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CHAPTER VI

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

A. Legal opinions of the Secretariat of the United Nations (Issued or prepared by the Office of Legal Affairs)

PRIVILEGES AND IMMUNITIES

1. Licensing fees levied against the United Nations for the allocation of radio frequencies—Sections 7 and 34 of the Convention on the Privileges and Immunities of the United Nations

Memorandum to the Director and Deputy to the Assistant Secretary-General for Support Services, Office of Conference and Support Services

With reference to your memorandum of 14 December 1994, our comments are as follows:

1. Pursuant to the Agreement between the United Nations and [the State] regarding the Headquarters of the United Nations Environment Programme,[1] the Convention on the Privileges and Immunities of the United Nations[2] adopted by the General Assembly of the United Nations on 13 February 1946, to which [State] has been a party since 1965, is ipso facto applicable to the United Nations Environmental Programme.

2. Pursuant to article II, section 4(b), of that Agreement, "the Government shall, upon request, *grant* to UNEP for official purposes appropriate radio and other telecommunication facilities in conformity with technical arrangements to be made with the International Telecommunication Union" (emphasis added).

3. Under the International Telecommunications Convention,[3] there is no requirement to pay for registration or use of radio frequencies. In addition to the aforementioned Convention, section 4(b) above provides that [State] shall grant to UNEP appropriate radio and other telecommunications facilities for official purposes. The allocation of frequencies would seem a precondition or a integral part of such facilities and must be deemed to be covered by the grant referred to in this section. Thus, the term "grant" shall be understood as providing such radio frequencies without charge.

4. Furthermore, it could be argued that the licensing fee in question constitutes a direct tax from which the United Nations is exempt under article VIII, section 17(a), of the UNEP Headquarters Agreement and under article II, section 7(a) of the Convention on the Privileges Immunities of the United Nations. Section 17(a) of the Agreement provides that "UNEP, its assets, income and other property, shall be exempt from all direct taxes…" Section 7(a) of the Convention provides that "United Nations, its assets, income and other property shall be exempt from all direct taxes; it is understood, however, that the United Nations will not claim exemption from taxes which are, in fact, no more than charges for public utility service".

5. Although the fee at issue might be perceived to be in payment for a service rendered by the host Government, the service being the allocation of the radio spectrum and frequencies and its protection from interference by other radio operators, the United Nations has consistently maintained a narrow definition of the expression "charges for public utility services" used in section 7(a). In particular, "charges for public utility services" must relate to concrete services that can be specifically identified, described, itemized and calculated according to some predetermined unit. As far as the fee in question is concerned, it is difficult to clearly identify and itemize the service being rendered by allocating radio-electric spectrum and frequencies. Moreover, the charge which is levied bears no relation to the amount of services rendered. Therefore, it appears that a fee for the use of radio-electric spectrum and frequencies does not constitute a charge for public utility services under section 7(a) of the Convention, but rather a direct tax from which the United Nations is exempt.

6. In addition to being advised of the foregoing, the Government of [the State] should be informed that, under section 34 of the Convention on the Privileges and Immunities of the United Nations, it has a legal obligation to "be in a position under its own law to give effect to the terms of this Convention" and that any interpretation of the provisions of the Convention on the Privileges and Immunities of the United Nations must be carried out within the spirit of the underlying principles of the Charger of the United Nations, and in particular Article 105 thereof, which provides that the Organization shall enjoy such privileges and immunities as are necessary for the fulfilment of its purposes. Measures which might, inter alia, increase the financial or other burdens of the Organization have to be viewed as being inconsistent with this provision.

9 January 1995

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2. Entitlement to diplomatic privileges and immunities of a member of a permanent mission who does not have the nationality of the sending or receiving state—Articles 7 and 8 of the 1961 Vienna Convention on Diplomatic Relations

Memorandum to the Chief of Protocol, Executive Office of the Secretary-General

1. This is with reference to your memorandum of 13 December 1994, seeking legal advice in connection with the refusal by the United States Mission to the United Nations to extend diplomatic privileges and immunities to an official (hereinafter "Mr. X") who joined the permanent mission of a State of which he is not a national as Special Adviser. We have the following views on the matter.

2. In its letter of 2 December 1994, the United States Mission advises that it is "unable to accede to the request to extend privileges and immunities to Mr. X" since "he is neither a (State of permanent mission) national nor does he carry a (State of permanent Mission) passport". As such, according to the letter, "he does not meet all the Department of State's criteria for the extension of diplomatic privileges and immunities". The letter also stated that "[s]hould the Permanent Mission of [name of State] elect to engage Mr. X as a full-time, salaried non-diplomatic staff member, the United States Mission will request a change in his visa status". In our view, the above-mentioned observations touch upon, as a matter of principle, at least the following three main and interrelated issues: the right of Member States to freely appoint the members of the staff of their missions; nationality of the members of a permanent mission; and, finally, the entitlement to privileges and immunities.

The right of Member States to freely appoint the members of the staff of their permanent missions to the United Nations

3. Neither the 1946 Convention on the Privileges and Immunities of the United Nations (the General Convention) nor the 1947 United Nations/United States of America Headquarters Agreement[4] contains any explicit restrictions on the choice by the Member States of non-nationals as representatives to the United Nations. The rules and norms of diplomatic law in this area were codified and developed in the 1961 Vienna Convention at Diplomatic Relations (the 1961 Vienna Convention).[5] Article 7 of the 1961 Vienna Convention provides that, "[s]ubject to the provisions of articles 5, 8, 11, the sending State may *freely* appoint the members of the staff of the mission" (emphasis added). According to the definition in paragraph (c) of article 1 of the Convention, the expression "members of the staff of the mission" includes "the members of the diplomatic staff, of the administrative and technical staff and of the service staff of the mission". It should also be noted that the same principle of freedom of appointment of mission members has been reflected in article 9 of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character[6] (not yet in force).

Nationality of the members of a permanent mission

4. Neither the General Convention nor the Headquarters Agreement provides the representatives of Member States may only be of the nationality of the sending States. Article 8 of the 1961 Vienna Convention states that "[m]embers of the diplomatic staff of the mission should *in principle* be of the nationality of the sending State" (emphasis added). Thus, the Vienna Convention does not exclude the possibility that certain members of a mission, including the diplomatic staff, could be of a nationality different from that of the sending State. The 1975 Vienna Convention reflects the same approach as contained in the 1961 Vienna Convention. Paragraph 1 of article 73 of the former Convention stipulates:

> "The head of mission and members of the diplomatic staff of the mission, the head of delegation, other delegates and members of the diplomatic staff of the delegation, the head of the observer delegation, other observer delegates and members of the diplomatic staff of the observer delegation should in principle be of the nationality of the sending State".

5. However, in article 8, paragraph 2 of the 1961 Vienna Convention foresees that the consent of the receiving State is necessary when the sending State wishes to appoint a member of the diplomatic staff from among persons who have the nationality of the receiving State. According to article 8, paragraph 3 "[t]he receiving State *may reserve the same right* with regard to nationals of a third State who are not also nationals of the sending State" (emphasis added).

6. The 1975 Vienna Convention, which codifies various aspects of representation of States their relations with international organizations, does not reflect the principle in accordance with which the consent of the host State is required when a national of a third State is being appointed by a State member of the organization as a member of the diplomatic staff of its permanent mission. Such right is explicitly reserved in the 1975 Vienna Convention only with regard to appointments of persons having the nationality of the host State. Paragraphs 2 and 3 of article 73 dealing with this subject matter provide as follows:

> "2. The head of mission and members of the diplomatic staff of the mission may not be appointed from among persons having the nationality of the host State except with the consent of that State, which may be withdrawn at any time."

> "3. Where the head of delegation, any other delegate or any member of the diplomatic staff of the delegation or the head of the observer delegation, any other delegate or any member of the diplomatic staff of the delegation or the head of the observer delegation, any other observer delegate or any member of the diplomatic staff of the observer delegation is appointed from among persons having the nationality of the host State, the consent of that State shall be assumed if it has been notified of such appointment of a national of the host State and has made no objection."

7. Apparently, one of the reasons why the principle foreseeing the consent of the host State was not included in the 1975 Convention in the context of the question of nationality of the diplomatic staff of missions is that the repre-

sentatives of member States are accredited not to the host State to exercise in any form and in any sense, control over appointments by a member State unless the latter chooses nationals of the State itself. In this connection, it could be recalled that in his statement to the Sixth Committee, on 6 December 1967, the Legal Counsel, inter alia, stated: "the Secretary-General in interpreting diplomatic privileges and immunities would look to provisions of the Vienna Convention [on diplomatic relations] so far as they would appear relevant mutatis mutandis to representatives to United Nations organs and conferences. It should of course be noted that some provisions, such as those relating to *agrément*, *nationality* (emphasis added) and reciprocity have no relevancy in the situation of representatives to the United Nations". We believe that these observations remain relevant in the case under consideration.

Entitlement to diplomatic privileges and immunities

8. In view of the above observations, the States Members of the United Nations are entitled to appoint members of the diplomatic staff of their missions freely, including those having the nationality of third States, with the sole exception of nationals of the host State, for the appointment of whom the consent of the host State is required. As to the scope of their privileges and immunities, members of the diplomatic staff are entitled to such privileges and immunities as are accorded to diplomatic envoys, pursuant to article IV of the General Convention and article V of the Headquarters Agreement. The privileges and immunities of diplomatic envoys have been codified in the 1961 Vienna Convention and are applicable to the representatives of Member States in their entirety. Only one exception in this respect is relevant, namely, that contained in section 15 of the General Convention, stating that the privileges and immunities are not applicable "as between a representative and the authorities of the State of which he is a national or of which he is or has been the representative."

11 January 1995

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3. Question of who can determine whether the acts of United Nations officials are performed in their official capacity—Section 20 of the Convention on the Privileges and Immunities of the United Nations

Letter to the Minister Counsellor, United States Mission to the United Nations

As you will recall in connection with the above-referenced case, I addressed to you a copy of my letter of 8 August 1994 to the New York City Commission on Human Rights.

By that letter, the United Nations notified all concerned that insofar as it purported to express a cause of actin against Mr. X, the Verified Amended Complaint must be dismissed since Mr. X, being an official of the United Nations,

"is immune from suit pursuant to the provisions of article V, section 18(a) of the Convention on the Privileges and Immunities of the Nations (the General Convention), adopted on 13 February 1946, and acceded to by the United States on 29 April 1970, 21 U.S.T. 148 (1970), T.I.A.S. No. 6900".

Recently, a copy of your letter dated 11 January 1995 addressed to Mr. A, Attorney Trainee of the New York City Commission on Human Rights, has been brought to my attention. The letter correctly states that "[a]s a United Nations official, Mr. X enjoys, pursuant to section 18(a) of the Convention on the Privileges and Immunities of the United Nations (21 U.S.T. 148), immunity from legal process in respect of words spoken or written and all acts performed (by him) in (his) official capacity".

However, the United Nations cannot accept, as a matter of principle, the assertion contained in your letter that "[w]hether the alleged acts by Mr. X giving rise to this suit were performed in his official capacity is a question for the court or other appropriate adjudicative entity. Defendants enjoying official acts immunity must assert that the acts alleged were performed in their official capacity and participate in the process insofar as issues relate to the determination of immunity. If the court or other adjudicative entity finds that the acts complained of were performed in the defendant's official capacity, the defendant is immune from the litigation".

As you know, according to the provisions of Article 97 of the Charter of the United Nations, the Secretary-General "shall be the chief administrative officer of the Organization". Furthermore, under section 20 of the Convention on the Privileges and Immunities of the United Nations, the Secretary-General has been granted "the right and the duty to waive the immunity of any official in any case where, *in his opinion*, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations" (emphasis added). Based on these provisions, it has been a long-lasting and uncontested practice that the competence to determine what constitutes an "official" or "unofficial" act performed by a staff member is vested solely in the Secretary-General.

In view of the foregoing observations, the United Nations has never recognized or accepted that courts of law or any other national authorities of Member States have jurisdiction in making determinations in these matters.

24 January 1995

4. Exemption of the United Nations Development Programme from various taxes levied by a State-Agreement between UNDP and a Member State—Articles II and V of the Convention on the Privileges and Immunities of the United Nations

Memorandum to the Chief, Legal Section, Division of Personnel, United Nations Development Programme

With reference to your memorandum of 30 January 1995 concerning the five [name of State] taxes mentioned in a facsimile of 15 December 1994, you may be advised as follows:

1. Pursuant to paragraph 1 of article IX of the Agreement between the Government of [the State] and the United Nations Development Programme, "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 Nations".

2. Furthermore, pursuant to paragraph 1 article X of that Agreement, "the Governments shall take any measures which may be *necessary to exempt* the UNDP, its Executing Agencies, their experts and other persons performing services on their behalf, from regulations or other legal provisions which may interfere with operations under this Agreement and shall grant them such other facilities as may be necessary for the speedy and efficient execution of UNDP assistance. It shall, in particular, *grant* them the following rights and facilities:

> "…(*b*) prompt issuance *without cost* of necessary visas, licences or permits;
>
> "…(*d*) free movement within or to or from the country, to the extend necessary for proper execution of UNDP assistance…" (emphasis added)

3. Article II, section 7, of the Convention on the Privileges and Immunities of the United Nations provides that "the United Nations, its assets, income and other property shall be:

(*a*) Exempt from all direct taxes; it is understood, however, that the United Nations will not claim exemption from taxes which are, in fact, no more than charges for public utility services;

(*b*) Exempt from customs duties and prohibitions and restriction on imports and exports in respect of articles imported or exported by the United Nations for its official use…"

Article II, section 8, of the Convention provides that, "while the United Nations will not, as a general rule, claim exemption from excise duties and from taxes on the sale of movable and immovable property which form part of the price to be paid, nevertheless when the United Nations is making important purchases for official use of property on which such duties and taxes have been charged or are chargeable, Members will, whenever possible, make appropriate administrative arrangements for the remission or return of the amount of duty or tax."

4. Article V, section 18(b), of the Convention provides that "officials of the United Nations shall be exempt from taxation on the salaries and emoluments paid to them by the United Nations".

5. Based on the foregoing, the [name of State] taxes may be classified as follows:

(*a*) The Commercial Transactions Levy is charged and collected in respect of transactions involving the sale and rendering of service. While the seller or performer of the service is liable to pay the levy, he may require the purchaser of the service to bear the amount of the levy payable in respect of any transaction. Accordingly, the levy is not a charge for services but a tax on the sale or rendering of such services. The levy is therefore an indirect tax subject to the provisions of article II, section 8, of the Convention. While section 8 does not provide for an explicit exemption, it does oblige the Governments of [the State], whenever possible, to make appropriate administrative arrangements for the remission or return of the amount of levy.

(*b*) The registration fee is an amount payable by the United Nations to register and licence official vehicles. Pursuant to paragraph 1(b) of article X of the aforementioned Agreement, the Governments of [the State] shall grant prompt issuance without cost of necessary visas, licences or permits. The Government therefore has a legal obligation to grant registration and licences for official vehicles at no cost to the United Nations. The Organization is therefore exempt from paying the registration fee.

(*c*) The road toll is an amount payable by the United Nations on trucks transporting United Nations imported equipment. To the extend that the road toll is levied directly upon the United Nations, it is, within the meaning of the Convention, a direct tax from which the United Nations is exempt under article II, section 7(a), of the Convention. Furthermore, to the extent that it is levied on the transportation of articles imported by the United Nations for its official use, it constitutes a customs duty from which the United Nations is exempt under article II, section 7(b), of the Convention.

(*d*) The airport service charge is an amount payable by members of the United Nations upon their departure from [the State's] International Airport. The United Nations has consistently sought exemption from taxes of this nature on the ground that they are direct taxes from which the Organization is exempt under article II, section 7(a), of the Convention. Furthermore, pursuant to paragraph 1(d) of article X of the Agreement, the Governments of [the State] shall grant free movement to or from the country. The term "grant" is understood to mean at no expense to the Organization.

(*e*) The Graduated Tax is deducted from the salaries and wages of all employees. Pursuant to article V, section 18(b), of the Convention, United Nations officials, irrespective of their nationality, are clearly exempt from the payment of this tax on all salaries and emoluments paid to them by the United Nations.

6. Finally, it should also be pointed out that, under section 34 of the Convention on the Privileges and Immunities of the United Nations, the Government of [the State] has a legal obligation to "be in a position under its own law to give effect to the terms of this Convention". Furthermore, any interpretation of the provisions of the Convention on the Privileges and Immunities of the

United Nations must be carried out within the spirit of the underlying principles of the Charter of the United Nations, and in particular, Article 105 thereof, which provides that the Organization shall enjoy such privileges and immunities as are necessary for the fulfilment of its purposes. Measures which might, inter alia, increase the financial or other burdens of the Organization have to be viewed as begin inconsistent with this provision.

2 February 1995

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5. Privileges and immunities and facilities for contractors supplying goods and services in support of United Nations Peacekeeping operations

Memorandum to the Assistant Secretary-General for Peacekeeping Operations

1. This is with reference to your memorandum 14 June 1995, referring to certain difficulties recently encountered by contractors supplying goods and services in support of United Nations peacekeeping operations (hereinafter "the Contractors").

2. We understand that these difficulties prompted certain Member States to inquire whether the Contractors could be considered "experts on mission" pursuant to the Convention on the Privileges and Immunities of the United Nations ("the Convention"). Furthermore, and in order to resolve difficulties encountered by the Contractors, you specifically requested our views on whether privileges and immunities provided for under the Convention could be extended to such Contractors in future agreements regulating the status of United Nations peacekeeping operations ("SOFA/SOMSA"). Our views on the above are set out below.

Privileges and immunities for Contractors

3. Although the Convention does not define the term "experts on mission," the term is understood to apply to persons who are charged with performing specific and important functions or tasks for the United Nations. As indicated by the International Court of Justice in its advisory opinion of 15 December 1989, on the applicability of article VI, section 22, of the Convention, experts on mission "have been entrusted with mediation, with preparing reports, preparing studies, investigations or finding and establishing facts".[7] The Court's description of the scope of functions of experts on mission conforms in a general sense to the United Nations and State practice.

4. The functions performed by the Contractors in the context of United Nations peacekeeping operations are commercial in nature and range from the procurement of goods and the supply of services to construction and catering services. As such the functions and tasks performed by the Contractors do not fall within the scope of the understanding of the expression "experts on mis-

sion", which has evolved within the Organization and among its Member States. Therefore, the Contractors do not qualify for the status of "experts on mission".

5. As to privileges and immunities which you propose to be granted to the Contractors, it should be pointed out that the categories of persons to whom privileges and immunities are granted under the SOFAs/SOMAs include those specifically provided for in the Convention, i.e., diplomats, officials of the Organization and experts on mission for the United Nations. Additionally and in accordance with customary law applicable to United Nations peacekeeping operations, SOFAs provide for privileges and immunities to be granted to military personnel contributed by Member States.

6. As the contractors and their employees do not constitute a category of personnel under the Convention, States parties to the Convention are therefore under no obligation to grant them any privileges and immunities.

Facilities for the Contractors

7. As a result of the expansion and growth of peacekeeping operations, the United Nations has had to rely increasingly on commercial firms to provide services and perform tasks which traditionally were performed by military personnel made available to the Organization by Member States. The difficulties recently experienced by the Contractors in the context of peacekeeping operations has led this Office to examine whether those difficulties could be resolved by extending to the Contractors certain facilities which would enable them to carry out their assigned tasks.

8. Facilities which may be necessary for the Contractors in the performance of their functions would include freedom of movement for the proper performance of the services; prompt issuance of necessary visas; exemption from immigration restrictions and alien registration; prompt issuance of licences or permits, as necessary, for required services, including for imports and for the operation of aircraft and vessels; repatriation in time of international crisis; right to import for the exclusive and official use of the United Nations, without any restriction, and free of tax or duties, supplies, equipment and other materials.

9. For the purpose of inserting in future SOFAs/SOMAs the above-mentioned facilities, this Office is currently engaged in drafting pertinent clauses, which will be duly forwarded to you for your consideration.

10. We would, however, wish to caution that the willingness of this Office to consider extending such facilities to the Contractors would not of itself result in their obtaining them since Governments have in the past expressed reservations on including the Contractors in the SOFAs/SOMAs. The consent of the Government concerned to grant such facilities cannot therefore be presumed, but this Office is ready to espouse the need for those facilities despite the anticipated difficult negotiations.

23 June 1995

6. Question of whether United Nations laissez-passer can be issued to individuals engaged on special service agreements—Article VII of the Convention on the Privileges and Immunities of the United Nations

Memorandum to the Director and Deputy to the Assistant Secretary-General, Office of Conference and Support Services

1. This is with reference to your memorandum of 20 June 1995, seeking our comments as to whether the United Nations laissez-passer should be issued to 30 judges and lawyers engaged on special service agreements for rehabilitation of the criminal justice system in Rwanda.

2. As you know, according to article VII of the Convention on the Privileges and Immunities of the United Nations (the General Convention), the United Nations laissez-passer shall be issued to "United Nations officials". Individuals engaged on special service agreements are not United Nations officials and are thus not entitled to United Nations laissez-passer. The repetitive issuance of the United Nations laissez-passer to non-entitled officials could undermine the trust placed by national authorities in that document and might be considered by them as derogation from the respective provisions of the General Convention.

3. It should be noted that the United Nations laissez-passer as a document does not provide by itself the appropriate protection, since holders thereof are entitled as a rule to functional immunities. Persons engaged on special service agreement are normally considered experts on mission within the meaning of article VI of the General Convention, and as such are entitled to the immunity from personal arrest and detention, as well as to some other quasi-diplomatic immunities. According to the existing guidelines specified in paragraph 27(a),[8] experts on mission may be issued the United Nations Certificate.

4. In the light of the foregoing observations, we do not find it appropriate to issue United Nations laissez-passer to the individuals in question.

7 July1995

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7. Privileges and immunities of United Nations experts on mission—Section 22 of the Convention on the Privileges and Immunities of the United Nations

Facsimile to the Acting Special Representative of the Secretary-General for Western Sahara

Reference is made to your facsimile of 31 October 1995. You inquire in particular as to whether experts on mission should submit to the scanning control apparatus and whether any airport authority has the right to search their luggage, including hand luggage. The scope of the privileges and immunities of United Nations experts on mission is regulated by section 22 of the 1946 Con-

vention on the Privileges and Immunities of the United Nations (the General Convention) and other applicable international legal instruments as described below.

Section 22 of the General Convention provides as follows:

> "Experts (other than officials coming within the scope of article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular, they shall be accorded:
>
> (*a*) Immunity from personal arrest or detention and from seizure of the personal baggage;
>
> (*b*) In respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations;
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> (*c*) Inviolability for all papers and documents;
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> (*d*) For the purpose of their communications with the United Nations, the right to use codes and to receive papers or correspondence by courier or in sealed bags;
>
> (*e*) The same facilities in respect of currency or exchange restrictions as are accorded to the representatives of foreign Governments on temporary official missions;
>
> (*f*) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys."

It should be noted that immunity from personal arrest or detention are the attributes attached to the notion of personal inviolability of a diplomatic agent codified in the 1961 Vienna Convention on Diplomatic Relations (Vienna Convention). Article 29 of that Convention provides as follows:

> "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity."

The commentary of the International Law Commission on the then draft articles of the Vienna Convention, in pertinent part, provides that "being inviolable, the diplomatic agent is exempt from measures that would amount to direct coercion".[9] International law has no further direct norms on the matter of subjecting agents to screening through magnetometers (also known as metal detectors) or other electronic and mechanical devices.

As you will note from the General Convention, all official papers and documents of experts on mission are inviolable. Similar provisions are also found in the General Convention with respect to representatives of States. For the latter category, these provisions are codified in the 1961 Vienna Convention. Article

27 thereof in particular requires that official correspondence shall include "all correspondence relating to the mission and its functions". By analogy, one can argue that the scope of inviolability of experts on mission in this respect is equivalent to that pertaining to diplomatic agents. However, it is clear that the purpose of inviolability is to ensure the confidentiality of the contents and non-detention of such correspondence and documents. In a somewhat similar case, when United Nations pouches were subject to X-ray, we advised that this could infringe their inviolability and confidentiality, which would not be in accordance with the provisions of the General Convention.

As to personal baggage of United Nations experts on mission, under the General Convention, it should be accorded the immunity from seizure and enjoy the same other immunities and facilities as are accorded to diplomatic envoys in his respect. Immunities and facilities to be accorded to diplomatic envoys are specified in article 36, paragraph 2 of the Vienna Convention as follows:

> "The personal baggage of a diplomatic agent shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1 of this article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State. Such inspection shall be conducted only in the presence of the diplomatic agent or of his authorized representative."

In the absence of more specific norms in international law on matters referred to above, we believe the United Nations experts on mission should be accorded the same treatment as accorded by Governments to diplomatic envoys.

3 November 1995

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8. Authority of the United Nations Environment Programme to take direct legal action against private entities of States Member of the United Nations

Memorandum to the Deputy Director, Environmental Law and Institutions, Programme Activities Centre, United Nations Environment Programme

1. This is in response to your facsimile of 8 November 1995 wherein you seek the opinion of this Office concerning a reply which could be given to Mr. A, a lawyer. The latter suggests in his letter dated 21 September 1995 that UNEP should launch a lawsuit in one of the federal district courts in the United States against several large multinational chemical manufacturers alleging that their production of ozone-destroying chemicals has contributed to a serious deterioration of the ozone layer. He further proposes that grounds for the suit should

lie mainly in common-law public nuisance negligence. Mr. A claims that if successful, UNEP would be handsomely rewarded and expresses willingness to manage this case on behalf of UNEP together with four or five other attorneys on a contingent fee basis.

2. In responding negatively to the above proposal, UNEP, in our view, should inform Mr. A of the following.

3. UNEP is a United Nations programme established in 1972 by the General Assembly in its resolution 2997 (XXVII) of 15 December 1972. Under its mandate, as defined by the General Assembly, UNEP has been provided with the authority to take direct legal actions, in the form of court proceedings or otherwise, against private entities of States Members of the United Nations on the basis of allegations that their activities are detrimental to the global environment, in general, or are harmful to the ozone layer, in particular.

4. As a subsidiary body of the United Nations, UNEP does not have its own legal personality. Consequently, legal proceedings in the courts of Member States can be instituted by UNEP, acting on behalf of the United Nations, only on those occasions where UNEP is duly authorized to do so within the limits of its competence.

5. Pursuant to the provisions of article II, section 2 of the Convention on the Privileges and Immunities of the United Nations, the Organization enjoys immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. By filing a lawsuit, the Organization, acting through UNEP, would in effect waive its immunity and therefore would no longer be immune from counter claims which could be filed by defendants. The latter may, for example, claim that the Organization shares the responsibility for the depletion of the ozone layer inasmuch as it has failed to promulgate adequate international standards in this regard. Since court actions place at risk the privileges and immunities enjoyed by the Organization, any such action requires the approval of the Secretary-General. Given the circumstances of the case at hand, it would not be possible for UNEP to obtain the required approval.

6. The international regime for the protection of the ozone layer is regulated by the 1985 Vienna Convention for the protection of the Ozone Layer[10] and the 1987 Montreal Protocol.[11] Under those two instruments, the international community of States establishes world standards and approves control measures which are directed to eliminating emission of substances that can significantly deplete and otherwise modify the ozone layer. The United States and other industrialized countries are parties to both instruments and most of the industrialized countries have ratified the 1990 Amendment to the Montreal Protocol. Therefore, their multinational chemical-producing countries are bound by standards and measures adopted under the aforementioned instruments. Should there be any concern about manufacturing activities of multinational chemical-producing companies, it should be addressed by using the non-compliance procedures and mechanisms established by States parties pursuant to article 8 of the Montreal Protocol.

7. In addition, it is worthy of note that, notwithstanding the important role played by UNEP in assisting parties to the Vienna Convention and Montreal Protocol in realizing their objectives, from a legal point of view UNEP is not one of those organs or an element of the administrative structure established by

those instruments. Consequently, UNEP cannot be asked by parties to those instruments to undertake activities such as the institution of legal proceedings, which would be inconsistent with its status as subsidiary of body of the United Nations responsible primarily to the Economic and Social Council and the General Assembly.

17 November 1995

PROCEDURAL AND INSTITUTIONAL ISSUES

9. Participation of the United Nations Development Programme as an implementing agency in the restructured Global Environment Facility—Issue of whether lending type activities are permitted under the GEF instrument—UNDP financial regulations and rules 8.12, 13.5, 13.6 and 13.7

Memorandum to the Acting Treasurer, Bureau for Finance and Administration, United Nations Development Programme (UNDP)

1. This is in response to your memorandum of 5 January 1995, with enclosures, by which you seek our views on a number of issues arising from the participation of UNDP, as an implementing agency, in the restructured Global Environmental Facility (GEF).

2. GEF, we understand, was originally established as a pilot programme by the International Bank for Reconstruction and Development (the World Bank), by resolution of the Executive Directors of the Bank in 1991, to assist in the protecting of the global environment and promote thereby environmentally sound and sustainable economic development. The resolution authorized the Bank to enter into appropriate arrangements between UNDP and United Nations Environment Programme for implementation of programmes under GEF. An interagency agreement among the Bank, UNDP and UNEP provided for cooperation among the parties for the implementation of programmes under GEF.

3. At a meeting in Geneva between 14 to 16 March 1994, representatives of 73 States participating in the pilot phase, as well as other States wishing to participate in the future, agreed on the restructuring of the GEF and accepted the Instrument for the Establishment of the Restructured GEF (hereinafter "the GEF Instrument") for adoption by the governing bodies of the implementing agencies. The GEF Instrument, we understand, has been approved by the UNDP Executive Board.

4. The specific questions on which you seek our views are: (a) whether the audit and financial control provisions of the GEF Instrument are compatible with the UNDP Financial Regulations and Rules and with an Agreement between UNDP and the World Bank as Trustee of the Global Environment Trust

Fund (hereinafter "the UNDP/World Bank Agreement"), dated 24 April 1991; and (b) whether lending type activities are permitted under the GEF Instrument. Our comments and advice thereon are set out below.

Audit and financial control provisions of the GEF Instrument, the Agreement and the UNDP Financial Regulations and Rules

5. Paragraph 20(j) of the GEF Instrument provides the GEF Council shall, inter alia, "review and approve the administrative budget of the GEF and arrange for periodic financial and performance audits of the UNDP secretariat and implementing agencies with regard to activities undertaken for the Facility". Paragraph 4(c), of Annex B to the GEF Instrument includes among the responsibilities of the World Bank, as Trustee of the GEF Trust, "the maintenance of appropriate records and accounts of the Fund, and providing for their audit, in accordance with the rules of the Trustee".

6. You express your concern that these provisions may be inconsistent with the UNDP Financial Regulations and Rules, as they would purport to confer audit rights to an entity outside the UNDP auditing authorities. You thus inquired whether those provisions would be consistent with the UNDP/World Bank Agreement, which provides, in its article VI, that funds allocated to UNDP and transferred to it by the World Bank thereunder "shall be subject exclusively to the internal and external auditing procedures provided for in the financial regulations, rules and directives of the UNDP".

7. We should like to respond first to your query as to "which agreement takes precedence" (i.e., the GEF Instrument or the UNDP/World Bank Agreement). We note in this connection that the UNDP/World Bank Agreement concerns the pilot programme and establishes the terms and conditions for, and the procedures whereby, the World Bank, as trustee of the Global Environment Trust Fund, allocates and transfers funds to UNDP for implementation of the GEF activities. However, it is clear from the GEF Instrument that the Global Environment Trust Fund is to be terminated, and a new GEF Trust Fund is to be established by the World Bank, upon the entry into force of the GEF Instrument. In this respect, paragraph 32 of the GEF Instrument reads as follows:

> "The World Bank shall be invited to terminate the existing Global Environment Trust Fund (GET) on the effective date of the establishment of the new GEF Trust Fund, and any funds, receipts, assets and liabilities held in the GET upon termination, including the administration of any co-financing by the Trustee in accordance with the provisions of resolution NO. 91-5 of the Executive Directors of the World Bank, shall be transferred to the new GEF Trust Fund. Pending the termination of the GET under this provision, projects financed from the GET resources shall continue to be processed and approved subject to the rules and procedures applicable to the GET."

8. In the light of the above, it is our view that, upon termination of the Global Environment Trust Fund, the object and purpose of the UNDP/World Bank Agreement will cease, and the Agreement will only continue in force for purposes of completing pending GET activities. We therefore, suggest that, once the conditions provided for in its article X, paragraph 1 are fulfilled, the UNDP/

World Bank Agreement should be formally renewed and made applicable to the GEF activities or a new agreement should be entered into concerning the terms and conditions under which GEF funds will in the future be administered by UNDP.

9. As regards your query as to whether the audit and financial control provisions of the GEF Instrument are compatible with the UNDP Financial Regulations and Rules, it is our view that neither paragraph 20(j) of the GEF Instrument nor paragraph 4(c) of its Annex B confers audit powers on the World Bank over the funds provided to UNDP for implementation activities. We believe that those provisions can be applied consistently with the UNDP Financial Regulations and Rules.

10. Paragraph 20 of the GEF Instrument requires that the GEF Council shall "*arrange* for periodic financial and performance audits of the UNDP Secretariat and Implementing agencies with regard to activities undertaken for the Facility" (emphasis added). It is assumed that the Council will authorize the Bank to conclude agreements such as the one between the Bank, UNDP and UNEP for implementation of GEF projects, in which the question of audit can be more expressly dealt with.

11. As you know, it is the established practice in the United Nations system that each agency applies its own rules for the financial management of the funds placed under its custody. An intention to depart from such practice cannot merely be implied; it has to be expressly stated. As this does not seem to be the case here, it is our view that paragraph 20 of the GEF Instrument does not require the GEF implementing agencies to apply rules other than their own financial regulations and rules in respect of funds entrusted to them to implement GEF activities.

12. As regards paragraph 4(c) of Annex B to the GEF Instrument, which provides that the World Bank is responsible for "the maintenance of appropriate records and accounts of the Fund, and providing for their audit, in accordance with the rules of the Trustee", we are of the opinion that this provision relates to funds held by the Trustee and to the records and accounts kept by the Trustee, and not those of the implementing agencies.

Lending-type activities under the GEF mandate

13. With reference, inter alia, to paragraph 9(c) of the GEF Instrument, you request our views as to whether the GEF mandate would include lending type activities, "provided that their terms are in accordance with any instructions for such activities as produced by the GEF Council". Paragraph 9(c) of the GEF Instrument, to which you refer in your memorandum, reads as follows:

> "GEF concessional financing in a form other than grants that is made available within the framework of the financial mechanism of the conventions referred to in paragraph 6 shall be in conformity with eligibility criteria decided by the Conference of the Parties of each convention, as provided under the arrangements or arrangements referred to in paragraph 27. GEF concessional financing in a form other than grants may also be made available outside those frameworks on terms to be determined by the Council."

14. It is clear from the above-quoted provision that lending-type activities, including loans and loan guarantees are authorized under the GEF mandate and may be undertaken by the implementing agencies in accordance with their respective mandates. But there is nothing in the GEF Instrument which would oblige an implementing agency to engage in such concessional financing activities, if such Agency does not otherwise have the mandate to do so.

15. In paragraph 10 and 11 above, we have indicated that the involvement of UNDP in the management of GEF funds would be governed by the UNDP Financial Regulations and Rules. Under its Financial Regulations and Rules, UNDP has been given only a limited capacity to invest its funds when they are not required immediately (see UNDP financial regulation 13.5), or to place it funds "in the form of participation in development loans by international or regional development banks or in loans provided under the terms and condition of the Reserve for Construction Loans to Government" (see UNDP financial regulation 13.6). UNDP financial regulation 13.7 further provides as follows:

> "The specific advance approval of the Governing Council shall be required for any loan not clearly authorized under the provisions of these Regulations."

16. We note in this respect that the UNDP Financial Regulations and Rules have been recently amended by, inter alia, the adoption of a new financial regulation 8.12, which reads as follows:

> "The Administrator is authorized to incorporate microcapital grant support in association with technical cooperation programmes. Such microcapital assistance may be in the from of small grants, credit or loans *implemented through an intermediary*, which includes non-governmental or grass-roots organizations." (emphasis added)

The wording of this provision is far from clear, but on the basis of the existing restrictions on granting loans, it is proper to say that this regulation alone does not confer the authority to directly grant loans for credits. We understand the regulation to have authorized, under rather strict conditions (e.g., "microcapital grant support in association with technical cooperation programmes"), to provide assistance in the form of small grants, credits or loans implemented through an intermediary.

17. In the light of the above, we conclude that the provisions of paragraph 9(c) of the GEF Instrument would not, in and of themselves, constitute sufficient legal basis for UNDP to engage in lending-type activities, which are not expressly authorized by its Financial Regulations and Rules. For this purpose, a decision of the UNDP Governing Council would be necessary, as provided in financial regulation 13.7.

14 February 1995

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10. Organisations affiliated with the United Nations"—Establishment of an international federation of trade points

Memorandum to the Senior Legal Officer, Executive Direction and Management, United Nations Conference on Trade and Development

1. This is with reference to your telefax of 3 February 1995, in which you raise the following questions in connection with the ongoing discussion regarding the establishment of an international federation of trade points:

(*a*) Would an agreement with the United Nations be required in the case of the international federation?

(*b*) How is the status of affiliation granted by the United Nations?

(*c*) Would it be sufficient for UNCTAD Trade and Development Board and subsequently its parent body, the General Assembly, "to welcome" in a resolution the establishment of the international federation?

(*d*) Would it be necessary for the Board or the General Assembly to approve the articles of the agreement with the international federation before affiliation status is granted?

(*e*) Would it be sufficient if the Trade and Development Board "takes note" of the articles of the agreement?

You also seek our comments with regard to the two United Nations Secretariat non-papers, which are attached to your telefax, containing basic elements for an international federation of trade points and proposals for a decision by the Trade and Development Board.

2. With reference to your questions, I would like to point out that there is no such status as "an organization affiliated with the United Nations". The United Nations has never established a procedure under which organization or other entities could apply and, if they meet certain criteria, should be granted the status of "organizations affiliated with the United Nations", implying that they have special relations with the United Nations and in this regard enjoy particular rights and privileges. Thus, the United Nations does not grant the status of affiliation to international organization or other entities.

3. At the same time, it should be noted that there are several institutions which are independent from the United Nations, but which have been established in furtherance of important policy decisions taken by the principal organs of the United Nations and the activities of which are closely related to the work of the Organization. In order to highlight the close relationship these institutions enjoy with the United Nations and to underline the fact that their activities to a great extent are guided by decisions of the respective United Nations organs, such entities are sometimes referred to as "entities affiliated with the United Nations". In the case of the Helsinki Institute for Crime Prevention and Control, the term "affiliated" has even been incorporated, at the suggestion of the Finnish authorities, into the title of that Institute. In other words, the term "affiliated" means that a particular entity is not established by the United Nations as its subsidiary organ or body and is not directly controlled by the United Nations, but rather merely assisted and to some extent generally guided by the United Nations in its activities.

4. It appears from the foregoing that an entity cannot be referred to as affiliated with the United Nations unless the United Nations enters into an agreement either with the host country, which is taking an active part in the work of that institution, or with the entity itself and unless this agreement leads to the establishment of special relations that could justify the use of the term "affiliated" in the case of that entity.

5. It is our understanding that in order to be registered under Swiss law and to obtain under that law legal personality, the international federation of trade points should have a statute. Since the federation is anticipated to be an autonomous institution, created outside the constitutional framework of the United Nations, formal approval of its statue on the part of the United Nations is not required. However, since the federation is expected to be closely linked to the United Nations and the latter would probably be asked to assume in this regard, certainly responsibilities and duties, the United Nations should be satisfied with the purposes, functions and organizational structure of the federation. Therefore, the Trade and Development Board may wish to consider expressing its views regarding the aforementioned issues prior to the establishment of the federation and the approval of its statute. The competent Swiss authorities should also be consulted regarding the requirements of Swiss law.

6. Once the federation is established and registered under Swiss law as an autonomous non-profit entity having its own legal personality, the United Nations and the federation would be able to enter into an agreement specifying the conditions of their cooperation. Should the agreement be consistent with the previous decisions of the Trade and Development Board and the General Assembly concerning the basic elements of cooperation between the United Nations and the prospective federation, then no formal approval of the agreement by any of these organs would be required and the agreement may be concluded by the United Nations Secretariat. Should, however, the agreement contain additional provisions implying responsibilities which have not been mandated so far by those organs, the agreement will have to submitted to the Board and subsequently to the Assembly for approval.

17 February 1995

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11. Question whether members of the Bureau of the Preparatory Commission for the Habitat II Conference were elected as representatives serving in their personal capacity or as States—Rule 103 of the Rules of Procedure of the General Assembly

Memorandum to the Officer-in-Charge of the United Nations Conference on Human Settlements

1. This is in reply to your memorandum of 6 February 1995 on the above-captioned subject. You inquire whether members of the Bureau of the Preparatory Commission for the Habitat II Conference were elected as representatives serving in their personal capacity or as States.

2. Preparatory bodies established by the General Assembly, such as that for the Habitat II Conference, are, pursuant to rule 161 of the rules of procedure of the General Assembly, subject to the rules applicable to committees of the Assembly unless the General Assembly or the preparatory body decide otherwise. The applicable rule concerning election of officers of committees is rule 103. That rule, as well as other rules dealing with officers of committees, such as rule 104, show that officers are elected in their personal capacity among the delegates accredited to the committee. Under rule 161, the preparatory body can decide to elect its officers in another manner. In a few cases, an open-ended body consisting of all Member States has decided to elect a large Bureau similar to that of the General Assembly, in which the Vice-Chairman were elected as States.

3. In the case of Preparatory Commission for the Habitat II Conference, the relevant part of its report, attached to your memorandum, lists the various officers by individual name, followed by an indication in parenthesis of the delegation from which they were elected. This indicates that the officers were elected in accordance with the standard practice, i.e., in their personal capacity and not as States. The only exception is the host country of the Conference which is listed as an ex officio member of the Bureau.

4. In view of the foregoing, if one or more of the officers cease to participate as representatives in the Preparatory Commission, it would be necessary for the Committee to replace them by electing new officers; they cannot automatically be replaced by another member of their own delegation.

21 February 1995

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12. Circulation of official documents to intergovernmental organizations accorded permanent observer status—Rule 74 of the rules of procedure of the functional commissions of the Economic and Social Council

Memorandum to the Secretary, Commissions on Health rights, Fifty-first session

1. This is in reply to your facsimile dated 27 February 1995, by which you request legal guidance on the question whether rule 74 of the rules of procedure of the functional commissions of the Economic and Social Council (or any other rule, decision, or practice, for the matter) entitles participating intergovernmental organizations, such as the Organization of the Islamic Conference (OIC), to have official documents circulated.

2. Rule 74 of the rules of procedure of the functional commissions of the Economical Social Council reads as follows:

"Representatives of intergovernmental organizations accorded permanent observer status by the General Assembly and of other intergovernmental organizations designated on a continuing basis by the Council or invited by the com-

mission may participate, without the right to vote, in the deliberations of the commission on questions within the scope of the activities of the organizations."

3. As an intergovernmental organization accorded permanent observer status by the General Assembly, OIC pursuant to rule 74 may participate, without the right to vote, in the deliberations of the Commission on Human Rights.

4. According to the established practice of the Organization, the right to participate "in the deliberations" of meetings does not encompass the right to circulate documents. This is the practice not only of the functional commissions but also of Economic and Social Council, the parent organ of such commissions. Rule 79 of the rules of procedure of the Council provides that organizations such as OIC may participate "in the deliberations of the Council". That rule has not, to our knowledge, ever been interpreted to include the right to distribute documents.

5. The right to circulate documents, which entails financial implications for the Organization, is reserved to the members of the Organization, unless otherwise decided by the competent intergovernmental organ. (See for example Economic and Social Council resolution 1296 (XLIV) of 23 May 1968 concerning non-governmental organization and General Assembly resolution 43/160 A of 9 December 1998 concerning the Palestine Liberation Organization.)

6. As you are aware, documents emanating from an intergovernmental organization may always be circulated upon requests by any State Member of the United Nations.

2 March 1995

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13. Meaning of the words "agreed candidate"—Rule 68 of the rules of procedure of the Economic and Social Council—Paragraph 16 of annex VI to the rules of procedure of the General Assembly

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

I should like to reply to your letter of 8 May 1995 addressed to the Legal Counsel, by which you requested legal advice on certain aspects of rule 68 of the rules of procedure of the Economic and Social Council, which reads in relevant part as follows:

> "All elections shall be held by secret ballot, unless, in the absence of any objection, the Council decides to proceed without taking a ballot on *an agreed candidate or slate*…" (emphasis added)

The general question you raised was: in the absence of consensus among the members of the Economic and Social Council, what is the legal interpretation of the phrase "agreed candidate" contained in rule 68? The phrase in question reflects the well-established practice in both the General Assembly and the

Economic and Social Council by which the requirement of a secret ballot for elections is waived when there is an "agreed candidate or slate" and when there is no objection to such a waiver. The meaning of the phrase is set out in paragraph 16 of annex VI to the rules of procedure of the General Assembly, which defines the practice of the Assembly as follows:

> "The practice of dispensing with the secret ballot for elections to subsidiary organs *when the number of candidates corresponds to the number of seats to be filled* should become standard and the same practice should apply to the election of the President and Vice-Presidents of the General Assembly, unless a delegation specifically requests a vote on a given election" (emphasis added).

Thus, an agreed candidate or slate exists when the number of candidates corresponds to the number of seats to be filled. The threshold question of what constitutes the number of seats to be filled depends upon the particular election. In some cases, there is no official geographic distribution among the posts to be filled and thus it is the total number of vacancies to be filled which is the number at issue. In most other cases, the seats have been distributed among geographic regions by decision of the competent organ and thus the number of seats to be filled is per region.

Turning to your specific question, if three seats are to be filled by candidates from a particular region, that is the number of seats to be filled. Thus, a secret ballot may be waived only if there are three candidates from the region and there is no objection. If, as in your specific question, there are five candidates from the region for three seats to be filled and only one has been endorsed by the regional group, a secret ballot is still required among all five candidates for the three seats. The fact that a group has endorsed certain candidates, of whatever number, is irrelevant to ascertaining whether in fact, the number of candidates from the region corresponds to the number of seats to be filled.

12 May 1995

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14. Sponsorship of resolutions by associate members of the Economic Commission for Asia and the Pacific—Resolution 69 (V) Economic and Social Council

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

1. This is reply to your facsimile message of 12 May 1995, requesting advice and guidance on the question whether sponsorship of resolutions by associate members of ESCAP could be seen as conflicting with their non-voting status. You also expressed the hope that it could be found legally acceptable to allow them to co-sponsor resolutions.

2. As you note in your message, paragraph 6 of the terms of reference of ESCAP states that representatives of associate members are entitled to "participate without vote" in ESCAP meetings. The terms go on to state in paragraph 7 that such representatives are eligible for appointment as members of ESCAP subsidiary bodies, may vote in such bodies and may hold office therein. Neither the terms of reference nor the rules of procedures, however, address the question of associate members sponsoring resolutions or submitting proposals.

3. In order to address your query, it may be useful to refer to the legislative history of associate membership. In March 1947, the Economic and Social Council requested the then Economic Commission for Asia and the Far East (ECAFE) to appoint, at its first session, a Committee of the Whole to examine the question of making provision for associating with the work of the Commission territories in the area proposed by member Governments responsible for said territories' international relations. It requested the Committee of the Whole to report directly back to the Economic and Social Council at its July 1947 session. The 1947 report of ECAFE to the Economic and Social Council[12] included the requested report of the Committee of the Whole and revealed differing views among the members of the Committee as to the kind of status that should be granted to such territories, ranging from full membership to consultations on questions of particular concern to them.

4. During the debate in the Committee, the Assistant Secretary-General in charge of the Legal Department concluded that: "while there was not explicit provision in the Charter of the United Nations on the subject, the Charter, in spirit and principle, envisaged a clear difference between Members and non-members and that this difference rested upon the fundamental principle that rights of membership should not be granted unless the obligations of membership were also assumed … As for Non-Self-Governing Territories … full membership would be contrary to the special regime prescribed for such Territories under Chapters XI, XII and XIII of the Charter".

5. The Committee of the Whole eventually agreed on admitting Non-Self-Governing Territories as associate members of the Commission, as well as on the procedure for admitting them. The Commission also considered rights to be accorded to associate members. The Economic and Social Council adopted the text recommended by the Committee as resolution 69(V) of 5 August 1947, which reads in relevant part as follows:

"*The Economic and Social Council*,

Resolves that the following be added to the terms of reference of the Commission as article 3a:

…

(ii) Representatives of associate members shall be entitled to participate without vote in all meetings of the Commission, whether sitting as Commission or as a committee of the whole;

(iii) Representatives of associate members shall be eligible to be appointed as members of any committee, or other subordinate body, which may be set up by the Commission and shall be eligible to hold office in such body."

During the debate on the report in the Council, no references were made to the specific issue of the rights to be accorded associate members.

6. While the report of the Committee of the Whole does not reveal whether the right of associate members to submit formal proposals was discussed, the following paragraph is highly instructive:

> "The rights to be accorded to associate members were … considered. *It was the general view of the delegations that associate members should participate as fully as possible in the work of the Commission and should enjoy all the privileges of membership short of the right to vote in meetings of the Commission*. Eligibility to hold office and the right to vote in any subordinate bodies were regarded as appropriate to associate membership. It was finally decided that associate members should not be given the right to vote when the Commission was sitting as Committee of the Whole" (emphasis added).

7. The legislative history summarized above points to clear intention on the part of both ECAFE and the Economic and Social Council, at the time of the adoption of resolution 69(V), to grant associate members wide rights of participation in the work of the Commission, while at the same time maintaining a clear distinction between their status and that of full members.

8. As a general rule, unless decided otherwise by the competent body, the submission of proposals and the sponsoring of resolutions is a prerogative of full membership in United Nations bodies. It is linked to the right to vote as it in fact initiates the decision-making process, culminating in voting or the taking of a decision; proposals are made with a view to their being acted upon by the body concerned. The same applies to other actions, such as explanations of vote, procedural motions and points of order, which, by their very nature are closely linked to the process of decision-making and thus are actions which remain solely within the prerogative of full members.

9. In certain circumstances, however, procedures have been devised to allow non-members of a body to submit proposals and draft resolutions, and yet not initiate a decision-making process. This is done by specifying that such a proposal may not be put to the vote unless so requested by a member of the body concerned (see, for example, rule 38 of the provisional rules of procedure of the Security Council). The parent organ of ESCAP has made such exceptions both for itself and for its functional commissions. States which are not members of the Economic and Social Council and specialized agencies are permitted to submit proposals which may be put to the vote on request of any member of the Council (rules 72(3) and 75(b) of the rules of procedure of the Economic and Social Council). The same applies, mutatis mutandis, in the function commissions of the Council (rules 69(3) and 71(b) of the rules of procedure of the functional commissions of the Council).

10. It should be noted that, as in the case of ESCAP, many resolutions are adopted in the aforementioned bodies without a vote. In those circumstances, the requirements of the rule are met if any member of the body concerned requests that a decision be taken on the draft resolution proposed by a non-member. Such a request may be inferred by a member co-sponsoring the proposal of the non-member as well as by a presiding officer proposing its adoption.

11. In the case of ESCAP, it is consistent with the legislative history of resolution 69(V), as indicated above, for ESCAP to interpret its terms of reference broadly with regard to the rights of associate members, so as not to bar associate members from sponsoring resolutions or making substantive proposals in the Commission. However, in order to ensure that the decision-making process remains in the hands of full members, we would advise ESCAP to follow the model of the Economic and Social Council and, while allowing the submission and consideration of proposals by associate members, adopt the policy that such proposals may not be acted upon unless so requested by a full member of the Commission.

12. If ESCAP interprets its terms of reference as indicated above, in view of the silence on this matter in the ESCAP terms of reference, it would be appropriate in our view for ESCAP to inform the Economic and Social Council of such interpretation. ESCAP could submit to the attention of the Council its interpretation of the scope of rights of associate members, based upon the relevant legislative history. This would allow the Council to confirm, explicitly or implicitly, that understanding or to modify it should it so wish.

13. Alternatively, from a policy point of view ESCAP may prefer to have the matter squarely addressed in its terms of reference. It could thus recommend to the Economic and Social Council that paragraph 6 of its terms of reference should be amended to include a provision reading along the following lines: "Representatives of associate members may submit proposals which may be put to the vote on request of any member of the Commission".

30 May 1995

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15. Relationship between United Nations agencies and advertising agencies for fund-raising activities and programmes—Use of United Nations name and emblem

Memorandum to the Director, Mexico Regional Office, United Nations International Drug Control Programme

1. This is in response to your facsimile of 13 June 1995. By your facsimile, you advised us that the Regional Office of the United Nations International Drug Control Programme in Mexico "has embarked on a relationship with commercial firms, in an effort to raise awareness of UNDCP's mandate in the region and to raise funds for activities and programmes". You sought our guidance on the appropriate procedures to be followed by UNDCP in its "contacts with commercial firms, and particularly with advertising agencies, for awareness-raising and fund-raising activities". Specifically, you sought our advice and comments on the following issues:

(*a*) Whether other United Nations agencies have concluded arrangements "with commercial firms, and particularly with advertising agencies, for awareness-raising and fun-raising activities;"

(*b*) The quantum and method of calculating the professional fees payable by United Nations agencies to advertising agencies;

(*c*) The Organization's policy and applicable restrictions in respect of associating the United Nations name and emblem with commercial firms "in addition to the prohibition of taking on sponsors that manufacture cigarettes, liquor, or which have poor environmental or labour records".

Our comments on your queries are set out below.

2. On the basis of your facsimile, it appears that the context giving rise to your inquiries is the celebration of International Day against Drug Abuse and Illicit Trafficking. We understand that, for purposes of the commemoration, an arts festival has been organized by UNDCP to take place on 26 June 1995 in Mexico City. You indicated that the arts festival will not have a fund-raising component and that "its sole purpose is to raise public awareness of [UNDCP's] work in the region". You further advise, however, that all expenses for this festival will be financed from funds raised from "commercial patrons (i.e., companies) that at this moment are still being lined up". It further appears that this fund-raising will not be undertaken by UNDCP, which "is not making direct contact with the companies," but by an advertising agency. As stated in your facsimile, UNDCP is "guiding" the advertising agency on, inter alia, "the appropriateness of certain companies sponsorship".

3. In the light of the above statements, we understand that the advertising agency will engage in fund-raising on behalf of the United Nations and will be using its name to obtain money from corporate sponsors to cover the expenses of the festival. As regards the details of the actual fund-raising, e.g., the amounts of the donations to be given by corporate sponsors, the manner of collecting and accounting for funds raised, the amounts to be retained by the advertising agency for expenses or whether any remaining balance of the funds, if any is left after expenses, would be turned over to the United Nations, no information has been made available to us on those issues.

4. We would urge the utmost caution before proceeding with this course of action. The advertising agency will raise funds by using the name of the United Nations and acting as agent for the United Nations. In return, the Organization allegedly will benefit from the funds raised. Our consistent experience with these schemes over the past 20 years is that, when problems arise during the course of the fund-raising activities (e.g., improper solicitation of funds, mismanagement of funds or difficulties with the taxation authorities of the State in which the agency is incorporated), the Organization is potentially vulnerable to resultant claims since donors or those supplying services will argue that they were induced to do so by the representations of the agency that it was acting for the Organization. Thus, the United Nations could be held responsible and thus, liable vis-à-vis the sponsors and donors for actions or omissions of the agency which will be acting on behalf of the United Nations.

5. In addition, and in view of the fact that the agency is subject to the national law and would be acting as an agent of the United Nations, the Organization runs the danger of being joined in any claims and/or judicial proceedings initiated against the agency by aggrieved sponsors and contributors, and this may lead to a questioning, and perhaps a denial by the courts, of the immunities of the Organization. There are no contract clauses in a contract with an advertis-

ing agency that can protect the United Nations since corporate sponsors and donors will be acting on the agency's representations and would not be party to the United Nations/advertising agency contract (on the assumption that one has been concluded) which would contain the clauses holding the United Nations harmless.

6. As regards your query on the Organization's policy and applicable restrictions in respect of associating the United Nations name and emblem with commercial firms "in addition to the prohibition of taking on sponsors that manufacture cigarettes, liquor, or which have poor environmental or labour records", it should be noted that the use of the United Nations name and emblem is reserved solely for official purposes in accordance with General Assembly resolution 92(I) of 7 December 1946. Furthermore, that resolution expressly prohibits any use of the United Nations name and emblem for commercial purposes or in any other way without the authorization of the Secretary-General, and recommends that States Members take the necessary measures to prevent the use thereof without the authorization of the Secretary-General. This Office has consistently opposed permitting the use of the United Nations name or emblem by private enterprises, even for the purpose of raising funds for the United Nations activities.

7. In the light of the foregoing, granting to an advertising agency and/or to commercial sponsors the right to use the United Nations name in return for financial contributions would constitute a departure from the accepted policies and practices of the Organization and, in particular, from the mandated obligation to avoid arrangements which countenance commercial benefits to firms through use of the United Nations name. Furthermore, authorizing such use of the United Nations name would endanger the continued protection enjoyed by the Organization in respect of the United Nations name, which is protected free of charge pursuant to the Paris Convention[13] but on the basis that it is not used for commercial purposes.

8. In our view, for the reasons given above, it would be necessary to obtain legislative approval to proceed with the activities outlined in your facsimile, in particular, because there is not legislative authority for the assumption of open-ended financial liabilities by the Organization through the use of the United Nations name for fund-raising purposes.

26 June 1995

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16. Accountability of the Administrator of the United Nations Development Programme vis-à-vis the activities of the United Nations Office

Memorandum to the Administrator, United Nations Development Programme

1. This is in reference to the memorandum of 1 August 1995, requesting advice on the above-captioned subject matter. The delay in responding to that request is very much regretted; however this has been necessitated by the complex nature of the questions raised, entailing as they do a review of the complete history of the establishment of the United Nations Office of Project Services (UNOPS).

2. In the memorandum under reference, you requested "advice on the nature and extent of the Administrator's accountability on the activities of UNOPS and to whom," in his capacity as Administrator of UNDP, Chariman of the Management Coordination Committee (MCC) and member of MCC.

3. The question of the accountability of the UNDP Administrator on the activities of UNOPS, in my view, has to be examined in the light of the status of, and functions entrusted to, UNOPS by the Executive Board of UNDP, formerly the Governing Council, as well as the Administrator's overall responsibilities for the United Nations Development Programme, as provided by the General Assembly in its resolution 2688(XXV) of 11 December 1970 (also known as the "Consensus"), on the capacity of the United Nations development system.

UNOPS status and functions

Status

4. The Secretary-General proposed the separation of UNDP and the Office of Project Services (OPS), in the context of the restructuring of the economic and social sectors, to eliminate "the conflict inherent in UNDP exercising coordination responsibility in relation to the operational activities of the system while retaining, through OPS, its own implementation capability".[14]

5. In response to the Secretary-General's initiative, UNOPS was established pursuant to Executive Board decision 94/12 of 9 June 1994, and on the authority of General Assembly decision 48/501 of 19 September 1994. In paragraph 6 of its decision 94/12 the board recommended to the General Assembly, and the Assembly accepted, that UNOPS should become a "separate and identifiable entity in a form that does not create a new agency and in partnership with the United Nations Development Programme and other operational entities." The term "agency" in this context has to be understood in the sense of a subsidiary organ of the United Nations in terms of Article 22 of the Charter United Nations, rather than a specialized agency. The General Assembly is authorized to establish subsidiary organs, such as UNDP and the United Nations Children's Fund. The Board does not posses that power.

6. The Executive Board further decided, in paragraph 4 of decision of 94/12, to enhance its role vis-à-vis UNOPS and to retain overall policy guidance and supervision for its activities. In paragraph 8 of the decision, the Board decided that "subject to paragraph 6 of the present decision, the Executive Director of UNOPS will report to the Secretary-General and the Executive Board through the Management Coordinating Committee".

Functions

7. The functions of UNOPS are described in paragraph 4 of the report of the Executive Director, on ways of establishing the Office as a separate and identifiable entity,[15] and consist of: comprehensive project management; implementation of project components; project supervision and loan administration; and management services.[16] However, these functions are to be carried out within the limitations established by the Board in its decisions 94/12 of 9 June 1994 and 94/32 of 10 October 1994, that UNOPS is to undertake implementation rather than funding activities, which remains the responsibility of UNDP within the United Nations development system. The Executive Board itself does not provide the distinction between implementing and funding activities, although some of its members did request clarification on this matter when considering the note by the Secretary-General, resulting in decision 94/12. However, it is safe to say in this context that UNOPS is authorized to provide services relating to implementation of already funded programmes and projects, and not to engage in the actual fund-raising to support such programmes and projects. UNDP was thus to retain its role as the main funding agency of United Nations system technical assistance activities, for which the specialized agencies essentially provide executing agency functions and UNOPS acts as implementing entity.

Accountability

8. On the question of accountability for UNOPS activities, the Executive Director had proposed in his report:[17] "UNOPS activities shall be considered separate and distinct from UNDP activities, and shall be reported as such. Consequently, the Executive Director, through MCC, and in accordance with delegated authority, *shall be fully responsible and accountable to the Executive Board for all phases and aspects of UNOPs activities*". (emphasis added)

9. However, in its decision 94/32, the Executive Board, while taking note of the report of the Executive Director, found reason once again to underline the fact that "the United Nations Office for Project Services will undertake *implementation and not funding activities*",[18] and reaffirmed, in paragraph 4, that "*UNOPS will operate with the United Nations development system and will not become a new agency* and that the requirements regarding accountability must be consistent with the decision not to establish a new agency as contained in paragraph 3 of decision 94/12". (emphasis added)[19]

10. The question of accountability was again addressed in the UNOPS Financial Regulations which were submitted in a joint report to the Executive Board of the UNDP Administrator and the Executive Director.[20] The report was considered by the Board at its first regular session in 1995; by its decision 95/1 of 10 January 1995 the Board approved the Financial Regulations as an annex to the UNDP Financial Regulations and Rules.[21] UNOPS financial regulation

3.1 provides that "the Executive Director is accountable for UNOPS activities to the Executive Board and to the Secretary-General, and shall report to the Executive Board through the Management Coordination Committee, which shall provide operational guidance and exercise management direction". This provision is consistent with Executive Board decision 94/12, which also provides that the Executive Board shall report to the Secretary-General and the Executive Board through MCC (see decision 94/12, para 8).

11. It is clear from the above analysis that while the various reports to the Executive Board make references to accountability, the Board itself only addresses it in its decision 94/32 by emphasizing that UNOPS is to operate within the development system and is not to become a new agency, and in the limited context of the UNOPS Financial Regulations. In this context, while MCC is to provide "operational guidance and management direction", collectively, to the Executive Director, the latter remains accountable for the conduct of UNOPS activities.

12. Therefore, the responsibility and ultimate accountability of the Administrator in this case must also be examined in the broad context of the General Assembly resolution 2688(XXV).

Administrator's accountability

Operational activities

13. Paragraph 37 of General Assembly resolution 2688(XXV) provides that "*in addition to the responsibilities to be delegated to him by the Governing Council, the Administrator will be fully responsible and accountable to the Governing Council for all phases and aspects of the implementation of the Programme*".

14. The accountability of the Administrator is thus very broad and also encompasses the UNDP-funded and supported programmes implemented by UNOPS, as such implementation by UNOPS is one phase or aspect of the overall Programme, although the Executive Director remains accountable for the actual implementation of the particular projects entrusted to UNOPS.

15. It is important to note that in accepting to separate UNOPS from UNDP, "in order to strengthen the coordinating and central funding and roles of the United Nations Development Programme" and to "ensure that the Office for Project Services will undertake implementation rather than funding activities", the Executive Board recommended to the General Assembly that the Office for Project Services, while becoming a separate and identifiable entity, should be established in "a form that does not create a new agency; and in partnership with the United Nations Development Programme and other operational entities". (See Executive Board decision 94/12, para. 1 and 5, respectively). The General Assembly accepted the recommendation of the Board in its decision 48/501, acting also on the recommendation of the Economic and Social Council. While, therefore, in terms of financial regulation 3.1, the Executive Director is accountable to the Executive Board and the Secretary-General for the proper discharge of UNOPS activities, the Administrator retains certain responsibilities for the Programme derived from General Assembly resolution 2688(XXV).

16. In accordance with General Assembly resolution 2688(XXV), the Administrator has specific responsibilities and is accountable to the Executive Board, and the General Assembly, for the realization of the objectives of the United Nations Development Programme. In view of the fact that the Executive Board of the United Nations Development Programme also exercises authority over UNOPS, providing overall policy guidance and supervision for its activities, the Administrator, in the light of his overall responsibilities sunder resolution 2688(XXV), remains ultimately accountable for the activities of UNOPS, relating to the implementation of the Programme.[22] Furthermore, on the basis also of resolution 2688(XXV), the Administrator is responsible and accountable to the Executive Board for any other matters within the purview of the Board, which the Board may in its discretion delegate to him.

17. However, it is very clear that in the performance of his responsibilities vis-à-vis UNOPS, the Administrator is to take account of the authority entrusted to MCC to provide "*operational guidance* and management direction for UNOPS" (see paragraph 3 of decision 95/1 approving the UNOPS Financial Regulations and Rules). This is especially important, in view of the decision to establish UNOPS as a separate and identifiable entity albeit within the United Nations development system, and the role of MCC which resulted from the need to address certain perceived conflicts inherent in UNDP exercising coordinating responsibilities in relation to operational activities of the system while retaining, through UNOPS, its own implementing capability.[23]

18. Apart from the above, we have found no specific evidence in the documentation relating to UNOPS, for the view that the Administrator bears any individual responsibility for UNOPS in his capacity as Chairman of MCC. Paragraph 7 of Executive Board decision 94/12 provides that the membership of MCC shall consist of the following: "Chariman: Administrator of UNDP; Members: the Under-Secretary-General for Administration and Management and the Under-Secretary-General for Development Support and Management Services; Secretary: the Executive Director of UNOPS". The role of the Chairman is not defined further and it does not seem that it was in any way intended to confer on him any more personal responsibilities for the functioning of MCC than the other members of that body, except those largely procedural responsibilities inherent in the Office of the Chariman. MCC has been given responsibilities by the Board and the Secretary-General and performs those functions collectively. We therefore do not see any individual role for the Administrator, except as part of the Committee, in the exercise of his functions as a part of MCC.

Personnel

19. In respect of the personnel and financial aspects of UNOPS, however, the accountability of the Administrator is much clearer than in the case of the operational activities. In his note to the Executive Board (DP/1994/52) of 6 June 1994, the Secretary-General stated, in paragraph 10, that "the existing financial and personnel regime would be maintained".

20. Accordingly, the delegation of authority by the Secretary-General to the Administrator, provided in personnel directive PD/2/65/Add.1 of 14 February 1966 as amended on 11 October 1971, in respect of the United Nations Staff Regulations and Rules, would seem to also be applicable to UNOPS.[24] There-

fore, although the Executive Director would clearly be responsible for managing the day-to-day personnel-related questions that may arise, the Administrator is ultimately accountable for such matters.

Finance

21. As regards the financial regime, the Executive Board approved separate UNOPS Financial Regulations (in DP/1995/7/Add.1) by its decision 95/1 of 10 January 1995, as an annex to the UNDP Financial Regulations and Rules. Regulation 9.1 provides that the Secretary-General shall "act as custodian of UNOPS income and resources entrusted to the charge of UNOPS". Regulation 9.2 provides that the Secretary-General may "delegate to the Administrator of UNDP such authority with respect to custody of funds as would facilitate the efficient and effective management of UNOPS income as well as resources entrusted to the charge of UNOPS, and such delegated authority may be accepted by the Administrator of UNDP in writing". Thus, the Administrator under delegation from the Secretary-General is responsible for the custody of the UNOPS funds and is ultimately accountable to the Secretary-General and the Executive Board for their proper administration under the UNDP Financial Regulations and Rules.

Conclusion

22. In summary, while UNOPS has been separate operationally from UNDP to avoid the perceived conflict mentioned by the Secretary-General, the UNDP Administrator retains certain overall responsibilities with regard to the activities of UNOPS. These responsibilities are derived from General Assembly resolution 2688(XXV), which makes the Administrator accountable to the Executive Board directly for all phases and aspects of the Programme and realization of its objectives, and upon delegation, for the other activities for which the Board retains overall policy guidance and supervision. Thus, while the UNDP Administrator remains accountable for the achievement of the overall objectives of the Programme, the Executive Director is accountable for the implementation of the particular projects for which he has operational responsibility.

23. In addition, the Administrator, under delegation from the Secretary-General, retains the ultimate responsibility for UNOPS in personnel and financial matters. As explained above, we see no basis for individual responsibility of the Administrator, for UNOPS activities as Chairman or part of MCC, except in regard to procedural matters inherent in the position of Chairman. The responsibilities of MCC have been entrusted to the Committee and are exercised collectively by that body in accordance with such directions as the Secretary-General or the Executive Board may provide with regard to the functioning of the Committee.

6 September 1995

17. The Secretary-General's authority to borrow funds

I. *Note to the Under-Secretary-General for Legal Affairs*

The United Nations Financial Regulations and Rules

1. Financial regulation 4.1 provides as follows:

> "The appropriations voted by the General Assembly shall constitute an authorization to the Secretary-General to incur obligations and make payments for the purposes for which the appropriations were voted and up to the amounts so voted."

This regulation stipulates that the Secretary-General can only "incur obligations and make payments", which would bind the Organization financially, on the basis of previously approved appropriations by the General Assembly. Consistent with this plain meaning of the regulation, financial rule 110.1(a) requires the Under-Secretary-General for Administration and Management to be responsible for ensuring that the expenditures of the Organization remain within he limits of the appropriations approved by the General Assembly.

2. This Office has consistently interpreted these texts as excluding, per se, borrowing activities, because only appropriated funds (i.e., funds that are available within the budget, in accordance with the Financial Regulations and Rules) can be expended. In other words, it has never been doubted by this Office and, we understand,by past Controllers, that the United Nations Financial Regulations and Rules require that specific authority from the General Assembly would be required for the United Nations to borrow.

Borrowing by the Organization

Borrowing from the external sources

3. Borrowing from sources external to the Organization with the authority of the General Assembly is exceptional.

4. In its resolution 1739 (XVI) of 20 December 1961, the General Assembly noting, in the context of a grave financial crisis, that "under the existing circumstances, extraordinary financial measures are required" but "that such measures should not be deemed a precedent for the future financing of the expenses of the United Nations", authorized the Secretary-General to issue United Nations bonds in the amount of US$ 200 million, to be repaid in 25 annual installments. The bonds were to be offered by the Secretary-General to States Members of the United Nations, the specialized agencies and the International Atomic Energy Agency, as well as to the official institutions of such members, and with concurrence of the Advisory Committee on Administrative and Budgetary questions, to non-profit institutions or associations.

5. In the few instances where the General Assembly granted borrowing authority, it made such borrowing subject to strict conditions, notably those mentioned below.

(*a*) *Sources of funds*

6. In the exceptional instances where the General Assembly has authorized borrowing from sources outside the Organization, such outside sources have been generally restricted to Governments, and governmental or intergovernmental institutions,[25] authorizing the Secretary-General to negotiate with the International Refugee Organization an interest free loan to finance the United Nations programme of assistance to Palestine refugees. We only found one instance where borrowing had been authorized from private, non-commercial sources, namely, "non-profit institutions or associations", subject to the concurrence of the Advisory Committee on Adminstrative and Budgetary Questions[26] on United Nations bonds (also noted above). Our files indicate that borrowing from commercial sources or banks has never been authorized.

(*b*) *Other Conditions*

7. The General Assembly's granting of borrowing authority has been on a case-by-case basis and, with one exception (resolution 1739(XVI) on the United States bonds), for short-term loans. Strict conditions are provided to guarantee that borrowing is utilized as a last resort, and to secure the availability of funds for repayment. In the only case where the Assembly authorized the issuance of bonds, it also decided to include annually in the regular budget of the organization an amount sufficient to cover the installments of principal, and the interest charges, on the bonds.

8. To our knowledge, the only authorization currently in effect for borrowing from sources external to the Organization is pursuant to financial regulation 5.10, which authorizes borrowing from Governments for the reimbursable seed operations of the United Nations Centre for Human Settlements (HBITAT) Foundation, on the condition that payment of the principal of, and any interest on, such borrowing should be only the resources of the Foundation.

9. In the light of the above, it seems that the Secretary-General would need authorization from the General Assembly to borrow funds from any source external to the Organization, including the World Bank.

Borrowing from United Nations funds

10. The Secretary-General has been given limited authority to borrow from United Nations funds. General Assembly resolution 48/232 of 23 December 1993, authorized the Secretary-General, inter alia, to advance from the Working Capital Fund," during the biennium 1994—1995, such sums as are necessary to finance budgetary appropriations pending receipt of contributions" and, in that connection, to "cash from special funds and accounts *in his custody*" (emphasis added). The latter provision reads as follows:

> "Should [the amount of 100 million United States dollars] prove inadequate to meet the purposes normally related to the Working Capital Fund, the Secretary-General is authorized to utilize, in the biennium 1994—1995, cash from special funds and accounts in his custody, under the conditions approved in General Assembly resolution 1341(XIII) of 13 December 1958, or the proceeds of loans authorized by the General Assembly."

11. The fact that such authority is reiterated in a General Assembly resolution for each biennium makes it clear that this is an exceptional arrangement requiring a specific authorization from the General Assembly.

STATUS OF THE WORLD BANK AND ITS LENDING AUTHORITY

12. Although it is not for this Office to advise on the capacity of the World Bank to extend loans for the temporary relief of budgetary deficits of intergovernmental organizations, the following observations are offered from our quick review of the World Bank's Articles of Agreement.

13. The International Bank for Reconstruction and Development, also known as the World Bank, provides assistance on technical and financial matters to developing countries.

14. Article I of the Articles of Agreement of IBRD provides that one of the World Bank's purposes is:

> "to assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes …, to promote private foreign investment by means of guarantees or participating in loans and … to arrange those loans."

15. The use of the resources of the World Bank is exclusively for the benefit of the members with equitable consideration to projects for development and reconstruction. World Bank loans are subject to a number of conditions, the most salient of which are the following:

(a) At the base of every request of a potential borrower must be a project that the World Bank should finance (the principle of "project financing"); and

(b) The Bank makes loans either to its member States or governmental authorities or private enterprises in the territories of its member States.

26 September 1995

II. *Note to the Secretary-General*

THE SECRETARY-GENERAL'S AUTHORITY TO BORROW FUNDS

1. This is in response to your request of yesterday to elaborate on certain aspects of our previous note on this subject [see note of 26 September 1995 above] with respect to those instances where, in the past, the Secretary-General was authorized by the General Assembly to borrow funds from sources external to the Organization.

2. The information set out below was gathered by the Office of Legal Affairs on the basis of information contained in our files and in consultation with the Office of the Controller, which would have had responsibility for overseeing these matters.

SUMMARY

3. The present paper contains information concerning particular instances in which previous Secretaries-General were granted exceptional authority by the General Assembly to borrow monies from sources external to the Organization beyond that contained in our earlier note on borrowing authority of 26 September 1995.

4. The paper addresses four instances in which the General Assembly authorized the Secretary-General to borrow from an external source: two involved authorizations for short-term loans by Governments, one involved the issuance of bonds to Governments, members of the specialized agencies and, with the concurrence of the Advisory Committee on Administrative and Budgetary Questions, to non-profit organizations, and a fourth involved a loan from the host Government to construct the Headquarters.

5. As far as we can determine from the information available to us, the Secretary-General never exercised the authority to seek short-term loans from Governments. The Secretary-General did exercise the authority in 1961 to issue bonds, borrowing approximately $170 million from Governments. The Secretary-General also borrowed $65 million for the construction of Headquarters. Please not that, given the little time available for this review, we have limited ourselves to documentation available in the files of the Office of Legal Affairs, as well as to other documents published in the *Official Records of the General Assembly*.

Short-term loans authorizations

6. In 1958, for the first time, the Secretary-General was authorized, by the General Assembly in its resolution 1341 (XIII) of 13 December 1958, subject to the conditions set out in paragraph 8 of his report (A/C.5/743) of 19 December 1958, and in case the Working Capital Fund proved to be inadequate, to borrow cash, on payment of normal current rates of interest, from special funds and accounts in his custody for purposes which normally relate to the Working Capital Fund (resolution 1341 (XIII), para. 4). Since that time, in the resolutions approving the Working Capital Fund for a specific financial period, that authorization has been extended.

7. In 1959 the Secretary-General in his report (A/C.5/809) pointed out the need for continuing the authorization to borrow from special funds and accounts under his custody and suggested, inter alia, that "consideration also be given to the desirability of removing the present restriction which limits such recourse to funds temporarily available in special accounts under the Secretary-General's custody". The Advisory Committee considered the Secretary-General's proposals and recommended, inter alia, that the Assembly should expand the authorization granted under paragraph 4 of resolution 1341 (XIII) "to cover also short term loans from Governments and, exceptionally, from commercial sources". The Advisory Committee on Administrative and Budgetary Questions recommendation, however, was only partially endorsed by the General Assembly, which, by its resolution 1448 (XIV) of f5 December 1959, extended the borrowing authority given to the Secretary-General under resolution 1341 (XIII) to "short-term loans from Governments", but not to loans from commercial sources.[27] The reference to "short-term loans from Governments" was repeated in General Assembly resolu-

tion 1586 (XV) of 20 December 1960. As for the current biennium, in its resolution 48/232 of 23 December 1993 the General Assembly authorized the Secretary-General to utilize "cash from special funds and accounts in his custody … or the proceeds of loans authorized by the Assembly".

8. The authority to borrow from funds under the Secretary-General's custody has been frequently used. However, despite the authorization to seek "short-term loans from Governments" or the general reference to "loans approved by the General Assembly", nothing in the documentation available in our files indicates that the Secretary-General's ad hoc authority to seek such short-term loans was ever used. Indeed, no such loans are mentioned in a comprehensive review of prior financial crises contained in the Secretary-General's report (A/C.5/40/16) of 3 October 1985. We have contacted the Controller's Office, which after a quick review of its records, has confirmed that apparently no such short-term loans were ever sought by the Secretary-General. From our review of the matter, it appears that only instance where the Secretary-General actually borrowed funds from sources external to the Organization is the 1961 bond issue, which is briefly described below.

The United Nations bond issue

9. By its resolution 1739 (XVI) of 20 December 1961, the General Assembly, noting, in the context of a grave financial crisis, that "under the existing circumstances, extraordinary financial measures are required" but "that such measures should not be deemed a precedent for the future financing of the expenses of the United Nations", authorized the Secretary-General to issue United Nations bonds in the amount of $200 million, to be repaid in 25 annual installments. Of the total amount originally authorized by the General Assembly, bonds amounting to US$ 169.9 million were sold. The bonds were to be offered by the Secretary-General to States Members of the United Nations, and members of the specialized agencies and of the International Atomic Energy Agency, as well as to the official institutions of such members, and, with the concurrence of the Advisory Committee on Administrative and Budgetary Questions, to non-profit institutions or associations. According to the limited information available in the files on this matter (doubtless archival files in the Controller's Office would have more details concerning the bond issue), it seems that all bonds then issued by the Organization were subscribed by Governments.

10. Unlike public bonds issued by the World Bank and by regional development banks, which are explicitly made subject to the law of the country of issue, the United Nations bonds were truly international and were not explicitly, or by implication, made subject to any national law. The bonds were subject to the United Nations Bond Regulations No.1, which were printed on the reverse thereof. The bonds were issued in fully registered form, were payable to the named holder and could only be transferred to a Government or institution to which the bonds were authorized to be offered by General Assembly resolution 1739 (XVI). They were subject to prepayment at the election of the United Nations, as a whole at any time or in part from time to time, upon not less than 45 nor more than 60 days written notice to the holder. By its resolution 1739 (XVI) the General Assembly decided to include annually in the regular budget an amount sufficient to pay the interest charges on such bonds and the installments of principal due on the bonds. To our knowledge, the bonds were fully amortized in or around 1991.

Loan to finance the construction of the permanent Headquarters of the United Nations

11. As part of the arrangements for the construction of the United Nations Headquarters in Manhattan, the Secretary-General was authorized by the General Assembly in its resolution 182 (II) of 20 November 1947, inter alia, to negotiate and conclude, on behalf of the United Nations, a loan agreement with the Government of the United States of America for an interest-free loan which would require approval by the Congress of the United States in an amount not to exceed $65,000,000 to provide for the payment of costs of construction (and related costs)". That resolution further provided that such loan would be for a term not less than 30 years and should be repayable in annual installments from the ordinary budget of the United Nations.

12. Pursuant to that authorization, the United Nations and the United States Governments signed the loan agreement on 23 March 1948. The loan agreement provided for the loan of a sum not to exceed the aggregate of $65,000,000, to be advanced by the United States to the United Nations upon request by the Secretary-General and upon certification of the architect or engineer in charge of the construction that the amount was requested to cover payments in connection with the construction and furnishing of the permanent Headquarters of the United Nations. The loan agreement provided for early payments in amounts ranging from $1,000,000 to $2,500,000 commencing in 1 July 1951 and ending on 1 July 1982. Pursuant to the loan agreement, the United Nations agreed that it would not, "without the consent of the United States, while any indebtedness incurred [there]under [was] outstanding unpaid, create any mortgage, lien or other encumbrance on or against any of its real property in the Headquarters district".

29 September 1995

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18. Right to vote of a union or group of Member States Rights of the European Community in the General Assembly

Letter to the Director, Office of International Standards and Legal Affairs, United Nations Educational, Scientific and Cultural Organization

I wish to acknowledge receipt of your telefax message dated 20 September 1995.

In your communication, you inquire about the following:

(1) Do the rules and/or practice of the United Nations permit the full participation, with the right to vote, by any union or group of Member States, on the same footing as other participating Member States, in meetings of the Governing bodies of the Organization?

(2) If so, may the Member States of the union or group also participate at the same time in their respective individual capacities in such meetings with the right to vote?

The Charter of the United Nations grants the right to vote in the intergovernmental organs of the United Nations only to individual Member States. Intergovernmental organizations or other entities cannot be Members of the United Nations, and consequently do not have the right to vote in its organs. However, such entities may participate in the work of United Nations organs as observers.

In your communication, you refer to "any union or group of Member States", by which you may have in mind the "European Union". In this connection, please note that the European Economic Community was granted observer status in the General Assembly by the Assembly resolution 3208 (XXIX) of 11 October 1974. Since then, that organization has changed its name to the "European Community", which is represented at Headquarters by the Presidency of the Council of the European Union and by the European Commission.

As to the scope and extent of the participation of intergovernmental organizations enjoying observer status in the work of United Nations organs, they obviously do not enjoy the same rights as Member States but, in general, a limited right of participation in substantive discussions on items of relevance to them. Intergovernmental organizations, as well as other observers, cannot perform a number of acts which are reserved for the full members of an organ, such as the introduction of substantive proposals or procedural motions, the raising of points of order, the circulation of communications as official documents of that organ and the exercise of the right of reply.

As regards the European Community, the particular nature of this organization and its sometimes exclusive competence on behalf of its Member States in certain areas has led the General Assembly to grant to the Community rights of "full participation" in a number of United Nations conferences, such as the United Nations Conference on Environment and Development of 1992. In paragraph 7(a) of resolution 47/191 of 22 December 1992, the General Assembly recommended to the Economic and Social Council that the newly established Commission on Sustainable Development should "provide for the European Community, within its areas of competence, to participate fully … *without the right to vote*" (emphasis added). Pursuant to that recommendation, the Council, on 8 February 1995, adopted decision 1995/201, which amends the rules of procedure of the functional commissions of the Council and spells out the scope of the "full participation" by the Community in the work of the Commission.

As to your second query, let me firstly reiterate that the issue of voting is moot, as only Member States can vote in United Nations organs. As to participation, the distribution of competence between an organization and its member States and consequently the right to make statements on a particular subject matter, is an internal matter between the organization and its members and does not affect per se the work of the organs of the United Nations. Needless to say, an intergovernmental organization can only exercise the limited rights of participation granted to it, even if it declares that it speaks on behalf of its member States or that it exercises exclusive competence over a particular subject matter.

29 September 1995

19. Role of the Secretary-General vis-à-vis the United Nations Joint Staff Pension Board—Investment Activities of the Joint Staff Pension Fund—Responsibility for investment of the assets of the Fund

Memorandum to the Under-Secretary-General for Administration and Management, Special Representative of the Secretary-General for Investments of the United Nations Joint Staff Pension Fund

1. The present memorandum refers to your discussion with a member of this Office following the meeting of the Standing Committee last July concerning both (a) the role of the Secretary-General versus that of the Pension Board with regard to responsibility for investment of the assets of the United Nations Joint Staff Pension Fund and (b) the legal ramifications of changing the management of the Fund's investment activities from an internally managed endeavour to outside-managed investment accounts.

2. This memorandum also examines the role of the Secretary-General vis-à-vis the Secretary of the Pension Board, as requested by your memorandum of 8 August 1995.

Summary of analysis

3. The Regulations of the United Nations Joint Staff Pension Fund define the roles, responsibilities and duties of the Secretary-General, the Pension Board and the Secretary of the Pension Board with respect to the investment of the assets of the Fund and the administration of the Fund. The Regulations have remained essentially unchanged over their more than 46 year history with regard to the specification of such duties and responsibilities.

4. Pursuant to the Regulations of the Pension Fund, the responsibilities for investment of the assets of the Fund are accorded to the Secretary-General. The role of the Pension Board is limited to providing the Secretary-General with "observations and suggestions" on the investment policies.

5. In carrying out his duties and responsibilities for investment of the assets of the Fund, the Secretary-General, pursuant to his role as chief administrative officer of the Organization under Article 97 of the Charter of the United Nations, may delegate to subordinate officials his responsibilities and duties in regard to investment of the assets of the Fund. However, the Secretary-General, as a fiduciary to the participants and beneficiaries of the Fund, may not delegate to sub-agents (i.e., outside investment managers and advisers) those duties and responsibilities concerning investment of the assets of the Fund which he reasonably may be expected to perform personally or through his subordinates. The Secretary-General may only delegate to sub-agents those investment duties and responsibilities which he reasonably may not be expected to perform in-house.

6. Finally, the Regulations of the Pension Fund make clear that the Pension Board is responsible for the administration of the Fund. The Secretary of the Pension Board acts under the authority of the Pension Board. The Pension Board's responsibilities for the administration of the Fund include the formulation of the budget for the expenses of the administration of the Fund, the deter-

mination of staff requirements for servicing the Pension Board and the Fund and the day-to-day administration of the Fund. In carrying out its responsibilities for the administration of the Fund, the Pension Board is accountable to the General Assembly., The role of the Secretary-General in relation to the administration of the Fund is limited to his power to appoint staff, including the Secretary and Deputy Secretary of the Pension Board, upon the recommendation of the Pension Board, and such staff as may be required from time to time by the Board.

Responsibility for Investment of the Assets of the Fund

Authority of the Secretary-General

7. Both of the questions referred to in paragraph 1 above relate to the issue of who has responsibility for investment of the assets of the Fund. Article 19 of the Regulations and Rules of the Fund (hereafter, the "Regulations") provides as follows:

> "(*a*) The investment of the assets of the Fund shall be decided upon by the Secretary-General after consultation with an investments committee and *in the light of observations and suggestions made from time to time by the Board on the investments policy*.
>
> "(*b*) The Secretary-General shall arrange for the maintenance of detailed accounts of all investments and other transactions relating to the Fund, which shall be open to examination by the Board." (emphasis added)

Additionally, article 20 of the Regulations provides that the "Investments Committee shall consist of nine members appointed by the Secretary-General after consultation with the Board and the Advisory Committee on Administrative and Budgetary Questions, subject to confirmation by the General Assembly".

8. These provisions concerning responsibility for investment of the assets of the Fund have remained virtually unchanged since the creation of the Fund. Article 25 of the Original Regulations of the Fund, promulgated pursuant to General Assembly resolution 248 (III) of 7 December 1948, provided that:

> "Subject to the complete separation to be maintained between the assets of the Fund and the assets of the United Nations as provided in article 14, the investment of the assets of the Fund shall be decided upon by the Secretary-General, after consultation with an Investments Committee and having heard any observations or suggestions by the Joint Staff Pension Board concerning the investments policy. The Investments Committee shall consist of three members appointed by the Secretary-General after consultation with the Advisory Committee on Administrative and Budgetary Questions, subject to subsequent confirmation by the General Assembly."

This provision is essentially, identical to the earlier section 25 of the United Nations Joint Staff Provisional Scheme Regulations adopted by the General Assembly pursuant to its resolution 82(I) of 15 December 1946.

9. The provisions of article 19 of the current Regulations make clear that the Secretary-General is solely responsible and accountable for investment of the assets of the Fund. In carrying out that responsibility, the Secretary-General shall consult with the Investments Committee, the members of which he appoints. However, article 19(a) of the Regulations makes it clear that the Pension Board may make "observations and suggestions … on the investments policy". The Secretary-General, of course, is not bound to follow such "observations and suggestions". Thus, it is clear that the Secretary-General alone bears the responsibility for the investments of the assets of the Fund. The Secretary-General's role in this regard has been reaffirmed by the General Assembly on various occasions when it has sought to encourage diversity of investment, particularly holdings in developing countries.[28]

The Secretary-General's power to delegate investment responsibilities

10. While the Secretary-General has been accorded sole responsibility for investment of the asserts of the Fund, his responsibility in this regard has been described by the General Assembly as that of "fiduciary … for the interests of participants and beneficiaries of the United Nations Joint Staff Pension Fund under the Regulations and Rules of the Fund".[29]

11. The issue raised by you, as set out in a memorandum of 18 September 1995, is the extent to which the Secretary-General may delegate to others, in particular outside investment managers, duties to carry out that responsibility.

(A) General rule on delegation of fiduciary responsibility

12. The Regulations and Rules of the Fund are silent as to the question of whether and to what extent the Secretary-General may delegate his responsibilities for investment of the asserts of the Fund.[30] As "fiduciary" for the interests of participants and beneficiaries of the Fund, the Secretary-General has been accorded the powers of an agent with respect to he investment of the assets of the Fund. As a general rule, unless it is otherwise agreed between the agent and his principal, an agent cannot properly delegate to another the exercise of discretion in the use of a power held for the benefit of the principal.[31] Given the relationship of trust between the Secretary-General and the participants and beneficiaries of the Fund, the Secretary-General, as fiduciary of a fund located in the United States, is under a duty to the participants and beneficiaries *not* to delegate to others the doing of the investment acts which the Secretary-General can reasonably be required personally to perform.[32]

13. Under the general standard of prudent investment, a fiduciary is under a duty to the beneficiaries to invest and manage the funds held in trust as a prudent investor would, in the light of the purposes, terms, distribution requirements and other circumstances governing the funds held in trust. In carrying out that duty, the fiduciary must act with prudence in deciding whether and how to delegate authority and in the supervision of agents.[33]

(B) Delegation of fiduciary responsibility to subordinates

14. While as a general rule a fiduciary cannot delegate his responsibility for the investment of the funds of beneficiaries to another actor, a corporate fiduciary, although unable to delegate the administration of a trust, can properly administer the trust through duly appointed and supervised subordinates.[34]

15. In the context of the United Nations, the Secretary-General, in his capacity as chief administrative officer of the Organization pursuant to Article 97 of the Charter of the United Nations, delegates numerous duties and responsibilities to subordinate officials. Thus, in the case of his responsibilities for investment of the assets of the Fund, the Secretary-General has appointed a Representative and has established an Investment Management Service to assist the Representative in conducting the investment activities for the assets of the Fund, in particular in executing investment activities in furtherance of the Investment Committee and with the observations and suggestions of the Pension Board. This approach is consistent with the role of a corporate fiduciary under general principles of agency and trusts.

(C) Delegation of fiduciary responsibility to sub-agents

16. Within the parameters of the General rule preventing the delegation of fiduciary responsibilities and duties which can be reasonably performed personally or by subordinates, a fiduciary may delegate his fiduciary responsibilities and functions in such a manner as a prudent investor would in like circumstances in the management of his own affairs entrusted others to perform.[35] Thus, a fiduciary is not required personally or through his subordinates to perform all duties and responsibilities which it would be unreasonable to expect him to perform and may in appropriate cases, delegate his responsibilities and functions to an outside agent.[36]

17. On the other hand, with professional advice as needed, the fiduciary is under the responsibility to personally define the objectives of the investments of the funds held in trust and must not abdicate that responsibility or delegate such responsibilities unreasonably. In particular, any delegation of the fiduciary's duties to an outside agent must be done carefully, with caution and only to the extend reasonably necessary under the circumstances.[37]

18. In the Context of the Secretary-General's responsibilities for investment of the assets of the Fund, the Secretary-General has, in the past, delegated to an outside investment manager the responsibility for investment decisions in small capitalized companies, in which the number of transactions is so great and the amount of each transaction and the proportion of Fund assets involved in such transactions is so small as to make in-house management impracticable. Nevertheless, the Secretary-General has the duty and responsibility, as would be reasonably expected of him to perform either personally or through subordinates, for making decisions, setting policies and carrying out the major activities for investment of the assets of the Fund. Acting through a Special Representative and relying on the advice of the Investments Committee, having regard to the observations and suggestions of the Pension Board, and utilizing the support of the Investment Management Service, the Secretary-General is carrying out those duties and responsibilities.

19. Insofar as the provisions of the Regulations and Rules of the Fund do not expressly permit him to do so, the Secretary-General may not unreasonably delegate his duties and responsibilities for investment of the assets of the Fund to outside investment managers and advisers. The extent of permitted delegation is one of degree and judgement. In any case, the Secretary-General may not delegate to such outside investment advisers his duties and responsibilities as relates to establishing and managing investments policy and strategy.

Role of the Representative of the Secretary-General vis-à-vis the Secretary of the Board

20. Your memorandum of 8 August 1995 seeks our views on the respective roles of the Secretary-General of the Pension Fund and the Representative of the Secretary-General for Investments of the Fund.

21. The roles of these two officials are described in parts II and III of the Pension Fund Regulations. These texts have remained essentially unchanged since their promulgation over 46 years ago.[38]

22. The provisions of the Regulations concerning the roles and responsibilities of the Secretary-General and of the Secretary of the Pension Board are, in principle, clear. The functions and duties for investment of the assets of the Fund are the responsibility of the Secretary-General, as delegated to the Representative of the Secretary-General for Investments of the Fund.[39] The functions and duties with respect to the administration of the Fund are the responsibility of the Board.[40]

23. With regard to the responsibilities for the administration of the Fund, article 4(a) of the Regulations provides that the "Fund shall be administered by the United Nations Joint Staff Pension Board, a staff pension committee for each member organization, and secretariat to the Board and to each such committee". Articles 4(d) and 14 of the Regulations provide for the General Assembly to have an oversight role in respect of the Pension Board's responsibilities for the administration of the Fund. Thus, article 4(d) provides that "the assets of the Fund shall be used solely for the purposes of, and in accordance with, the Regulations", which are adopted by the General Assembly. Article 14(a) provides the "Board shall present annually to the General Assembly and to the member organizations a report, including a balance-sheet, on the operation of the Fund, and shall inform each member organization of any action taken by the General Assembly upon the report".

24. With regard to the expenses for the administration of the Fund, the Pension Board is required, pursuant to article 15(b) of the Regulations, to submit a biennial estimate of expense "to the General Assembly for approval". Additionally, article 15(a) provides that "expenses incurred by the Board in the administration of the Regulations shall be met by the Fund". Thus, the General Assembly has the power to approve the budget for expenses of the Fund, the Pension Board has the power to formulate a budget concerning, and to incur expenses in respect of, the administration of the Fund.

25. The role of the Secretary-General vis-à-vis the Pension Board and the Secretary of the Pension Board is expressly limited to the power to appoint the Secretary and Deputy Secretary of the Pension Board "on the recommendation of the Board". Additionally, the Secretary-General has the power to "appoint such further staff as may be required from time to time by the Board in order to give effect to these regulations.[41] However, the Secretary of the Pension Board "shall be the chief executive officer of the Fund and shall perform his functions under the authority of the Board".

26. Thus, the Secretary of the Pension Board acts under the authority of the Pension Board in carrying out the Pension Board's responsibilities for the administration of the Fund.[42] The responsibilities of the Pension Board include the formulation of the budget for the expenses of the administration of the Fund,

determination of the requirements of staff for the secretariat support to the Pension Board, and for the secretariat support to the Pension Board, and for the day-to-day administration of the Fund's assets.

27. The role of the Secretary General, as described above, is primarily related to investment of the assets of the Fund. In this area, the Secretary-General has paramount authority, subject only to the right of the Pension Board to make "observations and suggestions" concerning investment policy as well as to examine the detailed accounts maintained by the Secretary-General in respect of all investments and other transactions relating to the Fund.

28. The main issue concerning the role of the Secretary-General vis-à-vis the role of the Secretary of the Pension Board is the separate nature of their responsibilities. In the case of investment of the assets of the Fund, the duties and responsibilities have been accorded to the Secretary-General. In the area of administration, duties and responsibilities fall upon the Pension Board and the Secretary of the Pension Board acting under the authority of the Board. Any differences between the Pension Board and the Secretary-General as to the way in which the Pension Board exercises its powers over matters such as the budget proposals for the administration of the Fund, if they are not able to be resolved at sessions of the Pension Board, would have to be resolved by the General Assembly, to whom the Pension Board must report and which approves the budget for the expenses related to the administration of the Fund.

3 October 1995

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20. Terms of reference of the Office of Internal Oversight Services Investigations: "Mismanagement, Misconduct, Waste of Resources and Abuse of Authority"

Note to the Office of Internal Oversight Services

Terms of Reference for OIOS Investigations: "Mismanagement, Misconduct, Waste of Resourcesand Abuse of Authority"

Introduction

1. The Office of Internal Oversight Services exercises operational independence under the authority of the Secretary-General in the conduct of its duties and is authorized to initiate, carry out and report on any action which it considers necessary to fulfil its responsibilities with regard to monitoring.[43] The purpose of OIOS is to assist the Secretary-General in fulfilling his internal oversight responsibilities, which extend to the staff and resources of the Organization as well as to separately administered organs.[44]

2. Among its several duties, OIOS is mandated to investigate reports of violations of United Nations regulations, rules and pertinent administrative issuances and to transmit to the Secretary-General the results of such investiga-

tions together with appropriate recommendations to guide the Secretary-General in deciding on jurisdictional or disciplinary action to be taken.[45]

3. The Investigations Unite of the Office of Internal Oversight Services focuses its investigations on assessing the potential within programme areas for fraud and other violations through the analysis of systems of control in high-risk operations as well as offices away from headquarters.[46]

Additionally, the Unit may receive reports from staff and other persons engaged in activities under the authority of the Organization suggesting improvements in programme activity and reporting perceived cases of possible violations of rules or regulations as well as possible cases of (a) mismanagement, (b) misconduct, (c) waste of resources or (d) abuse of authority.[47]

4. In order to ensure transparency in the implementation of its investigations, OIOS has established definitions for the four categories of activities for which the Investigations Unit may receive reports from staff and other persons engaged in activities under the authority of the Organization. These definitions derive from the Charter of the United Nations, the United Nations Staff Regulations and Rules, other pertinent administrative issuances and decisions of the United Nations Administrative Tribunal. These definitions will be applied by the Investigations Unit to investigations of staff and, mutatis mutandis,[48] to United Nations officials or others engaged in activities under the authority of the Organization.

The legal framework

The Charter of the United Nations

5. Article 101, paragraph 3, of the Charter of the United Nations prescribes the standards of conduct expected of staff as follows:

> "The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity."

In a similar vein is Article 100, paragraph 1, of the Charter, which enjoins staff from taking any action that might "reflect on their position as international officials responsible only to the organization".

6. The United Nations Administrative Tribunal has repeatedly affirmed that Article 97 of the Charter of the United Nations makes the Secretary-General responsible for achieving these requirements by making him "the chief administrative officer of the Organization".

The Staff Regulations and Rules

7. The Staff Regulations, promulgated by the General Assembly pursuant to Article 101, paragraph 1, of the Charter of the United Nations, contain provisions to ensure that staff maintain the highest standards of efficiency, competence and integrity. These concepts are further amplified in the United Nations Staff Rules and other administrative issuances, such as the Secretary-General's bulletin and administrative instructions, as interpreted by the jurisprudence of the United Nations Administrative Tribunal.[49]

8. In addition, staff are obliged to respect the standards of conduct described in the 1954 Report on the Standards of Conduct in the International Civil Service, a document which is given to staff members upon their initial appointment and which has been reissued from time to time. This document has been drawn to the attention of staff by an information circular and is included in the United Nations personnel Manual.[50]

9. The Secretary-General, as chief administrative officer of the Organization, must enforce these Charter-imposed standards, However, the Secretary-General also has the responsibility to ensure that the rights of staff are protected, including the right to due process, and that all decisions are free from prejudice and any other extraneous factors.[51]

The role of the Investigations Unit of OIOS

10. In keeping with the responsibility of the Secretary-General to enforce the Charter-imposed standards of conduct, the Investigations Unit of OIOS is charged with drawing to the attention of the Secretary-General specific instances of conduct which should be corrected. Pursuant to its mandate, the Unit will investigate the activities of staff members, United Nations officials and others engaged in activities under the authority of the Organization in order to determine, among the other things, whether such activities may constitute one or more of the following categories of conduct: "mismanagement, misconduct, waste of resources or abuse of authority".

11. When the Investigations Unit has completed an investigation, it must report the results of the investigation to the Secretary-General or to his authorized designee, unless the unit determines that, in the circumstances, such action is unnecessary. Upon receiving a report of an investigation, the Secretary-General must then determine whether the nature of the reported conduct constitutes "misconduct," within the meaning of chapter X of the Staff Regulations and Rules, or "unsatisfactory performance," within the meaning of chapter IX of the Staff Regulations and Rules. Following the determination, the Secretary-General must next decide whether to institute disciplinary proceedings in the case of misconduct, to institute appropriate proceedings in relation to unsatisfactory performance or to take other suitable measures. No matter what determination is made by the Secretary-General, staff are entitled to full protection of the procedures prescribed in the Staff Regulations and Rules, as interpreted by the United Nations Administrative Tribunal.[52] Moreover, the report and recommendations of the Investigations Unit notwithstanding, the Secretary-General has discretion to decide that matters described in the report of the Unit do not warrant further action and many so inform OIOS.

12. In order to better guide the Investigations Unit in conducting investigations and to more clearly apprise staff members, United Nations officials and others of the nature of such undertakings, OIOS provides the following definitions for the four categories of activities upon which the Unit will focus its investigations. These definitions are grouped under the two principal classifications derived from the Charter of the United Nations and the Staff Regulations. However, these two principal classifications are not mutually exclusive; for example, activities that may be seen to constitute "misconduct" may, and often do, also constitute "unsatisfactory performance".

Misconduct

13. Staff rule 110.0 defines misconduct as follows;

> "Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances, or to observe the standards of conduct expected of an international civil servant, may amount to unsatisfactory conduct within the meaning of staff regulation 10.2, leading to the institution of disciplinary proceedings and the imposition of disciplinary measures for misconduct."

Activities that would constitute a failure to maintain the highest standards of integrity include, for example, the following:

(*a*) Any willful disregard of the Organization's legislative mandates or of its Regulations and Rules and other administrative issuances and any willful failure to exercise proper care that is either intended to result in personal benefit or in fact results in the misappropriation of monetary or other resources of the Organizations;

(*b*) Any act, or failure to act, which demonstrates failure to maintain the highest standards of integrity required by the Charter of the United Nations as well as any statement, written or oral, or silence that is intended to mislead and that results in the misappropriation of monetary or other resources of the Organization; for example, any type of false certification in respect to claims for benefits and allowances.

Unsatisfactory performance

14. The Charter of the United Nations requires staff to perform in accordance with the "highest standards of efficiency [and] competence". Lapses from that standard may be characterized as "unsatisfactory performance". Activities that would constitute a failure to meet the highest standards of efficiency and competence, and therefore, that could be characterized as "unsatisfactory performances" include the following:

(A) Mismanagement

Mismanagement includes, for example:

(i) Any failure of a staff member to perform all assigned tasks, duties and management responsibilities efficiently, competently and with the best interest of the Organization in mind;

(ii) Any failure by a staff member to ensure that consultants and contractors are trained on such terms and for such tasks as are in the best interest of the Organization and to adequately supervise those consultants or contractors so as to ensure that they are paid only if they perform as agreed.

(B) Waste of resources

Waste of resources includes, for example:

(i) Any failure to ensure that the monetary or other resources of the Organization are used solely for the purposes of the Organization or for its benefit;

(ii) Any act or failure to act which is a direct result of a failure to exercise due care, causes loss to the Organization.

(C) Abuse of authority

Abuse of authority includes, for example:

(i) Any discharge of management responsibilities which is motivated other than by the interests or purposes of the Organization;

(ii) Any act or any failure to at which is motivated by discrimination or prejudice.

1 November 1995

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21. Membership and functions of the Panel of External Auditors

Memorandum to the Executive Secretary, United Nations Board of Auditors

1. This is in response to your memorandum on the above subject in which you seek the opinion of this Office regarding the following questions set out in paragraph 8 and 9 of the annex to the memorandum:

—Whether permitting private-sector audit institutions, which are appointed External Auditors of some specialized agencies, to attend Panel sessions may create a potential constraint for the United Nations;

—Who qualifies for Panel membership within the framework to the General Assembly resolution which established the Panel;

—Whether those United Nations bodies which are currently audited by the private-sector audit firms are regarded as United Nations organizations for the purpose of Panel membership;

—Whether the private-sector audit firms referred to above may be permitted to attend Panel sessions as observers.

2. To answer your questions, we first examined how the issue of membership of the Panel External Auditors has historically evolved.

3. On 7 December 1946, the General Assembly by its resolution 74(I), entitled "Appointment of External Auditors", established the United Nations Board of Auditors, composed of the Auditors General of three Member States, and decided that they would serve as external Auditors of the accounts of the United Nations and the International Court of Justice, and *of such specialized agencies as may be designated by the appropriate authority* (emphasis added).

4. Three years later, the General Assembly adopted resolution 347 (IV) of 24 November 1949 entitled "Audit procedures for the United Nations and the specialized agencies", by which it endorsed the revised procedures governing the audit of the accounts of the United Nations and set out the principles regarding *a joint system of external auditors* (emphasis added). Those procedures and principles were contained respectively in annexes A and B to the resolution.

5. According to resolution 347 (IV),t the previous system under which members of the Board of Auditors of the United Nations had been designated to serve as external auditors of specialized agencies was replaced with a new arrangement providing for the establishment of a joint system of external audit in the form of a Panel of External Auditors. Under annex B to resolution 347 (IV), each organization was invited to select one or more members of the Panel to perform its audit. As far as the United Nations was concerned, the General Assembly had decided that members of the Board of Auditors should be nominated to the Joint Panel of External Auditors and that the audit of the accounts of the United Nations should be performed by those members only.

6. Annex B to resolution 347 (IV) stated that the Panel of External Auditors would not exceed six in number and that it would consist of the auditors appointed by common consent by the United Nations and specialized agencies. Annex B imposed an important limitation on the appointment of members of Panel. Paragraph 1 of that annex provided that the Panel should be composed of auditors having the rank of Auditor-General or its equivalent in the various Member States.

7. According to resolution 347 (IV, the Panel of external Auditors was established for three main purposes. Its first task was to provide organizations with an opportunity to select an external auditors from the list of six external auditors, members of the Panel. Secondly, annual meetings of the Panel were to be used by its members for the coordination of their audits and for the exchange of information on methods and findings. Finally, the Panel was invited to submit any observations or recommendations which it might wish to make on the coordination and standardization of the Accounts and financial procedures of the United Nations and the specialized agencies.

8. It appears from the foregoing that the joint system of external auditors introduced by General Assembly in its resolution 347 (IV) was based to a great extent on the assumption that most of the specialized agencies would structure their external audit services along the lines of the external audit procedures employed by the United Nations. Therefore, as noted above, under the joint system each organization was asked to select its external auditor or auditors from the members of the Panel and the latter were required to have the rank of Auditor-General or its equivalent in the various Member States, as provided for by the United Nations regulations.

9. At its fourteenth session, the General Assembly reviewed, on the basis of the observations submitted by the panel and the Consultative Committee on Administrative Questions (CCAQ) of the Administrative Committee on Coordination (ACC),[53] the operation of the joint system of external auditors and, in effect, concluded that the original concept of having a Panel of External Auditors from which the Auditors of the participating organizations would be chosen was no longer viable and that, consequently, that function of the Panel should be abolished. In the light of the foregoing, the General Assembly by the resolution 1438 (XIV) of 5 December 1959, revised the terms of reference of the Panel. Paragraph 1 of annex to the resolution states that "the purpose of the Panel shall be to further the coordination of the audits for which its members are responsible and to exchange information on methods and findings". The Assembly also decided that under the circumstances the Panel should have a difference composition providing all of the specialized agencies with an opportunity to derive advantage from the work of the Panel. Paragraph 1 of the annex to

resolution 1438 (XIV) provides that the Panel of External Auditors shall be composed of the members of the United Nations Board of Auditors and appointed external auditors of the specialized agencies and International Atomic Energy Agency. Resolution 1438 (XIV) remains at present in effect and, therefore, continues to determine membership of the Panel of External Auditors and to govern its activities.

10. The textual analysis of the relevant provisions of resolution 1438 (XIV) does into provide any ground for drawing a distinction, for the purposes of determination of memberships of the Panel, between private and government audit institutions employed by the specialized agencies. Paragraph 1 of the annex to the resolution explicitly states that "the appointed external auditors of the specialized agencies … shall constitute a Panel of External Auditors". It appears from the text that should a specialized agency decide to contract a private institution to under take the external audit of its accounts, under resolution 1438(XIV) a designated official of that institution would be entitled to become a member of the Panel for the duration of the contract.

11. Provisions of resolution 1438 (XIV) concerning membership of the Panel, in our view, cannot be interpreted in isolation from its other provisions, in particular those related to the functions of the Panel. Pursuant to the resolution, the Panel of External Auditors is entrusted with the primary responsibility of enhancing the coordination of the audits and the exchange of information on methods and findings. The resolution further provides that the Panel may submit to the executive heads of the participating organizations any observations or recommendations in relation to the accounts and the financial procedures of the organizations concerned and that, conversely, the executive heads of the participating organizations may, through their auditors, submit to the Panel for its opinion or recommendations any matter within its competence. Should the private audit institutions employed by the specialized agencies be deprived of the right to participate in the work of the Panel, the latter would be deliberately excluded from its activities.

12. It is noted in your memorandum that at the time of the adoption of the above captioned resolution all the specialized agencies and the International Atomic Energy Agency which had been notified of the proposed changes (International Labour Organization, World Health Organization, Food and Agriculture Organization of the United Nations, United Nations Educational, Scientific and Cultural Organization and the International Civil Aviation Organization) had external auditors with the rank of Auditor-General or its equivalent. This is a noteworthy factor. However, it cannot in our view, play a decisive role for the purposes of the interpretation of the resolution.

13. In summation, having analyzed resolution 1438 (XIV) in its entirety, with reference to your question concerning membership of the Panel, we have arrived at the conclusion that all designated external auditors employed by the specialized agencies, irrespective of whether they work for a private company or a government institution are entitled to be members of the Panel for the duration of their service as external auditors of the specialized agencies concerned.

14. With regard to your question as to whether permitting private audit institutions to attend Panel sessions may create a potential constraint for the United Nations, we should like to point out that according to its terms of reference the Panel of External Auditors is not authorized too perform an actual audit of accounts of the United Nations or accounts of the trust funds established under the Financial Regulations and Rules of the Organization, nor is it permitted to have access to books of account and records of the United Nations. As noted above, the task of the Panel is "the coordination of the Audits *for which its members are responsible* (emphasis added) and the exchange of information on methods and findings. With reference to the latter, it should be observed that pursuant to United Nations financial regulations 12.10 and 12.11, the findings of the audit are recorded in the report of the Board of Auditors, which is transmitted, together with the audited financial statements, to the General Assembly. Therefore, we believe that participation in the work of the Panel of private auditors employed by some specialized agencies should not create any potential constraint for the United Nations.

15. As far as your last two question are concerned, we would like to reiterate that in accordance with resolution 1438 (XIV) only the members of the United Nations Board of Auditors, the appointed external auditors of the specialized agencies and of the International Atomic Energy Agency constitute the Panel of External Auditors. Consequently, pursuant to the resolution, external auditors of other international organizations are not qualified for Panel membership. In addition, it is worth noting that according to international law the term "international organization" means an intergovernmental organization, in other words an organization which is created by an agreement of States. Subsidiary bodies of the United Nations are established by decisions of the principal organs of the United Nations, such as the General Assembly, the Security Council or the Economic and Social Council. Therefore, those bodies are not regarded as international organization in their own right.

16. Resoltuion 1438 (XIV) is silent on the question as to whether observers should be permitted to attend sessions of the Panel. In accordance with paragraph 4 of the annex to the resolution, the Panel is supposed to adopt its rules of procedure, which may theoretically contain provisions allowing participation of observers. However, in view of the delicate nature of the issue of observers, we believe that, should the Panel conclude that its work would be facilitated by participation of particular categories of observers, it should first circulate for observations its recommendations on the subject to all organizations concerned and subsequently submit those recommendations for the consideration by the General Assembly.

5 December 1995.

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22. Juridical personality of the United Nations Framework Convention on Climate Change Secretariat

Memorandum to the Executive Secretary, Framework Convention of Climate Change, Geneva

1. This is with reference to your facsimile transmissions of 1 and 13 December 1995 seeking our views, among others matters, on the question of juridical personality and legal capacity of the Secretariat under the United Nations Framework Convention on Climate Change[54] (hereinafter 'the Convention Secretariat").

2. The Convention Secretariat is one of the bodies foreseen in that instrument. Thus, in accordance with paragraph 2 of article 7, the Conference eof the Parties is "the supreme body of [the] Convention". Furthermore, the Convention established a subsidiary body for scientific and technological advice (article 9), a subsidiary body for implementation (article 10) and, finally, a financial mechanism (article 11). Our analysis of both the legal nature and the functions of these bodies indicates that they have certain distinctive elements attributable to international organizations. However, it is clear that none of these bodies is de jure a United Nations subsidiary organ.

3. As you will recall, in accordance with our previous advice regarding the arrangements for first meeting of the Parties to the Convention, the relevant conference agreement was concluded between the Secretariat of the Convention and the Government of Germany. That advice was based inter alia, on the provisions of paragraph 2(f) of article 8 which empowered the Secretariat to "enter into such administrative and *contractual arrangements* as may be required for the effective discharge of its functions" (emphasis added).

4. However, none of the above-referenced bodies of the Convention has been duly vested by the Parties with a clear juridical personality on the international plan. Nor have the entities established by the Parties been accorded the appropriate privileges and immunities, including immunity from legal process.

5. Moreover, notwithstanding the fact that the Convention Secretariat is "institutionally linked to the United Nations", the legal regime enjoyed by the United Nations under applicable agreements cannot be automatically attached to the Convention Secretariat. Therefore, it would in our view be appropriate to clarify the ambiguity concerning the nature and legal status of the Convention Secretariat under international law, which would help to focus the forthcoming discussion with Germany on the mutatis mutandis applicability of the recently concluded United Nations Vienna Headquarters Agreement to the Convention Secretariat. One possible way of clarifying this ambiguity would be if the Conference of the Parties or the subsidiary body for implementation took a decision conferring the required juridical personality and legal capacity upon the Convention Secretariat and according it such privileges and immunities as are necessary for the fulfilment of its purposes.

6. In the context of this approach, I should like to draw your attention to decision VI/16 taken in October 1994 by the Sixth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer,[55] attached herewith, clarifying the nature and legal status of the Multilateral Fund as a body under international law and, in particular, conferring upon it juridical personality and the legal capacities to enter into contractual arrangements, acquire and dispose of movable and immovable property and institute legal proceedings. By the same decision, the Fund was vested with the necessary privileges and immunities, and its officials were also accorded such privileges and immunities as are necessary for the independent exercise of their functions.

Attachment

DECISION VI/16. JURIDICAL PERSONALITY, PRIVILEGES AND IMMUNITIES OF THE MULTILATERAL FUND

Recalling decision IV/18 of the Fourth Meeting of Parties, which established the Financial Mechanism, including the Multilateral Fund for the Implementation of the Montreal Protocol, provided for in article 10 of the Montreal Protocol, as amended in London on 29 June 1990,

To clarify the nature and legal status of the Fund as a body under international law as follows:

(*a*) *Juridical personality*. The Multilateral Fund shall enjoy such legal capacity as is necessary for the exercise of its functions and the protection of its interests, in particular the capacity to enter into contracts, to acquire and dispose of moveable and immovable property and to institute legal proceedings in defence of its interests;

(*b*) *Privileges and immunities*

(i) The Fund shall, in accordance with arrangements to be determined with the Government of Canada, enjoy in the territory of the host country such privileges and immunities as are necessary for the fulfilment of its purpose;

(ii) The officials of the Fund Secretariat shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Multilateral Fund.

18 December 1995

23. Amendments to the Convention on Certain Conventional Weapons and Additional Protocols—Articles 3 and 8 of the Convention

Letter to the Deputy Director, Centre for Disarmament Affairs, and Provisional Secretary-General of the Convention on Certain Conventional Weapons Review Conference

This is in reply to your telefax of 14 July 1995, conveying a number of questions on actions to be taken by the forthcoming Review Conference of the Convention on Certain Conventional Weapons. I received under separate cover copy of the note verbale from the Secretary-General informing States about the convening the Review Conference, to be held at Vienna from 25 September to 13 October 1995.

I shall address your queries in the order in which you formulated them. My reply will be on the basis of the contents of your telefax, as well of the text of the Convention and the draft rules of procedure for the Review Conference.[56]

Amendments to the Convention and the annexed Protocols[57]

(*a*) If the proposed rules of procedure are adopted, would amendments to the Convention or to annexed Protocols have to be adopted with a vote?

(*b*) If the answer to the preceding question is in the affirmative, what would be the course of action to be followed if there was no agreement among the States parties on a specific amendment? Since the rules of procedure are not precise on this point, would it be possible to resort to a vote, if a majority of the States parties were willing to do so?

Rule 34 of the draft rules of procedure states that the Conference "shall conduct its work and take decisions in accordance with article 8 of the Convention". Article 8.1(b) of the Convention provides that amendments to the Convention or any annexed Protocol shall be adopted "in the same manner as this Convention and the annexed protocols, provided that the amendments to this Convention may be adopted only by the High Contracting Parties and that amendments to a specific annexed Protocol may be adopted only by the Eight Contracting Parties which are bound by that Protocol". You state in your telefax that the Conference which adopted the Convention was unable to adopt a rule of procedure on decision-making for lack of agreement on this issue, and that the Convention and its annexed Protocols were eventually adopted without a vote.

It is the view of this Office that the fact that the Convention and the annexed protocols were adopted without a vote cannot, in the particular circumstances that prevailed in the 1979-1980 Conference, constitute a binding precedent for the Review Conference. As you state in your communication, the first Conference was unable to agree on the decision-making process to be followed for the adoption of the instruments under consideration; this is reflected in the absence of an appropriate rule of procedure for the Conference and by the silence of the two reports of the Conference to the General Assembly on the issue of decision-making.[58] The adoption of the text of the Convention and the annexed Protocols without a vote, i.e., by general agreement, took place de facto

rather than in conformity with a previous decision by the Conference and in accordance with its rules of procedure. Article 8.1(b) uses the expression "shall be adopted … *in the same manner as this convention and the annexed Protocols*" (emphasis added); however, it seems to us that the Convention makes reference to the method agreed upon by the Conference for such adoption, rather than to the manner in which in the absence of a decision thereon, the Convention was a fact adopted.

In view of the foregoing, it is the view of this Office that the issue of the "manner of adoption" of the Convention and its annexed Protocols, to which article 8.1(b) makes reference, remains undecided. Consequently, and pursuant to the above-quoted draft rule 34, the Review Conference is not limited to adopting proposed amendments without a vote but can resort to a vote in case it is impossible to obtain a general agreement. However, it would be up to the Conference to agree on the conditions and modalities for resorting to a vote, and on the necessary majority.

(*c*) Once the amendments are adopted, should they be opened for signature or, since the Convention and the Annexed Protocols have already entered into force, should they be referred to all States for their consideration and, as appropriate, for their ratification and accession?

There is no general rule of international law as to whether amendments to a convention are to be opened for signature. Consequently, reference must be made to the final clauses of the Convention in question. In the case of the Convention on Certain Conventional Weapons and its annexed Protocols, article 8.1(b) of the Convention states that amendments to the Convention and the annexed Protocols "shall enter into force in the same manner as this Convention and the annexed Protocols". Article 5 of the Convention provides that the Convention shall enter into force six months after the date of deposit of the twentieth instrument of ratification, etc; an annexed Protocol shall enter into force six months after the date by which 20 States have notified their consent to be bound by that Protocol. After that date, the Convention and the annexed Protocols shall enter into force for a State six months after that State has deposited its instrument of ratification, etc., or, respectively, six months after it has notified its consent to be bound by a protocol. The opening of a certain instrument to signature is only required by article 3, which states that the Convention would be open for signature by all States for 12 months as from 10 April 1991. Nowhere is it mentioned, expressly or by reference to article 3, that amendments to the Convention or to the annexed Protocols are to be opened for signature.

In view of the foregoing, amendments adopted at the forthcoming Conference do not have to be opened for signature. In the case of the Convention, they shall be immediately open to ratification, etc., by the High Contracting Parties. In the case of the annexed Protocols, they shall be open to notifications of consent to be bound by States parties to those Protocols.

Additional protocols

(*d*) Should States which are not parties to the Convention but are participating in the Review Conference be able to participate in the decision to adopt additional protocols? Or, on the other hand, should they not be allowed to participate in the decision to adopt additional protocols, since those protocols would be additional to a Convention to which those States are not parties?

Article 8.2(a) of the Convention provides that, in case a conference for the consideration and adoption of additional protocols is convened, the depositary shall invite "all States" to such a conference. Article 8.2(b) provides that the conference may agree, "with the full participation of all States represented at the Conference," upon additional protocols. We are aware of the fact that the ambiguous language of the latter provision was the result of a difficult compromise between rather different positions as regards the negotiations and adoption of new protocols.

Pursuant to established international practice, protocols additional to a given convention are not completely separate and autonomous instruments but are ancillary to, and inseparable from, that convention. This principle is reflected in article 4.5 of the Convention on Certain Conventional Weapons which states that protocols, once they are in force for a certain State, form an integral part of the Convention as far as that State is concerned. It follows from the above that additional protocols could normally only be adopted by the State parties to the Convention in question, unless the Convention itself clearly laid out a different decision-making process. It does not seem to us that the language of the relevant articles of the Convention on Certain Conventional Weapons as well as the draft rules of procedure for the Review Conference, contain a clear exception to the foregoing principle. Article 8.2(a) provides that only a High Contracting Party can propose an additional protocol, and that the depositary shall communicate this proposal to all High Contracting Parties, and shall convene a Conference if a certain number of High Contracting Parties so agree. Article 8.2(b) states that "such a conference" may agree upon additional protocols; the "full participation of all States represented at the Conference" is added after those words as a parenthetical. The draft rules of procedure only refer to States parties as regards representation in the Conference (rule 1) and the determination of the quorum (rule 18). Draft rule 1 adds that States non-parties may participate as observers. The draft rules do not contain any distinction between the adoption of amendments and that of new protocols.

In view of the foregoing, it is the view of this Office that only States parties to the Convention on Certain Conventional Weapons can adopt additional protocols. The process that leads to the adoption, however, has to ensure the full participation of all States represented at the Conference. It should be noted in this regard that a distinction between a right of "full participation" in a United Nations conference and the right to take part in the adoption of substantive decisions by that conference finds a recent precedent in "full participation" of the European Community in the United Nations Conference on Environment and Development. In that case, a right of "full participation" did not include the right to take part in the adoption of substantive decisions.

(*e*) Once adopted, would the additional Protocols be open for signature or should they be referred to all States for their consideration and, as appropriate, for their ratification or accession, since they would be additional to a Convention which is already in force?

The reply given to point (c) applies, mutatis mutandis, also to the additional Protocols.

You further inquire as to whether full powers should be required for the delegations participating in the review Conference. Under general international law, as codified by article 7.2(c) of the 1969 Vienna Convention on the Law of

Treaties, "representatives accredited by States to an international conference …, for the purpose of adopting the text of a treaty in that conference" are considered as representing their States by virtue of their functions and without having to produce full powers. The credentials of the representatives of the States participating in the Conference would constitute adequate full powers.

28 July 1995

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24. Interpretation of article 8 of the Convention on Certain Conventional Weapons

Facsimile to the Convention on Conventional Weapons Review Conference

This is in response to the questions which were raised in your facsimile of 9 October 1995.

Periodicity of future Review Conferences

1. The question has been raised whether in order to ensure the convening every 5 or 10 years of regular conferences of States parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects[59] (hereinafter "the Convention") to review the scope and operation of the Convention, the text of article 8, paragraph 3, of the Convention should be amended, or whether the current Conference has the authority to take a decision to that effect without amending the Convention.

It has been suggested in the latter case that, should the current Conference decide on the matter, the subsequent regular conferences would be automatically convened by the Secretary-General of the United Nations or at the request of the general Assembly.

2. The procedures concerning the convening of Conferences of High Contracting Parties are governed by the provisions of article 8 of the Convention.

3. Paragraphs 1 and 2 of article 8 set forth the requirements for the convening of such conferences in cases where a State party proposes either an amendment to the Convention or any annexed Protocols, or an additional protocol relating to the categories of conventional weapons not covered by the existing Protocols.

4. Paragraph 3 of article 8 relates to the convening of a review conference, which according to paragraph 3(a) could be convened *at the request of any High Contracting Party* (emphasis added) if, after a period of 10 years following the entry into force of the Convention, no conference has been convened in accordance with paragraphs 1 or 2 of article 8. It is pursuant to article 8, paragraph 3(a), of the Convention, that the Government of … requested the convening of the present Conference.

5. Paragraph 3 of article 8 does not provide for the convening, following the conclusion of the review conference referred to in subparagraph 3(a), of subsequent periodic review conferences. However, it is noted in paragraph 3(c) of that article that there may be a need for a further review conference. Paragraph 3(c) provides in this regard that the review conference may consider whether provision should be made for such a further conference. Paragraph 3(c) quite explicitly states in this connection that, should the review conference take a decision to that effect, the conditions governing the convening of the review conference should also be observed in the case of a further conference, namely, it may be convened at the request of any High Contracting Party such request could be made only after the expiration of a 10 year period during which no conference had been convened in accordance with paragraphs 1 or 2 of article 8 referred to above.

6. It appears from the foregoing that, from a strictly legal point of view, a single further conference is the only additional review forum that may be convened under article 8, paragraph 3, of the Convention, because the latter contains no provisions authorizing the further conference to make arrangements for a subsequent review conference or conferences.

7. The foregoing analysis results from an interpretation of the Convention which is based solely on the textual reading of paragraph 3 of article 8. However, it should be noted that article 8 of the Convention is entitled "Review and amendments". It could be argued that at the time of the adoption of the Convention, it was understood that the purpose and object of the Convention would require the convening of Conferences of Contracting Parties 'to review the scope and operation of this Convention and the Protocols annexed thereto" (article 8, pa. 3(a)). The fact that article 8 includes a reference to a review procedure may be considered as a reflection of an intent on the part of the authors of the Convention to establish a mechanism which, taking into account the purpose and object of the Convention, would allow, if necessary, the convening of conferences of Contracting Parties to review the implementation of the Convention. It is worth noting that the International Law Commission in its commentaries to the draft articles on the law of treaties pointed out that the majority of jurists emphasized the primacy of the text as the basis for the interpretation of a treaty, while at the same time giving a certain place to extrinsic evidence of intentions of the parties and to the objects and purposes of the treaty as a means of interpretaion.[60]

8. It could also be argued that although article 8, paragraph 3, of the Convention does not provide for serial periodic review conferences, it does not, at the same time, necessarily preclude the holding of such conferences, should the Contracting Parties be in agreement that it would facilitate the implementation of the Convention.

9. The 1969 Vienna Convention on the Law of Treaties states in paragraph 3(a) of article 31 (General rule of interpretation) that in interpreting a treaty there shall be taken into account, together with the context, inter alia, any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.

10. In its commentaries on this paragraph, the International Law Commission concluded that "an agreement as to the interpretation of a provisions reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for the purposes of its interpretation".[61]

11. On the basis of the above analysis, this office is of the view that should the current Review Conference determine by general agreement or consensus, that in the light of the purpose and object of the Convention Review Conferences of Contracting Parties should be held regularly in order to facilitate the implementation of the Convention such a decision would not directly contravene the provisions of paragraph 3 of article 8 of the Convention as long as the above decision was taken on the understanding that, as provided for in the paragraph, a request to convene a review conference, after a determined period of time would be made by a Contracting Party and, therefore, there would be no trigger mechanism implying that review conferences should be convened automatically by the Secretary-General as the Depositary.

13 October 1995

CLAIMS, COMPENSATION, CONTRACTS AND LIABILITY ISSUES

25. Liability of the United Nations in respect of contingent-owned equipment—Guidelines for Governments contributing troops to United Nations peacekeeping operations—Model Agreement between the United Nations and Member States contributing personnel and equipment to United Nations peacekeeping operations

Memorandum to the Assistant Secretary-General, Controller, Office of Programme Planning, Budget and Accounts

1. This is with reference to your memorandum of 19 December 1994, seeking our views on the request by the Advisory Committee on Administrative and Budgetary Questions regarding the liability of the United Nations in respect of contingent-owned Accounts

Introduction

2. You have indicated that, in the Secretary-General's report on the financing of the United Nations Assistance Mission in Rwanda (UNAMIR),[62] provision was made for compensating claims by Governments for equipment which was lost, stolen or abandoned during the withdrawal of military contingents from Rwanda in April 1994. You have also indicated that, in its related report on the financing of UNAMIR, the Advisory Committee recommended that "an analysis should be undertaken of the legal aspects of United Nations liability under various circumstances which might arise in peacekeeping operations and the results of such analysis should be submitted for the Advisory Committee's consideration as soon as possible".[63] You have indicated to us that the Advisory Committee requested that the cost estimate for the following financial period should reflect the results of the legal analysis, and you have accordingly requested the Office of Legal Affairs to undertake the Analysis requested by the Advisory Committee on this matter.

Preliminary remarks

Scope of the requested legal analysis

3. Further to your above-mentioned memorandum, we were informed that the Advisory Committee on Administrative and Budgetary Questions seeks a succinct analysis of the Organization's liability in respect of damaged, lost or abandoned contingent-owned equipment, having regard, in particular, to the abandoned equipment in Rwanda. Such an analysis is set out in the following sections.

Lack of case-specific documentation

4. We would first note that neither your memorandum nor the Secretary-General's aforementioned report on the financing of UNAMIR, provide any information as to the precise facts and circumstances concerning the abandoned equipment in Rwanda which led to the Advisory Committee's inquiry. Neither your Office nor the Department of Peacekeeping Operations could provide us with further facts. In the absence of specific cases of loss, we find it difficult to provide other than general advice.

Agreements between the United Nations and troop-contributing States

5. The issue of whether it is the United Nations or the Government of the contingent to which the equipment belongs that bears the responsibility for the cost of repair/replacement of damaged/lost equipment is a matter which has to be considered on a case-by-case basis in the light of the arrangements between the United Nations and each Government contributing equipment to peacekeeping operations. Such arrangements should be based on the Model Agreement between the United Nations and Member States contributing personnel and equipment to United Nations peacekeeping operations.[64]

6. In the context of UNAMIR, this Office has only cleared one draft agreement: with a Member State concerning its contribution to UNAMIR. The draft in question was based on the Model Agreement and legal clearance was given on that ground. In the absence of information or documentation concerning, for example, (a) the identity of the equipment that was abandoned in Rwanda in April 1994; (b) the specific terms agreed upon between the Organization and Governments which contributed this equipment to UNAMIR; (c) the identity of the contingents which were using the equipment in question; and (d) the exact circumstances under which the equipment was abandoned, we will review the matter under consideration on the basis of the provisions of the Model Agreement. We will further refer to the relevant provisions of the Aide-Memoire entitled "Guidelines for Governments Contributing Troops to United Nations Peacekeeping Operations" which are annexed to the agreements between the Organization and Member States contributing personnel and equipment[65] and which provide the general administrative and financial arrangements applicable to the deployment of military personnel to peacekeeping operations. These Guidelines set out the Letter of Assist procedures and the general principles governing the calculation of reimbursement by the United Nations in respect of contingent-owned equipment.[66]

7. Paragraph 19 of the Model Agreement provides that the equipment provided by a Member State at the Organization's request "shall remain the property of the Government". Accordingly, unless otherwise agreed by the Organization and the Government, the equipment provided by the Governments always remains the property of the Government. As regards the financial arrangements for such equipment, paragraph 20 of the Model Agreement regulates the reimbursement obligations of the United Nations to the Government as follows:

> "20. The value of all Government/contingent-owned equipment and other supplies made available to the United Nations shall be determined upon their arrival in and departure from [the United Nations peacekeeping operation]. The United Nations shall reimburse the Government of the [participating State] *as compensation for usage of the equipment* in the amount of the difference between the value of the equipment at the time it is brought in and the residual value when it is repatriated, in the case of short-term missions, or, in the case of missions extending over several years, at rates of 30 per cent, 30 per cent, 20 per cent and 20 per cent per annum respectively over a four-year period. In the case that the full incoming value of the equipment is reimbursed to the Government of [the participating State], the residual value of outgoing equipment at the completion of an operation shall be credited to the United Nations."[67] (emphasis added)

In the light of the above provision, it is clear that the Organization compensates the Government "*for usage of the equipment*" according to depreciation guidelines based on the value of the equipment agreed upon at the time of its arrival and for a period extending up to four years at sliding scale rates.[68] If the equipment remains in use in the mission area for more than four years, the issue of compensation for usage does not arise, as the agreed upon value of the equipment would have been fully paid by the United Nations. Similarly, no question should arise for compensating the Governments for loss of or damage to equipment, if such loss or damage occurred four years after the equipment has been in use by the Organization.

8. In addition to the Organization's responsibility to compensate the Government for the use of the equipment, the Guidelines stipulate that the United Nations is responsible for the maintenance of the contingent-owned equipment and bears the cost of effecting repairs to such equipment in the event of damage while it is in use by the United Nations.[69] It is thus clear that the United Nations is responsible for repairing equipment that has been damaged while in use by the United Nations.

9. While paragraph 23 of Model Agreement makes provision for negotiations between the parties in the event that Government-owned aircraft/vessels are lost, there are no explicit provisions in either the Model Agreement or the Guidelines regulating which party bears the risk in the event that other types of equipment are totally lost, stolen or abandoned. Paragraph 23 states:

> "23. The United Nations shall arrange appropriate third-party insurance.[70] *Any claim by the Government of [the participating State] in respect of loss of aircraft vessel(s) while in service with the United Nations shall be settled by negotiation, based on the residual value of the aircraft/vessel(s) at the time of the loss*." (emphasis added)

In this respect, it should be pointed out that the applicability of the latter provisions is explicitly limited to aircraft and vessels and should not be interpreted as applicable to the issue at hand, i.e., which of the parties bears the responsibility for the replacements costs for other types of lost, stolen or abandoned contingent-owned equipment. It should be noted that, under the above-quoted provisions, claims would have to be settled by negotiation based on the residual value of the aircraft/vessel. The Organization is, under such provisions, exposed to potential liability in the event of loss of an aircraft/vessel being used by the United Nations under Letters of Assist. We have been informed by the Field Administration and Logistics Division that such liability could, in the case of totals loss, run to millions of dollars since modern aircraft, such as the C-130, used for troop rotations and long-term services for peacekeeping operations are State aircraft and are not normally insured.

Conclusion

10. Having regard to the foregoing, it would appear that the existing arrangements for contingent-owned equipment do not take account of the rapid expansion of peacekeeping operations and the risks associated with that expansion. A lacuna exists as to which party bears the responsibility for the cost of lost, stolen, or abandoned contingent-owned equipment, other than aircraft/vessel(s). However, troop-contributing States could argue that the resolution of claims in respect of such contingent-owned equipment should be based on the formula provided in the above-quoted paragraph 23. As mentioned above in respect of aircraft/vessels, this could pose extensive potential liability for the Organization.

31 January 1995

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26. Prohibition of advertising in United Nations purchase orders—Use of the United Nations name and emblem—United Nations General Condition for General Contracts

Memorandum to the Officer-in-Charge, Purchase and Transportation Service

1. Please refer to your memorandum of 3 April 1995 on the above-captioned subject. It is noted that you have received an informal inquiry from the Permanent Mission of … as to whether United Nations contractors should be permanently bound by the standard provisions of the purchase orders prohibiting vendors from advertising that they are furnishing goods or services to the United Nations, or whether this prohibition lapses after the contract has been performed. You requested our advice with regard to this inquiry.

2. As you know, the use of the United Nations name and emblem is reserved for official purposes of the Organization in accordance with General Assembly resolution 92(I) of 7 December 1946, which also prohibits any use of the United Nations name or emblem for commercial or any other purposes without the authorization of the Secretary-General.

3. The inquiry, as described in your memorandum, is formulated in general terms: it is not clear to which specific goods or services the inquiry refers. Therefore, relevant provisions of applicable existing g United Nations are briefly reviewed below.

4. As noted in your memorandum, United Nations General Conditions for Purchase Orders contain a provisions entitled "Prohibition on advertising," which reads as follows:

> "the Vendor shall not advertise or otherwise make public that the vendor is furnishing goods or services to the United Nations."

In additions, those General Conditions contain a provisions entitled "Use of the United Nations name and emblem" stipulating that:

> "The Vendor shall not use the name, emblem or official seal of the United Nations or any abbreviations of the name 'United Nations' for any purpose."

5. It is noted that the inquiry concerns both goods and services provided to the United Nations, and that usually services to the Organization are provided on the basis of contracts rather than purchase orders. In this connection, it should be recalled that the United Nations General Conditions for General Contracts contain a provisions concerning "Use of name, emblem or official seal of the United Nations," which reads as follows:

> "The Contractor shall not advertise or otherwise make public the fact that it is a contractor with the United Nations. Also the Contractor shall, in no other manner whatsoever, use the name, emblem or official seal of the United Nations or any abbreviation of the name of the United Nations in connection with its business or otherwise."

6. Similar provisions are included, for example, in the United Nations Standard Aircraft charter Agreement and the United Nations Development Programme General conditions of Contract for Minor Construction Works (with the addition of the words "Unless written authorization is given by UNDP").

7. While the above provisions do not contain a specific reference to the continued validity of the prohibition established therein after contract performance, some others do. For example, the General Terms and Conditions Applicable to Purchase Orders, used by UNDP, provide as follows:

> "The Seller shall not advertise or make public the fact that it is performing, or has performed, services for the UNDP or the United Nations, or use the name, emblem or official seal of the UNDP or the United Nations or any abbreviation of the name of the UNDP or the United Nations for advertising purposes or for any other purposes. *This obligation does not lapse upon completion of work under this Order or termination thereof*." (emphasis added)

A similar stipulation is included in the General Conditions for United Nations Development Programme/Office of Personnel Service (UNDP/OPS) Contracts for Professional Services.

8. Thus, while specific legal arrangements for purchasing different goods or services by the organizations of the United Nations system may differ, the prohibition on using the United Nations name or emblem for commercial or any other unauthorized purposes is applicable in all cases in accordance with General Assembly resolution 92(I). Some of the provisions quoted above explicitly state that the prohibition contain therein does not lapse with the completion of performance under the contract. While others do not contain a specific indication to that effect, they are not intended to derogate from the general prohibition established by the General Assembly, which remains valid irrespective of the way one or another contract or purchase order is formulated.

9. Accordingly, unless an explicit written authorization to the contrary is granted by the Organization, United Nations vendors and contractors are precluded from the advertising or making public that they were furnishing goods or services to the Organization even upon cessation of performance under purchase orders or contracts.

17 April 1995

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27. Responsibility for carrying out embargoes imposed by the Security Council—Issue of liability of the United Nations for costs of any action by Member States carried out in order to ensure compliance with resolutions of the Security Council

Memorandum to the Assistant Secretary-General, Department of Peacekeeping Operations

1. This is in response to your memorandum dated 28 March 1995, requesting our advice in connection with a claim for reimbursement of cargo handling expenses incurred by the[name of Company] (hereinafter "the Claimant") from 20 August to 2 September 1993 at Djibouti harbour. Our advice thereon follows.

2. From the documentation forwarded to us, it appears that the cargo vessel "Y", which arrived at Djibouti harbour on 19 August 1993, was suspected of carrying weapons to Somalia in violation of the embargo imposed by the Security Council pursuant to paragraph 5 of its resolution 733 (1992) of 23 January 1992. It further appears that the Djibouti authorities as well as the navy of a Member State undertook to search the "Y" for such weapons and that, for that purpose, the Claimant was requested by officials of that Member State to discharge the entire cargo of the "Y" and reload it after completion of the search.

3. Thereafter, it seems that the Claimant repeatedly attempted to obtain from the Embassy of the Member State in Djibouti reimbursement of the cargo handling expenses incurred during that operation, but to no avail. In a letter dated 29 January 1994 addressed to the Claimant, the Deputy Chief of Mission in the Member State's Embassy indicated the following:

"I should like to confirm that my Governments is of the view that this search was conducted within the framework to he United Nations Somalia operations and hence suggests that you address yourself to the United Nations Secretariat for payment of the expenses incurred".

As suggested by the Embassy of the Member State in Djibouti, the Claimant has now addressed its claim, in the amount of US$ 104,320.99, to the United Nations.

4. In paragraph 2 of your memorandum, you indicate your view that "if the Member State's authorities in Djibouti requested the services of the company, responsibility for payment of the related costs should be borne by such authorities". You also indicated that "no request was sent to any Governments by the Departmnet of Peacekeeping Operations or any part of the Secretariat, for that matter, to search ships perhaps suspected of carrying weapons to Somalia".

5. The responsibility for carrying out embargoes imposed by the Security Council rests with Member States, which are accordingly, responsible for meeting the costs of any particular action they deem necessary for ensuring compliance with the embargo. Furthermore, commitments on behalf of the United Nations can only be validly made by the Secretary-General and other officials acting under his authority. Officials of Member States who are not entrusted with the authority to act on behalf of the Organization do not have the power to commit the United Nations.

6. We therefore fully concur with your view that responsibility for payment of the costs incurred by the Claimant should be borne by the authorities who requested the Claimant's services and not by the United Nations.

21 April 1995

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28. Responsibilty for the costs of repairing aircraft used in peacekeeping operations—Standard Aircraft Charter Agreement—Arrangements for troop rotations

Memorandum to the Officer-in-Charge, Logistics and Communications Service, Field Administration and Logistics Division, Department of Peacekeeping Operations

1. This refers to your memorandum of 5 January 1995, requesting our advice in connection with a claim submitted to the United Nations by the Government of a Member State for reimbursement of the costs of repairs of an IL-76 aircraft that is said to have been damaged during a rotation of that State's troops in the service of the United Nations Protection Force (UNPROFOR).

Outline of facts

2. We understand that, pursuant to a Letter of Assist issued to the Government of the Member State on 10 August 1994, the Government undertook the rotation of its Battalion-1, which had been contributed by the Government to UNPROFOR, between that State and Sarajevo in July and August 1994. The State's air force operated in IL-76 aircraft, which is a State Aircraft, for this rotation. Under the one page Letter of Assist, the United Nations agreed to a lump-sum payment for the rotation; there were no other terms and conditions agreed to between the United Nations and the Governments to govern the rotation.

3. In connection with one of the flights performed by the Governments on 22 July 1994, a one page, undated report by UNPROFOR remarked, "A/C shot at during take off". We understand that no other reports setting out further information and details on the matter were prepared by the United Nations.

4. Five months after the 22 July 1994 flight, the Permanent Representative of the Member State to the United Nations sent a note verbale to the United Nations stating that, during takeoff at Sarajevo airport for the 22 July 1994 flight, the IL-76 aircraft had come under enemy fire and, as a result had been damaged. The Permanent Representative further indicated that a soldier inside the aircraft had been injured and had subsequently died. The Permanent Representative requested that the United Nations reimburse the Governments for repairs to the aircraft. We noted that the Government did not provide any investigative reports on the alleged incident nor any information as to whether the repairs had been effected or the actual costs of the repairs. Such reports and information should normally accompany any claims made against the Organization. We do not know whether the Governments has submitted any claim in respect of the soldier inside the aircraft who died as a result of the firing upon the aircraft. The letter of claim did not provide any supporting evidence of the identity of the soldier or the cause of his death. The present memorandum will address only the request for reimbursement for repairs.

Arrangement for troop rotations.

5. The issue of whether it is the United Nations or the Government of the Member state that bears the responsibility for the costs of repairing the IL-76 aircraft is a matter which has to be considered in the light of the arrangements the Organization has for troop rotations.

Commercial chartering of aircraft

6. Troop rotations are normally arranged by the United Nations by means of commercially charted aircraft following international competitive bidding among commercial carriers. This is provided for in the Aide-Memoire entitled "Guidelines for the Governments contributing troops to the United Nations Protection Force in the former Republic of Yugoslavia (hereinafter referred tot as "Guidelines"), which provides the general administrative and financial arrangements applicable to the deployment of military personnel to UNPROFOR. Paragraph 138 of the Guidelines provides, in part:

"the rotation of contingents will be arranged by the United Nations, normally by chartered commercial aircraft after international bidding … Contractual arrangements with commercial airlines are made by the United Nations. Since numerous airlines will be requested to submit bids for airlifts, a national airline of the troop-contributing country competes on an equal footing for an award of the contract…"

7. Following international competitive bidding, a contract is concluded between the United Nations and the successful bidder for the rotation on the basis of the Standard Aircraft Charter Agreement. Under that Agreement, it is the carrier that is responsible for maintaining the aircraft in a fully operative condition and airworthy as well as for maintaining full hull (and third party) insurance to cover any damage to the aircraft.[71] Accordingly, the carrier has the risk of loss or damage to the aircraft and is responsible for any costs of repairs of the aircraft which would be covered by commercial insurance.

Letters of Assist

8. Letters of Assist constitute an exception to the international competitive bidding whereby a Government may be authorized the United Nations to provide, inter alia:

"transportation services for the movement of United Nations military personnel … to or from a mission area that are not readily available commercially, or which, if provided commercially, would likely cause operational dislocations or shortages;

"…

"provided that resort to Letters of Assist shall be discontinued when the circumstances for conditions that give rise to their use no longer obtrain".[72]

9. While arrangements with troop-contributing Governments for troops rotations under a Letter of Assist are allowed as an exception to international competitive bidding when the transportation services "are not readily available commercially, or which, if provided commercially, would likely cause operational dislocations or shortages", the nature of the air transportation services, whether performed by a Government or a commercial operator, is the same. The United Nations, which is neither the owner nor the operator of the aircraft, is in effect chartering air transportation services for the rotation of troops, irrespective of whether those services are performed by a Government or a commercial operator. The responsibility of the United Nations is limited to payment of an all-inclusive, lump sum price for the performance of the rotation.[73] In such case, the Governments may, like commercial carriers, make arrangements for instance, or it may self-insure, but in any event it assumes the risks of damage that may occur to the aircraft during the rotation.

10. It should be noted in this respect that, having regard to the difficulties which have arisen in the use of Letters of Assist for air transportation services, we have provided to your service the General Terms and Conditions of Letters of Assist for Aviation/Air Transportation Services involving State Aircraft. Para-

graph 15 of the General Terms and Conditions provides that the Government bears the risk of loss or damage to the aircraft and the Government may meet its responsibility under the Letter of Assist through insurance or self-insurance. In future, when troop rotations by means of State aircraft under Letters of Assist are authorized as an exception to commercial charter of aircraft, the above-mentioned General Terms and Conditions of Letters of assist should be used for rotation so that the terms governing the rotations are clearly set out.

Conclusion

11. Having regard to the above, it is our view that the Government of the Member State, and not the United Nations, bears the responsibility for the costs of repairing the IL-76 aircraft.

9 May 1995

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29. Death and disability benefits to members of military contingents participating in United Nations peacekeeping operations

Memorandum to the Chief, Finance Management and Support Service, Field Administration and Logistics Division, Department of Peacekeeping Operations

1. This is with reference to your memorandum of 20 September 1995, which sought our comments on the views of the Advisory Committee on Administrative and Budgetary Questions on the Secretary-General's repot (A/49/906) of 2 June 1995 concerning the death and disability benefits to members of military contingents participating in United Nations peacekeeping operations.

Background

2. In his report, the Secretary-General considered six different alternatives to the current compensation system taking into account the principles and options[74] previously set out in General Assembly resolution 49/233 A of 23 December 1994:

(*a*) Current arrangements with a reasonable minimum level of compensation payable for death and disability (option 1);

(*b*) System of compensation featuring standardized rates of reimbursement for death and disability (option 2);

(*c*) Uniform Global insurance scheme to cover all troops (option 3);

(*d*) Current arrangements for military observers and civilian police (option 4);

(*e*) Current system of following national legislation with a ceiling (option 5);

(*f*) Payment to contributing countries of a fixed amount per soldier per month in lieu of reimbursement (additional option).

The report concluded (para. 25) that "only options 2 and 3 meet all the criteria set out in General Assembly resolution 49/233 A". In particular, the Secretary-General recommended option 3 as the best alternative.

3. The above proposals were considered by the Advisory Committee in its report (A/50/684) of 30 October 1995. The Committee noted, inter alia, a number of administrative and legal issues related to the different options formulated by the Secretary-General, including what the Committee considered would be a "departure from current practices of paying reimbursement for compensation paid by troop contribution countries", as well as the need to clarify "the legal implication of requiring a soldier without direct contractual arrangements with the United Nations to designate a beneficiary upon arrival in the mission area and of the providing for payments directly to individuals" (para. 10). The Advisory Committee concluded its consideration as follows:

> "19. In reviewing the current system and the six options referred to above, the Advisory Committee identified issues on which the General Assembly needs to provide further guidance on whether payments should be in the form of an allowance, a reimbursement or an award and whether they should be made to Member States or individuals directly; the amount to be paid by the United Nations; the status of the additional allowance mechanism put forward by the Secretary-General in his additional option; and whether an insurance scheme should be established. In this regard, a necessary prerequisite is an understanding and agreement on the precise legal status of contingent personnel and of the nature of their legal, administrative and operational relationship with the Organization and their Government. The Fifth Committee may wish to seek appropriate legal guidance on this matter. Furthermore, in relation to the awards aspect of options 2 and 3, the question of whether awards should be paid at one universal rate regardless of national practice and/or origins remains to be clarified.
>
> "20. On the basis of the policy decisions to be taken by the General Assembly on these issues, the Secretary-General should be requested to draft and submit to the Assembly through the Advisory Committee a detailed proposal together with the draft procedures for implementation and the administrative, legal and financial implications. The proposal, which should be formulated with the assistance of the Office of Legal Affairs of the Secretariat, should take into account comments made by the Advisory Committee above as well as such concerns as may be expressed by the Fifth Committee.
>
> "21. Pending the introduction of a new system, the Advisory Committee recommends that, without prejudice to whatever new procedures will be decided upon by the General Assembly, steps should be taken to improve the management of the current system so as to handle outstanding claims expeditiously. For example, there is a need for accurate and readily accessible data and a clear indication of the steps that are taken from the time a claim is submitted to the time of payment."

Comments

4. We agree with the comments of the Advisory Committee. Contingent personnel are provided by their Governments under agreements between those Governments and the United Nations. Throughout their period of service in a United Nations peacekeeping operation, they remain under the orders of their respective commanders and retain their legal relationship with their Governments. The United Nations has a legal relationship only with the troop contributing countries. Unlike military observers, who are accorded the status of experts on mission for the United Nations pursuant to section 22 of the Convention on the Privileges and Immunities of the United Nations, contingent personnel, as the Advisory Committee rightly points out in paragraph 16 of its report, "have no direct contractual arrangements with the United Nations".

5. It follows from the above that it would not be legally appropriate for the United Nations to make any form of direct payments to individual contingent personnel. Nor could internal compensation rules of the United Nations apply directly to individual contingent members, who remain under the in persona jurisdiction of their respective Governments. Therefore, we do not think that the current reimbursement procedure can easily be eliminated or substituted by a system of direct payments to disabled troops or dependent survivors.

6. Also, given the lack of a contractual or a statutory link between the United Nations and the contingent personnel, it would be difficult for the United Nations to require individual contingent members to nominate beneficiaries upon arrival in the mission area. The beneficiaries of such personnel will necessarily be those who are entitled to such benefits under the applicable national law, a situation which the United Nations could not purport to change without the consent of the Governments concerned, which would make the present system of payments even more complex.

7. In the light of the above, and given the views of the Advisory Committee, it seems doubtful to us that option 3 could serve as basis for formulating further proposals to the General Assembly on this matter. Instead, it would seem more consistent with the legal status of contingent personnel and with the nature of their legal, administrative and operational relationship with the Organization and their Governments, to revert to and explore further the position taken earlier by the Secretary-General in paragraph 70 of his report (A/48/945) of 25 May 1994 (i.e., that "the basic mechanism would remain, with the states concerned settling in the first instance and claims for its contingent personnel, based on the national law and regulations prevailing for payments to the armed forces").

8. In that connection, consideration could be given to a system of combined minimum and maximum payments which would help to give some quality of treatment, while acknowledging the fact that national compensation schemes will vary. At the same time, special attention could be given to those principles mentioned in General Assembly resolution 49/233 A which clearly fall within the authority of the Secretary-General (i.e., "simplification of administrative arrangements to the extent possible" and "speedy settlement of claims for death and disability"). For that purposes, we suggest that Field Administration and Logistics Division consider the possibility of the elimination of unnecessary layers of control and simplifying and speeding-up the certification requirements. It should also be possible to develop clear information mat-

ers to be distributed to troop-contributing States explaining the documentary and other requirements of reimbursements by the United Nations, so as to expedite the handling of such claims.

9. We should be happy to discuss further these matters with you and to review the draft of any future Secretary-General's report on his subject, which will have to address the policy issues raised by the fact that there is no direct relationship between the contingent members and the United Nations.

December 1995

COPYRIGHT ISSUES

30. Attribution of authorship at the United Nations—Paragraph 3 of administrative instruction ST/AI/189/ADD.6RE/V.3 of 19 March 1990—Copyright on other intellectual property rights

Memorandum to the Chief, United Nations Publications Service

1. I am writing in response to your memorandum of 23 November 1994, by which you sought our comments on the draft of an addendum to the administrative instruction concerning attribution of authorship at the United Nations. You indicated that a presentation concerning the draft addendum was to take place before the Working Committee of the Publications Board and you requested that we provide our comments so that they could be incorporated into the draft prior to that meeting.

Policy considerations concerning attribution of authorship

2. We note that the current policy concerning attribution of authorship at the United Nations is stated in paragraph 3 of administrative instruction ST/AI/189/Add.6/Rev.3 of 19 March 1990, which provides that "the general principle to be applied [to attribution of authorship] is that publications are issued in the name of the United Nations, while documents emanating from the Secretariat are attributed to the Secretary-General or to the Secretariat". From that statement of general principle, it is clear that writings or other original works of authorship produced by United Nations staff members are generally considered to be works produced by the Organization itself. Thus, whether or not an individual staff member should be attributed credit for authorship is, for most part, a question of policy flowing from that general principle.

3. In this regard, we note further that, as stated in paragraph 3 thereof, the proposed addendum to the administrative instruction seeks "to advance the Secretary-General's policy on the establishment of a transparent and effective system of accountability and responsibility" by instituting "a more flexibly applied and consistent policy of attribution, which can be granted as long as it [i.e., attribution of authorship] is consistent with the legislative authority". The

objectives for such a more flexible policy of attribution, as stated in paragraph 4 thereof, would be:

> "(*a*) to acknowledge the original intellectual contributions in the preparation of United Nations publications and reports, taking into account the special creative, scientific and literary efforts contained therein; (*b*) to facilitate a dialogue with the international academic and professional communities in order to advance United Nations objectives in relation to political and economic and social issues of global concern and thereby enhance the image of the United Nations; (*c*) to serve as an incentive to staff presently working in the Organization, as well as to potential new staff members known to be experts in their respective fields; (*d*) to increase staff accountability and responsibility in the creation of high-quality publications and reports; and to (*e*) enhance the sales potential of United Nations publications."

There are not legal objections to the Publications Board concluding that these stated objectives appear to provide a reasonable basis for a more flexible approach to attribution of authorship. However, we are not sure that "accountability" has anything to do with attribution of authorship, which seems to us to accomplish nothing more than giving credit to the creative acts of staff members. We are unable to subscribe to the assumption, apparently linking attribution of authorship and accountability, that a staff member will prepare better written material if he or she gets public credit for his or her efforts.

Legal issues concerning attribution of authorship

4. Althoguh attributing authorship for United Nations publications is for the most part a policy question, there are three legal issues which relate to that question. First, the question arises as to whether the draft addendum comports with existing United Nations Regulations and/or Staff Rules. Second, if it does, then it should be determined whether attributing authorship would allow the person so attributed to claim copyright or any other intellectual property rights in the work published by the United Nations. Finally, the draft addendum provides that attribution could be granted only if such attribution were "consistent with the legislative authority". Each of the issues is reviewed in turn.

Consistency of the draft addendum with existing regulationsand/or rules

5. The first question is whether the draft addendum to the administrative instruction on attribution of authorship is consistent with applicable United Nations Staff Regulations and Rules. Obviously, no administrative instruction promulgated by the Secretary-General could contradict regulations adopted by the General Assembly or rules adopted by the Secretary-General in furtherance thereof.[75]

6. We see nothing in the Staff Regulations or Rules that would expressly prohibit the attribution of authorship to United Nations Staff members. Staff regulation 1.4 provides, as a general rule, that staff members "should avoid any action and in particular any kind of public pronouncement which may adversely reflect on their status [as international civil servants], or on the integrity, inde-

pendence and impartiality which are required by that status". Presumably any work that is to be published by the United Nations would not cause a staff member to violate this principle. Staff rule 101.6(e)(iv) appears to apply directly to the question of attribution of authorship. It provides that staff members shall not, "except in the normal course of official duties or with the prior approval of the Secretary-General," submit articles, books or other material for publication. To the extent that the United Nations published a writing and attributed its authorship to a staff member, this would be done in the normal course of the staff member's official duties and, it must be presumed, with the approval of the Secretary-General.

7. Based on the foregoing, it would seem that nothing in the Staff Regulations or Rules prevents the implementation of a more liberal policy of attribution of authorship as envisaged by the draft addendum to the administrative instruction.

Copyright or other intellectual property rights

8. The second question concerns whether attribution of authorship would involve the creation of any copyrights or other intellectual property rights for the staff member to whom the work is attributed.[76] The United States Copyright Act of 1976 provides that "in the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for the purposes of this title, and unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright."[77] A "work made for hire" is defined to be "a work prepared by an employee within the scope of his or her employment".[78]

9. Under United states copyright law, therefore, a staff member would have no claim to copyright in a original work of authorship prepared by the staff member in the course of his or her official duties. Rather, the United Nations would be considered the owner of the copyright. This result would not be changed merely because of the name of the staff member was attributed to the publication.

10. We note, however, that the draft addendum contemplates, in paragraph 11 and 12, that the attribution guideline set forth therein would also apply to "consultants specifically engaged for the purpose of preparing a publication or paper". Attribution would be given, pursuant to the policy guidelines set forth in the addendum, except in cases "when a consultant is engaged to prepare a policy paper that is to be issued as a report of the Secretary-General, usually in response to request from a legislative body".

11. Under United States copyright law, the rules governing "works made for hire" do not necessarily apply, per force, to works prepared by a consultant. Cases interpreting the "work made for hire" provisions of the Copyright Act[79] have determined that the employer engaging the consultant is the owner of the copyright.[80] However, in other cases, copyright in works created by a consultant have been accorded to the consultant.[81]

12. Thus, it is not clear that the United Nations would own original works of authorship created by a consultant. Any uncertainties regarding copyright or any other intellectual property rights could, however, be dealt with by means of a written agreement between the United Nations and the consultant.[82]

13. In this regard, we note that clause 3 of the "Conditions of Service—Consultants" set forth on the reverse side of the United Nations Special Service Agreement for Consultants[83] provides as follows:

> "The United Nations shall be entitled to all property rights, including but not limited to patents, copyrights and trademarks, with regard to material which bears a direct relation to, or is made in consequence of, the services provided to the Organization by the Consultant. At the request of the United Nations, the consultant shall assist in securing such property rights and transferring them to the Organization in compliance with the requirements applicable law".

A similar clause is contained in the United Nations "General Conditions for General Contracts". Such a clause should be sufficient to dispel any doubts about ownership by the United Nations of any copyrights or other intellectual property rights in original works of authorship produced by a consultant.

14. Unless the clause referred to above is part of a contract with a consultant, however, the United Nations should enter into a specific written agreement with the consultant concerning ownership of copyright in that work. Such an agreement would provide that, to the extent the consultant has any copyright or other intellectual property rights in the work being produced and attributed to him or her, he or she thereby irrevocably transfers all such rights to the United Nations In case of any doubts, this Office should be consulted. To the extent that the draft addendum does not make this clear, it should be revised to clearly reflect that a specific written agreement with a consultant may, under certain circumstances, be warranted.

Consistency with legislative authority

15. The remaining issue concerns whether any given attribution of authorship would be consistent with the "legislative authority" to which the publication responds. The draft addendum to the administrative instruction states, in paragraph 3, that attribution of authorship "can be granted as long as it is consistent with legislative authority" and that "in case of any doubt regarding the interpretation of the legislative authority, the Office of Legal Affairs will be consulted and its views will be forwarded to the Publications Board".

16. It would appear that the concern here is that written material may sometimes be produced at the United Nations in response to a request therefore from a legislative body (e.g., a report by the Secretary-General in response to a specific request therefore by the Advisory Committee on Administrative and Budgetary questions). In such cases, it may be inappropriate to attribute the written material to anyone other than the Secretary-General or a specific department, office or subsidiary body. Clearly, the appropriateness of attribution in such circumstances depends on various factors, including the terms of the legislative authority itself, and therefore granting attribution must be determined on a case-by-case basis. It appears then that the draft addendum sufficiently provides for this by requiring that the Office of Legal Affairs be consulted for any interpretation of the legislative authority pursuant to which written material was to be produced.

Conclusion

17. The foregoing constitute the legal considerations that should be brought to the attention of the Working Committee of the Publications Board when it considers the question of attribution of authorship. The draft addendum appears to be consistent with existing United Nations Staff Regulations and Rules. Any questions concerning copyright, particularly with regard to works produced by and attributed to consultants, should be brought to the attention of this Office. Additionally, any concerns over whether attribution would be inconsistent with relevant legislative authority pursuant to which a work is produced should likewise be brought to the attention of this Office.

13 April 1995

FINANCIAL ISSUES

31. Labeling of goods bought with donor's contribution with the latter's flag and the words "donated by"—General Assembly Resolution 48/209

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

1. This is with reference to your memorandum of 17 March 1995, requesting our advice on the proposal by the Governments of [a Member State], contained in a note verbale addressed to the Centre for Human Rights dated 12 January 1995, that goods and materials procured with its contribution should be specifically identified as donated by the Governments of [that Member State].

2. In your memorandum, you indicated that the Centre for Human Rights had relied, for this request, on an earlier precedent contained in an Agreement between the European Union and the United Nations for provision of personnel and equipment for use by the Commission for Human Rights in Rwanda. You also stated in your memorandum that you had had discussions with the representatives of the Permanent Mission of the United Nations Office at Geneva, who expressed a need for a legal opinion on the matter, should the request not be acceptable.

3. We share your view that the Agreement with the European Union does not constitute a precedent in the present case. It is clear that the acceptance of the request by the European Union to identify equipment provided under that Agreement as a contribution from the European Union was based on the fact that the Agreement itself concerns a contribution by the European Union in the form of personnel and equipment. The contribution is made under a Cooperation Service Agreement whereby the personnel remain officials of the European Union and

ownership of the equipment is retained by the European Union as well. These arrangements are different from contribution to the United Nations multilateral assistance programmes in the economic and social sector, or for general humanitarian assistance, which are based on policies established by the General Assembly pursuant to Chapter IX of the Charter of the United Nations and are administered as United Nations funds. In this respect, you may wish to refer to General Assembly resolution 48/209 of 21 December 1993, which reaffirmed that "the fundamental characteristics of the operational activities of the United Nations system should be, inter alia, their universal, voluntary and grant nature, and their neutrality and multilateralism". These principles enumerated by the General Assembly in respect of operational activities for development are equally applicable to contributions to United Nations activities with regard to humanitarian assistance such as those conduced by the United Nations High Commissioner for Human Rights in Rwanda. The principle of multilateralism suggested that the assistance provided is not identifiable to any particular donor, but is considered as United Nations assistance provided on behalf of all its Member States.

4. However, I believe that you should be able to assure the Permanent Mission of the Member States that the contributions of the Government of the State would be appropriately recognized by the United Nations. This recognition is normally made by the Secretary-General in his reports to the General Assembly on the work of the United Nations, which includes the work of the United Nations High Commissioner for Human Rights in the area of humanitarian assistance. We would also have no objection, should the Centre for Human Rights consider it feasible, to accept the suggestion by the Permanent Mission of … in paragraph 5 of the note verbale, to publicize their contribution "to the countries, organizations and the people concerned" through the normal channels of communications used by the United Nations, such as press releases and reports.

7April 1995

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32. Donation of a copy of the Peace Bell to the United Nations—United Nations policy concerning donations—Financial regulations 7.2 to 7.4—Financial rules 107.5 to 107.7

Letter to the Senior Legal Liaison Office, United Nations Office at Vienna

1. Please refer to your memorandum of 28 June 1995 to the Legal Counsel on the above-captioned subject. It is noted that a non-governmental organization (hereinafter "the NGO") cooperating with the United Nations International Drug Control Programme wishes to donate to the United Nations, for display at the Vienna International Centre, a copy of the Peace Bell which is located at United Nations Headquarters in New York. You requested our advice and guidance as to whether "this particular gift … can be accepted and, if so, on what conditions". There are a few questions in connection with your request which will be examined separately below.

Original Peace Bell

2. According to press feature 214, produced by Press Section of the United Nations Office of Public Information in July 1971, the Peace Bell "was donated by the United Nations Association of Japan in the name of the people of Japan. The bell was cast from coins donated by delegates of the 60 nations at the Thirteenth General Conference of United Nations Associations held in Paris in 1951, and from individual contributions of various kinds of metal. The bell is 3 feet, 3 inches high, 2 feet in diameter at its base and weighs 256 pounds. It is based in a typically Japanese structure like a Shinto shrine, made of cypress wood. The Tada factory in Japan completed the bell on United Nations Day, 24 October 1952; it was presented to the United Nations on 8 June 1954 by Renzo Sawada, Japanese observer to the United Nations."

3. Files of this Office do not contain any information as to the legal arrangements of the donation of the original Peace Bell to the United Nations. In particular, we do not know whether the original bell was copyrighted and, if so, whether those copyrights were transferred to the United Nations in 1954.

4. As you know, ownership of a physical object does not always entail ownership of the intellectual property relating to the object. For example, article 202 of the United States Copyright Act of 1976 provides that, unless there is an agreement to the contrary, the transfer of ownership of a physical object does not itself convey right of copyright in the copyrighted work represented by the object.

5. Accordingly, it is necessary to ascertain that the entities intending to produce and donate a copy of the original Peace Bell have addressed the intellectual property aspect of the case in order to avoid possible future embarrassment for the Organization if the donation is accepted.

United Nations policy concerning donations

6. The policy of the United Nations concerning acceptance of donations is based on United Nations financial regulations 7.2 to 7.4 and financial rules 107.5 to 107.7 promulgated under them. Those rules stipulate as follows:

"*Rule 107.5*

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

"*Rule 107.6*

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

"Rule 107.7

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

7. It appears that the proposed donation would be consistent with the policies and aims of the Organization, as required by financial rule 107.6. However, the financial arrangements of the donation are not clear. It is noted, for example, that, according to the undated "discussion paper" concerning the proposal, a copy of which was attached to your memorandum, "*funds donated to the UNDCP by the NGO will be used for purchase of the bell (estimated cost between $50,000 and $100,000)*". It is not clear whether the above-mentioned funds have already been donated to UNDCP for some purposes other than the "purchase" of the bell and their "reassignment" is suggested or a new donation of funds is intended. Similarly, it is not clear under what legal authority UNDCP could "purchase" the bell. In any event, you must seek the concurrence of the Controller prior to taking any further action in this case as his Office has the authority delegated pursuant to financial rule 107.5.

8. As indicated in the letter of 23 April 1992 signed by the Assistant Secretary-General, Office of General Services, "due to the finite space available, the United Nations can only accept donations from Member States. This general policy has in the past resulted in our inability to accommodate any of the numerous offers of fine works of art we have received from non-governmental organizations." We are aware that a few exceptions to that general policy were made in the past. Whether or not an exception should be made in the case under review is of course a policy question.

Use of the United Nations name

9. As you know, the use of the United Nations name is reserved for the official purposes of the Organization in accordance with General Assembly resolution 92(I) of 7 December 1946. Moreover, that resolution expressly prohibits any use of the United Nations name for commercial purposes. In order to implement the commercial use prohibition, the practice of the United Nations has been to include in its commercial contracts a standard clause preventing any entity contracting with the Organization from advertising or making public the fact that it provided services to the United Nations. The purpose of this clause is to prevent solicitation for business on the basis of a connection with the United Nations.

10. The same policy and practice must be applied in this case, notwithstanding the fact that the bell would be donated to the United Nations free of charge. If the donations in question are from commercial entities, the United Nations cannot allow its name to be used in connection with such companies or their services and/or products.

11. While your memorandum mentions only the NGO as the donor, it is noted, from copies of documentation attached to your memorandum, that an Association and possibly other donors may participate in the project, and, in such case, their names would be added to a plaque to be displayed at the site of the bell.

12. On the assumption that the NGO is a not-for-profit entity, the depiction of its name on the plaque does not pose problems. Whether the Association and other donors are commercial entities is not known to us. If they are, the participation of those donors in the donation could be acceptable only if they agreed not to publicize the donation, including the publication of their names on the plaque, and not to use their participation in the donation for advertising or any other commercial purposes.

Agreement to be concluded

13. Provided it is eventually decided by the Organization to accept the gift in question, the terms and conditions of the donation should be recorded in a brief agreement to be concluded by the United Nations, on one side, and the donor(s) on the other.

5 July 1995

PERSONNEL ISSUES

33. Participation of high-level United Nations officials in non-governmental structures—Staff rule 101.6—Meaning of the expression "normal course of official duty"

Memorandum to the Director, Executive Office of the Secretary-General

1. Please refer to your note, dated 7 March 1995, seeking my further advice on the request addressed to the Secretary-General by a Swiss organization (hereinafter "the Foundation") for the support of the United Nations for a meeting of the Foundation to be held in Malta. In my memorandum of 16 February 1995, it was suggested that, given the uncertainties of the case and the need for more data to enable a full consideration of the request, the Director-General of the United Nations Office at Geneva, who is listed as a member of the Advisory Board of the Foundation, should be contacted for more information on the subject. Your memorandum of 7 March 1995 has provided me with the additional information.

Preliminary matters

2. I have some difficulty in accepting the general approach to the effect that, if international institutions are not profit-making and are recognized by Member States, such institutions should necessarily deserve the support of the United Nations, "especially when they deal with substantive issues which are of primary concern[84] to the United Nations". Although this is more a policy than a legal matter, it would appear to me that no automatic support should be implied in such matters: support, by the United Nations, of any organization or institution outside the United Nations system should, in my view, be extended only after a careful consideration of all aspects and implications of such action.

3. Similarly, I have to disagree with the proposed interpretation of United Nations staff rule 101.6, to the effect that "the participation of high-level United Nations officials in non-governmental structures, … as well as national, legal and political science societies … are in full compliance with staff rule 101.6 and are carried out in the 'normal course of official duties'". My disagreement is based on the considerations described below.

4. Paragraph (a) of staff rule 101.6 stipulates that:

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

The participation in the work of more or less permanent organs or bodies of "non-government structures" or of "national, legal and political science societies" constitutes a continuous or recurring outside occupation for purposes of staff rule 101.6 and therefore requires prior approval. Accordingly, to be "in full compliance" with that rule, such participation should receive such prior approval.

5. Furthermore, the question is raised whether the participation of high-ranking United Nations officials in non-governmental structures may be carried out "in the normal course of official duties", an evident reference to the expression used in staff rule 101.6 (e), the full text of which reads as follows:

> "Staff members shall not, *except in the normal course of official duties* or with the prior approval of the Secretary-General, perform any of the following acts, if such act relates to the purpose, activities or interests of the United Nations:
>
> (i) Issue statements to the press, radio or other agencies of public information;
>
> (ii) Accept speaking engagements;
>
> (iii) Take part in film, theatre, radio or television productions;
>
> (iv) Submit articles, books or other material for publication." (emphasis added)

According to the above staff rule, participation in non-governmental structures is not among "acts" which may be performed by staff members "in the normal course of official duties" without the prior approval of the Secretary-General.

Advice

6. It is noted from the additional information provided that the United Nations support for the Foundation is sought "in order to obtain the greatest possible participation and a large audience at the highest political level" and that "the endorsement of patronage of the United Nations has no connection whatsoever with fund-raising and/or other financial purposes". It is further noted that the United Nations "has already provided support to the activities of the Foundation on the occasion of its meeting in Bucharest from 21 to 24 April 1994".[85]

7. However, it is still not clear from the additional information what is the specific nature or form of the support that the Foundation is seeking from the United Nations. It is noted in this regard that, in describing the support provided by the United Nations to the Bucharest meeting of the Foundation in 1994, it was indicated that "the Secretary-General had on that occasion designated the Assistant Secretary-General for Human Rights to attend". On the assumption that a similar support may be sought in the case under review, this Office sees no legal impediment to the Secretary-General's deciding to designate a United Nations official to attend the forthcoming 1995 meeting of the Foundation. As indicated in my former memorandum to you on the subject, whether or not to make this decision in view of the inherently political nature of some of the Foundation's activities is, of course essentially a policy issue and therefore ultimately a matter for your Office.

14 March 1995

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34. Possibility of initiating recovery action against a staff member before national civil courts—Jurisdiction of the United Nations Administrative Tribunal.

Memorandum to the Legal Liaison Officer a.i., United NationsOffice at Geneva

1. This is with reference to your memorandum of 15 February 1995, forwarding, for our comments and advice, a copy of a legal opinion given by a [name of city] lawyer concerning the possibility and prospects of initiating recovery action against Mr. B (a staff member) before a State's civil courts.

Advice given by local counsel

2. The lawyer's (hereafter "Mr. A") first conclusion is that the relationship between the United Nations and a staff member (or for that matter, a former staff member) that derives from the United Nations Staff Regulations and Rules is part of public international law. Mr. A further concludes that a [State] civil court, when seized of a civil action for recovery brought by the United Nations against Mr. B, would probably decline jurisdiction, considering such an action to be under the exclusive internal administrative jurisdiction of the United Nations.

3. Even if the court would qualify the claim by the United Nations against Mr. B as a claim for unjust enrichment under the [State] Civil Code, Mr. A considers that the outcome would still be doubtful, as the court would probably apply a statute of limitations of one year in this case. Mr. A nevertheless advises in favour of initiating legal action, at least for the purposes of establishing a precedent for future cases.

Policy considerations

4. In the light of the conclusions reached by Mr. A, you suggest, in paragraph 5 of your memorandum, that the International Trade Center (ITC) should, "taking into account the very slim chances of winning the case and the costs involved, consider its claim against Mr. B as a write-off under the Financial Rules."

5. We appreciate that it is normally not in the interest of the United Nations to initiate legal action before national courts for recovery of relatively small amounts of money when the outcome of such action would seem to be unfavourable and the potential costs entailed might exceed the amount that the Organization can reasonably expect to recover. However, the particular circumstances of this case give rise to general policy issues which require consideration.

6. As you know, the General Assembly has over the years expressed increased concern about alleged cases of fraud or presumptive fraud within the United Nations. A report on "Recovery of misappropriated funds from staff members and former staff members"[86] was submitted by the Secretary-General to the General Assembly on 9 November 1993 pursuant to a request contained in General Assembly resolution 47/211 of 23 December 1992.[87] In that report, the Secretary-General described as follows the difficulties faced by the Organization in instituting civil action for recovery of misappropriated funds, where such misappropriation consisted in fraud in connection with United Nations entitlements:

> "(*a*) Establishing legal and effective mechanisms to recover misappropriated funds, as recommended by the Advisory Committee on Administrative Budgetary Questions in paragraph 53 of its report;
>
> (*b*) Seeking criminal prosecution of those who have committed fraud against the Organization."
>
> "12. Civil action for recovery of misappropriated funds requires proof of fraud by staff members. In this connection, a general problem arises if the alleged fraud consisted of breach of internal United Nations regulations of rules (e.g. claiming and obtaining from the United Nations excessive or unwarranted reimbursement for medical expenses, education grant or income taxes). In such cases, in order to determine whether the staff members' acts were fraudulent, the national court would have to interpret and apply those provisions of the internal regulations and rules of the Organization allegedly violated by the staff member concerned.
>
> "13. However, in many legal systems, a national court may find difficulties in, or even a legal impediment to, applying internal rules of an intergovernmental organization which do not have the force of law in that national legal system, unless they are the few regulations promulgated pursuant to Headquarters Agreements to the express exclusion of local law. Fur-

thermore, the submission of disputes involving internal regulations or rules to national courts could result in interpretations conflicting with those given by United Nations organs or inconsistent with the policies and interests of the Organization."

7. The Secretary-General proposed to the General Assembly, on that occasion, that the statute of the United Nations Administrative Tribunal should be amended to give it jurisdiction to judge claims submitted by the Organization against staff members so that proceedings before national courts would be required only for enforcement of the judgment.

8. The General Assembly, in section III of its resolution 48/218 (A) of 23 December 1993, decided to study the possibility of the establishment of a new jurisdictional and procedural mechanism or of the extension of mandates and improvement of the functioning of existing jurisdictional and procedural mechanisms. To that end, the Assembly decided to establish an ad hoc intergovernmental working group of 25 members (the "Group of Experts") to examine these questions and submit a report with specific suggestions to the General Assembly.

9. In its final report, the Group of Experts recommended, inter alia, that the Statute of the Administrative Tribunal should be amended to give it jurisdiction to adjudicate financial claims submitted by the Secretary-General against staff members.[88]

10. The Group of Experts appears to have endorsed the recommendation originally made by the Secretary-General in paragraph 26 of his report (A/48/572), but it does not seem to have addressed the question of enforcement of judgments of the Tribunal by Member States, should this become necessary. As a result, the expanded jurisdiction of the Tribunal may not turn out to be fully effective if the judgments of the Tribunal are not recognized and enforced by nations courts. Similarly, other recommendations of the Group of Experts for cooperation between the United Nations and Member States on these matters,[89] if adopted, might not in and of themselves be sufficient for the purpose of providing the United Nations with adequate tools for seeking recovery of misappropriated funds.

11. In this connection, we note Mr. A's closing statement that, in his view, "a proceeding would be worth the expenditure to get a precedent". We ourselves are inclined to agree with Mr. A's assessment. In our view, the claims by the United Nations against Mr. B may indeed represent a valuable test case. If the Organization succeeds in obtaining a favourable judgment, this would constitute an important precedent for similar cases in [the State] and, perhaps, in other duty stations. If the [State] civil courts deny jurisdiction as expected by Mr. A, a judgment in that sense would confirm in practice the position taken by the Secretary-General in his report (A/48/572) and would be a forceful argument for the general adoption of the measures advocated by the Secretary-General in that report. On a more limited scale, such a judgment could eventually justify negotiating with the [State] Government the establishment of mechanisms for cooperation between the [State] judiciary and the United Nations in similar cases.

Proposed course of action

12. In the light of the above, and given that ITC is accountable for the monies paid to Mr. B, it might be questionable to write off the misappropriated sums before serious attempts are made for their recovery.

13. We therefore recommend that steps be taken to initiate legal action against Mr. B, should you be satisfied that the facts are adequately documented and that the claim against Mr. B is solid. Since the misappropriated funds are ITC funds, the costs relating to such legal action should be borne by ITC. If proceedings are instituted, we stand ready to assist the local counsel.

31 March 1995

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35. Travel of staff representatives—Administrative instruction ST/AI/293 of 15 July 1982—Status of representatives of the Federation of International Civil Servants' Associations

Memorandum to the Officer-in-Charge, Compensation and Classification Service, Officer of Human Resources Management

1. This is in response to your memorandum of 9 March 1995, seeking our advice as to whether staff representatives traveling on United Nations Staff Association business are considered as being on mission status for purposes of compensation in case of death, injury or illness compensable under Appendix D of the United Nations Staff Rules. You have also requested our advice on the status of representatives of the Federation of International Civil Servants' Associations (FICSA), traveling on FICSA business, paid for and authorized by FICSA, rather than the Staff Association.

2. Pursuant to paragraph 2 of administrative instruction ST/AI/293 of 15 July 1982 on the "Facilities to be provided to staff representatives", "[t]he functions of staff representatives are official". The official nature of the functions of staff representatives also has been emphasized by the United Nations Administrative Tribunal in a recent judgment as follows:

> "The official nature of the functions of staff representatives implies that time spent in exercising these functions should not be regarded differently from the time spent on office duties, but as being on a par with the latter."[90]

Paragraph 12 of the aforementioned instruction further provides that "staff representatives duly designated to attend intra-organizational, interorganizational or intergovernmental meetings shall be placed on official duty status for the time required to attend such meetings, *including appropriate travel time*" (emphasis added). In the light of that provision, injuries incurred by "duly designated" staff representatives while in travel status for such meetings would be deemed to be service-incurred and thus compensable under Appendix D.

3. For the purpose of responding to your second query, i.e., whether the same considerations would also apply to FICSA representatives traveling on FICSA business, account must taken of FICSA's status as an *interlocuteur valable* with the administrations of the common system on matters relating to staff welfare and administration: FICSA representatives make submissions to the International Civil Service Commission (ICSC) and participate in its meetings[91] and they attend meetings of the United Nations Joint Staff Pension Board (UNJSPB) as observers.[92] FICSA is also cooperating with the other recognized staff bodies of other organizations and with the United Nations system's Coordinating Committee for International Staff Unions and Associations of the United Nations System (CCISUA) [also recognized by rule 36 of the ICSC rules of procedure].

4. In the light of the foregoing, we consider that the provisions of paragraph 12 of administrative instruction ST/AI/293, quoted in paragraph 2 above, apply also to the United Nations staff who are "duly designated" FICSA representatives and who travel "to attend intra-organizational, interorganizational or intergovernmental meetings". Thus, injuries while in travel status incurred by United Nations staff who are designated as such representatives would be deemed to be attributable to the performance of official duties for purposes of Appendix D to the Staff Rules.

1 May 1995

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36. Question whether dependency allowances are independent from the payment of similar welfare benefits by national Governments—Staff regulation 3.4(c)

Memorandum to the Senior Legal Officer, Division of Human Resources and Management, Office of the United Nations High Commissioner for Refugees

1. This is with reference to your memorandum of 22 June 1995, on the above-captioned matter, which was referred to us for reply. In your memorandum, you request our advice as to whether the obligation of the United Nations to pay dependency allowances to those staff members entitled to such benefit is independent from, or subsidiary to, the payment of similar welfare benefits by the national governments of the staff members concerned.

2. We understand that the question outlined above arose with respect to welfare benefits to which staff members residing in those two countries of their nationality are entitled under their national laws, and that authorities in those countries have indicated to UNHCR that they consider the United Nations to be the "first payer" of any such benefits. Accordingly, both Governments have informed the United Nations that, in calculating the payments due to those staff members under their national law, both Governments will deduct the amount of any dependency allowance paid by the United Nations from the family allowances that would otherwise be payable to their respective nationals/residents. In this connection, you indicate your view that if authorities of the two States main-

tain that position the United Nations would in practice become the "first payer", and would be unable to deduct any amount paid by those Governments to staff members entitled to family allowances under the respective legislation.

3. The payment of dependency benefits is subject to the provisions staff regulation 3.4(c) of the United Nations Staff Regulations and Rules, which reads as follows:

> "With the view to avoiding duplication of benefits and in order to achieve equality between staff members who receive benefits under applicable laws in the form of governmental grants and staff members who do not receive such dependency allowances, the Secretary-General shall prescribe conditions under which the dependency allowance … *shall be payable only to the extent that the dependency benefits enjoyed by the staff member or his or her spouse under applicable laws amount to less than such a dependency allowance*." (emphasis added)

These provisions are elaborated in staff rule 103.23 (b), which provides as follows:

> "… the full amount of dependency allowances provided under that regulation and staff rules in respect of a dependent child shall be payable, *except where the staff member or his or her spouse receive a direct governmental grant in respect of the same child. Where such a governmental grant is made, dependency allowance payable under this rule shall be the approximate amount by which the governmental grant is less than the dependency allowance set out by the Staff Regulations and Staff Rules*." (emphasis added)

4. It is quite clear from the above that, under the régime of dependency allowances instituted by staff regulation 3.4, the payment of such allowances is always subsidiary to payments by national Governments under existing national welfare schemes, which are, accordingly, regarded as "first payers" for United Nations purposes. Thus, in case no governmental grants are paid, the Organization pays the full allowance, but if any national grants are paid, the Organization has to deduct the approximate amount of the national grant.

5. We emphasize that the subsidiary nature of these payments is clearly stated in staff regulation 3.4 (c). It follows that the Administration cannot deviate from, or make exceptions to, such a fundamental and clearly stated principle unless the General Assembly authorizes such action through an amendment to staff regulation 3.4(c). We note, moreover, that the entitlement to dependency benefits under staff regulation 3.4(c) is operative only to the extent that the government benefits are less than United Nations benefits so that United Nations benefits only "top up" government benefits to reach the level of United Nations benefits. If government benefits are higher than United Nations benefits, the staff concerned do not receive United Nations benefits. If a Government takes the view that it will only pay if the United Nations is a first payer, the result may be that staff will be entitled to those government benefits and so the United Nations allowance will be payable in full. If this result is intolerable, the Secretary-General could request the General Assembly to amend staff regulation 3.4(c).

23 October 1995

37. Use of brokers or similar agencies on aircraft charters

Memorandum to the Director and Deputy to the Assistant Secretary-General for Support Services, Office of Conference and Support Services

1. This is further to our previous correspondence on the above-reference matter. We have recently been provided a copy of the Audit Observation Memorandum of 15 December 1994 on air operations, and would like to provide a few more comments on the question of brokers, which we believe should be taken into account in making any decisions as to the use of brokers.

2. We firstly note that the External Auditors have observed that the monthly base cost under the new standard Aircraft Charter Agreement concluded with licensed operators is generally lower than the monthly base cost under the prior lease agreements with [name of a company]. We would point out in this connection that under the prior lease agreements, the brokers concluded sub-lease contracts with aircraft operators and passed on the expenses of the operation to the United Nations without disclosing the actual costs for those sub-leases. In this way, the United Nations contributed indirectly to paying a broker's fee. In many of those lease agreements, it was unusual for the United Nations to end up paying much more (e.g., through amendments to the agreements) than the price which the broker had originally bid.

3. The overall lower monthly base costs, together with the savings from a decrease in the exposure to third-party claims to which the United Nations would be exposed under leasing arrangements, must be computed when comparing any bids from brokers with bids from aircraft operators.

4. The External Auditors have noted certain awards of contract to operators for higher prices than the prices bid by brokers. The Auditors recommended, in this regard, that the issue of subcontracting should be given careful consideration to ensure that the Organization seizes any opportunity for cost savings. We note that the reintroduction of subcontractors would essentially mean that the United Nations would sign contracts with brokers which would subcontract the performance of the air transportation services. For the reasons discussed below, in paragraph 2 above and in our 22 November memorandum, we observe that the apparent cost benefits are not real, and even where they may exist, they would be offset by the potential legal liability to which the United Nations would be exposed by contracting directly with brokers for operation of the aircraft. We would therefore advise, as explained below, against engaging brokers under the United Nations Aircraft Charter Agreement. This would of course not preclude other arrangements with brokers whereby they could be used for a fee to locate an aircraft operator, provided that the Aircraft Charter Agreement is always concluded with the actual licensed aircraft operator.

5. We note that a broker is an individual or firm doing business as a middle person, providing a variety of services which the individual or firm is not necessarily licensed or qualified to do. In the air transportation business, brokerage firms provide certain services such as ticketing and procurement, but they are not involved in the actual operation of the aircraft for which they are

licensed. As distinct from a broker, an aircraft operator, which is normally a firm but may also be an individual, possesses an air operator certificate issued by the State of the operator.[93] The issuance of air operator certificates is one of the important ways in which States regulate air transport operations and ensure that those operations are safe.

6. The legal instrument often used to obtain aircraft from brokers is a lease agreement with an aircraft operator under which the lessee takes responsibility for the operation and control of the aircraft and assumes responsibility for claims from passengers and other third parties. The lease is necessary because the broker cannot operate the aircraft without a licence. In the past, there have been misunderstandings arising from brokers leasing aircraft directly to the United Nations and the operation of such aircraft by pilots or crew engaged by brokers and relying on United Nations markings and call signs for navigation of the aircraft. States, airport and in-flight agencies, and even brokers, have argued that the United Nations functioned under the lease agreements as the operator of the aircraft and thus bore the responsibilities and liabilities applicable to carriers. Under such lease arrangements, the Organization was exposed to third-party claims and other financial liabilities for which it was not adequately protected. Furthermore, the International Civil Aviation Organization advised that the United Nations itself could not act as an aircraft operator since it was not a State, had not been licensed by any State to do so, and the ICAO system made no provision for the United Nations to perform the function of a State or an aircraft operator.

7. ICAO thus advised that, since the United Nations is not a licensed operator, a leasing arrangement with a broker is not an appropriate contractual modality for the provision of air transport services for the United Nations. For this reason, a new standard Aircraft Charter Agreement was designed to be concluded with licensed operators only. Under the standard Aircraft Charter Agreement, the operator retains control of the aircraft and its operation and maintenance. The crew remains in the employ of the operator, which bears the risk of loss of, or damage to, the aircraft and assumes responsibility for claims from passengers and other third parties. In our view, this is the only contracting arrangement which would adequately protect the United Nations until the United Nations can secure a special status under the ICAO instruments to directly own and operate aircraft.

8. If it is decided that brokers should be reintroduced into the procurement process, we would advise that the role of the brokers should be limited to identifying suitable aircraft operators, for which they would be paid a specified fee under a separate arrangement. As soon as the aircraft operator is selected by the United Nations, the United Nations should proceed to contract under the standard Aircraft Charter Agreement with the licensed operator of the aircraft without any further involvement of the broker. We consider that this would satisfy the Auditors' concerns with respect to cost savings and would avoid the problems posed by entering into contracts with brokers using subcontractors. This Office would be happy to assist in the preparation of appropriate contracting modalities should such decision be made.

10 January 1995

TELECOMMUNICATIONS

38. Use of the space segment capacity leased by the United Nations from INTELSAT—Article 39 of the 1982 International Telecommunication Convention

Memorandum to the Director and Deputy to the Assistant Secretary-General for Support Services, Office of Conference and Support Services

1. Please refer to your memorandum, dated 11 July 1995, on the above-captioned subject. It is noted that recently the World Health Organization concluded a contract with [name of a Corporation] concerning the provision of international telecommunications services for the WHO office in [name of State]. It is also noted that, while this contract does not explicitly provide that the Corporation would be using space segment capacity leased by the United Nations from the International Telecommunication Satellite Organization (INTELSAT) under the 1984 Agreement between the two organizations (as amended in 1993),[94] your Office has been requested by WHO to provide such international business service transponder capacity. You requested an advice as to whether it would be possible, under the terms of the 1984 United Nations/INTELSAT Agreement and other relevant instruments, to grant the WHO request and to authorize the proposed use of the space segment capacity by the Corporation, and, if so, under what circumstances or conditions.

General framework

2. The authority of the United Nations to engage in radio broadcasting and to have a telecommunication network may be derived from the approval by the General Assembly in 1946 of a recommendation of the Technical Advisory Committee on Information Concerning Policies, Functions and Organization of the Department of Public Information, as follows:

> "The United Nations should also have its own radio broadcasting station or stations, with the necessary wavelengths, both for communication with Members and with branch offices, and for the origination of United Nations programmes." (General Assembly resolution 13 (I) of 13 February 1946, annex, I, para. 10)

3. Article 39 of the 1982 International Telecommunication Convention (Nairobi)[95] recognized that "the telecommunication operating services of the United Nations shall be entitled to the rights and bound by the obligations of this Convention and of the Administrative Regulations annexed thereto"; and article XVI of the 1947 Agreement between the United Nations and the International Telecommunication Union states:

> "1. The Union recognizes that it is important that the United Nations shall benefit by the same rights as the members of the Union for operating telecommunication services.

"2. The United Nations undertakes to operate the telecommunication services under its control in accordance with the terms of the International Telecommunication Convention and the regulations annexed thereto …"

4. International Telecommunication Union (ITU) resolution No. 50 of 1989, entitled "Use of the United Nations Telecommunication Network for the Telecommunication Traffic of the Specialized Agencies", adopted by the ITU Plenipotentiary Conference (Nice, 1989), "resolved" that "*the United Nations telecommunication network* may carry the traffic of the specialized agencies" (emphasis added) and established certain specific conditions for that purpose. A similar resolution was adopted by ITU in 1994.

5. Amendment No. 1, of 1993, to the 1984 Agreement for the leasing of space segment capacity between INTELSAT and the United Nations reflected the wish of the parties that "space segment capacity leased *for the United Nations telecommunications network* also [should be] available for use by the specialized agencies of the United Nations" (third preambular paragraph of the Amendment, emphasis added), and modified the text of the original Agreement accordingly.

Contract between WHO and the Corporation

6. WHO, a specialized agency linked to the United Nations, is an independent international organization. We understand that the contract between WHO and the Corporation has been concluded directly, without any participation by the United Nations.

7. The text of the WHO/the Corporation contract does not contain any provision explicitly stating or implying that WHO is obliged to provide the Corporation with space segment capacity leased under the United Nations/INTELSAT Agreement. We have been informed by the Office of the WHO Legal Counsel that "WHO and the Corporation had assumed on the basis of prior links using the Corporation's equipment established by the United Nations High Commission for Refugees and the United Nations that establishing a link with INTELSAT in this case was a matter of routine."

8. In a preliminary manner, it should be noted that, as far as the United Nations/INTELSAT Agreement is concerned, there appears to be a substantive difference between UNHCR, which is a part of the United Nations, and WHO, which is not. The implications of this difference are indicated below.

9. The above ITU resolutions authorize the United Nations telecommunication network to carry the traffic of the specialized agencies which wish to use it under certain specific terms. Similarly, the United Nations/INTELSAT Agreement envisages leasing INTELSAT space segment capacity to the United Nations telecommunication network. In other words, the existence of the United Nations network is a precondition for either carrying the traffic of specialized agencies or leasing the capacity from INTELSAT.

10. Accordingly, the United Nations has no right to utilize the space segment capacity for the use of specialized agencies provided by INTELSAT in telecommunications networks or facilities established independently by such agencies from the United Nations. Thus, WHO cannot use the space segment capacity leased to the United Nations under the 1984 Agreement, and the United

Nations cannot authorize such use because this action would be in contradiction with the 1984 Agreement between the United Nations and INTELSAT, as well as with relevant ITU resolutions.

11. In view of the foregoing, it is our opinion that the WHO request cannot be granted under the presented circumstances. Of course, under the appropriate circumstances, the United Nations could agree with WHO to provide such services under the relevant ITU resolutions through a United Nations telecommunication network comprising United Nations-owned facilities or facilities provided to the United Nations under contract. Naturally, the degree to which any such arrangement would serve the interests of the United Nations would be an important consideration. In any event, WHO and its contractor are free to seek the assistance of the appropriate [name of State] authorities in obtaining space segment capacity from INTELSAT, or any other source, for whatever length of time is deemed appropriate.

13 July 1995

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

FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

1. Question of European Community Membership in a joint body established by FAO and WHO

Communication from the Legal Counsel of FAO

…As a member of FAO, the European Community (EC) has a right to become a member of the Codex Alimentarius Commission, which is a body established jointly by FAO and WHO under, in FAO's case, article VI.1 of the FAO Constitution. Article II of the Statutes of the Codex Alimentarius Commission, however, indicates that membership of the Commission "shall comprise such of those nations" (Member Nations and Associate Members of FAO and WHO) "as have notified the Director-General of FAO or of WHO of their desire to be considered as Members". In view of the issues that arise through membership by both Member Nations and Member Organizations (regional economic integrating organizations) and the fact that the Codex Alimentarius Commission is a joint body of both FAO and WHO, a number of modifications will need to be introduced in the Statutes and the Rules of Procedure of the Commission, before the EC can take up its membership. This fact was recognized expressly by the Council at its 99th session in June 1991, when considering the question of the amendment of the Basic Texts of the Organization to allow for the admission to FAO membership of regional economic integration organizations (see

report of the 99th session of the Council, June 1991, para. 268).

… The matter of EC participation in the Codex was discussed by the Committee on Constitutional and Legal Matters (CCLM) at its 59th session in September 1992. At that session, the Committee considered that it would not be appropriate to consider renegotiating the status of EC, nor would it be correct to increase the rights of participation of EC in a joint body as compared to the rights which it now enjoys as a member of FAO, given that its capacity to participate in the joint body could only derive from its membership in FAO …

In view of the above, I can answer your queries in your memorandum of 25 January 1995 as follows:

1. The notification does not entail immediate membership of EC in the Codex Alimentarius Commission.
2. The issue of how EC membership would affect the status of the current EC member states that are members of the Commission is a matter which must be settled in the Statutes and/or Rules of Procedure of the Codex Alimentarius Commission and should be settled along the same lines as EC membership of FAO…
3. Until these matters are settled and the relevant amendments to the Rules of Procedure and Statutes are adopted, the status of EC at Codex meetings, including the Committee on Food Import and Expert Inspection and Certification Systems to be held at the end of February 1995, should remain that of an observer …

1 February 1995

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2. Question of a government screening an FAO national programme officer candidate

Note to the FAO Deputy Director-General

You asked for my legal advice regarding the letter from the Principal Secretary of the Ministry of Agriculture in [a Member Nation] in which he states that it is imperative that selected candidates be screened and cleared by the Government. Under article VII of the FAO Constitution, "[t]he staff of the Organization shall be appointed by the Director-General in accordance with such procedures as may be determined by rules made by the Conference." Rule XXXIX.4 of the General Rules of the Organization provides that "… the Director-General shall act in his unfettered judgment in appointing, assigning and promoting staff personnel, and shall not be bound to accept advice or request from any other source."

The above provisions of the Basic Texts would preclude as a general principle acceptance of the [Member Nation's] request that selected candidates be screened or cleared by the Government. In this context, your attention is drawn

to the comments of the Committee on Constitutional and Legal Matters at its 63rd session in September 1994 in which the Committee "underlined the independence of national professional officers (NPOs) from the influence of any authority external to the Organization, both in their recruitment and in the performance of their duties, was a fundamental condition for the new system."

It is to be noted in this connection that the Agreement for the FAO representation in [the Member Nation] provides that both the FAO representative and his expatriate staff must be cleared by the Government before assignment to the representation. However, this clearance procedure refers only to *expatriate* staff who will normally already be FAO staff members and can be assigned in any country in the world. NPOs, on the other hand, can only be assigned to the country of which they are a national. To accept the principle that the national Government can clear the "assignment" of an NPO would therefore amount in practice to requiring clearance by the national Government for the "appointment" of an FAO staff member. If the principle were to be conceded on this point to the Government of [the Member Nation], it would need to be conceded to all Governments in which NPOs are to be appointed. It would in practice sound the death knell of the independence of the international civil service in so far as NPOs are concerned.

21 March 1995

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3. Question of an associate member of FAO being represented at meetings by its metropolitan Power

Letter to the Permanent Representative of a member nation

Please refer to your letter of 10 March 1995 in which you ask for my advice as to whether an Associate Member of FAO could, if it wished, be represented at meetings of FAO Committees or under conventions or agreements by its metropolitan Power. Mr. Stein has already drawn your attention to article III.3 of the Constitution, which provides that "No delegate may represent more than one Member Nation or Associate Member."

I can confirm that this provision, although it appears under the heading "Conference", is considered to be of a general application. It is therefore my opinion that it would not be possible from a legal point of view for an Associate Member of FAO to ask another country, or in this case its own metropolitan Power, to represent it at meetings of the Organization. I believe that the same principle would hold for meetings of bodies established under article XIV of the FAO Constitution in the absence of any provision in those agreements specifically allowing for such representation.

24 March 1995

Note

[1]United Nations, *Treaty Series*, vol. 962, p.89.

[2]Ibid., vol. 1, p.15.

[3]Ibid., vol. 195, p. 2; vol. 1209, p. 32; vol. 1281, p.297. Se also International Telecommunication Convention concluded at Nairobi on 6 November 1982 (not yet published) and Constitution and Convention of the International Telecommunication Union concluded at Geneva on 22 December 1992 (not yet published).

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

[5]Ibid., vol. 500, p. 223.

[6]A/CONF.67/16.

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

[8]Document PAH/INF.78/2

[9]*Yearbook of the International Law Commission, 1958*, vol. II, p. 96.

[10]United Nations, *Treaty Series*, vol. 1513, p.293.

[11]Ibid., vol. 1522, p.3.

[12]*Official Records of the Economic and Social Council, Second Year: Fifth Session, Supplement No. 6*, Part II, document E/491, chap. III, pp. 17-23.

[13]United Nations, *Treaty Series*, vol. 828, p. 107 and p. 305.

[14]See DP/1994/52.

[15]DP/1994/62.

[16]The same activities, as defined in DP/1994/62, are also reproduced in the joint report of the Administrator and the Executive Director (DP/1995/6) to the Executive Board, dated 22 November 1994.

[17]DP/1994/62, para. 20.

[18]See para.1, decision 94/32, see also decision 94/12, paragraph 1, which reads: "*Takes note* of the Secretary-General's intention to strengthen the coordinating and central funding roles of the United Nations Development Programme in accordance with General Assembly resolution 47/199 and other resolutions and to ensure that the Office for Project Services *will undertake implementation rather than funding activities*…" (emphasis added)

[19]Paragraph 3 of Board decision 94/12 reads: Stresses the importance of OPS continuing to operate within the United Nations development system and not becoming a new agency.

[20]DP/1995/7 of 23 November 1994, and DP/1995/7/Add.1 of 22 November 1994.

[21]The General Assembly, by its resolution 1240(XIII) of 14 October 1958, entitled, Establishment of the Special Fund, authorized the Governing Council to approve financial regulations for the Special Fund (the predecessor of UNDP). It provided that: "The Special Fund shall be governed by financial regulations consistent with the financial regulations and policies of the United Nations. The financial regulations for the Fund shall be drafted by the Secretary-General of the United Nations, in consultation with the Managing Director, for approval by the Governing Council, after review by the Advisory Committee for Administrative and Budgetary Questions."

[22]See Executive Board decision 94/12, para. 4, which reads: "*Underlines* the need to enhance further role of the Executive Board in providing overall policy guidance for and supervision of OPS".

[23]See Executive Board decision 94/12, para. 6.

[24]It appears that the only exclusions from that delegation are the authority to award compensation in the event of death, injury or illness attributable to the performance of official duties, and the authority to interpret the staff regulations and rules in cases involving issues of general policy.

[25]See General Assembly resolution 1448 (XIV of 5 December 1959 and 1586 (XV) of 20 December 1960 authorizing the Secretary-General "to seek short term loans from Governments," as well as resolution 302 (IV) of 8 December 1949.

[26]See General Assembly resolution 1739 (XVI) of 20 December 1961.

[27]Geneal Assembly resolution 1448 (XIV), para. 4.

[28]See, for example, General Assembly resolutions 31/197 of 22 December 1976, 32/73 A of 9 December 1978, 34/222 of 20 December 1979 and 35/216B of 17 December 1980.

[29]General Assembly resolution 35/216 B of 14 December 1980.

[30]It should be noted that the Administrative Rules of the Pension Fund specify, in subparagraph (e) of the introduction thereto, that "for the purpose of article 18 of the Regulations," which provides that "the assets shall be the property of the Fund and shall be acquired, deposited and held in the name of the United Nations," the phrase "in the name of the United Nations … shall include the holding of assets in the name of a nominee or nominees of custodians for the United Nations". Thus the Pension Board has, by administrative rule, delegated responsibility for the holding of the assets of the Fund. This, however, cannot be seen as authority for a delegation of responsibility for investment of the assets of the Fund.

[31]See, e.g., Restatement (Second) Agency § 18.

[32]See, e.g., Restatement (Second) Trusts § 171.

[33]See, e.g., Restatement of Trust (Prudent Investor Rule) § 227.

[34]For example, in the United States, the conduct of trust business by national banks is regulated by the Board of Governors of the Federal Reserve System and the Comptroller of the Currency. Regulations issued by the Comptroller of the Currency require that national banks administering trusts maintain separate trust departments and further provide for the supervision of such departments by the directors of the bank as well as for the appointment of a trust investment committee and of an executive officer and competent legal counsel. See 12 C.F.R. §§9.1 et seq. See also, e.g., *Restatement (Second) Trusts* § 171, comment e.

[35]See, for example, *Restatement Trusts (Prudent Investor Rule)* §227, comment j.

[36]Idem, comment j to section 227 of *Restatement Trusts (Prudent Investor Rule)* gives an example of a delegation of fiduciary responsibility by trustees to investment agents who possess the necessary skill and expertise for carrying out a particular investment strategy with which the trustees or their subordinates are unfamiliar. The comment indicates that, assuming the investment strategy itself was prudent and worthwhile for the beneficiaries, then if the strategy were to be pursued, prudent delegation of responsibility for engaging in such an investment strategy would be consistent with principles of agency and trusts,. However, even where were such delegation is justified, the comment goes on to note that prudent delegation "requires informed careful planning and arrangements" because "in undertaking to delegate, [fiduciaries] must have, or must obtain through the advice and assistance of others, the skill and time necessary to make a competent, careful evaluation of potential [investment] managers … and to monitor their performance of their duties". See also, e.g., *Restatement Trusts (Prudent Investor Rule)* §227, comment j.

[37]By way of analogy, these general rules prohibiting unreasonable delegation of investment decision-making responsibilities are reflected in ERISA section 402(c)(3) and 403(a)(2). See also *Uniform Management of Institutional Funds* Act § 5. See also, for example, *Restatement Trusts (Prudent Investor Rule)* §227, comment j.

[38]See General Assembly resolution 248(III) of 7 December 1948: article 23 of the Regulations, as promulgated thereunder, established a Secretary of the Pension Board as "exercising functions under the authority of the Board". The Secretary-General's role over the Secretary of the Pension Board was limited to the power of appointment only. Article 22 thereof established the Pension Board, and related articles of those Regulations placed the responsibility for administration of the Fund under the authority of the Pension Board.

[39]See articles 19 and 20 of the Regulations.

[40]See article 4 and 7 through 15 of the regulation. There is nothing in the history of the General Assembly action concerning the Pension Fund Regulations to suggest the Assembly envisioned a dual role to be played by the Secretary of the Pension Board and the Secretary-General with respect to the administration of the Fund. The Pension Board, with the assistance of the Secretary of the Pension Board, was given responsibility for administering the Fund while the Secretary-General, with the assistance of the Investments Committee, was given responsibility for administering the investments of the assets of the Funds.

[41]See article 7(a) and (b) of the Regulations.

[42]Of course the Secretary, the Deputy Secretary of the Pension Board, as well as the staff appointed to assist them, are appointed as United Nations staff members and are, accordingly, subject to the authority of the Secretary-General in all matters not specifically governed by the Regulations.

[43]Genral Assembly resolution 48/218 B of 29 July 1994.

[44]Secretary-General bulletin ST/SGB/273 of September 1994.

[45]General Assembly resolution 48/218 B, para. 5(c)(iv).

[46]ST/GB/273, para. 17.

[47]ST/SBG/273, para. 18.

[48]The definitions will be applied generally to officials or others in activities under the authority of the Organization taking into account, as necessary and appropriate, the different status of such officials and others or their relationship to Organization. Generally, "others" engaged in activities under the authority of the United Nations will be contractors, either corporate or individual, whose relationship to the Organization will be governed by a contract that will, at least in part, define the scope of the organization's remedies for activities within these definitions.

[49]In particular, article I of the United Nations Staff Regulations and staff regulations 4.1 and 4.2. In essence, staff are primarily assessed in accordance with the Charter-imposed duty to maintain the highest standards of efficiency, competence and integrity, rather than by having done a prohibited act.

[50]ST/IC/82/13 of 26 February 1982; section 1030 of the United Nations Personnel Manual (vol. I).

[51]The procedures dealing with misconduct are described in chapter X of the Staff Regulations and Rules, while the procedure for dealing with unsatisfactory performance are set out in chapter IX of the Staff Regulations and Rules and in ST/AI240/Rev.2 of 28 November 1984.

[52]Pursuant to paragraph 7 of its resolution 48/218 B, the General Assembly requested the Secretary-General 'to ensure that procedures are … in place that protect individual rights, the anonymity of staff members, due process for all parties concerned and fairness during investigations". These procedures are detailed in paragraph 18 of the Secretary-General's bulleting ST/SGB/273.

[53]Document A/C.5.795.

[54]A/AC.237/18 (Part II)/Add.1 and Corr.1.

[55]United Nations, *Treaty Series*, vol.1522, p.3.

[56]United Nations, *Treaty Series*, vol. 1342, p. 137 and document CCW/CONF. I/16 (Part I).

[57]Document CCW/CONF.I/GE/23, annex III.

[58]A/CONF.95/8 and A/CONF.95/15.

[59]United Nations, *Treaty Series*, vol. 1342, p. 137.

[60]*Official Records of the United Nations Conference on the Law of Treaties, Second Session, Vienna, 9 April—22 May 1969* (United Nations Publication, Sales No. 70.V.6), Documents of the Conference, p.38.

[61]Ibid. p.41.

[62]A/49/375.

[63]A/49/501, para.31.

[64]A/46/185 and Corr.1, annex.

[65]Model Agreement, para.14.

[66]These Guidelines are mission-specific and are issued for every peacekeeping operation by the Department of Peacekeeping Operations. Owing to the fact that every peacekeeping operation has special compositional features and operational movements, the Guidelines have to be adapted to suit the particular operational requirements of each peacekeeping mission. However, the provisions concerning the general administrative and financial arrangements remain the same in every case.

[67]United Nations document A/46/185 and Corr.1, annex, para.20.

[68]It should be noted that the General Assembly during the current session consider the Secretary-General's report on the "effective planning, budgeting and administration of peacekeeping operations" (A/48/945) which, in paragraph 82 to 84, discusses alternatives to the current procedures for determining reimbursement to Member States for contingent-owned equipment. The outcome of the Assembly's consideration of the Secretary-General's proposals may well affect the reimbursement obligations of the United Nations to Governments for contingent-owned equipment.

[69]See the Annex to the Guidelines, entitled "General guidelines on the basis of which reimbursement is calculated for peacekeeping operations" which provide, in relevant part, that "maintaining the serviceability of the equipment, including repairs, provisions of spare parts, etc. rests with the United Nations, from the time of its delivery to the peacekeeping operations service".

[70]Third-party insurance does not, of course, relate to the damage to the contingent-owned equipment and covers only the risk of injury and/or property damaged incurred by third parties.

[71]See article 4.3 and 8.1 of the Standard Aircraft Charter Agreement.

[72]See section 5.03 of the Procurement Manual for the Purchase and Transportation Service.

[73]We understand that these payment terms are the same for commercially chartered aircraft and for aircraft provided under Letters of Assist.

[74]In resolution 49/233 A the General Assembly requested the Secretary-General to present concrete proposals on possible revisions to the current arrangements for compensation for death or injury sustained by contingent troops in the service of United Nations peacekeeping operations based on the principles of:

(a) Equal treatment of Member States;

(b) Compensation to the beneficiary that is not lower than reimbursement by the United Nations;

(c) Simplification of administrative arrangements to the extend possible;

(d) Speedy settlement of claims for death an disability;

and requested concrete proposals for each of the following options:

"(a) Current arrangements with a reasonable minimum level of compensation payable for death and disability;

"(b) A system of compensation featuring standardized rates of reimbursement for death and disability;

"(c) A uniform global insurance scheme to cover all troops;

"(d) The proposals submitted by the Secretary-General in paragraph 71 of his report [i.e., the current policy used for military observers, whereby reimbursement is limited to twice the annual salary excluding allowances, or $50,000, whichever is greater.]".

[75]See for example, staff regulations 12.2, 12.3 and 12.4 (providing that staff rules promulgated in furtherance of staff regulations are subject to modifications or deletions by the General Assembly); financial rule 114.4 (providing that the Financial "Rules may be *amplified* by administrative instructions by the Under-Secretary-General for Administration and Management " (emphasis added); financial rule 114.5 (providing that Financial "Rules may be amended by the Secretary-General in a manner consistent with the Financial Regulations").

[76]Section 201 of the United States Code.

[77]17 USC § 201(b).

[78]17 USC § 101. We have not conducted a comparative analysis of other legal systems to determine whether such a "work made for hire" rules exists, but we suspect that the same rule or a similar rule applies to original works of authorship made by an employee in the regular course of his or her employment.

[79]17 USC § 201.

[80]See *Real Estate Data, Inc. v. Sidewell Co*., 809 F.2d 366 (7th Circ. 1987), aff'd. 907 F.2d 770, *cert. Denied* 498 U.S. 1088 (an agreement to the contrary, copyright belongs to the person commissioning the work, not the person creating the work, even in cases where the person creating work is an independent contractor).

[81]See for example *Aymes v. Bonelli*, 980 F.2d 857 (2dCir. 1992) (where computer programme required high degree of skill to create, programmer was independent contractor, and his program required high degree of skill to create, programmer was independent contractor, and his programme was not "work for hire" under the Copyright Act).

[82]See 17 USC § 201 (b) (parties may vary "work made for hire" ownership of copyright by means of "a written agreement signed by them"); cf. also 17 USC § 201(d)(1) ('[t]he ownership of a copyright may be transferred in whole for in part by any means of conveyance or by a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession").

[83]United Nations Form P. 104.

[84] Incidentally, I wonder whether the development of "dialogue between the leaders of Governments and the business community" (which, as I understand, is the main objective of the Foundation) is indeed "of *primary* concern to the United Nations".

[85] According to our files, this Office was not consulted when the decision to provide support for the Bucharest meeting was taken.

[86] A/48/572

[87] By that resolution the General Assembly requested the Secretary-General to make proposals to the General Assembly on:

[88] A/49/418, para. 32(d)

[89] For example, that the General Assembly consider recommending to Member States that they: (*a*) extend to the United Nations and to other Member States assistance in investigating and securing criminal prosecution of individuals who defraud or attempt to defraud the United Nations; and (*b*) consider enacting legislation making fraud and attempted fraud against the United Nations subject to the jurisdiction of national courts and punishable by appropriate penalties (A/49/418, para. 32 (g)).

[90] See Administrative Tribunal Judgment No. 679: *Fagan*, at para. XI

[91] See rules 36 and 37 of the rules of procedure of the ICSC.

[92] See rule A.9 (b) of the rules of procedure of UNJSPB

[93] See Annex 6 to the Convention on International Civil Aviation, Part I, chap. 4, para. 4.2.1.1; United Nations, *Treaty Series*, vol. 15, p. 295.

[94] United Nations, *Treaty Series*, vol. 1365, p. 307 (Agreement). Amendment unpublished.

[95] United Nations, *Treaty Series*, vol. 195, p. 2; vol. 1209, p. 32; vol. 1281, p. 297. See also International Telecommunication Convention, concluded at Nairobi on 6 November 1982 (not yet published), and Constitution and Convention of the International Telecommunication Union, concluded at Geneva on 22 December 1992 (not yet published).