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

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

Chapter VI

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

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

COMMERCIAL ISSUES

1. USE OF UNITED NATIONS NAME AND EMBLEM BY NATIONAL UNITED NATIONS ASSOCIATIONS AND THEIR LOCAL AFFILIATES — GENERAL ASSEMBLY RESOLUTION 92 (I) OF 7 DECEMBER 1946

Memorandum to the Senior Legal Officer, Legal Liaison Office in Geneva

1. This is in response to your 14 July 1997 memorandum on the above-referenced subject to the Legal Counsel, which was referred to me for response. You seek advice in connection with a communication from the World Federation of United Nations Associations (WFUNA), requesting clarification as to the use of the United Nations emblem by local United Nations Associations.

The United Nations emblem

2. 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. Furthermore, that resolution expressly prohibits any use of the United Nations name and emblem in any other way without the authorization of the Secretary-General and recommends that Member States take the necessary measures to prevent the use thereof without the authorization of the Secretary-General. The United Nations name is also protected by the national laws of some States and by article 6 ter, section (1) (*b*), of the Paris Convention for the Protection of Industrial Property, revised in Stockholm on 14 July 1967.

Guidelines for the use of the United Nations emblem by United Nations Associations

3. Based on the limitations placed by General Assembly resolution 92 (I) and the practices and policies of the Organization, the Organization developed guidelines for considering cases involving use of the United Nations emblem by outside bodies. As far as United Nations Associations are concerned, the guidelines made a distinction between United Nations Associations with national and local coverage. The relevant section of guidelines reads as follows:

"I. *United Nations Associations*

"(*a*) United Nations Associations with national coverage *may be permitted* to use the United Nations emblem, side by side with the national insignia of the country concerned, on stationery and publications.

"(*b*) United Nations Associations with local coverage (cities, towns, boroughs, counties, universities, etc.) *may be permitted* to use the emblem. However, in these cases, the emblem should not be placed side by side with the insignia of the local body. The emblem should appear quite separately, and some distance away from the insignia of the local body, with the words 'Our hope for mankind' placed below the emblem." (emphasis added)

Current use of the United Nations name and emblem by the World Federation of United Nations Associations

4. As was correctly stated in the WFUNA letter to you, WFUNA was authorized by the United Nations to use the United Nations emblem with the acronym "FMANU/WFUNA" around the globe, keeping the olive branches on the sides (hereinafter "WFUNA emblem"). However, it was also stated that WFUNA "affiliates" have been using the WFUNA emblem, "with their acronyms", since WFUNA received the authorization. It is not clear what is specifically meant by "affiliates" in this context. If those "affiliates" are merely local officers of WFUNA in particular countries, i.e., they are part of WFUNA, then there would be no legal objections against their using the WFUNA emblem.

5. If, however, by "affiliates" WFUNA means local United Nations Associations, then their use of the emblem, without the express authorization of the United Nations, is inappropriate. It must be unequivocally clear that the authorization granted to WFUNA to use the WFUNA emblem should in no way be interpreted as a delegation of the authority which, according to General Assembly resolution 92 (I), resides in the Secretary-General to authorize the use of the United Nations name and emblem by entities outside the United Nations system. Therefore, mere association of United Nations Associations (national or local) with WFUNA does not imply that the authorization granted to WFUNA to use the United Nations emblem is automatically extended to all its members. United Nations Associations, like any other organization, should request authorization to use the United Nations emblem from the Organization.

6. Additionally, WFUNA informed you that the organization's Constitution does not allow it to recognize more than one United Nations Association "from any state or territory" and that problems had arisen due to local laws protecting the freedom of association. He informed you that local groups can possibly form "United Nations Associations depending on the local law regarding registration of Associations". While local laws which protect the freedom of association in every country would allow organizations to pursue the same goals as those of the United Nations Associations (i.e., support the activities of the United Nations), local laws cannot authorize the use of the United Nations name or emblem by those newly created bodies, which use must be authorized by prior authorization of the Organization. Moreover, as indicated in paragraph 2 above, General Assembly resolution 92 (I) requested Member States to enact legislation to prevent the unauthorized use of the name, emblem or initials of the United Nations. Therefore, any organization using the name, emblem or initials of the United Nations without authorization from the Secretary-General is doing so in violation of international and, possibly, national laws.

7. WFUNA asked specific questions as to whether a United Nations Association "legally established in a country" can use the United Nations emblem even if WFUNA cannot admit it as a member since it recognizes only one United Nations Association from any State or territory. In response to that question, it should be emphasized that such local United Nations Associations must request and receive authorization from the United Nations to use the United Nations name in their titles. Similarly, such entities would need a separate and prior authorization from the United Nations to use the United Nations emblem. If any of these local "United Nations Associations" have obtained authorization to use the United Nations name and/or emblem, it does not matter that such local United Nations Association cannot be admitted as a member of WFUNA.

8. As to the second question posed by WFUNA (whether a United Nations Association which is no longer affiliated with WFUNA can continue to use the United Nations emblem), the response is in the affirmative, provided that this United Nations Association received a proper authorization from the United Nations to use the emblem. As stated in paragraph 4 above, the authority to grant authorization to use the United Nations emblem resides in the Secretary-General. Therefore, a United Nations Association that has been duly authorized by the Secretary-General to use the United Nations emblem does not automatically lose its authorization to use the emblem simply because it is no longer associated with WFUNA.

9. Given the importance that the Organization attaches to the use of its name and emblem, we would appreciate any information that WFUNA may have on the use of the name and emblem by United Nations Associations inconsistent with the advice provided above.

13 January 1998

PERSONNEL

2. Reimbursement of income taxes for staff members of dual nationality—Permanent United States residents—Visa status of staff members—Staff regulation 3.3 (*f*)

Memorandum to the Deputy Chief, Income Tax Unit/Office of Programme Planning, Budget and Accounts

1. Please refer to your memorandum dated 4 November 1997 requesting our advice regarding two issues: First, you seek clarification regarding the eligibility for reimbursement of income taxes for staff members of dual nationality where one nationality is United States but another nationality has been recognized by the Organization under the Staff Regulations and Rules and, more specifically, staff rule 104.8(*a*), which provides that "in the application of the Staff Regulations and Staff Rules, the United Nations shall not recognize more than one nationality for each staff member". Secondly, you seek clarification as to whether the Organization must take specific action to encourage permanent residents of the United States to sign the "waiver" or relinquish their permanent resident status and obtain a G-4 visa.

A. *First issue*

2. Regarding the eligibility for reimbursement of income taxes of staff members with dual nationality where one nationality is United States but the other na-

tionality has been recognized by the Organization for administrative purposes, you will note that staff regulation 3.3(*f*) provides as follows:

> "(*f*) Where a staff member is subject both to staff assessment under this plan and to national income taxation in respect of the salaries and emoluments paid to him or her by the United Nations, the Secretary-General is authorized to refund to him or her the amount of staff assessment collected from him or her provided that:
>
> (i) The amount of such refund shall in no case exceed the amount of his or her income taxes paid and payable in respect of his or her United Nations income;
>
> (ii) If the amount of such income taxes exceeds the amount of staff assessment, the Secretary-General may also pay to the staff member the amount of such excess;
>
> (iii) Payments made in accordance with the provisions of the present regulation shall be charged to the Tax Equalization Fund;
>
> (iv) A payment under the conditions prescribed in the three preceding subparagraphs is authorized in respect of dependency benefits and post adjustments, which are not subject to staff assessment but may be subject to national income taxation."

3. Staff regulation 3.3(*f*) implements the general principle of equality of treatment among all staff members with regard to tax reimbursement. It answers the question you raise.

B. *Second issue*

4. The policy regarding the visa status of staff members was established by the General Assembly in 1953 and is still valid. It is presently governed by administrative instruction ST/AI/294 of 16 August 1982, entitled "Visa status of non-United States staff members serving in the United States". The General Assembly then established the policy that "persons in permanent resident status should in future be ineligible for appointment as internationally recruited staff members unless they are prepared to change to a G-4 visa status". That policy (concerning staff members recruited for posts in the Professional and higher categories) was adopted because it was considered that "a decision to remain in permanent resident status in no way represents an interest of the United Nations. On the contrary, to the extent (if any) that it may weaken existing ties with the country of nationality, it is an undesirable decision" (ST/AI/294, para. 19).

5. In other words, internationally recruited staff members who have permanent resident visa status in the United States are generally required to renounce such status and to change to G-4 visa status upon appointment: internationally recruited staff members who seek to change to permanent resident status shall generally not be granted permission by the Secretary-General to sign the waiver of rights, privileges and immunities required by the United States Government for the acquisition or retention of permanent resident status (ibid.).

6. The only exceptions to this established policy are listed in paragraph 20 of ST/AI/294, which provides:

> "Exceptions to the policy that internationally recruited staff members must apply for G-4 visa status and give up their permanent resident or other visa status in the United States on appointment may be made in cases of:

(*a*) Stateless persons;

(*b*) Newly appointed staff members who have applied for citizenship by naturalization, when such citizenship will be granted imminently;

(*c*) General Service staff members previously authorized to retain permanent resident status, on promotion to the Professional category; and

(*d*) Staff members in the General Service, Manual Workers and Security Service categories"…

7. The procedures regarding the staff members in the General Service, Manual Workers and Security Service categories wishing to retain their permanent resident visa status are described in paragraphs 21 and 22 of the same administrative instruction.

27 January 1998

3. Conditions of service of locally recruited staff—Nationally recruited project professional personnel

Memorandum to the Chief, Legal Section, Office of Human Resources, United Nations Development Programme

1. This refers to your memorandum of 17 September 1997, responding to our memorandum of 12 September 1997, seeking further advice concerning the conditions of service of locally recruited staff in [a member State].

2. You have indicated that in addition to locally recruited staff appointed under the 100, 200 or 300 Series of the Staff Rules, UNDP has

> "other categories of locally recruited staff who do not fall into any of those above-mentioned categories. The French text of the note verbale refers to "*recrutements à niveau local*"/"*agents locaux*". Due to their contractual nature, these local agents are considered local staff without falling into any one of the four categories mentioned in your legal opinion of 12 September 1997. Enclosed, please find a copy of the model contract applied by UNDP for this category of agents."

From the documents attached to your memorandum, we understand that you refer to nationally recruited project professional personnel (NPPP). You seek our advice on whether NPPP staff are subject to the requirements under the [State's] legislation, which is set out in the note verbale of 3 June 1997 from the Ministry of Foreign Affairs of [the State].*

3. As you are aware, the NPPP category was developed by UNDP for use essentially by Executing Agencies, and NPPP staff are experts and consultants who

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* As set out in my 12 September 1997 memorandum, the note verbale dated 3 June 1997 from the Ministry of Foreign Affairs of [State] advises that [State] legislation establishes the following requirements for locally recruited staff:

(*a*) Such staff must be engaged through a contract which complies with the labour law;

(*b*) Priority must be given to nationals over other nationals;

(*c*) The organization must pay the employer contribution to the national social security system for locally recruited staff;

(*d*) At the end of each year, a list of locally recruited staff must be provided to the Ministry of Foreign Affairs, indicating their nationality, the date of their recruitment and their social security number.

are nationals of the host country and who are recruited locally to work for a specific UNDP-funded project in their own country. NPPP staff are not issued with a Letter of Appointment and do not, therefore, have the status of staff members of the United Nations and they are thus not covered by the United Nations Staff Regulations and Rules. Pursuant to the UNDP Programme and Projects Manual ("the Manual"), the rights, duties and benefits of NPPP staff are governed by the terms and conditions of contractual arrangements used to engage their services, which are either a reimbursable loan agreement with a releasing organization or a service contract directly with individual NPPP staff (see Manual, sect. 30400(1.2)(3) and (5.1)(1)). The Manual also provides that the clearance of the host Government should be obtained for the appointment of all NPPP staff (see Manual, sect. 30400(5.2)(*d*)(l)).

4. Under a reimbursable loan agreement, which is the preferred contractual arrangement, an executing agency enters into a contract with a releasing organization which makes available the services of an NPPP staff for the purpose of carrying out functions in a UNDP-financed post, and the releasing organization is reimbursed by the executing agent for the cost of the services provided by the NPPP staff (see Manual, sect. 30400(5.3)(*a*)). There is thus no direct contractual relationship between the NPPP staff; the executing agency under this arrangement and the NPPP staff do not receive any payment directly from the executing agency or UNDP and their conditions of service are established by the releasing organization (see Manual, sect. 30400(5.3)(3) and (1.2)(3)). The model reimbursable loan agreement attached to the Manual expressly provides that the releasing organization assumes all legal and financial obligations for NPPP staff (see article VI of the model reimbursable loan agreement). Accordingly, the releasing organization has the responsibility to meet any requirements under local laws in respect of NPPP staff engaged under a reimbursable loan agreement.

5. NPPP staff engaged under a service contract arrangement have a direct contractual relationship with the executing agency. However, they are not staff members of the United Nations, but independent contractors, and they, like individuals engaged under the Special Services Agreements, must comply with local law on independent contractors and pay appropriate taxes and social security contributions (see para. 12 of my 12 September 1997 memorandum). In that regard, the model service contract attached to the Manual provides that NPPP staff engaged under a service contract are responsible for their health insurance and pension plans (see article III of the model service contract). It should be noted, however, that pursuant to the Manual, participation in health insurance and pension plans is taken into account in determining the amount of total remuneration to NPPP staff under a service contract (see Manual, sect. 30400(6.2)(*c*)(3)). In addition, the Manual provides that the levels of remuneration for all NPPP staff are established by taking into account prevailing compensation for comparable functions in the host country and the host Government is consulted on the levels of compensation offered to NPPP staff (see Manual, sect. 30400(6.2)).

6. Pursuant to the Manual, all compensation payments should be made directly to individual NPPP staff concerned and not on their behalf to other entities, but exceptions to this may occur "when, in accordance with local labour laws, payments for social security must be made directly by the employer" (Manual, sect. 30400(6.2)(*c*)(3)). Therefore, if the [State] legislation described in the note verbale of 3 June 1997 would require the Organization to make employer contributions *directly* to the national social security system in respect of NPPP staff engaged under a service contract, it would appear that the Organization would have to consider

establishing this arrangement subject to the fact that the amount of such direct payment would be deducted from the amount of remuneration to the NPPP staff. Your Office may therefore wish to seek clarification in this regard from the Ministry of Foreign Affairs.

20 February 1998

4. Status of United Nations Volunteers—Article 105, paragraph 1, of the Charter of the United Nations

Memorandum to the Chief, Legal Section, Office of Human Resources, Bureau of Planning and Resources Management, United Nations Development Programme

1. This is with reference to your memorandum of 10 March 1998 enclosing a letter dated 26 February 1998 from the United Nations Development Programme Resident Representative a.i. addressed to you, with attachments. The Resident Representative brings to our attention a number of the problems experienced by United Nations volunteers and the UNDP mission in a Member State, and seeks advice there. We have the following comments.

2. According to the Resident Representative, the Member State's authorities have: (*a*) required that a work permit be obtained by United Nations volunteers for a fee of approximately US$ 100.00, prior to their arrival in the country; (*b*) required that volunteers pass an examination to obtain the appropriate medical licence; (*c*) required that volunteers apply for a special visa which would also be issued for a fee. United Nations volunteers who do not comply with these conditions are considered to be working illegally in the country, and they might be subject to deportation.

3. From the inception of the concept of volunteers, these individuals have been considered by the Organization, and generally recognized by the Member States, as *international civil servants*. As early as 1961, the Economic and Social Council, by its resolution 849 (XXXII), of 4 August 1961, approved principles governing the use and assignment of volunteer technical personnel. These principles, inter alia, stated that "the acceptance of a volunteer will confer upon him [her] the legal status of an international civil servant and both offering and receiving countries shall undertake to respect this status".

4. This status is characterized by the impartiality and independence of United Nations volunteers. The assignment of United Nations volunteers is governed solely by the United Nations system and the scope of their activity is confined to projects assisted by the United Nations system. In view of their special international status, the activities of United Nations volunteers are not subject to the control and authority of recipient Governments. Conditions of service of United Nations volunteers are governed by policies, rules, regulations and decisions of competent United Nations bodies. They are not subject to local laws and regulations. The requirements outlined in paragraph 2 above are not consistent with the foregoing principles.

5. The entitlement of the Organization to a special status and treatment is based on Article 105, paragraph 1, of the Charter of the United Nations, which provides as follows:

> "The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes."

While the Member State has not yet acceded to the 1946 Convention on the Privileges and Immunities of the United Nations ("the Convention"), by virtue of the Standard Basic Assistance Agreement concluded between UNDP and that State on 3 October 1994 (the SBAA), it has agreed to apply the Convention to the United Nations in the context of UNDP projects of assistance (article IX (1)). The SBAA also makes explicit reference to assistance that may be provided by United Nations Volunteers (UNV) (article II (1) (*c*)). Thus, the project "UNV Support to the Health Sector Programme in Rural Areas" is a UNDP-assisted project fully covered by the provisions of the SBAA.

6. Under article IX (6) of the SBAA, United Nations volunteers fall under the category of "persons performing services". In accordance with article IX (4) of the SBAA, unless the Parties otherwise agree in a Project Document, United Nations volunteers are to be accorded the same privileges and immunities as enjoyed by United Nations officials under section 18 of the Convention (however, pursuant to the latter provisions, that regime cannot be extended to nationals of the Member State). Thus, United Nations volunteers, unless they are locally recruited nationals of the Member State, are to be granted, inter alia, immunity from immigration restrictions and alien registration in accordance with section 18(*d*) of the Convention.

7. Work permit and local licence requirements for United Nations volunteers are inconsistent with the United Nations policy and practice in this respect and with the provisions of article X (1) of the SBAA. By the latter, the Government accepted to take such measures as might be necessary to exempt, among others, persons performing services, i.e., United Nations volunteers, "from regulations or other legal provisions which may interfere with operations under this Agreement". Furthermore, the Government agreed to "grant them such other facilities as may be necessary for the speedy and efficient execution of the UNDP assistance". It is obvious that these requirements have an adverse effect on the efficient implementation of the UNV project.

8. The requirement of the issuance of an appropriate visa to United Nations volunteers is in itself unobjectionable. However, a condition that such visas be issued for a fee is unacceptable. Such fees are in the nature of a tax to be reimbursed by the Organization. Since the Organization is immune from taxation, under section 7(*a*) of the Convention, the Government should be requested to reconsider its position in the light of these provisions.

9. The Resident Representative also brings to our attention the question of taxation of UNDP staff and United Nations volunteers who do not hold a United Nations laissez-passer. In accordance with the Convention and applicable guidelines, United Nations laissez-passer are issued to United Nations officials only.* In the past there were, however, exceptions to this policy, dictated mainly by operational needs and concerns for the safety and security of persons in question. The entitlement to exemption from taxation for United Nations volunteers derives from section 18(*b*) of the Convention, which is applicable to them by virtue of article IX (4) of the SBAA. As to UNDP staff members, it should be noted that, in accordance with General Assembly resolution 76 (I) of 7 December 1946, all members of the staff

* We note from section 501(1.8) of Conditions of Service of UN Specialists that they "shall travel under their national passports and shall be responsible for obtaining all the necessary visas".

of the United Nations, with the sole exception of those who are recruited locally and are assigned to hourly rates, are entitled to the privileges and immunities under the Convention, including immunity from taxation. Thus, irrespective whether the individuals in question possess a United Nations laissez-passer or not, the Government is under an obligation to grant them exemption from taxation unless they are recruited locally and assigned to hourly rates or, in the case of United Nations volunteers, unless they are nationals of the Member State.

3 April 1998

5. CONTRACTUAL RELATIONSHIP BETWEEN THE UNITED NATIONS AND INDIVIDUALS WHOSE SERVICES ARE DIRECTLY REMUNERATED BY THEIR GOVERNMENT OR OTHER DONOR ENTITY—COOPERATION SERVICE AGREEMENTS

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

1. This refers to your memorandum of 15 April 1998 requesting our advice on "the proper instrument to be used in cases where personnel are provided for United Nations peacekeeping operations or civilian police programmes on a voluntary basis—and in excess of the authorized strength—by a Government, [which] assumes responsibility to directly and fully remunerate their national for his or her services". Your request relates specifically to the engagement of civilian police observers as that issue was raised in connection with the proposed deployment of an Inspector of the Royal Canadian Mounted Police to United Nations Human Rights Verification Mission in Guatemala (MINUGUA), on which we had advised by our memorandum of 4 March 1998. You indicated that you had consulted the Department of Political Affairs on the matter and attached as an example a copy of an agreement used by the Department in similar cases which, you indicated, has been cleared by the Office of Legal Affairs. As we understand it, such an agreement is concluded between the United Nations and the Government providing the personnel in question and it attaches a United Nations Special Service Agreement (SSA). You seek our advice on whether the same agreement can be used by your Service to engage the services of civilian police observers, like that of the Inspector, for peacekeeping operations or civilian police programmes.

2. You also seek our advice on whether the same agreement, "modified to be concluded between the individual concerned and the Organization", can be used, together with an SSA, in respect of individuals appointed to serve on the International Commission of Inquiry in Rwanda, which was established pursuant to Security Council resolution 1013 (1995) or in other similar instances. Each of these two questions will be addressed in turn below.

I. *Provision of personnel to peacekeeping operations or civilian police programmes: agreement with contributing Government*

3. We have reviewed the agreement that is being used by the Department of Political Affairs ("the Agreement") and note that it is a Cooperation Service Agreement, which was devised by this Office for the purpose of accepting the services of individuals provided by Governments or NGOs on a non-reimbursable basis for a short period of time. Under such an agreement, the individuals are provided at no or minimal cost to the Organization in accordance with United Nations financial regu-

lation 7.2, which provides that voluntary contributions, in cash or in kind, should not involve additional financial liability for the Organization, unless the consent of the appropriate authority is obtained. Since the United Nations is to incur only minimal liability under these arrangements, Cooperation Service Agreements provide that the Government (or NGO) is responsible for ensuring that appropriate arrangements exist (e.g., insurance coverage) to provide for compensation in the event of illness, disability or death of the personnel during their assignment with the United Nations (see Agreement, article I, para. 3). The United Nations will only accept claims for such illness, disability or death which arise from the gross negligence of the officials or staff of the United Nations (ibid., article II, para. 9). Cooperation Service Agreements provide that the Government is responsible for any third-party claims or damages, injury or death as a result of any act or omission by the personnel provided by the Government (ibid., article I, para. 5). Cooperation Service Agreements also provide that Governments will ensure that personnel provided under the agreement and who sign the undertaking will comply with the provisions set forth in the undertaking.

4. With respect to the obligations of the United Nations under these arrangements, Cooperation Service Agreements indicate that the United Nations will provide the personnel with support staff, equipment and other resources necessary to carry out their functions, as well as additional security to the personnel as may be required (see Agreement, article II, paras. 6 and 8). In addition, the United Nations may provide a daily subsistence allowance (DSA) to these personnel (ibid., article II, para. 7).

5. The personnel provided by Governments (or NGOs) under Cooperation Service Agreements are given the status of experts on mission within the meaning of article VI of the Convention on the Privileges and Immunities of the United Nations (see Agreement, article IV). Such personnel are required to sign an undertaking which sets out their duties and obligations during their service with the United Nations, e.g., that they shall perform their functions "under the authority, and in full compliance with the instructions of the Secretary-General or the person acting on his behalf"; that they shall not seek or accept instructions regarding their functions from any Government or from any authority other than the Secretary-General or the person acting on his behalf; and they shall "refrain from any conduct which would adversely reflect on the United Nations and shall not engage in any activity that is incompatible with the aims and objectives of the United Nations or the exercise of [their] functions" (ibid., annex I). The undertaking recognizes that Governments will seek to ensure compliance. We consider that the provisions in the undertaking clearly establish the accountability of the personnel provided to the Secretary-General in respect of their functions under the Agreement.

6. We also consider that the Cooperation Service Agreement is by itself entirely sufficient to govern the terms and conditions of the provision by the Government of these personnel and, in view of the fact that the undertaking discussed above is attached to the Agreement, we consider that there is no need to also attach an SSA to the Agreement. In this respect, we do not believe that an SSA establishes any greater accountability on the part of such personnel than an undertaking. The Agreement used by the Department of Political Affairs is thus suitable for use for the purpose you indicated, subject to the relevant changes made to the text (e.g., deletion of the reference to the provision of equipment). In this connection, we also suggest, but do not insist upon, a change to the title of the Agreement from "Arrangement" to "Agreement".

II. *Provision of personnel to the International Commission of Inquiry in Rwanda and to other similar instances*

7. You have also sought our concurrence to using the Cooperation Service Agreement, together with an SSA, "in respect of personnel appointed to serve on the International Commission of Inquiry in Rwanda or other similar instances where specific Governments are requested to make available officials (specific expertise) for a limited period of time."

8. You have indicated that the individuals serving on the Commission are customarily engaged through an SSA, following the approach taken by the United Nations Special Commission (UNSCOM), and you have emphasized the need that the arrangements for their services would "adequately address such questions as their legal status, accountability, liability, standards of conduct and financial implications and, consequently, facilitate the development of uniform policies within the Organization in this regard."

9. As indicated in paragraphs 3 to 5 above, Cooperation Service Agreements and the undertaking adequately address the issues you raised, such as the legal status, accountability, liability, standards of conduct and financial and administrative matters. In addition, as indicated in paragraph 6 above, the undertaking which is attached to the Agreement obviates the need for also attaching an SSA thereto. Lastly, the conclusion of a Cooperation Service Agreement in all those instances would ensure that the Organization's policies in respect of such personnel and the terms and conditions of their services are uniformly and consistently applied. We are therefore of the view that Cooperation Service Agreements would also be appropriate in the case of the members of the Commission and in other similar instances.

10 August 1998

6. FINANCIAL CONFLICT OF INTEREST—UNITED NATIONS POLICY—CONFLICT OF INTEREST OF STAFF MEMBERS—GENERAL ASSEMBLY RESOLUTION 52/252 OF 8 SEPTEMBER 1998

Letter to the Legal Counsel of the World Health Organization

This is in response to your electronic mail of 16 December 1998, requesting information from several United Nations agencies, funds and programmes concerning their policy on financial conflict of interest of their staff members.

I wish to inform you that in respect of United Nations staff members, new provisions on conflict of interest, as contained in the revised article I of the Staff Regulations, which were adopted by the General Assembly in its resolution 52/252 of 8 September 1998, and the revised chapter I of the 100 series of the Staff Rules, taken note of by the Assembly in the same resolution, will come into effect as from 1 January 1999. The provisions on conflict of interest are set out in new staff regulations 1.2 (*m*) and 1.2 (*n*) and new staff rules 101.2 (*n*) and 101.2 (*o*).

Staff regulation 1.2 (*m*) provides that staff members cannot be actively associated with a profit-making business or other concern if either the concern or the staff member is to profit by the association with the Organization. This regulation essentially reproduces and clarifies the scope of former staff rule 101.6(*b*), which provided that "no staff member may be actively associated with the management of, or hold a financial interest in, any business concern if it were possible for the staff

member to benefit from such association or financial interest by reason of his or her official position with the United Nations."

Staff regulation 1.2 (*n*) establishes a new requirement for financial disclosure in respect of staff members at the Assistant Secretary-General level and above. The procedures for implementing the financial disclosure requirement, including the scope of such disclosure, are under development pursuant to staff rule 101.2 (*o*). The original text of the regulation, as proposed by the Secretary-General to the General Assembly, included language which would enable the Secretary-General to require other categories of staff, e.g., finance and procurement officers, to file financial disclosure statements. However, that language was deleted by the Fifth Committee of the Assembly during its deliberations on this provision. It is envisaged that the financial disclosure requirement for other categories of staff will be proposed again in the context of the preparation of additional rules for those staff, which was requested by the Assembly in resolution 52/252.

The issue raised in your correspondence is addressed specifically in new staff rule 101.2 (*n*). Under this rule, a staff member who is dealing with any matter involving a profit-making business or other concern in which he or she has a financial interest, direct or indirect, must disclose that interest to the Secretary-General and, unless otherwise authorized, he or she must dispose of that interest or formally excuse himself or herself from participating in that matter which gives rise to the conflict-of-interest situation.

Please note that rule 101.2 (*n*) is intended to deal with, inter alia, cases of conflict of interest in which the spouse of a staff member would benefit from a transaction. Indeed, such conflict of interest was found to exist in a case involving a staff member in the United Nations Centre for Human Settlements (Habitat). There, the "conflict-of-interest" transactions between 1991 and 1993 involved a staff member who was in a unit that proposed contracts the main beneficiary of which was her husband, although this was not then officially known by Habitat. The staff member also certified payments to her husband. In late 1993, the Habitat management prohibited further contracts from the staff member's unit with the contractor, which provided the services of, inter alia, the staff member's husband. However, it was not until 1997 that all contracts with the contractor were prohibited following a memorandum issued by the Chief of Administration of Habitat.

The United Nations Office of Internal Oversight Services, which investigated this case in 1997, found that the facts of the case presented a "common-sense" conflict of interest and that the series of contracts and certifications were clearly improper and, moreover, were prohibited by the United Nations General Conditions of Contract, which prohibited indirect benefit to staff from United Nations contracts, and were contrary to modern procurement standards. However, the Office of Internal Oversight Services concluded that there had been no breach of staff rule 101.6 (*b*) (quoted above) because the staff member was not *actively* associated with the business of the contractor and she herself did not hold a financial interest in the firm. The Office of Internal Oversight Services found that rule 101.6(*b*) did not satisfactorily protect the interest of the Organization in the circumstances presented in this case and therefore recommend that the rule be amended. The report of the Office of Internal Oversight Services on this case (A/52/339, annex) was forwarded to the General Assembly by the Secretary-General on 10 September 1997. The case is also discussed in the third annual report of the Secretary-General on the activities of the Office of Internal Oversight Services (A/52/426), dated 2 October 1997.

New staff rule 101.2(*n*) responds to the recommendation of the Office of Internal Oversight Services. In that respect, we believe that the use of the phrase "directly or indirectly" is sufficiently broad to encompass the interest a staff member would have in a contract whereby the United Nations would be employing his or her spouse.

Pursuant to the request of the General Assembly in its resolution 52/252, the revised text of article I of the Staff Regulations and chapter I of the 100 Series of the Staff Rules together with the commentary thereto will be issued as a publication to each staff member. It is expected that this publication will be issued early next year. Please note that the commentary will not constitute part of the "rules", but is intended to assist staff members in understanding their status, basic rights and duties as set out in those provisions. Please also note that while the 100 Series of the Staff Rules apply only to staff appointed under the 100 Series of the Rules, corresponding changes will be made to the 200 and 300 Series of the Staff Rules, so that the provisions similar to staff rules 101.2(*n*) and 101.2(*o*) will be included in the 200 and 300 Series of the Rules.

28 December 1998

PRIVILEGES AND IMMUNITIES

7. Payment of social security contributions by locally recruited employees—Exemption of the United Nations from national security schemes—Article II, section 7 (*a*), and article V, section 18, of the 1946 Convention on the Privileges and Immunities of the United Nations

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

The Legal Counsel of the United Nations presents his compliments to the Permanent Mission of [name of Member State] to the United Nations and has the honour to refer to the position taken by the competent [State] authorities with respect to the payment of social security contributions by United Nations Development Programme for locally recruited employees, be they staff members on fixed-term contracts or consultants engaged on Special Service Agreements.

It has been consistent United Nations practice and policy, pursued by the Organization for more than five decades, that mandatory contributions for social security schemes under national legislation are considered a form of direct taxation on the United Nations and therefore contrary to the Agreement between the Government of [Member State] and the United Nations Development Programme, Standard Basic Assistance Agreement (SBAA), and the Convention on the Privileges and Immunities of the United Nations, to which [the State] became a party in October 1949 without reservation.

Pursuant to paragraph 1, article IX of the SBAA, "the Government shall apply to the United Nations and its organs, including 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" (the 1946 Convention).

Pursuant to the provisions of article II, section 7(*a*), of the 1946 Convention, the United Nations, its assets, income and other property shall be exempt from all direct taxes. Furthermore, pursuant to article V, section 18, subparagraph (*b*) of the 1946 Convention, "officials of the United Nations shall be exempt from taxation on the salaries and emoluments paid to them by the United Nations". It should be noted in this regard that the General Assembly, by its resolution 76 (I) of 7 December 1946, approved "the granting of the privileges and immunities referred to in article V … to all members of the staff of the United Nations, with the exception of those who are recruited locally and are assigned to hourly rates". Thus, locally recruited staff who are not assigned to hourly rates are entitled, irrespective of their nationality or residence status, to exemption from such taxation. The latter applies to staff on permanent as well as fixed-term contracts.

As a party to the 1946 Convention, [the State] is not entitled to make use of United Nations emoluments for any tax purposes. The principal rationale of the immunity from taxation of salaries paid by the United Nations is to achieve equality of treatment for all officials of the Organization, regardless of nationality. These principles were clearly enunciated by the General Assembly in its resolution 78 (I) of 7 December 1946 as follows:

> "In order to achieve full application of the principles of equality among Members and equality among personnel of the United Nations, Members which have not yet completely exempted from taxation, salaries and allowances paid out of the budget of the Organization are requested to take early action in that matter."

The Organization's exemption from national social security schemes is further evidenced by the fact that the United Nations has its own comprehensive social security scheme for United Nations staff members. The establishment of such a scheme is required under regulation 7.2 of the United Nations Staff Regulations, which are established by the General Assembly pursuant to Article 101.1, paragraph 1, of the Charter of the United Nations.

Consultants engaged on Special Service Agreements are deemed to be experts on mission within the meaning of article VI of the 1946 Convention and do not enjoy immunity from taxation on the salaries and emoluments paid to them by the United Nations. Thus, these persons are to comply with any tax obligations imposed by the competent [State] authorities. However, in accordance with the provisions of section 7(*a*) of the 1946 Convention, the United Nations must not be requested to make any contributions, as their employer, for the social security schemes of [the State]. Accordingly, the Organization will not withhold taxes due from such consultants, nor pay any taxes on their behalf.

Any interpretation of the provisions of the 1946 Convention must be carried out within the spirit of the underlying principles of the Charter of the United Nations, and in particular Article 105 thereof, which provides that the Organization shall enjoy such privileges and immunities as are necessary for the fulfilment of its purposes. Measures which might, inter alia , increase the financial or other burdens of the Organization have to be viewed as being inconsistent with this provision as well as with the above-cited provisions of the 1946 Convention.

The Legal Counsel trusts that it is not the intention of [the State] authorities to violate the privileges and immunities of the United Nations or its officials. The Legal Counsel therefore requests that, in the light of the foregoing, the necessary measures will be taken by the competent authorities to resolve this matter expedi-

tiously in a manner consistent with the obligations of the Government of [the State] under the SBAA, the 1946 Convention and the Charter of the United Nations.

12 January 1998

8. Question of whether contractors' personnel could be considered as "experts on mission"—Article VI, section 22, of the 1946 Convention on the Privileges and Immunities of the United Nations

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

1. This memorandum deals with the question which was raised in a meeting on 18 February 1998 between the General Legal Division and the Supply Section of Field Administration and Logistics Division, as to whether in the context of the United Nations Observer Mission in Angola (MONUA), contractors' personnel could be considered as "experts on mission" and whether they would then be exempt from taxes to the local Government.

2. Article VI, section 22, of the Convention on the Privileges and Immunities of the United Nations ("the Convention") deals with the status of "experts on mission". It reads as follows:

> "Experts (other than officials coming within the scope of article V [of the Convention]) 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 …"

Article VI, section 22, of the Convention does not provide any further definition of the term "experts on mission".

3. The consistent practice of the Organization has been to consider as "experts on mission" persons who are charged with performing specific and important tasks for the United Nations, as long as those persons are neither representatives of Member States nor staff members (i.e., officials) of the Organization (see "Applicability of article VI, section 22, of the Convention on the Privileges and Immunities of the United Nations", written statement submitted by the Legal Counsel on behalf of the Secretary-General to the International Court of Justice, para. 59). In its advisory opinion of 15 December 1989, on the applicability of article VI, section 22, of the Convention, the International Court of Justice, inter alia, indicated: "[experts on mission] … have been entrusted with mediation, with preparing studies, investigations or finding and establishing facts". The Court's description conforms in a general sense to the United Nations and State practice.

4. In a memorandum dated 23 June 1995 from the Legal Counsel to the then Assistant Secretary-General for Peacekeeping Operations, the Legal Counsel stated that the functions performed by contractors in the context of United Nations peacekeeping operations are commercial in nature and that, as such, the functions and tasks performed by contractors do not fall within the scope of the understanding of the expression "experts on mission" which has evolved within the Organization and among its Member States. Therefore, the position of this Office has been that contractors do not qualify for the status of "expert on mission".

5. As a general rule, under the Convention, "*[e]xperts on mission enjoy no tax exemption on their official emoluments* … The limited rights they are granted are strictly designed to protect the interests of the Organization in the privacy of its

papers and communications and in preventing any coercion or threat thereof in respect of the performance of the experts' missions." (See "Applicability of article VI, section 22, of the Convention on the Privileges and Immunities of the United Nations", written statement submitted by the Legal Counsel on behalf of the Secretary-General to the International Court of Justice, para. 63). Thus, under the Convention, "experts on mission" are not exempt from taxation.

6. Even if contractors' personnel were considered "experts on mission", they would still *not* be entitled to exemption from taxation.

7. In certain cases, the receiving Governments have granted additional privileges and immunities to "experts on mission". However, this is done on a country-by-country basis in accordance with the applicable agreement with the Government concerned.

8. The Agreement between the United Nations and Angola on the Status of the United Nations Peacekeeping Operation in Angola dated 3 May 1995, as amended by the Agreement of 1 July 1997, ("the status-of-forces agreement for MONUA") provides an exemption from taxation only for "members of UNAVEM III" (United Nations Angola Verification Mission). Contractors' personnel, however, do *not* qualify as "members of UNAVEM III", as they are not part of the civilian, military or police components.

9. To summarize, under the status-of-forces agreement for MONUA, contractors' personnel do not qualify as "experts on mission". Even if they were treated by the United Nations as "experts on mission", they would still not be entitled to any tax exemption on their remuneration.

23 March 1998

9. Military service obligation of locally recruited staff—Appendix C to the United Nations Staff Rules

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

1. This is with reference to your memorandum of 26 June 1998 seeking advice in connection with call-up notices issued by the Government of [a Member State] requiring that five UNHCR locally recruited staff members report for military service. The UNHCR Director of Operations for the region has expressed his concern that refusing to agree to waive the immunity of the staff concerned and thus to permit them to serve could jeopardize the entire mission of UNHCR in the country, with the possible result of "keeping 140,000 … refugees out there in exile".

2. As noted in our 3 June 1998 memorandum concerning the request by the Government of another Member State that UNHCR local staff in that State report for military service, it is vital for the United Nations to insist that States which have ratified the Convention on the Privileges and Immunities of the United Nations abide by its terms, including section 18 (*c*), which exempts staff from military service, since any precedent to agree to permit a State to violate its obligations to exempt officials from national service obligations would be a very unfortunate precedent. Although the Member State in question has not yet acceded to the Convention, it signed a 1993 Agreement relating to the Establishment of a United Nations Integrated Office, and article VII of that Agreement provides that officials of the United Nations shall "be immune from national service obligations".

3. On the other hand, paragraph 1 of Appendix C to the United Nations Staff Rules provides that the Secretary-General may agree to permit staff to serve "in case of a staff member who, with the *advance* approval of the Secretary-General, volunteers for military service or requests a waiver of immunity under section 18(*c*) of the Convention on the Privileges and Immunities of the United Nations" (emphasis added). UNHCR might wish to draw this provision to the attention of the State's authorities and indicate that the same measure would be applied to the corresponding obligation under article VII(*c*) of the Agreement. This would enable State nationals who wished to volunteer to obtain special leave from UNHCR to perform national service.

4. In the present case, the five officials have already been drafted and UNHCR has not, we understand, given "advance" approval to such service. Although the privileges and immunities in the Convention are given to the Organization, and thus the Secretary-General can decide to waive them in the interests of the Organization (and the continued operation of UNHCR in the country is clearly in the interest of the Organization), the Secretary-General is bound by the Staff Rules until they are changed. Appendix C requires advance approval of a request of a staff member as a condition prior to the waiver of immunity. A *retroactive* decision of any nature, except with the consent of the staff or a decision that benefits staff, such as a salary increase, has consistently been held null and void by the United Nations Administrative Tribunal. A decision to waive immunity from national service *without the consent of the staff members concerned* violates Appendix C to the Staff Rules and exposes the Organization to claims for damages, including punitive damages, especially if the staff member is killed or injured. However, if the staff concerned are prepared to volunteer and if UNHCR made a submission explaining in detail why a waiver would be in the interest of the United Nations, the Secretary-General could validly decide to retroactively waive immunity and decide to apply the provisions of Appendix C that deal with staff who have volunteered in advance.

5. We note that Appendix C, as currently drafted, leaves the decision as to whether a staff member wants to volunteer for national service *wholly* in the hands of the staff member, whereas a decision on waiver of immunity is for the decision of the Secretary-General, in the interests of the Organization.

9 July 1998

PROCEDURAL AND INSTITUTIONAL ISSUES

10. Procedures for obtaining observer status with the General Assembly of the United Nations

Facsimile to the Legal Counsel of the South Pacific Regional Environment Programme

Your facsimile of 26 November 1997 to the United Nations Protocol Office concerning the procedures for obtaining observer status with the United Nations was referred to the Office of Legal Affairs. Our comments are as follows:

1. The arrangements for consultative status with the Economic and Social Council are set out in Council resolution 1996/31 of 25 July 1996.

2. With respect to observer status in the General Assembly, neither the Charter of the United Nations nor the rules of procedure of the General Assembly address the question of observers. In practice, however, the General Assembly has adopted

resolutions according observer status to various intergovernmental organizations. The first step is for a Member State or States to request the inclusion of an appropriate agenda item on the relevant rules; the request must be accompanied by an explanatory memorandum and, if possible, by basic documents or a draft resolution.

3. The General Committee of the General Assembly then reviews the request and recommends to the General Assembly whether or not to include the item in the agenda. Assuming the item is inscribed on the agenda, the next step is for the Member State or States to sponsor a draft resolution by which the General Assembly would decide that the intergovernmental organization concerned is invited to participate in the sessions and the work of the General Assembly in the capacity of observer. It is then a matter for the States Members of the United Nations to take a decision on the proposed resolution, if necessary by a majority vote of the Members present and voting.

5 January 1998

11. Circulation of communications from the Organization of the Islamic Conference—Article 54 of the Charter of the United Nations

Memorandum to the Under-Secretary-General for Political Affairs

1. This responds to your memorandum of 9 February 1998 concerning the circulation of communications from the Organization of the Islamic Conference (OIC) under Article 54 of the Charter of the United Nations. My comments on the questions raised in your memorandum are as follows:

2. In the first instance, you inquire whether the Secretariat should circulate as a Security Council document a communication from OIC claiming itself to be a regional organization under Article 54. In our view, the Secretariat should not automatically circulate any communication. The Secretariat has a duty to establish that the communication falls within the ambit of Article 54.

3. Article 54 provides that "[t]he Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under *regional arrangements or by regional agencies* for the maintenance of international peace and security" (emphasis added). Accordingly, only regional arrangements and regional agencies are encompassed by Article 54. The OIC Charter and the explanatory memorandum accompanying the draft resolution granting observer status to the Organization of the Islamic Conference at the United Nations (adopted as General Assembly resolution 3369 (XXX) of 10 October 1975) refer to the maintenance of international peace and security but do not characterize OIC as a regional organization, arrangement or agency. To the contrary, the OIC Charter and explanatory memorandum repeatedly refer to Muslim nations, without regional limitation. In fact, the Islamabad Declaration of the Extraordinary Session of the Islamic Summit (A/51/915-S/1997/433) specifically refers to "the 1.2 billion Muslims, across five continents". The foregoing indicates the international, rather than regional, character of OIC. General Assembly resolutions on cooperation with OIC and the Memorandum of Cooperation between the United Nations and OIC of 14 October 1982 further confirm the international character of OIC. Based on the foregoing, it would therefore be difficult for the Secretariat to conclude that OIC is a regional arrangement or a regional agency within the meaning of Article 54 of the Charter of the United Nations.

4. As to your second question concerning the correct procedure to be followed for transmittal to the United Nations of correspondence addressed to the United Nations by OIC member States via the Permanent Observer, the current procedure is the correct procedure. Any OIC member(s) which (are) a State(s) Member(s) of the United Nations may circulate an OIC communication as an annex to its or their own communication (see in particular *Article 35 of the Charter of the United Nations*).

5. If the communication relates to the maintenance of international peace and security, an OIC communication *might* also be circulated as an annex to a communication submitted by a regional arrangement or agency within the meaning of Article 54 of the Charter, such as the League of Arab States or the Organization for African Unity. Finally, pursuant to rule 39 of its provisional rules of procedure, the Security Council itself may request OIC to supply it with information or to give other assistance examining matters within its competence.

6. Your third question, as to who determines what constitutes a regional organization or arrangement under Article 54, raises policy as well as political considerations. As a legal matter, however, reference should be made to the basic legal texts of OIC and any instruments concluded by OIC members or between OIC and the United Nations. The documents mentioned in paragraph 3 above, however, do not characterize OIC as a regional arrangement or agency within the meaning of Article 54 of the Charter. If OIC nonetheless insists that it should be deemed a regional organization, its member States may seek recognition as such from the General Assembly or the Security Council.

18 February 1998

12. Executing agency status with the United Nations Development Programme of the Centre for International Crime Prevention—Designation of United Nations organizational units as executing agencies

Memorandum to the Chief of Operational Activities Section, Centre for International Crime Prevention

1. This refers to your letter of 18 June 1998 to … of this Office requesting our advice in connection with the request by the Centre for International Crime Prevention for executing agency status with United Nations Development Programme. We regret the delay in responding.

Background of request for executing agency status

2. We understand that, at its seventh session, from 21 to 30 April 1998, the Commission on Crime Prevention and Criminal Justice recommended a draft resolution for adoption by the Economic and Social Council requesting the Executive Director of the Office for Drug Control and Crime Prevention to enter into discussions with the Administrator of UNDP with a view to having the Centre for International Crime Prevention recognized as an executing agency.[1] We have been informed that the Economic and Social Council adopted that draft resolution on 28 July 1998 (resolution 1998/24). In addition, the Office of Internal Oversight Services, during its in-depth evaluation of the United Nations Crime Prevention and Criminal Justice Programme, recommended that the Centre should seek executing agency

status with UNDP, and the Secretary-General concurred with the recommendation (see E/AC.51/1998/3, para. 67). The Committee for Programme and Coordination endorsed the recommendation,[2] and the General Assembly is to consider that report at its current session.

Status of the Centre

3. Under the programme for reform set out in the Secretary-General's report entitled "Renewing the United Nations: a programme for reform" (see A/51/950, chap. V), the Secretary-General reconstituted the Division for Crime Prevention and Criminal Justice into the Centre for International Crime Prevention and established the Office for Drug Control and Crime Prevention, consisting of the Centre and the United Nations International Drug Control Programme, headed by an Executive Director accountable to the Secretary-General. We understand that a Secretary-General's bulletin on the organization of the Office is being finalized. The Centre thus appears to be an organizational unit of the United Nations Secretariat.

Designation of United Nations organizational units as executing agencies

4. The United Nations has been designated by the General Assembly as an executing agency of UNDP-funded projects, from the beginning of UNDP and its predecessor programmes.* When consulted on whether individual units of the United Nations Secretariat could act as an executing agency of UNDP-funded projects, this Office has consistently advised that they could not be separately designated as executing agency, but that they could provide, in coordination with the department in the Secretariat in charge of the United Nations executing agency function, such services within their field of competence as were required for the execution of UNDP projects.

5. Our advice was also based on considerations related to legal capacity, and accountability, of executing agencies. Executing agencies are required to sign agreements setting out their rights and obligations in executing UNDP-funded projects. Those agreements consist, typically, of the UNDP Standard Basic Executing Agency Agreement (SBEAA) and the project documents signed by the executing agencies, UNDP and the recipient Governments. The SBEAA specifically provides that the executing agency shall be accountable to UNDP for its execution of UNDP projects (see article VII of the 1989 model SBEAA), consistent with paragraph 43 of General Assembly resolution 2688 (XXV) of 11 December 1970, which provides that "every executing agent will be accountable to the Administrator [of UNDP] for the

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* UNDP was established by the General Assembly in its resolution 2029 (XX) of 22 November 1965 by merging the Expanded Programme of Technical Assistance (EPTA) and the Special Fund (SP), the two predecessor programmes of UNDP. Before the establishment of UNDP, the execution of technical assistance was carried out by participating organizations of EPTA and the United Nations was one of such participating organizations, pursuant to Economic and Social Council resolution 222 (II) of 15 August 1949. The United Nations was also specifically designated as one of the organizations carrying out the execution of UNDP projects in paragraph 39 of General Assembly resolution 1240 (XII) of 14 October 1958, by which the Assembly established the Special Fund. After the consolidation of EPTA and the Special Fund into UNDP in accordance with Assembly resolution 2029 (XX), the United Nations continued to be one of the executing agencies of UNDP projects, pursuant to paragraph 2 of the resolution, which reaffirmed the principles, procedures and provisions governing the two earlier programmes.

implementation of programme assistance to projects". Thus, an executing agency should have the legal capacity to enter into legally binding commitments and to be held legally responsible for its own acts, and should have the financial resources to meet those legal responsibilities. Only then would the agency be in a position to be accountable. Individual organizational units of the United Nations do not have such legal capacity, which vests in the Organization as a whole, and thus cannot bind the Organization by entering separately into commitments relating to the execution of UNDP-funded projects, unless they have been specifically authorized to do so in the name of the Organization.*

6. The departments in the Secretariat responsible for the United Nations executing agency function have changed over time, with the successive reorganizations of the Secretariat. In application of General Assembly resolution 32/197 of 20 December 1977, the Secretary-General on 23 March 1978 established the Department of Technical Cooperation for Development and entrusted it with the responsibility to, inter alia, "implement UNDP projects and projects financed from extrabudgetary resources for which the United Nations is the executing agency" (ST/SGB/162, para. 2(*b*)).

7. Subsequently, as part of the reorganization of the United Nations Secretariat in 1992-1993, the Secretary-General established the Department for Development Support and Management Services to, inter alia, "act as an executing agency ... for programmes/projects relating … to institutional development and human resources development" and "be the focal point at United Nations Headquarters for … implementation functions for technical cooperation" (A/C.5/47/88, para. 40, General Assembly resolution 47/212 B, sect. III, para. 2).

8. Under the reform of the United Nations Secretariat in 1997, the Secretary-General consolidated three Secretariat departments in the economic and social field into a new Department of Economic and Social Affairs (see A/51/950, paras. 69 and 139). Within that Department, the Assistant Secretary-General for Policy Coordination and Inter-Agency Affairs has been entrusted with the function of "providing policy advice to the Under-Secretary-General on all issues related to technical cooperation and advisory services and ensuring the coordinated management of related activities" (ST/SGB/1997/9, sect. 6.2(*d*)). It is unclear to us whether these responsibilities of the Department of Economic and Social Affairs encompass the function assumed earlier by the former Department of Technical Cooperation for Development and the Department for Development Support and Management Services, to coordinate the participation of United Nations Secretariat units in the execution of UNDP projects. We note, however, the following statement in the second paragraph of the 2 June 1998 letter from the Executive Director of the Office for Drug Control and Crime Prevention to the Administrator of UNDP: "Although the Centre has been implementing UNDP projects through

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* Concerning United Nations subsidiary organs, this Office has advised that, even when they have their own intergovernmental body, administrative machinery and financial resources, and have been expressly entrusted by the General Assembly with contracting capacity, they cannot, unless so authorized by their constitutive documents or an express decision of a competent governing body, act as executing agency for UNDP. Such an express authorization was, for instance, provided to UNCTAD and to regional commissions, by the General Assembly in its resolution 2401 (XXIII) of 13 December 1968 in respect of UNCTAD, and by the Economic and Social Council in its resolutions 1896 (LVII) of 1 August 1974 and 1952 (LIX) of 23 July 1975 in respect of the regional commissions.

the Office for Project Services* and the Department for Economic and Social Affairs, I am convinced that a direct relationship with UNDP would be more efficacious". It seems, therefore, that the involvement of the Centre for International Crime Prevention in the execution of UNDP-funded projects has been, until now, in line with the established practice and the advice given in the past by this Office, although the Centre is now seeking a more direct relationship with UNDP.

Conclusion and recommendation

9. Having regard to the foregoing, it is our opinion that the Centre for International Crime Prevention, as an organizational unit of the United Nations Secretariat, cannot be separately designated as an executing agency of UNDP in its own name. However, the General Assembly could request the Secretary-General to authorize the Centre to exercise United Nations executing agency functions with respect to UNDP projects within its field of competence and make direct arrangements with UNDP for this purpose. The Centre would thus be able to establish the "direct relationship with UNDP" which we understand it is seeking.

21 September 1998

13. Rules of procedure applicable with respect to the participation of non-governmental organizations in the Commission on the Status of Women—General Assembly resolution 52/100 of 12 December 1997

Letter to the Chairman of the Third Committee of the General Assembly

I have the honour to refer to your letter of today's date raising two questions put forth by the Third Committee of the General Assembly during its informal consultation on the "Follow-up to the Fourth World Conference on Women and full implementation of the Beijing Declaration and Platform of Action" under agenda item 104, entitled "Implementation of the outcome of the Fourth World Conference on Women". Our comments on the two questions are as follows:

> "1. What rules of procedure apply with respect to the participation of non-governmental organizations in the Commission on the Status of Women, acting as preparatory committee for the special session in the year 2000, taking into account the provisions of paragraph 46 of resolution 52/100?"

In paragraph 46 of its resolution 52/100 of 12 December 1997, the General Assembly decided "that the Commission on the Status of Women shall serve as the preparatory committee for the high-level review, and as such will be open to the participation of all States Members of the United Nations, members of the specialized agencies and observers, in accordance with the established practice of the General Assembly, and invites the Commission to take appropriate action towards that end, including giving attention to appropriate arrangements for the involvement and participation of non-governmental organizations in the review".

It is clear from the foregoing that observers will participate in the Commission on the Status of Women serving as preparatory committee for the special session of

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* The functions of the United Nations Office for Projects Services include undertaking "implementation activities for UNDP" (see DP/1994/62, para. 2 (*c*), and *Official Records of the Economic and Social Council, 1994, Supplement No. 15* (E/1994/35/Rev.1), part four, Executive Board decision 94/32, para. 1).

the General Assembly "in accordance with the established practice of the General Assembly".

As there are no provisions in the rules of procedure of the General Assembly relating to observer status in the General Assembly, the status and rights of participation of observers rest solely on the practice of the General Assembly. The General Assembly has adopted resolutions inviting specific intergovernmental organizations as well as entities, including Palestine, the International Committee of the Red Cross, the Sovereign Military Order of Malta and the International Federation of Red Cross and Red Crescent Societies, to participate, in the capacity of observer, in its sessions and work. The specialized agencies, the International Atomic Energy Agency and the World Trade Organization are also represented in the General Assembly pursuant to provisions contained in relationship agreements concluded between each agency and the United Nations, and approved by the General Assembly.

As the General Assembly does not have an established practice on the participation of non-governmental organizations and as it is the intent of the Assembly that non-governmental organizations also be involved and participate in the preparatory committee, the participation of non-governmental organizations in the Commission on the Status of Women, serving as preparatory committee for the special session, would, unless otherwise decided, be governed by rules 75 and 76 of the rules of procedure of the functional commissions of the Economic and Social Council.

> "2. Bearing in mind the reply to the above question, is paragraph 29 of the draft resolution properly formulated?"

At the outset, it must be stated that, subject only to the Charter of the United Nations, it is entirely within the discretion of Member States to formulate their resolutions. As the Committee has, however, formally requested the views of the Office of Legal Affairs on the propriety of this specific formulation, the Office would make the following observations:

In the first part of paragraph 29 of the draft resolution, the General Assembly recalls a resolution of the Economic and Social Council, putting forward interim measures for the participation of non-governmental organizations, applicable to the forty-second session of the Commission on the Status of Women, with a view to their application to the forty-third and forty-fourth sessions of that Commission. Although the Commission on the Status of Women has been designated as the preparatory committee for the special session of the General Assembly, it is our understanding that the Commission will only serve as preparatory committee for part of its forty-third and forty-fourth sessions. As the Commission is one of the functional commissions of the Economic and Social Council, it would be for the Council to decide on the applicability of the interim measures to the entirety of those sessions. It would therefore be more appropriate if in the first part of operative paragraph 29 the Assembly invited the Council to recall the interim measures put forward in its resolution 1997/298 with a view to their applicability to the forty-third and forty-fourth sessions of the Commission. In the alternative, the first part of operative paragraph 29 could refer the applicability of the interim measures to the forty-third and forty-fourth sessions of the Commission on the Status of Women when serving as the preparatory committee for the special session of the General Assembly.

In the second part of operative paragraph 29 of the draft resolution, the Commission will be invited or urged "to decide on" appropriate arrangements for the involvement and participation of non-governmental organizations in the special

session. We note that in paragraph 46 of its resolution 52/100, the General Assembly invited the Commission to take appropriate action, including giving attention to appropriate arrangements for the involvement and participation of non-governmental organizations. As any decisions adopted by the Commission in this respect would constitute recommendations for the special session of the General Assembly, it would be more appropriate in the second part of operative paragraph 29 for the Assembly to invite or urge the Commission to "take appropriate action on" or "recommend" such arrangements.

30 October 1998

14. Status of the United Nations International Drug Control Programme—Memorandum of Understanding on a Joint and Co-sponsored United Nations programme on HIV/AIDS

Letter to the Legal Counsel, World Health Organization

This is in response to a letter dated 2 October 1998, in which two questions were raised in connection with the submission by the Executive Director of the United Nations International Drug Control Programme (UNDCP) of the Programme's candidature as an additional co-sponsor of the Joint and Co-sponsored United Nations Programme on HIV/AIDS (UNAIDS). These questions are the following:

(*a*) Whether UNDCP can be said to have a status comparable to that of UNDP, UNICEF and UNFPA for purposes of co-sponsoring of UNAIDS;

(*b*) Whether the prior approval of the governing bodies of the existing co-sponsors is required before their executive heads can take a valid decision to admit UNDCP as an additional co-sponsor.

As noted in the letter, following the endorsement of the establishment of UNAIDS by the governing organs of UNICEF, UNDP, UNFPA, UNESCO, WHO and the World Bank as well as by the Economic and Social Council, the executive heads of the aforementioned programmes, funds and specialized agencies signed in 1995 the Memorandum of Understanding on a Joint and Co-sponsored United Nations Programme on HIV/AIDS, which defines the structure and operation of the Joint Programme. Pursuant to the last preambular paragraph of the Memorandum of Understanding, the original parties to it are collectively referred to in the Memorandum as the "Co-sponsoring Organizations".

Paragraph 12.2 of section XII of the Memorandum of Understanding provides that after the first anniversary of the entry into force of the Memorandum and with the unanimous agreement of the Co-sponsoring Organizations, "other United Nations system organizations may become Co-sponsoring Organizations by signature of the Memorandum of Understanding". In the letter it is suggested that the encompassing term "Organizations" appears to stress the organizational status that co-sponsors should enjoy to be able to fully discharge their responsibilities in the Joint Programme. In this regard the letter refers to the fact that the present United Nations programmes and funds which are the co-sponsors of UNAIDS have been established by the General Assembly as semi-autonomous bodies within the United Nations and are governed by separate executive boards responsible for the formulation of their policies, and are administratively autonomous from the United Nations.

We do not share the view that the organizational status is the factor that should be decisive in determining whether a United Nations entity can be a co-sponsoring organization of the Memorandum. It is our understanding that any United Nations

entity which has the authority under its respective mandate to enter into arrangements similar to that of the Memorandum of Understanding and which can make a substantial contribution to the implementation of the objectives of UNAIDS, defined in section II of the Memorandum, is entitled to apply to become an additional co-sponsor of UNAIDS.

Since in the case of the original Co-sponsoring Organizations, the establishment of UNAIDS was first endorsed by the governing organs of those entities before the Memorandum of Understanding was signed by their executive heads, it may be assumed that, although the Memorandum is silent on this matter, if a United Nations entity which is qualified to become an additional co-sponsor of UNAIDS wishes to submit its candidature, its governing organ should first endorse that co-sponsorship.

As to the question of whether UNDCP is qualified to become an additional co-sponsor of UNAIDS, it is our view that UNDCP, which is not an entity that is completely analogous to other United Nations programmes and funds, nevertheless, has the authority to enter, within the framework of the responsibilities delegated to it by the General Assembly, into appropriate arrangements for the exercise of its functions. This conclusion is based on the following considerations:

A decision to establish UNDCP was taken in 1990 by the General Assembly at its forty-fifth session. The Assembly in its resolution 45/179 of 21 December 1990 instructed the Secretary-General "to create a single drug control programme" to be headed by "a senior official at the level of Under-Secretary-General" appointed by the Secretary-General. The Assembly determined the future structure of the Programme and decided that the Programme should become operational as of 1 January 1991. The Assembly subsequently endorsed paragraph 1 (*c*) of Economic and Social Council resolution 1991/38 of 21 June 1991, in which the Council called upon the Commission on Narcotic Drugs to give policy guidance to UNDCP and to monitor its activities. While recognizing that the Programme remains a part of the United Nations Secretariat, the Assembly emphasized the need for the Executive Director of UNDCP to have the necessary degree of managerial flexibility to discharge effectively and expeditiously the functions of the Programme.

In its report to the General Assembly at its forty-sixth session (A/C.5/46/23), the Secretary-General stated that, given the magnitude of the extrabudgetary resources of UNDCP and the distinctive features of the proposed fund of UNDCP, he considered that the new fund called for special treatment by way of separate financial rules and, where necessary, exceptions to the Financial Regulations of the United Nations. The Secretary-General proposed that, in the interest of efficient operation, the Executive-Director of the Programme should be granted a maximum degree of decentralized authority as regards both financial and personnel matters.

At its forty-sixth session, the General Assembly, in part XVI of its resolution 46/185 of 20 December 1991, decided to establish, as of 1 January 1992, under the direct responsibility of the Executive Director of UNDCP, the Fund of the United Nations International Drug Control Programme to finance operational activities of UNDCP and endorsed the aforementioned proposals of the Secretary-General. The Assembly authorized the Commission on Narcotic Drugs, as the principal United Nations policy-making body on drug control issues, to approve, on the basis of the proposals of the Executive Director of the Programme, both the budget of the Programme of the Fund and the administrative and programme support costs budget, other than expenditures borne by the regular budget of the United Nations. Notwithstanding regulations 11.1 and 11.4 of the Financial Regulations of the United Nations, requiring the accounts to be maintained by the Secretary-General, the As-

sembly decided that the Executive Director of the Programme should maintain the accounts of the Fund of UNDCP and should be responsible for submitting the said accounts and related financial statements to the Board of Auditors and for submitting financial reports to the Commission on Narcotic Drugs and the General Assembly.

Under its establishing resolutions, approved by the General Assembly at its forty-fifth and forty-sixth sessions and reaffirmed by the Assembly in subsequent resolutions concerning activities of the Programme (resolutions 47/101; 48/112, part V; 49/168, part V; 50/148, part VI; 51/64, part VI, and 52/92, part VI), UNDCP is entrusted with a wide variety of functions which are defined in section 5 of the recently promulgated Secretary-General's bulletin on the organization of the Office for Drug Control and Crime Prevention[3]. The bulletin states that, while UNDCP is currently administratively incorporated in the Office for Drug Control and Crime Prevention, as a programme established by the General Assembly in its resolution 45/179, it is a single body responsible for coordinated international action in the field of drug abuse control. According to the bulletin, the functions of UNDCP include initiation and participation in joint projects, promotion of coordination and cooperation on drug control activities with regional and international organizations.

It is worthy of note that, following its establishment, UNDCP has concluded Memoranda of Understanding for cooperation with FAO (1993), ILO (1994) and UNESCO (1994) and a working arrangement with UNDP. Almost 99 per cent of the budget of UNDCP currently comes from voluntary contributions.

For the reasons stated above, we believe that UNDCP, subject to a prior endorsement by the Commission on Narcotic Drugs, has the authority to submit its candidature as an additional co-sponsor of UNAIDS and, if accepted, to sign the Memorandum of Understanding. It is, of course, for the original Co-sponsoring Organizations to decide, in accordance with paragraph 12.2 or section XII of the Memorandum of Understanding, whether the co-sponsorship of UNDCP will assist in meeting the objectives of UNAIDS.

With reference to your second question, we are of the view that admission of an additional co-sponsor does not require any decision by the governing organs of the original Co-sponsoring Organizations, as the establishment of the Joint Programme has already been endorsed by those organs.

9 November 1998

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

[No legal opinions of the secretariats of intergovernmental organizations related to the United Nations were reported for 1998.]

Notes

[1] *Official Records of the Economic and Social Council, 1998, Supplement No. 30* (E/1998/30), chap. I.B, draft resolution IX.

[2] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 16* (A/53/16), part one, chap. II.E.3, para. 240.

[3] ST/SGB/1998/17.