e.g., the Publication Board) have been established to ensure that the outside activity is compatible with the interests of the Organization. Thus, permission to use the United Nations emblem is only granted if the outside activity is essentially United Nations supportive and not purely commercial.[6]

B. THE JOINT VENTURE CONTEMPLATED BY THE DEPARTMENT OF PUBLIC INFORMATION

5. The joint venture contemplated by the Department of Public Information would result in the association of the United Nations with a private firm (under one legal form or another) with a view to mutual profit. Such joint ventures are carefully regulated in most legal systems in the public interest and with a view to protecting the third parties with which they deal. In particular, the joint venture would be subject to national trade and tax laws. In its actual operations, no meaningful distinction could be made between the United Nations and its joint venture partner. To our knowledge the United Nations has never engaged in such a profit-making joint venture with a commercial concern and it is extremely doubtful whether the Untied Nations can do so for the reasons set forth below.

C. PRINCIPLES AND OBJECTIVES OF THE UNITED NATIONS

6. In our view, the proposed United Nations activity — participation in an independent commercial venture directed to producing revenue — would not be within the scope of the principles and objectives of the United Nations, as set forth in the Charter of the United Nations. While some legislative basis might exist for the publication of *Development Business,* that basis could not justify the carrying out of a commercial activity of the type envisaged.

D. PRIVILEGES AND IMMUNITIES

7. The United Nations is an intergovernmental organization with a noble mandate of immense importance set out in the Charter of the United Nations. In order to facilitate the fulfilment of this mandate, the Organization enjoys privileges and immunities as stated in Article 105 of the Charter and specified in the 1946 Convention on the Privileges and Immunities of the United Nations. These privileges and immunities include, among others, immunity from every form of legal process and fiscal immunities. They are granted on the understanding that the Organization pursues only its Charter objectives. If, however, the Organization were to participate in a commercial joint venture, it would (at least in respect of the joint venture) have to waive its privileges and immunities, the granting of which would no longer be justified.[7] Moreover, participation in a commercial joint venture could put the status and character of the Organization in question.

E. CONCLUSION

8. For the reasons set out above, we do not believe that the proposed joint venture can be entered into. We consider this to be so, even if the revenue derived by the United Nations from the project is to be devoted to United Nations programmes.

23 July 1990

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5. QUESTION WHETHER THE UNITED NATIONS DEVELOPMENT PROGRAMME COULD BECOME A FOUNDING MEMBER OF A CORPORATE BODY UNDER THE NATIONAL LAW OF A MEMBER STATE — CHARACTER OF UNITED NATIONS ACTIVITIES IN THE TERRITORIES OF MEMBER STATES — SUBMISSION OF UNDP TO THE NATIONAL LAW OF THE CORPORATE BODY COULD BE CONSTRUED TO CONSTITUTE A WAIVER OF THE PRIVILEGES AND IMMUNITIES TO WHICH UNDP IS ENTITLED

Memorandum to the Director, Policy Division, Bureau for Programme Policy and Evaluation, United Nations Development Programme

1. This responds to your memorandum of 26 June 1990 by which you sought a legal opinion on whether UNDP could become a founding member of the International Institute for Management in [name of a Member State] (the Institute). We understand from the documents you attached that the Institute is actually to be founded as a national body incorporated under the Company Laws of [name of the Member State concerned], as a company limited by guarantee, without share capital.

General

2. The involvement of UNDP as a founding member of a corporate body under the national law of a Member State raises a number of conceptual and practical problems. These problems stem from the character of the United Nations, of which UNDP is a part, as an international organization operating in the territories of Member States, and the status of its staff members, as international civil servants. The United Nations and its staff enjoy specific privileges and immunities in the host country which may be in conflict with the idea of active participation in the establishment and operation of a corporate body under national law.

The character of United Nations activities in the territories of Member States

3. UNDP is a subsidiary organ of the Untied Nations and, within the general mandate conferred upon it by the resolutions of the General Assembly, it enjoys in the territories of the Member States such capacities as may be necessary for the exercise of its functions and the fulfilment of its purposes (Article 104 of the Charter of the United Nations). We do not consider that UNDP as such has, under its mandate, the capacity to establish or participate in the establishment of a legal entity under the national laws of a Member State.

Submission of UNDP to the national law of the Institute

4. Quite apart from the question of legal capacity, UNDP, as a founding member of the Institute, would, unlike any of the other founding members, be immune from legal process by virtue of the privileges and immunities it enjoys under the Convention on the Privileges and Immunities of the United Nations. This, despite the fact that the Institute would be subject to the laws of the State in question concerning the regularity of its establishment and conduct of its activities. Thus, neither the Institute nor the Government nor any party aggrieved by the acts or omissions of the Institute could obtain effective remedies against UNDP.

5. Furthermore, UNDP's submission to the domestic law of the host country could, in case of a claim arising out of UNDP's involvement in the operation of the corporate body, be construed to constitute a waiver of the privileges and immunities to which UNDP is entitled. Such an implied waiver in advance would be contrary to

the practice followed by the United Nations, whereby the immunities of the Organization may only be waived expressly and on an ad hoc basis by the Secretary-General (sections 2 and 20 of the Convention, respectively). In this regard, it should be noted that the authority to waive the immunities of the United Nations has not been delegated.

Participation of UNDP staff members

6. The participation of UNDP in the incorporation and operation of the Institute would necessarily mean that UNDP staff members would be required to participate in the affairs of the Institute, possibly with rights to vote. They would thus subject themselves to the local law of the State in question in respect of their activities within the Institute. To the extent that the staff members would perform the said activities in a representative capacity of UNDP, their actions could also result in legal liability for UNDP itself. Although, according to the Memorandum of Association of the Institute, the liability of members is limited to 20 pounds in the event of the Institute being wound up, the very concept of UNDP or its staff being held liable in such circumstances would in our view be incompatible with the status of the Organization.

Conclusion

7. It follows from the above that the participation of UNDP or its staff in the establishment or operation of the Institute is not legally permissible and, therefore, would not be advisable.

1 August 1990

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6. POSSIBLE COLLABORATION BETWEEN THE UNITED NATIONS CENTRE FOR HUMAN SETTLEMENTS (HABITAT) AND NATIONAL COMMITTEES FOR UNCHS FOR FUND-RAISING PURPOSES — PRECEDENTS OF THE RELATIONSHIP OF THE UNITED NATIONS CHILDREN'S FUND AND THE UNITED NATIONS DEVELOPMENT FUND FOR WOMEN WITH THEIR NATIONAL COMMITTEES — TERMS OF REFERENCE OF UNCHS

Memorandum to the Officer-in-Charge, United Nations Centre for Human Settlements (Habitat)

1. This responds to your memorandum of 5 September 1990 requesting this Office's views with respect to the possible collaboration between United Nations Centre for Human Settlements (Habitat) and individual national committees of UNHCS for fund-raising purposes, and in which you refer to the precedents of the relationship of the United Nations Children's Fund (UNICEF) and the United Nations Development Fund for Women (UNIFEM) with their national committees.

The UNICEF and UNIFEM precedents

2. The relationship between UNICEF and its national committees is based on General Assembly resolution 57 (I) of 11 December 1946 which in paragraph 2 (*a*) stipulates that "[the Fund] shall be *authorized* to receive funds, contributions or other

assistance from [Governments, *voluntary agencies, individual or other sources*]" (emphasis added); (see also paragraph 2 of General Assembly resolution 417 (V) of 1 December 1950). It is also provided for in the UNICEF Financial Regulations and Rules which stipulate, in regulation 4.3, that contributions "may be received by UNICEF, unsolicited or as a result of fund-raising activities, through the national committees for UNICEF and otherwise".

3. Similarly, the relationship of UNIFEM with its national committees is foreseen in General Assembly resolution 37/62 of 3 December 1982, in which the Assembly considered "that fund-raising . . . activities have a vital role to play in maintaining and increasing the financial viability and effectiveness of the Fund" and expressed "its appreciation for the support which *national committees* for the Fund, national United Nations associations and other non-governmental organizations have given to the work of the Fund" (paragraphs 8 and 9, emphasis added).

4. As is explained below, however, the function of UNCHS consists in coordinating possible sources of financing *governmental programmes* pertaining to human settlements and in providing assistance arrangements between donors and recipients. As such, it would seem that those functions are financed by Governments rather than through individual contributions or fund-raising activities.

Terms of reference of UNCHS (Habitat)

5. The United Nations Habitat and Human Settlements Foundation was established by General Assembly resolution 3327 (XXIX) of 16 December 1974 on the basis of decision 16(A)(II) of the Governing Council of the United Nations Environment Programme. In that resolution, the Assembly had stated that the "primary operative objective of the Foundation will be to assist in *strengthening national environmental programmes relating to human settlements*" (emphasis added). The Executive Director of UNEP was charged under the resolution with the responsibility, under the authority and guidance of the Governing Council of UNEP, of administering the Foundation and providing the technical and financial services related to that institution. By General Assembly resolution 32/162 of 19 December 1977, the responsibilities of the Governing Council were transferred to the Commission on Human Settlements, and provision was made for the establishment of a United Nations Centre for Human Settlements (UNCHS) (Habitat) to be headed by its own Executive Director. In that resolution, the Assembly reaffirmed that "action [to improve the quality of life of all people in human settlements] is *primarily the responsibility of Governments*", and that "the *international community* should provide, *both at the global and regional levels, encouragement and support to Governments determined to take effective action* to ameliorate conditions, especially for the least advantaged, in rural and urban human settlements" (see preambular clauses of resolution 32/162, emphasis added), and charged the Commission with the responsibilities:

"(*a*) To assist *countries and regions* in increasing their own efforts to solve human settlement problems;

"(*b*) To promote greater international cooperation in order to increase the availability of resources of developing countries and regions;

"(*c*) . . .;

"(*d*) To strengthen cooperation and co-participation in this domain among all countries and regions" (see paragraph II (3) of resolution 32/162, emphasis added).

To that end, the Commission was given, *inter alia*, the following functions:

"(*d*) To give overall policy guidance and carry out supervision of the operations of the United Nations Habitat and Human Settlement Foundation;

"(*e*) To review and approve periodically the utilization of funds at its disposal for carrying out human settlements activities at the *global, regional and subregional levels*;

"(*f*) To provide overall direction to the secretariat of the Centre referred to in section III below"; (see paragraph II (4) of resolution 32/162, emphasis added).

6. The Executive Director of UNCHS (Habitat) was given the responsibility to administer the Habitat Foundation and to exercise the functions previously performed by the Executive Director of UNEP over the Foundation under General Assembly resolution 3327 (XXIX).

7. In the note by the Secretary-General to the General Assembly regarding the administrative arrangements of the Habitat Foundation (A/C.5/32/24 of 17 October 1977), the Secretary-General proposed as follows:

"The financial operations of the Foundation are to be governed by the Financial Regulations and Rules of the United Nations, including any necessary special or clarifying financial rules required to meet the authorized purposes of the Foundation. These will be promulgated by the Secretary-General, including such additional financial rules as may be required to further control the activities under the Financial Regulations described in paragraph 42 and annex II, if they should be approved by the General Assembly. While it would be the intention of the Secretary-General to delegate much of the authority so provided, he would retain custody of the funds of the Foundation and the right to further amend or change the relevant financial rules as conditions may require". (ibid., para. 43)

Following acceptance of those proposals by the General Assembly, the Secretary-General promulgated special Financial Rules applicable to the Foundation (330 Series to the United Nations Financial Regulations and Rules).

8. Rule 307.5(*a*) of the 300 Series — Financial Rules provides that "the Executive Director [of UNCHS (Habitat)] is hereby delegated authority to accept voluntary contributions, gifts or donations *for purposes consistent with those of the Foundation*" (emphasis added). While this rule would seem on its face to authorize the receipt of contributions, etc., without limitation as to source, it must however be construed in the light of General Assembly resolution 3327 (XXIX) which provides that the primary sources of funds for the Foundation would come essentially from Member States by way of voluntary grants. Consequently, although there would be no impediment for the Executive Director to accept voluntary contributions and donations from private sources, direct solicitation and fund-raising activities through national committees as proposed do not seem to have been envisaged, since they do not fall within the terms of reference of UNCHS as contained in General Assembly resolutions 3327 (XXIX) and 32/162.

9. It appears therefore that UNCHS (Habitat) will require prior, express authorization from its constitutive body to engage in direct fund-raising for its programmes and to establish national committees for that purpose.

18 September 1990

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7. Claim by the Tokyo Energy Analysis Group that its copyright on the "OLSC", a software component used in a United Nations software program entitled "Enerplan", would be infringed by the Department of Technical Cooperation for development's modification of Enerplan — Copyright and software protection under the Universal Copyright Convention and the Berne Convention for the Protection of Literary and Artistic Works — Copyrightability of computer software under United States law

Memorandum to the Officer-in-Charge, Energy Resources Branch, Natural Resources and Energy Division, Department of Technical Cooperation for Development

1. This refers to the letter of 30 May 1990 sent by the Tokyo Energy Analysis Group (the Group), alleging that the Group's copyright on the "OLSC", a software component used in a United Nations software program entitled "ENERPLAN", would be infringed by the modification of ENERPLAN by the Department of Technical Cooperation for Development (DTCD).

2. On the basis of the documents forwarded to us earlier, we provide below the facts, the law regulating copyright and our opinion with respect to the above issue.

Summary of facts

3. The Natural Resources and Energy Division of DTCD developed in 1984-1985 a microcomputer software ("ENERPLAN"), which is to be used by planners and policy-makers in the developing countries when formulating national energy plans. The three members of the Group were recruited by the Division as consultants to help develop the software programme.

4. For the purpose of designing and developing ENERPLAN, an already developed and commercialized software component was used ("OLSC"), which had been authored and copyrighted by the three consultants both in the United States and in Japan.

5. The understanding between DTCD and the three consultants was that, in developing the software program, the possible need to convert the program to other language(s) in the future should be taken into account. It was further understood that ENERPLAN would have possibilities permitting the users to feed exogenous variables or parameters to the model to be developed without using OLSC.

ENERPLAN III and claim of copyright infringement

6. At the beginning of 1990, and in view of numerous problems experienced with ENERPLAN, DTCD decided to undertake modifications of the software program. The new version, which is entitled "ENERPLAN III", will be written in computer languages other than that previously used in ENERPLAN and, while the interface of the program is to be completely redesigned, no code of the original ENERPLAN will be required for such redesigning, and the OLSC component will not be included in ENERPLAN III.

7. Upon being informed of DTCD's plans, the Group requested that DTCD not proceed with the planned modifications, as they might involve or affect the copyrighted OLSC component, and further stated that their copyright covered not only the

source code, but also the organization and structural details of the program, as well as its screen display.

Copyright protection under international conventions

8. Copyright protection on the global level is regulated by international conventions and bilateral treaties dealing with copyright. Those instruments leave a large measure of autonomy to national regulation. It is, however, still important to examine the legal mechanisms afforded by the two major international conventions for protection of copyright, i.e., the Universal Copyright Convention (UCC)[8] and the Berne Convention for the Protection of Literary and Artistic Works,[9] to determine what their effect is on computer software.

The Universal Copyright Convention

9. Article I of the UCC protects "literary, scientific and artistic works, including writings, musical, dramatic and cinematographic works, and paintings, engravings and sculpture." The UCC does not provide any additional substantive protection of copyright beyond the protection granted by national legislation. Under its terms, each contracting State shall give adequate and effective protection to the rights of authors and other copyright proprietors of literary, scientific and artistic work (UCC, art. I). The Convention does not describe the details of protection, but substantially leaves the mode and extent of protection to the legislation of each member State (UCC, art. II). Because the UCC is only a national treatment agreement, computer programs will only be protected in countries where domestic copyright law is applicable to software. The United States is a member of the UCC, and therefore the United States law on copyright is the only applicable statutory law to a suit held in United States courts.

The Berne Convention for the Protection of Literary and Artistic Works

10. Article 2 of the Berne Convention defines literary and artistic works as including "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression", and sets forth a non-exclusive catalogue of covered works that include books and other writings, illustrations, plans, architectural and scientific works. Similar to the UCC, the Berne Convention provides for national treatment (art. 4(1)), and therefore, computer programs will only be protected in countries where domestic copyright law is applicable to computer programs. The United States does not adhere to the Berne Convention because the Convention abandons formalities to acquire protection, and because it offers protection to moral rights which are not recognized by the United States.

Software protection under the UCC and the Berne Convention

11. Having regard to the fact that both conventions afford no more than national protection of copyrights, and before discussing national laws on copyright, it is necessary to ascertain whether computer programs are within the subject matter of protected material under those conventions.

12. Neither convention refers explicitly to computer programs, and neither lists or defines computer software, or what constitutes infringement or unauthorized use of software. In a recent study concerning the existing protection under international conventions, the World Intellectual Property Organization conducted a survey of member

nations and received replies from 26 countries, the majority of which indicated that computer software was not protected, or was insufficiently protected by existing treaties (see C. Melilema, "Copyright Protection for Computer Software: An International View", 11(1) *Syracuse Journal of International Law and Commerce,* 87, 104-105 (1984)). There is, therefore, at the present time no consensus among the nations that are members of the two major international copyright conventions concerning the inclusion of computer programs in the list of works protected by those copyright conventions.

Copyright protection under United States law

13. The next consideration is the extent to which software is protected under United States law, as the members of the Group allege that they have registered the OLSC component with the United States Copyright Office, and as United States law would be the only applicable statutory law to a suit held in United States courts.

Copyrightability of computer software under United States law

14. Section 102 (*a*) of the 1976 Copyright Act protects "original works of authorship fixed in any tangible medium of expression, now know or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device" (17 *U.S.C.* Section 102 (*a*)). That same section provides also seven illustrative examples of such "works of authorship", which include "literary works". The legislative reports accompanying the 1976 Act make clear that the term "literary works" is defined as encompassing computer programs and databases (see H.R. REP. No. 94-1476, 94th Cong., 2d Sess. 54 (1976), quoted in W.F. Patry, *Latman's — The Copyright Law* (1986) at p. 59, n.191).

15. The 1980 Computer Software Copyright Act, which amended some sections of the 1976 Copyright Act, provided a statutory definition of the term "computer program": "A 'computer program' is a set of statements or instructions to be used directly or indirectly in a computer program in order to bring about a certain result" (17 *U.S.C.* Section 101 (1980)).

16. Section 102 (*b*) of the 1976 Act provides that "[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated or embodied in such work". Thus, while the *expression* of an idea or principle may be copyrighted, that *idea* or *principle* is not afforded copyright protection.

17. The statutory language of the above-quoted provisions makes clear that under United States law, copyright protection is given to original expression embodied in computer programs, but not to any idea, method or process described by that expression. The issue, therefore, is not whether or not computer programs are copyrightable, but discovering the protectible elements in individual computer programs, in order to determine which particular components are (unprotectible) ideas and which are (protectible) expressions of an idea.

Scope of Protection

18. Computer software includes not only the computer program in its various manifestations, but also the documentation created in connection with or for use with

that program (see *University Computing Co. v. Lykes —Youngstown Corp.*, 504 F.2d 518, 527 (5th Cir. 1974)). The debate today is not whether software is protectible in the abstract, but whether a particular form of representation of the software is protectible. The forms in which software can be represented include:

(*a*) The basic algorithms or methods implemented in the program;

(*b*) The program itself in source code and object code versions;

(*c*) The supporting documentation, including the program descriptions, flow charts, instruction manuals, operator's manuals and other materials that explain the operations of the program (See WIPO, Model Provisions on the Protection of Computer Software, 9-12 (1978)).

19. *Apple Computer Inc. v. Franklin Computer Corp.* was the first significant and far-reaching decision on protection of computer software (714 F.2d 1240 (3d Cir. 1983). In that case, the court held that object code is protectible by copyright. The court also reasoned that, if only one or a few other expressions are possible for a particular idea, the expression is "necessarily dictated by the underlying subject matter", and therefore, the idea and expression have merged and are not protected by copyright. If, however, "other programs can be written or created which perform the same function as . . . Apple's operating system program, then that program is an expression of the idea and hence copyrightable." (*idem*, at p. 1253; see also *Stern Elecs., Inc. v. Kaufman,* 669 F.2d 852, 855 n.3 (2d Cir. 1982)). In *Whelan Associates, Inc. v. Jaslow Dental Lab., Inc., et al.*, (797 F.2d 1222 (3d Cir. 1986)), the court stated: ". . . We must determine whether the structure (or sequence and organization) of a computer program is protectible by copyright, or whether the protection of the copyright law extends only as far as the literal computer code. The district court found that the copyright law covered these non-literal elements of the program, and we agree."

20. In a recent case on whether copyright protection extends to all elements of computer programs that embody original expression, whether literal or non-literal, the court articulated the legal test for the copyrightability of such elements as follows: "If, however, the expression of an idea has elements that go beyond all functional elements of the idea itself, and beyond the obvious, and if there are numerous other ways of expressing the non-copyrightable idea, then those elements of expression, if original and substantial, are copyrightable." (*Lotus Development Corp. v. Paperback Software International and Stephenson Software, Ltd.*, Civil Action No. 87-76-K, U.S. District Court for Massachusetts, 60 (1990)). In the court's reasoning, therefore, for the expression of an idea to be copyrightable, it has to meet the following four criteria: it has to be original; it has to embody more than just functional elements, i.e., it has to be substantial; it has to go beyond the obvious; and it is not the only possible way in which the idea can be expressed (*idem*, at p. 58).

What constitutes infringement of copyright

21. The Copyright Act does not define "infringement". In place of such a definition, Section 501 (*a*) provides that "[a]nyone who violates any of the exclusive rights of the copyright owner as provided by Sections 106 through 118, . . . , is an infringer of the copyright".

22. Having regard to that provision, it is clear that infringement occurs when one or more of the copyright owner's exclusive rights have been violated. Those rights are shaped not only by the grants in Section 106 but by the limitations in Sec-

tions 107-118 as well. Of particular relevance for the purpose of determining whether or not a computer program has been infringed, is the exclusive right of the copyright owner to reproduce the copyrighted work, or to authorize that work's reproduction (see 17 *U.S.C.* Section 106 (1)). Any unauthorized reproduction or copying of the copyrighted work would, therefore, constitute infringement.

23. The determination of whether a copyright has been infringed has been left to the courts. As copying is rarely done blatantly, usually, the copyright owner must make out a circumstantial case based on *access* and *similarity*. "Access" means that the alleged infringer had an opportunity to copy the protected material. The concept of "similarity", as elaborated in a recent court's decision, requires that the copyright owner must "demonstrate substantial similarity in both ideas and expression . . .", which ". . . would permit a reasonable person to find an unlawful appropriation, a capture by the infringing work of the 'total concept and feel' of [the infringed] work". (See *Johnson Controls v. Phoenix Control Systems,* 886 F.2d 1173 (9th Cir. 1989).)

Permissible use of copyrighted work

24. Section 117 of the Copyright Act, as revised by the 1980 amendments, limits the scope of the exclusive right of the copyright owner to reproduce or authorize the reproduction of the copyrighted work, as follows:

> "Notwithstanding the provisions of Section 106, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided:
>
> "(1) that such [a new] copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or
>
> "(2) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful.
>
> "Any exact copies prepared in accordance with the provisions of this section may be leased, sold, or otherwise transferred, along with the copy from which such copies were prepared, only as part of the lease, sale, or other transfer of all rights in the program. Adaptations so prepared may be tranferred only with the authorization of the copyright owner."

25. In the light of that provision, it is clear that the permissible use of copyrighted works includes adaptations as part of the lawful utilization of the program. Moreover, this privilege is accorded to lawful "owners" and does not require prior authorization from the copyright holder. The scope of such lawful utilization was understood to be as follows:

> "Because of a lack of complete standardization among programming languages and hardware in the computer industry, one who rightfully acquires a copy of a program frequently cannot use it without adapting it to that limited extent which will allow its use in the possessor's computer. The copyright law . . . should no more prevent such use than it should prevent rightful possessors from loading programs into their computers. Thus, a right to make those changes necessary to enable the use for which it was both sold and purchased should be provided. *The conversion of a program from one higher-level language to another to facilitate use would fall within this right as would the right to add features to the program*

that were not present at the time of rightful acquisition. These rights would necessarily be more private in nature than the right to load a program by copying it and could only be exercised so long as they did not harm the interests of the copyright proprietor . . . *Should proprietors feel strongly that they do not want rightful possessors of copies of their programs to prepare such adaptations,* they could, of course, make such *desires a contractual matter.*" (quoted in F. W. Neitzke, *A Software Law Primer,* 18 (1984), emphasis added)

Opinion

26. ENERPLAN is the property of DTCD. The copyrighted OLSC component, included in some versions of ENERPLAN, was used by permission of the authors, and DTCD acknowledges the latter's copyright on that component.

27. Even though DTCD has not registered any version of ENERPLAN with the United States Copyright Office, protection of it is not forfeited by such omission to register. Registration is merely a prerequisite to bringing a suit for infringement and is not required for the purpose of granting protection to copyrightable works. Indeed, copyright protection automatically attaches to a work as it is "fixed in a tangible medium of expression" (see 17 *U.S.C.* Section 102 (*a*)). DTCD retains, therefore, exclusive rights with respect to ENERPLAN, which rights include the right to reproduce the work and the right to prepare derivative works based upon the pre-existing work (see 17 *U.S.C.* Section 106 (1), (2)).

28. DTCD's exclusive right to prepare derivative works, as that term is defined by Section 101 of the Copyright Act[10] is curtailed only by the rights of the authors of the copyrighted OLSC component (see 17 *U.S.C* Section 103).[11] DTCD has, therefore, the right to undertake any modification or alteration of ENERPLAN without consulting the authors, but only in so far as such modifications do not affect or involve the OLSC component.

29. DTCD has also the right to make adaptations to ENERPLAN, even in those versions of the program that include the copyrighted OLSC component, as part of its lawful utilization of the program. As previously indicated (see paras. 24-25 above), the right of the owner of a copy of a computer program to make adaptations to that computer program limits the exclusive right of the copyright owner with respect to the software, but only if such adaptations are necessary for utilizing the computer program and only in so far as the new copies so prepared are not leased, sold or otherwise tranferred without the copyright owner's authorization.

Conclusion

30. DTCD retains the exclusive right to reproduce ENERPLAN in its original version, which includes the copyrighted OLSC component, which is used by permission of the authors.

31. DTCD further retains the exclusive right to prepare derivative works of "ENERPLAN" without, however, using the copyrighted OLSC component. This is particularly relevant in the case under consideration, as the preparation of ENERPLAN was designed in a way that would permit such derivative works, i.e., through conversion into other computer languages, etc., without using the OLSC component (see para. 5 above).

32. As the new software program, entitled ENERPLAN III, does not include any portion of OLSC or any other previously copyrighted material, it is our opinion

that ENERPLAN III, being a derivative wok of the original ENERPLAN, does not infringe on the rights of the authors of the OLSC component.

23 August 1990

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8. Award of the 1988 Nobel Peace Prize to the United Nations Peace-keeping Forces — Practical and legal obstacles to the exercise by the United Nations Peace-keeping Forces of the right to nominate candidates provided for by the Special Regulations governing the award of the Prize

Memorandum to the Executive Assistant to the Secretary-General, Assistant Secretary-General

1. This responds to your memorandum of 6 December 1989 informing us that, after the Secretary-General received the Nobel Peace Prize (the Prize) in 1988 on behalf of the United Nations Peace-keeping Forces, he has been twice called upon to propose a candidate for the Prize. You requested our advice as to whether (*a*) the incumbent Secretary-General is entitled to make such proposals to the Nobel Peace Prize Committee and, if so, (*b*) whether future Secretaries-General would also be entitled to make such proposals.

2. Under the terms of the will of the late Alfred Nobel, the Prize is awarded by the Norwegian Nobel Committee (the Committee), which is elected by the Norwegian Storting. Special Regulations governing the award of the Prize were adopted by the Committee on 10 April 1905. Paragraph 3 of those Regulations provides that "the right to submit proposals for the award of the Nobel Peace Prize shall be enjoyed by: . . . 7. Persons who have been awarded the Nobel Peace Prize". Paragraph 4 of the Regulations specifies that "the Nobel Peace Prize may also be awarded to institutions and associations". It is to be noted that, under paragraph 3 of the Regulations referred to above, there is no obligation to submit proposals.

3. The Committee awarded the 1988 Prize to the United Nations Peace-keeping Forces and invited the Secretary-General to receive the Prize on their behalf at a prize-awarding ceremony to be held on 10 December 1988, as indicated in a letter of 29 September 1988 addressed by the Chairman of the Committee to the Secretary-General. It is to be noted that the Prize was not awarded to any specific United Nations Peace-keeping Force, but to the Peace-keeping Forces in general.

4. A United Nations Peace-keeping Force is a subsidiary organ of the United Nations, normally established pursuant to a resolution of the Security Council and falling under its authority. The Secretary-General is responsible to the Security Council for the organization, conduct and direction of the Force, and keeps the Council fully informed of developments relating to the functioning of the Force. The Secretary-General may, therefore, be regarded as the chief executive officer of every Peace-keeping Force, and it was presumably in recognition of this capacity that he was invited to receive the Prize on behalf of the Forces. It is also to be noted that the Secretary-General was invited by the Committee to give the lecture which article 9 of the Statutes of the Nobel Foundation requires the Prize winner to give. We therefore feel that, if it is desired to submit proposals on behalf of the Peace-keeping Forces,

and it is feasible to do so, the Secretary-General would be the appropriate channel through which to submit the proposals.

5. Nevertheless, the question arises whether the Prize winner in question — the United Nations Peace-keeping Forces — is able to choose a person, institution or association to be proposed to the Committee, since the Forces lack a legal personality of their own. As noted previously, the award was to the Peace-keeping Forces in general, and it is impossible to envisage a procedure or machinery by which the Forces could make a choice. Furthermore, even if such a procedure or machinery existed, the Forces have been given no mandate to make such a choice. The Secretary-General, while closely associated in the manner described above in paragraph 4 with the Forces, and therefore perhaps capable of representing the Forces in all matters relating to United Nations peace-keeping, could not be regarded as representing the Forces in matters extraneous thereto.

6. Other component parts of the United Nations or members of the United Nations family, recipients of the Peace Prize in earlier years, have not made nominations. UNICEF has no record of having been requested to make nominations and none have in fact been made by it. UNHCR did receive requests but has taken the position that the High Commissioner has no power to do so and that it would be too troublesome to obtain an agency decision on this question. ILO also received requests to make nominations but has taken the same position as the UNHCR. In addition, ILO feels that paragraph 3.7 of the Special Regulations, mentioned above in paragraph 2, may be interpreted as giving the right to make nominations only to natural persons.

7. While it is unlikely that the Committee would refuse to receive proposals for the award of the Prize submitted by the Secretary-General, we are of the opinion that, having regard to the difficulties noted in paragraph 5 above and in view of the absence of nominations from other United Nations organs and members of the United Nations family, recipients of the Prize, it would not be desirable to submit proposals.

8. Paragraph 3 of the Special Regulations governing the award of the Prize does not specify a time-limit within which a Prize winner can submit proposals for the award of the Prize, and accordingly proposals can be submitted on behalf of the Peace-keeping Forces as long as those Forces exist. If, contrary to our opinion expressed in paragraph 7 above, it is considered desirable that proposals be submitted by the Secretary-General on behalf of the Forces, such proposals could be submitted by both the present and future incumbents of the office of Secretary-General.

2 February 1990

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9. Question of the status of the United Nations Council for Namibia after Namibian independence

Memorandum to the Officer-in-Charge, Office of the United Nations Commissioner for Namibia

1. I wish to refer to your memorandum of 8 March 1990 by which you conveyed to me the request for advice of the President of the United Nations Council for Namibia on the status of that body after Namibian independence on 21 March 1990.

2. From a constitutional and legal standpoint, the United Nations Council for Namibia is a subsidiary organ of the General Assembly established pursuant to General Assembly resolution 2248 (S-V) of 19 May 1967. Under the terms of that resolution, the Council was endowed by the General Assembly with broad administrative, executive and legislative powers until the achievement of Namibian independence. Over the course of the past 23 years, the mandate of the Council has been further modified by numerous resolutions of the General Assembly under which the Council has continued to function as a subsidiary organ fulfilling its role as an administering authority for the Territory.

3. While the constitutive resolution (2248 (S-V) of 19 May 1967) and subsequent resolutions of the General Assembly imply in substantive terms that the mandate of the Council is fulfilled and that, therefore, the Council ceases to exist upon Namibian independence, no automatic dissolution of the Council is foreseen in these resolutions. The independence of Namibia on 21 March 1990 will not, therefore, automatically trigger the dissolution of the Council, which will continue to exist from a purely legal point of view as a duly constituted subsidiary organ of the General Assembly until such time as the Assembly itself decides otherwise.

4. This is not to say, of course, that all of the activities of the Council will survive the independence of Namibia. Some activities of the Council will automatically lose their *raison d'être* or will by their very nature be assumed by the new Government of Namibia. These include activities such as the representation of Namibia, participation in treaties, membership in intergovernmental organizations, policy-making functions, issuance of travel documents and the dissemination of information. Other activities, however, such as assistance activities and fellowship programmes, will continue by virtue of existing General Assembly resolutions. In due course, the General Assembly will no doubt wish to review such activities and take the action which it deems necessary and appropriate.

5. As far as the question of status is concerned, therefore, one may conclude that the legal status of the Council for Namibia as a subsidiary organ of the General Assembly remains unchanged until such time as the General Assembly decides otherwise.

9 March 1990

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10. LEGAL STATUS OF THE INTERNATIONAL TRADE CENTRE AND APPLICABILITY TO THE CENTRE OF GENERAL ASSEMBLY RESOLUTIONS REGARDING THE PARTICIPATION OF THE PALESTINE LIBERATION ORGANIZATION IN UNITED NATIONS MEETINGS — USE OF THE DESIGNATION "PALESTINE" IN PLACE OF THE DESIGNATION "PLO"

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

Reference is made to your memorandum of 16 February 1990 concerning an informal request made by Palestine to participate as an observer in the forthcoming session of the Joint Advisory Group (JAG) on the International Trade Centre (ITC). Our views in this connection are as follows:

(*a*) On 12 December 1967 the General Assembly approved by resolution 2297 (XXII), the accord between UNCTAD and GATT on the establishment of ITC "to be

operated jointly by UNCTAD and GATT on a continuing basis and in equal partnership". In 1974, the legal status of ITC was confirmed by the General Assembly as that of a "subsidiary organ of both the United Nations and GATT", the former acting through UNCTAD.[12]

(*b*) We note that at meetings of the Joint Advisory Group on the International Trade Centre UNCTAD/GATT, the observers indicated in paragraph 7 of your memorandum participate on the basis of notifications sent by the ITC secretariat. We note also that in the Group's practice, entities such as Palestine and national liberation movements recognized by the Organization of African Unity (OAU) have not been notified of sessions of JAG.

(*c*) With regard to Palestine, the General Assembly in resolution 3237 (XXIX) of 22 November 1974 invited the Palestine Liberation Organization (PLO) to participate in the capacity of observer in the sessions and the work of the General Assembly (paragraph 1) and in the sessions and the work of all international conferences convened under the auspices of the General Assembly (paragraph 2). It also considered that the PLO is entitled to participate as an observer in the sessions and the work of all international conferences convened under the auspices of other organs of the United Nations (paragraph 3). Furthermore, as you know, by resolution 43/177 of 15 December 1988, the General Assembly decided that, as of that date, the designation "Palestine" should be used in place of the designation "PLO" in the United Nations system, without prejudice to the observer status and functions of the PLO within the United Nations system, in conformity with the relevant United Nations resolutions and practice.

(*d*) Since ITC has been recognized by the General Assembly as a subsidiary organ of both the United Nations and GATT and since the annual meeting of JAG is convened by ITC to review ITC activities and formulate recommendations to governing bodies of GATT and UNCTAD, such meetings would, as far as the United Nations is concerned, fall within the ambit of resolution 3237 XXIX (paragraph 3). Thus, in response to your question, the United Nations would have no legal objection to the participation of Palestine as an observer in JAG meetings.

1 March 1990

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11. Question whether the Trade and Development Board may adopt a resolution on economic problems arising from the Gulf crisis in the light of Article 12 of the Charter of the United Nations

Memorandum to the Secretary-General of the United Nations Conference on Trade and Development

1. This is in reply to your memorandum dated 12 October 1990 in which you informed me that the President of the Trade and Development Board of UNCTAD requested my advice on whether or not it would be in keeping with Article 12 of the Charter of the United Nations if the Trade and Development Board were to adopt a resolution on the "economic consequences of the Gulf crisis" or incorporate the substance of its views in a broader resolution dealing with current developments in the world economy.

2. Article 12, paragraph 1, of the Charter of the United Nations provides that:

> "While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests."

You correctly presume that by implication Article 12, paragraph 1, also applies to subsidiary organs of the General Assembly, including UNCTAD and its organs, such as the Trade and Development Board.

3. The Security Council is seized of the situation between the Member States concerned and it has adopted a number of resolutions concerning that situation. In addition, at the request of the Permanent Representative of one of the Member States concerned, the General Asembly decided on 21 September 1990 to include on its agenda an item concerning the Gulf crisis. In practice, Article 12 has not been interpreted as barring the General Assembly from generally considering, discussing and making recommendations on items which are on the agenda of the Security Council. This is particularly so if the titles of the items before the Council and before the General Assembly are not identical.

4. One of the Security Council resolutions concerning the Gulf crisis, namely resolution 669 (1990) of 24 September 1990, relates to the particular subject-matter raised in your memorandum and the text in question, although the latter is of a broader scope than the Security Council resolution. By resolution 669 (1990) the Security Council entrusted its Committee established under resolution 661 (1990) concerning the situation between the two States concerned, commonly known as the Sanctions Committee, with the task of examining requests for assistance under the provisions of Article 50 of the Charter of the United Nations and making recommendations to the President of the Security Council for appropriate action. In the particular case of [name of a Member State], the Sanctions Committee submitted such a report with its recommendations to the Council on 18 September 1990 (S/21786), that is, before the adoption of resolution 669 (1990). The members of the Security Council passed the report and its recommendations to the Secretary-General for appropriate action.

5. We have examined the draft resolution on "Economic consequences of the latest crisis" which addresses in a general way the problems faced by the countries adversely affected by this crisis and the need for a multilateral financial response, and recommends that the General Assembly take certain steps in this respect. As such it does not seem to be within the purview of the phrase "any recommendation with regard to that dispute or situation".

6. In the light of its substance and in the light of the practice of the United Nations, we are of the opinion that Article 12 of the Charter is not an obstacle to the adoption of a recommendation to the General Assembly of the kind contained in the draft resolution before the Trade and Development Board of UNCTAD.

17 October 1990

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12. Execution of projects funded by the United Nations Development Programme in the framework of its developmental cooperation and technical assistance activities — Arrangements for project execution between UNDP and other United Nations entities forming part of the Organization — Implications of articles VI and VII of the Standard Basic Executing Agency Agreement from the viewpoint of the United Nations in cases where the Department of Technical Cooperation for Development executes UNDP projects — Clarification on the meaning of the term "accountability" in the Agreement in the context of project implementation by an executing agency to UNDP

Memorandum to the Director, Policy, Programming and Development Planning Division, Department of Technical Cooperation for Development

1. This responds to your memorandum of 23 October 1989 by which you sought our comments specifically on the implications of articles VI (Recruitment of personnel and procurement of goods) and article VII (Accountability) of the Standard Basic Executing Agency Agreement (SBEA) from the viewpoint of the United Nations in cases where the Department of Technical Cooperation for Development (DTCD) executes UNDP projects. In the meantime, however, we understand that DTCD has signed the SBEA. Hence, our observations on the specific issues you raised should serve as guidelines at the concrete level of individual implementation.

2. Before considering your queries, we believe that some general remarks directed to the specific United Nations-UNDP relationship are advisable. As you know, UNDP was established by the General Assembly as a subsidiary organ of the United Nations and charged with the funding and coordination of developmental cooperation and technical assistance activities. When the General Assembly adopted the Consensus Resolution,[13] it essentially endorsed the recommendations contained in the 1969 "Study of the Capacity of the United Nations Development System".[14] That study envisaged that projects funded by UNDP would be executed by an agency on the basis of a "contract" containing the respective obligations of the parties. The agency would have a contractual obligation to UNDP for the proper performance of the project entrusted to it. In implementation of the above-mentioned Consensus Resolution, regulation 8.10 (B) of the UNDP Financial Regulations and Rules requires that "Agreements shall be entered into between UNDP and executing agencies which are organizations of the United Nations system, specifying the general terms and conditions which are to govern UNDP's assistance to projects for which that organization has been designated as an executing agency".

3. In 1977 the General Assembly decided by its resolution 32/197 to take measures which would also enable subsidiary organs of the United Nations to function as "executing agencies". Accordingly, DTCD was established to "assist and advise the Secretary-General in regard to technical cooperation activities for which the United Nations is executing agency", and the status of executing agency was expressly conferred upon the five regional economic commissions.[15]

4. It follows from the foregoing that a designation as an executing agency enables a department of the United Nations or a United Nations subsidiary organ to act as an independent entity for the purpose of project execution. In this respect these United Nations entities assume a distinct legal status in order to enter into the necessary arrangements for project execution. However, based on the fact that all such parties (DTCD, UNDP and regional commissions) form part of the United Nations, it

was considered inappropriate to have United Nations entities enter into a formal agreement *inter se* as contracting parties. Instead, a less formal operational framework was adopted whereby DTCD and the regional commissions merely expressed their consent through a letter stating that they would be guided by the terms of the SBEA "to the extent applicable".

5. As to the general question concerning difficulties with the applicable conditions of service with respect to the recruitment of personnel (article VI (1) of the SBEA), the following can be stated: while the International Civil Service Commission, which was established by the General Assembly for the purpose of "the regulation and coordination of conditions of service of the United Nations common system", has laid down the basic conditions of service for all staff, including project personnel (e.g., national professional officers), the General Assembly none the less also expressed the view in the Consensus Resolution (paragraphs 45 to 48) that the UNDP Administrator should develop conditions of service "that will attract and retain candidates".

6. As you know, UNDP has indeed introduced categories of personnel, such as the internationally recruited project professional personnel and nationally recruited project professional personnel, whose terms of service drastically depart from those approved for staff of the United Nations as set forth in the Staff Regulations and Rules and the respective Secretary-General's bulletins and administrative instructions.[16] Despite the existence of the above-mentioned UNDP personnel categories, in the absence of a decision of a United Nations deliberative body concerning such categories, it is our view that DTCD is not bound to adopt categories which are inconsistent with United Nations regulations and rules, and may conduct its own recruitment under such conditions of service as it considers permissible under the Staff Regulations and Rules of the United Nations. In this regard, you will note that the new text deviates from the old 1975 SBEA text in so far as the last half-sentence of article VI (1), which in its entirety reads: "The Executing Agency agrees to give sympathetic consideration to any such conditions of service recommended to it by the UNDP, and shall adopt such conditions of service to the maximum extent possible", has been deleted. The present text reads: "The Executing Agency agrees to give sympathetic consideration to the adoption of any such conditions".

7. With regard to the procurement of goods and services (article VI (2) of the SBEA), your query (although not explicit) appears to be whether it is legally possible for DTCD and regional commissions to comply with the decision of the UNDP Governing Council to grant "preferential treatment up to 15 per cent of the purchase price in respect of local procurement of indigenous equipment and supplies of developing countries . . ." even though the Financial Regulations and Rules of the United Nations have not incorporated such a principle.

8. The requirement of giving preference to procurement from local suppliers in developing countries was established in the Consensus Resolution, and has since been reiterated in a series of General Assembly resolutions. Since those resolutions contained requests addressed to UNDP, it was only appropriate for the Governing Council to implement them. We consider that DTCD also has no option but to give effect to those resolutions. If the existing Financial Regulations and Rules of the United Nations are inadequate, then special arrangements may have to be made to enable DTCD to comply, by the issuance of a supplement to those Regulations and Rules. The issue of preferential treatment in respect of local procurement might in fact be one of the matters that should be discussed by the Task Force envisaged in 1987,

which should be reactivated, and special rules to be contained in a separate supplement to the Financial Regulations and Rules of the United Nations applicable to procurement by DTCD as an executing agency of UNDP may have to be formulated.

9. You also wanted clarification on the meaning of the term "accountability" in the SBEA in the context of project implementation by an executing agency to UNDP (article VII). The concept of accountability is contained in paragraph 43 of the Consensus Resolution, which provides that "every executing agent will be accountable to the Administrator for the implementation of Programme assistance to projects". In turn, the Administration of UNDP is accountable to the Governing Council. In this context the Governing Council has, on many occasions, similarly urged that the executing agencies should be fully accountable to UNDP for the fulfilment of their obligations, such as the responsibility for the proper utilization of funds budgeted for the project, for meeting the target dates and successfully completing the project activities and, in general, for the proper performance of all obligations agreed upon between the executing agency and the UNDP in the SBEA or the project document signed by the executing agency, UNDP and the recipient Government.

10. In the light of the above, the Administrator has the responsibility to monitor the performance of the executing agencies and to report thereon to the Governing Council. The Governing Council has the duty to take such action as is necessary to effect corrective measures to ensure proper performance of project activities by the executing agencies either on its own or through recommendations for appropriate action to be taken by the Economic and Social Council or the General Assembly. In general, it would be correct therefore to state that the executing agencies are legally and operationally answerable to the Administrator for the proper implementation of projects.

19 January 1990

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13. Legal status of the United Nations Development Programme — Question whether UNDP has the capacity to acquire real property

Memorandum to the Director, Division for Administrative and Management Services, United Nations Development Programme

1. This is in reference to our telephone conversation of today and your request for confirmation that the United Nations Development Programme has the capacity to acquire real property in a Member State.

2. The United Nations Development Programme is a subsidiary body of the United Nations, having been established by the General Assembly by its resolutions 1240 (XIII), 1383 (XIV) and 2688 (XXV), in pursuance of Article 22 of the Charter of the United Nations. Article 104 of the Charter provides that "the Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes". The United Nations Development Programme has been charged by the General Assembly to provide "systematic and sustained assistance in fields essential to the integrated technical, economic and social development of the less developed countries",[17] and to this end has been authorized to establish field offices under the charge of a resident representative exercising authority over the programme activities in the country in receipt of such assistance.[18]

3. In recognition of the need for the Organization to have certain privileges and facilities, including the capacity to enter into contracts and to acquire property in the discharge of its functions, the General Assembly adopted a Convention on the Privileges and Immunities of the United Nations, to which the State concerned is a party. That Convention provides in article I, section 1 (*b*), that the Organization shall possess juridical personality and shall have the capacity to acquire and dispose of immovable and movable property.

4. In the light of the above, the Resident Representative in the Member State in question has the authority to conclude contractual arrangements for the acquisition of real property on behalf of the United Nations Development Programme.

1 March 1990

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14. Question whether officers of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees serve *in personam* or whether the States they represent hold the post — Applicability of rule 19 of the rules of procedure of the Functional Commissions of the Economic and Social Council under rule 15 of the rules of procedure of the Executive Committee of the High Commissioner's programme

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

1. This is with reference to your memoranda on the interpretation of rule 19 of the rules of procedure of the functional commissions of the Economic and Social Council dated 20 and 21 September 1990. By those memoranda, you forwarded a request from the Chairman of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees for our advice on whether the officers of the Executive Committee serve *in personam* or whether the States which they represent hold the posts.

2. The latest version of the rules of procedure to the Executive Committee of the High Commissioner's Programme[19] include the following relevant provisions:

Rule 10

"The Committee shall, at the first meeting of the first regular session in any one year, elect the officers of the Committee: Chairman, Vice-chairman and Rapporteur, who will serve in these functions until the Committee's next regular session.

Rule 11

"The officers of the Committee shall hold office until their successors are elected. The Vice-chairman, acting as Chairman, shall have the same duties and powers as the Chairman."

Rule 15

"...

"... On all matters not covered by these rules, the Chairman shall apply the rules of procedure of the Functional Commissions of the Economic and Social Council."

3. In your memorandum of 20 September 1990 and in the letter to you of 21 September 1990 from the Chairman of the Executive Committee of the High Commis-

sioner's Programme, reference is made to rule 19 of the rules of procedure of the functional commissions of the Economic and Social Council, which reads as follows:

> "If the Chairman or any other officer is unable to carry out his functions or ceases to be a representative of a member of the commission or if the State of which he is a representative ceases to be a member of the commission he shall cease to hold such office and a new officer shall be elected for the unexpired term."

4. Reference should also be made to the latest report of the Executive Committee of the High Commissioner's Programme which, in listing the Committee's officers, indicates the States they represent.[20]

5. It is clear from the above report that the Executive Committee of the High Commissioner's Programme follows the standard practice of United Nations bodies of electing from among representatives of States members of the body *persons* to serve as officers. A few exceptions to this practice exist (such as Vice-Presidents of the General Assembly), but the Executive Committee is not one. Rule 19 of the rules referred to above reflects the standard practice.

6. Thus, if an officer of the Executive Committee is no longer able to serve in that capacity because he/she no longer represents the member State on that body, a vacancy arises which should be filled according to the usual procedures and practices. While it often happens that such a vacancy is filled by a person representing the same State as did the departing officer, such a practice is neither automatic nor required; it is a question to be determined by the members of the body concerned.

26 September 1990

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15. Legal requirements for associate membership in the Economic and Social Commission for Asia and the Pacific — Paragraphs 2, 4 and 5 of the terms of reference of ESCAP

Memorandum to the Executive Secretary of the Economic and Social Commission for Asia and the Pacific

1. Please refer to your cable of 12 December 1989 in which you requested our opinion and advice regarding a possible application for associate membership in ESCAP for a Territory.

2. According to paragraph 5 of the terms of reference of ESCAP,[21] an associate membership in ESCAP should meet the following two requirements:

(*a*) The Territory in question must be within the geographical scope of ESCAP as defined in paragraph 2 of its terms of reference;

(*b*) The application must be made by a member responsible for the international relations of the Territory concerned.

3. With respect to the first requirement, The territory in question is not a Territory enumerated in paragraph 2 of ESCAP's terms of reference. It would, therefore, be necessary first to initiate an amendment to paragraph 2 to include the Territory concerned in the geographical scope of ESCAP. Such an amendment can only be done by the Economic and Social Council itself. Indeed, this procedure has been followed in previous cases (e.g., the Cook Islands, the Trust Territory of the Pacific Islands).

4. As to the second requirement, the State responsible for the Territory's international relations is not a member of ESCAP. Another State concerned is an ESCAP member, but is not, in law at present, responsible for the Territory's international relations. It is, however, known that negotiations are being conducted between those two States with a view to determining the future legal status of the Territory in question. In view of this very special circumstance, we believe that the term "member" in paragraph 5 of the ESCAP terms of reference could be interpreted as comprising the State for the sole purpose of presenting the application for the Territory in question which otherwise would be blocked at least for a considerable time; this could not have been the intention of the framers of the terms of reference. Of course, all members of ESCAP would have to agree to that interpretation.

5. On the basis of the above observations, if this matter is to be pursued, the following steps would need to be considered:

(*a*) A formal application would have to be presented by the State responsible for the international relations of the Territory concerned pursuant to paragraph 5 of the Commission's terms of reference;

(*b*) The Commission would have to consider and take a decision on the application;

(*c*) The Commission would then need to request the Economic and Social Council to amend paragraph 2 of the Commission's terms of reference so as to name the Territory in question in the geographical scope of the Commission. This could be done by a draft resolution from the Commission submitted to the Council;

(*d*) Paragraph 4 of the terms of reference of the Commission would also have to be amended by the Economic and Social Council to include the Territory in question as an associate member.

6. The Council may amend paragraphs 2 and 4 of the Commission's terms of reference at the same time. This would not, however, prevent the Commission from taking a decision on the application for the Territory in question prior to the amendment; the decision of the Commission would only enter into force after the terms of reference of the Commission had been amended by the Council.

11 January 1990

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16. EVENTUALITY THAT THERE MIGHT BE NO AGREEMENT ON THE CANDIDATE FOR THE CHAIRMANSHIP OF THE ECONOMIC AND SOCIAL COMMISSION FOR ASIA AND THE PACIFIC — APPLICABILITY OF RULE 41 OF THE COMMISSION'S RULES OF PROCEDURE — QUESTION WHETHER A MEMBER OF THE COMMISSION MAY INSIST ON A SECRET BALLOT WHEN THERE IS AN AGREED SLATE FOR A CERTAIN REGION AND THE NUMBER OF CANDIDATES CORRESPONDS TO THE NUMBER OF SEATS TO BE FILLED — RULE 68 OF THE RULES OF PROCEDURE OF THE ECONOMIC AND SOCIAL COUNCIL AND RULE 66 OF THE RULES OF PROCEDURE OF THE FUNCTIONAL COMMISSIONS OF THE ECONOMIC AND SOCIAL COUNCIL

Cable to the Executive Secretary of the Economic and Social Commission for Asia and the Pacific

This is with reference to your note of 31 May 1990 requesting our view on the applicability of rule 41 of the Commission's rules of procedure[22] in the event that there is no agreement on the candidate for chairmanship. Our view is as follows:

Pursuant to rules 13 and 41 of the Commission's rules of procedure, the officers of the Commission are to be elected by secret ballot at the Commission's first meeting of the year. The relevant practice of both the General Assembly and of the Economic and Social Council in this regard confirms that the Commission is permitted not to resort to voting if there is an agreed candidate. Indeed, as you stated, that has been the consistent practice of ESCAP in this respect. This practice may continue so long as consensus is obtained. But whenever consensus is not obtained, rule 41 becomes applicable.

As to whether a member may insist on a secret ballot when there is an agreed slate for a certain region and the number of candidates from that region corresponds to the number of the seat to be filled, the relevant rules of procedure of the Economic and Social Council (rule 68) and of the functional commissions of the Council (rule 66) show that secret ballot may be dispensed with only in the absence of any objection. If there is any objection, election must be done by secret ballot. We are of the view that this rule should also be followed by ESCAP.

1 June 1990

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17. QUESTION WHETHER IT WOULD BE PERMISSIBLE UNDER THE STATUTE OF THE INTERNATIONAL CIVIL SERVICE COMMISSION FOR THE SECRETARY-GENERAL TO RECOMMEND THE APPOINTMENT OF A PERSON AS A MEMBER OF THE COMMISSION FOR THE STATUTORY TERM OF FOUR YEARS WHILE ALSO RECOMMENDING THAT THAT PERSON BE DESIGNATED AS CHAIRMAN FOR A LESSER PERIOD

Internal note

The issue

1. The Director of the Department of Administration and Management requested an opinion on the question whether it would be permissible, under the International Civil Service Commission statute, for the Secretary-General to recommend the appointment of a person as a member of the Commission for the statutory term of four years, while also recommending that that person be designated as Chairman for a lesser period. A reason for this request is an ongoing comprehensive review of the functions and structure of ICSC.

2. We advised that such a recommendation would be legally acceptable for the reasons set out below.

(i) *ICSC statute*

3. Chapter II of the ICSC statute deals with the composition and appointment of the Commission and provides, in relevant part, as follows:

"Article 2

"The Commission shall consist of fifteen members appointed by the General Assembly, of whom two, who shall be designated Chairman and Vice-Chairman respectively, shall serve full-time.

"Article 3

"1. The members of the Commission shall be appointed in their personal capacity as individuals of recognized competence who have had substantial ex-

perience of executive responsibility in public administration or related fields, particularly in personnel managment.

"2. The members of the Commission, no two of whom shall be nationals of the same State, shall be selected with due regard for equitable geographical distribution.

"Article 4

"1. After appropriate consultations with Member States, with the executive heads of the other organizations and with staff representatives, the Secretary-General, in his capacity as Chairman of the Administrative Committee on Coordination, shall compile a list of candidates for appointment as Chairman, Vice-Chairman and members of the Commission and shall consult with the Advisory Committee on Administrative and Budgetary Questions before consideration and decision by the General Assembly.

"2. In the same way, the names of candidates shall be submitted to the General Assembly to replace members whose terms of office have expired or who have resigned or otherwise ceased to be available.

"Article 5

"1. The members of the Commission shall be appointed by the General Assembly for a term of four years and may be reappointed. Of the members initially appointed, however, the terms of five members shall expire at the end of three years, and the terms of five other members at the end of two years.

"2. A member appointed to replace a member whose term of office has not expired shall hold office for the remainder of his or her predecessor's term.

"3. A member of the Commission may resign on giving three months' notice to the Secretary-General."

(ii) *Analysis*

4. Article 5 makes it clear that the General Assembly must appoint members for a term of four years, except when the appointment is made to fill a casual vacancy.

5. Under article 2 the Chairman and Vice-Chairman are selected from among the members. There is no specific requirement that the Assembly must designate a member as Chairman for the full term, although we understand that such has been the practice until now.

6. It should be noted that on 24 July 1979, this Office gave an opinion[23] to the effect that a person who had been appointed a member *and designated Chairman or Vice-Chairman for the four-year period* ought not be able to resign as Chairman or Vice-Chairman and retain membership *without the approval of the General Assembly* (emphasis added). That opinion recognizes that the Assembly could designate a member as Chairman for less than the four-year term.

7. Since the General Assembly may designate a Chairman for less than four years, it follows that the Secretary-General could make a recommendation that the Assembly so do, as long as the Secretary-General follows the consultation procedure set out in article 4.1 of the ICSC statute.

22 October 1990

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18. EXCLUSIVE JURISDICTION OF THE SECRETARY-GENERAL OVER THE GRANTING OF INTERNATIONAL STATUS TO STAFF MEMBERS OF THE UNITED NATIONS

Letter to the Director of the Legal Department of the Ministry of Foreign Affairs of a Member State

The United Nations Office at Geneva has brought to my attention a case concerning respect by the authorities of [name of a Member State] for the international status of a staff member of the United Nations. It is this matter that I should like to raise with you, with a request for your support.

More precisely, the case involves recognition by the competent authorities of your country of the Secretary-General's exclusive jurisdiction over the granting of international status to staff members, more specifically to translators and interpreters holding short-term contracts. One of them, a national of your country, has received several short-term appointments at the United Nations Office at Geneva. In common with his colleagues in that category of United Nations staff, he came under the authority of the United Nations and enjoyed the privileges and immunities that go with that status.

His international status has been questioned by the tax authorities of your country, which claim that his appointments with the United Nations have not been of sufficient duration to qualify him for that status and the respective tax regime.

The decision by those tax authorities to tax income which the staff member in question earned from the United Nations prompted the United Nations Office at Geneva to intervene.

I am transmitting herewith a copy of one of the communications from the United Nations Office at Geneva and a copy of the notification of the rejection of the claim which the staff member concerned received from the competent tax authorities.

In this connection, I should like to confirm that international status is based on criteria which the Secretary-General alone is empowered to define, according to the requirements for the smooth functioning of the Organization which he heads. He is therefore the sole authority competent to determine which categories of employees are accorded international status.

You will agree that if the Secretary-General's competence in this area is recognized, there would be no basis for taxing income which the person in question received from the United Nations as a staff member.

I thank you in advance for intervening on my behalf with the competent authorities of your State.

3 December 1990

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19. RULES APPLICABLE TO THE CONDUCT BY STAFF MEMBERS OF OUTSIDE ACTIVITIES OF A SUBSTANTIVE NATURE

Memorandum to the Officer-in-Charge, Personnel Policy and Services Section, Division of Personnel, United Nations Children's Fund

Introduction

1. This responds to your memorandum of 12 July 1990 whereby you requested our advice in respect of two staff members who wish to engage in activities outside their official duties. The activities at issue concern, in the first case, full membership

on a part-time basis in a Presidential Commission appointed by the President of a Member State to draft a new constitution, and in the second case, membership on the Advisory Board of a nongovernmental organization involved, *inter alia*, in efforts to extend the right to health to all citizens of a given State.

Rules governing the activities of United Nations staff members

2. The basic rules governing the activities of United Nations staff members are set forth in Article 100 (*l*) of the Charter of the United Nations, in regulations 1.2 and 1.4 of the Staff Regulations and rule 101.6 of the Staff Rules, in the Report on Standards of Conduct in the International Civil Service 1954[24] and in paragraphs 4 and 5 of administrative instruction ST/AI/190/Rev.1.

3. Article 100 (*l*) of the Charter of the United Nations lays down the principle of the exclusive responsibility of the international civil service towards the Organization. United Nations staff members are thus precluded from seeking or receiving instructions from any Government or authority external to the United Nations, and from engaging in "any action which might reflect on their position as international officials responsible only to the Organization".

4. Regulation 1.2 of the Staff Regulations of the United Nations provides that:

> "Staff members are subject to the authority of the Secretary-General and to assignment by him to any of the activities or offices of the United Nations. They are responsible to him in the exercise of their functions. *The whole time of staff members shall be at the disposal of the Secretary-General* . . ." (emphasis added)

Regulation 1.4 of the Staff Regulations of the United Nations further provides that:

> "Members of the Secretariat shall conduct themselves at all times in a manner befitting their status as international civil servants. *They shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations* . . ." (emphasis added)

5. Staff members cannot engage in any continuing or recurring outside activity of a substantive nature, unless they have been authorized to do so by the Secretary-General. Authorization may be given only if:

(*a*) The activity is compatible with the proper discharge of the staff member's duties with the United Nations (regulation 1.4; section VII of the Standards of Conduct; paragraph 4 (*a*) of ST/AI/190/Rev.1);

(*b*) The activity does not interfere with the work of the staff member, nor with his ability to accept new assignments (paragraph 4 (*b*) of ST/AI/190/Rev.1);

(*c*) Proper account has been taken of the relationship between the outside activity and the staff member's official duties, and between his emoluments from the United Nations and remuneration received from the outside activities (paragraph 5 of ST/AI/190/Rev.1).

Applicability of the rules governing the activities of staff members to the cases under consideration

A. *Membership in a Presidential Commission*

6. The membership of a UNICEF staff member in a Presidential Commission appointed to draft a new constitution is objectionable on all of the three above-men-

tioned accounts. The drafting of a national constitution is by its very nature a political process which is bound to affect a wide range of national issues, some of which might be highly controversial. Taking part in such a process might impinge upon the independence, integrity and impartiality of the international civil servant, and should therefore not be authorized.

7. In addition, membership in the said Presidential Commission raises questions of remuneration and of interference with the staff member's work. If participation in the Commission is remunerated by the Government of the State concerned, account should be taken of regulation 1.6 of the Staff Regulations which stipulates that no staff member shall accept any honour, decoration, favour, gift or *remuneration from any Government* (emphasis added), except with the approval of the Secretary-General; which approval "shall be granted only in exceptional cases and where such acceptance is not incompatible with the terms of regulation 1.2 of the Staff Regulations and with the individual's status as an international civil servant".

8. In your memorandum you mention that active participation of the staff member in the Presidential Commission would be on a *part-time basis*. Such part-time involvement would be in violation of regulation 1.2 of the Staff Regulations, and of paragraph 4 (*b*) of administrative instruction ST/AI/190/Rev.1, mentioned above.

B. *Membership on the Advisory Board of a non-governmental organization*

9. From the relevant correspondence it is not clear to us what functions the staff member concerned would be required to perform, other than lending his endorsement and his name to the work of a non-governmental organization. In your memorandum, however, you mentioned that it is the intention of the organization in question to use in its letterheads the name of UNICEF next to the name of the staff member concerned.

10. Using the name of UNICEF in such a manner would imply participation of the staff member in the Advisory Board in his *official capacity* as a UNICEF staff member, and would thus associate UNICEF with an activity which is not a part of the approved UNICEF Programme of Cooperation in the country. For this reason it is not appropriate for UNICEF to lend its name, or to be involved, including, in particular, through representation of one of its staff members, in the work of the non-governmental organization concerned in the State in question.

6 September 1990

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20. Request by the Government of a Member State for the services of a staff member to assist it in legal matters — United Nations policy with respect to secondment or loan of staff to a Government — Basis on which the TOKTEN and the OPAS/OPEX programmes operate

Memorandum to the Under-Secretary-General, Department for Special Political Questions, Regional Cooperation, Decolonization and Trusteeship

This refers to your letter dated 6 November regarding a request by the Government of a Member State for the services of a staff member of its citizenship to assist it in legal matters.

It has been the policy of the United Nations not to second or loan staff members to Governments, including the national Government of a staff member. The rationale behind this policy is that a staff member on secondment or loan retains his status as a staff member of the United Nations and, as such, remains subject to article I of the Staff Regulations setting forth the duties, obligations and privileges of United Nations staff members. It would, therefore, be problematic for a staff member on secondment or loan to comply with regulation 1.3 of the Staff Regulations, which enjoins staff not to accept instructions from any Government or from any other authority external to the Organization.

The TOKTEN [Transfer of Knowledge through Expatriate Nationals] programme administered by UNDP, to which you refer, operates on a different basis. Expatriate nationals recruited under the programme are not staff members. The employment contracts they sign with the United Nations define their status as "independent contractors" and specify that they are not to be regarded as "staff members of the United Nations".

The only other programme administered by the United Nations for assistance to Governments is the OPAS/OPEX, established by General Assembly resolutions 1256 (XIII) and 1946 (XVIII). Persons recruited under this programme hold government appointments but, in order to supplement their government salaries, they are also granted United Nations contracts. However, in these contracts it is expressly stated that such persons are not to be staff members of the United Nations.

We therefore consider that the best course of action in this case would be for the staff member to be separated from service, and that the organization should at the same time undertake to use its best efforts to reappoint him. The person could then be engaged under the TOKTEN or the OPAS programmes.

14 November 1990

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21. Claim of the right of authorship by a former staff member of the United Nations Children's Fund — Rule 112.7 of the Staff Rules of the United Nations

Memorandum to the Officer-in-Charge, Personnel Policy and Services Section, Division of Personnel, United Nations Children's Fund

1. This responds to your memorandum of 1 June 1990 requesting our advice on a claim by a former staff member of the United Nations Children's Fund of the right of authorship for three books she wrote during the performance of her functions as a UNICEF official between 1978 and 1980.

2. We note that the books in question have already been published through an arrangement between UNICEF and a local publisher in a Member State. We therefore assume that the question of copyright in those books has already been settled and that the requisite copyright symbol appropriately appears on the inside cover of each book claiming such rights for the United Nations.

3. However, even if the copyright notice was not inserted in the published books, we still consider that it is the United Nations (UNICEF), and not the person concerned, which is entitled to the rights of authorship. The books were prepared as part of her official duties, when she was employed by UNICEF, and thus the proprietary rights in the books must be determined in accordance with the appropriate provi-

sions of the Staff Rules and Regulations of the United Nations, in particular rule 112.7 entitled "Proprietary rights", which reads:

> "All rights, including title, copyright and patent rights, in any work performed by a staff member as part of his or her official duties shall be vested in the United Nations."

4. In the light of the clear policy stated in rule 112.7, there is no doubt that all proprietary rights in the three books which the person concerned wrote while employed by UNICEF as part of her official functions belong to the United Nations. We suggest that the person in question be so informed, in response to her claim, and that, if the copyright notice in the name of the United Nations was not inserted in the first edition of the books, it be included in all subsequent reprints thereof.

11 June 1990

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22. CLAIM BY A FORMER UNITED NATIONS STAFF MEMBER ON ACCOUNT OF AN ACCIDENT ON UNITED NATIONS PREMISES — QUESTION WHETHER THE LOCAL COMPENSATION LAW IS APPLICABLE WITHIN THE UNITED NATIONS HEADQUARTERS DISTRICT — RELEVANT PROVISIONS OF THE AGREEMENT BETWEEN THE UNITED NATIONS AND THE HOST COUNTRY — PROVISIONS OF THE STAFF RULES AND REGULATIONS OF THE UNITED NATIONS GOVERNING COMPENSATION IN THE EVENT OF DEATH, INJURY OR ILLNESS ATTRIBUTABLE TO THE PERFORMANCE OF OFFICIAL DUTIES ON BEHALF OF THE UNITED NATIONS — NON-APPLICABILITY OF NATIONAL LABOUR LAWS

Letter addressed to a Workers' Compensation Board in a Member State

Reference is made to your letter of 10 July 1990 whereby you requested the United Nations to provide information with respect to compliance with section 50 of the New York Workers' Compensation Law. We note that your letter refers to a former United Nations staff member who met with an accident on 31 October 1989.

The applicability of the New York Workers' Compensation Law within the United Nations Headquarters district must be considered in the light of the Agreement between the United Nations and the United States of America Regarding the Headquarters of the United Nations.[25] Section 8 of the Agreement provides that the United Nations is empowered "to make regulations, operative within the headquarters district, for the purpose of establishing therein conditions in all respects necessary for the full execution of its functions. *No federal, state or local law or regulation of the United States which is inconsistent with a regulation of the United Nations authorized by this section shall, to the extent of such inconsistency, be applicable within the headquarters district.*" (emphasis added)

Pursuant to section 8 of the Headquarters Agreement and to Article 101 (1) of the Charter of the United Nations, the General Assembly established the Staff Rules and Regulations of the United Nations and the Secretary-General promulgated Staff Rules governing, *inter alia*, compensation in the event of death, injury or illness attributable to the performance of official duties on behalf of the United Nations.[26] Accordingly, any United States legislation which is inconsistent with the above-mentioned regulations and rules should, pursuant to section 8 of the Headquarters Agreement, be considered inapplicable within the United Nations Headquarters district.

The freedom of international organizations — of which the United Nations is the most notable example — to enact their own regulations and rules governing conditions of service, and the non-applicability thereto of national labour laws, was recognized in the Case of *Broadbent v. Organization of American States* (628 F.2d27 (D.C. Cir. 1980)).[27] The Court of Appeals for the District of Columbia Circuit held, in connection with the question of immunity from suit, that:

> "The United States has accepted without qualification the principles that international organizations must be free to perform their functions and that no member State may take action to hinder the organization. The unique nature of the international civil service is relevant . . . An attempt by the courts of one nation to adjudicate the personnel claims of international civil servants would entangle those courts in the internal administration of those organizations. Denial of immunity opens the door to divided decisions of the courts of different member States passing judgement on the rules, regulations and decisions of the international bodies. Undercutting uniformity in the application of staff rules or regulations would undermine the ability of the organization to function effectively" (at pages 34-35).

As to the case in question, the claimant was at the time of the alleged accident a United Nations staff member. Under section IV of appendix D, she has the right to submit, within four months of the accident, a claim for compensation to the Advisory Board on Compensation Claims (ABCC). Our enquiries with ABCC revealed that the person in question has indeed submitted a claim for compensation, which claim is being currently processed by the Board.

27 August 1990

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23. Petition by a company for an order staying the arbitration commenced by the United Nations — Immunity of the United Nations from every form of legal process under the Convention on the Privileges and Immunities of the United Nations

Letter to a Justice of the Supreme Court of New York

I wish to refer to the petition by a company for an order staying the arbitration commenced by the United Nations, and the documents accompanying that petition, copies of which were mailed to the United Nations by the attorneys for the petitioner.

In that connection, I wish to direct Your Honour's attention to the fact that the United Nations is immune from every form of legal process under the Convention on the Privileges and Immunities of the United Nations (hereinafter referred to as "the Convention"),[28] to which the United States is a party, and that the United Nations also enjoys immunity under the United States International Organizations Immunities Act (hereinafter referred to as "the Act"). The immunity of the United Nations was also expressly acknowledged and reserved by the company concerned and the United Nations in the contract containing the arbitration clause which is the subject of the petition by the company (see article VIII, section 18.2, of the contract). I also wish to inform Your Honour that, because of the immunity of the United Nations, I have returned the documents referred to in the preceding paragraph to the attorneys for the petitioner.

Without prejudice to or in any way waiving the immunity from legal process of the United Nations, which immunity is hereby expressly reserved, I should like to bring to Your Honour's attention the fact that the arbitral tribunal to be constituted under the auspices of the Arbitration Association of the United States in the arbitral proceedings instituted by the United Nations is the forum to deal with the issues raised by the company, and that the United Nations has agreed in the contract to be bound by any determination of the arbitral tribunal on those issues. Providing for arbitration of disputes thus fulfils the obligation placed on the United Nations by articles VIII, section 29 of the Convention to "make provisions for appropriate modes of settlement of: (*a*) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party. . ." .

12 December 1990

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24. PRACTICE OF THE UNITED NATIONS WITH RESPECT TO THE APPLICATION OF VALUE-ADDED TAX TO PURCHASES OF GOODS AND SERVICES FOR OFFICIAL USE — ARTICLE II, SECTION 8, OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS — QUESTION WHETHER STAFF MEMBERS ENJOY PERSONAL EXEMPTION FROM SUCH TAXES IN RELATION TO PURCHASES OF GOODS AND SERVICES NOT INTENDED FOR OFFICIAL UNITED NATIONS USE

Memorandum to the Senior Policy Officer (Legal), Division of Personnel, United Nations Development Programme

1. I wish to refer to your memorandum of 22 February on the value-added tax (VAT) applied in (name of a Member State).

2. In United Nations practice, VAT is deemed to be an indirect tax within the meaning of article II, section 8, of the Convention on the Privileges and Immunities of the United Nations, to which the Member State concerned acceded on 23 December 1949. Section 8 of the Convention provides, *inter alia*, that "when the United Nations is making *important purchases for official use* of property on which . . . duties and taxes have been charged or are chargeable, Members will, whenever possible, make appropriate administrative arrangements for the remission or return of the amount of duty or tax" (emphasis added). While the language of section 8 does not place any obligations on States regarding the remission or return of duty or tax, the practice of Member States parties to the Convention shows that remission or return of indirect taxes on important purchases of goods and services for official use is generally granted. In this regard, either an administrative arrangement is made by the local United Nations office with the national tax authorities or a formal exchange of letters is concluded between the United Nations and the Member State concerned.

3. While in general the practice described in paragraph 2 above is followed by many Member States, it should be noted that some have declined to make the administrative arrangements referred to in section 8 of the Convention. No clear pattern emerges from the practice in Latin America.

4. The relevant provisions of the Convention do not provide for personal exemption from such taxes for staff members or for reimbursement of such taxes paid by staff members for the purchase of goods and services not intended for official use by the United Nations. However, the Government of one Member State recently decided not only to reimburse VAT payments made by the Organization but also VAT

payments on personal purchases made by staff members and their families, other than its nationals serving in this country.

6 March 1990

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25. LIMITATION IMPOSED IN A MEMBER STATE ON EXEMPTION FROM PAYMENT OF VALUE-ADDED TAX ON PURCHASES MADE BY THE UNITED NATIONS DEVELOPMENT PROGRAMME FOR THE CONSTRUCTION OF THE UNDP OFFICE BUILDING IN THE STATE CONCERNED — UNITED NATIONS POLICY AND PROCEDURE WITH RESPECT TO THE PAYMENT OF VALUE-ADDED TAX — ARTICLE II, SECTION 8, OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

Memorandum to the Chief, Treasury Section, Division of Finance, United Nations Development Programme

1. I wish to refer to your memorandum of 7 May 1990 on the tax treatment applied to UNDP in (name of a Member State).

2. Under the terms of the note verbale, dated 31 January 1989, addressed to the Minister of Construction and Urban Affairs by the Ministry of Finance of the Member State in question, the exemption from payment of value-added tax (VAT) granted to UNDP is limited to "the alterations to the building where the Mission of UNDP is located". In the note verbale of 23 February 1989 addressed to the UNDP Resident Representative by the Ministry of Construction and Urban Affairs, it is indicated that the exemption authorized related only to non-imported goods and services purchased for the construction of the UNDP office building in the State concerned and that such authorization was valid only during the period of the construction.

3. We assume from the first paragraph of your memorandum that UNDP is not normally exempt from VAT on any purchase made in the State in question. If that assumption is correct, you may wish to bring to the attention of the relevant authorities the general policy of the United Nations with respect to VAT, with a view to resolving any difficulty being encountered by UNDP in this matter.

4. The United Nations generally regards VAT as an indirect tax within the meaning of article II, section 8, of the Convention on the Privileges and Immunities of the United Nations, to which the State concerned succeeded on 8 December 1961. While that section does not provide for an exemption from such taxes, it does oblige Members, whenever possible, to "make appropriate administrative arrangements for the remission or return of the amount of duty or tax" paid on "important purchases for official use". Such appropriate administrative arrangements in the form of, *inter alia*, exchange of letters have been effected between the United Nations and some Member States imposing VAT on purchases made by the United Nations or a body or organ thereof.

5. We would suggest, in the light of the above, that the subject of an exchange of letters between the United Nations and the State in question with respect to reimbursement of VAT paid by UNDP and other United Nations entities operating in this State, be raised with the Government. The Office of Legal Affairs would be willing to provide a draft of such an exchange of letters.

22 May 1990

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26. Imposition of value-added tax on the sale of United Nations Children's Fund greeting cards and related materials in a Member State by the National Committee for UNICEF — Question whether UNICEF owns all Greeting Card Operation products until sold and is entitled to reimbursement of value-added tax — Article II, sections 7 and 8, of the Convention on the Privileges and Immunities of the United Nations

Memorandum to the Director, Greeting Card Operation, United Nations Children's Fund

1. This is in reference to your memorandum of 21 June 1990 requesting our assistance in connection with the value-added tax (VAT) imposed on the sale of UNICEF greeting cards and related materials in (name of a Member State) by the National Committee for UNICEF.

2. From the correspondence attached to your memorandum, we understand that the Government in question has refused, since 1987, to grant to the National Committee for UNICEF the exemption from or refund of the VAT the latter used to enjoy on the sale of UNICEF cards and related materials in that country.

3. The relationship between UNICEF and the National Committee is governed by the Recognition Agreement of 1977 and related supplementary agreements. Pursuant to paragraph 8 of the Recognition Agreement, the Committee may "subject to a supplemental agreement, act as sales agent or distributor for the marketing, distribution and sale of products such as greeting cards and calendars available through UNICEF Greeting Card Operation". By virtue of paragraph 5 of the Supplementary Agreement No. 2 of 1983, the National Committee is responsible, *inter alia*, for "the sales of GCO products". Furthermore, paragraph 6 of that same supplementary agreement provides that "UNICEF owns all GCO products until sold and the Committee acts as an agent for UNICEF, the principal, which enjoys the protection of the privileges and immunities of the United Nations". As the GCO and related UNICEF products are, until sold, property of UNICEF, the latter should be considered as making the sales through its agent, the National Committee. As a subsidiary organ of the United Nations, UNICEF enjoys the privileges and immunities provided for in the 1946 Convention on the Privileges and Immunities of the United Nations, to which the State concerned is a party.

4. Section 7 of article II of the Convention provides in subparagraph (*a*) for exemption 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". While there is no express provision on the matter of the value-added tax, this tax and sales taxes in general are dealt with under the provisions of section 8 of the Convention, which entitles the Organization to the remission or return of the amount of duty or tax when "making important purchases for official use of property on which such duties and taxes have been charged or are chargeable". The Convention, furthermore, provides that members "will, whenever possible, make appropriate administrative arrangements for the remission or return of the amount of duty or tax".

5. It should also be emphasized that UNICEF Greeting Card Operation sales constitute an important official activity of UNICEF and are significantly different from sales by national charities inasmuch as the sales are by an international organization and the funds realized are used for international public purposes. The payment of VAT on the UNICEF Greeting Card Operation sales undoubtedly has an adverse effect on the amount realized therefrom by UNICEF and therefore on the purposes such sales serve.

6. In view of the foregoing, UNICEF may, along the lines of this memorandum, request the Government concerned for an exemption from or refund of VAT on the sales of the GCO and related UNICEF products.

11 July 1990

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27. QUESTION WHETHER THE UNITED NATIONS SHOULD CLAIM EXEMPTION FROM EXCISE TAX ON THE SALE OF CHEMICALS WHICH DEPLETE THE OZONE LAYER IMPOSED BY A DOMESTIC LAW ENACTED IN PURSUANCE OF THE MONTREAL PROTOCOL ON SUBSTANCES THAT DEPLETE THE OZONE LAYER — PURPOSE OF THE MONTREAL PROTOCOL

Memorandum to the Chief of the Commercial, Purchase and Transportation Service, Office of General Services

1. This is in reply to your memorandum of 28 September 1990 requesting our advice as to whether the United Nations should be accorded exemption from excise tax on the sale of chemicals which deplete the ozone layer imposed by a domestic law.

2. The Government concerned enacted the above-quoted law in pursuance of the Montreal Protocol on Substances that Deplate the Ozone Layer[29] ("Montreal Protocol"), negotiated as a Protocol to the 1985 Vienna Convention for the Protection of the Ozone Layer.[30] The Protocol entered into force on 1 January 1989 and establishes specific obligations to limit and reduce the consumption and production of chemicals that deplete the ozone layer. The Government also promulgated amendments to the environmental tax regulations relating to the Internal Revenue Code. Furthermore, final and temporary regulations were issued which stipulate that "sales to state and local Governments, to the Federal Government, and to non-profit educational organizations are not exempt from the tax". Under the above legal instruments, Freon #12, which was purchased by and sold to the United Nations, is an ozone-depleting chemical (ODC) which, when sold, is taxed in the amount of $1.37 (base tax amount) per pound. The tax forms part of the purchase price of the ODC.

3. With regard to the question of tax exemption under the Convention on the Privileges and Immunities of the United Nations, section 8 of article II refers specifically to exemption from excise duties and from taxes on the sale of movable and immovable property which form part of the price to be paid. Section 8 provides as follows:

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

The Convention therefore does not accord to the United Nations automatic exemption. However, the Organization is entitled to request that a Government make administrative arrangements for the remission or return of the excise tax if an important purchase for official use is made.

4. It has been a consistent position of the Organization that a purchase constitutes an "important purchase" when (*a*) the amount of tax and the proportion that

amount bears to the total purchase price is sufficient to consider the tax as an undue burden upon the Organization or (*b*) the purchase occurs on a recurring basis.

5. While we note that the tax imposed on the price of Freon #12 amounts to nearly half of the actual product price, we consider seeking remission or return of the tax to be unwarranted for the following reasons.

6. The purpose of the Montreal Protocol is to ensure the control of the production and use of ODCs by the parties to the Protocol. Taxation of the manufacture and consumption of ODCs is generally considered a means to bring about the desired objective. In this regard, we note that the host country regulations specifically exclude normally tax-exempt legal entities from tax exemption, albeit not international organizations. However, we do not think that such omission would support a United Nations request for tax exemption. As pointed out, the Organization is not entitled to exemption or remission; it may only make a request for exemption, which a Member State may accommodate. In this respect, we have reservations about the United Nations making a request. Such a request would be anomalous in that the very Organization which, through the Convention and Protocol, seeks reduction in the use of ODCs, would be attempting to exempt itself from a control measure imposed to secure a reduction. Furthermore, the parties to the Vienna Convention for the Protection of the Ozone Layer as well as to the Protocol are called upon to cooperate with and through international organizations, bodies and agencies in promoting awareness of the environmental effects of the emission of ODCs. It is clearly intended, therefore, that the United Nations cooperate in implementing "control measures" in order to bring about further reductions of production or consumption of ODCs.

7. In the light of the above, it is our view that the Organization in the exercise of its discretion and judgement should not claim exemption from the excise duty in question. In addition, the Buildings Management Service, in pursuance of the objectives of the Protocol, should actively look into the possibility of replacing Freon #12 by other chemicals or reducing its use.

31 October 1990

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28. Taxation of the United Nations Joint Staff Pension Fund in a Member State — Character of the turnover tax, stamp duty tax and other taxes related to the securities activities of the Fund — Article II, section 7 (*a*), of the Convention on the Privileges and Immunities of the United Nations

Memorandum to the Chief, Investment Management Service

1. This is with reference to your memorandum of 25 May 1990 requesting our views concerning the question of imposition of turnover taxes, stamp duty taxes and other taxes which are related to the securities activity of the United Nations Joint Staff Pension Fund (UNJSPF) in (name of a Member State).

2. It is to be noted that imposition of the above-referenced taxes should be considered in the light of the Convention on the Privileges and Immunities of the United Nations. Under article II, section 7 (*a*), of the Convention, to which the State in question acceded without reservation in 1947, the United Nations, the assets, income and other property of the Organization 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".

3. In our view, the taxes in question do not represent "charges for public utility services" and should be considered as direct taxes, since their incidence falls directly on the Organization. The term "public utility services" has a restrictive connotation. It is applicable to particular supplies or services rendered (principally gas, electricity, water and transport) which can be specifically identified, described or calculated. The United Nations has consistently taken this position, which was extensively covered in the *study on Relations between States and intergovernmental organizations*.[31]

4. As for withholding taxes on cash dividends paid on securities, including securities forming part of the assets of UNJSPF, in our view they represent taxes on the dividends and, as such, should also be considered as direct taxes levied on income and assets of the owner of the securities. The fact that the tax is withheld at the source does not convert it into a tax against the corporation as such. Therefore the United Nations is entitled to exemption from the tax in question as well.

11 July 1990

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29. QUESTION OF EXEMPTION FROM CUSTOMS DUTIES FOR ARTICLES IMPORTED FOR SALE BY THE NATIONAL COMMITTEE FOR UNICEF — LEGAL ASPECTS OF THE RELATIONSHIP BETWEEN UNICEF AND THE NATIONAL COMMITTEE FOR UNICEF — OBJECTIVES OF UNICEF GREETING CARD OPERATION — ARTICLE II, SECTION 7, OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

Note verbale to the Permanent Representative of a Member State to the United Nations

The Legal Counsel of the United Nations presents his compliments to the Permanent Representative of (name of a Member State) to the United Nations and has the honour to refer to the question of exemption from customs duties of articles imported into the country for sale by the National Committee for UNICEF.

The Legal Counsel has been informed that the Customs Board had rejected a request by the National Committee for UNICEF to grant exemption from customs duties for UNICEF products on grounds of its alleged inconsistency with the relevant provisions of article II, section 7, of the 1946 Convention on the Privileges and Immunities of the United Nations. In particular, the Customs Board concluded that "articles imported by the National Committee for UNICEF do not appear to be of such nature that they should be considered as imported by UNICEF", and, therefore, the Committee was not "entitled to exemption from customs duties and taxes" under the Convention.

The Legal Counsel would like to take this opportunity to clarify the legal aspects of the relationship between UNICEF and the National Committee for UNICEF, as well as the legal nature and objectives of UNICEF Greeting Card projects.

The relationship between UNICEF and the National Committee in question is governed by the Recognition Agreement of 1977 and the Supplementary Agreements. Pursuant to paragraph 8 of the Recognition Agreement, the Committee could, "subject to a supplemental agreement, act as sales agent or distributor for the marketing, distribution and sale of products such as greeting cards and calendars available through UNICEF Greeting Card Operation". By virtue of paragraph 5 of the 1984 Supplementary Agreement II, the Committee became responsible for "the sales of

GCO products" as well as for the "development, organization of distribution and sales channels". It should be taken into consideration that under the unequivocal terms of paragraph 6 of the latter Agreement, "UNICEF owns all GCO products until sold and the Committee acts as an agent for UNICEF, the principal, which enjoys the protection of the privileges and immunities of the United Nations".

Accordingly, the National Committee should be considered as a sales agent acting for UNICEF. Consequently, the provisions of section 7 of the Convention on the Privileges and Immunities of the United Nations are applicable and, therefore, articles under GCO projects, until sold, are to be considered property of UNICEF, which is an organ of the United Nations.

It should be recalled that section 7 of the Convention provides, in subparagraph (*b*), for exemption from customs duties on articles imported for United Nations *official use*, and in subparagraph (*c*), for exemption from customs duties for all United Nations *publications*. Governments in countries where cards are sold have generally recognized that it would be inappropriate, as a matter of principle as well as law, for a Member State to impose customs duties on UNICEF GCO projects which are internationally determined and financed by contributions from Governments and from private sources. In most cases where the issue has been raised at all, the term "official use" has been interpreted to include UNICEF fund-raising activities, so as to exempt the cards and calendars under paragraph 7 (*b*), or such materials have been treated as "publications" under paragraph 7 (*c*) of the Convention.

In the light of the foregoing observations, the Legal Counsel trusts that the competent authorities of (name of a Member State) will review their position with a view to granting exemption from customs duties for the articles imported into the country by the National Committee for UNICEF.

4 January 1990

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30. QUESTION OF THE SALE IN A MEMBER STATE OF USED VEHICLES BELONGING TO THE UNITED NATIONS DEVELOPMENT PROGRAMME — DOMESTIC REGULATIONS PREVENTING THE UNDP OFFICE FROM DISPOSING OF ITS USED VEHICLES THROUGH COMPETITIVE BIDDING AS PROVIDED FOR IN THE FINANCIAL REGULATIONS AND RULES OF UNDP — ARTICLE II, SECTION 7 (*b*), OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS — RULE 114.35 OF THE FINANCIAL REGULATIONS AND RULES OF UNDP

Memorandum to the Officer-in-Charge, Division for Administrative and Management Services, United Nations Development Programme

1. This is with reference to the memorandum of 23 November 1990 in which the advice of this Office has been requested in connection with a matter involving the sale of used UNDP vehicles in (name of a Member State) following the issuance of a circular dated 25 May 1990 by the Government of the State in question. The circular, which sets out the procedures that must be followed by international organizations, and diplomatic and consular missions in the State concerned, has the effect of preventing the UNDP office from disposing of its used vehicles through competitive bidding as provided for in the Financial Regulations and Rules of UNDP.

2. We have examined this matter in the light of the Convention on the Privileges and Immunities of the United Nations, the application of which to the State in question is provided for in the Standard Basic Assistance Agreement (SBAA) of 18

February 1977 between the UNDP and the said State. An analysis of the relevant provisions of the Convention shows that the resale of United Nations imported articles is not covered by the privileges and immunities of the Organization. Under article II, section 7 (*b*), of the 1946 Convention concerning the privileges that the Organization enjoys with respect to articles imported or exported for its official use, such articles "will not be sold in the country into which they were imported except under conditions agreed with the Government of that country". It is therefore clear that the sale of United Nations imported articles requires the agreement of the Government of the host country concerned.

3. On the other hand, in the case of UNDP, the rules governing the sale of property are contained in the Financial Regulations and Rules of UNDP, specifically in rule 114.35. In the light of that rule, it would seem that in any agreement between UNDP and a Government pursuant to section 7 (*b*) of the 1946 Convention, UNDP must observe the provisions of the above-mentioned rule, i.e., competitive bidding subject to the terms of that rule. Accordingly, the sale of UNDP used vehicles in the State concerned must take into consideration the provisions of the above-mentioned Financial Regulations and Rules. In support of UNDP's position, it might be argued that under article I, paragraph 2, of the SBAA, assistance by UNDP ". . . shall be furnished and received in accordance with the relevant applicable resolutions and decisions of the competent UNDP organs. . ." . The Financial Regulations and Rules of UNDP approved by the Governing Council undoubtedly fall within the meaning of "decisions of the competent UNDP organs".

4. In the light of the foregoing considerations, every effort should be made to persuade the authorities of the State concerned that while UNDP respects the obligation to agree with the Government on conditions for the resale of imported vehicles, for its part the Government must give proper consideration to the Financial Regulations and Rules which call for competitive bidding. In the event that such a *démarche* is unsuccessful, alternative procedures within the meaning of rule 114.35 may have to be considered.

21 December 1990

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31. ADVISORY OPINION OF THE INTERNATIONAL COURT OF JUSTICE OF 15 DECEMBER 1989 ON THE APPLICABILITY OF ARTICLE VI, SECTION 22, OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS IN THE CASE OF A SPECIAL RAPPORTEUR OF THE SUBCOMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES OF THE UNITED NATIONS COMMISSION ON HUMAN RIGHTS — QUESTION WHETHER IN THE LIGHT OF THE ADVISORY OPINION THE MEMBERS AND ALTERNATE MEMBERS OF THE UNITED NATIONS JOINT STAFF PENSION BOARD REPRESENTING THE GOVERNING BODIES OF THE FUND'S MEMBER ORGANIZATIONS, WHO ARE AT THE SAME TIME REPRESENTATIVES OF THEIR STATES TO THE UNITED NATIONS, ARE ENTITLED TO UNITED NATIONS LAISSEZ-PASSER AND MULTIPLE ENTRY VISAS — ARTICLE VII, SECTIONS 24, 25 AND 26, OF THE CONVENTION

Memorandum to the Secretary of the United Nations Joint Staff Pension Board

1. This is with reference to your memorandum of 11 May 1990 requesting an analysis as to the impact of the advisory opinion of the International Court of Justice of 15 December 1989[32] on the applicability of article VI, section 22, of the Convention on the Privileges and Immunities of the United Nations ("the General Conven-

tion") on the status of the members and alternate members of the United Nations Joint Staff Pension Board (UNJSPB) representing the governing bodies of the Fund's member organizations, who are at the same time representatives of their States to the United Nations in New York. In particular you wish to know whether members and alternate members of UNJSPB are entitled to multiple United States entry visas.

2. In paragraph 48 of its advisory opinion, ICJ reflected the information supplied to the Court by the Secretary-General setting out examples of categories of persons considered to be "experts on missions" for the United Nations. The paragraph contains no specific reference to members of UNJSPB, nor does annex I to the written statement submitted on behalf of the Secretary-General. The examples provided can, however, by no means be regarded as exhaustive. They necessarily refer for the most part only to categories in respect of whom a legal question had arisen at one point or another. It is to be noted that members of UNJSPB, in accordance with article 5 of the Regulations of the Board,[33] are elected or appointed in their personal capacities, i.e., not as representatives of States. Considering the fact that ICJ observed, in paragraph 48, that "[i]n addition, many committees, commissions or similar bodies whose members serve, not as representatives of States, but in a personal capacity, have been set up within the Organization", the Court's conclusion that persons so appointed, and in particular the members of these committees and commissions, have been regarded as "experts on missions" within the meaning of section 22 should be considered applicable to the above-referenced categories of members of UNJSPB.

3. The Court further concluded, in paragraph 52 of its advisory opinion, that persons (other than United Nations officials) to whom a mission has been entrusted by the Organization, i.e., experts on missions, are entitled to enjoy the privileges and immunities provided for in section 22 of article VI of the General Convention with a view to the independent exercise of their functions. Experts enjoy these functional privileges and immunities during the whole period of such missions, whether or not they travel. The Court also took the view that these privileges and immunities, which include *inter alia* immunity from personal arrest or detention, "may be invoked as against the State of nationality or of residence unless a reservation to section 22 of the General Convention has been validly made by that State". At present, only two States have made such reservations.[34]

4. In the light of the above observations, the legal status of the Pension Board members concerned may be defined as follows: While performing functions on the Pension Board within the host country, they continue to enjoy the diplomatic immunities laid down in article IV of the Convention in addition to those to which they are entitled as experts on missions for the United Nations. In all other countries, while performing functions in connection with the Pension Board, such members enjoy the privileges and immunities granted to experts on missions under article VI of the Convention.

5. It is to be noted that the advisory opinion does not touch upon the questions of entitlement to hold a United Nations laissez-passer or issuance of multiple entry visas for experts on missions. As to the laissez-passer, this matter is regulated by the provisions of article VII of the General Convention. Pursuant to section 24, the Organization may issue United Nations laissez-passer only to its officials. Experts on missions, according to section 26, are entitled to "have a certificate that they are travelling on the business of the United Nations". The detailed regulations concerning this matter are set out in the "Guide to the issuance of United Nations travel documents".[35] They unequivocally provide that experts on missions are not entitled to United Nations laissez-passer but may be issued United Nations certificates.[36]

6. As regards the question of issuance of multiple entry visas, according to the provisions of sections 25 and 26 of the General Convention, the host country is under an obligation to deal with applications for visas (where required) as speedily as possible. Neither the General Convention nor the Headquarters Agreement of 1947[37] provide for multiple entry visas for any of the categories of persons specified in these agreements, i.e., representatives of Members, officials or experts. (The issuance of multiple entry G-4 visas valid one year for United Nations officials of certain nationalities is carried out by the competent authorities of the host country on the basis of unilateral decisions.)

20 June 1990

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32. Question of the standard of travel applicable to members of the Committee on the Exercise of the Inalienable Rights of the Palestinian People who are appointed to represent the Committee itself at seminars, symposia and other meetings away from Headquarters — Rules contained in Secretary-General's Bulletin ST/SGB/107/Rev.5 governing the payment of travel expenses for members of organs or subsidiary organs of the United Nations

Memorandum to the Deputy Controller, Office of the Controller

1. This is in response to your memorandum of 14 November 1990 requesting the views of this Office regarding the standard of travel applicable to members of the Committee on the Exercise of the Inalienable Rights of the Palestinian People ("the Committee") when attending seminars, symposia and other meetings away from Headquarters. In this regard, we have taken note of the position expressed by the Chairman of the Committee on this matter in his letter to the Controller of 31 October 1990.

2. For the reasons set out in detail in our opinion attached hereto, we are of the view that, in the light of the inherent ambiguities in the relevant legislative texts and of the variations in current practice, it is not possible for this Office to give a general answer as to whether delegations or representatives of the Committee are always, or never, entitled to business-class travel in the above-cited instances. However, after having considered the facts of the present situation in the context of the applicable legal framework, we feel that it would be difficult to deny the Committee Chairman's claim that the members concerned are appointed to represent the Committee itself (and not their respective Governments) at the subject meetings and to perform a number of tasks on its behalf and that, therefore, such members are entitled to travel by air in the class immediately below first-class (i.e., business-class standards). In our opinion, we also reiterate the recommendation made by this Office in previous memoranda that the General Assembly should be asked to provide clarification in respect of the rules governing travel entitlements for such subsidiary organs of the United Nations.

21 December 1990

Legal opinion

A. Factual background

1. This opinion is in response to a memorandum of 14 November 1990 from the Deputy Controller indicating that the Office of the Controller was requested

recently by the Executive Officer for the Offices of the Secretary-General to "confirm the standard of travel applicable to members of the Committee on the Exercise of the Inalienable Rights of the Palestinian People". For our consideration, the Deputy Controller has forwarded a copy of the memorandum that she sent to the Executive Officer, of 21 August 1990, presenting the position of her Office on this matter.

2. In the above-cited memoranda, the Deputy Controller explains that it is clear from General Assembly resolution 3376 (XXX), by which the Assembly established the Committee, that the Committee is composed of representatives of Member States and that the Assembly did not make any exceptional arrangements for the travel of its members. Further, in referring to the current rules governing the payment of travel expenses and subsistence allowances in respect of members of organs or subsidiary organs of the United Nations as presented in ST/SGB/107/Rev.5 of 18 July 1989, she points out that the Committee does not appear in the lists contained in annexes II or III thereto of continuing organs and subsidiary organs whose members are entitled to reimbursement of travel and/or subsistence expenses. On this basis, the Deputy Controller states that, when the Committee holds its meetings in New York, its members are not entitled to either travel expenses or subsistence allowances. On the other hand, she explains that resources are provided under sections 1A and 1B of the proposed programme budget for the biennium 1990-1991[38] "to cover the costs of travel and subsistence of members of the Committee to attend conferences, seminars and other meetings that the Committee considers appropriate to attend" and that a difference of opinion has arisen regarding the standard of travel applicable in such instances. In this regard, the Deputy Controller indicates that a statement of her Office's position was read to the Committee at its 171st meeting on 25 October 1990 and that, subsequently, the Committee Chairman requested, in a 31 October letter to the Controller, a review of their interpretation of the rules in the light of comments made by members and observers of the Committee at that meeting. The Deputy Controller summarizes the respective positions taken on this issue as follows:

> "The position taken by the Committee is that its Chairman and four members represent the Committee rather than their Governments when they travel to such meetings and are therefore entitled to travel in accommodation in the class immediately below first-class (i.e., according to the standards established for committees composed of experts serving in a personal capacity).
>
> "On the other hand, if members of a committee which is composed of representatives of Member States travel in their official capacity as a delegation of that committee, it seems to us that payment of travel expenses should be limited to the cost of economy class accommodation in accordance with paragraph 6 (*a*) of ST/SGB/107/Rev.5. . ."[39] (paras. 6 and 7)

3. As regards the position expressed by the Committee Chairman in his letter, we note that he emphasized that such members of the Committee are designated to attend the seminars, symposia and meetings as representatives of the Committee itself and to perform important tasks on its behalf, in stating:

> ". . . [T]he Committee found it somewhat difficult to understand the interpretation given by your Office to the words 'in their official capacity' regarding the travel of the members of *its* delegations to regional seminars, symposia and other meetings. The Committee considers that its representatives to such meetings are designated by name — usually at the ambassadorial level — by the Committee itself. They do not, therefore, represent their own Governments but the Committee itself, on whose behalf they perform a number of important and sensitive tasks such as chairing all or part of the meetings and drafting the final conclu-

sions and recommendations or guiding the panelists or non-governmental organizations in the drafting of their final documents. Further, when one of the designated ambassadors cannot travel, he/she is usually replaced by the ambassador of another country and not by another member of his/her permanent mission, a fact which clearly shows that the delegates in question are representatives of the Committee and not of their own Governments. . ."

We also note that the Chairman referred to previous practice in expressing his hope that a review by the Controller's Office "will lead to a restoration of the practice followed until recently, which would enable the Committee to continue to carry out its mandated programme of meetings without impediments".

4. In order for this Office to address the question of the standard of travel applicable to Committee members when attending the above-cited meetings away from Headquarters, it is necessary to examine the enabling legislation in respect of the Committee in conjunction with the relevant rules governing travel entitlements.

B. APPLICABLE LEGAL FRAMEWORK

1. Legislation concerning the Committee on the Exercise of the Inalienable Rights of the Palestinian People

5. The General Assembly, in its resolution 3376 (XXX) of 10 November 1975, decided:

"... to establish a Committee on the Exercise of the Inalienable Rights of the Palestinian People composed of twenty Member States to be appointed by the General Assembly at the current session".[40] (para. 3)

It is thus clear from the establishing resolution that the Committee is composed of Member States, and is also a subsidiary organ of the General Assembly. It is further relevant to take into account that the General Assembly, although it has not taken any specific decision regarding travel of the Committee as a whole, has authorized the Committee to send delegations or representatives to conferences and meetings considered by it to be appropriate. Most recently, the Assembly, by its resolution 44/41 A of 6 December 1989, authorized the Committee:

"... to continue to exert all efforts to promote the implementation of its recommendations, *including representation at conferences and meetings and the sending of delegations*, to make such adjustments in its approved programme of seminars and symposia and meetings for non-governmental organizations as it may consider necessary, and to report thereon to the General Assembly at its forty-fifth session and thereafter".[41] (para. 4) (emphasis added)

Moreover, the General Assembly has annually approved budgetary appropriations to cover the costs of travel for Committee members attending such international conferences and meetings. In this regard, the Deputy Controller has noted that the proposed programme budget for the biennium 1990-1991,[42] approved by the General Assembly in its resolutions 44/202 A, B and C of 21 December 1989, specifies, in paragraph 1.53 of section 1.A.7, the resources required for such travel of representatives of the Committee as follows:

"The requirements under this heading ($93,200) provide for the anticipated travel costs of Committee members to international conferences and meetings that the Committee considers appropriate to attend. . . The conferences include those organized by specialized agencies, intergovernmental, governmental and non-governmental organizations that may deal with, among other issues, the question of Palestine."[43]

2. *Rules governing travel entitlements for members of organs or subsidiary organs of the United Nations*

6. While it is clear from the above-cited General Assembly resolutions that authorization has been provided to the Committee to send delegations or representatives to international conferences and meetings, it is necessary — in so far as the Assembly did not address the standard of travel to be accorded — to ascertain whether these Committee representatives are entitled to business-class travel in such instances. In so far as the fundamental principles governing the payment of travel and subsistence expenses are contained in General Assembly resolution 1798 (XVII) of 11 December 1962, it is worthwhile, in addressing the subject question, to examine these principles.

7. As a basic principle, General Assembly resolution 1798 (XVII) provides in paragraph 2 (*a*), that "[t]ravel and subsistence expenses shall be paid in respect of members of organs and subsidiary organs who serve in an individual personal capacity and not as representatives of Governments". The second basic principle established by this resolution is contained in paragraph 2 (*b*) which provides that "neither travel nor subsistence expenses shall be paid in respect of members of organs or subsidiary organs who serve as representatives of Governments". This principle, however, is subject to certain exceptions specified in paragraph 3 of the resolution. Paragraph 3 (*b*) thereof exceptionally provides for the payment of travel and subsistence expenses to the following persons who are authorized by the organ concerned to perform official functions on behalf of that organ:

> "(i) The chairman or the rapporteur of a subsidiary organ who is called upon to present the report of such subsidiary organ to a parent organ;
>
> "(ii) One member of an organ or subsidiary organ serving as its designated representative at meetings of a second organ or subsidiary organ;
>
> "(iii) One representative of a Member State or one alternate participating in a subsidiary organ instituted by the General Assembly or the Security Council and which is required, by a decision of the parent organ, to work away from United Nations Headquarters in the performance of a special task . . ."

Thus, resolution 1798 (XVII), in effect, refers to three different categories:

(*a*) Members of organs and subsidiary organs who serve in an "individual personal capacity and *not* as representatives of Governments": they are entitled to travel and subsistence expenses (para. 2 (*a*));

(*b*) Representatives of Governments serving, in that capacity, as members of organs and subsidiary organs: they are ordinarily not entitled to any travel or subsistence expenses (para. 2 (*b*)), except for those entitled to travel expenses under paragraph 3 (*a*); and

(*c*) Representatives of Governments serving as members of organs and subsidiary organs, who exceptionally act as quasi-representatives of the United Nations organ concerned and are therefore entitled to travel and subsistence expenses (para. 3 (*b*)). (It should be noted (from para. 2 (*b*) and the introduction to para. 3) that the persons in this category are still considered representatives of Governments, although they are entrusted by the organ concerned with specific representational responsibilities.)

8. Subsequently, the General Assembly, by its resolution 2489 (XXIII) of 21 December 1968, reaffirmed the basic principles governing the payment of travel and subsistence costs of members of organs and subsidiary organs as laid down in General

Assembly resolution 1798 (XVII) as well as the basic principles adopted at its 1082nd plenary meeting governing the payment of honoraria to such persons. The Assembly further decided therein to establish additional rules to govern such payments to individuals appointed by organs or subsidiary organs to undertake in their personal capacity the performance of special studies or other ad hoc tasks on behalf of the bodies involved. In this regard, paragraph 3 of the resolution provides as follows:

"*The General Assembly*

"Decides that the following additional rules shall become effective as from 1 January 1969:

"(*a*) A clear distinction shall be drawn between:

"(i) Individuals appointed by organs or subsidiary organs to undertake in their personal capacity the performance of special studies or other ad hoc tasks on behalf of the bodies involved;

"(ii) Experts or consultants appointed by the Secretary-General to assist him in the performance of special studies or other ad hoc tasks entrusted to the Secretariat;

"(*b*) Cases falling under category (i) above shall be governed by the rules established by the General Assembly in its resolution 1798 (XVII) on the payment of travel and subsistence costs of members of organs and subsidiary organs of the United Nations and the decision taken by the General Assembly at its sixteenth session on the payment of honoraria, namely, that neither a fee nor any other remuneration in addition to travel expenses and a subsistence allowance at the standard rate shall normally be payable; . . ."

9. In view of the above, it is important to note that the rules contained in the Secretary-General's bulletin ST/SGB/107/Rev.5 governing the payment of travel entitlements were established pursuant to General Assembly resolution 1798 (XVII) of 11 December 1962,[44] as amended by resolutions 2245 (XXI) of 20 December 1966, 2489 (XXIII) of 21 December 1968, 2491 (XXIX) of 21 December 1968, 41/176 of 5 December 1986, 41/213 of 19 December 1986, 42/214 of 21 December 1987, 42/225 (section VI) of 21 December 1987 and 43/217 (section IX) of 21 December 1988. Paragraph 4 of the Secretary-General's bulletin — corresponding to paragraph 2 (*b*) of resolution 1798 (XVII) — specifies that "[e]xcept as provided in paragraph 3 [thereof], neither travel nor subsistence shall be paid in respect of members of organs or subsidiary organs who serve as representatives of Governments, unless the resolution establishing the organ or subsidiary organ provides otherwise." Paragraph 3 of the bulletin provides that travel and subsistence expenses shall be paid in the following cases:

"(*a*) In respect of members of organs or subsidiary organs who serve as such in their individual personal capacity and not as representatives of Governments;

"(*b*) In respect of individuals appointed by organs or subsidiary organs to undertake in their personal capacity the performance of special studies or other ad hoc tasks on behalf of the bodies involved;

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

(i) The Chairman or the rapporteur of a subsidiary organ who is called upon to present the report of such subsidiary organ to a parent organ;

(ii) One member of an organ or subsidiary organ serving as its designated representative at meetings of a second organ or subsidiary organ;

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

(iv) Members of the Board of Auditors."

The validity of these rules would appear to be beyond question, as paragraph 3 (*a*) is taken verbatim from paragraph 2 (*a*) of resolution 1798 (XVII) and paragraph 3 (*c*) is taken almost verbatim from paragraph 3 (*b*) of that resolution, while paragraph 3 (*b*) is taken verbatim from paragraph 3 (*a*) (i) of General Assembly resolution 2489 (XXIII).

10. In respect of those cases in which travel expenses shall be paid by the United Nations, the bulletin also specifies the standard of travel accommodation applicable to such persons. In this regard, paragraph 6 (*a*) provides:

"Payment of travel expenses by the United Nations will be limited to the cost of economy class accommodation by air or its equivalent by recognized public transport via a direct route, with the following exceptions:

(i) The limit on payment of travel expenses will be the cost of first-class accommodation by air or its equivalent by recognized public transport via a direct route in respect of one representative of each Member State designated as a least developed country attending regular, special or special emergency sessions of the General Assembly;

(ii) The limit on payment of travel expenses will be the cost of accommodation in the class immediately below first-class by air or its equivalent by recognized public transport via direct route in respect of all members of organs or subsidiary organs who serve in their individual capacities, as distinct from those serving as representatives of Governments; and in respect of the individuals referred to in paragraph 3 (*b*) above; . . ."

11. It is apparent that, in cases such as the present, difficulties could arise in the application of paragraph 3 (*b*) of the bulletin in that its language tends to confound the categories referred to in paragraph 7 above, as the individuals appointed "in their personal capacity" to perform certain tasks on behalf of the organ concerned — who are entitled to payment of travel and subsistence expenses and, moreover, *travel at the business-class level* pursuant to paragraph 6 (*a*) (ii) — are actually governmental representatives serving on that organ who are ordinarily not entitled to payment of such costs. In so far as paragraph 3 (*b*) of the Bulletin is general in its wording, and does not limit eligibility to only members of particular bodies, it cannot be said that the business-class travel entitlement provided under paragraph 6 (*a*) (ii), may only be accorded to members of certain designated bodies. Furthermore, as a result of this inherent ambiguity in the rules, it is not unlikely that an organ would request business-class travel for certain of its members in cases where such members, although serving on that organ as representatives of Governments, have been selected by the organ to carry out particular tasks in their individual capacities. The significance of this "loophole" provision is apparent in considering that, under the terms of para-

graph 6 (*a*) of the bulletin, payment of travel expenses by the United Nations is limited to the cost of economy-class accommodation with only three exceptions.

C. CONCLUDING REMARKS

12. In considering the request of the Committee Chairman within the above framework, it is thus relevant to consider whether the present case falls within the spirit of the exception of paragraph 3 (*b*) of the bulletin, i.e., whether the Committee members designated to attend the above-cited international conferences and meetings can be regarded in such instances as "individuals appointed by organs or subsidiary organs to undertake in their personal capacity the performance of . . . ad hoc tasks on behalf of the bodies involved". As regards such an assessment, we would initially state that we do not believe that, in the light of the existing legislative texts and of the variations in current practice, it is possible for this Office to give a general answer either to the effect that such delegations/representatives of the Committee are always entitled to business-class travel or that they are never entitled to business-class travel. In paragraphs 7 and 11 above, and in previous exchanges of memoranda on similar subjects, we have highlighted that the existing legislation on travel entitlements is inherently ambiguous in that it appears to presuppose a clear-cut distinction between "representatives of Governments" and "persons who serve in their individual capacities", which is not always the case. While it may be difficult in certain circumstances — where the organ concerned is composed of representatives of Member States and those persons have been serving as Government representatives — to decide whether one or more of these persons who have been specifically requested by that organ to travel and represent it have been "appointed . . . to undertake in their personal capacity the performance of . . . ad hoc tasks on behalf of the bodies involved", it cannot be said a priori that service of a representative of a Member State on an organ automatically prevents later appointment in a personal capacity; the facts of each case have to be examined.

13. In considering the present situation, it is particularly relevant to take into account: (*a*) the Chairman's letter to the Controller (which refers to the comments in the record of the Committee's 171st meeting) indicating that the members attending the subject conferences/meetings are clearly appointed to represent the Committee itself and to perform a number of important tasks on its behalf, and (*b*) the very particular circumstances created by General Assembly resolution 44/41 A of 6 December 1989 (and resolutions to the same effect issued in previous years) whereby the Assembly authorized the Committee to exert all efforts to send delegations or representatives to such conferences/meetings. In the light of these factors, it is our view that it could be justifiably maintained that the members of the Committee, in attending the subject conferences and meetings, are not serving as "representatives of Governments" but as persons specifically designated by the Committee to represent that organ at forums for the purpose of performing special tasks connected with the mandate entrusted to it by the General Assembly. It could therefore be concluded that, for the purpose of attending such conferences/meetings, the persons concerned should be regarded as serving in their individual capacities and would accordingly be entitled to business-class travel under paragraphs 3 (*b*) and 6 (*a*) of the Secretary-General's bulletin.[45]

14. However, as there is nothing in the record to indicate the clear intention of the General Assembly in respect of the standard of travel to be accorded to Committee members in such instances (i.e., the relevant resolutions being silent on this point),

the Controller may wish to refer this matter to the Advisory Committee on Administrative and Budgetary Questions (ACABQ) for its views, particularly considering that (*a*) ACABQ previously reviewed the general subject of travel entitlements in 1988 (see document A/43/7/Add.8 of 22 November 1988), and (*b*) whichever way the question of the level of travel entitlements for Committee members is resolved could have an effect on the level of entitlements to be accorded to representatives or delegations of other United Nations subsidiary organs of similar composition in comparable circumstances. While it appears to us that the existing legislation grants business-class travel entitlement for the Committee members attending the subject meetings, we feel that it would be appropriate for ACABQ to advise the General Assembly as to whether to confirm this view, instruct otherwise or issue new provisions (e.g., more clearly delineate the "ground rules" governing the extent to which an organ composed of representatives of Member States may designate such persons to serve in their personal capacity to perform tasks on its behalf).

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33. REFUSAL BY A DIPLOMAT TO FOLLOW AN ORDER BY A CUSTOMS OFFICER OF A RECEIVING STATE TO OPEN THE TRUNK OF A DIPLOMATIC CAR — LEGAL STATUS OF THE MEANS OF TRANSPORT OF A DIPLOMATIC MISSION — ARTICLES 22, 30 AND 36 OF THE 1961 VIENNA CONVENTION ON DIPLOMATIC RELATIONS — ARTICLE IV, SECTION 9, OF THE INTERIM ARRANGEMENT ON PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS CONCLUDED BETWEEN THE SECRETARY-GENERAL AND THE SWISS FEDERAL COUNCIL, OF 11 JUNE 1946

Memorandum to the Senior Legal Officer, Office of the Director-General, United Nations Office at Geneva

1. This is with reference to your memorandum of 9 April 1990 in which you seek our opinion on and interpretation of article 36, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations[46] in connection with the refusal by a diplomat to follow an order by a customs officer of the receiving State to open the trunk of a diplomatic car.

2. In our view, such matters should primarily be considered in the context of the provisions of article 22, paragraph 3, and article 30, paragraph 2, of the Vienna Convention rather than those of article 36.

3. Paragraph 2 of article 36 is conceived to regulate an immunity from inspection of the personal baggage of a diplomatic agent. It provides for such inspection only in case there are serious grounds for presuming that the personal baggage contains *inter alia* articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State.

4. It should be noted that the legal status of diplomatic means of transport of the mission is governed by the provisions of paragraph 3 of article 22 of the Convention, which stipulates that ". . . the means of transport of the mission shall be immune from search, requisition, attachment or execution."

5. Pursuant to paragraph 2 of article 30 of the Convention, the property of a diplomatic agent himself also enjoys the status of inviolability. The term "property of a diplomatic agent", among other elements, encompasses his motor vehicle. This interpretation was given in particular in the commentary of the International Law Commission to article 28 of its draft articles on diplomatic intercourse and immuni-

ties, which later became article 30 of the Convention. The Commission, in its report covering the work of its tenth session (1958), stated that "so far as movable property is concerned . . . the inviolability primarily refers to goods in the diplomatic agent's residence; but *it also covers other property such as his motor car* . . "[47] (emphasis added)

6. Therefore, in the light of the foregoing clarifications, we are of the opinion that a motor vehicle belonging either to the mission or to a diplomatic agent should enjoy immunity from search as well as other immunities associated with inviolability (for example, requisition, attachment, execution). Consequently, a request to open the trunk of a diplomatic car seems to be at variance with the provisions of the Vienna Convention on Diplomatic Relations referred to above.

7. The above-mentioned provisions are applicable to the mission staff at Geneva by virtue of the obligations of Switzerland pursuant to article IV, section 9, of the Interim Arrangement on Privileges and Immunities of the United Nations concluded between the Secretary-General of the United Nations and the Swiss Federal Council of 11 June 1946.[48] Section 9 (*g*) provides that representatives of Member States shall enjoy "such other privileges, immunities, and facilities . . . as diplomatic agents enjoy . . .". This general clause should be considered as encompassing all pertinent norms regulating the diplomatic status as codified in existing international agreements.

30 April 1990

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34. CONSULTANTS, FELLOWS AND EXPERTS OF THE UNITED NATIONS INSTITUTE FOR TRAINING AND RESEARCH APPOINTED UNDER ARTICLE VI, PARAGRAPH 2, OF THE STATUTE OF UNITAR — CLARIFICATION OF THE MEANING OF THE TERMS "OFFICIALS" AND "EXPERTS ON MISSIONS" AS USED IN THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS AND THE RELEVANT ANNEXES OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE SPECIALIZED AGENCIES

Memorandum to the Executive Director of the United Nations Institute for Training and Research

1. This is with reference to our recent telephone conversation and your request that we examine article VI of the statute of UNITAR, as amended in 1988 and 1989,[49] with a view to amending it further, in particular its paragraph 2, to permit consultants, fellows, and experts appointed by the Executive Director to be granted certain privileges and immunities of the United Nations, especially while in travel status. The paragraph in question reads as follows:

> "2. For the purpose of contributing to the analysis and planning of the activities of the Institute or for special assignments in connection with the Institute's programmes of training and research, the Executive Director may arrange for the services of consultants, fellows and experts, who shall not be considered as officials of the United Nations and who shall not be regarded as members of the staff of the Institute or of the United Nations."[50]

2. The Secretariat also obtains the services of consultants and experts who are not "staff members" or "officials" of the Organization.[51] These individuals are employed as contractors under various types of Special Service Agreements. These

Agreements specifically provide that the individual contractor is not an "official" or "staff member" of the United Nations, but that such individual contractor may be given the status of "expert on mission" while travelling on United Nations official business. The usual clause inserted in the Special Service Agreements used by the United Nations reads as follows:

> "Individuals engaged under a special service agreement as individual contractors serve in their personal capacity and not as representatives of a Government or of any other authority external to the United Nations. Individual contractors are neither 'staff members' under the Staff Regulations of the United Nations nor 'officials' for the purpose of the Convention of 13 February 1946 on the privileges and immunities of the United Nations. Individual contractors may, however, be given the status of 'experts on mission' in the sense of section 22 of article VI of the Convention. If individual contractors are required to travel on behalf of the United Nations, they may be given a United Nations certificate in accordance with section 26 of article VII of the Convention."

3. A clause similar to the one quoted above could be incorporated by UNITAR in the contracts it concludes with the consultants, fellows and experts engaged under paragraph 2 of article VI of the UNITAR statute, in which case the purpose contemplated in your request for amending the statute of UNITAR in order to grant the persons in question certain of the privileges and immunities enjoyed by United Nations staff members could be achieved without such an amendment. In our view, the process of effecting further amendments to the statute should preferably be avoided until sufficient time has elapsed to permit an informed judgement on its efficacy.

4. Please find attached herewith, for your information, a copy of a note clarifying the meaning of the terms "officials" and "experts on mission" drafted by the Office of Legal Affairs at the request of UNDP and incorporated in UNDP/ADM/FIELD/762 and UNDP/ADM/HQTRS/503 of 17 April 1981.

18 January 1990

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35. LEGAL STATUS OF LOCALLY RECRUITED OFFICIALS OF THE UNITED NATIONS — ALL UNITED NATIONS OFFICIALS ARE EXEMPT FROM TAXES ON THEIR UNITED NATIONS SALARIES AND EMOLUMENTS IRRESPECTIVE OF THEIR NATIONALITY OR RESIDENCE — ARTICLE V, SECTION 18 (*b*) OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

Note verbale to the Permanent Representative of a Member State to the United Nations

The Legal Counsel of the United Nations presents his compliments to the Permanent Representative of (name of a Member State) to the United Nations and has the honour to refer to the question of taxation on salaries of nationals or residents of the State in question employed as United Nations officials.

The Legal Counsel's attention has been drawn to the fact that locally recruited staff members who are nationals or residents of your country are required by the appropriate authorities to pay local income tax on their United Nations salaries and emoluments. Moreover, when travelling on official business, the staff members concerned are not granted the needed exit permits without producing evidence of having paid the taxes. Such actions are at variance with the relevant provisions of the existing

agreements between the United Nations and your country, in particular, the Convention on the Privileges and Immunities of the United Nations,[28] to which your country has been a party since 1972. The Legal Counsel, therefore, wishes to clarify the legal status of locally recruited officials as follows.

Article V, section 18 (*b*), of the above-mentioned Convention stipulates that "[o]fficials of the United Nations shall . . . (*b*) [b]e exempt from taxation on the salaries and emoluments paid to them by the United Nations". The rationale for this exemption is that equality in conditions of service, irrespective of nationality, is essential in the international civil service and that no country should derive any national financial advantage from the presence of international organization staff on its territory.

In this connection it should be noted that the definition of the term "officials" was established by the General Assembly in resolution 76 (I) of 7 December 1946. In that resolution the General Assembly approved "the granting of the privileges and immunities referred to in articles V and VII of the Convention . . . to all members of the staff of the United Nations, with the exception of those who are recruited locally and assigned to hourly rates". This definition allows of no distinction among staff members of the United Nations on the basis of natonality or residence.

Therefore, in the view of the Legal Counsel, the taxation of the salaries and emoluments of locally recruited United Nations officials is wrong in law.

The Legal Counsel trusts that in the light of the foregoing observations the necessary measures will be taken by the appropriate authorities with a view to reconciling the internal domestic regulations and practice of the State concerned with its international obligations referred to above.

30 January 1990

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36. PRIVILEGES AND IMMUNITIES ENJOYED BY SHORT-TERM CONSULTANTS — APPLICATION OF THE HOST COUNTRY REGULATIONS ON MOTOR VEHICLES TO PERSONS ENTITLED TO DUTY-FREE IMPORTATION OF AUTOMOBILES — PROVISIONS OF THE 1954 ECONOMIC AND SOCIAL COMMISSION FOR ASIA AND THE PACIFIC HEADQUARTERS AGREEMENT

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

1. This is with reference to your memoranda of 18 May and 4 July 1990 requesting our comments on several matters concerning the 1954 Economic and Social Commission for Asia and the Pacific (ESCAP) Headquarters Agreement[52] and certain domestic regulations.

2. As to the applicability of article IX, section 21, of the Headquarters Agreement to short-term consultants, it should be noted that according to that section, "those persons who, *without being officials of the ECAFE,*[53] are performing missions for the United Nations in relation with the ECAFE in Thailand, shall enjoy the privileges and immunities specified in section 17 of article VIII" (emphasis added). It should also be noted that the expression "officials of the ECAFE" is defined in article I, section 1 (*h*), as "all staff members of the United Nations Secretariat, other than manual workers locally recruited, *who are at any time working with the ECAFE,* and

whose names are communicated from time to time to the appropriate Thai authorities" (emphasis added). Consequently, section 21, referring to persons not being United Nations staff members, should be considered as applicable to short-term consultants, who are accordingly entitled in the host country to the privileges and immunities specified in section 17 of the Headquarters Agreement. It is understood that the relevant provisions of that section do provide for exemption from taxation on the salaries and emoluments paid to persons specified in section 21.

3. As regards the issuance of visas to persons within the scope of section 21, these matters are regulated by the provisions of sections 22 and 23 of the Agreement. The host country authorities, therefore, are under an obligation to deal with applications for visas *as speedily as possible* and to grant facilities for speedy travel. Neither the Convention on the Privileges and Immunities of the United Nations[28] nor the Headquarters Agreement provide for multiple entry visas for any of the categories of persons specified in these instruments, i.e., representatives of Members, officials or experts on mission. Usually, the issuance of multiple entry visas is carried out by the competent authorities of the host country on the basis of unilateral decisions.

4. We are inclined to share your interpretation of the provisions of subsection (i) of section 17 of the Headquarters Agreement. That subsection consists of two separate basic elements. In the first place, it provides for the right to import free of duty furniture and effects, subject to a six-month initial time-limit. Secondly, the importation of automobiles is specifically made subject to the same regulations as are in force for the resident members of diplomatic missions of comparable rank. In this connection, we also agree with your interpretation of the relevant domestic automobile regulations. In the case in question, we suggest that you proceed on the basis of this interpretation. For this purpose you may wish to request a clarification on the part of the host country Government as to the exact legal basis of the six-month limit and its interpretation of the relevant requirements in the light of the Headquarters Agreement.

5. As regards the possible retroactive application of the new domestic automobile regulation of 1989, the Ministry of Foreign Affairs of the host country, in a letter dated 23 November 1989, stated that the 1983 regulation was no longer effective, implying an ineffectiveness as of the date of the coming into force of the new regulation, which, according to article 10 thereof, was 19 June 1989. Staff members who purchased a duty-free vehicle before that date are therefore not encumbered by any additional restrictions imposed by the 1989 regulation.

6. As to the definition of an ESCAP official or staff member in article I, section 1 (*h*), of the Agreement, that definition differs slightly from that of United Nations officials as reflected in General Assembly resolution 76 (I) of 7 December 1946. Under the latter definition, United Nations officials "should include all members of the staff of the United Nations, with the exception of those who are recruited locally and are assigned to hourly rates". With a view to maintaining consistency as between the various United Nations regional organs, this definition should, in our view, be maintained as strictly as possible.

7. Finally, concerning the desirability for all or some parts of the Headquarters Agreement to be renegotiated, we should like to draw your attention to article XII, section 25 (*a*), of the Agreement, under which the Government and the United Nations may enter into such supplementary agreements as may be necessary within the scope of the Agreement. We would suggest that you address to the Government concerned requests for clarification of any matters relating either to the Agreement or

to the domestic regulations. If necessary, such clarifications could be reached by means of an exchange of letters of agreement, in accordance with section 25 (*a*).

13 July 1990

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37. TAXATION BY THE AUTHORITIES OF A MEMBER STATE OF LOCALLY RECRUITED NATIONALS OR PERMANENT RESIDENTS OF THAT STATE EMPLOYED BY THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES — ARTICLE V, SECTION 18 (*c*), OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

Note verbale to the Permanent Representative of a Member State to the United Nations

The Legal Counsel of the United Nations presents his compliments to the Permanent Representative of (name of a Member State) to the United Nations and has the honour to refer to the question of taxation on the salaries and emoluments of locally recruited nationals or permanent residents of the United Nations High Commissioner for Refugee Branch Office.

The Legal Counsel has recently been informed that the competent authorities, following a number of approaches by UNHCR clarifying the United Nations position on taxation of its officials, maintain their position that locally recruited personnel of the UNHCR Branch Office are liable to pay national income tax.

This position cannot be reconciled with the relevant provisions of the existing international agreements and, in particular, with the Convention on the Privileges and Immunities of the United Nations to which (name of the Member State) became a party on 30 July 1956 without making a reservation on the question of taxation.

The Legal Counsel therefore wishes to clarify the legal status of United Nations locally recruited officials and their obligations *vis-à-vis* the internal revenue authorities.

Article V, section 18 (*b*) of the Convention on the Privileges and Immunities of the United Nations stipulates that officials of the United Nations shall be exempt "from taxation on the salaries and emoluments paid to them by the United Nations". The rationale for this exemption is that equality in conditions of service, irrespective of nationality, is essential in the international civil service and that no country should derive any national financial advantage from the presence on its territory of international staff who receive salaries from the Organization which employs them.

For the purpose of section 18 (*b*) of the said Convention, a definition of the term "officials" was established by the General Assembly in resolution 76 (1) of 7 December 1946. In that resolution, the General Assembly approved the granting of the privileges and immunities referred to in articles V and VII of the Convention (i.e., including the provision on exemption from taxation) "to all members of the staff of the United Nations, with the exception of those who are recruited locally *and* are assigned to hourly rates" (emphasis added). Accordingly, this definition allows for no distinction among staff members of the United Nations on the basis of nationality or residence. Therefore, in the view of the United Nations, the taxation of the salaries and emoluments of locally recruited UNHCR personnel not assigned to hourly rates would be wrong in law and inconsistent with the obligations of the Permanent Repre-

sentative's country under the Convention on the Privileges and Immunities of the United Nations.

The Legal Counsel also wishes to draw attention to section 34 of the Final article of the Convention in which it is presumed that "when an instrument of accession is deposited on behalf of any Member, the Member will be in a position under its own law to give effect to the terms of this Convention".

The Legal Counsel trusts that this matter will be reviewed by the competent authorities with a view to reconciling internal domestic legislation and practice with the international obligations referred to above.

27 December 1990

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38. EXEMPTION OF UNITED NATIONS OFFICIALS FROM NATIONAL SERVICE OBLIGATIONS — ARTICLE V, SECTION 18 (*c*), OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS — ARRANGEMENTS SET OUT IN APPENDIX C OF THE STAFF RULES WITH RESPECT TO MILITARY SERVICE IN THE CASE OF GOVERNMENTS WHICH HAVE NOT ACCEDED TO THE EXEMPTION PROVIDED FOR IN THE CONVENTION

Memorandum to the Under-Secretary-General, Department of Administration and Management

1. I wish to refer to the memorandum of 27 August 1990 concerning national service obligations of United Nations officials.

2. Although the Convention on the Privileges and Immunities of the United Nations[28] provides in article V, section 18 (*c*), that officials of the United Nations shall "be immune from national service obligations", a formal reservation with respect to that section was made by (name of a Member State) when depositing its instrument of accession on 29 April 1970. The Member State in question stated that section 18 (*c*) shall not apply with respect to its nationals and aliens admitted for permanent residence. Accordingly, the Member State concerned is under no legal obligation either to cancel or to defer any national service obligation incumbent upon a United Nations official.

3. Arrangements relating to military service in the case of Governments which have not acceded to the exemption provided for in the Convention are set out in appendix C of the Staff Rules. While paragraph (*b*) of appendix C provides that requests to Governments to defer or exempt staff members shall be made by the Secretary-General, such requests can, of course, be made by officials to whom the Secretary-General has delegated authority in the area of personnel administration. In the present case, if a request is made, the letter could be signed by the Executive Director of UNICEF.

4. While this Office has no further comment to make on the proposed draft letter, we would suggest that, before making a formal request, UNICEF might consider making an informal approach through the Mission of the Member State in question. Should the official concerned be called for reserve duty, certain administrative implications follow under appendix C.

29 August 1990

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

Legal opinions of the secretariat of the United Nations Industrial Development Organization (Issued or prepared by the Legal Service)

1. UNITED NATIONS SANCTIONS AGAINST IRAQ — SHIPMENT OF EQUIPMENT TO A PROJECT IN IRAQ — *FORCE MAJEURE*

Memorandum to the Chief, Purchase Section, Department of Administration

1. I refer to the routing slip dated 17 August 1990 asking for advice with respect to a purchase order to a member State firm concerning equipment to be delivered to a project in Iraq. My comments are as follows.

2. Security Council resolution 661 (1990) of 6 August 1990 reads in part:

"*The Security Council*.

"...

"*Acting* under Chapter VII of the Charter [of the United Nations],

"...

3. *Decides* that all States shall prevent:

"...

"(*c*) The sale or supply by their nationals or from their territories or using their flag vessels of any commodities or products, including weapons or any other military equipment, whether or not originating in their territories but not including supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs, to any person or body in Iraq or Kuwait or to any person or body for the purposes of any business carried on in or operated from Iraq or Kuwait, and any activities by their nationals or in their territories which promote or are calculated to promote such sale or supply or such commodities or products;

"...

"5. *Calls upon* all States, including States non-members of the United Nations, to act strictly in accordance with the provisions of the present resolution notwithstanding any contract entered into or licence granted before the date of the present resolution;"

3. This resolution constitutes *a decision* of the Security Council in accordance with Article 39 of the Charter of the United Nations, which is binding on all States. All States are therefore under an international legal obligation to take measures to prevent the activities listed in subparagraph (*c*) above.

4. Under embargo legislation of the State concerned issued in compliance with the Security Council resolution, the shipment of the equipment in question to Iraq by the member State firm would be illegal and will not be effected, as I am informed.

5. As far as UNIDO is concerned, it is in accordance with its Constitution a subject of international law. As such — and as an international organizaton of the United Nations system — it has to comply with decisions of the Security Council that are binding on all States, including UNIDO's member States, even if the resolution does not specifically address international organizations. It follows that UNIDO may not undertake any activity in furtherance of the activities banned by the Security

Council or request others to commit such activities. In the case at hand, therefore, UNIDO may no longer request that the equipment be shipped.

6. Regarding UNIDO's contractual relationship with the firm concerned and the question whether UNIDO could invoke clause VIII of the General Conditions governing the purchase order dealing with *force majeure,* I should like to comment as follows:

(*a*) It seems that the requirements of the first sentence of clause VIII are fulfilled, as the inability to ship the goods is due to "laws or regulations" which neither party is able to overcome. However, if I understand it correctly, the Vendor has only telephoned UNIDO but has not invoked *force majeure* in writing as required under the second sentence of the clause. Once the Vendor has submitted the required information, "UNIDO shall then have the right to terminate the contract by giving in writing seven days notice of termination to the Vendor". This does not mean that UNIDO has to terminate the contract at the present time since UNIDO may agree with the Vendor on any other course of action and UNIDO, in particular, may request the Vendor to preserve (store) the goods at a reasonable cost. Therefore, before considering termination, I suggest that the relevant service of the Department of Administration, as appropriate in consultation with the substantive section, assess whether the goods are of a nature that they could be stored for some time so that if the economic embargo by the United Nations against Iraq is lifted and the corresponding regulations of the State concerned are abolished, the goods can be delivered without further delaying the project. In this case the reasonable storage charges would be paid by UNIDO.

(*b*) In this connection I would like to recall clause 11 of annex A, General conditions of contract, annexed to our Service and Turnkey Contracts, which provides *inter alia* that "the obligations and responsibilities of the Contractor . . . shall be suspended to the extent of his inability to perform them and for as long as such inability continues. During such suspension and in respect of work suspended, the Contractor shall be entitled only to reimbursement by UNIDO, against appropriate vouchers, of the essential costs of maintenance of any of the Contractor's equipment . . ." Only if the Contractor is rendered permanently unable to perform his obligation does UNIDO have the right to terminate. Inability to perform for less than 90 days shall only be deemed temporary inability to perform. It seems therefore that termination of the contract at this point may be a somewhat hasty decision.

(*c*) However, should the substantive section be of the opinion that the set-up of the project would make termination preferable already now, the Vendor must comply with the requirement of the second sentence of clause VIII, i.e., he must invoke *force majeure* as a reason for non-delivery in writing within 15 days of the occurrence of *force majeure*.

(*d*) In any case, at present no funds should be transferred to the Vendor, pending agreement on the final disposition of the mutual obligations of the parties.

29 August 1990

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2. Merger of Democratic Yemen and the Yemen Arab Republic — Unification of the German Democratic Republic and the Federal Republic of Germany

Note to the Director-General

1. Certain legal questions, especially with respect to assessed contributions for 1991, arise in connection with both Yemen and Germany — and should be treated in a consistent manner.

2. The effect of the merger of North and South Yemen [Democratic Yemen and the Yemen Arab Republic] on the obligation to pay assessed contributions is addressed in paragraphs 51 to 53 of the report of the United Nations General Assembly's Committee on Contributions to the General Assembly at its forty-fifth session,[54] presently under way. UNIDO has not, to my knowledge, received any other communication than a copy of the joint communication of the Ministries of Foreign Affairs of the two States, addressed to the Secretary-General of the United Nations. In documentation for the November session of the Industrial Development Board, however, Yemen will be shown as being responsible for the assessed contributions of both North and South Yemen. In taking this step, UNIDO's secretariat will thus take the same position as recommended by the United Nations Committee on Contributions to the General Assembly.

3. In the case of Germany, not only is the assessed contribution of the German Democratic Republic for 1991 substantial but the legal obligation of the united Germany (Federal Republic of Germany) has been called into question by articles 11 and 12 of the Unification Treaty concluded on 31 August 1990 between the Federal Republic of Germany and the German Democratic Republic.[55] In fact, article 12 does not accept that obligations of the German Democratic Republic automatically devolve on the Federal Republic of Germany, but offers discussions or consultations with the treaty partners of the former Federal Republic of Germany, whereupon the united Germany will determine its position. The potential significance of articles 11 and 12 for UNIDO derives from the fact that these provisions have been quoted in a note verbale, dated 4 October 1990, from the Permanent Mission of the Federal Republic of Germany to UNIDO in which it is stated that "the Federal Republic of Germany will proceed in accordance with these provisions". Generally accepted rules of international law do not permit a successor State, or two uniting States, unilaterally to decide the extent to which the (rights and) obligations of a predecessor State shall continue in force, however. It would therefore be legally advisable at the present time to formally recall the applicable rules of international law and on this basis to state the obligation of the Federal Republic of Germany/united Germany to meet the financial obligation of the German Democratic Republic with respect to the assessed contributions for 1991.

4. While international law — as codified in two international conventions[56] — is firm concerning the devolution of debts,[57] succession in respect of a treaty does not take place if "it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation" (article 31.1 of the Vienna Convention on the Succession of States in respect of Treaties). Considering that the German Democratic Republic State Planning Commmission has been dissolved, I would suggest that UNIDO take the initiative to propose consultations on the continued applicability or expiry of the Working Arrangement on

group training concluded in 1987 with the German Democratic Republic State Planning Commission.

25 October 1990

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3. COMMENTS ON A NOTE VERBALE DATED 4 OCTOBER 1990 FROM THE PERMANENT MISSION OF THE FEDERAL REPUBLIC OF GERMANY REGARDING THE CONTINUED APPLICATION OF TREATIES OF THE FEDERAL REPUBLIC OF GERMANY AND THE GERMAN DEMOCRATIC REPUBLIC IN ACCORDANCE WITH THE GERMAN UNIFICATION TREATY

Letter to the Permanent Representative of the Permanent Mission of the Federal Republic of Germany to the United Nations Industrial Development Organization

I have the honour to refer to the note verbale dated 4 October 1990 from the Permanent Mission of the Federal Republic of Germany addressed to the United Nations Industrial Development Organization, which advised that with regard to the continued application of treaties of the Federal Republic of Germany and the treatment of treaties of the German Democratic Republic, following its accession to the Federal Republic of Germany with effect from 3 October 1990, the Federal Republic of Germany will proceed in accordance with articles 11 and 12 of the Treaty of 31 August 1990 between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity (Unification Treaty).[55]

I further have the honour to take this opportunity to refer to the generally accepted, and applicable, rules of international law on the legal succession of States as codified in the Vienna Conventions on Succession of States in respect of Treaties, of 23 August 1978, and on Succession of States in respect of State Property, Archives and Debts, of 8 April 1983.[58] In this connection, I wish to recall that normally the international legal obligations and rights of a predecessor State under treaties in force in respect of a territory at the date of succession do not devolve on the successor State by reason only of the fact that the predecessor State and the successor State have concluded an agreement to that effect.

It is a fundamental rule of general international law that when States unite and so form one successor State, any treaty in force at the date of succession of States in respect of any of them normally continues in force in respect of the successor State and any financial obligation of the predecessor State arising in conformity with international law towards another State, an international organization or any other subject of international law passes to the successor State.

In the light of the foregoing rules, I would like to refer, in particular, to the financial obligation of the German Democratic Republic towards UNIDO arising out of the decision taken by the General Conference of UNIDO at its third session to assess the German Democratic Republic a certain contribution to the organization's regular budget for the fiscal period 1990-1991. While the share for fiscal year 1990 has been received, the share for fiscal year 1991 remains an outstanding financial obligation which under the rules of international law has devolved to the Federal Republic of Germany. Since according to article 15.2 of the Constitution of UNIDO the scale of assessments of member States shall be based to the extent possible on the scale most recently employed by the United Nations, I would anticipate UNIDO's General Conference at its next session, scheduled for November 1991, to assess the

united Germany on the basis of a revised scale meanwhile adopted by the General Assembly of the United Nations.

As far as succession in respect of treaties is concerned, I should like to refer to the Working Arrangement between the State Planning Commission of the German Democratic Republic and the United Nations Industrial Development Organization, which entered into force on the date of its signature, 13 October 1987. Taking into account the changed conditions for the continued operation of the Working Arrangement, which are inherent in the unification of Germany, I wish to propose that consultations be held as soon as possible between the appropriate successor authorities of the Federal Republic of Germany and the secretariat of UNIDO with a view to determining the continued application, adjustment or expiry of said Working Arrangement.

29 October 1990

NOTES

[1] United Nations, *Treaty Series*, vol. 450, p. 81.

[2] S/20412/Add.1.

[3] ST/SGB/132.

[4] "Procedure for the establishment of a firm and lasting peace in Central America", signed at Guatemala City on 7 August 1987 (A/42/521-S/19085, annex).

[5] E/ICEF/1988/AB/L.3.

[6] See the legal opinion published in the United Nations, *Judicial Yearbook, 1979*, p. 178.

[7] For example:

(1) How can the Organization, which will be on an equal footing with its business partner, maintain tax-exempt status in accordance with Section 7 of the Convention on Privileges and Immunities?

(2) How can the Organization assert that information concerning financial or other particulars with respect to the joint venture transactions is privileged in accordance with section 4 of the Convention?

(3) How can the Organization be considered objective if it is committed to assisting a business partner in making profits?

[8] United Nations, *Treaty Series*, vol. 216, p. 132 and vol. 943, p. 178.

[9] United Nations, *Treaty Series*, vol. 331, p. 217 (1948 text).

[10] Section 101 of the Copyright Act defines "derivative works" as works "based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation or any other form in which a work may be recast, transformed or adapted. A work consisting of editorial revisions, annotations, elaborations or other modifications which, as a whole, represents an original work of authorship, is a 'derivative work' ". In that connection, it should be noted that the right to prepare derivative works is one of the exclusive rights of the *copyright owner*, and should not be confused with the right to make adaptations of computer works, which is a right granted to the lawful *owner* of a copy of a computer program (see paras. 24-25 above).

[11] Section 103 of the Copyright Act reads:

> "(*a*) The subject matter of copyright as specified by Section 102 includes compilations and derivative works, but *protection for a work enjoying pre-existing material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.*

"(*b*) *The copyright in a* compilation or *derivative work extends only to the material contributed by the author of such work, as distinguished from the pre-existing material.* The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, and copyright protection in the pre-existing material." (emphasis added)

[12] General Assembly decision of 18 December 1974, on the programme budget for the biennium 1974-1975, para. (g). See also documents A/9608/Add.9 and A/C.5/1604.

[13] General Assembly resolution 2688 (XXV) of 11 December 1970.

[14] *A Study of the Capacity of the United Nations Development System,* vols. I and II (United Nations publication, Sales No. E.70.I.10), known informally as "the Jackson report".

[15] General Assembly resolution 33/202.

[16] See in that regard ST/SGB/177 of 19 November 1982 on "Policies for obtaining the services of individuals on behalf of the Organization"; ST/AI/295 of 19 November 1982 on "Temporary staff and individual contractors"; and ST/AI/297 of 19 November 1982 on "Technical cooperation personnel and OPAS officers".

[17] General Assembly resolution 1240 (XIII), part B, sect. I, para. 1 (b).

[18] General Assembly resolution 2688 (XXV), annex, paras. 63-64.

[19] A/AC.96/187/Rev.4.

[20] *Official Records of the General Assembly, Forty-fourth Session. Supplement No. 12A* (A/44/12/Add.1), para. 6.

[21] *Official Records of the Economic and Social Council, Fifty-ninth Session, Supplement No. 7* (E/5656), annex III, p. 143.

[22] *Official Records of the Economic and Social Council, 1978, Supplement No. 8* (E/1978/48), annex V, p. 95.

[23] United Nations, *Juridical Yearbook, 1979,* p. 176.

[24] International Civil Service Advisory Board, *Report on Standards of Conduct in the International Civil Service 1954* (COORD/CIVIL/5).

[25] Incorporated in the United States Headquarters Agreement, Public Law 80-357, 4 August 1974.

[26] Appendix D to Staff Rules.

[27] See *Juridical Yearbook, 1980,* p. 224.

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

[29] UNEP/IG.53/5/Rev.1. See also *International Legal Materials,* vol. XXVI, No. 6 (November 1987), p. 1550.

[30] International Legal Materials, vol. XXVI, No. 6 (November 1987), p. 1529.

[31] *Yearbook of the International Law Commission,* 1967, vol. II, documents A/CN.4/195 and Add.1, p. 133; see also the supplementary study of 1985, document A/CN.4/L.383/Add.1.

[32] *I.C.J. Reports 1989,* p. 177.

[33] Document JSPB/G.4/Rev.13/Amend.1 of April 1988.

[34] Mexico and the United States of America.

[35] Document PAH/INF.78/2 of 1 June 1978.

[36] Ibid., para. 27 (*a*) and 29-32.

[37] United Nations, *Treaty Series,* vol. 11, p. 11.

[38] *Official Records of the General Assembly, Forty-fourth Session, Supplement No. 6* (A/44/6/Rev.1), vol. I.

[39] In explaining the position of her Office, the Deputy Controller focuses on the reference to "official capacity" in the text of the programme budget in stating:

"According to the text of paragraph 1.104 of the programme budget for the biennium 1990-1991[38] (and comparable paragraphs in prior biennium budgets), 'it is anticipated that five members of the Committee (the Chairman and four other members)

would travel *in their official capacity* to attend a total of six regional seminars as well as symposiums and meetings.' (emphasis added) We assumed that the reference to official capacity was meant to indicate that the members travel as representatives of their Governments and not in an individual capacity . . ."

[40] It should be noted that the Committee's membership was increased from 20 to 23 by the Assembly at its thirty-first session.

[41] In previous years, the General Assembly has provided authorization to the same effect in its resolutions 33/28 B of 7 December 1978 (para. 3), 34/65 C of 12 December 1979 (para. 3), 35/169 C of 15 December 1980 (para. 3), 36/120 A of 10 December 1981 (para. 3), 37/86 A of 10 December 1982 (para. 4), 38/58 A of 13 December 1983 (para. 5), 39/49 A of 11 December 1984 (para. 4), 40/96 A of 12 December 1985 (para. 4), 41/43 A of 2 December 1986 (para. 4), 42/66 A of 2 December 1987 (para. 4) and 43/175 A of 15 December 1988 (para. 4).

[42] *Official Records of the General Assembly, Forty-fourth Session, Supplement No. 6* (A/44/6/Rev.1), vols. I and II.

[43] We also note that paragraph 1.104 of section 1.B.3 (*b*) of the programme budget, dealing with travel of representatives of the Division for Palestinian Rights, requests funds for travel of Committee members to meetings organized by the Division in stating:

"Resources in the amount of $662,700 . . . are requested to cover the costs of travel and subsistence of Committee members and of expert participants attending the meetings organized by the Division . . ."

[44] The General Assembly, in its resolution 1798 (XVII), paragraph 6, "[a]uthorize[d] the Secretary-General to establish such administrative rules and procedures as may be necessary for the implementation of the present resolution."

[45] As for the Deputy Controller's concern regarding certain language in the programme budget text relating to travel by the Committee members, it is our view that such documents, which do not constitute administrative rules and are simply narratives explaining budgetary appropriations, cannot derogate from the language and intent of General Assembly resolutions and rules issued by the Secretary-General; in any event, we do not consider that the language of the relevant sections of the programme budget is inconsistent with such legislative texts (see para. 5 above).

[46] United Nations, *Treaty Series*, vol. 500, p. 95.

[47] *Official Records of the General Assembly, Thirteenth Session, Supplement No. 9* (A/3859), chap. III, part II, sect. I,C, para. (3) of commentary to article 28.

[48] United Nations, *Treaty Series*, vol. 1, p. 163.

[49] A/43/697/Add.1. Article VI of the statute was not materially affected by the 1988 revisions of the statute, made pursuant to General Assembly resolution 42/197; it was separately amended in 1989 to clarify the status of UNITAR full-time senior fellows further to General Assembly resolution 43/201 and the UNITAR Executive Board's deliberations at its twenty-seventh session on the same subject. The text of article VI as amended was approved by the General Assembly by its resolution 44/175 (para. 4).

[50] See annex II to the Secretary-General's report to the General Assembly (A/44/611).

[51] "Staff members" are individuals with letters of appointment issued under the 100, 200 or 300 Series of the Staff Rules and Regulations. The term "officials" as used in the Convention on the Privileges and Immunities of the United Nations has been interpreted by the General Assembly to mean "all members of the staff of the United Nations, with the exception of those who are recruited locally and are assigned to hourly rates" (See General Assembly resolution 76 (I)).

[52] United Nations, *Treaty Series*, vol. 260, p. 35.

[53] ESCAP was originally known as the Economic Commission for Asia and the Far East (ECAFE); its name was officially changed as of 1 August 1974.

[54] *Official Records of the General Assembly, Forty-fifth Sesssion, Supplement No. 11* (A/45/11).

[55] *International Legal Materials,* vol. XXX, p. 457 (1991).

[56] That is, the Vienna Convention on Succession of States in respect of Treaties of 23 August 1978 (for the text, see *Official Records of the United Nations Conference on Succession of States in respect of Treaties, Vienna, 4 April-6 May 1977 and 31 July-23 August 1978,* vol. III, Documents of the Conference (United Nations publication, Sales No. E.79.V.10), document A/CONF.80/31; and *Juridical Yearbook 1978,* p. 106) and the Vienna Convention on Succession of States in respect of State Property, Archives and Debts of 8 April 1983 (for the text, see A/CONF.117/14 and *Juridical Yearbook 1983,* p. 139). The Conventions have not entered into force due to lack of sufficient ratifications. Nevertheless, the Conventions largely codify already accepted rules and were adopted by international conferences of all States after careful preparation by the International Law Commission of the United Nations.

[57] Article 39 of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts simply provides that "when two or more States unite and so form one successor State, the State debt of the predecessor State shall pass to the successor State."

[58] See note 56 above.