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Chapter VI

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

Legal opinions of the Secretariat of the United Nations

(Issued or prepared by the Office of Legal Affairs)

1. QUESTION WHETHER UNITED NATIONS ORGANS AND SPECIALIZED AGENCIES MAY PRODUCE AND DISPLAY THEIR OWN FLAGS — UNITED NATIONS FLAG CODE — USE BY UNITED NATIONS BODIES OF DISTINCTIVE EMBLEMS ON DOCUMENTS AND PUBLICATIONS — ADMINISTRATIVE INSTRUCTION ST/AI/189/ADD.21 — POLICY CONSIDERATIONS AGAINST THE ADOPTION OF SEPARATE FLAGS

Memorandum to the Legal Counsel, United Nations University

1. This refers to your facsimile of 5 March 1992 requesting our views as to whether the United Nations University may produce and display its own flag which will be flown together with the United Nations flag.

2. We note from the attachments to your facsimile that this matter was the subject of previous consultations between our offices, dating back to 1976. In that regard, we note that there was agreement on the fact that article 4, paragraph 2, of the United Nations Flag Code[1] precludes the use of a flag by a United Nations body, *in place of* the United Nations flag. The question, however, of whether a United Nations body, including the University, may be authorized to adopt its own flag to be flown *together with* the United Nations flag was not resolved at that time. It was observed, however, that a proliferation of flags for different United Nations bodies could create confusion in the public mind as to the identity of the body concerned.

3. The use by United Nations bodies of distinctive emblems on documents and publications has been specifically recognized in administrative instruction ST/AI/189/Add.21 of 15 January 1979. Such use, however, is strictly regulated by part II of the instruction as follows:

> "Such bodies may also use distinctive emblems of their own, subject to the following considerations:
>
> "(*a*) On official documents, which must bear the United Nations emblem, the distinctive emblem of the United Nations body may be used in conjunction with the United Nations emblem, provided that the latter is given greater typographical prominence;
>
> "(*b*) On non-official documents, the distinctive emblem may be used alone; it should not be combined with the United Nations emblem."

4. On the other hand, the adoption for public display by United Nations organs and specialized agencies of their own distinctive flags, besides the United Nations flag, is not foreseen in the United Nations Flag Code and Regu-

lations nor has it been sanctioned in any other regulation or instruction. Indeed, when the issue of the adoption by the World Health Organization of a separate flag was raised in 1960, the policy considerations *against* the adoption by specialized agencies of their own flags were set forth in a memorandum by the Secretary-General of 14 March 1960. This opinion provides in relevant parts:

> "... 5. The adoption by each specialized agency at this juncture of its own flag would, in the opinion of the Secretary-General, destroy *the value of the United Nations flag as the symbol of the whole United Nations family.* The proliferation of flags, furthermore, would give rise to confusion in the public mind. There are other practical inconveniences. The display of all flags together would raise the question of precedence; Governments and civil organizations might be discouraged from flying or otherwise displaying the flags on special occasions or for demonstration of support, since the multiplicity of flags would in itself constitute a problem. It may happen that flags of some agencies would be flown while others are not and this could contribute to ill-feeling among the agencies ...
>
> "7. ... He [the Secretary-General] is inclined to the view that, in present circumstances, *the interests of the United Nations family of organizations is better served by symbols of unity than by manifestations of the individuality of each of them* ... " (emphasis added)

5. In our view, the policy considerations against the adoption of separate flags by specialized agencies are even more valid with respect to subsidiary organs of the United Nations, which are not separate legal entities. Furthermore, there is no record in our files that the adoption for public display of a distinctive flag by a United Nations organ has ever been authorized or cleared by the Office of Legal Affairs.

6. In the circumstances, while we would not go so far as to say that the applicable regulations and rules prohibit the use by the United Nations University of a separate flag, we would (for the policy reasons set out above) advise against it. In our view it is very desirable for subsidiary organs of the United Nations to affirm their identity with the United Nations by the use solely of the United Nations flag.

13 March 1992

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2. USE OF THE UNITED NATIONS FLAG ON VESSELS—PRECEDENTS INVOLVING THE DISPLAY OF THE UNITED NATIONS FLAG IN THE FRAMEWORK OF PEACEKEEPING OPERATIONS—SPECIAL CASES INVOLVING VESSELS FLYING THE UNITED NATIONS FLAG

Internal memorandum

1. Please refer to the letter from an official of a Member State dated 26 October 1992, requesting information, *inter alia,* on guidelines for the use of the United Nations flag on vessels.

2. We have researched the subject matter in our files, and the results are set out below.

A. DISPLAY OF THE UNITED NATIONS FLAG IN THE FRAMEWORK OF PEACEKEEPING OPERATIONS

(i) *Vessels of the United Nations Emergency Force*

3. Following the establishment of the United Nations Emergency Force (UNEF) in Egypt, vessels were chartered by the United Nations itself or made available to it by participating and other Governments for the transportation of troops and material by sea. Vessels made available to the United Nations flew either the United Nations flag alone[2] or displayed both their national flag and the United Nations flag.[3] Either one or the other of the above-mentioned practices was observed by vessels chartered by the United Nations itself.

4. Under the authority of the Secretary-General, the United Nations concluded an agreement with the Government of Egypt, by means of exchange of letters dated 8 February 1957, concerning the status of UNEF in Egypt and which, *inter alia*, provided for the display of the United Nations flag on vessels assigned to or owned by the force while within Egyptian territory.[4]

5. As the UNEF obtained title to a Landing Craft, Mechanized (LCM) of 26 tons dead weight and a cargo capacity of 30 tons, which was expected, if required, to sail over the high seas, it was decided that, in such case, the vessel should fly the United Nations flag. This raised the question of jurisdiction for crimes committed on the LCM on the high seas.

6. The Secretariat of the United Nations, in a report on the use of the United Nations flag on vessels prepared for the information of the Second Committee of the 1958 United Nations Conference on the Law of the Sea[5] stated the understanding at that time that the situation was unlikely to create any problems, since the crew would be composed exclusively of members of the Force, who are subject to the jurisdiction of their national States according to the Regulations of the Force.[6] The Secretariat referred also to the exchange of notes between the Secretary-General and the States participating in UNEF, by which the former was given assurance that the States would exercise their jurisdiction with respect to any crime committed by members of their national respective contingents.[7]

(ii) *Vessels of the United Nations Suez Canal Clearance Operation*

7. At the end of 1956 and early in 1957, vessels of at least nine nationalities were assembled together in a salvage fleet under the United Nations Suez Canal Operation (UNSCO). The majority of those vessels had been chartered by the United Nations from private firms, but some were made available to it by the United Kingdom of Great Britain and Northern Ireland or France.

8. As in the case of UNEF, it was necessary to identify the vessels as part of a United Nations project, thus indicating that they were entitled to the protection of the Organization. Therefore, the vessels flew the United Nations flag, although most of them continued to fly their national flags as well. Provisions for the display of the flag of the United Nations can be found either in the agreement between the United Nations and the Government of Egypt regarding the clearance of the Suez Canal, entered into by the parties by means of exchange of letters dated 8 January 1957,[8] or in the contract with the private consortium that provided the vessels to the United Nations.[9]

9. These two early operations (i.e., (i) and (ii) above) established the general principles for the use of the United Nations flag by vessels during peacekeeping operations. The operations undertaken thereafter observed the practice of including provisions for the right of the forces to fly the United Nations flag

on vessels contributed to the peacekeeping operations in the agreement signed with the host country (for instance, United Nations Operation in the Congo (ONUC), United Nations Transitional Assistance Group (UNTAG)). Even though, in exceptional situations, the United Nations flag was flown alone by some vessels, when journeys of short length and duration were involved, this has always been considered an exception and, whenever possible, the United Nations flag is flown alongside the flag of the vessel's country of registration and, in some cases, together with the courtesy flag. There is no precedent of the United Nations authorizing a vessel to fly the United Nations flag alone in the territorial waters of a State without its consent.

B. SPECIAL CASES INVOLVING VESSELS FLYING THE UNITED NATIONS FLAG

(i) *The fishing vessels of the Korean Reconstruction Agency*

10. In 1954, as a contribution to the reconstruction of the fishing industry of the Republic of Korea, the United Nations Korean Reconstruction Agency (UNKRA) had 10 wooden fishing trawlers constructed in Hong Kong. Those ships were expected to navigate to Pusan, Republic of Korea, for delivery to their owners in early 1955. However, the question arose as to what flag should be flown and where the ships should be registered. Because the vessels were owned by UNKRA, neither British nor Republic of Korea registration could be obtained. Additionally, it was deemed necessary to maintain the vessels under United Nations ownership during the trip. Under the authority of the Secretary-General it was then decided that the United Nations itself should undertake the registration and that the vessels should navigate to the Republic of Korea under the United Nations flag.

11. This decision was brought to the attention of the International Law Commission, then involved with the draft Geneva Conventions on the Law of the Sea, by the Legal Counsel of the United Nations, as a precedent for the understanding that, under the regime of the high seas, the right to register vessels was not necessarily confined to States.[10]

12. On 8 May 1956, the Special Rapporteur issued a supplementary report dealing with the right of international organizations to register vessels, in which the following alternatives were submitted to the International Law Commission:

"(*a*) The Members of the United Nations recognize a special United Nations registration which entitles the ship to fly the United Nations flag and to special protection by the United Nations;

"(*b*) The Secretary-General of the United Nations is authorized to conclude, as the need arises, a special agreement with one or more of the Members by which these Members allow the vessels concerned to fly their flag in combination with the United Nations flag;

"(*c*) The Members of the United Nations undertake in a general agreement to extend their legislation to ships concerning which a special agreement between them and the Secretary-General, as referred to in paragraph (*b*), may have been concluded, and to assimilate such ships to their own ships, in so far as that would be compatible with the United Nations' interests;

"(*d*) The Members of the United Nations declare in the same general agreement that they recognize the special agreements between the

Secretary-General and other Members of the United Nations, referred to in paragraph (*b*), and extend to the United Nations all international agreements relating to navigation to which they are a party."

The Special Rapporteur concluded that, should the views expressed in the report be accepted by the Commission, it would seem proper to insert a paragraph in the comment, under article 4 of the articles concerning the regime of the high seas, indicating the views of the Commission on this subject.[11]

13. The supplementary report was discussed by the International Law Commission at its 347th meeting, on 16 May 1956, and the following understanding was expressed:[12]

"The Chairman said that the general consensus of opinion was against the inclusion of an article dealing with the right of international organizations to sail vessels under their flags. With regard to the formula to be included in the comment to article 4, it should be basically the proposal of the Special Rapporteur, which might, however, be broadened by the addition of Mr. Pal's reference to the right of international organizations other than the United Nations to sail ships on the high seas under their own flags and by any other items that Mr. Pal and the Special Rapporteur might judge appropriate. Subject to a decision at a subsequent reading, the Commission would not then vote on the proposal, but would simply take note of it."

(ii) *Evacuation of armed elements of the Palestine Liberation Organization from Tripoli*

14. Another exceptional case of the use of the United Nations flag involved the evacuation of armed elements of the PLO from Tripoli, Lebanon, in December 1983. In that case the Secretary-General had been requested to allow Greek vessels to fly the United Nations flag during their trip to and from Tripoli, where they were expected to take on board the Chairman of the PLO with his troops. Without this form of protection, the PLO considered the evacuation unsafe.

15. Before making his decision, the Secretary-General consulted with the Security Council and the following statement was then made by the Secretary-General at the Security Council consultations:[13]

"I would like to make it clear that the only issue which I have raised is the request for the flying of the United Nations flag, alongside the national flag of the ship concerned, on the ships which would evacuate the armed elements of the Palestine Liberation Organization from Tripoli. The reason for doing this would be on purely humanitarian grounds to facilitate the resolution of a situation which has already cost many innocent lives and created great destruction. The permission to use the United Nations flag would be given to the countries under whose flags the ships involved are operating.

"I understand that the probable number of ships involved would be approximately five to evacuate some 3,000 armed elements with the possible addition of another 1,000 militia, carrying personal weapons only. The probable destinations of the ships would be Tunis and the Yemen Arab Republic. There would be no financial implications and the only purpose would be to provide symbolic protection. The nationalities of the ships concerned and dates of departure would apparently be decided after my reply concerning the use of the flag is received.

"The actual arrangements for this evacuation are obviously primarily a matter for the Lebanese Government and the parties to the agreement that has been negotiated with the help of Saudi Arabia and the Syrian Arab Republic. Yesterday afternoon I spoke on the telephone to President Gemayel and, among other issues, mentioned this problem to him. As I understand it, the Lebanese Government has no objection to the use of the United Nations flag on the evacuation ships, provided, as is the normal practice, the Lebanese flag is also flown in Lebanese territorial waters. I shall naturally remain in consultation with the Government of Lebanon in this matter, which obviously requires its concurrence.

"I need hardly add that any action I take will be in line with the overall objective of respecting the sovereignty and authority of the Government of Lebanon.

"I wish to repeat that the humanitarian factor is the one which concerns me. I have consulted the Security Council because I felt that this was the right thing to do on a matter of such importance.

"In taking my decision, therefore, I would like to have the understanding of the Security Council on this matter."

16. On the same day, the President of the Security Council issued the following statement:[14]

"With reference to the statement made public by the Secretary-General today, and after consultations with the members of the Council, I confirm, as President of the Security Council, that his statement has the support of the members of the Council."

Summary

17. The arrangements for the use of the flag discussed above may be summarized as follows:

(*a*) In the framework of peacekeeping operations, the practice has been to include the right of vessels to fly the United Nations flag in agreements with the host country. In practice, the United Nations flag has been flown with the flag of the State of registration of the vessel, though in exceptional cases the United Nations flag was flown alone.

(*b*) In one case of a United Nations project not related to peacekeeping operations, the United Nations flag was flown alone.

(*c*) The use of the United Nations flag, together with the national flag, on vessels sailing without connection to a United Nations operation, was on one occasion authorized by the Secretary-General, after consultation with the Security Council.

19 November 1992

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3. REQUEST FOR AUTHORIZATION TO USE THE UNITED NATIONS NAME AND EMBLEM IN AN ADVERTISEMENT TO BE PUBLISHED IN THE FRAMEWORK OF AN INFORMATION CAMPAIGN IN A MEMBER STATE

Letter to a government official of a Member State

This refers to your letter of 22 April 1992 requesting authorization to use the United Nations name and emblem on a proposed one-page advertisement to

be published in regional weeklies across (name of a Member State) as part of an information campaign connected with the current process of constitutional renewal in the State in question. We note that the one-page advertisement will contain, in its English version, the question "Who says (name of a specific Member State) is the best country in the world?" in the upper part of the page, with the answer as "The United Nations" set out below together with the United Nations emblem and a reference to "The Human Development Report (1992) . . . published by the United Nations Development Programme", and the Human Development Index in that report. The French version contains the sentence "(tel État Membre) a la meilleure qualité de vie au monde! Selon qui? Les Nations Unies", followed by the identical references as in the English version.

We have carefully considered the proposed advertisements, and the use of the United Nations name and emblem therein, and find that we cannot agree to their publication on several grounds. Firstly, a reader might form the impression, from their format, that the advertisements have been placed by the United Nations itself. Indeed the advertisements nowhere refer to any other organ, entity or department. It would, of course, be inappropriate for the United Nations to discriminate among Member States, categorizing one Member State as "the best country in the world". We note in this connection that Article 2, paragraph 1, of the Charter of the United Nations states: "The Organization is based on the principle of the sovereign equality of all its Members."

Apart from this point, the advertisement seems to us to be inaccurate in some important respects. The answer that it is the United Nations which says that a specific Member State is "the best country in the world" (or "has the best quality of life in the world")[15] is reached on the basis of the Human Development Report (1992) published for the United Nations Development Programme. While UNDP is a subsidiary organ of the General Assembly, it has a distinct identity of its own within the developmental area within which it operates. It has its own Governing Council, its own budget and its own staff, headed by an Administrator. It indeed enjoys virtual autonomy within its area of operations. Accordingly, if the report and its conclusions have to be attributed to any entity, it should be to the United Nations Development Programme. In this connection, we note that the report has not been approved or adopted by any of the principal organs of the United Nations itself.

However, even if attribution to the United Nations Development Programme is considered, we wish to bring to your attention the fact that the foreword to the report, by the Administrator of UNDP, contains the following paragraph:

> "I would like to express my appreciation for the excellent work that the report team has accomplished . . . The views set forth in this report have emerged from the team's professional, frank and candid analysis of the issues. *They do not necessarily reflect the views of UNDP, its Governing Council or other member Governments of UNDP*. The usefulness of a report such as this continues to depend on its professional independence and intellectual integrity." (emphasis added)

Accordingly, attribution of any conclusions in the report even to UNDP would be inaccurate.

Moreover, the use of the United Nations name and emblem is regulated by General Assembly resolution 92(I) of 7 December 1946. According to the in-

terpretation of that resolution which has been consistently adopted, the use of the emblem has, with very limited exceptions, been allowed only on official documents. The Human Development Report (1992) has been published *for* UNDP by Oxford University Press, and does not itself contain the United Nations emblem.

In the circumstances we are sure you would agree that we cannot consent to the use of the United Nations name and emblem as proposed.

29 April 1992

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4. USE OF UNITED NATIONS PREMISES BY GROUPS OTHER THAN OFFICIAL UNITED NATIONS BODIES — AUTHORIZATION GIVEN TO UNICEF UNDER GENERAL ASSEMBLY RESOLUTION 57(I) TO ACCEPT DONATIONS FROM INDIVIDUAL SOURCES — UNDER GENERAL ASSEMBLY RESOLUTION 92(I) THE UNITED NATIONS CANNOT PERMIT THE USE OF ITS NAME OR PREMISES FOR THE PROMOTION OF A COMMERCIAL ACTIVITY

Memorandum to the Chief of the Public Advocacy Unit, United Nations Children's Fund

1. This refers to your facsimile of 17 January 1992 regarding the request by a commercial enterprise to hold a media event on United Nations premises.

2. We understand that the event would consist of a press briefing by the commercial enterprise with substantial media attendance (numerous international television camera crews and journalists) to announce a sponsorship agreement between the enterprise in question and a well-known entertainer and to announce the formation of a foundation of the entertainer's name which will support children's charities around the world. This enterprise has agreed to grant a significant donation to UNICEF at the time of the event for the use of the premises.

3. Administrative instruction ST/AI/335 of 11 July 1986 stipulates that:

> "Meeting rooms and conference facilities at United Nations Headquarters are intended primarily for use by meetings and conferences scheduled under the calendar of conferences approved by the General Assembly or scheduled by the Secretariat. Groups other than official United Nations bodies wishing to meet on United Nations premises must seek authorization, which will be granted only when such meetings are consistent with the purposes and principles of the United Nations and are of a *non-commercial nature*". (emphasis added)

4. Even though the underlying purpose of launching the above-mentioned foundation may well be intended to benefit UNICEF programmes and goals envisaged in the Declaration adopted by the World Summit for Children and the Plan of Action,[16] as you informed us, it remains that the proposed media event as a whole would in fact use the United Nations venue primarily to promote the commercial enterprise, in a highly visible manner, with the appearance of the enterprise logo and name on United Nations premises. The use of United Nations premises for such an event of a primarily commercial nature would be objectionable from a legal standpoint. We would therefore recommend that the event be held at facilities outside United Nations Headquarters.

5. As for UNICEF's own involvement in the proposed event, this Office has advised in the past that fund-raising activities in cooperation with private commercial firms raise fundamental problems for the United Nations as an international organization. Therefore, while UNICEF has indeed been authorized under its founding General Assembly resolution 57 (I) to accept, in addition to voluntary contributions from Member States, donations and gifts from individual sources, the practice in the past has been for UNICEF to accept such donations and gifts through the national committees. We note in this respect that the enterprise's proposal in its letter of 16 January 1992 is extremely vague on the nature of the proposed foundation to assist children's charities around the world and the extent of cooperation between this foundation and UNICEF's worldwide network of national committees.

6. We are in fact left with the distinct impression from the imprecise details of the proposed event that the commercial enterprise's main purpose is to use the United Nations premises to "announce a sponsorship agreement" between the enterprise and the entertainer in question as stated in paragraph 1 of the letter to you. The United Nations cannot under General Assembly resolution 92 (I) of 7 December 1946 permit the use or association of its name, or acronym thereof, or its premises for the promotion of a commercial activity such as is envisaged here. This prohibition still applies even where there are or might be probable benefits to United Nations programmes.

21 January 1992

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5. LIABILITY RESULTING FROM VACCINATION—FINDINGS IN THE *MAZUR V. MERCK* JUDGEMENT ON VACCINES—POSSIBLE IMPLICATIONS OF THE CASE FOR UNICEF IN MASS IMMUNIZATION PROGRAMMES

Memorandum to the Director of the Supply Division, United Nations Children's Fund

1. This concerns your request for advice on the possible implications for UNICEF of the findings in the *Mazur v. Merck* judgement on vaccines[17] which was rendered by the United States Court of Appeals, Third Circuit.

2. Before analysing the case and identifying its principal holdings, we would wish to mention that since the countries recipient of UNICEF-supplied vaccines encompass virtually all major legal systems of the world, an analysis of a case decided in a single jurisdiction cannot possibly cover every aspect of UNICEF's risk exposure in other countries. Nonetheless, in this case it would seem that the basic principles restated are of general application in the area of product liability, so that awareness of its holdings would provide an appropriate guide to UNICEF in the conduct of its procurement practices, for the purposes of minimizing risks of liability.

3. In order to focus more easily on the principles expounded in the case, this opinion will first briefly set out the general legal principles concerning product liability (see paras. 4-10 below) and will then examine the way the courts have applied these principles in the *Mazur* case (see paras. 11-14 below). The possible implications of the case for UNICEF are set out in paragraphs 15 to 22.

4. Product liability under the common law imposes legal liability on manufacturers, sellers and distributors to pay compensation to buyers and consumers for damages or injuries caused by defects[18] in the manufactured goods attributable to negligence. The concept of product liability makes a manufacturer liable for damage resulting from his product which has a defective condition that makes it unreasonably dangerous to the user or consumer. Under modern principles of product liability, liability may be imposed upon any participant in the chain of production to final distribution of products to the ultimate consumers, regardless of the existence of any contractual relationship between the ultimate consumers and such participants. This principle was first articulated by Lord Atkin in *Donoghue v. Stevenson*, a decision which still applies today in English and many other jurisdictions following the common law.[19] Thus, responsibility for injury or damage in a product liability case may rest with the manufacturer, or with a retailer, wholesaler or middleman.

(i) *Strict liability for defective products*

5. Section 402A of the Restatement (Second) of Torts imposes *strict liability*[20] on the seller[21] of any product "in a defective condition unreasonably dangerous to the user or consumer". A "defective condition" can pertain either to the lack of proper preparation/manufacture of the product in question or to the absence of any warning of the danger involved in its use, if the manufacturer or seller of the product had reason to anticipate that danger may result from a particular use. This may happen, for example, in the case of a drug which, being safe only in limited doses, is given to the consumer with no or inadequate warning of this fact. In such a case, the manufacturer may be held liable for failure to warn of the danger, since a product sold without such warning is deemed to be defective, thus giving rise to strict liability claims.[22]

(ii) *"Unavoidably unsafe" products*

6. There are some products which, in the present state of human knowledge, are quite incapable of being completely made safe for their intended and ordinary use. These are especially common in the field of drugs. Thus, a product is "unavoidably unsafe" when, even though the quality standards are met, the product is potentially harmful, and this effect cannot be avoided under the current state of knowledge. The classic example of an "unavoidably unsafe" product is the vaccine for the Pasteur treatment of rabies, which can often result in very serious and damaging side effects when it is injected. Many other vaccines, like the vaccine for poliomyelitis, fall under this category.

7. The manufacturer/seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk. Thus, "unavoidably unsafe" products, when properly prepared and accompanied by proper directions and warning, are not deemed defective, nor are they deemed "unreasonably" dangerous.

(iii) *Duty to warn the physician or another "learned intermediary"*

8. Since the strict liability rule of section 402A is not applicable to "unavoidably unsafe" products that are properly prepared and are marketed accompanied by proper warning, the adequacy of such warning is to be measured

against the standard of care set forth in section 388 of the Restatement (Second) of Torts, dealing with the liability of suppliers of products known to be dangerous for their intended use. Under that section, the supplier has a duty to exercise reasonable care to *inform* those for whose use the product is supplied of the facts which make it likely to be dangerous.[23] Ordinarily, the end user is the consumer but, in the case of "unavoidably unsafe" products, the courts have held that the duty of the supplier to provide adequate warning may be discharged by providing such warning to a "learned intermediary".[24]

9. Since normally "unavoidably unsafe" drugs are available only upon prescription of a duly licensed physician, the duty of the supplier to provide adequate warning may be discharged if provided to the prescribing doctor. The doctor acts as the "learned intermediary" between the manufacturer and the patient, evaluating the patient's needs, assessing the risks and benefits of available drugs, prescribing one, and supervising its use.[25] If the prescribing physician or another "learned intermediary"[26] is sufficiently warned about the potential side effects, the manufacturer cannot be held liable for failure to exercise reasonable care to inform those for whose use the drug is supplied, even if the information given to the learned intermediary is never actually communicated to the vaccinees.

(iv) *The mass immunization exception*

10. In the case of mass immunization, where vaccine is not dispensed by a "learned intermediary", but is administered to "all comers at mass clinics", the courts have formulated different criteria. In those cases, the courts have upheld the principle that "it is the responsibility of the manufacturer to see to it that *warnings* reach the consumer, either by giving the warning itself, or by obligating the purchaser to give the warning."[27] This has become known as the "mass immunization exception" to the learned intermediary rule, and its principal reason is that when vaccines are administered under "mass clinic-like" conditions, it is difficult, if not impossible, to render the type of individualized medical care rendered by the learned intermediary.[28] The mass immunization exception to the learned intermediary rule, essentially, restores the duty of care, which rests always on the manufacturer, to *warn* users of any known or foreseen dangers accompanying the use of the products.

B. FACTUAL BACKGROUND AND THE JUDGEMENT IN THE *MAZUR* CASE

11. In the *Mazur* case, the parents of Lisa Mazur instituted a claim against a vaccine manufacturer (Merck) seeking compensation and punitive damages for failure to warn that the use of its MMR II vaccine against measles could result in serious neurological illness. The MMR II vaccine, produced by Merck, was selected and purchased by the Director of the Philadelphia Health Department based on a recommendation and information from the Centers for Disease Control (CDC), which purchased the vaccines from Merck. At the Morrison School the immunization programme was administered by a registered nurse. Lisa Mazur was inoculated there on 26 February 1982. On 2 November 1983, she was diagnosed with subacute sclerosing panencephalitis (SSPE), a fatal, slowly progressing neurological disease.

12. The district court based its decision on the "learned intermediary rule" and entered summary judgement for Merck on the ground that it had provided an adequate warning to the nurse charged with the administration of the immunization programme at the Morrison School. The district court considered that

a learned intermediary need not be a physician and that the nurse at the Morrison School was acting as a learned intermediary.[29] Therefore, the district court found that Merck had met its duty to warn by making available to the nurse the Food and Drug Administration (FDA)-approved "package circular" describing the risks attendant to the vaccine's use, including mention of the risk of contracting SSPE.[30]

13. The United States Court of Appeals, Third Circuit, affirmed the judgement of the district court but based its holding on different grounds. The Appeals Court did not consider the nurse a "learned intermediary" because of her lack of minimum qualifications and experience. The Appeals Court instead based its holding on the "mass immunization exception", as established in the *Davis v. Wyeth Lab., Inc.*, case (399 F.2d 121), according to which, where vaccine is not dispensed by a learned intermediary, but to all comers at mass clinics, "it is the responsibility of the manufacturer to see that warnings reach the consumer, either by giving warning itself, or by obligating the purchaser to give warning." In this case, however, the Court considered that Merck had satisfied its duty towards the vaccinees by contractually obligating the purchaser of the vaccines to ensure that the vaccine was administered by a physician or to provide meaningful warnings to the vaccinees as to the risks of the vaccination.[31] The Court further held that Merck had adequately informed CDC of the facts which made its MMR II vaccine dangerous, and reasonably relied on CDC to communicate these risks to vaccinees in lay terms.

14. In conclusion, and before proceeding to examine the possible implications for UNICEF of the *Mazur* case, it should be noted that the liability question raised by that case pertains only to failure to provide *adequate* information on the potential side effects of "unavoidably unsafe" products. It does not relate to liability arising from defective products; nor does it relate to cases of strict liability arising from the absence of any warning of the danger involved in the use of products.

C. IMPLICATIONS OF THE *MAZUR* CASE FOR UNICEF

15. The judgement in the *Mazur* case may have implications for UNICEF, since UNICEF's position in mass immunization programmes conducted by Governments with which UNICEF cooperates is similar to the role of CDC, which, in the *Mazur* case, purchased the vaccines from the manufacturer for distribution in the public health sector. UNICEF, like CDC, purchases vaccines from manufacturers and ships them to Governments or UNICEF field offices for use. Furthermore, immunization programmes in the recipient countries are usually carried out in "mass clinic-like" conditions, to which the "mass immunization exception" would be considered applicable (see para. 10 above). In those cases, on the basis of the *Mazur* holdings, the duty to warn vaccinees of any potential dangers in the vaccination drugs would lie with the manufacturer. This duty, according to the *Mazur* case, may be discharged by the manufacturer by showing that, under its contract with UNICEF, as purchaser, UNICEF had been given notice of the dangers entailed in the use of the vaccines and had thus assumed the duty to warn the recipients of the vaccines, that is, the Governments and end users, of these dangers.

16. In this connection, it should be noted that the findings and holdings in the *Mazur* case, though made in a common-law jurisdiction,[32] would be relevant also in civil-law countries. The civil-law systems are traditionally less lib-

eral than the common-law countries in accepting exclusions of liability, especially when the scope of such exclusion clauses is to release one party from liability resulting from its own negligence. Under civil-law doctrine, it could even be argued that it is unimportant who has the duty to inform the consumer of the risks of the product. So long as such information is not given to the consumer, the intermediary who is aware of the risks involved would equally be liable, as the manufacturer, for negligence if he did not discharge his duty of care. *If the manufacturer has, by contract, passed on to UNICEF the duty to warn the end users and UNICEF failed to do so, then UNICEF would run the risk of liability claims without possible recourse to the manufacturer.*

17. In the light of the above, we have examined samples of agreements between UNICEF and Governments, as well as purchase contracts with manufacturers, for the purpose of determining (i) whether they adequately protect UNICEF from direct third-party claims, and (ii) whether UNICEF could obtain relief from manufacturers or UNICEF's insurers in case of such claims.

18. As regards the first point, the UNICEF Basic Agreements with Governments provide that the Government bears all risks of the operations and UNICEF is to be indemnified by the Government concerned in respect of any third-party claims arising out of or in connection with its programmes, including procurement of goods and supplies on behalf of the Government.[33] Therefore, the remedy of end users would, in effect, be limited to submitting their claims to the Government, against which, in most cases, private actions of this kind may be entertained by courts. We know, however, that in case of a major disaster, politically sensitive or financially exorbitant claims, many Governments would lack the resources to pay necessary compensation. In those cases, it would not be too far-fetched to assume that Governments would turn to UNICEF for help for satisfaction of the claims. Additionally, it should be noted that the UNICEF Basic Agreement does not apply in cases of gross negligence by UNICEF, and that, therefore, possible liability should be anticipated where, for example, injury or death resulted from UNICEF's failure to provide Governments with warnings given by a manufacturer, as a result of which the manufacturer and its insurers become judgement-proof.

19. In the light of the above, it appears that the indemnification provision in the agreements concluded between UNICEF and Governments does not adequately protect UNICEF from liability in the event of injury or death attributable to UNICEF's negligence, such as failure to provide sufficient information on potential side-effects of vaccines.

20. As regards the second point, we note that the provisions relating to third-party claims in UNICEF purchase contracts obligate the manufacturer to indemnify UNICEF against third-party claims, *with the exception of those claims that are attributable to the fault or negligence of UNICEF.*[34] Furthermore, our review of the samples existing in our files indicates that purchase contracts do not include any provision whatsoever obligating the manufacturer to obtain and maintain product liability insurance.

21. Accordingly, we consider that the existing contractual arrangements do not provide adequate protection to UNICEF against the form of liability discussed in the *Mazur* case. It may, therefore, be necessary to re-examine those contractual arrangements, with a view to revising them to:

(*a*) Ensure that manufacturers maintain product liability insurance to cover the additional areas of liability raised by the *Mazur* case;

(*b*) Make it clear that vaccines and other drugs purchased by UNICEF shall be clearly labelled by the manufacturers to *warn* of any potentially known and foreseeable dangers and that the duty to do so shall not shift to UNICEF by virtue of the purchase contract;

(*c*) Provide for a minimum general insurance by manufacturers to protect UNICEF and the recipient Governments from product liability claims.

We consider that such provisions might be incorporated in the UNICEF General Terms and Conditions that form an integral part of purchase contracts.

22. Once you have examined this opinion and considered our proposals in paragraph 21 above, we could meet and discuss how best to proceed in this manner so as to ensure that, in the conduct of its procurement practices, UNICEF will be adequately protected from exposure to product liability claims.

17 December 1992

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6. DISTRIBUTION OF THE INTEGRATED MANAGEMENT INFORMATION SYSTEM (IMIS) SOFTWARE AND DATABASE TO OTHER ORGANIZATIONS OF THE UNITED NATIONS SYSTEM — MEASURES TO BE TAKEN TO ENSURE PROTECTION OF THE UNITED NATIONS' RIGHTS IN THE IMIS SOFTWARE, DATABASE AND RELATED DOCUMENTATION

Memorandum to the Chief of the Integrated Management Information System Project, Department of Administration and Management

1. This refers to your letter of 20 January 1992 whereby you requested our advice on measures to be taken to ensure protection of the United Nations' rights in the integrated management information system (IMIS) software and database (hereinafter referred to as the "Product") and related documentation, which is to be made available to other organizations in the common system.[35] We note that a major concern is that, while the Product and documentation are being made available to the organizations themselves, the organizations may be hiring consultants to assist them in reviewing the Product and documentation, and that protection may be necessary vis-à-vis those consultants.

2. With regard to your question concerning copyright, please be advised that international copyright protection of software, databases and documentation is problematic. Such protection is basically dependent on the national laws of a given country, and the extent to which it is given, if at all, varies. There are international conventions regulating copyright, but it is uncertain at present whether unpublished software, databases and documentation are covered by the conventions, except to the extent provided under national law.

3. It may be worthwhile to try to secure copyright protection, where available, in the countries where the Product and documentation are to be used. In this connection, we believe it desirable to ask the organizations to help, both financially and otherwise, in obtaining copyright in those respective countries, as consideration for the supply of the Product and documentation. The feasibility of obtaining copyright protection should be explored through attorneys in those countries specializing in copyright law.

4. In the United States, copyright protection should be secured by placing notice of copyright in the Product and documentation,[36] and registration and deposit of the Product and documentation with the United States Copyright Office.

5. Having regard to the specific problem submitted to us, and to the difficulty of obtaining copyright protection worldwide for the Product and documentation, we believe the best protection is through a licence agreement to be entered into between the United Nations and the United Nations family member to which the Product and documentation are to be made available, which strictly restricts the use thereof by the recipient, its employees and its consultants.

5 March 1992

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7. OWNERSHIP OF THE COPYRIGHTS TO A COMPUTER PROGRAM DEVELOPED UNDER A UNDP/INTERNATIONAL TRADE CENTRE TECHNICAL ASSISTANCE PROJECT—UNDP POLICY ON OWNERSHIP OF INTELLECTUAL PROPERTY RIGHTS—OWNERSHIP OF COPYRIGHTS TO COMPUTER PROGRAMS

Memorandum to the Director of the Division of Technical Cooperation, International Trade Centre

1. Reference is made to your letter of 11 March 1992, whereby you requested our views on the question of ownership of the copyrights to a computer program developed under a UNDP/International Trade Centre (ITC) technical assistance project for Communauté economique de l'Afrique de l'Ouest (CEAO), a West African intergovernmental agency consisting of seven French-speaking countries. We understand that CEAO has requested to be given ownership rights with respect to the computer program, either individually or jointly with the ITC.

A. OWNERSHIP OF INTELLECTUAL PROPERTY RIGHTS—UNDP POLICY

2. It is the long-standing policy of UNDP that intellectual property rights, including copyrights, to work prepared or created in the context of UNDP technical assistance belong to UNDP. The recipient of the project does not obtain these rights; however, unless otherwise agreed by the parties, it is given the right to use the work free of charge. This policy is reflected in article III, paragraph 8, of the UNDP Standard Basic Assistance Agreement (SBAA) with recipient Governments, which reads:

> "Patent rights, copyright rights and other similar rights to any discoveries or work resulting from UNDP assistance under this Agreement shall belong to UNDP. Unless otherwise agreed by the parties in each case, however, the Government shall have the right to use any such discoveries or work within the country free of royalty or any charge of a similar nature."

3. This policy is also set forth in the UNDP Standard Basic Executing Agency Agreement (SBEAA).[37] The SBEAA states in its article VIII:

> "Ownership of patent rights, copyright rights and other similar rights to any discoveries, inventions or works resulting from execution of Projects under this Agreement (hereinafter called the "Patent Rights") shall vest in UNDP, in accordance with the requirements of the Standard Basic Assistance Agreement between UNDP and the Government concerned.
>
> "The Executing Agency shall inform UNDP promptly of any occasion to claim or assert ownership to such Patent Rights, and of the steps it

has taken to secure the Patent Rights. The Executing Agency agrees to take such steps as are necessary, in consultation with UNDP and the recipient Government concerned, to secure the protection of such Patent Rights through registration or otherwise in accordance with applicable law, and to ensure that recipient Governments receive such licences, as necessary to permit them to use or exploit such Patent Rights."

4. The rationale behind this policy is explained in a note by the Administrator of UNDP regarding the above-quoted provision of the SBAA, which states as follows:

"The thrust of the present provision is that the benefits of intellectual property resulting from UNDP assistance under the Agreement should be available to all recipient countries in addition, of course, to the signatory recipient country. Since it is obviously impractical to provide in the Agreement that the rights in question should belong jointly to the 149 States eligible to participate in UNDP, it stipulates that such intellectual property should belong to UNDP but that the signatory Government should have the right to use it within the country free of royalty or any charge of similar nature. Under such an arrangement, the interests of other potential users of the discovery among the membership are represented by UNDP, and the latter is placed in a position to take such steps as may be necessary to make the benefits of the discovery available to the others either by yielding such discoveries into the public domain or taking out appropriate legal protection and licensing public or private enterprises to produce and/or distribute the discovery, etc. The Administrator believes that such an arrangement conforms to and might even be deemed required by the spirit and purposes of the technical assistance programmes of the United Nations, which include among their principal aims the promotion of the transfer of technical knowledge to developing countries through international cooperation."[38]

5. The retention of intellectual property rights by UNDP is therefore an integral part of the technical assistance programmes of the United Nations; it safeguards the interest of the United Nations to secure the widest possible dissemination and use of the works for the common interest of developing countries. This precludes individual entities other than UNDP from acquiring exclusive rights to the works or even joint ownership of rights in the works with UNDP.

B. COPYRIGHTS TO COMPUTER PROGRAM

(i) *Ownership of copyrights*

6. The above policy applies to all UNDP technical assistance projects. In accordance with this policy, and in the absence of any other agreement with CEAO of which we are not aware, ownership of the copyrights to the computer program would belong to UNDP on an exclusive basis. CEAO, as recipient of the project, would not acquire any rights of ownership to the computer program but, in the absence of any agreement to the contrary, would have the right to use the program free of charge.

7. As between UNDP and ITC (the latter being the Executing Agency of the project), the above-quoted provision of the SBEAA would apply, and any copyrights to the computer program resulting from the execution of the project would belong to UNDP. In a memorandum to the Associate Administrator of UNDP on 15 July 1991, the Executive Director of ITC confirmed acceptance

of the SBEAA without any limitation on the applicability of the SBEAA. This memorandum states:

"I am pleased to inform you that the International Trade Centre fully agrees that its relations with UNDP, when serving as Executing Agency of UNDP-funded projects, shall be governed by the above-mentioned Agreement [UNDP Standard Basic Executing Agency Agreement] to the full extent of its applicability."

(ii) *Securing protection of copyrights*

8. Under the SBEAA, ITC is to assist UNDP in securing the protection of the copyrights. Securing protection of the copyrights to the computer program is basically dependent on the national laws of a given country. Although there are international conventions regulating copyrights, it is uncertain at present whether unpublished computer programs are covered by the conventions, except to the extent provided under national law.

9. Since UNDP headquarters is in New York, we suggest that copyright protection be secured under United States law, which extends copyright protection to computer programs. The formalities required to secure this protection in the United States involve placing notice of copyright in the computer program, i.e. in the menu at the beginning of the program, in all documentation accompanying the program and in any databases,[39] and registration and deposit of the program and any databases with the United States Copyright Office.[40] It may also be worthwhile to try to secure copyright protection, where available, in the countries where the program is to be used.

C. LICENCE TO USE COMPUTER PROGRAM

10. Normally, pursuant to the policy described above, CEAO would be entitled to use the computer program free of charge. In order to facilitate this use of the program, we recommend:

(i) That UNDP and CEAO enter into a license agreement setting forth the various rights and obligations of the parties; or

(ii) Since ITC will be providing certain services related to the computer program, including installation and updating the program, consideration might be given to an arrangement whereby UNDP and ITC would enter into a license agreement under which ITC could grant sublicenses, e.g. to CEAO or to national entities, on the same terms and conditions as in the licence agreement.

27 April 1992

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8. PROPOSAL TO INCLUDE IN A STANDARD BASIC ASSISTANCE AGREEMENT A CLAUSE WHICH WOULD PROVIDE FOR JOINT OWNERSHIP OF PATENT RIGHTS AND OTHER INTELLECTUAL PROPERTY RIGHTS IN DISCOVERIES AND WORKS RESULTING FROM UNDP-ASSISTED PROJECTS — POLICY AND PRACTICE OF UNDP IN THIS AREA

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

1. Reference is made to your memorandum of 29 May 1992, whereby you requested our advice on whether UNDP should agree to the intellectual prop-

erty clause proposed by the Government of (name of a Member State), and if so, whether to insert the proposed text in the SBAA itself, or reflect it in an exchange of notes as was statedly done in previous cases with two other Member States.[41]

2. The intellectual property clause proposed by (name of the Member State) provides for joint ownership of patent rights and other intellectual property rights in discoveries and works resulting from UNDP-assisted projects and attempts to subject the utilization of such discoveries and works outside the country to the prior approval, in particular, of the Government on a case-by-case basis.

3. UNDP, on the advice of this Office, has consistently rejected the concept of joint ownership of intellectual property rights, including rejection in the course of the negotiations with the Government in question. It has been the long-standing policy and practice of UNDP to assert ownership in intellectual property rights resulting from UNDP-assisted projects, in order to comply with United Nations internal legal requirements, and to ensure widespread dissemination, use and exploitation of such rights through other UNDP-assisted programmes.[42] We therefore suggest that UNDP should not accept the proposed clause and should instead insist, as a matter of principle, on retaining ownership to intellectual property rights, except in well-defined circumstances as explained below.

4. We have noted, during negotiations of standard agreements, an increased tendency for Governments to assert ownership to intellectual property rights in cases where programs are jointly funded by the Government and a United Nations agency. In view of the increased resort to joint financing and use of Governments and national institutions as executing agencies, we consider that UNDP could, without derogating from its previous stand, accept to transfer ownership of intellectual property rights in certain cases. UNDP could thus agree to transfer ownership to the Government in cases of jointly funded projects, or where discoveries or inventions resulted from the efforts of experts or institutions provided by the Government.

5. In the light of the above observations, we suggest that the following clause be proposed in negotiations with the Government:

> "Patent rights, copyrights and other intellectual property rights to any discoveries or works resulting from projects and programs under this Agreement shall be vested with UNDP. The Government shall have the right to the use and exploitation of any such discoveries or works free of royalty, and shall also be entitled, by written agreement of the parties, to transfer of ownership of any such intellectual property rights resulting from discoveries or works made through the exclusive efforts of personnel and/or institutions provided by the Government, or through projects jointly funded by UNDP and the Government. UNDP shall have the right to the use and exploitation of any such rights and to grant licences for their use and exploitation by other Governments free of royalties."

6. As for the second question, we suggest that the agreed text should be inserted in the SBAA itself and not in a separate exchange of notes to avoid problems of interpretation and application.

24 July 1992

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9. CONSEQUENCES FOR PURPOSES OF MEMBERSHIP IN THE UNITED NATIONS OF THE DISTINTEGRATION OF A MEMBER STATE—GENERAL ASSEMBLY RESOLUTION 47/1 AND PRACTICAL CONSEQUENCES OF ITS ADOPTION

Letter to the Permanent Representative of a Member State to the United Nations

On behalf of the Secretary-General, I would like to acknowledge receipt of your letter to him dated 25 September 1992, by which you raised a number of questions arising from the adoption by the General Assembly of resolution 47/1 of 22 September 1992.

As you know, by the said resolution, entitled "Recommendation of the Security Council of 19 September 1992", the General Assembly considered that the Federal Republic of Yugoslavia (Serbia and Montenegro) could not continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations and decided that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it should not participate in the work of the General Assembly. General Assembly resolution 47/1 deals with a membership issue which is not foreseen in the Charter of the United Nations, namely, the consequences for purposes of membership in the United Nations of the disintegration of a Member State on which there is no agreement among the immediate successors of that State or among the membership of the Organization at large. This explains the fact that resolution 47/1 was not adopted pursuant to Article 5 (suspension) of the Charter of the United Nations or under Article 6 (expulsion). The resolution makes no reference either to those Articles or to the criteria contained in those Articles.

While the General Assembly has stated unequivocally that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot automatically continue the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations and that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations, the only practical consequence that the resolution draws is that the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not *participate* in the work of the General Assembly. It is clear, therefore, that representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) can no longer *participate* in the work of the General Assembly, its subsidiary organs or conferences and meetings convened by it.

On the other hand, the resolution neither terminates nor suspends Yugoslavia's *membership* in the Organization. Consequently, the seat and nameplates remain as before, but in General Assembly bodies representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot sit behind the sign "Yugoslavia". Yugoslav missions at United Nations Headquarters and offices may continue to function and may receive and circulate documents. At Headquarters, the Secretariat will continue to fly the flag of the old Yugoslavia as it is the last flag of Yugoslavia used by the Secretariat. The resolution does not take away the right of Yugoslavia to participate in the work of organs other than Assembly bodies. The admission to the United Nations of a new Yugoslavia under Article 4 of the Charter will terminate the situation created by resolution 47/1.

The above represents the considered view of the United Nations Secretariat regarding the practical consequences of the adoption by the General Assembly of resolution 47/1.

29 September 1992

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10. ESTABLISHED UNITED NATIONS PRACTICE REGARDING THE EXERCISE OF THE RIGHT TO SPEAK BY OBSERVERS—SPECIFIC CASE OF THE EUROPEAN ECONOMIC COMMUNITY

Letter to the Secretary, United Nations World Food Council

This in reply to your letter of 27 January 1992. By that letter, you raised questions regarding the exercise of the right to speak by the observer from the European Economic Community (EEC) in the meetings of the World Food Council.

First, you indicate that both the Commission of the European Communities and the Council of the European Economic Community attended WFC's June 1991 session as "Observer Intergovernmental Organizations". As you may know, only the entity "European Economic Community" was granted observer status in the General Assembly (resolution 3208 (XXIX) of 11 October 1974). This fact is reflected in rule 60 of the rules of procedure of WFC, which refers to the participation by non-members of the Council. It is an internal matter for EEC to decide whether the Commission or the Council will represent EEC at any given time. What is clearly excluded are two separate seats or representations.

Second, you request confirmation of the ruling of the Chairman at the June 1991 WFC session that the observer of EEC should speak after WFC members. We confirm that ruling as it was fully in accordance with established United Nations practice. According to that practice, observers are given the opportunity to speak after the members of the United Nations body concerned have been given that opportunity.

The practical arrangements may vary from case to case, depending on the practices of the body concerned and the context of the particular debate. In some bodies, a list of speakers is established for a debate lasting over several days, in which case observers speak at the end of the debate following members. In other contexts, lists of speakers are for a shorter period and may only be established one meeting at a time. Again, observers would speak after members during the particular meeting in question. The key factor is not to give the floor to an observer when a member is prepared to speak. An observer should not usurp the place of a member on a speakers' list.

Also, you indicate that a certain practice has developed in WFC whereby a member cedes its right to speak and its position on the speakers' list to EEC. We find such a practice to be at variance with established United Nations practice.

While it is true that members of a Committee are usually allowed, by mutual agreement, to exchange places on a speakers' list, such practice involves exchanges between participants of equal status. The conduct of business, including the order of speakers, is a matter for the presiding officer of the body concerned and ultimately, if necessary, of the body itself; members have a "right"

to speak but not a "right" to cede their place on a list to an entity of a different status which would otherwise not have the right to speak in that place. If a member wishes to have its place on the list taken by an observer, that may be done only with the unanimous consent of the body concerned. It is also possible for a member to indicate that it is speaking on behalf of the members of an organization which has observer status.

Finally, we would agree that as the World Food Council is headquartered in Rome and deals with subject matters linked to those before the FAO, there may be some uncertainties in the light of the recent changes to the FAO constituent instrument allowing for a new category of membership, i.e., "member organization". As you know, changes in FAO constitutional arrangements do not affect our situation and cannot be used as a precedent in the United Nations context.

26 March 1992

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11. QUESTION OF THE APPLICATION OF THE 1949 GENEVA CONVENTIONS FOR THE PROTECTION OF WAR VICTIMS AND THEIR 1977 ADDITIONAL PROTOCOLS IN PEACEKEEPING OPERATIONS OF THE UNITED NATIONS

Letter to the President of the International Committee of the Red Cross

On behalf of the Secretary-General, I would like to thank you for your letter of 4 May 1992, regarding the question of the application of the Geneva Conventions of 12 August 1949 for the protection of war victims[43] and their 1977 Additional Protocols[44] in peacekeeping operations of the United Nations, in particular, the operations in Cambodia and the former Yugoslavia.

In reply, we would like to state, at first, that the present Secretary-General is, like his predecessor, firmly convinced that the principles of humanitarian law are of critical importance and must, whenever necessary, be applied in United Nations operations and, of course, in the two major operations to which you referred. The Secretary-General, in this sense, endorses the exchange of letters of 1978 between the then President of the International Committee of the Red Cross (ICRC) and the then Secretary-General. Likewise, the instructions contained in the circular letter of 24 May 1978 to Force Commanders have never been withdrawn. As a result of your letter to the Secretary-General, however, the circular letter will be updated and reissued.

More importantly, however, the Secretariat is working on a formula which it intends to insert into the model status-of-forces agreement and into all agreements of this kind. This clause will consist of two paragraphs, the first of which will contain an undertaking by the United Nations to the effect that the operations of the United Nations forces in question will be conducted with full respect for the principles and spirit of the general international conventions applicable to the conduct of military personnel. These international conventions include the Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977 and the UNESCO Convention on the Protection of Cultural Property in the event of Armed Conflict of 14 May 1954;[45] the second paragraph will contain an undertaking by the State of operation according to which that State will treat the United Nations forces at all times with full respect for the principles and spirit of the general international conventions applicable to

the treatment of military personnel. These international conventions include the Geneva Conventions of 12 April 1949 and their Additional Protocols of 8 June 1977.

As far as arrangements with troop-contributing countries are concerned, the Model Agreement contained in General Assembly document A/46/185 contains in its section X, paragraph 28, a formula of the kind just mentioned.

One of the problems arising in this context lies in the description of the humanitarian law which is to be observed. The description must not be too narrow but for practical purposes it must also not be too broad; it cannot be excluded that some of the troops put at the disposal of the United Nations are provided by countries which are not yet parties to some of the humanitarian law conventions. We have, however, reached the conclusion that the description used in section X, paragraph 28, of the Model Agreement between the United Nations and contributing States would be appropriate and still manageable even for contingents from countries not yet parties to the 1977 Additional Protocols or the 1954 UNESCO Convention.

While we intend to insert clauses of the kind described above in the near future into status-of-forces agreements and arrangements with troop-contributing countries, we are aware that a fair number of such agreements are in force which do not yet contain such clauses. Once we have established a final text for the provision to be inserted into the status-of-forces agreements, we shall try to insert such provisions into the existing agreements and arrangements. Given the scope and complexity of the existing peacekeeping operations, it has to be anticipated that these efforts will take some time.

17 September 1992

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12. QUESTION WHETHER THE UNITED NATIONS DEVELOPMENT PROGRAMME HAS THE AUTHORITY UNDER ITS CONSTITUTIVE DOCUMENTS AND FINANCIAL REGULATIONS AND RULES TO PROVIDE LOAN GUARANTEES AS A FORM OF TECHNICAL ASSISTANCE

Memorandum to the Deputy Director and Treasurer, Division of Finance, United Nations Development Programme

1. This is in reply to your memorandum of 31 July 1992 requesting our advice on whether the United Nations Development Programme has the authority to provide loan guarantees as a form of technical assistance.

2. Your memorandum states that several projects have been approved by UNDP which provide for the use of the loan guarantees modality. Since we have not examined these projects, we are not in a position to determine the legal basis on which they were approved.[46]

Loan guarantees as technical assistance

3. On the assumption that the loan guarantees modality used in the projects you referred to functions in the same way as usual commercial transactions, whereby the guarantor acts as substitute for the borrower, we consider that its use by UNDP would give rise to a number of constitutional, legal and financial problems. First, we consider that the legal mandate for the provision of loan guarantees is uncertain; it has not been provided for, *expressis verbis*,

in UNDP's constitutive documents, or in the UNDP Financial Regulations and Rules. Secondly, given that assistance is provided by UNDP at the request of Governments, the role that the recipient Government would play in the scheme of such programmes is not clear. As we understand it, loan guarantee programmes would most likely bring UNDP in direct involvement with the private sector (by guaranteeing loans granted by lending institutions to, for example, micro-entrepreneurs, etc.), for which there is no clear mandate.[47]

4. Specifically, the very nature of loan guarantees[48] would give rise to problems arising from the status of UNDP as an international, intergovernmental organization;[49] consequently, the use of loan guarantees would require the establishment of a number of complex legal documents to make such a modality acceptable. These legal documents would have to address, *inter alia*, the relationship arrangements between UNDP as guarantor, the commercial banks as lenders and the private parties as borrowers, and the role of the executing or implementing agency.

5. Furthermore, from a practical point of view, since the use of this modality would require extensive legal and financial arrangements for the recovery of loan payments in case of default, it would necessitate expert and continuous monitoring of the loan project, from the beginning to the end of the loan cycle up to final repayment, all of which would entail a significant administrative burden for UNDP.

Conclusion

6. In view of the problems outlined above, we consider that for purposes of ensuring the orderly conduct of operational activities, specific authority would be required from the UNDP Governing Council to, in particular, define the conditions under which UNDP may provide such loan guarantees.

7. The above comprise our preliminary views on the subject. We would be glad to examine the matter further if you provide us with copies of the project documents in which this modality has been used.

10 September 1992

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13. United Nations policy regarding procurement from developing countries — Interpretation of General Assembly resolution 3405 (XXX), rule 114.8 of UNDP Financial Regulations and Rules and decisions of the Governing Council of UNDP regarding preferential treatment to be accorded to goods and services from developing countries

Memorandum to the Legal Adviser, United Nations Relief and Works Agency for Palestine Refugees in the Near East

1. This is in response to your telephone inquiry on the United Nations policy regarding procurement from developing countries.

2. The General Assembly, under its resolution 3405 (XXX) of 28 November 1975, entitled "New dimensions in technical cooperation", stressed the importance of applying certain general guidelines adopted by the Governing Council of UNDP.[50] Among the guidelines are the following:

"(v) The United Nations Development Programme should diversify the sources of its supply from countries to enable it to mobilize in a prompt and efficient manner all available human and material resources for technical cooperation, including particularly those from developing countries;

"(vi) The United Nations Development Programme should give increased support to programmes of technical cooperation among developing countries and should procure as much equipment and as many services as possible on a preferential basis, in accordance with United Nations practice from local sources or from other developing countries".

3. Rule 114.18 of the UNDP Financial Regulations and Rules, which sets out general principles to be given due consideration when UNDP is carrying out its procurement activities, states in its subparagraph (*e*): "Preferential treatment to be accorded to sources of those supplies indigenous either to the country being assisted or to other developing countries."

4. By its decision 77/42 of 30 June 1977, the Governing Council of UNDP requested "the Administrator, United Nations Participating and Executing Agencies and regional commissions 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* ...".[51] However, at its 38th meeting, on 21 June 1991, the Governing Council, by its decision 91/48, found that the 15 per cent price preferential system had no merit in its current form and decided to discontinue it. Although the 15 per cent price preferential system is discontinued, the Governing Council, by the same decision 91/48, urged all specialized agencies of the United Nations system to give preference to suppliers from developing countries and to continue their efforts to increase procurement from developing countries.[52]

5. Therefore, goods and services from developing countries are and continue to be accorded preferential treatment by UNDP, the regional commissions and all United Nations participating and executing agencies carrying out procurement activities for UNDP-funded projects.

6. The United Nations itself (except, as noted above, the regional commissions when acting as executing agencies) is not required to accord similar preferential treatment to goods and services from developing countries.

31 January 1992

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14. QUESTION WHETHER THE MEMBERS OF THE INTERNATIONAL NARCOTICS CONTROL BOARD COULD SERVE AS CONSULTANTS FOR UNITED NATIONS INTERNATIONAL DRUG CONTROL PROGRAMME WORK AND AS PARTICIPANTS IN UNDCP MISSIONS — RELEVANT PROVISIONS OF THE 1961 SINGLE CONVENTION ON NARCOTIC DRUGS AS AMENDED BY THE 1972 PROTOCOL

Memorandum to the Director of the Treaty Implementation and Legal Affairs Division, United Nations Drug Control Programme

1. This is in reply to your letter of 31 July 1992 in which you seek the advice of this Office on whether the members of the International Narcotics Con-

trol Board could serve as consultants for United Nations International Drug Control Programme (UNDCP) work and as participants in UNDCP missions.

2. The International Narcotics Control Board, which was established by the 1961 Single Convention on Narcotic Drugs[53] to perform specific functions,[54] consists of 13 individual members elected in their personal capacity by the Economic and Social Council. Article 9 of the Single Convention, as amended by the 1972 Protocol,[55] provides in the relevant part as follows:

> "2. Members of the Board shall be persons who by their competence, impartiality and disinterestedness will command general confidence. *During their term of office they shall not hold any position or engage in any activity which would be liable to impair their impartiality in the exercise of their functions* . . ." (emphasis added)

In addition to being a treaty organ distinct from the United Nations, the International Narcotics Control Board is considered to be a quasi-judicial body and the Economic and Social Council is expressly enjoined by article 9, paragraph 2, of the Single Convention "to ensure *the full technical independence of the Board* in carrying out its functions". (emphasis added)

3. The Board is provided with secretariat services by UNDCP. In assisting the Board in the discharge of its functions, the Secretary of the Board and the staff assigned by the Executive Director of UNDCP to assist the Board "*will be under the direction of the Board in substantive matters* relating to the exercise of powers and the performance of functions of the Board pursuant to the relevant international conventions. *In all other matters, the staff will be responsible to the Executive Director*". (emphasis added)[56]

4. The issue of whether members of the Board could also engage in consultancy activities for UNDCP has to be examined in the light of the above provisions, which in particular prohibit any concurrent employment or service by Board members which might compromise the Board's complete independence and impartiality. While we have not been provided with precise information concerning the nature of the proposed consultancy, in our view simultaneous service in both the Board and UNDCP may well create situations giving rise to a potential conflict of interest (e.g., the fact that Board members have the possibility of obtaining remunerative employment through their own secretariat; that the Board has to judge on secretariat reports or proposals in the formulation of which Board members have participated).

5. The possibility exists, of course, of members of the Board being employed as consultants in UNDCP work falling outside the competence of the Board. Nevertheless, the UNDCP secretariat being now one integral entity, the conflict of interest inherent in Board members being potentially employable by the secretariat which services it will remain.

6. In the light of the above, our view is that it would seem both undesirable and inappropriate for members of the Board to assume consultancy functions within UNDCP.

7. As regards the issue of members of the Board participating in UNDCP missions, we note from the documentation you submitted to us that joint missions may be undertaken by the Board and UNDCP and that proposals for such missions may be initiated by either body. You inform us that these arrangements were approved by the Economic and Social Council in October 1991. We consider that in this case no legal objection could be raised against the partici-

pation of members of the International Narcotics Control Board in such missions. Care should be taken, however, that the objectives of each particular mission and any envisaged joint activities between Board members and UNDCP staff while on such missions do not compromise the independent character and role of the Board.

1 September 1992

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15. QUESTIONS REGARDING THE SCALE OF ASSESSMENT FOR BELARUS AND UKRAINE IN THE LIGHT OF THE CHANGE IN THE RELATIONSHIP BETWEEN THEM AND THE FORMER UNION OF SOVIET SOCIALIST REPUBLICS — REPORT OF THE COMMITTEE ON CONTRIBUTIONS ON "ASSESSMENT OF NEW MEMBER STATES" — GENERAL ASSEMBLY RESOLUTION 46/221 A AND RULE 160 OF THE RULES OF PROCEDURE OF THE GENERAL ASSEMBLY

Opinion given by the Legal Counsel at the 38th meeting of the Fifth Committee on 8 December 1992

1. Are Belarus and Ukraine "new Member States" or are they in terms of Article 3 of the Charter of the United Nations the original Members of the United Nations, participating in its activities since its inception?

Article 3 of the Charter of the United Nations states that:

> "The original Members of the United Nations shall be the states which, having participated in the United Nations Conference on International Organization at San Francisco, or having previously signed the Declaration by United Nations of 1 January 1942, sign the present Charter and ratify it in accordance with Article 110."

The participation of the then Byelorussian Soviet Socialist Republic and Ukrainian Soviet Socialist Republic at the San Francisco Conference, and eventually in the Organization as original Members, was the subject of an agreement reached among the sponsoring Powers at Yalta in 1945. Pursuant to that agreement, the second plenary session of the San Francisco Conference on 27 April 1945 resolved that "the Ukrainian Soviet Socialist Republic and the Byelorussian Soviet Socialist Republic be invited to be initial Members in the proposed international organization". At the end of the San Francisco Conference, both countries signed the Charter and subsequently deposited their instruments of ratification. Since then, they have never been expelled from the Organization or readmitted to it. The recent constitutional changes, the change in the relationship between them and the former USSR or changes in their official designations did not and could not somehow transform them automatically into new Members of the Organization. There is no procedure for that, either in the Charter or in any other document. Belarus (the new name of the Byelorussian SSR) and Ukraine are, and remain, consequently "original Members" of the United Nations within the purview of Article 3 of the Charter and they are correctly listed as Members since 1945 in the official records of the Organization.[57]

2. Is the scale of assessment adopted by consensus for the period of 1992, 1993 and 1994 as contained in General Assembly resolution 46/221 A of 21 December 1991 valid for Belarus and Ukraine?

Paragraph 1 of General Assembly resolution 46/221 A provides for a scale of assessments for the contributions of Member States to the regular budget of

the United Nations for 1992, 1993 and 1994, unless a new scale is approved earlier by the General Assembly on the recommendation of the Committee on Contributions, should the Committee, in accordance with its mandate and the rules of procedure of the Assembly, so recommend, on the basis of substantial changes in relative capacity to pay. Since the General Assembly has not proceeded to the approval of a new scale as indicated by paragraph 1, the scale of assessments contained in resolution 46/221 A applies to all Member States listed therein, including Belarus and Ukraine.

3. Is the scheme of limits—one of the guiding principles of the United Nations assessment methodology—applicable universally or selectively to the States Members of the United Nations in apportioning their assessments?

The scheme of limits is a mechanism to avoid excessive fluctuations of the rates of assessment of Member States. As such it applies to the rate of all assessed Member States. Of course, it does not apply in the determination of the rate of assessment of a new Member State for the first time after admission to membership.

4. Are the recommendations of the Committee on Contributions aimed at reviewing and drastically increasing the rate of assessment of Belarus and Ukraine in the middle of a three-year assessment period consistent with the provision of resolution 46/221 and rule 160 of the rules of procedure of the General Assembly?

The report of the Committee on Contributions includes a chapter entitled "Assessment of new Member States".[58] The chapter begins with a statement that: "The Committee considered the assessment of new Member States in the context of paragraph 1 of General Assembly resolution 46/221 A and rule 160 of the rules of procedure of the General Assembly." Further on in the chapter, the Committee reviewed the manner in which the rates of assessment of Belarus and Ukraine had been determined since 1946. It then concluded:

> "In view of the unique manner in which the rates of assessment for Belarus and Ukraine were determined in the context of the former Union of Soviet Socialist Republics and because of the special relationship which existed among the 15 republics of the former Union of Soviet Socialist Republics during the base period of the scale of assessments, the Committee decided to include Belarus and Ukraine in its considerations as well."[59]

This paragraph seems to suggest that, in the view of the Committee on Contributions, the method by which the rates of assessment for Belarus and Ukraine were determined and/or the deep-rooted change in the relations that existed between those two States and the former Soviet Union had led to a situation in which they were to be treated, irrespective of their status as founding Members of the United Nations, for assessment purposes as new Member States.

Such a hypothesis is legally untenable. Both rule 160 and resolution 46/221 presuppose and require that all Member States are assessed and given assessment rates. The two instruments are, however, completely silent about the method of arriving at the rate of assessment. The methods by which the rates of assessment were arrived at for Belarus and Ukraine for the past 47 years are certainly quite unique, as the Committee on Contributions has put it. Quite obviously, however, the two States have been assessed.

Since the inception of the Organization, both States have continuously appeared in all relevant documents and statistics of the Secretariat, the Commit-

tee on Contributions and the General Assembly as assessed Member States and a specific rate of assessment has been attributed to them as to all other Member States. It cannot, therefore, be said that there was no assessment at all—and that is all rule 160 and resolution 46/221 require. The question is therefore moot whether, had there been no assessment at all, a treatment as new Members might have been justified.

As to the change in the relations that existed between Belarus, as well as Ukraine, and the former Soviet Union, paragraph 36 of the report of the Committee on Contributions seems to imply that in the view of the Committee that change is a fundamental change of circumstances which justifies the treatment of the two States as new Member States, be it in itself or taken together with the "unique" method by which their rates of assessment were determined. Nothing, however, in rule 160 would give a basis for such reasoning. Rule 160 speaks of new Member States without any specifications or qualifying additions. This seems to indicate that the term has to be understood in the same sense as elsewhere in the rules of procedure of the General Assembly, i.e., as meaning States newly admitted as Members through the procedure laid down in Article 4 of the Charter, chapter XIV of the rules of procedure of the General Assembly and the relevant provisions of the provisional rules of procedure of the Security Council.

Nor does anything in resolution 46/221 point to the admissibility of treating previously assessed Members of the Organization belatedly as new Member States, either generally, or in the particular case of Belarus and Ukraine. In this regard, it should be noted that the resolution was adopted only on 20 December 1991, when the process of change was well established both in Belarus and in Ukraine.

Finally, there is no precedent case in which a Member State has been treated in the context of assessment as a new Member other than in connection with its first assessment following its admission to the United Nations. I arrive, therefore, at the conclusion that the treatment of Belarus and Ukraine as new Member States, as recommended by the Committee on Contributions, is not consistent with resolution 46/221 and rule 160.

5. Does any of the above in any way affect the authority of the General Assembly, notwithstanding resolution 46/221 and rule 160 of the rules of procedure, to decide to adopt a scale such as that contained in the report of the Committee on Contributions, which revises the scale adopted by the Assembly in resolution 46/221?

I have great difficulty with this question. As it has been reworded, the question presupposes the existence of an authority of the General Assembly to adopt the assessment rates recommended by the Committee on Contributions. All I have said in answering the first four questions concentrates on the erroneous treatment of Belarus and Ukraine by the Committee on Contributions as new Member States. If there was an authority as presupposed by the question, then that authority would not be affected by the answers I have given. However, in my view there is no such authority; the adoption of assessment rates as contained in the report of the Committee on Contributions for Belarus and Ukraine would not be consistent with rule 160 even leaving aside all that I have said about the erroneous conclusions of the Committee on Contributions.

Of course, the Fifth Committee, being composed of sovereign Member States, could decide not to apply rule 160 in this particular case. This, however, is a course of action that I, as Legal Counsel of this Organization, cannot recommend. I am, however, not elaborating on this point because I do not want to go beyond the question asked of me.

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16. PAYMENT OF ASSESSED CONTRIBUTION BY A MEMBER STATE — QUESTION OF DEFERRING THE CONTRIBUTION FOR THE PERIOD DURING WHICH THE UNITED NATIONS IS THE TRANSITIONAL AUTHORITY IN THE STATE IN QUESTION — ARTICLE 19 OF THE CHARTER OF THE UNITED NATIONS

Memorandum to the Assistant Secretary-General, Department of Political Affairs

1. Reference is made to your memorandum dated 11 June 1992 on the payment of assessed contribution by a Member State and your request for the advice of this Office on whether the Secretary-General should ask the General Assembly to defer that State's assessed contributions to the United Nations budget for the period during which the United Nations is the transitional authority in the said State.

2. Article 19 of the Charter of the United Nations provides that a Member which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of contributions due from it for the preceding two full years. The State in question presently falls within the ambit of this provision and thus at present may not vote in the General Assembly.

3. The second sentence of Article 19, however, provides that the General Assembly may permit such a Member to vote "if it is satisfied that the failure to pay is due to conditions beyond the control of the Member". Such a decision is within the exclusive competence of the General Assembly, upon the advice of the Committee on Contributions. As you may know, rule 160 of the rules of procedure of the General Assembly provides, in part, that that Committee shall "advise the General Assembly . . . on appeals by Members for a change of assessments and on the action to be taken with regard to the application of Article 19 of the Charter". There is a limited practice in this regard. However, typically the request is made by the country itself.

4. We are aware that under the Paris Agreements on Cambodia of 1991[60] the United Nations through the United Nations Transitional Authority in Cambodia (UNTAC) has assumed a certain responsibility for the country in question during the transitional period but this is not by itself sufficient reason for the Secretary-General to invoke Article 19. If a determination is to be made under Article 19 it must be done, as we have indicated, by the General Assembly. For the Secretary-General to make the determination himself and then seek the concurrence of the General Assembly, as is apparently being requested by the Deputy Special Representative to the country in question, could set an unhelpful precedent for the increasing number of Member States in which the United Nations becomes involved in some form of transitional authority.

5. Moreover, it must be pointed out that even if the General Assembly were to decide pursuant to Article 19 that it is satisfied that the failure of the State in

question to pay is attributable to conditions beyond its control, that decision would only allow the State concerned to vote in the General Assembly notwithstanding the fact that its level of arrearages had surpassed the limit in Article 19. The assessment and the arrearages would remain unaffected. Article 19 only relates to voting in the General Assembly; no change is made in the assessment or in the amounts owed the Organization. Article 19 contains no provision for deferring or suspending assessments or for relieving a State of its financial obligations. This would be a matter of basic policy for the Members of the Organization, through the General Assembly, to determine in accordance with Article 17, paragraph 2, of the Charter which reads: "The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly."

25 June 1992

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17. PROCEDURES TO BE FOLLOWED TO TERMINATE TRUST FUNDS—SECRETARY-GENERAL'S BULLETIN ST/SGB/188 ON "ESTABLISHMENT AND MANAGEMENT OF TRUST FUNDS"

Memorandum to the Acting Controller

1. This is with reference to your routing slip of 25 November 1992 enclosing a draft letter to the Permanent Representative of (name of a Member State) to the United Nations relating to the closure of a trust fund for external debt crisis and development and a trust fund for development problems and strengthening peace and security.

2. The trust funds in question are regulated by the Secretary-General's bulletin ST/SGB/188 on "Establishment and management of trust funds", paragraphs 44, 45 and 46 of which relate to the closure of trust funds. These paragraphs are as follows:

> "44. A trust fund may be closed only by the authority which established it or as required in its terms of reference. A trust fund established by the General Assembly or another legislative body may be terminated after a decision by the legislative body concerned.
>
> "45. Trust funds established under the authority of the Secretary-General may be terminated under the terms of the trust fund agreement or for such reasons and at such times as the Assistant Secretary-General for Financial Services or his delegate may consider appropriate after consulting with the donor or donors.
>
> "46. In respect of a trust fund which by its terms of reference or by the terms of a special agreement provides for the disposition of any remaining balance, the Assistant Secretary-General for Financial Services or his authorized delegate will ensure that such provisions are carried out at the time the fund is closed. Any other balances remaining at the time a trust fund is closed will be disposed of in a manner consistent with the purposes of the trust fund and with the Financial Regulations and Rules of the United Nations."

3. We understand that these trust funds were established by the Secretary-General, under the authority given to him by regulation 6.6 of the Financial Regulations and Rules of the United Nations, but that no terms of reference have been formulated for them, nor a trust fund agreement entered into. Therefore,

under paragraph 44 above, they may be closed by the Secretary-General, subject to paragraphs 45 and 46.

4. Paragraph 45 provides that such trust funds established by the Secretary-General without a trust fund agreement may be terminated for such reasons and at such times as the Controller may consider appropriate "after consulting with the donor or donors". Such consultation is therefore a condition precedent to closure.

5. With regard to any balance remaining at the time of termination of these trusts, under the second sentence of paragraph 46, the balances must be disposed of in a manner consistent with the purposes of the trust fund and with the Financial Regulations and Rules (we interpret the term "any *other* balances" as covering balances whose disposition is not covered by terms of reference or a special agreement — see the first sentence of the paragraph). Paragraph 46 does not contemplate the return of the moneys to the donor. We also understand that no instance where moneys have been returned can be recalled in the Office of Programme Planning, Budget and Finance.

6. We therefore consider that the appropriate course of action would be to initiate consultations with the Government of the State in question covering the wish of the United Nations to close the trust funds, and the reasons therefor, and on ways of applying the balances consistently with the purposes of the trust funds. The letter to the Government should be to that effect, and we suggest that the last paragraph be drafted as follows:

> "In implementing our general policy of rationalizing the distribution and number of trust funds of the Organization, it has appeared to us to be advisable to close both the above-named funds by the end of 1992, but applying the positive balances that we anticipate will remain after completion of all activities financed from those funds in a manner consistent with the purposes of the trust funds. We naturally are desirous of consulting with you on the available options."

1 December 1992

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18. ECONOMIC AND SOCIAL COUNCIL RESOLUTION 1983/27 ON COMMUNICATIONS CONCERNING THE STATUS OF WOMEN — QUESTION WHETHER THE DECISION TO INCLUDE THE TEXT OF THE REPORT OF THE WORKING GROUP WAS WITHIN THE MANDATE OF THE COMMISSION ON THE STATUS OF WOMEN — RULE 54 OF THE RULES OF PROCEDURE OF THE FUNCTIONAL COMMISSIONS OF THE ECONOMIC AND SOCIAL COUNCIL

Memorandum to the Secretary of the Commission on the Status of Women

1. This is in reply to your memorandum of 1 August 1991 transmitting to this Office a request by the Commission on the Status of Women for a legal opinion relating to Economic and Social Council resolution 1983/27 of 26 May 1983 on communications concerning the status of women for submission to the thirty-sixth session of the Commission.

2. The report of the Commission on the Status of Women on the work of its thirty-fifth (1991) session indicates that the question on which advice is sought is as follows: "The Secretariat was . . . requested to provide a legal opinion, especially with respect to paragraphs 5 and 6 of Economic and Social Council

resolution 1983/27, whether the decision to include the text of the report of the Working Group [on Communications concerning the Status of Women] [which the Commission was authorized to establish under the said resolution] was within the Commission's mandate, and to report to the Commission at its thirty-sixth session on the matter."[61]

3. As to the question of competence, rule 54 of the rules of procedure of the functional commissions of the Economic and Social Council provides:

"A motion calling for a decision on the competence of the commission to adopt a proposal submitted to it shall be put to the vote before a vote is taken on the proposal in question".

4. It is thus, in the first instance, for the Commission to decide on whether it is competent to adopt a particular proposal. In the case at issue, your memorandum makes clear that: (*a*) the Commission decided to adopt the report of the Working Group and to include it in its entirety in the report of the Commission, thus implicitly deciding it was competent to do so; and (*b*) after questions were raised as to its competence to have taken the decision referred to, the Commission maintained its earlier decision, thus confirming its position that it was competent to take the decision in question.

5. The Commission was therefore within its competence in taking the decision that it took.

6. Nevertheless, the Secretariat was requested by the Commission to provide a legal opinion on the competence of the Commission, especially with respect to paragraphs 5 and 6 of Economic and Social Council resolution 1983/27 of 26 May 1983.

7. By the resolution to which reference was made, the Economic and Social Council reaffirmed that the mandate of the Commission on the Status of Women was to consider confidential and non-confidential communications on the status of women (para. 1). The Secretary-General was requested to submit reports to the Commission on such communications and to solicit the cooperation of the specialized agencies, regional commissions and other United Nations bodies in compiling that report (paras. 2 and 3). The paragraphs most relevant to the question at issue read as follows:

"*The Economic and Social Council,*

". . .

"4. *Authorizes* the Commission on the Status of Women henceforth to appoint a working group consisting of not more than five of its members, selected with due regard for geographical distribution, to meet in closed meetings during each session of the Commission in order that it may perform the following functions:

"(*a*) Consideration of all communications, including the replies of Governments thereon, if any, with a view to bringing to the attention of the Commission those communications, including the replies of Governments, which appear to reveal a consistent pattern of reliably attested injustice and discriminatory practices against women;

"(*b*) Preparation of a report, based on its analysis of the confidential and non-confidential communications, which will indicate the categories in which communications are most frequently submitted to the Commission;

"5. *Requests* the Commission on the Status of Women to examine the report of the working group and to avoid duplication of the work undertaken by other organs of the Economic and Social Council, the Commission being, in this respect, empowered only to make recommendations to the Council, which shall then decide on what action may appropriately be taken on the emerging trends and patterns of communications;

"6. *Decides* that all actions envisaged in the implementation of the present resolution by the Commission on the Status of Women shall remain confidential until such time as the Commission may decide to make recommendations to the Economic and Social Council".

8. It is for the Commission in the first instance to interpret resolutions emanating from its parent organ addressed to it. If the Commission were to interpret an Economic and Social Council resolution in a manner not consistent with the intention of the parent organ, the Economic and Social Council would presumably inform the Commission of the proper intent and interpretation. The extracts from recent reports of the Commission which you transmitted with your memorandum reveal that for a number of years the Commission has included in its reports to the Economic and Social Council summaries of debates held in the Working Group and, on several occasions, the text of the report adopted by the Working Group. As we understand it, on no occasion did the Economic and Social Council indicate to the Commission that such inclusion of summaries or reports violated the letter or spirit of its resolution 1983/27.

9. The above practice is not objectionable from the legal point of view, given the text of the provision in question. Paragraph 6 of the resolution states that what is to remain confidential is *not* the reports of the Working Group or its discussions, but rather "*actions* envisaged in the implementation of the present resolution" (emphasis added). The actions envisaged in the resolution include the following: (*a*) consideration by the Working Group of all communications with a view to bringing to the attention of the Commission those communications which appear to reveal a consistent pattern of reliably attested injustice and discriminatory practices against women (para. 4 (*a*)); (*b*) preparation of a report by the Working Group indicating categories in which communications are most frequently submitted (para. 4 (*b*)); (*c*) Commission recommendations to the Economic and Social Council, which is then to decide what action may appropriately be taken on the emerging trends and patterns of communications.

10. The above-mentioned "actions" relate to emerging trends and patterns of communications and conclusions regarding consistent patterns of reliably attested injustice and discriminatory practices against women; organizational matters or conclusions with regard to the procedure for communications, including those aimed at improving such procedure, are not explicitly deemed "actions" under the resolution.

11. Of course, if the Commission had doubts regarding the proper implementation of its mandate, it could always seek clarification from its parent organ, the Economic and Social Council.

12. Thus we confirm the informal legal opinion presented to the Commission on 8 March 1991 by the Senior Legal Liaison Officer at the United Nations Office at Vienna, and advise that it was within the competence of the Com-

mission to decide that it could, within its mandate, include in its report to the Economic and Social Council the text of the report of its Working Group.

25 February 1992

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19. CONSIDERATIONS UNDERLYING THE SUGGESTION THAT THE GENERAL ASSEMBLY AUTHORIZE THE SECRETARY-GENERAL TO REQUEST ADVISORY OPINIONS OF THE INTERNATIONAL COURT OF JUSTICE UNDER ARTICLE 96, PARAGRAPH 2, OF THE CHARTER OF THE UNITED NATIONS

Statement of the Legal Counsel delivered at the meeting of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization on 18 February 1992

I have been asked to explain to this Committee the consideration underlying the suggestion made, on various occasions, by Secretary-General Pérez de Cuéllar, and which is shared by the present Secretary-General, to authorize the Secretary-General to request advisory opinions of the International Court of Justice. I would like to state the following.

Under Article 96, paragraph 1, of the Charter, the General Assembly and the Security Council have the express power to request advisory opinions from the Court on "any legal question".

Article 96, paragraph 2, further empowers the General Assembly to authorize "other organs of the United Nations and specialized agencies" to request advisory opinions from the Court "on legal questions arising within the scope of their activities".

In implementation of Article 96, paragraph 2, the General Assembly has to date authorized the Economic and Social Council and the Trusteeship Council, as well as the Interim Committee of the General Assembly and the Committee on Applications for Review of Administrative Tribunal Judgements, to request advisory opinions. The General Assembly has also authorized the International Atomic Energy Agency and all the specialized agencies (except the Universal Postal Union) to request advisory opinions. As a result of such authorization, all these bodies are empowered to request advisory opinions from the International Court of Justice on "legal questions arising within the scope of their activities".

But thus far, the Secretary-General has not been given a similar authorization.

The suggestion that the Secretary-General be authorized to seek advisory opinions under Article 96, paragraph 2, has been made in order to facilitate the carrying out of his functions by enabling him to receive authoritative legal advice as to questions of international law arising within the scope of his activities, particularly in respect of disputes as to which the Secretary-General has been asked to play a role (such as exercise of his good offices or mediation). In effect, Secretary-General Pérez de Cuéllar stated in his annual report for 1990 his belief that "the extension of this authority to the Secretary-General would greatly add to the means of peaceful solution of international crisis situations. The suggestion is prompted by the complementary relationship between the Security Council and the Secretary-General and by the consideration that almost all situations bearing upon international peace and security require the strenuous exercise of the good offices of the Secretary-General."[62]

Experience shows that almost all international disputes have some legal component. In efforts aimed at dispute settlement, a separation of the legal components from the political problems would permit proper treatment according to the nature and contents of the individual issues involved, and can have a stabilizing and helpful effect.

It may be argued that if the International Court of Justice's legal advice is useful, the parties concerned may obtain it by concluding a *compromis* (or a special agreement) for that purpose, which is already envisaged under Article 36, paragraph 2, of the Statute of the Court, and instituting contentious proceedings.

The issue here is, however, not a question of making better use of the existing arrangement. The issue is whether contentious proceedings would be the most appropriate means and whether such proceedings would help to achieve the objective, bearing in mind that delicate and sensitive situations are involved.

Contentious proceedings are adversarial and the parties are directly involved, which can inflate the issues or cause the positions of the parties to become more entrenched rather than facilitate a solution.

It may also be contended that, if advisory opinions are preferred, either the General Assembly or the Security Council might ask for them as they are directly authorized under Article 96, paragraph 1, to request advisory opinions "on any legal questions".

However, in order to request an advisory opinion, either the General Assembly or the Security Council must formally decide that an advisory opinion will be sought and which questions will be put to the Court. The questions to be posed must first be formulated and then endorsed not by the parties to the dispute or the Secretary-General but by a majority of the members of the Assembly or the Council. All these decisions are subject to and preceded by open, public debate. There would also be consultations and negotiations among the delegates as well as between the delegates and their home Governments. Clearly, the reaching of a formal decision can hardly be expected without a full exposure of the positions or arguments held by the respective parties to the entire membership of the Assembly or the Council. All this would not be desirable in instances where the goal is to defuse tension and to allow the Secretary-General to play his role.

However, if the Secretary-General himself has the competence to request advisory opinions, he would be able to do so in a quiet and discreet manner and without having to involve States not parties to the dispute.

It may also be contended that those bodies which have already been authorized to request advisory opinions are all deliberative organs, while the Secretary-General is an individual and makes decisions by himself.

In this regard, it is important to emphasize that in view of the status of the high office of the Secretary-General and its responsibility under the Charter, it is certain that the authorization given to the Secretary-General would only be exercised with the greatest care and consideration, and only after all relevant factors had been taken into account. I would also like to recall that the Charter has entrusted the Secretary-General with a politically sensitive right under Article 99, that is, to "bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and

security". There is no reason to suggest that the exercise of that authorization would require less constraint on the part of the Secretary-General than the exercise of the Article 96 authorization.

Moreover, it is the intention to link the authorization under Article 96, if it is given to the Secretary-General, to an important restriction where disputes are concerned: in these cases he would need the agreement of the parties to the dispute to the submission of a request to the Court. This condition would be spelled out in the authorizing resolution.

This is what I would like to state on the considerations underlying the suggestion to authorize the Secretary-General under Article 96, paragraph 2, of the Charter to request advisory opinions from the International Court of Justice. In this context the possibility of intermediary solutions has been mentioned, such as a resolution of the General Assembly setting forth that the Secretary-General might be authorized on an ad hoc basis to seek advisory opinions on specific legal issues or in the context of a specific dispute. However, authorization of this kind would not achieve the goal fully and would be difficult to operate in practice.

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20. QUESTION WHETHER ACCEPTANCE OF A DONATION TIED TO THE RECRUITMENT OF A NATIONAL OF THE DONOR STATE WOULD BE CONSONANT WITH THE OBLIGATION IMPOSED ON THE SECRETARY-GENERAL BY ARTICLE 101, PARAGRAPH 3, OF THE CHARTER OF THE UNITED NATIONS

Memorandum to the Director of the Division of Human Resources Management, Office of the United Nations High Commissioner for Refugees

1. Your memorandum of 20 February 1992 transmits a copy of a letter dated 29 January 1992 from the Permanent Mission of (name of a Member State) to the United Nations High Commissioner for Refugees which proposes the establishment of a trust fund for scholarship assistance for refugee students "from and in third world countries". The High Commissioner wishes to accept this donation but considers that she cannot agree to a provision in paragraph 5 of the proposed arrangements that obligates the High Commissioner to assign an individual of the donor State's nationality to administer the programme.

2. We agree with the views of the High Commissioner. Article 101, paragraph 1, of the Charter of the United Nations states that the Secretary-General appoints staff under regulations established by the General Assembly. That power has been delegated to the High Commissioner, but she remains bound by the relevant provisions of the Charter and the Staff Regulations.

3. Article 101, paragraph 3, of the Charter requires the Secretary-General (and therefore the High Commissioner) to treat as the paramount consideration in the employment of staff the necessity of securing staff of the highest standards of efficiency, competence and integrity. This provision is mirrored in regulation 4.2 of the Staff Regulations. It is obvious that a requirement that staff of only one nationality be appointed would seriously interfere with the obligation imposed on the Secretary-General.

4. We consider that a provision whereby a candidate for the post in question would be required to have perfect command of the written and spoken language of the country concerned and intimate familiarity with its educational institutions would result in nationals of that country receiving the most serious

consideration for appointment, but would preserve the discretion of the Secretary-General, and would therefore be legally unobjectionable. However, a provision which would expressly exclude consideration of nationals of other countries possessing the required qualifications would be objectionable for the reasons set out in paragraph 3 above.

3 March 1992

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21. STAFFING OF MISSIONS AWAY FROM HEADQUARTERS — AUTHORITY OF THE SECRETARY-GENERAL TO ASSIGN STAFF TO ANY UNITED NATIONS ACTIVITIES OR OFFICES — BUDGETARY, ADMINISTRATIVE AND FINANCIAL CONSIDERATIONS INVOLVED IN THE ASSIGNMENT OF STAFF TO MISSIONS — POSSIBILITY OF ADDITIONAL FINANCIAL BENEFITS TO INDUCE STAFF TO ACCEPT MISSION ASSIGNMENTS

Memorandum to the Under-Secretary-General for Administration and Management

1. This is in reply to your queries on staffing of missions away from Headquarters.

A. AUTHORITY

2. Article 97 of the Charter of the United Nations provides that the Secretary-General shall be the chief administrative officer of the Organization. Article 101, paragraph 1, of the Charter provides that the staff shall be appointed by the Secretary-General, under regulations established by the General Assembly. The Assembly has established Staff Regulations which embody the fundamental conditions of service and the basic rights, duties and obligations of staff and also contain the broad principles governing the personnel policy for the staffing and administration of the Secretariat; the Secretary-General is directed to provide and enforce staff rules consistent with these Regulations (see the "Scope and purpose" provision of the Regulations).

3. Regulation 1.2 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." This power has been repeatedly upheld by the United Nations Administrative Tribunal as long as it is in the interests of the Organization and properly motivated.

4. It is thus clear that the Secretary-General may assign staff to any United Nations activity or office, including peacekeeping missions, without obtaining the prior consent of the staff member.[63] However, on the basis of due process concerns and the need to deal fairly with staff, the Administration would be obliged to consider any objections of a staff member to such an assignment; the final decision, though, is for the Secretary-General, and the staff member must comply with that decision if he or she is to remain in United Nations service. In the past, we have, however, relied on staff volunteering for mission service.

5. Staff from other international organizations in the United Nations common system, Governments and national institutions could also be obtained for mission service on the basis of a "secondment" arrangement whereby they would serve with the United Nations for a specified period but have the right, at the end of that service, to return to that organization, Government or national institution.

B. BUDGETARY, ADMINISTRATIVE AND FINANCIAL CONSIDERATIONS

6. Missions are funded under separate budgets approved by the General Assembly.[64] A staff member assigned to a mission is placed on a mission post (which may be at a higher level than his or her current rank, in which case the staff member may receive a higher salary by way of a Special Post Allowance (SPA)), thus temporarily freeing up the staff member's post in his or her department. The Secretary-General has, in the past, authorized the filling of the vacated posts by outside recruitment for the period of the departing staff member's mission. To fill such posts, he may also reassign staff within the Secretariat, either laterally or to a higher-level post by means of an SPA.

7. As the General Assembly and the Secretary-General have emphasized the need for mobility and mission service, and stated that such service is to be considered as a positive factor for promotion, we consider that the promotion bodies ought to be instructed to ensure that all staff on mission service are given fair consideration for promotion for Secretariat posts while away on mission. Their careers must not seem to incur a setback as a result of mission service.

8. A major difficulty is to recruit competent Professional staff as short-term replacements, particularly for departments whose services are in demand both at Headquarters and in missions. In the legal area, for instance, well-qualified, competent lawyers outside the Organization generally have jobs with a measure of security and will not give them up unless they are assured of a position for at least two years.

C. POSSIBILITY OF ADDITIONAL FINANCIAL BENEFITS TO INDUCE STAFF TO ACCEPT MISSION ASSIGNMENTS

9. While it may be possible to offer to assign mission staff to posts at levels higher than that previously occupied, with an SPA to that higher level, the granting of such an SPA would not constitute a permanent promotion. Permanent promotions would have to be accomplished through the regular machinery embodied in the Staff Regulations and Rules and subordinate administrative instructions (in particular, ST/AI/373 of 23 December 1991). The existing promotion machinery does not contemplate the offer of a permanent promotion as an inducement to accept mission service.

10. The question of the possibility of granting special allowances to encourage staff to participate in missions would be a matter for the Compensation and Classification Service of the Office of Human Resources Management.

12 March 1992

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22. QUESTION WHETHER A UNITED NATIONS STAFF MEMBER MAY ACCEPT AN INVITATION TO BECOME AN HONORARY BOARD MEMBER OF AN INSTITUTE LOCATED IN A MEMBER STATE — RULES GOVERNING ACTIVITIES OF STAFF MEMBERS

Memorandum to the Special Assistant to the Under-Secretary-General for Political Affairs

1. This is in response to your memorandum of 25 November 1992, requesting our advice on whether there would be any objection from a legal point of view to a United Nations staff member accepting the invitation extended to

him by an institute located in a Member State (hereafter the "Institute") to become an honorary board member of that Institute.

Rules governing activities of United Nations staff members

2. The basic rules governing activities of United Nations staff members are set forth in Article 100, paragraph 1, of the Charter of the United Nations, in regulations 1.2 and 1.4 of the United Nations Staff Regulations, in the report on standards of conduct in the International Civil Service, re-promulgated by the Secretary-General on 26 February 1982 in information circular ST/IC/82/13 (hereafter "standards of conduct"), and in paragraphs 4 and 5 of administrative instruction ST/AI/190/Rev.1.

3. Article 100, paragraph 1, of the Charter lays down the principle of the exclusive responsibility of the international civil service to the Organization. United Nations staff members are thus precluded from seeking or receiving instructions from any Government or authority external to the United Nations, as well as from engaging in "any action which might reflect on their position as international officials responsible only to the Organization".

4. Regulation 1.2 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 . . ."

Regulation 1.4 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. ***They shall avoid any action and in particular any kind of public pronouncement which may adversely reflect on their status***, or on the integrity, ***independence and impartiality*** which are required by that status. While they are not expected to give up their national sentiments or their political and religious convictions, ***they shall at all times bear in mind the reserve and tact incumbent upon them by reasons of their international status.***" (emphasis added)

5. The standards of conduct provide, in relevant part, that:

> "20. It is . . . the duty of staff members to avoid any action which would impair good relations with Governments, or destroy confidence in the secretariat—such as public criticism of, *or any kind of interference with, the policies or affairs of Governments*". (emphasis added)

6. Staff members must not engage in any activity outside their working hours, 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 administrative instruction ST/AI/190/Rev.1);

(*b*) The activity does not interfere with the work of the staff member, or with his ability to accept new assignments (paragraph 4 (*b*) of administrative instruction 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 administrative instruction ST/AI/190/Rev.1).

Applicability of the rules governing activities of staff members to the present case

7. We have examined the "executive overview" of the Institute, which was attached to your memorandum and which briefly describes its envisaged functions and organizational structure. In that respect, we note the information given that the Institute "has been established at an *interim* level" and that it has a "*provisional* organizational infrastructure". It is, therefore, not clear whether the Institute is operational and it is further not disclosed whether it has been established in accordance with the national legislation of (name of the Member State concerned) as a partnership or as an association or in some other manner.[65]

8. Furthermore, while the said executive overview describes the aims, purposes and functions of the Institute in very broad, general terms, we note that the envisaged activities of the Institute do include the close collaboration of the academic, industrial and *Government* sectors for the purpose of developing comprehensive new solutions in international management. To that end, it is foreseen that the Institute "will be *jointly* managed by *equal* representation from academia, *Government* and industry".

9. We also note that the major funding for the Institute is from (name of the Member State concerned), that it would be located in that State and that the proposed board of directors seem all to come from institutes of the State in question. The Institute may therefore be perceived as being essentially a national body.

10. In the light of the above, we consider that acceptance by the staff member of the invitation to serve as an honorary board member in the Institute might be perceived as a departure from the impartiality required of the United Nations. We also envisage that the Institute may, at times, have occasion to publish reports and/or engage in activities at variance with, or critical of, United Nations operations. We are therefore of the view, regretfully, that it would not be appropriate for the staff member to serve the Institute as an honorary member of its board.

22 December 1992

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23. QUESTION OF THE COMPATIBILITY OF A STAFF MEMBER'S OUTSIDE ACTIVITIES WITH HER STATUS AS A STAFF MEMBER — RELEVANT PROVISIONS OF THE UNITED NATIONS STAFF REGULATIONS AND RULES

Memorandum to the Chief of Policy and Personnel Services, Division of Personnel, United Nations Children's Fund

1. This is in response to your memorandum of 28 November requesting our advice on whether involvement in outside activities, namely retaining the presidency of a company and writing technical articles in magazines, is compatible with the status of staff member of UNICEF.

2. The relevant provisions of the United Nations Staff Regulations and Rules governing outside activities of staff members are the following:

A. REGULATIONS 1.1, 1.2 AND 1.5

Regulation 1.1 provides that:

"Members of the Secretariat are international civil servants . . . By accepting appointment, they pledge themselves to discharge their functions and to regulate their conduct *with the interests of the United Nations only in view*." (emphasis added)

Regulation 1.2 provides that:

"Staff members are subject to the authority of the Secretary-General . . . 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 1.5 provides that:

"Staff members shall exercise the utmost discretion . . . They shall not communicate to any person any information known to them by reason of their official position which has not been made public, except in the course of their duties or by authorization of the Secretary-General. *Nor shall they at any time use such information to private advantage* . . . " (emphasis added)

B. RULE 101.6

Rule 101.6 provides as follows:

"(*a*) Staff members shall not engage in any continuous or recurring outside occupation or employment without the prior approval of the Secretary-General.

"(*b*) No staff member may be actively associated with the management of, or hold a financial interest in, any business concern if it were possible for the staff member to benefit from such association or financial interest by reason of his or her official position with the United Nations.

". . .

"(*e*) Staff members shall not, except in the normal course of official duties or with the prior approval of the Secretary-General, perform any one of the following acts, if such act relates to the purpose, activities or interests of the United Nations:

". . .

"(iv) Submit articles, books or other material for publication."

C. APPLICABILITY OF THE REGULATIONS AND RULES GOVERNING ACTIVITIES OF STAFF MEMBERS TO THE PRESENT CASE

4. According to the staff member's letter of 29 October, the company, which was founded by her and of which she holds the position of president, was formed as a means of circumventing United Nations rules on the engagement of individual consultants under Special Service Agreements. It has "had numerous UNICEF corporate contracts" and "has also contracted with other United Nations agencies, Governments and NGOs". The staff member stated that once she assumed the UNICEF post, the company would not accept UNICEF contracts.

5. It appears to us that in the present case there exists a conflict of interest, albeit the company would not accept contracts with UNICEF. It is possible that the company would benefit from contacts and information she gathered as a member of the UNICEF staff to derive benefits from major dealings with the

United Nations, as described in the article written by her. This would be inconsistent with the requirements of regulations 1.1 and 1.5, as well as rule 101.6 (*b*), cited above.

6. The staff member also stated that in non-UNICEF contracts which the company would enter into, she would not be personally involved in the actual work, but rather subcontract the work to someone else. Even assuming the staff member will not be involved in the day-to-day work of the company, she is still, as its president, responsible for and to the company. This, in our view, would be in conflict with regulation 1.2 and rule 101.6 (*a*).

D. WRITING ARTICLES FOR MAGAZINES

7. Although in some cases the United Nations has authorized staff members to contribute to technical and academic journals and publications about their work, it is to be noted that, in the case of the staff member, whose main functions with UNICEF involve information gathering and networking, the technical articles which she writes are likely to be of a similar nature to those she prepares for UNICEF. This could give rise again to serious conflict of interest, and may compromise United Nations confidential information. The staff member concerned is obviously in a position to provide substantial information to the benefit of outside firms, by virtue of her United Nations employment, as this can be easily seen in her article published in *Computers in Libraries* in September 1991. In fact, we believe that much of the source materials and information could have derived from her being a UNICEF staff member. Unless the staff member's articles are totally unrelated to the United Nations, including UNICEF and other United Nations agencies, such articles should not be published without the prior authorization of the Secretary-General under rule 101.6.

8. In the articles written by the staff member in question, she was prominently described as "the president of (name of the company), specialized in networking and database solutions for international organizations", or as "president of (name of the company), a consulting firm that deals with the United Nations and Governments". This misuse of the United Nations name is also a violation of the provisions in the United Nations standard general conditions included in contracts with all contractors with UNICEF.

E. CONCLUSION

9. It is our view, therefore, for the above reasons, that the two types of outside activities engaged in by the staff member would be incompatible with her status as a staff member. Consequently, if she wishes to continue her current employment with UNICEF, she must dissolve the company immediately and provide us with evidence that she has done so within 30 days. The formation of the company was, in the first place, intended to secure continued contractual status with the Organization, contrary to the clear policy of the Organization regarding Special Service Agreements, and cannot, therefore, be condoned. Now that the staff member has been brought on board, the continuation of the company to secure contracts from other agencies of the United Nations would, of course, be unacceptable.

24 January 1992

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24. QUESTION WHETHER A REQUEST BY A STAFF MEMBER FOR A DEPENDENCY ALLOWANCE BASED ON THE LEGAL GUARDIANSHIP OF HIS TWO NEPHEWS IS ADMISSIBLE ON THE GROUND THAT THE CONCEPT OF ADOPTION IS NOT RECOGNIZED BY THE LEGAL SYSTEM OF HIS HOME COUNTRY — CONDITIONS FOR CHILDREN TO BE RECOGNIZED AS DEPENDENT CHILDREN WITHIN THE MEANING OF ADMINISTRATIVE INSTRUCTION ST/AI/278/REV.1

Memorandum to the Personnel Officer, Staff Administration and Monitoring Service, Office of Human Resources Management

1. This responds to your memorandum of 17 October 1992 in which you requested our advice on whether, based on an attached letter of 6 October 1992 from the Chargé d'affaires a.i. of the Permanent Mission of (name of a Member State) to the United Nations addressed "to whom it may concern", a staff member's request for dependency allowance based on the legal guardianship of his two nephews is acceptable under rule 103.24 (*b*) of the United Nations Staff Rules. We already provided advice on the same subject by a memorandum of 20 August 1992 and concluded by saying that: "In these circumstances, we cannot consider the document evidencing guardianship as also evidencing adoption, and therefore are not at present prepared to recognize the children in question as legally adopted for the purpose of rule 103.24 (*b*). We are prepared to reconsider the matter in the light of any further material which the staff member might provide." It is on that basis and at the request of the staff member in question that the letter from the Mission of his home country referred to above was sent. It reads: "This is to inform you that in the legal system of (name of the Member State concerned) the concept of adoption is not recognized. However, the word 'adoption' may sometimes be used interchangeably with legal guardianship, which is the nearest corresponding notion accepted by law. Legal guardianship implies the same responsibilities for the upbringing and welfare of the child as adoption, without, however, the child having to acquire the last name (family name) of his/her legal guardian."

2. We understand from the letter of the Mission that the concept of adoption is not recognized by the legal system of the State in question. Consequently, the staff member's nephews cannot be considered to be *legally adopted* children and qualify as his "dependent children" on that basis.

3. In the absence of a system of natural or legal adoption, paragraph 3 (*d*) of the administrative instruction ST/AI/278/Rev.1 of 25 May 1982 alternatively defines the term "dependent children" as follows:

> "If legal adoption of the child is not possible because there is no statutory provision for adoption or any prescribed court procedure for formal recognition of customary or de facto adoption in the staff member's home country or country of permanent residence, then a child in respect of whom the following conditions are met:
>
> "(i) The child resides with the staff member;
>
> "(ii) The staff member can be regarded as having established a parental relationship with the child;
>
> "(iii) The child is not a brother or sister of the staff member; and
>
> "(iv) The number of children for which dependency benefits are claimed by the staff member under the present paragraph 3 (*d*) does not exceed three."

4. It is our opinion, based on the evidence examined in our memorandum of 20 August 1992 and especially the fact that "the responsibility and guardianship" of the two nephews whose parents are dead are transferred to the staff member, that the requirements of paragraph 3 (*d*) of the administrative instruction referred to above are met and that the children can be regarded as the staff member's *dependent children* for United Nations administrative purposes.

23 October 1992

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25. INTERPRETATION AND APPLICATION OF THE POLICY OF THE ORGANIZATION WITH RESPECT TO RECOVERY OF A SERIES OF OVERPAYMENTS MADE TO A STAFF MEMBER

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

1. This is in response to your memorandum dated 10 February 1992, in which you sought the advice of this Office as to the interpretation and application of the policy of the Organization with respect to recovery of a series of overpayments made to a staff member. For the reasons set out below we recommend that:

(*a*) recovery be limited to two years;

(*b*) a clear policy be promulgated in the Staff Rules.

The recommendation of the Joint Appeals Board

2. This advice has been sought in connection with a case before the Joint Appeals Board. In that case, the Organization sought to recover overpayments to the staff member of a Personal Transitional Allowance (PTA) made from October 1988 to June 1989. The staff member was notified of this recovery action in memoranda dated 20 December 1990 and 7 January 1991. The staff member contended that the Organization should be able to recover only payments made within two years prior to the date of the notification of the recovery action, and not payments made prior thereto. He based that contention on the policy enunciated by the Under-Secretary-General for Administration and Management in a telex dated 30 July 1987 (hereinafter referred to as the "telex"), which read in pertinent part as follows:

> "[T]he Under-Secretary-General for Administration and Management has decided, until appropriate policy is elaborated, to limit to two years recovery of overpayments made to staff members in cases where such overpayments are due to action of Administration and not of recipient and to suspend recovery beyond two years".

3. The JAB concluded, in effect, that the Organization should be able to recover all overpayments, including those made earlier than two years prior to the date of notification of the recovery action, because the staff member was notified of the recovery action within two years of the last overpayment made to him. The advice of this Office has been sought in connection with the decision to be taken by the Administration on the JAB report.

4. In our opinion, the policy enunciated in the telex should be interpreted and applied so as to preclude the recovery of overpayments made to the staff member earlier than two years prior to the date of notification of the recovery action. Our reasons for this conclusion are set forth in the following paragraphs.

5. Under rule 103.15 of the United Nations Staff Rules, claims by staff members against the Organization for underpayments are subject to a one-year time limit; however, the Staff Rules contain no time limit for recovery of overpayments to staff members by the Organization. In Judgement No. 124, *Kahale* (1968), the United Nations Administrative Tribunal expressed the opinion that, for the sake of fairness, claims by the Organization should also be subject to a time limit.

6. The question of establishing such a time limit was considered by the Consultative Committee on Administrative Questions (Personnel and General Administrative Questions) (CCAQ (PER)) in the 1980s. In that connection, the practice of various organizations was examined. In a note presented to CCAQ (PER), the Secretary of the Committee proposed that the Committee agree that the procedures for recovery of overpayments made to staff members and for claims by staff members in cases of underpayment should be left to the individual organizations,[66] but that all organizations should adopt a rule along the following lines:

> "(*a*) Except where otherwise provided for, any entitlement to an allowance, grant or other payment arising from the Staff Regulations or Staff Rules shall lapse two years after the date on which the staff member would have been entitled to the payment.
>
> "(*b*) The Organization shall be entitled to recover any payment which was not due. However, except in cases of fraud or bad faith or where the irregularity of the payment was so self-evident that the beneficiary could not fail to realize it, the right of the Organization to recover overpayments shall lapse after two years. *In the case of a series of overpayments, the two years shall be counted as from the date of the last overpayment.* Such recovery shall be effected by means of deductions from payments due to the staff member concerned over a period not normally exceeding twenty-four months."[67] (emphasis added)

7. CCAQ (PER) did not adopt the proposal made by its Secretary. Instead,

> "[T]he Committee agreed that individual organizations should continue to determine their own procedures for claiming reimbursements by staff of overpayments received by them and for dealing with cases of underpayment. It was noted that some organizations would continue to treat cases on an ad hoc basis, thus allowing for a degree of flexibility where this was warranted."[68]

8. In a memorandum dated 25 February 1987 to the Deputy Director, Division for Policy Coordination, Office of Human Resources Management, the then Director and Deputy to the Under-Secretary-General in charge of the Office of Legal Affairs, commenting on the proposed rule, expressed the view that, except in cases of fraud or bad faith, the time limit for recovery by the Organization should be limited to two years even in the case of a series of overpayments. Accordingly, he suggested that the sentence in the rule which is italicized in paragraph 6 (*b*) above be deleted.

9. The policy of the Organization with respect to the recovery of overpayments was enunciated in the telex dated 30 July 1987 by the Under-Secretary-General for Administration and Management.

10. From a reading of that telex, and in the light of the background to this question outlined above, it seems clear to us that recovery of overpayments is to be limited to two years, and that payments beyond two years are not to be recovered. We regard it as noteworthy that the telex omits the express provision dealing with a series of overpayments that was contained in the rule proposed to CCAQ (PER), which would have permitted recovery of overpayments even beyond two years if the recovery was instituted within two years of the last overpayment in the series. The two-year period should be reckoned from the date that the Organization notifies the staff member of the claim of recovery.

Policy for the Organization

11. We consider that the Administration should now promulgate a clear rule for incorporation in the Staff Rules concerning the time limit for recovery of overpayments by the Organization, as it is very unsatisfactory to have a policy on an important matter affecting all United Nations staff set out in an unpublished telex.

28 February 1992

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26. RELIANCE BY THE JOINT APPEALS BOARD ON THE PROVISIONS OF THE LABOUR CODE OF A MEMBER STATE — OBLIGATION OF THE JAB, IN EXAMINING QUESTIONS CONCERNING THE TERMS AND CONDITIONS OF APPOINTMENTS OF STAFF MEMBERS, TO APPLY THE INTERNAL ADMINISTRATIVE LAW OF THE UNITED NATIONS

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

1. This is in response to your memorandum dated 8 May 1992, in which you referred to this Office the report of the JAB in the case of a staff member, with the following request:

> "Since this appeal concerns the existence and validity of an Agreement between Senegal and the United Nations, I would be grateful for your opinion, particularly whether the agreement [purportedly entered into by the Director of the African Institute for Economic Development and Planning (IDEP) and the Government of Senegal] overrides the United Nations Staff Rules."

I. BACKGROUND

A. *IDEP*

2. IDEP is a subsidiary body of the Economic Commission for Africa. It was established in 1962 by a resolution adopted by ECA.[69] A revised statute for IDEP was adopted by the General Assembly in 1979.[70] Located at Dakar, its primary purpose is the training of specialists and senior officials of those services and institutions in Africa responsible for economic development and planning.[71]

B. *Facts found by the JAB*

3. The salient facts found by the JAB are as follows. In 1990, a decision was taken by the Governing Council of IDEP to reduce local staff in connection with a restructuring of IDEP's basic activities. Pursuant to that decision,

several locally recruited staff members serving at IDEP under fixed-term contracts were informed that their appointments would not be renewed and that they would not be entitled to the payment of a termination indemnity.

4. Nine of those staff members, including the staff member in question, addressed a letter to the Secretary-General requesting a review of that decision. They were subsequently informed by the Office of Human Resources Management that the decision had to be maintained. They appealed to the JAB, and their individual appeals were grouped with the appeal of the staff member in question.

5. The JAB found that the staff member, a Senegalese national, had entered the service of the United Nations on 1 January 1984 on a one-year fixed-term appointment at the G-1 level to serve with IDEP. His functional title was changed to clerical worker on 10 October 1985 and he was promoted to the G-2 level on 1 February 1989. His appointment was renewed several times and, on 31 June 1990, upon expiration of his fixed-term appointment, he separated from service, after serving approximately 6½ years.

6. In support of his case, the Appellant relied in part upon an Agreement between the Government of Senegal and the United Nations concerning the establishment of IDEP (hereinafter referred to as the "Host Agreement"). The Host Agreement provides, in article IV (4):

> "Locally recruited personnel serving at the Institute who are nationals of Senegal shall be subject to the rules of the United Nations, in particular as regards salaries, entitlements, family allowances, leave and medical insurance, and provisions governing dismissal, to the extent that these rules do not conflict with the Labour Code of Senegal, *which shall continue to apply to such personnel*. However, they shall remain subject to the laws of Senegal in respect of taxation." (emphasis added)

7. The Appellant further relied upon article 35 of the Labour Code of Senegal, which he said provides that no worker can have more than two fixed-term contracts with the same firm; the continuation of service beyond those contracts will be deemed the execution of a permanent contract. The Appellant, who had been given more than two successive fixed-term contracts, contended that, by virtue of article IV (4) of the Host Agreement and article 35 of the Labour Code of Senegal, he must be treated as if he had a permanent contract.

C. *Report of the JAB*

8. In a report adopted unanimously on 31 March 1991, the JAB found that the Organization was bound by the provision of the Host Agreement, which subordinated the United Nations Staff Regulations and Rules to the Labour Code of Senegal, stating that a treaty between the parties superseded any internal laws of the Organization. Accordingly, the JAB recommended that the Appellant be reinstated with full retroactive payment of salary, allowances and benefits; and that if his post had been abolished, he be paid termination indemnities as if he had had a regular appointment.

II. THE JAB MUST APPLY THE INTERNAL ADMINISTRATIVE LAW OF THE UNITED NATIONS IN EXAMINING QUESTIONS CONCERNING THE TERMS AND CONDITIONS OF APPOINTMENTS OF STAFF MEMBERS

9. In examining questions concerning the terms and conditions of appointments of staff members of the United Nations, the JAB must apply the *in-*

ternal administrative law of the Organization, including the Charter of the United Nations, applicable resolutions and decisions of the General Assembly, the Staff Regulations and Rules and applicable administrative issuances.[72]

10. Article 101 of the Charter of the United Nations provides that staff members of the Organization "shall be appointed by the Secretary-General under regulations established by the General Assembly". Such Staff Regulations include the Staff Rules made thereunder.

11. The statute of IDEP was adopted by a decision of the General Assembly. Article III of the statute provides:

> "The Institute ... shall be subject to the Financial Regulations and the Staff Regulations of the United Nations. It shall also be subject to the Financial Rules, the Staff Rules and all other administrative issuances of the Secretary-General, except as may be otherwise decided by him."

With respect to matters of personnel administration, the exceptions to the Financial Rules, Staff Rules and other administrative issuances of the Secretary-General referred to in the statutes are ordinarily effected by the Secretary-General through promulgation of new, or existing, rules and other administrative issuances. In the case of IDEP, no such rules or issuances have been shown to exist on which the Appellant can rely in support of his claim.

12. It is stated in the Staff Regulations that the scope and purpose of the Regulations "embody the fundamental conditions of service and the basic rights, duties and obligations of the United Nations Secretariat. They represent the broad principles of personnel policy for the staffing and administration of the Secretariat . . ." (Staff Regulations, "Scope and purpose")

13. Pursuant to the Staff Regulations (annex II (*a*) (i) and (*b*)), appointments are subject to the Staff Regulations *and* to the Staff Rules adopted by the Secretary-General to implement those Regulations. The Staff Rules are applicable to all staff members appointed by the Secretary-General (see rule 100.1).

14. The Labour Code of Senegal, which is referred to by the Appellant and upon which the Appellant based his claim that his fixed-term appointment had become permanent, was never incorporated in the administrative legal regime governing United Nations staff at IDEP. The JAB could not, therefore, take cognizance of article 35 of the Labour Code of Senegal and base its recommendations upon it.

15. The JAB was established pursuant to regulation 11.1 of the United Nations Staff Regulations. Pursuant to that regulation, its mandate and authority is to advise the Secretary-General with respect to appeals by staff members against an administrative decision alleging "the non-observance of the terms of their appointment, including all pertinent regulations and rules". Since, as stated above, the terms of appointment of a United Nations staff member are governed by the internal administrative law of the Organization, the JAB exceeded its authority in directly applying the Labour Code of Senegal, to justify the Appellant's claims.

III. THE APPELLANTS SHOULD BE GRANTED TERMINATION INDEMNITIES UNDER REGULATION 9.3

16. We note that the JAB found that the staff member in question had served under several fixed-term appointments between his initial appointment on 1 January 1984 and his separation on 31 June 1990. We also observe that, as

found by the JAB, his fixed-term appointment was not renewed because of the abolition of his post in connection with a reduction of local staff owing to restructuring at the Institute for financial reasons.[73]

17. We call your attention to an opinion issued by this Office on 3 June 1992 in connection with another JAB case, in which we stated:

> "Since the stated ground for the decision not to renew the contract of the staff member concerned was, in fact, a termination for abolition of post, under the provisions of regulation 9.1 (*b*), termination indemnities should have been awarded to her in accordance with regulation 9.3 and annex III to the Staff Regulations. It was thus an error for the Administration to have effected her separation by letting her contract merely expire when she had been in United Nations service, albeit on fixed-term contracts, for a total period of 10 years."

18. In that opinion, we also observed that there was no evidence that the Appellant had been considered for a career appointment after the completion of five years of satisfactory service pursuant to General Assembly resolution 37/126 of 17 December 1982.

19. We believe that our conclusions in that case also apply in the present case, where the Appellant had served on successive fixed-term contracts in excess of 6 years. We consider that the Administration should, while rejecting the JAB recommendation that the Appellant be reinstated, pay the Appellant the termination indemnities provided for in regulation 9.3 of the United Nations Staff Regulations. In that respect, we advise that the recommendation of the report of the JAB should be accepted, but for quite different reasons from those given by the JAB.

20. Please note that, in paying the termination indemnities, it is important that the letter to the Appellants make it clear that the payment is made on the basis of regulation 9.3, and not on the basis of the reasoning of the JAB, which exceeded its authority in applying the Host Agreement and the Labour Code of Senegal.

1 July 1992

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27. QUESTIONS PERTAINING TO THE SUCCESSION OF THE FORMER SOVIET REPUBLICS TO TREATIES IN FORCE FOR THE FORMER UNION OF SOVIET SOCIALIST REPUBLICS—PROCEDURES TO BE FOLLOWED BY THE NEW REPUBLICS WITH RESPECT TO OPTIONS OF SUCCESSION TO OR CONTINUATION OF MULTILATERAL TREATIES WHICH WERE IN FORCE FOR THE FORMER USSR

Letter to the Deputy Permanent Representative to the United Nations of a Member State

I wish to refer to our meeting of 23 January 1992. In that meeting, you sought my advice on several questions pertaining to the succession of the former Soviet republics (hereinafter "new republics") to treaties in force for the former Soviet Union (hereinafter "USSR").

Your enquiry obviously excluded from its scope the Russian Federation, which continues to participate in all the treaties of the former USSR, as stated, *inter alia*, in a note dated 24 December 1991 addressed to the Secretary-General

by the Ministry of Foreign Affairs of the Russian Federation. I assume that your enquiry also excluded Belarus and Ukraine.

I

Before addressing your specific questions mentioned above, we wish to mention that a review of the general practice of States, and of the existing relevant international legal instruments, leads to the conclusion that there is no clear rule of general international law governing the succession of States in respect of treaties in the case of separation of parts of a State. However, the practice available to this Office shows that, in the course of time, new States emerging from the separation of parts of a State have the following options in connection with treaties concluded by a predecessor State which were applicable to their territories: (*a*) notification of succession to treaties (in this case the succeeding State acts on the legal basis that it is not automatically bound by treaties concluded by the predecessor State and that it starts with a "clean slate"; the succeeding State, therefore, has to indicate those specific treaties to which it has decided to succeed); (*b*) notification of the continuation of application of treaties concluded by the predecessor State (in this case the continuing State acts on the legal basis that it remains bound by those treaties by operation of the rules of general international law; the continuing State should, however, indicate those specific treaties which it may have decided *not* to continue).

New States may also accede to a treaty on their own, but such an action is *de novo* and not linked to succeeding to, or continuing in force, a treaty concluded by a predecessor State. The entry into force of the treaty for the acceding State (if the treaty is in force) will be determined on the basis of the date of the deposit of the instrument of accession in accordance with the relevant provisions of the treaties concerned. Succession and continuation, on the other hand, are aimed at the uninterrupted continuation in force of treaties. The present reply will deal only with succession and continuation.

As you may know, the 1978 Vienna Convention on Succession of States in respect of Treaties[74] is the only multilateral treaty in this field. The Convention distinguishes between the succession of "newly independent States" (i.e., ex-colonial States), to which it applies the "clean-slate" doctrine, and the succession of other States, to which it applies the opposite principle of the continuation in force of treaties. Article 34 of the Convention applies in particular to cases of separation of parts of a State and provides as follows:

> "1. When a part or parts of a territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:
>
> "(*a*) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed;
>
> "(*b*) any treaty in force at the date of the succession of States in respect only of that part of the territory of the predecessor State which has become a successor State continues in force in respect of that successor State alone.
>
> "2. Paragraph 1 does not apply if:
>
> "(*a*) the States concerned otherwise agree; or

"(*b*) 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."

The Vienna Convention is not yet in force and the former USSR was not a party thereto. However, it is worth noting that the approach adopted by the Convention received at the time the support of the majority of States, including that of the former USSR.

On the basis of the foregoing, the new republics have two options in respect of multilateral treaties which were in force for the former USSR:

(*a*) *Succession.* Under this option, the new State would declare that it succeeds to specific treaties in force for the predecessor State and applicable to the territory of the new State. In this case, under general international law, the entry into force of the treaty for the State would be retroactive to the date of the succession of States, i.e., the date when the new State has assumed responsibility for its own international relations. The new State succeeds to the legal position of the predecessor State for each treaty to which the succession applies. As a consequence, the new State becomes also bound by the reservations, declarations and objections made by the predecessor State, unless it declares otherwise.

(*b*) *Continuation* (as provided for in article 34 of the 1978 Vienna Convention). Under this option, the new State would make a general declaration that treaties in force for the predecessor State, and applicable to the territory of the new State, continue to be in force for the latter. As in the previous case, the entry into force of the treaty for the State would be retroactive to the date of the succession of States.

II

As regards replies to the specific questions raised by you during our meeting, they are set out below in the light of the foregoing:

(1) How should succession or continuation to treaties be formalized?

By the deposit of a formal notification of succession or a formal notification of continuation.

(2) Who should sign such notifications of succession or of continuation and to whom should they be sent?

As with any instrument which purports to bind a State to an international agreement, the notification of succession or of continuation should be signed by the Head of State or Government or by the Minister for Foreign Affairs, or any other person producing full powers issued by one of the three officials just mentioned, and should be forwarded to the depositary. With respect to treaties deposited with the Secretary-General, this means that the instrument should be addressed to the Secretary-General.

(3) What recommendations could be made as to the form and content of such declarations vis-à-vis treaties of a general character and treaties on specific issues?

In case of notifications of succession, they should clearly identify the treaty to which the State concerned intends to succeed. In practice, the succeeding State will simplify the procedure by depositing a single list of treaties to which it wishes to succeed. As noted above, unless specified otherwise, succession is

deemed to take effect on the actual date of succession (i.e., the date of "independence"), so that the obligations and rights under the treaty that are being continued without interruption are indeed those which had been accepted by the predecessor State.

In case of a notification of continuation, the Secretary-General would consider in good order a general declaration that treaties in force for the former Soviet Union shall be continued by the declaring new republic, without the need to specify the treaties. In this case, however, following the approach adopted in article 34, paragraph 2, of the 1978 Vienna Convention, the declaring republic should indicate the individual treaties which it may have decided not to continue, in view of the fact that their application by the State in question would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

The above considerations are valid for treaties of a general character and treaties on specific issues.

Finally, on a number of occasions, newly independent States have communicated to the Secretary-General a "general declaration of intent", indicating that they were proceeding to a review of the treaties concluded by the predecessor State and that, pending that review and until further notice, it should be presumed that each treaty has been succeeded to by the State concerned and action should be based on that presumption. Such a declaration is usually transmitted to the Secretary-General by the Government of the State concerned, with a request that the declaration be circulated to all States Members of the United Nations and international organizations. While such a declaration may be of temporary assistance in determining the newly independent State's conduct and in providing the depositary with some guidance as to the intent of the newly independent State to continue specific treaties, it nevertheless leaves in doubt the definitive legal situation of the succeeding State with respect to treaties in general. For his part, the Secretary-General, acting as depositary of multilateral treaties, will only consider as definitive a formal notification of succession in respect of specific treaties, or a notification of continuation.

(4) Are there conditions which must be met for the treaties to be continued in force by the successor State, such as the consent of all the other parties to the treaty?

A notification of succession to specific treaties or a notification of continuation would normally be accepted by the depositary without any conditions and without requiring the prior consent of the other parties. However, there may be exceptional circumstances which would require such consent, for example when the application of the new State would clearly be incompatible with the object of the treaty or would radically change the conditions for its operation, or when, under the terms of the treaty, or by reason of the limited number of the parties, it must be considered that the participation of the new State should require the consent of all parties (as would be the case with treaties participation in which is restricted or limited in some manner.)

(5) How would succession be formalized in the case of treaties not yet in force at the date of succession?

A new republic may wish to continue or succeed to a treaty of which the former USSR was a contracting State, but which is not, or not yet, in

force. In that event, notifications could be formulated along the lines indicated above.

(6) Status of bilateral treaties

The options highlighted above for multilateral treaties would also apply to bilateral treaties. On the basis of the practice available to us and the 1978 Vienna Convention, a strong case can be made for continuity in the case of bilateral treaties. However, a peculiarity concerning bilateral treaties is that they would be considered as continuing in force between the new State and the other party provided that the other party so agrees (through an exchange of notes, etc.). The practice has also been accepted to consider that treaties were deemed continued in force if, by reason of its conduct, the other party indicated having so agreed. The States may also, of course, choose to enter into a new treaty, even if that new treaty is concluded on a similar basis as the treaty which existed between the predecessor State and the other State.

We hope that this reply can be useful in providing guidance to the new republics on the position to take towards treaties in force for the former USSR.

27 March 1992

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28. QUESTION OF THE WAY IN WHICH A FRAMEWORK CONVENTION ON CLIMATE CHANGE SHOULD BE ADOPTED — NORMS OF THE GENERAL LAW OF TREATIES WITH RESPECT OF THE ADOPTION OF THE TEXT OF A CONVENTION

Memorandum to the Executive Secretary, International Negotiating Committee for a Framework Convention on Climate Change

1. This is in reply to your memorandum to me dated 21 April 1992 by which you sought our advice on whether the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change should "adopt" the envisaged Convention without representatives producing full powers. You also raised the question of whether the term "agree upon" could be used in place of "adopt".

2. The 1969 Vienna Convention on the Law of Treaties,[75] which is in force and generally considered the authoritative codification of the international law of treaties, contains the following provision:

"Article 7

"FULL POWERS

"1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:

"*(a)* he produces appropriate powers; or

"*(b)* it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.

"2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

"(*a*) heads of State, heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;

"(*b*) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;

"(*c*) representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ."

3. Paragraph 2 (*c*) quoted above makes it clear that representatives accredited by States to an international organization or one of its organs, such as the Intergovernmental Negotiating Committee, for the purpose of adopting the text of a treaty in that organization or organ, do not need to produce full powers for the purpose of adopting that text.

4. This is further confirmed by the corresponding provision found in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations,[76] which provides:

"*Article 7*

"FULL POWERS

"...

"2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

"...

"(*c*) representatives accredited by States to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that organization or organ".

5. Again, the text of the Convention supports the procedure of the Intergovernmental Negotiating Committee adopting the text of the envisaged Convention, without requiring representatives to the Committee to produce full powers.

6. In the practice of the United Nations, numerous conventions have been adopted by the General Assembly without the requirement that Assembly representatives produce full powers for the adoption of the text.[77]

7. Turning to the question whether the Intergovernmental Negotiating Committee could "agree upon" the text of the envisaged convention rather than "adopt" it, as can be deduced from the above, the standard practice is for the United Nations body negotiating a treaty text to adopt it, in conformity with the general law of treaties.

8. In its resolution 45/212 of 21 December 1990, the General Assembly considered "that the negotiations for the preparation of an effective framework convention on climate change, containing appropriate commitments, and any related legal instruments as might be agreed upon, should be completed" prior to the Conference in June 1992 and opened for signature during the Conference. Thus, the General Assembly envisaged that the negotiations for the preparation of the Convention should be completed prior to the Conference. In that sense, the Intergovernmental Negotiating Committee is "completing the negotiations" of the Convention. The Assembly also referred to related legal instruments be-

ing "agreed upon". The Assembly's language relates more to the process of negotiation than to the final stages of treaty-making.

9. It is therefore our view that the Intergovernmental Negotiating Committee should "adopt" the text of the Convention, the negotiations for the preparation of which are now being completed, in order to align with the general law of treaties and the standard United Nations practice in this respect.

6 May 1992

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29. THE 1986 INTERNATIONAL AGREEMENT ON OLIVE OIL AND TABLE OLIVES—INTERPRETATION OF ARTICLE 53 OF THE AGREEMENT ON ACCESSION—IRRELEVANCE OF GEOGRAPHIC BOUNDARIES AS REGARDS ACCEPTANCE OF MEMBERSHIP IN THE UNITED NATIONS

Letter to the Executive Director of the International Olive Oil Council

By your letter dated 27 November 1991, you requested our opinion on a question raised by the representative of the European Economic Community (EEC) at the 65th session of the International Olive Oil Council, namely whether article 53 of the 1986 International Agreement on Olive Oil and Table Olives,[78] entitled "Accession", could be interpreted in such a manner as to enable parties to the Agreement to reject the candidacy of other States Members of the United Nations wishing to accede to the Agreement. The EEC representative has concluded that the article could not be so interpreted. In addition, you raised the question of the viewpoint of the United Nations on the relationship, if any, between geographical boundaries and acceptance of membership in the Organization.

The question concerning article 53

Article 53 of the Agreement reads as follows:

> "The Government of any State may accede to this Agreement upon conditions established by the Council, which shall include a time limit for the deposit of instruments of accession. The Council may, however, grant extensions of time to Governments which are unable to accede by the time limit set in the conditions of accession."

It follows quite clearly from article 53 that "any State" may accede to the Agreement. As the depositary of the Agreement, the Secretary-General is required to interpret the Agreement in accordance with the ordinary meaning to be given to the terms of the Agreement in their context and in the light of its object and purpose. This interpretation is consistent with the 1969 Vienna Convention on the Law of Treaties.

Since by virtue of article 53 any State may accede to the Agreement, it follows that the conditions referred to in that article cannot defeat this object and purpose. Therefore, the conditions established by the Council must be in accordance with that object and purpose and technical in nature. An example of such a technical condition is provided in the text of the article, namely the setting of time limits for the deposit of instruments of accession. A review of other commodity agreements which contain provisions similar to article 53 reveals no cases or practice where conditions other than technical ones have been established. Such technical conditions may relate to the number of participation shares for importing and exporting members, the level of financial contribu-

tions, the allocation of voting rights and, as is the case in article 53, the setting of a time limit for the deposit of instruments of accession.

We therefore agree with the interpretation of the representative of EEC that article 53 cannot be invoked in order to reject the candidacy of States Members of the United Nations that wish to accede to the Agreement.

Geographic boundaries

The practice of the United Nations is that the geographic boundaries of Member States and their membership status are two distinct and separate issues. Admission of a State to membership in the United Nations does not entail any substantive position on the part of the Organization on the question of that State's geographic boundaries or territorial disputes in general. Numerous Member States have boundary disputes which are totally unaffected by membership in the United Nations of the parties to such disputes.

7 January 1992

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30. LEGAL CONDITIONS UNDER WHICH CERTAIN ORGANS OF THE NEW ORGANIZATION TO BE CREATED BY A CONVENTION ON THE PROHIBITION OF THE DEVELOPMENT, PRODUCTION, STOCKPILING AND USE OF ALL CHEMICAL WEAPONS AND ON THEIR DESTRUCTION BEING PREPARED FOR ADOPTION BY THE CONFERENCE ON DISARMAMENT WOULD BE EMPOWERED TO REQUEST ADVISORY OPINIONS OF THE INTERNATIONAL COURT OF JUSTICE—QUESTIONS REGARDING THE RELATIONSHIP BETWEEN THE ORGANIZATION IN QUESTION AND THE UNITED NATIONS

Note to the Permanent Mission of a Member State to the United Nations

The Secretariat of the United Nations presents its compliments to the Permanent Mission of (name of a Member State) to the United Nations and has the honour to refer to the advice requested by the Permanent Mission by its note verbale 615/91 to the Secretariat dated 11 November 1991.

By that note, the Permanent Mission referred to paragraph 5 of article XVI of the draft convention being prepared for adoption by the Conference on Disarmament on the prohibition of the development, production, stockpiling and use of all chemical weapons and on their destruction. According to that draft provision, certain organs of the organization to be created by the convention would be empowered, "subject to authorization from the General Assembly of the United Nations, to request the International Court of Justice to give an advisory opinion on any legal question arising within the scope of the activities of the Organization".

The Permanent Mission requested the opinion of the Secretariat as to the legal conditions under which the organs of the new organization would be able to request advisory opinions of the International Court of Justice. It also requested an indication of how the relationship between the organization and the United Nations might be regulated.

Article 96 of the Charter of the United Nations concerns requests for advisory opinions and reads as follows:

"1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

"2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities."

As indicated by the Permanent Mission in its note, the envisaged new organization would be neither an organ of the United Nations nor a specialized agency, within the meaning of Articles 57 and 63 of the Charter of the United Nations. However, as further noted in the Permanent Mission's note, the General Assembly has approved a relationship agreement between the United Nations and an intergovernmental organization on terms similar to those found in relationship agreements concluded with specialized agencies, namely the Agreement concerning the Relationship between the United Nations and the International Atomic Energy Agency approved by the General Assembly in its resolution 1145 (XII) of 14 November 1957.[79]

With regard to the question of requesting advisory opinions from the International Court of Justice, it should be noted that article XVII.B of the statute of IAEA of 26 October 1956 contains language identical to that contained in article XVI, paragraph 5, of the draft convention quoted by the Permanent Mission. Attention should be drawn as well to article XVI of the IAEA statute, entitled "Relationship with other organizations",[80] paragraph B of which concerns agreements establishing the relationship between the Agency and the United Nations.

The relationship Agreement between IAEA and the United Nations provides important principles governing the relationship between the two organizations, particularly in its article I, as well as in article X concerning the International Court of Justice.

Following the approval of the relationship Agreement, the General Assembly, in its resolution 1146 (XII), authorized IAEA to request advisory opinions of the International Court of Justice.

Therefore, the Secretariat would advise that there should be no legal obstacle to the General Assembly giving authorization to the new organization envisaged in the draft convention to request advisory opinions of the International Court of Justice, as long as the terms of the convention which govern the relationship between the new organization and the United Nations, as well as the terms of the relationship agreement to be negotiated between the two organizations, follow the principles and relevant provisions governing the relationship between the United Nations and IAEA. The IAEA experience provides the model of how the organization being envisaged may propose regulating its relationship with the United Nations. The rules, principles and provisions governing the relationship between the new organization and the United Nations should in their totality be identical to those governing the relationship between IAEA and the United Nations. It goes without saying that it would be for the General Assembly to decide whether or not to approve such a proposed relationship agreement and whether or not to authorize the new organization to request advisory opinions of the International Court of Justice.

9 January 1992

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31. UNITED NATIONS PRACTICE WITH RESPECT TO RESERVATION CLAUSES IN MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL

Cable to the Officer-in-Charge of the Legal Office, Food and Agriculture Organization of the United Nations

I wish to refer to your facsimile dated 23 July 1992 on the reservation clauses in multilateral treaties. We shall reply to your query as follows.

First of all, we confirm that there have not been any other resolutions from the United Nations General Assembly dealing with reservation clauses since resolutions 598 (VI) of 12 January 1952 and 1452 A and B (XIV) of 7 December 1959.

Secondly, reservation clauses included in multilateral treaties concluded under the auspices of the United Nations tend to fall under the following seven categories, samples of which are attached herewith:

— Clauses prohibiting reservations altogether;

— Clauses expressly prohibiting reservations which are incompatible with the object and purpose of the treaty;

— Clauses providing for reservations specifically listed;

— Clauses providing for reservations on certain articles;

— Clauses allowing reservations when they have been accepted by a certain organ;

— Clauses allowing reservations when they have been accepted by a given number of parties;

— Clauses stipulating the legal consequences deriving from a reservation or an objection thereto.

Of course, a number of multilateral treaties deposited with the Secretary-General of the United Nations are altogether silent on the matter of reservations.

We now come to the question of "the practice, in recent years, of the United Nations system concerning restrictive reservation clauses similar to the one referred to above", that is, we infer from the second paragraph in your note, clauses allowing reservations on the condition of their unanimous acceptance by all parties to the convention.

We are not aware of conventions, adopted in the fairly recent past, which would contain clauses requiring unanimous acceptance. Indeed, conventions tend to either remain silent on the subject of reservations, prohibit them altogether or limit the permissibility of reservations to specific provisions.

Having said that, the practice of the Secretary-General can be described as follows.

Should a convention require unanimous — tacit or express — acceptance of reservations and if the convention did not provide for a time limit within which States would be allowed to object, the Secretary-General would notify the reservation to the States concerned, requesting that objections or acceptances be communicated within 90 days from the date of the notification. Of course, if the convention specified a time limit, the Secretary-General would adhere to the corresponding provisions of the convention.

The instrument would be kept pending and the reserving State would not be considered as a party to the convention until after the expiration of the time

limit indicated for objections and provided, of course, that no objection had been received.

In the absence of a restrictive or a prohibitive clause in a given treaty, the current practice is that the Secretary-General, adhering to the provisions of General Assembly resolution 1452 (XIV), will duly accept the instrument for deposit. The text of the reservation is circulated to the States concerned without the Secretary-General pronouncing himself on the legal effects of such reservations (or comments and/or objections possibly received to the reservations and equally circulated), leaving it to each State to draw legal consequences from all such communications. In accordance with article 20, paragraph 5, of the 1969 Vienna Convention on the Law of Treaties,[81] States have 12 months to notify their objection.

The difference is that, in the absence of a specific clause, *the instrument would be deposited upon its receipt and the State which had deposited an instrument containing, or accompanied by, reservations would be considered as a party to the treaty concerned on the date of entry into force in its respect or, as the case may be, would be included as a party for the purpose of the entry into force of the convention.*

In situations in which the treaty provides that no reservation may be made to the treaty, then of course the Secretary-General will not accept in deposit an instrument containing or accompanied by a reservation: it will contact the State concerned with the possible suggestion that the reservation be withdrawn if the said State does wish to participate in the treaty.

Finally, and in accordance with article 20 of the 1969 Vienna Convention on the Law of Treaties, when a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization. In such cases, the Secretary-General will inform the organization concerned and will remind the State of this requirement. The instrument will be accepted in deposit only upon the acceptance of the reservation by the competent organ of the organization to be, or upon the withdrawal of the reservation by the said State.

16 September 1992

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32. PERMISSIBILITY OF RESERVATIONS TO THE 1988 UNITED NATIONS CONVENTION AGAINST ILLICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES — UNITED NATIONS PRACTICE IN RESPECT OF RESERVATIONS TO MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL

Letter to the Permanent Representative of a Member State to the United Nations

I have the honour to acknowledge receipt of your letter dated 28 October 1992 in which you requested my opinion on four specific legal questions relating to the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.[82] Our views are as follows:

1. There is no provision in the Convention prohibiting reservations. In the absence of any contrary evidence that may be found in the legislative history of the 1988 Convention, and having noted that States have made reserva-

tions to this Convention when signing or acceding to it, we are therefore of the opinion that reservations may be made to the Convention, provided that such reservations are not incompatible with its object and purpose.

2. Neither article 3 nor article 6 of the Convention prohibits specified reservations. In keeping with established practice, a State can formulate reservations to article 3, paragraphs 6 and 9, and article 6, provided again that such reservations are not incompatible with the object and purpose of the Convention. According to United Nations practice, the Secretary-General, as the depositary, would circulate any reservations received to all interested parties and would also circulate to them any objections made to reservations. In themselves, objections do not preclude the entry into force of the Convention between the objecting and reserving States unless a statement to this effect is made by the objecting State, and except of course with respect to the reservations being objected to.

3. Also consistent with United Nations practice, a signatory State to the 1988 Convention may formulate reservations when it accedes to the Convention.

4. Pursuant to United Nations practice, a State has the possibility, when depositing its instrument of ratification, acceptance or approval, not to confirm a reservation made at the time of signature. In such a case, the reservation made at the time of the signature would be considered as withdrawn.

17 November 1992

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33. UNITED NATIONS POUCH ARRANGEMENTS IN A MEMBER STATE — LEGAL REGIME OF THE UNITED NATIONS POUCH UNDER RELEVANT PROVISIONS OF THE 1946 CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS AND THE 1961 VIENNA CONVENTION ON DIPLOMATIC RELATIONS

Memorandum to the Legal Adviser, United Nations Relief and Works Agency for Palestine Refugees in the Near East

1. This is with reference to your facsimile dated 29 September 1992 on United Nations pouch arrangements in a Member State. We note that the authorities of the Member State in question demand that UNRWA pouches be, like UNTSO and UNDP pouches, submitted to domestic security personnel 24 hours in advance of the intended departure from the State. We further note that the Permanent Representative to the United Nations Organizations at Vienna of another Member State made a *démarche* to the State in question in UNRWA support.

2. We have inquired with the Field Operations Division as to UNTSO's practice. The Division has provided this Office with UNTSO internal correspondence on its outgoing pouch arrangements at the airport of the State in question. According to this correspondence, UNTSO is indeed handing its diplomatic pouches over to the authorities of the said State on Sunday. They are kept for 24 hours at the airport and then flown to New York on Monday. This practice commenced on 1 September 1990, prior to which the UNTSO pouch was handed directly to Swissair. The Field Operations Division also informed us that

UNTSO shares UNRWA's position on the matter and suggests that an effort be made to revert to the past arrangements.

3. The United Nations position of principle on the legal status of the United Nations pouch is as follows. The legal regime of the United Nations pouch is governed by the relevant provisions of the 1946 Convention on the Privileges and Immunities of the United Nations[83] and the 1961 Vienna Convention on Diplomatic Relations.[84] According to article III, section 10, of the 1946 Convention, "the United Nations shall have the right . . . to dispatch and receive its correspondence by courier or in bags, which shall have the same immunities and privileges as *diplomatic couriers and bags*" (emphasis added). The detailed norms of international law regulating the legal status of diplomatic bags are codified in the 1961 Vienna Convention, article 27, paragraph 2, of which provides for inviolability of official correspondence. Paragraph 3, furthermore, unequivocally stipulates that the diplomatic bag shall not be opened or detained. Moreover, under paragraph 7, "a diplomatic bag *may be entrusted to the captain of a commercial aircraft* scheduled to land at an authorized port of entry" (emphasis added). In our view the detention of United Nations pouches would be in contravention of the above-mentioned stipulations regulating the legal status of diplomatic bags.

14 October 1992

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34. QUESTION OF THE POSSIBLE IMPOSITION ON THE UNITED NATIONS, AS OWNER OF THE UNITAR BUILDING, OF THE NEW YORK STATE SALES AND USE TAX ARISING FROM BUILDING SERVICES RENDERED TO UNITAR BY A PROPERTY MANAGEMENT FIRM—EXEMPTION OF THE ORGANIZATION FROM DIRECT TAXES, UNDER ARTICLE II, SECTION 7, OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

Memorandum to the Chief Administrative Officer, UNITAR

1. Reference is made to your memorandum of 6 December 1991 to me transmitting for our advice the 22 November 1991 letter to you from a property management firm on the subject of possible New York State sales and use tax arising from building services rendered to UNITAR by this firm.

2. According to the information contained in the firm's letter to you, it would appear that the State of New York has taken the position that State sales and use tax is payable by the *owner* of real property (here, the United Nations as the holder of title to the UNITAR property) on the "payroll costs" of third-party property management firms. The firm in question provides maintenance and repair services to UNITAR on the 805 First Avenue property.

3. Article II, section 7, of the Convention on the Privileges and Immunities of the United Nations,[85] to which the United States is a party, provides that the Organization is exempt from direct taxes on its "assets", which would include the UNITAR property. That exemption is binding on the State of New York under the supremacy clause of the United States Constitution. In fact, under section 1116 of the "Sales and Compensating Use Taxes" legislation, article 28 of the State of New York Tax Law, the United Nations is expressly exempted from the sales and compensating use taxes, where it is the purchaser of services subject to the taxes provided for under the provisions of article 28 of the Tax Law. Clearly, therefore, the United Nations (of which UNITAR is an integral

part) as the purchaser of services from the firm in question is exempt from the tax in issue under the law of the State of New York.

4. In view of the above, we suggest that UNITAR write to the firm in question to inform them of the Organization's exemption from the tax in question and to expressly instruct them not to pay any such tax on our behalf.

5. In the event it becomes necessary, it is suggested that UNITAR submit an application to the State of New York tax authorities for an exempt organization certificate. This Office would be happy to provide any assistance in that regard.

6. Lastly, since the UNITAR property is now owned in its entirety by the Organization and is unlikely to be sold in the near future, it would seem appropriate for the building services to be provided by the United Nations itself, rather than engaging the firm in question.

5 January 1992

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35. IMPOSITION IN A MEMBER STATE OF TAXES ON PURCHASES OF PETROL NEEDED FOR THE EXECUTION OF AGREED PROJECTS IN ACCORDANCE WITH UNICEF PLANS OF OPERATIONS—INTERPRETATION OF THE RELEVANT PROVISIONS OF THE AGREEMENT BETWEEN UNICEF AND THE MEMBER STATE IN QUESTION CONCERNING THE ACTIVITIES OF UNICEF IN ITS TERRITORY

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

1. This is with reference to your memorandum of 25 February 1992 on local taxes on UNICEF supplies.

2. As to the substance of inquiries raised in the UNICEF representative's letter, the following observations may be made. In our view, the expression "supplies and equipment furnished" as used in paragraph 4 of article I and in article VII of the 1961 Agreement between UNICEF and (name of a Member State) concerning the activities of UNICEF in the country in question should be considered as comprising local purchases of petrol needed for execution of agreed projects in accordance with each plan of operations. Accordingly, no taxes should be levied on purchases of petrol, pursuant to the provisions of article VII of the Agreement.

3. The consistent position of the United Nations on the matter is reflected in the study on relations between States and international organizations prepared by the United Nations Secretariat in 1985.[86] According to the study, "a petrol tax forming part of the price to be paid is to be considered as falling under the terms of article II, section 8, of the Convention on the Privileges and Immunities of the United Nations"[87] providing for the remission or refund of the amount of tax imposed on "important purchases for official use" by the United Nations. The amounts involved in a recurring purchase of petrol normally qualify as "important". The study concludes that the United Nations is in principle exempted from excise duty on petrol required for its operations in the territories of Member States. Certainly, such an exemption should be applicable to UNICEF as an integral organ of the Organization. The Member State con-

cerned, as a party to the Convention without any reservation, should fully comply with its obligations under the Convention.

4. A similar approach is laid down in the new Standard Basic Cooperation Agreement between UNICEF and Governments. The provisions of paragraph 6 of article VII expressly stipulate that "no direct taxes, value-added tax, fees, tolls or duties shall be levied on the supplies, equipment and other materials intended for programmes of cooperation in accordance with the master plan of operations. In respect of supplies and equipment purchased locally for programmes of cooperation, the Government shall, in accordance with section 8 of the Convention, make appropriate administrative arrangements for the remission or return of any excise duty or tax payable as part of the price."

5. Any discussion with the authorities of (name of the Member State) on the question of exemption from taxation on local purchase of petrol should be based on the above observations.

4 March 1992

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36. EXEMPTION OF THE UNITED NATIONS DEVELOPMENT PROGRAMME FROM VALUE-ADDED TAX ON GASOLINE PURCHASES AND FROM THE TAX ON CIRCULATION IN A MEMBER STATE—INTERPRETATION OF THE RELEVANT PROVISIONS OF THE STANDARD BASIC ASSISTANCE AGREEMENT AND THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

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

1. This is with reference to your memorandum dated 12 August 1992 on the United Nations Development Programme tax treatment in a Member State.

2. We understand from your memorandum and the correspondence enclosed therewith that by the end of 1992 the Government of (name of the Member State) will no longer exempt UNDP from value-added taxes on the purchase of gasoline and on circulation. A reason given by the competent authorities of this State seems to be based on the argument that no express provision to this effect is contained in the Agreement between UNDP and the State in question.

3. With respect to VAT and sales tax in general, the United Nations regards such taxes as indirect taxes within the meaning of article II, section 8, of the Convention on the Privileges and Immunities of the United Nations[88] (the Convention), to which the State in question acceded on 28 March 1968. Under paragraph 1 of article IX of the Standard Basic Assistance Agreement signed on 9 June 1978 between UNDP and the State in question, which agreement embodies the conditions under which UNDP provides assistance to this State, the provisions of the Convention "apply to the United Nations and its organs, *including the UNDP* [emphasis added] and United Nations subsidiary organs acting as UNDP Executing Agencies, their property, funds and assets . . .".

4. While there is no express provision on the matter of the value-added tax, this tax and sales tax are dealt with, pursuant to the long-standing United Nations practice in these matters, under the provisions of article II, section 8, of the Convention, which entitle the Organization (including UNDP) not to an exemption but rather 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". Such appropriate administrative arrangements may be in the form of, *inter alia*, an exchange of letters between the United Nations and the Member State concerned, in application of article II, section 8, of the Convention.

5. As regards the tax on circulation, referred to in the attachments to your above-mentioned memorandum as "road taxes", the United Nations has taken a position, which has been consistently maintained, that a tax on circulation, in so far as it is directly imposed upon the Organization, is within the meaning of article II, section 7, of the Convention and should therefore be exempted. The position taken by the United Nations in this connection has been published as a legal opinion in the *United Nations Juridical Yearbook*.[89]

6. In view of the foregoing, UNDP may, along the lines of the present memorandum, request the Government of the State in question to review its position before the end of 1992 taking into account the provisions of article II, sections 7 and 8, of the Convention. It would also be relevant to refer to the final article, section 34, of the Convention under which the Government of the State in question had assumed an obligation to be "in a position under its own law to give effect to the terms of this Convention".

3 September 1992

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37. BLOCKING OF A UNITED NATIONS CHILDREN'S FUND BANK ACCOUNT BY A COURT IN A MEMBER STATE—UNDER THE 1946 CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS AND THE 1963 AGREEMENT BETWEEN UNICEF AND THE MEMBER STATE CONCERNED, THE UNITED NATIONS, ITS FUNDS AND ASSETS ARE IMMUNE FROM ANY FORM OF LEGAL PROCESS AND INTERFERENCE

Note 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 matter of the blocking of the UNICEF bank account by the Commercial Bank of (name of the Member State).

It has recently been brought to the attention of the Legal Counsel that in the case concerning an accident involving a UNICEF-operated vehicle and in which one person lost his life, the High Court of (name of the Member State) ordered, on 27 July 1992, that "the amount of . . . be withdrawn from the account of UNICEF with the Commercial Bank of [the Member State]". On 23 September 1992, the Bank informed UNICEF that the latter's account had been blocked for the specified amount.

The Legal Counsel regrets the delay which has arisen in the settling of this case. However, UNICEF has decided to settle this claim on the basis of the award given to the victim's family by the courts of (name of the Member State). This is in keeping with UNICEF's obligations under article VIII, section 29, of the 1946 Convention on the Privileges and Immunities of the United Nations,[90]

which requires the United Nations to make provisions for appropriate modes of settlement of private law disputes to which it is a party. The Organization is thus fulfilling its responsibilities in this matter.

However, with regard to the actions taken with respect to the UNICEF account, the Legal Counsel is obliged to point out that they are in direct violation of the host country's international obligations under the Convention on the Privileges and Immunities of the United Nations to which (name of the Member State) has been a party since 27 July 1947 as well as the 1963 Agreement between UNICEF and (name of the Member State).[91] According to article II, section 2, of the Convention, United Nations funds and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process. Furthermore, article II, section 3, of the Convention stipulates that they "shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action". Article VII of the 1963 Agreement, entitled "Privileges and immunities", confirms the Government's obligation to "apply to UNICEF, as an organ of the United Nations, to its property, funds and assets, . . . the provisions of the Convention on the Privileges and Immunities of the United Nations . . .".

The Legal Counsel, therefore, trusts that the Government of (name of the Member State) will comply with its international obligations under the applicable agreements and ensure that the necessary action is taken to vacate the order blocking the account.

12 October 1992

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38. EXEMPTION FROM TAXATION ON PURCHASES MADE BY THE UNITED NATIONS DEVELOPMENT PROGRAMME—ARTICLE II, SECTIONS 7 AND 8, OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

Memorandum to the Assistant Administrator and Director, Office for Project Services, United Nations Development Programme

1. This is with reference to your memorandum of 13 March 1992 on the question of exemption from taxation of buses purchased by UNDP.

2. We note that ownership of the 46 buses was transferred in July 1991 from the supplier to UNDP; the supplier has subsequently arranged for the bonded storage of the buses through the manufacturer.

3. We also note that the UNDP Resident Representative in (name of a Member State), in his submission dated 9 March 1992, warns, with reference to the exceptional "duty-free period until 31 March 1992" previously accorded by the Government of the State in question, that no further extension will be granted by the Government. The Resident Representative has further indicated that thereafter the buses will be subject to "*duty, tax and penalty*" (emphasis added). In order to determine our position on the matter we need clarification regarding the nature of "duty, tax and penalty" to be levied by the Government of the State in question. Therefore, at this stage, we shall address only the issue of exemption from possible taxation levied on the purchases made by UNDP.

4. In the absence of a UNDP Standard Basic Assistance Agreement, UNDP's acquisition of the 46 buses should be considered in the light of the rel-

evant provisions of the 1946 Convention on the Privileges and Immunities of the United Nations[92] to which the State in question has been a party since 1948, without any reservation. According to the provisions of article II, section 8, of the Convention, "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". Whether United Nations purchases are to be regarded as "important" within the meaning of section 8 of the Convention is usually determined by reference to whether either a large quantity of items have been purchased or a large amount paid by the Organization. In our view, in the case under consideration, UNDP's purchase of 46 buses is to be considered as "important". Accordingly, UNDP is entitled to seek the remission of any tax on purchase which might be levied.

5. In addition, it should be observed that, being the property of UNDP, the buses, pursuant to article II, section 7, of the Convention, are exempt from *all direct taxes*, customs duties or prohibitions and restrictions on imports and exports. However, UNDP should not claim "exemption from those taxes which are, in fact, no more than charges for public utility services" (section 7 (*a*) of the Convention). We note, however, that the term "public utility services", both as a matter of principle and as a matter of obvious practical necessity for the Organization, has been restrictively interpreted as implying particular supplies or services rendered by a Government or a corporation under Government regulation for which charges are made at a fixed rate according to the amount of supplies furnished or services rendered and which can be specifically identified, described and itemized.

23 March 1992

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39. QUESTION WHETHER SUBJECTING THE SELLING OF UNITED NATIONS PROPERTY IN A MEMBER STATE TO THE REQUIREMENT OF A PRIOR AUTHORIZATION IS IN LINE WITH THE 1946 CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

Memorandum to a Resident Representative of the United Nations Development Programme

1. This is with reference to your facsimile of 14 August 1992 containing in the attachment a note verbale of the Foreign Ministry of (name of a Member State) informing that the selling of official vehicles must be subject to prior authorization to be obtained from the Ministry. In response to your question whether this requirement is in line with the 1946 Convention on the Privileges and Immunities of the United Nations,[93] please be advised as follows.

2. According to our information, the State in question is not yet a party to the Convention on the Privileges and Immunities of the United Nations. However, in 1976, it signed with UNDP a Standard Basic Assistance Agreement (SBAA). Article IX of the SBAA unequivocally provides that the Government "shall apply to the United Nations and its organs, including the UNDP and United Nations subsidiary organs acting as UNDP Executing Agencies, their property, funds and assets, and to their officials, including the resident representative and other members of the UNDP mission in the country, the provisions of the Convention on the Privileges and Immunities of the United Na-

tions". Therefore, the provisions of the Convention, in their entirety, are to be considered as fully applicable to the UNDP office and its property in the country in question.

3. Under article II, section 7 (*b*), of the Convention, the United Nations property shall be "exempt from customs duties and prohibitions and restrictions on imports and exports in respect of articles imported or exported by the United Nations for its official use". However, this section further provides that "articles imported under such exemption will not be sold in the country into which they were imported except *under conditions agreed with the Government of that country*" (emphasis added). Therefore the Government of a host State is entitled to set out conditions under which official vehicles should be sold in the country.

4. It should be noted that the United Nations has consistently maintained the view that the right of the host country to restrain the selling of property of the United Nations must not be misused, i.e., should be reasonably applied. In the legal opinion reflected in a study prepared in 1967 for the International Law Commission on this subject it is, in particular, stated that "while conditions for sale must be agreed with the host country, it was not intended that such conditions should be unilaterally and arbitrarily established but that they should be negotiated with the purpose of protecting the legitimate interests of both parties, that is, to ensure the host country against the abuse of import privileges and to ensure the United Nations and its staff effective use of such privileges for the purposes that they were intended".[94]

5. Accordingly, it is advisable to clarify with the Government the modalities of the proposed restrictive measure. Should these modalities appear to you to constitute arbitrary and unreasonable restrictions, you may wish to report the matter to Headquarters for further examination and advice.

27 August 1992

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40. Recording of the acquisition cost of UNITAR land and building — Question whether acquisition cost should be included in the value of the capital assets of the United Nations or whether it should be transferred to the UNITAR balance sheet as a debt owed to the United Nations — Background to the transaction leading to the purchase of the land in question

Memorandum to the Deputy Controller, Office of Programme Planning, Budget and Finance

1. You requested my opinion concerning the external audit observation note of 23 April 1992 on recording acquisition cost of the UNITAR land and building.

Auditors

2. As we understand it, the Auditors have queried the inclusion in the value of the capital assets of the Organization of the amount of $4.4 million which was used to purchase the land occupied by UNITAR as its headquarters premises. They have, consequently, requested that this amount should be transferred from the balance sheet of the United Nations to the UNITAR balance sheet as a debt owed to the United Nations.

3. The above determination is questioned on the ground that the purchase of the land was authorized by the General Assembly to be carried out by the United Nations, under United Nations control. It is argued that "it was never intended that UNITAR should control the property, or that the property should become an asset of UNITAR".

Background

4. As you will recall, the entire transaction leading to the purchase of the land in 1989, and the subsequent attempts to sell the entire property, were initiated by the Executive Board of UNITAR in 1986, as a means of solving UNITAR's financial problems. The Board recommended to the Secretary-General that ways of raising additional capital for UNITAR should be found, including the possibility of converting UNITAR's interests in the building it occupied as its headquarters into a revenue-producing asset. Thereafter, in 1987, on the advice of the Board and the concurrence of the Advisory Committee on Administrative and Budgetary Questions, the Secretary-General proposed to the General Assembly at its forty-second session the acquisition of the land with a view to effecting the sale of the entire property."[5] It is on the basis of that proposal that resolution 42/197 was adopted by the General Assembly on 11 December 1987.

5. The relevant paragraph of resolution 42/197 (paragraph 5) reads:

> "5. *Approves* the recommendation of the Secretary-General to proceed as rapidly as possible with the acquisition of the land and subsequent sale of the entire property of the building of the United Nations Institute for Training and Research, the resources to be used to repay the amounts currently due to the United Nations and the balance to be used as a reserve fund for the Institute."

Acquisition of land and building

6. The building referred to in the resolution was purchased in 1964 by the United Nations with a gift from the Rockefeller Foundation for the exclusive use of UNITAR. The land was originally occupied under a lease executed in the name of the United Nations. However, UNITAR paid the rent and the taxes on the land and all subleases of part of the building were executed by UNITAR.

7. The land was purchased in September 1989 with funds provided by the United Nations. Like the initial lease, it was also registered in the name of the United Nations. It was understood, and is so recorded in various reports of the Secretary-General to the General Assembly, that these funds would be repaid with interest upon sale of the property. Prior to purchase of the land in 1989, the Rockefeller Foundation informed the Executive Director of UNITAR that the Foundation had no more interest in the property.

Ownership of United Nations assets

8. It is not unusual that property, in particular real property, acquired by the United Nations for use by its subsidiary organs is registered in the name of the United Nations. Therefore, this alone should not be determinative of all questions concerning ownership of those assets. For purposes of the internal law of the United Nations, ownership is and should be determined according to the purpose for which the property was acquired, and the accounting of income and expenditure adopted by the Organization for the various beneficiary entities.

9. UNITAR was established under a statute promulgated by the Secretary-General pursuant to General Assembly resolution 1934 (XVIII) of 11 December 1963. As such, the Institute is regarded as a subsidiary body of the General Assembly and has been funded largely through voluntary contributions. While the statute provides that UNITAR has the capacity to acquire and dispose of real and personal property, this power can only be exercised where applicable national law so permits. In the United States, and New York in particular, real estate transactions are governed by national legislation, under which the subsidiary organs of the United Nations are not always treated as separate legal entities. It is for this reason that the title to the land was registered in the name of the United Nations, rather than that of UNITAR. This was done as a convenient legal mechanism, but was never intended as determinative of ownership under the internal law of the United Nations.

Conclusion

10. In the light of the clarification given above, we ourselves have no doubt that the proper thing to do is to treat the sum of $4.4 million as a debt owed by UNITAR to the United Nations. We do understand, however, that this amount was borrowed from other funds under the Secretary-General's custody and must be refunded. In the light of the various resolutions of the General Assembly which require that these funds must be repaid by UNITAR, they should be treated as a lien on the property, so that any disposition of the property or of UNITAR will always be subject to repayment of that debt.

27 April 1992

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41. QUESTION WHETHER IT IS LEGALLY POSSIBLE FOR THE UNITED NATIONS UNIVERSITY TO PROVIDE SECURITY FOR ITS PREMISES BY WAY OF A COMMERCIAL ARRANGEMENT WITH A SECURITY PROTECTION COMPANY, RATHER THAN BY EMPLOYING SECURITY PERSONNEL AS STAFF MEMBERS — STATUS OF UNITED NATIONS SECURITY PERSONNEL

Memorandum to the Legal Counsel, United Nations University

1. I refer to our several telephone conversations concerning the question of whether it is legally possible for the United Nations University to provide security for its premises by way of a commercial arrangement with a security protection company, rather than by employing security personnel as staff members. You also requested that we advise on whether to our knowledge any United Nations duty stations met their security needs through a commercial contract.

2. With the exception of one regional commission, where a commercial arrangement is presently in place in respect of the construction project (but not for the commission itself), we are not aware of any United Nations duty station that met its security needs commercially.

3. A perusal of our files reveals that on the few occasions when this issue has arisen, this Office has advised against commercial arrangements based on the following policy considerations:

(*a*) Under the Convention on the Privileges and Immunities of the United Nations,[96] the members of a United Nations security service, as United Nations officials, would have immunity for all acts performed by them in their official capacity. United Nations security personnel are not subject to prosecution for

activities connected with their official functions as they are immune from suit in national or local courts. On the other hand, security personnel of a commercial agency would not enjoy such functional immunity and hence could be brought into court in connection with any incident which might occur during the course of providing security protection to the Organization. At Headquarters, incidents do occur on a not infrequent basis.

(*b*) If security personnel are obtained through a commercial agency, there is no assurance that such personnel will meet the highest standards of integrity, competence or efficiency required under the Charter of the United Nations of all staff members. Nor can they be expected to observe the standards of conduct expected of an international civil servant. Furthermore, at Headquarters at least, commercial security firms do not pay well (often, the minimum wage) and attract employees with lower qualifications and less experience than United Nations security officers. The latter are required to have military or police experience and are qualified for United Nations service by completion of a formal United Nations security service training programme. We are not aware of the local situation in the country in question.

4. While, therefore, the course of action envisaged is legally possible, we would advise against it.

10 March 1992

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42. STATUS OF THE UNITED NATIONS GUARDS AND INTERNATIONAL STAFF IN A MEMBER STATE—APPLICATION OF THE RELEVANT PROVISIONS OF THE 1946 CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

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

1. I am writing in response to your memorandum of 26 August 1992 in which you seek the advice of our Office regarding the status of the United Nations Guards and international staff in (name of a Member State). In that memorandum you also raise specific questions about privileges and immunities enjoyed by the United Nations Guards and international staff when travelling within the country in question as well as to and from that country.

2. Neither the Memorandum of Understanding of 18 April 1991 nor the Memorandum of Understanding of 24 November 1991 make specific references to the legal status in the State in question of the United Nations personnel and the United Nations Guards referred to in those documents. It should be noted, however, that the State in question is a party to the 1946 Convention on the Privileges and Immunities of the United Nations;[97] the United Nations personnel should therefore be accorded privileges and immunities in the territory of the State in question, as specified in articles V and VII of that Convention. This seems to have also been implicit in the understanding of the signatories of the Memoranda and the subsequent practice. Under the Convention, the personal luggage of the United Nations officials is not exempted from inspection and seizure.

3. As for the United Nations Guards, it is our understanding that they have Special Service Agreements with the United Nations and therefore should be considered as experts on mission within the meaning of article VI of the afore-

mentioned Convention. Under article VI, section 22, of the Convention, experts on mission shall be accorded, *inter alia*, immunity from personal arrest or detention and from seizure of their personal baggage, inviolability for all papers and documents and the same immunities and facilities in respect of their baggage as are accorded to diplomatic envoys.

4. It is the view of our Office that while the continued presence of the United Nations Guards in the State in question depends on the arrangements to be worked out with the authorities of the State, the scope of the privileges and immunities enjoyed by the United Nations personnel and the United Nations Guards in the State in question will continue to be determined by the respective provisions of the 1946 Convention so long as the United Nations continues its humanitarian activities in that country.

4 September 1992

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43. STATUS OF UNITED NATIONS OFFICIALS AND EXPERTS ON MISSION FOR THE UNITED NATIONS IN A MEMBER STATE—QUESTION WHETHER ALL UNITED NATIONS OFFICIALS, IRRESPECTIVE OF THEIR LEVELS, ARE SUBJECT TO INSPECTION AND SEIZURE OF THEIR LUGGAGE—RELEVANT PROVISIONS OF THE 1946 CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS AND THE 1979 HEADQUARTERS AGREEMENT OF THE UNITED NATIONS ECONOMIC AND SOCIAL COMMISSION FOR WESTERN ASIA

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

1. I am writing in response to your memorandum dated 29 September 1992, which transfers a facsimile from the Coordinator of the Inter-Agency Humanitarian Programme in (name of a Member State). In his facsimile the Coordinator seeks further clarifications with regard to the privileges and immunities enjoyed by United Nations officials and experts on mission for the United Nations and, in particular, raises the question as to whether all United Nations officials, irrespective of their level, are subject to inspection and seizure of their luggage.

2. As was mentioned in our memorandum of 4 September 1992 on the above subject, privileges and immunities enjoyed by United Nations officials and experts on missions for the United Nations are spelled out in the Convention on the Privileges and Immunities of the United Nations,[98] adopted by the General Assembly on 13 February 1946. Under the Convention, the privileges and immunities enjoyed by officials and experts do not have the same scope. The main distinction between officials and experts is that, owing to the specific character of their functions, the latter are accorded wider privileges and immunities which are quasi-diplomatic in nature. Therefore, unlike United Nations officials, experts on missions, in accordance with article VI, section 22, of the Convention, enjoy, in addition to such privileges as inviolability for all papers and documents, immunity from seizure of their personal baggage. It is worth mentioning in this regard that the International Court of Justice in its advisory opinion dated 15 December 1989 on the applicability of article VI, section 22, of the Convention on the Privileges and Immunities of the United Nations[99] stated that the purpose of article VI, section 22, is to enable the United Nations to entrust missions to persons who do not have the status of an official of the

Organization, and to guarantee them such privileges and immunities as are necessary for the independent exercise of their functions.

3. In response to the inquiry as to whether all United Nations officials enjoy only functional immunities, we would like to point out that under article V, section 19, of the aforementioned Convention officials of the United Nations at the level of Under-Secretary-General and Assistant Secretary-General enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law. In addition, most of the headquarters agreements of the regional commissions concluded by the United Nations with host Governments contain provisions envisaging that officials of those commissions starting from a certain level enjoy privileges and immunities accorded to diplomats. Thus, the Agreement relating to the headquarters of the United Nations Economic and Social Commission for Western Asia,[100] signed on 13 June 1979 between the United Nations and the Government of the host country, provides in paragraph 3 of article 7 that officials of the Commission at the P-4 level and above, regardless of their nationality, shall enjoy during their residence in the State in question and their service with the Commission the facilities, privileges and immunities granted by the Government of that State to diplomats of comparable rank of the diplomatic missions. Privileges and immunities enjoyed by diplomats under international law are spelled out in the 1961 Vienna Convention on Diplomatic Relations, to which (name of the Member State) is a party. It is our understanding that the Coordinator refers in his memorandum to the provisions of that Convention. The 1979 headquarters Agreement of ESCWA also provides that all officials of the Commission, irrespective of their level, enjoy immunity from seizure of their personal and official effects and baggage. However, it should be noted in this regard that the provisions of the 1979 headquarters Agreement are applicable only to the officials of ESCWA and do not apply to United Nations officials who are presently located in the Member State performing functions which are unrelated to ESCWA.

4. It should be kept in mind that, although the 1979 Headquarters Agreement of ESCWA generally provided wider privileges and immunities than the 1946 Convention, in some instances it was more restrictive, which reflected new emerging tendencies in international law. In particular, many Governments, concerned about security matters, insisted on the inclusion in their agreements with international organizations of provisions envisaging that immunity from seizure of baggage of officials or experts could be provided except in cases of *in flagrante delicto*. The 1979 headquarters Agreement of ESCWA also contains a similar restriction. Subparagraphs 1 (*b*) and 6 (*a*) of article 8 of that Agreement state that the officials of the Commission and its experts, *inter alia*, enjoy immunity from seizure of their personal and official effects and baggage except in case of *in flagrante delicto*.

6 October 1992

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44. Request for waiver of immunity in connection with a motor vehicle accident of a United Nations volunteer performing services on behalf of the United Nations Development Programme — Question whether the volunteer was acting in an official capacity when the accident occurred — Legal status of

THE VOLUNTEER UNDER THE UNDP STANDARD BASIC ASSISTANCE AGREEMENT AND THE 1946 CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

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

1. This is in reply to your memorandum of 7 January 1992 in which a waiver of immunity has been requested in connection with the motor vehicle accident involving a United Nations volunteer which occurred on 6 May 1991 while he was driving a Government-owned vehicle from work to his home. The Resident Representative has stated that the volunteer, performing services on behalf of UNDP in (name of a Member State), was "on duty station" at the time the accident occurred.

2. The legal status of United Nations Volunteers, in the context of the activities of UNDP in the State in question, is governed by the UNDP Standard Basic Assistance Agreement (SBAA) signed with the State in question on 5 November 1980. Under article IX, paragraph 4 (*a*), of this Agreement, "the Government shall grant all persons other than Government nationals employed locally, performing services on behalf of the UNDP, . . . the same privileges and immunities as officials of the United Nations". In accordance with article IX, paragraph 5, of the Agreement, the expression "persons performing services" includes volunteers. Accordingly, the person in question, a volunteer assigned to serve with UNDP in the country in question, enjoys the privileges and immunities granted to United Nations officials as provided for in article V, section 18, of the 1946 Convention on the Privileges and Immunities of the United Nations,[101] and not those inherent to diplomatic envoys as indicated in his letter dated 3 December 1991.

3. Under article V, section 20, of the above-mentioned Convention, "Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves . . .". Accordingly, privileges and immunities of United Nations officials are essentially linked to official acts they perform on behalf of the Organization and as such are functional.

4. As a general rule, travel between home and office is not in itself considered to be an official act within the meaning of article V, section 18, of the Convention. Therefore, officials who commit traffic violations in transit between their home and the office and vice versa are not considered to be performing an official act for which they can assert immunity from legal process. The position taken by the United Nations in this connection has been published as a legal opinion in the *United Nations Juridical Yearbook.*[102] In any event, as a matter of good conduct, the United Nations expects its staff members, regardless of rank and status, to observe local laws and regulations.

5. However, there may be exceptions to the above-mentioned general rule in the light of particular circumstances, and in such a case, the Secretary-General would consider raising the question of functional immunity if the particular facts surrounding the incident would warrant it. Therefore, in order to enable the Secretary-General to take a decision regarding a possible waiver of immunity, it is necessary to clarify whether the United Nations official involved in a given matter was acting in an official capacity or not. This determination is necessary as a precondition to any decision since no question of a waiver of

immunity would arise unless it is determined that the official was acting in his official capacity.

6. Accordingly, it is necessary in the case currently under consideration to determine, before raising the question of waiver of immunity, whether the volunteer was acting, when the accident occurred, in an official capacity. From the information contained in your above-mentioned memorandum and attachments thereto, it does not seem that the facts surrounding the accident could warrant that he was indeed acting in an official capacity. For the purpose of determining that the volunteer was driving home from work in an official capacity, we would need to be informed of the circumstances and reasons, if any, of such determination. A mere statement made by the Resident Representative is not sufficient.

7. As to the civil action against the volunteer, we gather that the automobile that was used when the accident occurred was a Government-owned vehicle which he uses to carry out his official duties. It would be appreciated if you could provide our Office with details regarding ownership of the vehicle and the conditions under which the vehicle has been made available to the volunteer. This information is necessary, in respect of the third-party claims filed against the United Nations volunteer, for purposes of determining the applicability of article X, paragraph 2, of the SBAA, which provides that the Government of the State in question "shall be responsible for dealing with claims which may be brought by third parties against the UNDP or an Executing Agency, their officials or other persons performing services on their behalf, and shall hold them harmless in respect of claims or liabilities arising from operations under this Agreement. The foregoing provision shall not apply where the parties and the Executing Agency are agreed that a claim or liability arises from the gross negligence or wilful misconduct of above-mentioned individuals."

8. However, considering the conditions under which the United Nations Volunteers serve outside their home countries and the possibility of the volunteer being convicted under the criminal charges, we would advise that UNDP consider engaging an attorney in the country in question to represent the volunteer in the criminal proceedings instituted against him. The attorney engaged by UNDP should also be requested to enter a defence for him in the civil proceedings as well, pending our determination as to whether the entire civil proceedings should be taken over by the Government. Once the attorney is engaged, we would like to receive a report from him on his assessment of the two cases and the fees he would charge.

23 January 1992

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45. Consequences on liability to pay United States income tax of a delayed submission of a waiver of privileges and immunities by a staff member — Immigration and the tax status of the staff member in question — Question of the reimbursement by the United Nations of taxes imposed by the United States Internal Revenue Service

Memorandum to the Director of the Accounts Division, Office of Programme Planning, Budget and Finance

1. Reference is made to your memoranda of 7 November 1991 and 15 March 1992 requesting our views as to the consequences on liability to pay

United States income tax of a delayed submission of a waiver of privileges and immunities by a UNHCR staff member.

2. We regret that we cannot answer the specific questions as to the probable actions of the United States Internal Revenue Service (IRS). Indeed, although IRS have advised the staff member on the tax consequences of this action, they also state that this advice does not bind them! It follows that our views can hardly help. However, for the reasons set out below we consider that there is a legal obligation on the United Nations not to retract its prior permission to the staff member to sign the waiver,[103] even though this may have consequences on the taxable income of the staff member.

BACKGROUND

3. From the papers you sent us, the relevant facts relating to this issue appear to be as follows: The staff member in question joined UNHCR on 23 December 1984. He was and is a permanent resident of the United States. On 8 November 1984, and prior to recruitment, he requested permission to sign the waiver of privileges and immunities. He was granted that permission by UNHCR on 7 February 1985 and advised to contact the nearest United States Embassy. For reasons indicated by the staff member in his correspondence with UNHCR—he was working in remote refugee camps in Honduras far from an American Embassy—he was unable to sign the waiver. In fact he did not, from the date of his employment with UNHCR to the present, file United States income tax returns. The staff member now wishes to sign the waiver, file outstanding tax returns and seek reimbursement from the United Nations. UNHCR asks "sympathetic consideration" of this request.

OPINION

(i) *Immigration status*

4. Section 247 of the Immigration and Nationality Act[104] requires that a person with immigrant status be reclassified as non-immigrant when that person, *inter alia*, becomes an international official, except if the person files a waiver of "all rights, privileges, exemptions and immunities" to which he would be entitled under his new occupational status. Consequently, immigrant status of the staff member in question should have been readjusted to non-immigrant G-IV status as of 23 December 1984 (i.e., the date of his joining UNHCR) since he did not sign a waiver. However, the Immigration and Naturalization Service (INS) appears not to have undertaken any formal steps to change his status, which would have required notice to him.[105]

(ii) *Tax status*

5. Section 893 of the Internal Revenue Code[106] exempts from taxation, *inter alia*, all international organization employees who are not citizens of the United States. Section 1.893-1 of the Federal Tax Regulations specifies that this statutory exemption may be lost by filing the waiver referred to in paragraph 4 above, but only as to "income received ... after the date of filing of the waiver".[107] Nevertheless, because the law clearly does not intend for a person to enjoy *both* immigrant status and tax exemption, it is possible that INS might seek to deprive him of his immigrant status if he does not agree to an IRS demand for back taxes. Whether IRS demands back taxes remains to be seen, since the non-binding opinion letter of 24 October 1991 from IRS indicates that he will not be liable to taxation on United Nations income for the period when

he had not signed the waiver. The staff member should attach that letter to his first return.

(iii) *Reimbursement*

6. The question then arises as to whether the United Nations should reimburse the staff member for any back taxes that IRS might impose, despite the non-binding letter opinion. Since filing the waiver was initially agreed to by the Organization, we doubt that the Organization can now retract that consent without violating the rights of the staff member in question, who relied on that consent in joining the Organization. The United Nations would then of course have to reimburse any taxes imposed by IRS. This would require waiving the time limit of one year provided for by rule 103.15 (ii) of the United Nations Staff Rules on retroactivity of payments. The staff member, in accordance with the usual procedure in these cases, would be responsible for any penalties and interest caused by his failure to file tax returns during the period.

27 April 1992

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46. LEGAL STATUS OF EXPERTS EMPLOYED BY SPECIALIZED AGENCIES — QUESTION WHETHER SALARIES AND EMOLUMENTS OF EXPERTS ON MISSION SHOULD BE ACCORDED EXEMPTION FROM NATIONAL TAXATION IN PURSUANCE OF THE 1947 CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE SPECIALIZED AGENCIES — SCOPE OF THE PRIVILEGES AND IMMUNITIES ENJOYED BY UNIDO EXPERTS AND UNDP VOLUNTEERS

Aide-mémoire 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 latter's note verbale dated 2 November 1992 raising questions relating to the legal status of experts employed by the specialized agencies.

The note verbale inquires in particular whether salaries and emoluments of experts on mission employed by the specialized agencies should be accorded exemption from national taxation in pursuance of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies.[108] The note further seeks the Legal Counsel's assistance in identifying and confirming "the scope of rights and facilities accorded to experts employed by the specialized agencies" under the said Convention.

In following up this inquiry, the Mission further inquired as to the scope of privileges and immunities enjoyed by UNIDO experts and UNDP volunteers.

In response to the above inquiries, the Legal Counsel would like to make the following observations.

The legal status of experts on mission for the United Nations is governed by the provisions of article VI, sections 22 and 23, and article VII, section 26, of the 1946 Convention on the Privileges and Immunities of the United Nations[109] (hereinafter referred to as "the General Convention"). The Convention on the Privileges and Immunities of the Specialized Agencies (hereinafter referred to as "the Specialized Agencies Convention"), whose provisions are

largely based on those of the General Convention, does not contain, in its standard clauses, provisions corresponding to article VI of the General Convention. However, pursuant to article X, section 33, of the Specialized Agencies Convention, "in their application to each specialized agency, the standard clauses shall operate subject to any modifications set forth in the final (or revised) text of the *annex* relating to that agency . . ." (emphasis added). The annexes to that Convention are designed to adapt the standard clauses to the particular needs of the agencies. Those annexes include the provisions relating, *inter alia*, to "experts on mission" which generally correspond to those of article VI, sections 22 and 23, of the General Convention.

The annexes constitute an integral part of the Convention. They provide in particular that experts (other than officials of the specialized agencies) serving on committees of, or performing missions for, the specialized agency shall be accorded the following privileges and immunities as far as is necessary for the effective exercise of their functions:

(*a*) immunity from personal arrest or seizure of their personal baggage;

(*b*) immunity from legal process of every kind in respect of words spoken or written or acts done by them in the performance of their official functions; such immunity is to continue notwithstanding that the persons in question are no longer serving on committees of, or employed on missions for, the specialized agency;

(*c*) the same facilities in respect of currency and exchange restrictions and in respect of their personal baggage as are accorded to officials of foreign Governments on temporary official missions;

(*d*) inviolability of their papers and documents relating to the work on which they are engaged for the specialized agency.

Experts on mission enjoy no tax exemption in any form on their official emoluments and salaries, no immunity from national service obligations, no immunity from immigration restrictions and registration requirements, and no rights of duty-free imports. The privileges and immunities, rights and facilities that are granted to experts on mission are strictly designed to protect the interests of the organization concerned in preventing any coercion or threat thereof in respect of the performance by the experts of their missions.

This conclusion was reflected in the Legal Counsel's written statement submitted on behalf of the Secretary-General to the International Court of Justice, on 28 July 1989, in connection with the request for an advisory opinion of the Court concerning the applicability of article VI, section 22, of the General Convention in the case of a Special Rapporteur of the Subcommission on Prevention of Discrimination and Protection of Minorities.

A similar conclusion was reached in an earlier study prepared by the United Nations Secretariat for the International Law Commission in 1967 on the practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities.[110] In addressing the scope of privileges and immunities accorded to United Nations officials under article V and those enjoyed by experts on mission under article VI of the General Convention, the study concludes[111] that "the difference between the two articles . . . is that in article VI *no immunity is granted from national taxation*" (emphasis added).

As to the inquiry concerning UNIDO experts on mission, their privileges and immunities are defined in annex XVII to the Specialized Agencies Convention.

As regards UNDP volunteers, their legal status is primarily governed by provisions of article IX of the UNDP Standard Basic Assistance Agreement (SBAA). In accordance with paragraph 5 of that article, they fall under the definition of the expression "persons performing services". As such, UNDP volunteers, provided that they are not Government nationals employed locally, are entitled, pursuant to paragraph 4 (*a*) of article IX of the SBAA, to the same privileges and immunities as officials of the United Nations, or the specialized agency concerned or IAEA under sections 18, 19 or 18, respectively, of the General Convention, the Specialized Agencies Convention or the Agreement on the Privileges and Immunities of IAEA.[112] A number of additional facilities necessary for the execution of UNDP assistance projects are outlined in article X of the SBAA.

The Legal Counsel hopes that the foregoing observations will be helpful in the consideration of the questions raised in the Permanent Representative's note verbale dated 2 November 1992.

14 December 1992

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47. QUESTION WHETHER A STAFF MEMBER WITH DUAL NATIONALITY IS ENTITLED, PURSUANT TO REGULATION 3.3 (*f*) OF THE STAFF REGULATIONS, TO REIMBURSEMENT FOR ANY NATIONAL INCOME TAXES HE MAY BE OBLIGED TO PAY IN RESPECT OF HIS UNITED NATIONS EMOLUMENTS — PRINCIPLE OF EQUALITY OF TREATMENT AMONG STAFF MEMBERS — POSITION TAKEN BY THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL IN THIS RESPECT

Memorandum to the Director of the Accounts Division, Office of Programme Planning, Budget and Finance

1. Reference is made to your memorandum of 2 January 1992 referring to the previous exchange of correspondence between UNITAR and this Office concerning dual nationality and income tax reimbursement.

2. In sum, your memorandum sets forth disagreement with our previously expressed conclusion that the staff member, as a dual national of both the United States and the United Kingdom, is entitled, pursuant to regulation 3.3 (*f*) of the Staff Regulations, to be reimbursed for any national income taxes he may be obliged to pay the United States Government in respect of his United Nations emoluments.

3. Your disagreement with this conclusion is said to be based on rule 104.8 (*a*) of the Staff Rules, which provides that in applying the Staff Regulations and Rules, the Organization shall not recognize more than one nationality for each staff member.

4. As stated in its scope and purpose clause, the Staff Regulations embody the *fundamental* conditions of service and represent the broad principles of personnel policy for the staffing of the Secretariat. This clause also authorizes the Secretary-General, as the Organization's chief administrative officer, to promulgate staff rules *consistent with the principles set forth in the Staff Regu-*

lations. The General Assembly established the Staff Regulations by resolution, thereby giving them the force of law. Consequently, to the extent that the Administration's application of a staff rule might conflict with a staff regulation, the latter prevails.

5. As a matter of personnel policy, the General Assembly decided, and codified its decision in regulation 3.3 (*f*), that staff members subject both to United Nations staff assessment and to national income taxation must be refunded any income taxes they pay. This decision is based on fundamental notions of equal treatment. *A fortiori*, as the staff member in question both pays staff assessment *and* is subject to United States national income tax, he is entitled to be refunded such tax, subject to verification through normal procedures, irrespective of whether that liability arises from single or dual nationality status. Furthermore, the United Nations Administrative Tribunal has also held in several judgements (see *Davidson* (No. 88) and *Powell* (No. 237)) that the refund is *mandatory* in nature so as to preserve equality of treatment among staff, i.e., so that net United Nations emoluments of staff who are subject to national income tax (e.g., United States nationals) and those who are not should be the same. In the instant case, maintaining your decision that the staff member in question is not entitled to be reimbursed in accordance with the provisions of staff regulation 3.3 (*f*) would effectively require that he pay a double income tax on his United Nations emoluments, one to the United Nations as staff assessment, the other to the United States Government as national income tax. Clearly, such a result cannot be countenanced either in law or in equity and would involve discrimination against the staff member.

24 January 1992

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48. IMPOSITION OF SUCCESSION OR INHERITANCE DUTIES ON ONE HALF OF THE MOVABLE ASSETS OF A STAFF MEMBER, HELD JOINTLY BY HIM AND BY HIS DECEASED SPOUSE—INTERPRETATION OF THE RELEVANT PROVISIONS OF THE 1961 VIENNA CONVENTION ON DIPLOMATIC RELATIONS AND THE 1926 *MODUS VIVENDI*

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

1. This is with reference to your memorandum of 20 May 1992, inquiring whether the imposition of succession or inheritance duties by the cantonal authorities of Geneva on one half of the movable assets of a UNOG staff member, held jointly by him and his deceased spouse, would be compatible with the applicable legal instruments governing the legal status of United Nations high-ranking officials and their family members in Switzerland.

2. We note that the staff member (P-5) is entitled in Geneva to diplomatic privileges and immunities. According to the staff member, the movable assets in question derive principally from his United Nations income and his deceased spouse never had in Switzerland any income of her own.

3. Pursuant to the provisions of article 34 (*c*) of the 1961 Vienna Convention on Diplomatic Relations,[113] a diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except "estate, succession or inheritance duties levied by the receiving State, subject to the provisions of paragraph 4 of article 39" of the Convention. The latter provisions, *inter alia*, clearly stipulate that "estate, succession and inheritance du-

ties shall not be levied on movable property the presence of which in the receiving State was due solely to the presence there of the deceased ... as a member of the family of a member of the mission".

4. Any interpretation of the above-mentioned provisions must be in accordance with the general rules of interpretation as well as supplementary means of interpretation as codified in the 1969 Vienna Convention on the Law of Treaties,[114] that is to say in accordance with the ordinary meaning to be given to the terms to the treaty in the context and in the light of its object and purpose.

5. The main object and purpose of the provisions embodied in the second sentence of paragraph 4 of article 39 of the 1961 Vienna Convention is to ensure that in the event of the death of a diplomatic agent's family member, the receiving State should not impose any estate, succession or inheritance duties on movable property the presence of which in the receiving State was due solely to the presence in the receiving State of the deceased. This interpretation is confirmed by the legislative history of the provisions under review. In this connection it is to be noted that in the original draft articles on diplomatic intercourse and immunities, recommended in 1958 by the International Law Commission for the conclusion of a convention, the then draft article 38, paragraph 3, stated that "estate, succession and inheritance duties shall be levied only on *immovable* property situated in the receiving State" (emphasis added). The commentary of the Commission on that paragraph clarified that the provision had been added to the effect that "the receiving State may not levy estate, succession and inheritance duties, except on immovable property situated in that country".[115] At a later stage, the wording of the draft article was modified based on the assumption that immovable property should be the object of inheritance duties. Therefore, the corresponding provisions of a new article, currently article 39, paragraph 4, of the 1961 Vienna Convention, are focused on regulating the legal status of "movable property" by stipulating that no inheritance duties shall be levied on this type of property. The Convention, however, sets out one specific criterion in conjunction with the requirement of the non-taxation of movable property, namely that the latter's presence in the receiving State should be due solely to the presence there of the deceased member of a diplomatic agent's family. Consequently, if movable property of the deceased family member is attributable solely to the deceased's presence in the receiving State, the latter is not entitled to levy any estate, succession or inheritance duties on such movable property.

6. In our view, the present case should be considered in the light of these observations. If the movable assets of the staff member's family in the country in question consisted, at the time of the death of the staff member's spouse, of savings deriving exclusively from United Nations income, an assertion which we believe could be verified by the competent authorities of the State, such assets should be considered, for the purposes of the 1961 Vienna Convention, as movable property the presence of which in the country in question was due solely to the presence there of the deceased member of the staff member's family. In this event inheritance duties should not be levied on the staff member.

7. A similar conclusion may be reached from a review of the 1926 *modus vivendi*[116] concerning the League organizations at Geneva, as amended on 24 April 1928.[117] According to that agreement, staff members entitled to diplomatic privileges and immunities are exempt from all direct taxes, except real dues on immovable property and "death duties to which they may be liable ... it being understood that the transfer *mortis causa* ... belonging to officials en-

joying diplomatic privileges and immunities *shall continue to be exempted from all taxes*" (emphasis added).

8. Finally, we would like to note that the Swiss Mission, in its letter of 13 December 1991 addressed to the Fiscal Administration of the Canton de Genève, itself correctly determined that the staff member in question, owing to his full diplomatic status in the country, cannot be subjected to a "convocation" on the part of the authorities of that State; and that his succession of his spouse is to be regarded in the context of the exemptions under articles 34 (*c*), 37, paragraph 1, and 39, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations. We trust that the competent authorities of the State in question will be able to resolve the present matter in accordance with their obligations under the applicable international legal instruments.

9 June 1992

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49. QUESTION WHETHER THE DESIGNATION OF THE FOREIGN MINISTER OF A MEMBER STATE AS PERMANENT REPRESENTATIVE OF THAT STATE TO THE UNITED NATIONS IS CONSISTENT WITH EXISTING RULES AND NORMS OF CODIFIED DIPLOMATIC LAW—PRACTICE OF THE UNITED NATIONS

Memorandum to the Assistant Secretary-General, Chief of Protocol

1. This is with reference to your memorandum of 20 March 1992 concerning the question whether it is correct that the Foreign Minister of a Member State be also designated Permanent Representative of the same State to the United Nations.

2. The following legal aspects together with the current United Nations customary practice should be considered in addressing this matter.

3. From the legal point of view, the existing rules and norms of the codified law of diplomatic relations in general, and specifically the 1946 Convention on the Privileges and Immunities of the United Nations,[118] the 1947 Headquarters Agreement,[119] the 1961 Vienna Convention on Diplomatic Relations[120] and the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character[121] (not yet in force) do not explicitly regulate the procedure of designation of a head of mission to the United Nations. In part, this issue is addressed in paragraph 1 of General Assembly resolution 257 A (III) of 3 December 1948. By that resolution the Assembly, *inter alia*, recommended that "credentials of the permanent representative shall be issued either by the Head of the State or by the Head of the Government or by the Minister for Foreign Affairs, and shall be transmitted to the Secretary-General". This requirement of General Assembly resolution 257 A (III) was subsequently reproduced in the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. Article 10 of the Convention reads as follows:

> "The credentials of the head of mission shall be issued by the Head of State, by the Head of Government, by the Minister for Foreign Affairs or, if the rules of the Organization so permit, by another competent authority of the sending State and shall be transmitted to the Organization."

4. In the practice of the United Nations, there have been a number of cases where heads of missions, in addition to their normal designation "Permanent

Representative", had, for example, the title "Deputy Foreign Minister". However, the designation "Permanent Representative" was consistently interpreted by the Organization as requiring a person designated as Permanent Representative to the United Nations to be continuously (i.e., as distinct from temporarily) residing in New York for the duration of his or her assignment as head of the Permanent Mission.

5. The functions of a Foreign Minister, by definition, require his permanent presence in the capital of his State rather than at the seat of the Organization and that disqualifies him or her from being, at the same time, Permanent Representative. The practice of the Organization is, in this respect, quite in keeping with the bilateral diplomatic practice of many Member States. The latter often requires that the ambassadors accredited by a sending State reside in the capital of the receiving State or in its immediate vicinity (duty of residence). It should be noted that in the context of the diplomatic community in New York, even those permanent representatives who had the additional title of "Deputy Foreign Minister" always resided in New York or in its immediate vicinity. Moreover, such additional titles have never impinged on the discharge of their functions in New York as heads of missions on a permanent basis.

6. This position of the inadmissibility of a Foreign Minister being designated as Permanent Representative to the United Nations was consistently maintained with respect to controversial designations by certain Member States in 1979, 1986, 1989 and 1991. Therefore, we are of the view that it is appropriate to follow this customary practice of the Organization in the present case.

27 March 1992

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50. LEGAL ACTION TO EVICT THE PERMANENT MISSION OF A MEMBER STATE TO THE UNITED NATIONS FROM ITS PREMISES AS A RESULT OF THE MISSION'S INDEBTEDNESS—DUTY OF THE HOST COUNTRY TO RESPECT THE INVIOLABILITY OF MISSIONS ACCREDITED TO THE UNITED NATIONS UNDER THE 1946 CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS AND THE 1947 AGREEMENT REGARDING THE HEADQUARTERS OF THE UNITED NATIONS

Letter to the Counsellor of the Permanent Mission of a Member State to the United Nations

On 11 February 1992, you informed me that the Permanent Mission of (name of a Member State) to the United Nations had accumulated large debts, mostly in relation to real property, and that the owner of the building where the Mission is located was seeking to evict the Mission from its premises. In this connection, you asked the United Nations to intervene with the Mission in question with a view to convincing it to meet its financial responsibilities.

As far as the question of the eviction of the Mission from its premises is concerned, we would like to make the following observations. Pursuant to paragraph 2 of Article 105 of the Charter of the United Nations, "representatives of the Members of the United Nations . . . shall . . . enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization". These provisions were subsequently developed and specified both in the Convention on the Privileges and Immunities of the

United Nations,[122] adopted by the General Assembly on 13 February 1946, and in the Agreement regarding the Headquarters of the United Nations, concluded between the United States and the United Nations on 26 June 1947.[123] Article IV, section 11, of the Convention states that:

"representatives of Members . . . shall, while exercising their functions . . ., enjoy the following privileges and immunities:

"(*a*) immunity from personal arrest or detention and . . . immunity from legal process of every kind;

"(*b*) inviolability for all papers and documents; . . .

"(*g*) such other privileges, immunities and facilities . . . as diplomatic envoys enjoy . . .".

Under article V, section 15, of the Agreement, resident representatives of the Members of the United Nations "shall, whether residing inside or outside the Headquarters district, be entitled in the territory of the United States to the same privileges and immunities . . . as it accords to diplomatic envoys accredited to it". Privileges and immunities of diplomatic envoys were codified in the 1961 Vienna Convention on Diplomatic Relations.[124] In accordance with paragraph 1 of article 22 of the Vienna Convention, "the premises of the mission shall be inviolable". Paragraph 3 of the same article further requires that "the premises of the mission, their furnishings and other property thereon . . . shall be immune from search, requisition, attachment or execution".

The duty of the host country to respect the inviolability of missions accredited to the United Nations was also affirmed in a statement which my predecessor as the Legal Counsel of the United Nations made at the 92nd meeting of the Committee on Relations with the Host Country describing both the origin and the scope of the privileges and immunities of the then Permanent Observer Mission of (name of a State) to the United Nations. In particular, he observed that if inviolability, and that included in that context inviolability for official papers and documents, "is to have any meaning, it necessarily extends to the premises of the mission and the residences of its diplomatic staff". We should add that inviolability of mission premises is one of the most fundamental norms of the law of diplomatic relations and any disregard of it could have the most serious repercussions.

26 February 1992

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51. LEGAL STATUS OF NON-DIPLOMATIC STAFF OF MISSIONS ACCREDITED TO THE UNITED NATIONS OFFICE AT GENEVA—QUESTIONS OF THE PRIVILEGES, IMMUNITIES AND FACILITIES ENJOYED UNDER THE 1961 VIENNA CONVENTION ON DIPLOMATIC RELATIONS BY ADMINISTRATIVE AND TECHNICAL STAFF, SERVICE STAFF AND PRIVATE SERVANTS OF MEMBERS OF MISSIONS—LEGAL STATUS, RIGHTS AND DUTIES OF HOUSEHOLD EMPLOYEES OF UNITED NATIONS OFFICIALS, RECRUITED UNDER THE SO-CALLED "SPECIAL REGIME"

Letter to a trade union

Your letter dated 24 February 1992 addressed to the Secretary-General concerning non-diplomatic staff of missions accredited to the United Nations Of-

fice at Geneva and household employees of United Nations officials has been transmitted to this Office for advice.

Further to the Senior Legal Officer's letters to you of 12 November 1991 and 23 April 1992, the contents of which we endorse, we would wish to add the following points.

As far as the staff of diplomatic missions is concerned, the 1961 Vienna Convention on Diplomatic Relations[125] distinguishes among the following three categories of non-diplomatic staff:

(*a*) Administrative and technical staff;

(*b*) Service staff; and

(*c*) Private servants.

Members of each of these categories are entitled (under article 37, paragraphs 2, 3 and 4) to a different scope and level of privileges, immunities and facilities in the receiving State.

As to the legal status of the administrative and technical staff who are not nationals or permanent residents of the receiving State, they are entitled, with certain exceptions, to the main diplomatic privileges, immunities and facilities set out in the Convention. Nationals or permanent residents of the receiving State are subject to its jurisdiction. They may, however, be granted by the receiving State a special treatment which would entitle them to receive certain facilities under the Convention.

Service staff who are not nationals or permanent residents in the receiving State are entitled only to immunity in respect of official acts, exemption from dues and taxes on their emoluments and exemption from social security regulations in force in the receiving State. Similarly, as in the case of the administrative and technical staff, nationals or permanent residents fall under the jurisdiction of the receiving State. Consequently the laws, including labour regulations, of the receiving State are applicable to these persons as well.

Finally, private servants of members of the mission, if they are not nationals or permanent residents, are exempt only from taxation on their emoluments. The Convention provides that private servants may enjoy additional privileges and immunities, to the extent granted by the receiving State. The Convention, however, specifies that the receiving State, while exercising its jurisdiction over those persons, must proceed in such a manner as not to interfere unduly with the performance of the mission's functions.

The legal status, rights and duties of household employees of United Nations officials, recruited under the so-called "special regime", is normally described in an employment contract, the conditions of which are contained in the directive 01/6 published by the Permanent Mission of the host State in April 1987, which is assumed to reflect correctly the relevant standards and requirements set out in labour laws and regulations of the country.

In this connection, we would like to point out that as a matter of policy and practice the Organization does not intervene to prevent disputes between household employees and staff members from being taken up by the local courts of the host country.

We appreciate your concerns regarding non-diplomatic staff at the missions and household employees of United Nations officials. However, your suggestion that a committee on mediation between diplomats and internationally

recruited staff members and your trade union be established would be in express contravention of the Vienna Convention and would not appear consonant with the local regulations of the host country. However, we trust that the abovementioned observations will be helpful in ascertaining the legal status of the workers in question in the host country.

14 July 1992

NOTES

[1]Article 4, paragraph 2, of the United Nations Flag Code provides that "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* . . .". (emphasis added)

[2]For instance, the Yugoslav Government transported its contingent in its own military vessels, which, with the approval of the Secretary-General, flew the United Nations flag alone.

[3]This was the case of a Canadian aircraft carrier made available by the Canadian Government.

[4]The relevant provision of paragraph 20 of the Agreement reads as follows:

"The Egyptian Government recognizes the right of the Force to display within Egyptian territory the United Nations flag at its headquarters, camps, posts or other premises, vehicles, vessels and otherwise as decided by the Commander. Other flags or pennants may be displayed only in exceptional cases and in accordance with conditions prescribed by the Commander. Sympathetic consideration will be given to observations or requests of the Egyptian authorities concerning this last-mentioned matter."

See United Nations, *Treaty Series*, vol. 260, p. 61.

[5]A/CONF.13/C.2/L.87.

[6]In this connection, UNEF regulation 34 (*a*) provides that:

"Members of the Force shall be subject to the criminal jurisdiction of their respective national States in accordance with the laws and regulations of those States. They shall not be subject to the criminal jurisdiction of the courts of the host State. Responsibility for the exercise of criminal jurisdiction shall rest with the authorities of the State concerned, including as appropriate the commanders of the national contingents."

[7]See A/CONF.13/C.2/L.87, paras. 7 and 8.

[8]Referring to UNSCO, the letter of the Secretary-General to the Minister for Foreign Affairs of Egypt stated that:

"The undertaking would be regarded as a United Nations enterprise and its personnel would be under obligation to discharge their functions and regulate their conduct solely in the interests of the United Nations. In keeping with the United Nations' responsibilities, the vessels would fly the flag of the United Nations in place of their national flags."

See United Nations, *Treaty Series*, vol. 275, p. 75.

[9]Article 13.1 of the contract between the United Nations and the consortium of Smit-Svitzer provided that:

"Smit-Svitzer shall ensure that each of its vessels utilized in the performance of the work shall fly the United Nations flag in place of its national flag while in the Suez Canal Area, in accordance with the provisions of the United Nations Flag Code and any regulations made pursuant thereto by the Secretary-General or his duly authorized representative. The use of the United Nations flag on the vessels concerned shall not be deemed to effect any alteration in their national registration."

A/CONF.13/C.2/L.87, para. 11.

[10]A/CN.4/SR.320, para. 68.

[11]A/CN.4/103, para. 10.

[12]See A/CN.4/SR.347. In the report to the General Assembly covering the work of its eighth session (A/3159), the International Law Commission mentioned the discussion on this question in the commentary to article 29 of the draft articles concerning the law of the sea. After transcription of the suggestions of the Special Rapporteur (A/CN.4/103, para. 9), the following commentary was made:

"(6) The Commission, after discussion, merely took note of those proposals. Having regard to the diversity of the problems raised by this question, the Commission was unable to take a decision. It has, however, inserted these proposals in its report, since it regards them as useful material for any subsequent study of the problem."

[13]See S/16194.

[14]See S/16195.

[15]We have not been able to find statements using these phrases in respect of the Member State concerned in the report.

[16]A/45/625, annex.

[17]964 F.2d 1348.

[18]A product is defective when it does not meet the standard or quality it is supposed to meet, which is attributable to the manufacturer's negligence in its production.

[19]In that case, it was held that there were circumstances, quite apart from contract, where a person owed a duty of care in tort in respect of defective products, on the basis of what became known as "the neighbour principle" or the notion of proximity:

"The rule that you are to love your neighbour becomes, in law, you must not injure your neighbour; and the lawyer's question, who is my neighbour?, receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question." (Lord Atkin in *Donoghue v. Stevenson* [1932] A.C. 562, 579)

[20]Liability without fault. Strict liability means that liability is presumed without proof of negligence.

[21]The strict liability rule applies to any person engaged in the business of selling products for use or consumption. It therefore applies to any manufacturer of such a product and to any wholesale or retail dealer or distributor. The rule does not, however, apply to the occasional seller of the product who is not engaged in that activity as part of his business. See Restatement (Second) of Torts, comment (*f*).

[22]*Wolfgruber v. Upjohn*, 72 App. Div.2d 59, 61; 423 N.Y.S. 2d 95 (1979).

[23]*Lindsay v. Ortho Pharmaceutical Corp.*, 637 P.2d 87, at 91 (2d Cir. 1980).

[24]*Stottlemire v. Cawood*, 213 F. Supp. 897, 899 (D.C. Cir. 1963). See also the *Incollingo v. Ewing* case (282 A.2d 220), in which the Court, while upholding the principle that the supplier has a duty "to exercise reasonable care to inform those for whose use the article is supplied of the facts which make it likely to be dangerous", decided that a prescription drug manufacturer may meet its duty to warn by providing an adequate warning to a "learned intermediary" (*Incollingo v. Ewing*, 282 A.2d at 220).

[25]*Lindsay, supra*, at p. 91.

[26]A "learned intermediary" is one who exercises "individualized medical judgement bottomed on a knowledge of both patient and palliative" (*Reyes v. Wyeth*, 498 F.2d 1264).

[27]*Davis v. Wyeth Lab., Inc.*, 399 F.2d 121, 131 (9th Cir. 1968).

[28]*Krasnopolsky v. Warner-Lambert Co.*, 1992 WL 193113, at p. 4 (E.D.N.Y.).

[29]The district court did not require that a learned intermediary be "the most learned intermediary", but just a "qualified learned intermediary, that is, capable of making an individualized medical judgement" and present at the time of the inoculation (see *Mazur v. Merck*, 767 F. Supp. 687, at p. 711).

[30]See also *Cahill v. Miles, Inc.*, 1992 WL 110537 (United States District Court, E.D. Pennsylvania, 13 May 1992) and *Krasnopolsky v. Warner-Lambert Co.*, 1992 WL 193113 (E.D. New York), which also held that the manufacturer had met its duty to warn by providing adequate warning to a "learned intermediary".

[31]The relevant clause in the contract between the manufacturer (Merck) and the purchaser (CDC) reads as follows:

> "The [CDC] represents and agrees that it will: (1) take all appropriate steps to assure that all vaccine supplied to various locations within the 50 states, . . . pursuant to the terms of this contract, shall be administered to each patient on the basis of an individualized medical judgement by a physician, or (2) take all appropriate steps to provide to such a patient (or to the patient's parent or guardian) meaningful warning relating to the risks and benefits of vaccination, in form and language understandable to such patient, parent or guardian." (see 964, F.2d 1348, at 1351)

[32]It should be noted, however, that the issue of the manufacturer's duty to warn has been canvassed extensively only in United States case-law, and that little jurisprudence on this matter exists in other common law countries, such as Canada and the United Kingdom. See Patricia Peppin, "Drug/vaccine risks: patient decision-making and harm reduction in the pharmaceutical company duty to warn", in *The Canadian bar review*, vol. LXX (1991), at p. 479.

[33]See article XIX (Claims against UNICEF) of the 1991 UNICEF Basic Cooperation Agreement, which reads:

> "1. UNICEF cooperation in programmes under the present Agreement is provided for the benefit of the Government and people of the host country and, therefore, the Government shall bear all the risks of the operations under the present Agreement.
>
> "2. The Government shall, in particular, be responsible for dealing with all claims arising from or directly attributable to the operations under the present Agreement that may be brought by third parties against UNICEF, UNICEF officials, experts on mission and persons performing services on behalf of UNICEF and shall, in respect of such claims, indemnify and hold them harmless, except where the Government and UNICEF agree that the particular claim or liability was caused by gross negligence or wilful misconduct."

See also the provisions in the Agreement between UNICEF and Morocco for the procurement of vaccines, which provide as follows:

> "6.2 . . . , the Government agrees to apply the provisions of article VIII of the Basic Agreement in connection with any claims arising out of the supply and use of the vaccines.
>
> "6.3 UNICEF shall pass on to the Government all warranties offered by the suppliers of vaccines, and shall ensure that all contracts with manufacturer(s), supplier(s), seller(s), shipper(s) or insurer(s) include provisions covering product liability claims. All claims relating to any defect in quality or quantity shall be handled directly by and between the Government and the manufacturer(s), supplier(s), seller(s), shipper(s) or insurer(s) . . . UNICEF shall assist the Government in connection with such claims, provided that all costs and expenses related thereto shall be borne by the Government."

[34]See, for example, the provision concerning product liability claims in the Bid Acceptance Letter for purchase of vaccines under the Long-term Arrangements, which reads as follows:

> "Your firm agrees to indemnify, defend and hold harmless UNICEF, the other organizations on behalf of which UNICEF procures vaccines and each of the Governments receiving the vaccines ***against all claims***, damages, losses, costs and expenses

arising from the distribution and use of the vaccines supplied under these arrangements *not attributable to any fault or negligence of UNICEF* or those other organizations or Governments . . ." (emphasis added)

[35]We understand that only software, databases and documentation owned by the United Nations will be made available to other organizations; the dissemination or use of software, databases and documentation not owned by, but licensed to, the United Nations may be prohibited or subject to restrictions.

[36]Copyright notice is usually indicated by the symbol ©, the year of publication/creation of the work and the author's name.

[37]In addition, the policy is stated in regulations governing the employment of staff members, in special service agreements with consultants and in agreements with contractors.

[38]DPI/107.

[39]Copyright notice should be indicated by the symbol ©, the year of publication/creation of the work and UNDP's name.

[40]For computer programs and databases embodied in machine-readable form, a printout of identifying portions of the work (for computer programs, usually the first and last 25 pages of the source code) should be deposited with the United States Copyright Office.

[41]We note, however, that none of these precedents concerned joint ownership of intellectual property rights. Under both agreements ownership was retained by UNDP and the right to use and exploitation *in the country* was accorded to the Government. In the exchange of notes of 12 March 1981 between UNDP and (name of a Member State) it was agreed that article III (8) would apply only to intellectual property rights resulting from the exclusive effort of experts provided by UNDP. In the other case, the exchange of notes of 21 July 1977 provided that UNDP would inform the Government of other intellectual property rights available to it only when a general system of disseminating such information was established.

[42]See rule 112.7 of the United Nations Staff Rules. Also, in a note circulated by the UNDP Administrator in 1975, the rationale behind article III (8) of the SBAA was explained as follows:

> "The thrust of the present provision is that the benefits of intellectual property resulting from UNDP assistance under the Agreement should be available *to all recipient countries*, in addition, of course, to the signatory recipient country. Since it is obviously impractical to provide in the Agreement that the rights in question should belong jointly to the 149 States eligible to participate in UNDP, it stipulates that such intellectual property should belong to UNDP but that the signatory Government should have the right to use it within the country free of royalty or any charge of similar nature." (DPI/107, 7 April 1975)

[43]United Nations, *Treaty Series*, vol. 75, pp. 31, 85, 135 and 287.

[44]Ibid., vol. 1125, pp. 3 and 609.

[45]Ibid., vol. 249, p. 240.

[46]This Office is only aware of two previous cases involving the modality of loan guarantees: the UNDP-Palestinian Loan Guarantee Programme, and the UNIFEM/ACCION project. These two projects were justified in part on the basis of the unique mandate provided by the General Assembly. In the case of the UNDP-Palestinian Loan Guarantee Programme, the unusual modality was undertaken by UNDP, pursuant to the General Assembly's request, for the assistance of the Palestinian people, and no indicative planning figure (IPF) funds were used for its implementation. The funds were provided from a fully funded trust fund and the Loan Guarantee Agreement was drafted to ensure that: (*a*) the status of UNDP was protected, and (*b*) no additional financial liability for UNDP would be involved. In the case of the UNIFEM/ACCION project, the General Assembly has provided the Fund with a broad mandate to participate in activities with various entities for the benefit of women. The Agreements concluded for implementation of the Loan Guar-

antee Programme in that case were carefully sensitized to ensure maximum protection of the Fund, and the project was expressly approved by the UNIFEM Consultative Committee, an intergovernmental body.

[47]It is true that recently a number of General Assembly resolutions and Governing Council decisions have addressed the need for the United Nations and its agencies to assist in the development of entrepreneurship. In this respect, we note that the Governing Council, in its decision 92/17 of 26 May 1992, "[r]equested[ed] the Administrator, taking into account the experience gained, to continue to define further the role of the United Nations Development Programme in promoting assistance in private sector development in order to clarify better the comparative advantage of the United Nations Development Programme". In that same decision, the Governing Council further requested the Administrator to "strengthen communication and cooperation with other United Nations system organizations involved in the promotion of entrepreneurship and private sector development in order to enhance coordination of efforts both in the field and at headquarters in response to General Assembly resolution 46/166" and to "harmonize carefully the activities of the [UNDP] with other multilateral organizations and bilateral donors when promoting entrepreneurship and private sector development". However, General Assembly resolutions 45/188 of 21 December 1990 and 46/166 of 19 December 1991 refer to private sector development as part of "national policy objectives", to be undertaken at the request of interested countries.

[48]The usual meaning of the term is that, should the borrower, who is liable in the first instance, fail to make payment or repay the debt, the guarantor, who is secondarily liable for the debt of the borrower, is legally bound to repay the loan.

[49]For example, the following problems will undoubtedly be encountered when drawing up the Agreement between UNDP and the bank: (*a*) The Agreement between the guarantor and the bank usually contains terms and conditions similar to those contained in the Agreement between the borrower and the bank. Such conditions range from foreclosure, if there is security, to collection through the courts and execution. Clearly, such conditions would not be applicable in the case of UNDP, which is a subsidiary body of the United Nations, in view of the privileges and immunities of the Organization. For the purpose of bypassing this problem, commercial banks will insist upon a security to be provided by UNDP as the guarantor of the loan. Such security would normally entail tying up the equivalent funds for the duration of the loan, by the issuance of a letter of credit on the basis of an existing deposit of the whole amount of the loan. The amount of the deposit could be drawn upon by the bank on the basis of default by the borrower. It follows that the sum deposited by the guarantor to the bank is frozen and therefore no longer available to the guarantor for use in other programmes; (*b*) in the event of a borrower's default, the amount due the bank from the guarantor would include, in addition to the principal and any accrued interest, collection and attorney fees and such extra charges of a similar nature, the exact amount of which the banks do not usually determine in advance. It would therefore not be possible for UNDP to limit its secondary liability to a specific amount of funds that would need to be tied up for the duration of the loan.

[50]See para. 2 and the annex to the resolution.

[51]See para. 18 of the decision.

[52]See para. 2 of the decision.

[53]United Nations, *Treaty Series*, vol. 520, p. 151.

[54]Pursuant to the provisions of article 9 of the Single Convention, the International Narcotics Control Board cooperates with Governments for the purpose of limiting the cultivation, production, manufacture and utilization of illicit drugs and at the same time ensuring the availability of drugs for medical and scientific purposes. Article 14 of the Single Convention further empowers the Board to take measures to ensure the execution of the provisions of the Convention.

[55]United Nations, *Treaty Series*, vol. 976, p. 105.

[56]A/46/480, para. 12.

[57]See, in particular, A/47/100, annex VI.

[58]*Official Records of the General Assembly, Forty-seventh Session, Supplement No. 11* (A/47/11), chap. IV.

[59]Ibid., para. 46.

[60]See A/46/608-S/23177; the text of the agreements are reproduced also in *International Legal Materials* (1992), vol. XXXI, p. 180.

[61]*Official Records of the Economic and Social Council, 1991, Supplement No. 8* (E/1991/28), para. 48.

[62]*Official Records of the General Assembly, Forty-fifth Session, Supplement No. 1* (A/45/1), sect. III, para. 66.

[63]It, of course, goes without saying that staff on posts being earmarked for abolition because of the current restructuring of the Secretariat are not exempt from such mission assignment. If, however, such staff are to be used in missions away from Headquarters with a view to terminating them later, after their return, then it should be noted that regulation 9.1 and rule 109.1 (*c*) establish a number of factors to be taken into account, and procedures to be followed, prior to separation of staff on the grounds of abolition of post or reduction of staff.

[64]Conditions of service for Professional staff are fixed by the General Assembly after considering the advice of the International Civil Service Commission or, in some cases, directly by ICSC pursuant to powers delegated by the Assembly. Conditions of service for local staff are determined by the Secretary-General pursuant to general methodologies established by ICSC and approved by the Assembly. Administration of this complex mosaic is primarily entrusted to the Compensation and Classification Service in the Office of Human Resources Management.

[65]It is noted, in that regard, that the Institute is described as a "partnership" in the second page of the "executive overview" and that the language employed for its description suggests that its establishment has not yet been finalized but is still in a formative stage. This conclusion is suggested by the following expressions: ". . . this new partnership will bridge the gap . . ."; "the following distinguished persons . . . have agreed or are being invited to serve on the interim board", etc.

[66]ACC/1987/PER/R.13, para. 14.

[67]Ibid., para. 15.

[68]ACC/1987/4, para. 96.

[69]Resolution 58 (VI) adopted by the Economic Commission for Africa on 1 March 1962.

[70]General Assembly decision 34/454.

[71]Statute, articles I (1) and II (1).

[72]The question of whether or not the Organization is under an international obligation towards the Government of Senegal to apply the provisions of the Host Agreement and the Labour Code of the Member State is a different question, which is addressed in the present memorandum.

[73]We have not been presented with the details of the service histories of the other Appellants whose cases were grouped with that of the staff member in question; however, we assume that their situations were similar to that of the said staff member.

[74]*Official Records of the United Nations Conference on the Succession of States in respect of Treaties*, vol. III, *Documents of the Conference* (United Nations publication, Sales No. E.79.V.10).

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

[76]A/CONF.129/15.

[77]See, for example, General Assembly resolutions 44/25 of 20 November 1989, 44/34 of 4 December 1989 and 45/158 of 18 December 1990.

[78]United Nations, *Treaty Series*, vol. 1445, p. 13.

[79]Ibid., vol. 281, p. 369.

[80]Ibid., vol. 276, p. 3.
[81]Ibid., vol. 1155, p. 331.
[82]E/CONF.82/15 and Corr.2.
[83]United Nations, *Treaty Series*, vol. 1, p. 15.
[84]Ibid., vol. 500, p. 95.
[85]Ibid., vol. 1, p. 15.
[86]A/CN.4/L.383/Add.1.
[87]United Nations, *Treaty Series*, vol. 1, p. 15.
[88]Ibid.
[89]*Juridical Yearbook, 1964*, p. 121.
[90]United Nations, *Treaty Series*, vol. 1, p. 15.
[91]Ibid., vol. 457, p. 103.
[92]Ibid., vol. 1, p. 15.
[93]Ibid.
[94]*Yearbook of the International Law Commission, 1967*, vol. II, p. 250, para. 189.
[95]A/42/694, paras. 31 and 41 (*a*).
[96]United Nations, *Treaty Series*, vol. 1, p. 15.
[97]Ibid.
[98]Ibid.
[99]*I.C.J. Reports 1989*, p. 177.
[100]United Nations, *Treaty Series*, vol. 1144, p. 213.
[101]Ibid., vol. 1, p. 15.
[102]*Juridical Yearbook, 1977*, p. 246.
[103]In this regard it is noted that administrative instruction ST/AI/294 provides that staff recruited for less than one year with no prospect for extension or those recruited under the 200 Series do not have to surrender their immigrant status upon recruitment to the Organization (see para. 20). No mention was made in granting the staff member in question permission to sign the waiver that the reason was the fact that he was initially receiving a 200 Series appointment. Indeed, a few months later he was given a 100 Series appointment and no mention was made that this might be a reason to reconsider the initial permission, even if this could be validly done.
[104]8 U.S.C.A. Sec. 1257.
[105]8 C.F.R. Sec. 247.11.
[106]26 U.S.C.A. Sec. 893.
[107]26 C.F.R. Sec. 1.893-1.
[108]United Nations, *Treaty Series*, vol. 33, p. 261.
[109]Ibid., vol. 1, p. 15.
[110]*Yearbook of the International Law Commission, 1967*, vol. II, document A/CN.4/L.118 and Add.1 and 2, p. 154.
[111]Ibid., p. 285, para. 343.
[112]United Nations, *Treaty Series*, vol. 374, p. 147.
[113]Ibid., vol. 500, p. 95.
[114]Ibid., vol. 1155, p. 331.
[115]*Yearbook of the International Law Commission, 1958*, vol. II, document A/3859, p. 103, paragraph (3), of the commentary to article 38.
[116]League of Nations, *Official Journal*, October 1926, pp. 1407 and 1422.
[117]Ibid., June 1928, p. 839.
[118]United Nations, *Treaty Series*, vol. 1, p. 15.
[119]Ibid., vol. 11, p. 11.
[120]Ibid., vol. 500, p. 95.
[121]*Official Records of the United Nations Conference on the Representation of States in Their Relations with International Organizations* (United Nations publication, Sales No. E.75.V.12), vol. II, document A/CONF.67/16, p. 209. See also *Juridical Yearbook, 1975*, p. 87.

[122] United Nations, *Treaty Series*, vol. 1, p. 15.
[123] Ibid., vol. 11, p. 11.
[124] Ibid., vol. 500, p. 95.
[125] Ibid.