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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)

PRIVILEGES AND IMMUNITIES

1. Special Court for Sierra Leone—Legislative authority for the issuance of *laissez-passer*—Discretion of the Secretariat—Article VII of the Convention on the Privileges and Immunities of the United Nations, 1946—Definition of "official" of the United Nations—General Assembly resolution 76(I) of 7 December 1946—Privileges and immunities of members of the International Court of Justice—General Assembly resolution 90(I) of 11 December 1946—Independent judicial institution established by bilateral agreement

Letter to the Registrar of the Special Court for Sierra Leone

I am writing in response to your facsimile of 6 June 2003 wherein on behalf of the judges of the Special Court for Sierra Leone you inquire about any developments with regard to the Special Court's request to obtain United Nations *laissez-passer* to facilitate the judges' official travels. [. . .]

With reference to the Special Court's request and, in the light of the above statement, I believe that it is necessary to address in detail the issue of where the Secretariat of the United Nations derives the authority to issue United Nations *laissez-passer* and whether the Secretariat has any discretion in this regard.

As I pointed out in my letter to you, dated 25 June 2002, in the case of the United Nations, the issuance of United Nations *laissez-passer* is regulated by article VII of the Convention on the Privileges and Immunities of the United Nations[1] ("General Convention"). Section 24 of article VII of the General Convention provides that the United Nations may issue United Nations *laissez-passer* to its officials. As I further explained in the letter, the question of who constitutes an "official" is regulated by General Assembly resolution 76(I) of 7 December 1946, which states the following:

> ". . . the categories of officials to which the provisions of articles V and VII (the General Convention) shall apply should include all members of the staff of the United Nations, with the exception of those who are recruited locally and assigned to hourly rates."

In the case of the International Court of Justice, which pursuant to Article 92 of the Charter is the principal judicial organ of the United Nations and therefore distinct from other principal organs of the United Nations, including the Secretariat (Article 7), the

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

General Assembly adopted resolution 90(I) of 11 December 1946 defining the privileges and immunities of members of the International Court of Justice, officials of the Registry, assessors, the agents and counsel of the parties and of witnesses and experts. Paragraph 6 *(a)* of that resolution provides that:

> "*(a)* The authorities of Members should recognize and accept United Nations *laissez-passer*, issued by the International Court of Justice to the members of the Court, the Registrar and the officials of the, Court, as valid travel documents. . ."

Thus, the legislative authority for the issuance of a *laissez-passer* to the judges of the International Court of Justice and officials of the Registry is different from that of officials of the United Nations.

In the case of judges of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia ("The International Tribunal for the Former Yugoslavia") and the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 ("The International Tribunal for Rwanda"), which have been established by the Security Council as its subsidiary organs, the Council decided by resolutions 1329 (2000) of 30 November 2000 and 1431 (2002) amending respectively their Statutes that the terms and conditions of service of their judges shall be those of the judges of the International Court of Justice (article 13 *bis*, paragraph 3, of the Statute of the International Tribunal for the Former Yugoslavia; article 12 *bis*, paragraph 3, of the Statute of the International Tribunal for Rwanda).

It follows from the foregoing that the issuance of United Nations *laissez-passer* is strictly regulated by the instruments and decisions referred to above adopted by the principal organs of the United Nations and the Secretariat does not have much discretion in this regard.

The Special Court for Sierra Leone was established as a *sui generis* treaty-based organ. The appointment of judges of the Special Court for Sierra Leone is regulated by the agreement concluded between the United Nations and the Government of Sierra Leone[2] and the Statute of the Court, which forms an integral part thereof (articles 1 and 2 of the agreement, article 13 of the Statute). The latter provides that of the eight judges of the Special Court, five are appointed by the Secretary-General of the United Nations and three by the Government of Sierra Leone. The judges of the Special Court enjoy the privileges and immunities specified in the agreement (article 12), which are the privileges and immunities of diplomatic agents, and the expenses of the Special Court are borne by voluntary contributions.

The Special Court for Sierra Leone is, therefore, an independent judicial institution established by a bilateral agreement. The judges of the Special Court are not officials of the United Nations and their status is not regulated by decisions of either the General Assembly or the Security Council. I regret, therefore, to inform you in response to your inquiry that under the circumstances, the Secretariat of the United Nations does not presently have any authority to issue United Nations *laissez-passer* to the judges of the Special Court.

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[2] For the text of the Agreement and the Statute of the Special Court, see United Nations *Treaty Series*, vol. 2178, p. 137.

Since, according to your facsimile, the judges may appeal on this matter directly to the Secretary-General, I shall bring this response to his attention.

20 June 2003

2. United Nations Assistance Mission in Afghanistan (UNAMA)—Searches of United Nations vehicles—"Search" of or "interference" with property or an asset of the United Nations—Cooperation with the appropriate authorities—Article II, section 3, and article V, section 21, of the Convention on the Privileges and Immunities of the United Nations, 1946—*Mutatis mutandis* application of the Convention on the Privileges and Immunities of the Specialized Agencies, 1947—Effects of armed conflict on treaties

Note to the Under-Secretary-General of the Department of Peacekeeping Operations, United Nations

1. I refer to the Code Cable (N°. . . .) of 9 July 2003 to me, which was copied to you, regarding the procedures that have been followed by Coalition forces with regard to the stopping and searching of vehicles at checkpoints.

2. It appears that those procedures are as follows:

- vehicles are required to stop at checkpoints;
- all the occupants may then be required to exit the vehicle;
- the occupants of the vehicle may then be required to produce identification;
- the inside of the vehicle may then be physically searched;
- the outside of the vehicle may also be subjected to a visual inspection.

These procedures are applied to all vehicles. No exception is made for United Nations vehicles.

3. It appears that Coalition forces are now willing to review the application of these procedures to United Nations vehicles and to adopt new, modified procedures that would take into account the privileges and immunities of the United Nations and ensure minimal interference with United Nations operations.

4. UNAMA seek our advice regarding the application in this connection of the relevant provisions of the Convention on the Privileges and Immunities of the United Nations[3] and of the Convention on the Privileges and Immunities of the Specialized Agencies.[4] Our advice is as follows.

5. Article II, section 3, of the Convention on the Privileges and Immunities of the United Nations (the "General Convention") provides:

> "The premises of the United Nations shall be inviolable. The property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action."

6. A vehicle belonging to the United Nations is clearly "property" or an "asset" of the Organization. This is so whether or not that vehicle carries United Nations markings.

[3] United Nations *Treaty Series*, vol. 1, p. 15.
[4] United Nations *Treaty Series*, vol. 33, p. 261.

Section 3 of the Convention therefore applies to make any such vehicle immune from "search".

7. As regards what constitutes a "search", the United Nations has consistently maintained that section 3 of the General Convention bars national authorities from verifying the contents of United Nations property. Accordingly, in the case of United Nations supplies contained in sacks, envelopes or containers, national authorities are precluded from opening those sacks, envelopes or containers in order to verify their contents. Similarly, in the case of a vehicle, they are barred from opening the vehicle to inspect within, as, for example, by opening the doors of the passenger compartment, lifting the bonnet (hood) or opening the boot (trunk).

8. Once Coalition forces have ascertained that a vehicle is indeed a United Nations vehicle—either by verifying its external markings or by being given sight of a document that confirms its status—the General Convention would therefore bar them from conducting a physical search of its interior.

9. If the General Convention bars a search of the inside of a United Nations vehicle for the purpose of ascertaining and identifying its contents, it applies equally whether the purpose of that search is to examine contents that are chattels or contents that are people. Equally, if national authorities are precluded from opening a vehicle to inspect the contents within, they are also barred from insisting that the vehicle be opened and its contents placed outside for inspection. Otherwise, the protection afforded by the Convention would be circumvented and its purpose defeated.

10. Subject to what is said below, it must therefore be concluded that article II, section 3, of the General Convention bars Coalition forces from insisting that the occupants of a United Nations vehicle exit that vehicle.

11. The above conclusions are not affected in any way by the fact that the security situation in Afghanistan is difficult. The Convention does not contain anything to the effect that the privileges and immunities for which it provides are subject to abridgement or qualification in times of internal unrest or even in times of armed conflict. Indeed, it has been the consistent position of the Organization that the General Convention applies in such circumstances just as much as it does in times of peace and that the privileges and immunities for which it provides may not be qualified or overridden by any demands of military expediency or security.

12. This having been said, it must be recalled that article V, section 21, of the General Convention places an obligation upon the United Nations to "co-operate at all times with the appropriate authorities of Members to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the privileges and immunities mentioned in th[at] Article".

13. We would assume that checkpoints operated or supervised by Coalition forces are established pursuant to police regulations or regulations that are of a closely kindred nature. We would likewise assume that those regulations require persons arriving at, or passing through, such checkpoints to produce proof of their identity at the request of those operating a checkpoint.

14. In accordance with article V, section 21, of the General Convention, the United Nations should cooperate with a view to securing the observance of these regulations by requiring occupants of its vehicles to show proof of their identity, upon request, to the

members of Coalition forces operating such checkpoints. This applies both to occupants who are officials of the United Nations and to passengers who are not staff members.

15. In normal daytime conditions and in the case of normal passenger vehicles, it should not be necessary, in order to comply with such requests, that the occupants of a vehicle exit that vehicle. However, we would envisage that, in certain conditions and in the case of certain kinds of vehicle, it might conceivably be necessary for at least certain occupants of a vehicle to exit that vehicle in order to comply meaningfully with a request to identify themselves.

16. Moreover, it would be our view that the immunity from "search" and from "any other form of interference" which United Nations vehicles enjoy under article II, section 3, of the General Convention does not serve to preclude them from being made the subject of an external visual inspection, including for magnetic explosive devices—provided that it is conducted in an expeditious and non-intrusive manner. This is all the more the case in as much as it appears that the purpose of such an inspection, at least in part, is to ensure the safety of staff members occupying the vehicle. A rapid and non-intrusive visual inspection would not constitute a "search" of, nor amount to an "interference" with, property or an asset of the United Nations, within the meaning of article II, section 3, of the General Convention.

17. In conclusion, then, consistently with the provisions of the General Convention:

- United Nations vehicles may be required to stop at lawful checkpoints;
- occupants may not be required to exit the vehicle, except if and in so far as it may be impossible in the conditions prevailing for them to identify themselves to those lawfully operating the checkpoint;
- occupants of the vehicle may properly be required to produce identification;
- the inside of the vehicle may not be physically searched;
- a visual inspection may be conducted of the outside of the vehicle, including its underside.

18. These conclusions hold for United Nations vehicles, whether or not they carry United Nations markings. They also hold in respect of passengers who are not staff members of the Organization.

19. The relevant provisions of the Convention on the Privileges and Immunities of the Specialized Agencies—article II, section 5, and article VI, section 23—are identical, *mutatis mutandis,* to those of the General Convention. The above conclusions therefore apply equally to vehicles belonging to the specialized agencies.

11 July 2003

3. Inclusion of dependents in United Nations *laissez-passers* (UNLP) for United Nations High Commissioner for Refugees (UNHCR) local staff members in case of medical evacuation—United Nations Family Certificate for identification purposes—Guide on the issuance of United Nations travel documents

Memorandum to the Chief, Legal Affairs Section, Executive Office, United Nations High Commissioner for Refugees

Subject: Inclusion of dependents in United Nations laissez-passers for UNHCR local staff members in case of medical evacuation

1. This is in response to your memorandum of 25 July 2003 concerning the above matter.

2. The question whether or not adequate medical facilities are available in [Member State] is an issue we cannot comment on. According to your memorandum, this occasionally leads to situations where medical evacuations are the only option for treatment of medical emergencies. From a legal point of view, the inclusion of family members in the UNLPs as accompanying the bearer for official travel into and out of [Member State] would be acceptable and justified under these emergency medical circumstances. Although this follows neither directly from the Convention on the Privileges and Immunities of the United Nations[5] nor from the Guide on the issuance of UN travel documents (PAH/INF.78/2), it is the position of this Office that local staff members who are officially evacuated for medical emergencies can have their dependents travel with them under such emergency circumstances. Dependents can, therefore, be included in UNLPs *but only for such purposes.* It is, furthermore, our understanding that a dependent having to leave [the Member State] within the framework of a medical evacuation can do so if accompanied by a UNLP bearer and if travel for the purpose of an official medical evacuation has been authorized.

3. However, we would like to point out that UNLPs are issued for use only in connection with official travel, i.e. travel authorized by the United Nations or a specialized agency. Visas may only be entered therein for such purposes. UNLPs may not be used to travel abroad for private purposes. Therefore, local UNHCR staff members and their dependents may use their UNLPs to leave [Member State] only, if their travel has been authorized by UNHCR. We agree with the UNHCR policy to require the return of the UNLPs to UNHCR once the official travel has been completed.

4. Finally, we would like to advise that, according to the Guide on the issuance of United Nations travel documents, a United Nations Family Certificate can serve as a document that identifies the bearer as being a family member of the United Nations Official named therein. It is not a legal travel document, although it is sometimes accepted for visa purposes. Some countries have preferred to grant visas on the Family Certificate rather than on a national passport. A Family Certificate may be issued to the dependents of a United Nations staff member provided that the family member has been authorized by the Administration to travel separately from the staff member. In our views these certificates could be considered for the purposes described in your memorandum.

11 August 2003

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

4. Status of the Military Armistice Commission in Korea *vis-à-vis* the United Nations—Privileges and immunities of its members—"Unified Command" and "United Nations Command"—Security Council resolution 84 (1950) of 7 July 1950—Armistice Agreement of 27 July 1950

Note to the Assistant Secretary-General and Deputy to the Under-Secretary-General of the Office of Legal Affairs, United Nations

1. This is in response to your request for advice with respect to the status of the Military Armistice Commission *vis-à-vis* the United Nations, and whether its members enjoy privileges and immunities.

2. The Military Armistice Commission was established in accordance with paragraph 19 of the Armistice Agreement, which was signed on 27 July 1953, by the Commander in Chief, United Nations Command, on the one hand, and by the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers on the other. On 28 August 1953, the General Assembly in resolution 711 A (VII) "noted with approval" the conclusion of the Armistice Agreement.[6]

3. Although the Armistice Agreement was signed by the Commander in Chief, "United Nations Command", the United Nations is not a party to the Armistice Agreement. The "United Nations Command" is also referred to as the "Unified Command", and this latter terminology is used in the Security Council resolution 84 (1950) of 7 July 1950 which established "the Unified Command". Security Council resolution 84 (1950) recommended that all Members providing military forces and other assistance to the Republic of Korea "make such forces and other assistance available to a unified command under the United States of America", and requested the United States to "designate the commander of such forces". In its first report to the Security Council on the operation of the Command the United States informed the Council that on 25 July 1950 "upon the recommendation of the Security Council, the Unified Command was established and General Douglas MacArthur was designated" Commander-in-Chief of the Military Forces assisting the Republic of Korea (S/1626, p. 4). In his General Order No. 1 on the establishment of the Command, General MacArthur referred to it as the "United Nations Command".

4. As such, the Security Council did not establish the United Nations/Unified Command as a subsidiary organ of the Council, but rather recommended that States providing military assistance to the Republic of Korea form a "unified command" under the United States. Accordingly, the Military Armistice Commission established pursuant to the Armistice Agreement is not a United Nations body.

5. The Military Armistice Agreement does not address the question of the privileges and immunities enjoyed by the members of the Armistice Commission. It simply states that "the Commanders of the opposing sides shall". . . "afford full protection and all possible assistance and co-operation to the Military Armistice Commission. . . in the carrying out of their functions and responsibilities" as assigned in the Armistice Agreement. The Armistice Agreement does, however, provide for privileges and immunities with respect to "all members and other personnel of the Neutral Nations Supervisory Commission and of the Neutral Nations Reparation Commission" (paragraph 13 (j)). [. . .]

5 December 2003

[6] For the text of the Agreement, see the *Yearbook of the United Nations*, 1953.

PROCEDURAL AND INSTITUTIONAL ISSUES

5(*a*). Breach of Article 19 of the Charter of the United Nations—Arrears in payment of a Member State's financial contributions to the Organization and the right to vote in the General Assembly–Invalid ballots

Letter to the President of the General Assembly of the United Nations

In the afternoon of 29 January 2003, you sought my oral advice on a question that had arisen that same day during the 80th Plenary meeting of the General Assembly.

The situation that was described to me was as follows.

At the opening of the 80th Plenary meeting, you had informed representatives that certain Member States had made the necessary payments to reduce their arrears below the amount specified in Article 19 of the Charter of the United Nations. The General Assembly had taken note of that information. The Assembly had then proceeded, in good faith, to conduct three rounds of balloting on the assumption that the information that you had conveyed to it was correct. Unfortunately, it was not. The information that the Secretariat had given to you and which you had transmitted to representatives was erroneous. One of the States that had been the subject of the announcement that you had made to the Assembly had not in fact made the necessary payment to reduce its arrears below the amount specified in Article 19 of the Charter. This had come to your attention while the votes that had been cast in the third round of balloting were being counted.

You sought my advice as to how to proceed.

The advice that I offered was that you should inform the General Assembly that the three rounds of balloting that had taken place were invalid. In consequence, the candidates who were announced as having obtained absolute majorities could no longer be considered to have obtained those majorities. The elections should commence anew.

The reason why I offered you this advice was as follows.

When it proceeded to conduct the three rounds of balloting that took place on Wednesday, the General Assembly had, albeit unwittingly, committed a violation of the Charter of the United Nations.

Article 19 of the Charter provides as follows:

> "A Member of the United Nations which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The General Assembly may, nevertheless, permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member."

As the situation was described to me, a certain State was in arrears in the payment of its financial contributions by an amount that equalled or exceeded the amount of contributions due from it for the preceding two full years.

In accordance with Article 19 of the Charter of the United Nations, that State therefore had no vote. It consequently should not have been permitted to vote in any of the three rounds of balloting that had taken place. The State concerned was, however, erroneously allowed to vote.

The three rounds of balloting that had taken place were therefore conducted in violation of the Charter. It necessarily followed that those ballots were invalid.

In offering this advice, I was naturally mindful of the fact that it is of the utmost importance that proceedings of General Assembly be conducted strictly in accordance with the Charter and that their integrity be safeguarded and maintained. For the ballots that had taken place to have been considered in any way as valid would have set a most unfortunate precedent.

30 January 2003

5(*b*). Breach of Article 19 of the Charter of the United Nations—Error by the Secretariat—Retroactive validation of the election process by applying the last sentence of Article 19 of the Charter of the United Nations—Retroactive suspension of rule 160 of the rules of procedure of the General Assembly—Prerogative of the General Assembly to make final decision

Letter to the President of the General Assembly of the United Nations

The General Committee has asked that I review a suggestion to cure the invalidity that currently affects the three rounds of balloting for permanent judges of the ICTR that were held on 29 January 2003. That suggestion was motivated by the undeniable fact that the error was the fault of the Secretariat. Accordingly, it was suggested that there was a need for flexibility to respect the sovereignty of Member States, which had voted in good faith.

Let me first note that I stand by the advice that I gave to the President on Wednesday. That advice has been circulated to you all.

The suggestion to retroactively cure the invalidity in the election process is based on a proposal to apply the last sentence of Article 19 of the Charter of the United Nations. That sentence reads as follows: "The General Assembly may, nevertheless, permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member."

From a legal point of view, the difficulty with this suggestion is that the Charter itself permits such a waiver only in one defined circumstance, specifically, when "the failure [of the Member] to pay is due to conditions beyond the control of the Member".

If the suggestion made were to be accepted, the General Assembly would have to state, in an explicit decision, that it was acting in accordance with Article 19 and so make it clear that its decision was taken on the ground that it was satisfied that the failure of the State concerned to make the payment required to bring its arrears below the amount specified in the first sentence of Article 19 was "due to conditions beyond the control of [that] Member". The conclusion that this ground applied in the specific case in hand would, moreover, have to be limited to the specific date in question, since the suggestion, as I understand it, is to retroactively validate only the three ballots that took place on Wednesday, 29 January 2003.

The General Assembly has decided to confer upon the Committee on Contributions the responsibility of advising it on the action to be taken with regard to the application of Article 19 of the Charter: see rule 160 of the rules of procedure of the General Assembly.[7]

[7] A/520/Rev.15.

In the present case, if the suggestion were accepted, the General Assembly would have to retroactively suspend the application of rule 160.

In the very limited time available, we have made a quick examination of the way in which Article 19 of the Charter and rule 160 of the rules of procedure of the General Assembly have been applied in practice.

The information set out below indicates that the General Assembly has on occasions waived the strict requirements of rule 160 and has permitted a State to vote in advance of, or without, any consideration of its case by the Committee on Contributions.

> "In 1968 Haiti was explicitly authorized, after it had invoked the factual requirements of Art. 19, clause 2, to participate in voting until the Committee on Contributions had given its opinion. A similar authorization was accorded to Yemen in 1971 when, as indicated by the representative of that country, a remittance in the necessary amount had already been dispatched but had not yet reached the UN. A similar procedure was adopted in 1973 when the GA, in the opening meeting of the 28th session on September 18, 1973, authorized Bolivia, the Central African Republic, Guinea, and Paraguay to participate in voting after assurances had been given that the amount due had already been dispatched. Out of these states, Bolivia and later the Central African Republic contended at the same time that the delay was related to circumstances beyond their control."[8]

In all these cases, the waiver was granted prospectively, before any voting took place. In no case that we have been able to identify has the General Assembly retroactively made a decision to grant a waiver under Article 19.

In view of the above, I, as a lawyer and as Legal Counsel of the United Nations, could not advocate the course of action that has been suggested.

At the same time, I would note that the matter is properly before the General Assembly which has the power to take a final decision in the matter.

31 January 2003

6. Regional group system within the United Nations—Conditions for admission to a regional group—Consensus—General Assembly resolution 1192 (XII) of 12 December 1957

Letter to the Acting Chief Counsel, O.I.P.C., Interpol

I am writing in response to your e-mail in which you point out that [Member State], which is currently classified within Interpol as a country belonging to the Asian region, has requested to be transferred to the European region. You further note that the Executive Committee of Interpol has asked you to review the situation of [Member State] within the United Nations system and has specifically asked you to provide information on the reasoning adopted by United Nations bodies to accept the shift of [Member State] to the Western European Group and the conditions under which [Member State] was accepted to this Group. You ask for our assistance in preparing a response to this inquiry.

[8] B. Simma and others, eds., *The Charter of the United Nations*: *a commentary,* second edition, (New York, Oxford University Press, 2002), vol. I, p. 370-371.

In response to your inquiry please be advised as follows.

The regional group system is not mentioned or envisaged in the United Nations Charter. However, it has become an essential part of the whole working structure of the United Nations. The regional group system was established in the late fifties through the process of transformation of the system of unofficial and informal caucuses, based on loose geographical and political affinities, which had emerged following the founding of the United Nations, into a new arrangement. It was first reflected in indirect form in General Assembly resolution 1192 (XII) of 12 December 1957 concerning the composition of the General Committee of the General Assembly. The concept of regional groups has subsequently been endorsed in various decisions of the General Assembly, the Security Council, the Economic and Social Council and their subsidiary bodies as the accepted mechanism for distribution of elected places according to the principle of equitable geographical distribution and as the forum for consultations and negotiations on important issues.

It should be observed that although the General Assembly and other United Nations bodies have endorsed in their numerous decisions the new political arrangement which provided for a special role to be played by regional groups in the work of the Organization, none of these decisions has ever defined the concept of a regional group or the criteria for membership of any regional group. Even the use of the term "regional" does not provide sufficient guidance in this regard, because some regional groups, for example, the Western European and Other States Group (WEOG), the Eastern European Group, and to some extent the Asian Group are built on a composite relationship of geography and political affinity. While it is not stated in any of the aforementioned decisions in writing, it is understood that admission to a regional group is based on consensus.

Following the adoption by the General Assembly of resolution 1192 (XII), [Member State] was not invited to join any regional group and this awkward situation which became a matter of growing criticism within and outside of the Organization, has continued until June 2000. It is noteworthy that a press statement issued by the Secretary-General in this regard on 12 May 1999, stated the following:

> "[The Member State] could do much more for the United Nations were it not for a significant obstacle: its status as the only Member State that is not a member of a regional group, which is the basis of participation in many United Nations bodies and activities. I said last year that this anomaly should be rectified, and I hope it will be soon."

On 14 June 2000, the Secretary-General was informed by the then Chairman of the WEOG that [Member State] is now a member of the WEOG and will, therefore, be a participant in all the meetings of the WEOG at Headquarters.

As discussions within regional groups are conducted in private and the United Nations Secretariat is not privy to these discussions, I am not in a position to inform you as to whether [Member State] was invited to the WEOG under any specific conditions. You should, if you so wish, make inquiries about this from members of the WEOG.

4 March 2003

7. Request by a territory for membership in the World Tourism Organization (WTO)—Sovereignty—Associate Membership—Article 6 of the Statutes of the WTO—Required approval and declaration of the member State assuming responsibility for the entity's external relations—Approval by the WTO General Assembly

Memorandum to the Special Representative to the United Nations, World Tourism Organization

1. This is with reference to your facsimile of 5 May 2003 seeking our advice on the application of the [territory] to become a member of the World Tourism Organisation. Our comments are as follows.

2. By a letter of 24 April 2003 addressed to the Secretary General of the World Tourism Organization, the [territory], represented by the Government of [territory] expressed the interest to "pursue a State membership in the World Tourism Organization, separate from the State membership of the member State." The [territory] requested "due consideration within the rules and regulation for WTO State membership".

3. WTO has three categories of membership, spelled out in article 4 of the WTO Statutes: Full Members (article 5), Associate Members (article 6) and Affiliate Members (article 7). Currently, WTO has 139 Full Members, seven Associate Members and some 350 Affiliate Members, representing regional and local promotion boards, tourism trade associations, educational institutions and private sector companies, including airlines, hotel groups and tour operators.

4. In order to become a Full Member, article 5 section 1 requires the applicant to be a sovereign State. The [territory] is not a sovereign State. Only the [Member State] is a sovereign State, which already is a Full Member of WTO. Therefore, the [territory] may be eligible only for Associate Membership under article 6 of the WTO Statutes. Article 6, section 1, reads: "Associate membership of the Organization shall be open to all territories or groups of territories not responsible for their external relations."

5. Article 6 subsequently distinguishes in its sections 2 and 3 between "territories or groups of territories whose national tourism organizations are Full Members of IUOTO (International Union of Official Travel Organizations) at the time of adoption of these Statutes (. . .)" and those, where this is not the case. The former group has a "right to become Associate Member of the Organization without requirement of vote (. . .)". The WTO statutes were adopted on 27 September 1970. [The Member State] did not exist as a sovereign State then, which renders article 6, section 2, inapplicable.

6. The accession procedure for the [territory] to become an Associate Member of WTO is therefore governed by article 6, section 3, of the WTO Statutes, which reads: "territories or groups of territories may become Associate Members of the Organization if their candidature has the prior approval of the Member State which assumes responsibility for their external relations and declares on their behalf that such territories or groups of territories adopt the Statutes of the Organization and accept the obligations of membership. Such candidatures must be approved by the Assembly by a majority of two-thirds of the Full Members present and voting provided that said majority is a majority of the Full Members of the Organization."

7. Thus, in order to become an Associate Member of WTO the [territory] would require prior approval of [Member State], the Member State assuming responsibility for the [territory's] external relations. [The Member State] would have to declare on the [territory's] behalf that the [territory] adopts the Statutes of the Organization and accepts the obligations of membership. Subsequently, the [territory's] candidatures must be approved by the WTO General Assembly, the Organization's principal organ, by a majority of two-thirds of the Full Members present and voting provided that said majority is a majority of the Full Members of the Organization.

12 May 2003

8. Question of representation of a Member State in United Nations organs—Accreditation—Acceptance of credentials and recognition of sovereign government—Rule 39 of the provisional rules of procedure of the Security Council—Rules 27 and 29 of the rules of procedure of the General Assembly—Security Council resolution 1483 (2003) of 22 May 2003—General Assembly resolution 396 (V) of 14 December 1950—Designation of a Permanent Representative to the United Nations in contrast to a Chargé d'Affaires

Note to the Secretary-General of the United Nations

1. In the light of the stated intention of the Governing Council of Iraq to send a delegation consisting of [names] to the 22 July meeting of the Security Council, we understand that it is the intention of the President of the Security Council, after consultation with the members of the Council, to invite these persons to the 22 July meeting. It is also reported that the Governing Council intends to send representatives to assume the Iraqi seat in the United Nations and to designate a Chargé d'Affaires to the Permanent Mission of Iraq to the United Nations. Our comments are as follows.

2. The question of Iraq's representation in the United Nations is a sensitive political and legal matter which will ultimately be decided by the General Assembly in the light of any relevant Security Council resolutions. It should be noted, in this regard, that, pursuant to General Assembly resolution 396 (V) of 14 December 1950, the attitude adopted by the General Assembly on questions of representation "should be taken into account in other organs of the United Nations and in the specialized agencies". Accordingly, as has invariably been the case since 1950, the General Assembly's decisions on representation are followed by the organizations of the United Nations system.

3. With respect to the participation of representatives of the Governing Council in the 22 July meeting of the Security Council, pursuant to rule 39 of its provisional rules of procedure, "the Security Council may invite members of the Secretariat or other persons, whom it considers competent for the purpose, to supply it with information or to give other assistance in examining matters within its competence". Accordingly, if it so wishes, the Council could invite [the persons concerned] under rule 39. While such persons clearly could not sit behind the nameplate "Iraq", there should be no objection to their sitting behind a nameplate "Governing Council of Iraq" or personalized nameplates. We understand that the Security Council has opted for personalized nameplates.

4. If the Governing Council seeks to assume Iraq's seat in the General Assembly, however, this presents a different and far more complicated scenario. Iraq is and remains

a Member State of the United Nations and, under Article 9 of the Charter, is a member of the General Assembly. Pursuant to the established practice of the General Assembly and rule 29 of the rules of procedure of the General Assembly, the previously accredited representatives of Iraq would continue until such time as the General Assembly, on the recommendation of the Credentials Committee, decides otherwise.

5. In accordance with rule 27 of the rules of procedure of the General Assembly, "credentials shall be issued either by the Head of the State or Government or by the Minister for Foreign Affairs". In the absence of a sovereign government in Iraq, there is no recognized authority to issue such credentials. To the extent that the Authority is recognized in Security Council resolution 1483 (2003) as an occupying power, it would be inconsistent with such occupation to have representatives assume the sovereign Iraqi seat in United Nations organs. Moreover, General Assembly acceptance of credentials issued by the Governing Council or Interim Ministers it has appointed would confer recognition by the Assembly on the Governing Council as a sovereign Iraqi government. This may have implications on the implementation of resolution 1483 (2003) which assumes that the occupation ends upon the establishment of an internationally recognized representative government.

6. Thus, in order to avoid a political and legal crisis, every effort should be made, including through contacts between the Special Representative of the Secretary-General and the Governing Council, to ensure that the Governing Council does not attempt to claim the Iraqi seat in the General Assembly. Even if credentials issued by the Governing Council were deemed receivable, such an attempt would probably be subject to challenge necessitating the convening of the Credentials Committee which, as a technical body governed by rule 27, would in turn be compelled to reject any credentials which are not issued by a sovereign Iraqi government.

7. In order to avoid continuing the previously accredited representatives of the former Iraqi regime in the fifty-eighth session of the General Assembly, the General Assembly, on the recommendation of the Credentials Committee, could defer any decision on the credentials of Iraq, on the understanding that, pending the establishment of an internationally recognized government in Iraq, no one would occupy the seat of that country.

8. The rules of procedure of the General Assembly do not contain a rule similar to rule 39 of the provisional rules of procedure of the Security Council. It would be for the General Assembly, at an appropriate time if it so wishes, to adopt a formula to invite representatives of the Governing Council or the Iraqi Interim Administration to attend or participate in its work. Given the unique situation in Iraq, there are no precedents to be cited in this regard. The General Assembly would also have to determine whether such formula would include the right to make statements, the right to circulate documents and/or the right to receive documents. It would not be appropriate, however, for such formula to include the right to vote, sponsor or co-sponsor proposals or other attributes of sovereignty.

9. We understand that the Governing Council intends to designate a Chargé d'Affaires to the Permanent Mission of Iraq to the United Nations. The initial powers of the Governing Council are reported to include the right to "name Iraqi nationals to serve as representatives to international organizations and conferences". While the designation of a Permanent Representative would require a presentation to the Secretary General of credentials issued by a Head of State, Head of Government or Minister for Foreign

Affairs of a sovereign Iraqi government, the designation of a Chargé d'Affaires does not. Accordingly, in the event, the Secretary-General would not be required to receive or accept any documents purporting to be credentials.

17 July 2003

9. Application of rule 129 of the rules of procedure of the General Assembly—Voting procedures—Separate votes on parts of resolution—Adoption of resolution by consensus or without a vote—Implied legal question

Letter to the Chairman of the Third Committee of the General Assembly, United Nations

I wish to refer to the Bureau of the Third Committee's facsimile of 20 October 2003 requesting "an interpretation of rule 129 of the rules of procedure of the General Assembly." As the Bureau has declined to put forth a specific legal question, we must rely on our understanding that the question before us relates to the query recently discussed in the informal consultations of the Bureau, namely whether rule 129 requires a vote on the resolution as a whole if parts of that resolution have been voted on separately. The Bureau is of course free to correct that understanding.

Rule 129 provides that "a representative may move that parts of a proposal or of an amendment should be voted on separately. If objection is made to the request for division, the motion for division shall be voted upon. Permission to speak on the motion for division shall be given only to two speakers in favour and two speakers against. If the motion for division is carried, those parts of the proposal or of the amendment which are approved shall then be put to the vote as a whole. If all operative parts of the proposal or of the amendment have been rejected, the proposal or the amendment shall be considered to have been rejected as a whole".

The rules of procedure of the General Assembly do not make reference to decision-making by consensus or adoption without a vote. As such, a strict reading of any decision-making rule would presuppose voting on all proposals. Similarly, a strict reading of rule 129 would imply that whenever a part or parts of a proposal are voted upon separately, those parts of the proposal which are approved shall then be put to the vote as a whole.

As Member States are aware, however, it is the long-established practice of the General Assembly and its Main Committees to strive for consensus whenever possible. This means that, in the absence of an objection or a specific request for a vote, draft resolutions and decisions are adopted without a vote. Similarly, in respect of the interpretation and application of rule 129, the practice has emerged that in the absence of an objection or a specific request for a vote on the proposal as a whole, the proposal may be adopted without a vote even though a part or parts of that proposal have been voted on separately.

Thus, when the Chairman announces that, in the absence of any objection, may he take it that the Committee wishes to adopt the proposal without a vote, any delegation may block a consensus by lodging an objection or by specifically requesting a vote on the proposal as a whole. It is for the objecting delegation to formulate the grounds for its objection which, in any event, has the same effect as requesting a vote on the proposal as a whole.

23 October 2003

OTHER ISSUES RELATING TO UNITED NATIONS PEACE OPERATIONS

10. United Nations Organization Mission in the Democratic Republic of the Congo (MONUC)—Cross border operations in the internal waters of another Member State—Delimitation and demarcation of lake boundaries—Territorial limitations of MONUC's mandate—Consent by the Member State concerned—Authorization by the Security Council to use force within the Member State concerned—Use of force to ensure security and freedom of movement of personnel and to protect civilians under imminent threat of physical violence—Security Council resolutions 1291 (2000) of 24 February 2000 and 1445 (2002) of 4 December 2002—Agreement between the United Nations and the Democratic Republic of the Congo on the status of the United Nations Organization Mission in the Democratic Republic of the Congo. Kinshasa, 4 May 2000 (Status of Forces Agreement)

Note to the Director of the Africa Division,
Department of Peacekeeping Operations, United Nations

MONUC cross border operations on Lake [name]

1. I wish to refer to the communication of 13 February 2003 on the above-mentioned subject to the Legal Counsel from the Special Representative of the Secretary-General (SRSG) for MONUC and to your follow-up on this matter of 19 February 2003. According to this communication,

> "MONUC is planning the deployment of an armed Riverine Unit in Lake [name] which would have for main tasks to protect MONUC logistic traffic between the port of [name] in [State] and the Democratic Republic of [the] Congo (DRC) ports and possibly to monitor ceasefire violations. To carry out these tasks, the armed Riverine Unit may have to operate inside the internal waters of [the DRC's] neighbouring States."

2. The SRSG in his communication raises, *inter alia,* two questions concerning this proposal. The first is a request for information relating to, "the legal regime applicable for Lake [name], including accurate and detailed internal waters delimitation for each of the concerned States if available". Secondly, the SRSG has asked whether MONUC would be able, from a legal point of view, to deploy the armed Riverine Unit within the internal waters of the DRC and [State] on Lake [name].

3. As far as the first question is concerned, the Department of Peacekeeping Operations (DPKO) could contact the Cartographic Section in the Department of Public Information with a view to obtaining precise information on the demarcation of Lake [name]. However, as a practical way of facilitating its operations, MONUC could also approach each of the States bordering on Lake [name] (i.e. the riparian States) requesting maps and other information from them in order to facilitate MONUC's movements.

4. The second question relates to whether MONUC can deploy the armed Riverine Unit within the internal waters of the DRC and [State]. However, the attached communication does not elaborate on the concept of this Riverine Unit or who the Unit would consist of. There is also a very general description of its functions, which include activities to "protect MONUC logistic traffic" and to "monitor ceasefire violations." While the SRSG's communication does not clearly indicate how this Unit will fit into MONUC's concept of operations and specifically what its functions will be, his proposal does raise

important issues with respect to MONUC's area of operations and mandate as outlined in relevant Security Council resolutions.

5. In the first instance, MONUC, pursuant to relevant Security Council resolutions including resolution 1445 (2002) of 4 December 2002 enjoys full access throughout the territory of the DRC in order to fulfil its mandated tasks which would *ipso facto* include access to the DRC's internal waters. Thus, consistent with the above resolutions, the Riverine Unit would enjoy freedom of movement throughout the DRC's internal waters.

6. MONUC still has to elaborate on who would make up the Riverine Unit but it would appear that they are proposing that armed military members of MONUC's military component assist the Unit. This would imply that, if necessary, force could be used to protect the Unit's activities on DRC internal waters and if necessary ensure its freedom of movement. In this connection, we would point out that paragraph 8 of Security Council resolution 1291 (2000) of 24 February 2000 provides that:

> "*Acting* under Chapter VII of the Charter of the United Nations, *decides* that MONUC may take the necessary action, in the areas of deployment of its infantry battalions and as it deems it within its capabilities, to protect United Nations and co-located JMC [Joint Military Commission] personnel, facilities, installations and equipment, ensure the security and freedom of movement of its personnel, and protect civilians under imminent threat of physical violence."

Furthermore, the Status of Forces Agreement (SOFA)[9] with the Government of the DRC provides, *inter alia,* for freedom of movement throughout the DRC which includes the right to use port facilities and internal waters (articles 12 and 14) and the right of military members of MONUC to carry arms whilst on duty in accordance with their orders (article 39). Taking the above into account, we are of the view that there is a legal basis for armed members of MONUC to accompany the Riverine Unit within the ports and internal waters of the DRC provided its activities fall within MONUC's mandated tasks.

7. However, the SRSG points out that the activities of the Riverine Unit will extend beyond the DRC to the internal waters and ports of [State] and thus beyond MONUC's current mandated area of operations. As far as we are aware, the Security Council has not extended MONUC's area of operations to include any part of [State]. Thus, members of MONUC's military component could potentially be using force to protect the Riverine Unit in an area where MONUC does not, as far as we are aware, have any authority or responsibility.

8. As you are aware, this Office is, in conjunction with DPKO currently negotiating an agreement with the Government of [State] for a liaison office in that country in order to provide logistical and other support service to MONUC. The draft does allow for the presence of members of MONUC's military component (paragraph 5*(d)*) and also provides in paragraph 6 (ii) for freedom of movement throughout [State] including allowing MONUC to use canals, internal waters and port facilities and provides that, "United Nations military personnel, United Nations civilian police personnel and United Nations security officers designated by the SRSG may possess and carry arms while on duty in accordance with their orders." (Paragraph 9). But we wish to emphasise that this draft agreement still needs to be finalised and the above-mentioned provisions are still in draft form.

[9] United Nations *Treaty Series*, vol. 2106, p. 357.

9. Even if this agreement were to be concluded, as the Security Council has not extended MONUC's area of operation into [State], any activities of the Riverine Unit in that country would have to be in consultation and require the consent of the Government of [State], especially if it includes activities of MONUC's military component. Finally any authorisation to use force within the boundaries of [State] in order to protect the activities of the Riverine Unit and secure its freedom of movement would have to be granted by the Security Council.

21 February 2003

11. United Nations Mission in Ethiopia and Eritrea (UNMEE)—Liability for acts of staff members—Responsibility of staff members to comply with local laws and to honour their private legal obligations (ST/AI/2000/12)—Privileges and immunities of staff members for the performance of official functions—Detention of staff members for criminal offences—Jurisdiction in criminal proceedings over members of United Nations peacekeeping operations—Exclusive jurisdiction of the respective participating States—Articles 42 and 47 of the model Status of Forces Agreement (A/45/594)

Note to the Assistant Secretary-General, Office of Operations, Department of Peacekeeping Operations, United Nations

A. *Introduction*

1. I wish to refer to your Note of 4 August 2003 attaching an UNMEE Code Cable dated 26 July 2003 concerning two car accidents involving two members of UNMEE, which occurred while both were off-duty. The Code Cable also attaches a letter from the [State A] Commissioner, dated 18 July 2003 in which he objects to the fact that UNMEE did not assume responsibility for either accident and that UNMEE allegedly facilitated the departure of one of those involved from [State A]. The Commissioner requests a "clear and official explanation from the head of the mission" on this matter.

Our views are as follows:

B. *First car accident*

2. According to the Code Cable, an UNMEE staff member rented a private vehicle and drove with [name] to [place] on Sunday 9 March 2003. He was off duty at the time and the vehicle he rented was not a United Nations vehicle.

3. While driving to [place], the staff member collided with an oncoming truck killing [name] and injuring himself. The truck driver appears to have been injured as well. A government official who witnessed the accident assisted the truck driver, and the official and his friends removed the staff member and his girlfriend from the car. The truck driver also alerted the traffic police who assisted with the rescue. Both the staff member and his girlfriend were sent to the hospital where she was reported dead on arrival. The following day a team of investigators from UNMEE Security arrived in [place] to conduct an investigation and to obtain information from the local police and medical personnel. The staff member was flown back to [place] and from there to [State B] to receive medical treatment from where he was released from hospital on 17 March 2003. He remained on leave until his contract came to an end. He never returned to [State A].

4. Based upon the information provided by UNMEE, we agree from a legal point of view that this is a private act by a staff member for which the Organization does not incur

liability. Therefore, it is not the responsibility of the United Nations to address claims that arise from this incident. Were legal proceedings to be instituted against UNMEE, it should assert its privileges and immunities pursuant to the model Status of Forces Agreement (model SOFA) (A/45/594), which applies *mutatis mutandis* to the activities of UNMEE in [State A] pursuant to resolution 1320 (2000).

5. However, the United Nations has an interest in ensuring that staff members respect local laws and honour their private legal obligations. In this connection we note that the person concerned was a United Nations staff member at the time of the motor vehicle accident in question and that he is now apparently in retirement. As a United Nations staff member, he had a responsibility under Administrative Instruction ST/AI/2000/12 to comply with local laws and to honour his private legal obligations. Since, presumably, the staff member went to [State A] solely in connection with his assignment to UNMEE, we believe that it would be appropriate for the United Nations to contact the staff member and advise him to address this matter and to fulfil any related legal obligations. He should be reminded that as a United Nations staff member, he was required under ST/AI/2000/12 to fulfil his obligations with respect to this accident and that the Organization expects him to do so.

6. It is also important to note that section 6 of the above-mentioned Administrative Instruction provides that upon separation from service, deductions from all final entitlements including repatriation grant may be made under the staff rules to pay the staff member's legally established obligations.

7. In the event that the United Nations' efforts to have the staff member address this matter are unsuccessful, or in parallel with such efforts, UNMEE should also seek to determine whether there exists automobile insurance for rented vehicles which would respond to the claims against him.

8. Finally, we note from paragraph 7 of the Code Cable that the Government has threatened to detain those members of UNMEE who assisted the staff member in his departure from [State A]. However, our understanding, as mentioned above was that the staff member was evacuated for emergency medical treatment and that members of UNMEE assisting in the evacuation were performing their official functions.

9. The Government should therefore be informed that pursuant to paragraph 46 of the model SOFA, all members of UNMEE including locally recruited personnel are "immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity." UNMEE should accordingly assert the privileges and immunities of its members for purposes of their official functions.

C. *Second case: Alleged damage to a taxi by a soldier*

10. The second case concerns three soldiers who on 8 September 2002, took a taxi from the center of [place] to their barracks. The taxi driver alleges that upon their arrival at the barracks the front-seat passenger hit the front windscreen causing damage, which he reported to the local authorities.

11. It appears that the Government sent various letters of demand to UNMEE. Two reports issued on the matter were unable to come to a conclusion on liability, which was also the view of the Contingent with whom this matter was taken up.

12. Unfortunately, therefore, insufficient information has been provided for the Office of Legal Affairs to advise in this matter.

D. *Detention of members of UNMEE for criminal offences*

13. The Special Representative of the Secretary-General, in paragraph 7 of his Code Cable, raises the issue of the detention of members of UNMEE for criminal offences they may have committed in [State A]. Again this is a matter dealt with in the model SOFA. Paragraphs 42 and 47 provide as follows:

> "42. Subject to the provisions of paragraphs 24 and 26, officials of the Government may take into custody any member of the United Nations peacekeeping operation:
>
> *(a)* When so requested by the Special Representative/Commander; or
>
> *(b)* When such a member of the United Nations peacekeeping operation is apprehended in the commission or attempted commission of a criminal offence. Such person shall be delivered immediately, together with any weapons or other item seized, to the nearest appropriate representative of the United Nations peacekeeping operation, whereafter the provisions of paragraph 47 shall apply *mutatis mutandis*."
>
> "47. Should the Government consider that any member of the United Nations peacekeeping operation has committed a criminal offence, it shall promptly inform the Special Representative/Commander and present to him any evidence available to it. Subject to the provisions of paragraph 24:
>
> *(a)* If the accused person is a member of the civilian component or a civilian member of the military component, the Special Representative/Commander shall conduct any necessary supplementary inquiry and then agree with the Government whether or not criminal proceedings should be instituted. Failing such agreement, the question shall be resolved as provided in paragraph 53 of the present Agreement.
>
> *(b)* Military members of the military component of the United Nations peacekeeping operation shall be subject to the exclusive jurisdiction of their respective participating States in respect of any criminal offences which may be committed by them in the [host country/territory]."

14. Thus, pursuant to the model SOFA the Government is in a position to initially detain and if necessary prosecute a member of UNMEE's civilian component such as a United Nations official or police monitor or a civilian member of the military component such as a military observer. However, such legal measures should be in accordance with the above-mentioned provisions of the model SOFA and any prosecution done by the Government should be in agreement with the Special Representative.

22 August 2003

12. United Nations Mission in Liberia (UNMIL)—Authorization by the Security Council to use armed force in situations other than self-defence—Interpretation of Security Council resolution 1509 (2003) of 19 September 2003—Ordinary and natural meaning given to terms when they are read in the context of a resolution as a whole and in light of its object and purpose—History and circumstances of the adoption of a resolution

Note to the Under-Secretary-General
of the Department of Peacekeeping Operations, United Nations

I refer to your Note dated 8 October 2003 forwarding a copy of a letter that you have received from the Permanent Representative of [State] seeking written confirmation that

the Security Council, by its resolution 1509 (2003) of 19 September 2003, has authorized UNMIL to use armed force for purposes or in situations other than self-defence.

In the penultimate paragraph of the preamble of its resolution 1509 (2003), the Security Council "*[d]etermin[ed]* that the situation in Liberia continues to constitute a threat to international peace and security in the region, to stability in the West Africa subregion, and to the peace process for Liberia". In the final preambular paragraph of that same resolution, the Security Council stated that, in adopting the resolution, it was "*[a]cting* under Chapter VII of the Charter of the United Nations". The Security Council has therefore determined that the situation in Liberia falls within the scope of Chapter VII of the Charter and has decided, in resolution 1509 (2003), to exercise its powers under that Chapter.

The powers of the Security Council under Chapter VII of the Charter include the power to establish a United Nations operation. They also include the power to authorize that operation to use armed force for purposes or in situations other than self-defence. Whether the Security Council has in fact exercised that power and granted such authorization depends on the content of the resolution that it has adopted.

As the Permanent Representative of the [State] notes in his letter, resolution 1509 (2003) does not expressly authorize UNMIL to use "all necessary means" to fulfil any of the elements of its mandate set out in paragraph 3 of that resolution. Nor does it expressly authorize UNMIL "to take the necessary measures" to fulfil any of the elements of that mandate. Had such express wording appeared in the resolution, it would, of course, have been beyond all doubt that the Security Council had made use of its powers under Chapter VII of the Charter to authorize UNMIL to use armed force (other than in situations of self-defence).

However, it does not follow from the fact that no such express wording appears in the resolution that the Security Council has not exercised that power and granted such authorization. Whether it has done so depends upon the interpretation of the resolution, specifically, on the ordinary and natural meaning which is to be given to its terms when they are read in the context of the resolution as a whole and in the light of its object and purpose, and against the background of the discussions leading to, and the circumstances of, its adoption, in particular the report that the Secretary-General submitted pursuant to resolution 1497(2003).

Applying these tests, it is evident that the Security Council fully intended, in adopting resolution 1509 (2003), to authorize UNMIL to use armed force, otherwise than in self-defence.

This is clear from the wording of the resolution itself. So, for example, UNMIL would simply not be in a position meaningfully to discharge that element of its mandate which is set out in operative paragraph 3 *(j)* of the resolution if it were not able to resort to armed force, if need be.

It is also clear from the history and circumstances of the adoption of the resolution. Thus, the Secretary-General, in the report that he submitted pursuant to resolution 1497 (2003), proposed a concept of operations for UNMIL that was explicitly structured on the assumption that it should have "a robust mandate" which would enable it to take "a robust approach" and pre-empt potentially destabilizing events (S/2003/875, paragraph 57). The Security Council, in the eighteenth preambular paragraph of its resolution 1509 (2003), "*[w]elcom[ed]* the Secretary-General's report. . . and its recommendations". Moreover,

article IV of the Comprehensive Peace Agreement[10] sets out the request of the parties to the United Nations to "deploy a United Nations Chapter VII force" in Liberia to support the transitional Government and assist in the implementation of the Agreement. Resolution 1509 (2003), establishing UNMIL, represents the United Nations' response to that request.

This being so, we would advise that you write back to the Permanent Representative of [State] confirming that it is the considered view of the Secretariat that the Security Council, by its resolution 1509 (2003) of 19 September 2003, has authorized UNMIL to use armed force for purposes or in situations other than self-defence.

13 October 2003

OTHER ISSUES RELATING TO SPECIAL COURTS AND TRIBUNALS

13. Special Court for Sierra Leone—Consent for disclosure of confidential documents—*Mutatis mutandis* application of rule 70 (B) of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda (ICTR)—Article 14 of the Statute of the Special Court for Sierra Leone

Letter to the Prosecutor of the Special Court for Sierra Leone

I wish to refer to your letter dated 5 December 2002 to the Acting Special Representative of the Secretary-General for the United Nations Mission in Sierra Leone (UNAMSIL), requesting "access to investigative reports, documents, and other materials relating to the abduction of UNAMSIL personnel and seizure of UNAMSIL equipment during May 2000" including a request for copies of Boards of Inquiry (BOI) reports relating to these incidents.

Further to your request, we are forwarding to you copies of relevant documents from the United Nations Security Coordinator (UNSECOORD) and the Department of Peacekeeping Operations (DPKO), including pertinent BOI reports. However, we wish to point out that these documents are being made available to you in your capacity as Prosecutor of the Special Court for Sierra Leone pursuant to rule 70 B of the Rules of Procedure of the International Criminal Tribunal for Rwanda,[11] which apply *mutatis mutandis* to the conduct of legal proceedings before the Special Court under article 14 of its Statute (which rule is included in the draft Rules of Procedure and Evidence of the Court). Rule 70 B provides as follows:

> "If the Prosecutor is in possession of information which has been provided to him on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused."

As these documents are being provided to you on a confidential basis, you and your Office may not disclose them without the prior consent of the United Nations. Accordingly, when you do revert to the United Nations with a request to disclose a certain document, including using it in evidence, the United Nations is entitled to deny or grant your request.

[10] S/2003/850.

[11] ICTR/3/Rev., 6 July 2002.

The United Nations is also free to grant permission subject to any conditions it deems appropriate.

The above-mentioned procedure has been used with great success to facilitate the transmittal of documents to the Prosecutors of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda (ICTY/ICTR) under rule 70 B of their Rules of Procedure and Evidence. Accordingly, it is our understanding that the same working practice that has developed in the ICTY/ICTR under rule 70 B of their respective Rules of Procedure and Evidence will apply with respect to the transmittal of documents to the Special Court.

14 March 2003

14. Special Court for Sierra Leone—Cooperation of third States—Powers to enforce compliance by States under Chapter VII of the Charter of the United Nations—Powers of the *ad hoc* tribunals for the former Yugoslavia and for Rwanda—Bilateral agreements

Letter to the President of the Special Court for Sierra Leone

The Secretary-General has asked me to respond to your letter dated 10 June 2003 in which you seek his guidance on how the Special Court for Sierra Leone ("the Special Court") can effectively secure the assistance and cooperation of third States.

You suggest that the difficulties encountered by the Special Court in securing third State cooperation could be effectively addressed through a Security Council resolution endowing the Special Court with broad Chapter VII powers to enforce compliance by States with its orders and requests. In addition to granting the Special Court Chapter VII powers for purposes of requesting the surrender of indictees from outside the Special Court's jurisdiction, you recommend that such a resolution should also grant the Special Court the authority to secure from States cooperation in other areas, such as allowing indictees to travel to their territory, getting States to detain indictees and to provide them with medical treatment.

In this connection you mention that third States have complied with arrest warrants issued by the *ad hoc* tribunal for the former Yugoslavia (ICTY), which is "endowed with powers under Chapter VII—powers which the Special Court does not possess."

In response, I wish to point out that the ICTY and the international *ad hoc* tribunal for Rwanda (ICTR) were established as subsidiary organs of the Security Council under Chapter VII resolutions and endowed with powers for the purpose only of enforcing cooperation, "in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law" and more specifically, for the identification and location of persons, taking testimony, service of documents and the surrender or transfer of accused to the international tribunals (articles 29 and 28 of the ICTY and ICTR Statutes, respectively).

Your suggestion by contrast, to endow the Special Court with Chapter VII powers to enforce the cooperation of States in matters such as the transfer of a body of an indictee, providing medical facilities and detaining indictees in third States is all embracing and exceeds by far the purposes for which Chapter VII powers have been endowed and exercised in the practice of the two United Nations based tribunals which have been interpreted narrowly.

Furthermore, members of the Security Council with whom the Secretariat has consulted informally have expressed their unwillingness to act upon this request. Some of them are of the view that the use of Chapter VII powers would not solve the specific challenges facing the Special Court and that the most effective and expeditious way of addressing these matters is through bilateral cooperation with the States concerned either through the Special Court itself or with the assistance of the Government of Sierra Leone.

You will recall, for example, that at the Special Court's request, the Secretary-General raised the transfer of [name] to [State] with its Foreign Minister and it was agreed that for this to take place an agreement on this matter would have to be concluded with the Special Court and ratified by Parliament in [State].

We would therefore strongly urge the Special Court in this case as well as in the others mentioned in your letter to work directly with the governments concerned either informally or more formally through the negotiation of bilateral agreements in order to obtain compliance with the Special Court's requests.

14 July 2003

SANCTIONS

15. Paragraph 17 of Security Council resolution 1478 (2003) of 6 May 2003 (measures imposed against Liberia)—Obligation of all States to prevent the import into their territory of certain items originating from Liberia—Date of effect of said obligation—Definition of "import"—Interpretation of a term in its ordinary and natural meaning when read in its context and in light of the object and purpose of the resolution concerned—National legislation

Letter to the Chairman of the Security Council Committee established pursuant to resolution 1343 (2001) concerning Liberia

I refer to a letter dated 11 September 2003 from the Acting Chairman of the Security Council Committee established pursuant to resolution 1343 (2001) concerning Liberia (the "Committee"), in which, on behalf of the Committee, he sought the views of this Office on a matter relating to the application of the measures that were imposed by the Security Council in paragraph 17 of its resolution 1478 (2003) of 6 May 2003. I also refer to the attachments to that letter, specifically: a letter dated 30 July 2003 from the Permanent Representative of [State A] to the United Nations, transmitting a letter from the Marketing Director of [Corporation] dated 28 July 2003, in which the Marketing Director described a situation that he said had arisen with regard to one of the Corporation's shipments and in which he sought the assistance of the Committee in resolving that situation; a letter dated 15 August 2003 addressed by you, on behalf of the Committee, to the Permanent Representative of [State B] to the United Nations, seeking confirmation of certain facts stated in the Marketing Director's letter; a letter dated 15 August 2003 addressed by you, on behalf of the Committee, to the Marketing Director of the Corporation, requesting certain documentation relating to the situation described in his letter; and his reply dated 18 August 2003, together with its accompanying documentation.

In his two communications, the Marketing Director of the Corporation states the situation to be as follows. On 17 December 2002, the Corporation concluded a contract

with a [State C] company for the sale of a quantity of plywood, apparently being a "timber product originating in Liberia" in the sense of resolution 1478 (2003). Pursuant to that contract, the Corporation shipped the quantity of plywood concerned from Liberia on 23 May 2003. The vessel carrying that consignment arrived in the port of [name], [State B], on 25 June 2003. The necessary documents for making an entry of the consignment were lodged with the [State B's] customs authorities on 8 July 2003. Those authorities declined to clear the consignment on the ground that doing so would involve a violation by [State B] of its obligations pursuant to paragraph 17 of Security Council resolution 1478 (2003).

It appears from the Acting Chairman's letter and its attachments that the Committee has sought confirmation of these facts from the Permanent Representative of [State B] to the United Nations, but that no response had been received to that request as of the date of the Acting Chairman's letter. We understand that a response to that letter is still awaited.

On the assumption that the facts are as they are described by the Marketing Director of the Corporation in his two letters, the Acting Chairman, on behalf of the Committee, sought our advice as to the relationship of those events to an actual or potential violation of the measures imposed by the Security Council in paragraph 17 of its resolution 1478 (2003), more specifically, whether [State B] was on 8 July 2003, and remains today, under an obligation pursuant to paragraph 17 of that resolution to deny customs clearance to the consignment concerned.

The following advice is given on the assumption that the facts are as stated in the communications from the Marketing Director of the Corporation attached to the Acting Chairman's letter.

Pursuant to paragraph 17 of Security Council resolution 1478 (2003) of 6 May 2003, all States are under an obligation to take the necessary measures to prevent "the import into their territories of all round logs and timber products originating in Liberia." In accordance with paragraph 17 *(b)* of resolution 1478 (2003), that obligation came into force at 00:01 hours Eastern Daylight Time on Monday, 7 July 2003. All States therefore came under an obligation at that time to take the necessary measures to prevent the import into their territories of items of the description contained in paragraph 17 *(a)*.

In the nature of things, this obligation, being one of prevention, could apply only in respect of imports which might be sought or attempted at or after the time and date specified in paragraph 17 *(b)* of resolution 1478 (2003). It could not apply to imports which had already taken place by that time. The question here therefore is whether the consignment of plywood that had been shipped by the Corporation was imported into [State B] before the time and date specified in paragraph 17 *(b)* or whether, on the other hand, its import had yet to take place or, having begun, had yet to be completed. If the former, [State B] would not, on 8 July 2003, have been under any obligation by virtue of resolution 1478 (2003) to refuse to accept entry of, or to deny clearance to, the consignment; nor would it be under any obligation now to continue to refuse such entry or deny such clearance. If the latter, it would.

In order to determine when an "import" takes place, it is necessary to consider what constitutes an "import" of goods for the purposes of paragraph 17 of resolution 1478 (2003). That resolution does not contain any definition of that term; nor is a definition of it to be found in any of the other resolutions of the Security Council imposing measures in respect of Liberia; nor is it defined in any other of the resolutions that the Security Council has adopted to date imposing measures under Chapter VII of the Charter. This being so, it

is necessary to seek its meaning by giving to it the ordinary and natural meaning which it bears when it is read in the context, and in the light of the object and purpose, of the resolution in which it appears.

One sense which the term "import" bears in general usage is the introduction of goods from abroad into free circulation within a State's economic system. This corresponds, in the field of customs law and practice, with the notion of introduction of goods "into home use". It is clear, however, from the text of resolution 1478 (2003) that the term "import", as it is used in paragraph 17, bears a wider sense. Thus, paragraph 18 of that resolution supposes that the purpose of the measures imposed by paragraph 17 is to put an end to all "exports" from Liberia of round logs and timber products originating in that State by removing such items entirely from the field of commerce. To ensure that this objective is achieved, States would have to take the necessary steps to prevent such items not only from being introduced into free circulation in their national markets, but, more generally, from being introduced into their territories as items of trade.

It is apparent, then, that the term "import", as it is used in paragraph 17 of resolution 1478 (2003), should not be understood as being limited to the introduction of goods into home use. Rather, it bears a wider and more general sense, signifying the introduction of goods into the territory of a State where those goods are then entered for any form of customs procedure—be it for clearance for home use or whether it be for processing for home use, for inward processing, for temporary admission with a view to re-exportation, for warehousing, for transit, for transshipment or for carriage of goods coastwise—or where steps are otherwise then taken towards making them available as items of commerce, as, for example, where their admission to a free zone is sought.

This being so, there would seem be a range of points in time that could be identified as being that when an "import" is to be considered to take place for the purposes of paragraph 17 of resolution 1478 (2003): namely, when an item is introduced into a State's territory at a port or place of entry; when, after having been so introduced, it is presented to that State's customs authorities; and, in so far as it may be different, when, after having been introduced into a State's territory, the item is entered for a particular customs procedure. There is nothing in resolution 1478 (2003) which would dictate that one or other of those points in time be treated as the moment at which an "import" takes place. All of them would seem to be consistent with the notion of "import" employed in that resolution. It is therefore for States, in taking steps to implement the measures that the Security Council has imposed, to determine which of those points in time is to be considered as the moment of "import" for those purposes. In doing so, States will presumably designate that which best accords with the principles, standards, practices and concepts which form part of their existing national customs law.

In the light of the foregoing, it is the view of this Office that whether the consignment of plywood shipped by the Corporation falls within the scope of the prohibition set out in paragraph 17 of resolution 1478 (2003) must depend on the moment at which that consignment is considered to be "imported" under [State B] law.

19 September 2003

TREATY LAW

16. Functions of the Secretary-General as depositary as distinct from his administrative responsibilities as chief administrative officer of the Organization—ST/SGB/1998/3 (Organization of the Secretariat of the Economic Commission for Europe)—Requests to the Secretary-General, as depositary, by a treaty-based body

Letter to the Executive Secretary,
United Nations Economic Commission for Europe

I refer to your letter of 19 December 2002 informing the Secretary-General that the Executive Committee of the 1998 Agreement Concerning the Establishing of Global Technical Regulations for Wheeled Vehicles, Equipment and Parts Which Can be Fitted and/or be Used on Wheeled Vehicles (1998 Agreement)[12] requested by resolution that the Secretary-General of the United Nations discharge the notification functions of the 1998 Agreement for both the Compendium of Candidate Global Technical Regulations ("the Compendium") and the Registry of Global Technical Regulations ("the Registry") created under that Agreement. The resolution further states that the above functions should be performed by the Treaty Section of the Office of Legal Affairs.

I have been asked to respond to the letter. [. . .]

I recall that this issue had been the subject of extensive previous correspondence between the Transport Division of the Secretariat of the Economic Commission for Europe (ECE) and the Office of Legal Affairs. I have written to your predecessor on this matter. My office has continued to take the same view since the time of the negotiation of the 1998 Agreement.

At the outset, I note that the manner in which this matter has been addressed by the Executive Committee is wholly inappropriate. The Executive Committee is a body established under article 3 of the 1998 Agreement, constituted by representatives of Contracting parties and is, *inter alia,* responsible for the implementation of the 1998 Agreement and to fulfil such other functions as may be appropriate under the 1998 Agreement. As such, it may therefore, where appropriate, submit requests to the Secretary-General in his capacity as depositary on behalf of the Contracting parties, provided such requests are in accordance with the 1998 Agreement and relate to the responsibilities of the Secretary-General as depositary of the 1998 Agreement.

I emphasize again that the creation and maintenance of both the Compendium, which consists of existing national or regional regulations selected as candidates for global harmonization, and the Registry established under the 1998 Agreement, constitute administrative functions related to the implementation of the 1998 Agreement and do not constitute depositary functions. The Secretary-General may only undertake such administrative responsibilities in his capacity as the chief administrative officer of the Organization and not as the depositary. Administrative functions are allocated by the Secretary-General through organizational bulletins (see below).

I recall that the ECE subsidiary body, in the framework of which the 1998 Agreement was negotiated (*Working Party on the Construction of Vehicles* or "WP. 29"), considered, at its 115th session, that "With respect to the suggestions provided by the United Nations

[12] United Nations *Treaty Series*, vol. 2119, p. 129.

Office of Legal Affairs, the representatives of the [States] explained that [. . .] the delegation of certain administrative responsibilities from the United Nations Secretary-General to the ECE Executive Secretary, in particular with respect to the Compendium of Candidate Technical Regulations, should be solved by an internal arrangement within the United Nations, without change to the text of the Agreement" (TRANS/WP.29/638). The foregoing suggests that members of the Working Party themselves concluded at the time that the matter at issue is an internal matter which needs to be resolved by the Secretary-General in the light of his responsibilities under the Charter of the United Nations and consistent with applicable laws and practice through an internal arrangement within the Secretariat. This was the position that was reflected in my letter to your predecessor of 9 June 2000.

I also draw your attention to the distribution of tasks and resources in the Secretary-General's bulletin ST/SGB/1998/3, entitled "Organization of the Secretariat of the Economic Commission for Europe". Section 9.2*(c)* of this bulletin provides that some of the core functions of the ECE Transport Division are "elaborating, harmonizing, administering, updating and promoting international legal instruments in the field of transport".

Unfortunately, instead of the matter being resolved through an internal arrangement within the United Nations Secretariat, as suggested by me and as acknowledged by the Working Party mentioned above, it continues to be raised with the Contracting parties to the 1998 Agreement, at times, at the encouragement of the Transport Division of the ECE (see TRANS/WP.29/703).

I suggest that this matter be resolved on the basis of my letter to your predecessor, namely that the administrative functions (as distinct from the depositary functions) be performed by the Secretariat of ECE, as prescribed in section 9.2 *(c)* of the bulletin just quoted. If you do not agree, the matter will have to be resolved through the intervention of the Secretary-General and, if necessary, appropriate amendment of existing rules.

31 January 2003

17*(a)*. International Cocoa Agreement, 2001—Commodity Agreements—Treaty-making power of intergovernmental organizations—Shared and exclusive competence of the European Community and its member States—"Mixed agreements"—The European Commission becoming a party to an agreement on behalf of its member States—Distribution of voting rights

Letter to the Officer in Charge of the International Cocoa Organization

1. I refer to your letter of 19 March 2003, regarding the capacity of the European Commission (EC) to approve the International Cocoa Agreement, 2001,[13] (the Agreement) on behalf of the member States of the European Union (EU). Since your letter raised complex issues of the competencies of the EC and its member States, the preparation of the response entailed an examination of the law and practice both by the Treaty Section and the Office of the Legal Counsel.

[13] United Nations *Treaty Series*, vol. 2229, p. 2.

2. I note that this matter was first raised with the Treaty Section of the Office of Legal Affairs by the Principal Administrator, DG E II-Development Cooperation/Commodities Administrator, in early October 2002.

3. On 2 October 2002, the Treaty Section advised the Principal Administrator that, if the EC became a party to the Agreement, it could exercise the votes of its EU member States that were also party to the Agreement in accordance with article 4, paragraph 2, of the Agreement. The Treaty Section also advised that an intergovernmental organization could exercise only the relevant rights of its member States which have demonstrated their consent to be bound by the Agreement.

4. The Principal Administrator said in response that the Treaty Section's position did not "come as a surprise to us [EC]" and that "I [the Principal Administrator] fundamentally agree with your legal approach—this is why we deem it necessary to amend the Agreement as soon as possible."

5. Two distinct questions are at issue: the EC's ability to represent its member States, and its ability to undertake on their behalf the legal function of approving the Agreement.

6. On the first issue there is no dispute. The EC has, for some time, represented its member States at international negotiations, in concluding and adopting treaties and applying them. The second issue raises a number of legal aspects pertaining to the treaty-making power of intergovernmental organizations, the practice of the EC in concluding commodity agreements and the question of voting rights.

(a) *Treaty-making power of intergovernmental organizations*

7. Article 4, paragraph 1, of the Agreement provides that: "Any reference in this Agreement to a "Government" or "Governments" shall be construed as including the European Union and any intergovernmental organization having responsibility in respect of the negotiation, conclusion and application of international agreements, in particular commodity agreements. . .". The Agreement does not require the participation of some or all of the member States of the EC as a condition for its participation (as is required under the United Nations Convention on the Law of the Sea, 1982,[14] or the Protocol to the Agreement on the Importation of Educational, Scientific and Cultural Materials, 1950[15]), nor does it allow the EC to replace its individual member States and participate on their behalf. The Agreement is, in fact, silent on the relationship between the EC and its member States and their separate participation in the Agreement. In the absence of a clear provision to that effect, the general principles of treaty-making power of international organizations shall apply. Accordingly, any intergovernmental organization participating in an international agreement does so in its own capacity and on behalf of the organization as a whole, rather than on behalf of each and all of its individual member States.

8. Furthermore, there is no suggestion in the final clauses (article 54 (Signature) and article 55 (Ratification, acceptance approval)) of the Agreement that an intergovernmental organization could express consent to be bound by the Agreement on behalf of all its member States, or otherwise sign, ratify, accede to or approve the Agreement on their behalf.

[14] United Nations *Treaty Series*, vol. 1833, p. 3.
[15] United Nations *Treaty Series*, vol. 1259, p. 3.

9. In your letter you refer to the Statement adopted by the International Cocoa Council at its Sixty-Seventh Session[16] regarding the competence of the EC under the Agreement. We note, however, that the Statement merely acknowledges the decision of the Council of the EU of 18 November 2002 "by which the International Cocoa Agreement, 2001, was approved *on behalf of the European Community* and by which the President of the EU Council was authorized to designate the person empowered to sign the agreement and deposit the instrument of approval *on behalf of the European Community*". There is no reference in the Statement to approval on behalf of the *member States of the EU*. We should add that even if there had been one, we would still maintain that the Council has no power to amend or otherwise modify the provisions of the Agreement (article 7 on the Powers and functions of the Council, and article 64 on Amendment).

(b) *The EC practice in the field of commodity agreements*

10. In seeking to become a party to the Agreement *on behalf of its member States,* the European Community relies on its "exclusive competence", under Community law, in all matters governed by the Agreement. It is suggested that the sole participation of the European Community would operate not only to exclude the concurrent participation of its member States, but to actually replace them, and in so doing assume their rights and obligations, including funding and voting rights.

11. We do not dispute that in commercial and trade-related matters member States of the European Community have transferred to the European Community their powers and competences in the field of external relations, including negotiation and conclusion of international agreements. The exclusive competence of the European Community in all such matters, and notably commodity agreements, however, has long been recognized and yet, with few exceptions, all commodity agreements were signed both by the European Community and its member States (a practice, we recall, which was allowed by the European Court of Justice in its 1979 Opinion[17] on the draft International Agreement on Natural Rubber and the 1994 World Trade Organization Opinion[18]).

12. While maintaining the principle of exclusive competence in the field of commodity agreements, both the European Community and its member States have recognized that in practice, the *implementation* of these agreements is only partially exclusive, and in some respects falls within the shared competence of the Community and its member States. The major part of the commodity agreements, and notably, the International Wheat Agreement, 1986 (Wheat Trade Convention),[19] the International Agreement on the Jute and Jute Products, 1989,[20] the International Cocoa Agreement, 1993,[21] the International Tropical Timber Agreement, 1994,[22] the International Natural Rubber Agreement, 1995,[23] the Food Aid Convention, 1995[24] and the International Coffee Agreement, 2001,[25] were thus

[16] The Council held its Sixty-Seventh Session from 11-14 March 2003.
[17] European Court of Justice, Opinion 1/78.
[18] European Court of Justice, Opinion 3/94.
[19] United Nations *Treaty Series*, vol. 1429, p. 71.
[20] United Nations *Treaty Series*, vol. 1605, p. 211.
[21] United Nations *Treaty Series*, vol. 1766, p. 3.
[22] United Nations *Treaty Series*, vol. 1955, p. 81.
[23] United Nations *Treaty Series*, vol. 1964, p. 449.
[24] United Nations *Treaty Series*, vol. 1882, p. 195.
[25] United Nations *Treaty Series*, vol. 2161, p. 308.

signed in a mixed form (known as "mixed agreements") by both the EC and its member States. Following a two-decade practice of "mixed agreements" in the field of commodity agreements, it can hardly be argued that on the basis of its exclusive competence alone, the EC should now replace its member States and be allowed to sign the Agreement on their behalf.

13. The practice of "mixed agreements" prevails also in other fields, and notably environmental, where the EC competence in external relations is recognized. In none of these agreements has the EC signed on behalf of its member States, and despite the acknowledged competence of the EC in the environmental field, member States of the EU continue to become parties in their own right. (See, United Nations Framework Convention on Climate Change, 1992,[26] Montreal Protocol on Substances that Deplete the Ozone Layer, 1987,[27] and Convention on Biological Diversity, 1992.[28])

(c) *Voting rights*

14. The question of calculating the voting rights of the Community in relation to those attributed to its member States is governed by article 4 paragraph 2, of the Agreement. Accordingly, "In the case of voting on matters within their competence, such intergovernmental organizations shall vote with a number of votes equal to the total number of votes attributable to their member States in accordance with article 10. In such cases, *the member States of such intergovernmental organizations shall not exercise their individual voting rights".* Article 4 paragraph 2, *in fine,* thus presupposes the concurrent participation of some or all of the member States, and ensures that in the event of a vote, the Community should not have more votes than the total number of the participating member States.

15. Pursuant to article 10, paragraph 1, of the Agreement, voting rights are distributed among importing and exporting members of the Agreement. Under article 4, paragraph 2, thereof, an intergovernmental organization could only exercise the votes equal to the total number of votes attributable to its members. The Agreement is silent on whether it is intended that such an organization shall exercise the voting rights of *all* its members, or of only those who are parties to the Agreement. An indication that all along the intention has been to grant the EC only those rights accessory to its participating members, can be found in annex B of the Agreement on the "Imports of cocoa calculated for the purposes of article 58 (Entry into force)". Annex B sets forth all import percentages for purposes of calculation of entry into force in accordance with article 58, paragraph 1. The EC is not listed as holding any percentage of the imports, while its member States are each allotted an import percentage. The same applies, in our view, to the calculation of voting rights based, as they are, on import percentage. Accordingly, the EC could be allotted only those voting rights which are equal to the total number of votes attributable to its *participating* member States. As a sole participant, the EC would not be entitled under the Agreement and its annex, as presently formulated, to any import percentage necessary for the entry into force and voting rights.

16. In order for the EC to become a party on behalf of its member States and be allotted their import percentages and voting rights, two options may be envisaged: an amendment of the Agreement once it enters into force, and a submission of full powers

[26] United Nations *Treaty Series*, vol. 1771, p. 107.
[27] United Nations *Treaty Series*, vol. 1522, p. 3.
[28] United Nations *Treaty Series*, vol. 1760, p. 79.

conveying to the depositary the intention of member States of the EU to empower the EC to participate in the Agreement on behalf of its member States.

17. With regard to the entry into force of the Agreement, you will recall that since 1972 there have been six consecutive Cocoa Agreements; none of which have definitively entered into force. Each of these agreements has entered into force provisionally in accordance with its provisions. The current Agreement is also capable of being brought into force either definitively or provisionally, in accordance with article 58 paragraph 3. Once the Agreement enters into force it could be amended to address these concerns. Pending its entry into force, however, you may also wish to consider the possibility of reconvening the negotiating group of States with a view to revising the text. This Office stands ready to assist you with such an exercise.

18. Member States of the EU can also empower the EC to conclude the Agreement on their behalf by means of full powers. As of yet, none of the States concerned have informed the depositary of their intention to provide such full powers to the EC, or of any change in their status under the Agreement. Unless they convey their authority to the EC, there will be no restrictions constraining the depositary from accepting an instrument of ratification or accession from an individual EU member State at any time.

19. Mindful of the implications that our opinion may have for this and future agreements to which the EC or any other intergovernmental organization may become parties, we should underscore that the Secretary-General is guided in the discharge of his depositary functions by the provisions of each Agreement deposited with him, the Vienna Convention on the Law of Treaties, 1969,[29] and by the substantial practice developed over the years. In the instant case, neither the final clauses of the Agreement, nor the Vienna Convention or the practice relating to the treaty-making power of intergovernmental organizations, and notably that of the EC, support the conclusion that the EC could become a party to the Cocoa Agreement on behalf of all EU States without the appropriate authority being conveyed to it by its member States.

7 May 2003

17*(b)*. International Cocoa Agreement, 2001—Internal decision of the Council of the European Union and the role of the depositary— Intention to be bound by a treaty on the international plane—Treaty-making power of intergovernmental organizations—The European Commission becoming a party to an agreement on behalf of its member States

Letter to the Officer in Charge of the International Cocoa Organization

This is with reference to your letter of 13 May 2003 regarding the capacity of the European Commission (EC) to approve the International Cocoa Agreement, 2001,[30] on behalf of the member States of the European Union (EU), In your letter you propose that I make a determination that "the decision of the Council of the EU sufficiently expressed the will of the EU member States for the EC to participate in the International Cocoa Agreement, 2001, on behalf of the member States", or that in the alternative, I cooperate

[29] United Nations *Treaty Series*, vol. 1155, p. 331.
[30] United Nations *Treaty Series*, vol. 2229, p. 2.

with the EC with a view to finding a solution to the question of its participation in the Agreement.

At the outset I wish to note that it is not for the depositary to make a determination on the nature and effect of an internal decision of the Council of EU, or on whether it sufficiently expresses the will of its member States. In my letter of 7 May 2003 I made a reference to the statement of the Council only to conclude that the decision pertained to the approval of the Agreement on behalf of the *European Community* and not its member States, and that even if it had meant "approval on behalf of its member States" it would not have changed our position, which is based on the interpretation of the International Cocoa Agreement, 2001,[31] the Vienna Convention on the Law of Treaties, 1969,[32] precedent and the practice of treaty-making power of intergovernmental organizations, including, in particular, that of the European Community. I confirm that each member State of the EU must convey its intention to be bound by the International Cocoa Agreement, 2001, on the international plane, either through the deposit of a formal instrument or through the submission of full powers authorizing the European Community to undertake the requisite treaty action.

While it would not be appropriate for me to make a determination with regard to interpreting a decision of the Council of the EU, my Office stands ready to discuss an effective approach with representatives of the EC at their convenience.

20 May 2003

17 *(c)*. International Cocoa Agreement, 2001—Treaty-making power of intergovernmental organizations—The European Commission becoming a party to an agreement on behalf of its member States—Right to represent another State—Distribution of voting rights—Provisions of the treaty concerned—Impartiality of the depositary—Full powers

Letter to the Legal Advisor for External relations of the European Commission

Thank you very much for your e-mailed letter of 29 May 2003, and the accompanying annex. In your letter, you have raised the question as to whether in accordance with the provisions of the International Cocoa Agreement, 2001, the European Community can, in light of its new internal policy, become party to the International Cocoa Agreement, 2001,[33] on behalf of all member States of the European Union (EU) and in so doing cast collectively the votes of the EU, who are not party to the Cocoa Agreement as was allegedly done in the International Coffee Agreement, 2001, (ICA, 2001).[34] I have carefully reviewed this question, and I fully appreciate the policy considerations of the European Community.

This case is similar to the situation where two States are linked by a treaty that provides that one of them shall represent the other in certain fields of international interaction. The question that arises is the extent to which the Secretary-General, as depositary, is to accept instruments emanating from the Government of one such State seeking to bind the other State by virtue of the union treaty.

[31] United Nations *Treaty Series*, vol. 2229, p. 2.
[32] United Nations *Treaty Series*, vol. 1155, p. 331.
[33] United Nations *Treaty Series*, vol. 2229, p. 2.
[34] United Nations *Treaty Series*, vol. 2161, p. 308.

Although there is little likelihood that a State would attempt to act on behalf of another without a proper legal basis, it would seem dangerous to treat as binding on a State an act that it has not itself explicitly accepted. Accordingly, the Secretary-General's practice is to request confirmation from the other State, that it recognizes as valid the action taken on its behalf by the "representing" State.

In the case of [State A] and [State B], the Secretary-General has accepted a general statement from [State B] confirming [State A's] authority to act on its behalf in commodity and customs matters. However in cases of doubt, the Secretary-General would, of course, request specific confirmation. A similar approach could be applied in the case of the International Cocoa Agreement, 2001.

The annexes to the International Cocoa Agreement, 2001, clearly suggest that voting rights are allocated to States on an individual basis. It is noted also that the European Community is not listed in these annexes. Furthermore, article 11, paragraph 2, provides the procedure by which any party to the Cocoa Agreement can authorize any other party ". . . to represent its interests and to cast its votes. . ." at any meeting. The fact that such notification must be made in writing further suggests that votes under the International Cocoa Agreement, 2001, are allocated to States as set forth in the annexes, in their individual capacity.

With regard to the precedent that is claimed in relation to the ICA, 2001, it is noted that the depositary was never formally consulted in that matter. It is also noted that, all but five EU members are currently party to the ICA, 2001. One of the remaining five is a Signatory, and the depositary has been advised of the intention of another to become a party shortly. This seems to suggest that even the member States of the EU do not subscribe to the view that the European Community can represent their collective interests to the exclusion of their individual interests.

Once a State is a party to the ICA, 2001, or to the International Cocoa Agreement, 2001, for that matter, it can allocate the rights and obligations that flow from that State's participation as it determines.

However, with regard to both Agreements, it must be stressed that any interim solution, which is designed to accommodate the European Community's internal policy concerns, should be determined in accordance with the provisions of the treaty in question. If such interim solution relates to the administration of the final clauses of the agreement such as participation, entry into force, amendment etc., the Secretary-General, as depositary, must be consulted. The depositary is obliged to take into account the rights and obligations of the other parties.

The Secretary-General, as depositary of over 500 multilateral treaties, cannot set a precedent unsupported by either treaty provision or his practice. This would certainly create an unmanageable precedent for other treaties in his custody. As you would appreciate, where ambiguous provisions exist, precedents adopted without considering their wider implications, could become difficult to deal with. Similarly, an interpretation that is adopted should not lightly assume the secession of the rights of a State or usurp the rights of any party to a treaty. I, as the Secretary-General's representative, must ensure absolute impartiality in the discharge of the Secretary-General's functions.

I would suggest that the European Community could circulate a declaration to all EU countries requesting confirmation from the Ministers for Foreign Affairs that the EC has become party to the International Cocoa Agreement, 2001, on their behalf and that it was

authorized to exercise their rights in the context of that Agreement. This declaration could then be deposited with the Secretary-General. However, the depositary would not be able to agree with an interpretation of article 4, paragraph 2, which would have the effect of allocating the votes of the individual member States of the EU, which are not party to the Agreement, to the European Community.

In the alternative, the Community could seek to have the International Cocoa Agreement, 2001, amended to reflect its concerns once it had been brought into force provisionally or definitively.

As you are aware, the Secretary-General, as depositary, is not in a position to review the internal decisions of the European Community. Equally, it must be noted that the Community's internal decisions and the decisions of the European Court of Justice cannot modify the provisions of a treaty to which non-European Community States are party.

30 May 2003

MISCELLANEOUS

18. The Secretary-General's participation in events commemorating the Korean War—Establishment of the United Nations Command/Unified Command—Legal arrangements between the United Nations and the United Nations Command—Enforcement operation authorized by the Security Council under national command and control—Armistice Agreement of 27 July 1953—Security Council resolutions 83 (1950) of 27 June 1950 and 84 (1950) of 7 July 1950—General Assembly resolutions 711 (VII) of 28 August 1953 and 3390 (XXX) of 18 November 1975

Note to the Director of Asia and the Pacific Division, Office of the Assistant Secretary-General, Department of Political Affairs, United Nations

1. This is with reference to your routing slip of 1 April 2003 requesting our advice on an invitation addressed to the Secretary-General from [name] of the "United Nations Command", to attend ceremonies in the Member State commemorating the 50th Anniversary of the Armistice Agreement.[35] Our views were also sought on any "legal arrangements" which may exist between the United Nations Secretariat and the "United Nations Command". As the two questions are interrelated, our views on both are set out below.

2. The question of the Secretary-General's participation in events commemorating the Korean War was raised with this Office recently in connection with invitations received from two private associations. In both cases, we expressed the view that while the Secretary-General's participation in any of these events is a question of policy, it is not legally objectionable, given the legal status of the "United Nations Command" and its relationship to the United Nations. This, we maintain, is all the more so in the present case, where the invitation emanates, as it does, from the United Nations Command.

3. The Korean operation was the first enforcement action authorized by the Security Council under national command and control. In its resolution 83 (1950) of 27 June 1950, the Security Council "*determined* that the armed attack upon the Republic of Korea by

[35] For the text of the Agreement, see the *Yearbook of the United Nations*, 1953.

forces from North Korea constituted a breach of the peace", and "*recommended* that the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area". In its subsequent resolution 84 (1950) of 7 July 1950, the Council recommended that all Members providing military forces and other assistance make them available to a unified command under the United States of America, and requested the United States to designate the commander of the Force. In Security Council resolution 85 (1950) of 31 July 1950, it further extended the mandate of the Force to provide relief and support to the civilian population of Korea.

4. While the terminology of those early resolutions was different than the one currently used in similar cases, it is clear that the Council had made a determination under Article 39 of the United Nations Charter that there existed a "threat to the peace, breach of the peace, or act of aggression", and that on that basis "recommended" that Members provide the necessary assistance to repel the aggression, thus authorizing an enforcement action under the United States command. The Korean operation is, therefore, no different than other enforcement actions later authorized by the Council, and notably the Unified Task Force (UNITAF) in Somalia, Desert Storm in Iraq, and Operation Turquoise in Rwanda. As an authorized operation, it was not conducted under United Nations command and control (notwithstanding its name); it did not constitute a United Nations subsidiary organ, and was not funded by the United Nations budget. Established by the United States pursuant to a Security Council authorization, it could only be dissolved by that State.

5. That being said, both the Security Council and the General Assembly were politically and otherwise involved in many aspects of the operation. In its resolution 84 (1950), the Security Council authorized the Unified Command to use, at its discretion, the United Nations flag in the course of the operation, and the name "United Nations Command"—while largely a misnomer—was used by United Nations organs interchangeably with the Unified Command. More importantly, perhaps, the United States has submitted periodic reports to the Security Council, at its request, on the activities of the Unified Command. For its part, the General Assembly in its resolution 483 (V) of 12 December 1950, requested the Secretary-General to make arrangements with the Unified Command "for the design and award. . . of distinguishing ribbon or other insignia for personnel which has participated in Korea in the defence of the Principles of the Charter of the United Nations", and in its resolution 977 (X) of 15 December 1955, decided to establish a United Nations Memorial Cemetery in Korea for the men "who served with forces which fought under the United Nations Command".

6. The United Nations was not a party to the Armistice Agreement signed on 27 July 1953 between the Commander in Chief, United Nations Command, on the one hand, and the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's volunteers, on the other. Nevertheless, on occasion, both the General Assembly and the Security Council have expressed their views on the Agreement, its continued significance and conditions for its eventual replacement. In its resolution 711 (VII) of 28 August 1953, the General Assembly noted with approval the Armistice Agreement concluded in Korea on 27 July 1953. In its resolution 3390 (XXX) of 18 November 1975–the last on the question of Korea—the General Assembly expressed the view that the Armistice Agreement remains indispensable to the maintenance of peace and security in the area. It urged all the parties directly concerned to engage in talks so that the United Nations Command may be dissolved concurrently with arrangements for maintaining the

Armistice Agreement, and expressed the hope that such alternative arrangements would be made in order that the United Nations Command may be dissolved on 1 January 1976. No alternative arrangements, however, were made and the United Nations Command has, as of yet, not been dissolved. As recently as 1996, Members of the Council issued a Presidential Statement in which they stressed that "the Armistice Agreement shall remain in force until it is replaced by a new peace mechanism" (S/PRST/1996/42 of 15 October 1996).

7. While no "legal arrangements", as such, exist between the United Nations Command and the United Nations Secretariat or any other United Nations organ, the United Nations Command was established under the authorization of the Security Council and has operated throughout the years with the continuous political support of both United Nations organs. For all of the legal, political and practical links maintained over the years with the United Nations Command, we continue to hold the view that it would not be legally objectionable for the Secretary-General or his representative to participate in the commemoration of the 50th Anniversary of the Armistice Agreement organized in the Member State by the United Nations Command.

22 April 2003

19. Loss of diplomatic status of foreign missions *vis-à-vis* an occupying power—Obligation of an occupying power towards neutral citizens in an occupied territory—Status of United Nations personnel and related agencies in an occupied territory—Right of expulsion for reasons of public order and safety—Security Council resolution 1483 (2003) of 22 May 2003

Note to the Under-Secretary-General of the Department of Political Affairs, United Nations

Draft Coalition Provisional Authority (CPA) Order on the Status of Foreign Missions in Iraq

1. This refers to the code cable of 8 June 2003, requesting our views on the possible implications, if any, of the draft CPA Order on the Status of Foreign Missions in Iraq on the proposed Exchange of Letters (SOMA) between the United Nations and the Provisional Authority. We note that the status of foreign Missions in Iraq is regulated in a number of instruments attached to the code cable, none of which, however, is in the form of an Order. They include an internal communication of 4 June 2003 from the Office of General Counsel to the Administrator of the CPA, a "Circular notice to all Foreign Government Offices in Iraq" and a "Memorandum for Commander of Coalition Forces" dated 5 June 2003 from the Administrator of the CPA. Our review of the Order on the status of foreign Missions in Iraq and its implications on the SOMA has been conducted on the basis of these communications.

2. Under the CPA Circular Notice and its related communications, diplomatic personnel in Iraq accredited to the previous Iraqi Government have lost their diplomatic status *vis-à-vis* the CPA. The premises of foreign Missions are no longer inviolable, and their personnel have been stripped of their diplomatic privileges and immunities. The CPA has declared that it is not in a position to confer diplomatic status upon individuals and premises, with the result that pending the establishment of a sovereign Iraqi Government, the status of former diplomatic staff is akin to that of neutral citizens in an occupied territory, and the obligation to protect them does not extend beyond the general obligation

of an Occupying Power to restore and ensure, as far as possible, law, public order and safety in an occupied territory. In the circumstances, diplomatic staff who remain in Iraq or re-enter it, are doing so at their own risk, and the CPA reserves the right to expel them from the territory if reasons of public order and safety so warrant.

3. The status of the Special Representative of the Secretary-General's (SRSG) Office, United Nations personnel and personnel of Specialized Agencies in Iraq is, however, fundamentally different from that of foreign Missions. While some of the United Nations and related Agencies may have operated in Iraq prior to the occupation, their current presence in Iraq is mandated by Security Council resolution 1483 (2003) of 22 May 2003, and the status to which they are entitled derives from the Charter of the United Nations, the Convention on the Privileges and Immunities of the United Nations,[36] or the Convention on the Privileges and Immunities of the Specialized Agencies,[37] as well as the customary principles and practices of peacekeeping and similar United Nations operations. Once a SOMA is concluded it will provide a legal framework for the status and activities of the Office of the SRSG and United Nations related and specialized agencies in Iraq.

4. The loss of diplomatic status of foreign Missions in Iraq has no bearing, therefore, on the status of the SRSG's Office and its personnel, or the personnel and premises of other United Nations related or specialized agencies. In that latter respect, we note that the specialized agencies now operating in Iraq have expressed their agreement to be included in the SOMA, without prejudice to any subsequent agreement that they may wish to conclude separately with the CPA.

11 June 2003

20. General Assembly resolution 55/5 B of 23 December 2000 (scale of assessments for the apportionment of the expenses of the United Nations)—Conversion rates—Committee on Contributions—Rule 160 of the rules of procedure of the General Assembly—Authority to interpret a General Assembly resolution

Letter to the Chairman of the Committee on Contributions, United Nations

I am writing in response to your letter of 16 June 2003 in which you refer to paragraph 2 of General Assembly resolution 55/5 B of 23 December 2000 concerning the scale of assessments for the apportionment of the expenses of the United Nations and on behalf of the Committee on Contributions request our advice on the proper interpretation of the resolution.

You point out in the letter that in considering the possible use of conversion rates other than market exchange rates for conversion of income data for a number of Member States, the Committee is finding difficulty in reaching agreement on all the cases that it has considered. You further note that in that context, the view has been expressed in the Committee that, if no agreement is reached by the Committee on using a conversion rate other than the market exchange rate for a particular Member State, the provisions of resolution 55/5 B require that the Committee on Contributions should use the relevant market exchange rates for that Member State in advising the General Assembly on the scale of assessments pursuant to its mandate in rule 160 of the rules of procedure of the General Assembly.

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

[37] United Nations *Treaty Series*, vol. 33, 261.

The question posed in your request relates to an interpretation of the relevant General Assembly resolution, namely resolution 55/5 B. In this regard, I would like to point out at the outset, that an authoritative interpretation of General Assembly resolutions concerning the scale of assessments for the apportionment of the expenses of the Organization among Member States can be made only by the General Assembly itself, or by the Committee on Contributions within the competence given to it by the General Assembly. Consequently, the views provided by me in this letter represent my understanding as to the appropriate interpretation of the resolution in question.

By paragraph 2 of resolution 55/5 B, the General Assembly decided that "the elements of the scale of assessments contained in paragraph 1 above will be fixed until 2006, subject to the provisions of resolution C below, in particular paragraph 2 of that resolution, and without prejudice to rule 160 of the rules of procedure of the General Assembly".

In paragraph 1 of resolution 55/5 B, the General Assembly determined the elements and criteria on which the scale of assessments should be based. Subparagraph 1 (c), which is directly related to the question raised in your letter, states that in the case of conversion rates, the criterion should be the following:

> "*(c)* Conversion rates based on market exchange rates, except, where that would cause excessive fluctuations and distortions in the income of some Member States, when price-adjusted rates of exchange or other appropriate conversion rates should be employed, taking due account of General Assembly resolution 46/221 B of 21 December 1991."

Rule 160 of the rules of procedure of the General Assembly, which is also of relevance because it defines the authority of the Committee on Contributions and is expressly mentioned in paragraph 2 of resolution 55/5 B, provides that the Committee on Contributions shall advise the General Assembly concerning the apportionment of the expenses of the Organization among Member States and that the scale of assessments, when once fixed by the General Assembly, shall not be subject to a general revision for at least three years unless it is clear that there have been substantial changes in relative capacity to pay.

It is our understanding that pursuant to rule 160 of the rules of procedure of the General Assembly, any changes in the scale of assessments that had been fixed by the General Assembly should constitute rare exceptions that are justified by extreme circumstances recognized and accepted by the Committee on Contributions. Paragraph 2 and subparagraph 1 *(c)* of resolution 55/5 B should therefore be interpreted in the light of this general principle laid down in rule 160 of the rules of procedure of the Assembly.

It follows from the above that conversion rates should be based on market exchange rates unless the Committee on Contributions determines that in the case of a particular Member State this would cause excessive fluctuations and distortions in the income of the Member State concerned and that, therefore, another conversion rate should be employed under the circumstances. Should the Committee be unable to come to such a determination and therefore fail to agree on a different conversion rate, in advising the General Assembly the Committee, pursuant to its mandate as stipulated in rule 160 of the rules of procedure of the General Assembly, is obliged to use in the case of the Member State concerned the relevant market exchange rate.

17 June 2003

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

UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANIZATION

1. Tax exemption on salaries and emoluments of United Nations Industrial Development Organization officials—Definition of "officials of the United Nations"—Discrimination based on nationality or permanent residency—Discrimination between member States—Rationale of immunity from taxation—The Conventions on the Privileges and Immunities of the United Nations and of the specialized agencies—Article 27 of the Vienna Convention on the Law of Treaties, 1969 (Internal law and observance of treaties)—Customary law

Note verbale re: United Nations Industrial Development Organization officials tax exemption on salaries and emoluments

The Secretariat of the United Nations Industrial Development Organization (UNIDO) presents its compliments to the Federal Ministry of Foreign Affairs of [State] and has the honour to refer to its note verbale No. [. . .], dated 14 May 2003, communicating the adoption by the Government of two presidential decrees—Nos. [. . .] and [. . .]—which the Tax Office of the Ministry of Economy and Finance considers applicable to international organizations, with the exception of seat agreements agreed between [State] and the organization. The note verbale states that the presidential decrees contain provisions that will make officials of UNIDO who are [State's] citizens and foreigners permanently residents of [State] subject to an annual declaration of income and to pay the relevant taxes that have not been subject to taxation at source. It is further stated that it would be the intention of the Tax Office to start a systematic check shortly.

By the present note, the secretariat of UNIDO would like to express the view, as it did in the past, that UNIDO is not in a position to accept the Government's decision to tax the income earned by its officials who are citizens of [State] or foreigners permanently residents in [State]. Such measures run counter to the international obligations of [State] in regard to UNIDO.

(a) *Rules applicable to the [UNIDO Center] and its officials*

The Convention on the Privileges and Immunities of the Specialized Agencies[38] to which the Government of [State] acceded on [year] and which is applicable to the [UNIDO Center] in accordance with article 21, paragraph 2 (a), of the Constitution, applies to the [UNIDO Center] and its officials. Article 21, paragraph 2 (a), of the Constitution of UNIDO reads as follows:

> "2. The legal capacity, privileges and immunities referred to in paragraph 1 shall:
>
> *(a)* In the territory of any member that has acceded to the Convention on the Privileges and Immunities of the Specialized Agencies in respect of the Organization, be as defined in the standard clauses of that Convention as modified by an annex thereto approved by the Board;"

[38] United Nations *Treaty Series*, vol. 33, p. 261.

Also, article VI, section 19(b), of the Convention on the Privileges and Immunities of the Specialized Agencies states that:

"Officials of the specialized agencies shall:

(b) Enjoy the same exemptions from taxation in respect of the salaries and emoluments paid to them by the specialized agencies and on the same conditions as are enjoyed by officials of the United Nations;"

Regarding the Convention on the Privileges and Immunities of the United Nations[39] it may further be observed that there is a well established practice of the United Nations Secretariat in connection with the unacceptability of reservations to article V, section 18*(b)*, of that Convention—which corresponds to article VI, section 19*(b)*, of the Convention on the Privileges and Immunities of the Specialized Agencies. The Legal Counsel of the United Nations has invariably recognized that the Convention on the Privileges and Immunities of the United Nations provides for a procedure for the definition of the term "officials of the United Nations" and by the definition established by that procedure no distinction is established among the officials of the United Nations as to nationality or residence. All members of the staff of the United Nations are officials of that Organization and enjoy the same privileges and immunities provided for in the Convention; the exception being the staff recruited locally and assigned to hourly rates. These arguments are equally applicable to UNIDO's staff with respect to the Convention on the Privileges and Immunities of the Specialized Agencies.

The secretariat wishes to observe that UNIDO has consistently opposed the view that a distinction as to nationality or citizenship can be made to restrict the privileges and immunities of UNIDO's officials. Thus, when [State] ratified UNIDO's Constitution it attempted to make a reservation to article V of the Convention on the Privileges and Immunities of the United Nations with a view to taking into account the tax-free emoluments paid by UNIDO to [State] nationals or permanent residents of [State] for the purpose of calculating the tax to be levied on income from other sources. However, the Government clarified on [date] in a note verbale to the Secretary-General of the United Nations, as depositary of UNIDO's Constitution, that the purpose of the declaration was " . . . not that of making a reservation to the Constitution of UNIDO nor to article V of the 1946 Convention on the Privileges and Immunities of the United Nations, as it does not aim at excluding the application of that article nor at submitting its application to a condition." Also, concerning the Convention on the Privileges and Immunities of the Specialized Agencies, UNIDO has been unable to accept to curtail the exemption from taxation of UNIDO's officials whatever their nationality or place of residence, an opinion officially conveyed to the Government [in 1985] and [1987].

It is worth mentioning that section 46 of the Convention on the Privileges and Immunities of the Specialized Agencies provides as follows:

"It is understood that, when an instrument of accession of a subsequent notification is deposited on behalf of any State, this State will be in a position under its own law to give effect to the terms of this Convention, as modified by the final texts of any annexes relating to the agencies covered by such accession or notifications."

The secretariat holds that under international law the argument that presidential decrees will prevail over the international obligations of [State] cannot be maintained. The

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

Vienna Convention on the Law of Treaties, 1969,[40] codified this principle under article 27 which provides the long-standing principle of customary international law that a State cannot justify its failure to perform its obligations under a treaty because of any provision in its municipal law.

The eventual implementation of the presidential decrees referred to in the note verbale of the Government to UNIDO's officials would be susceptible of causing a double discrimination. First, discrimination between officials of UNIDO based on their nationality or residence. Secondly, it would give the host State a direct financial advantage thereby creating discrimination between member States.

It is pertinent to recall that the rationale of immunity from taxation in respect of the salaries and emoluments paid by UNIDO is to attain equality in the salary treatment for officials of equal rank throughout the entire organization, without the need for continuous adjustment which would be necessary if changes and variations in national tax legislation had to be taken into account.

(b) *Rules applicable to the [UNIDO Services] and its officials*

Pursuant to the exchange of letters dated [1990] between the Director-General of UNIDO and the Permanent Representative of [State] to UNIDO, the parties agreed in particular to the following:

> "2. Taking into account Article 21.2*(c)* of the Constitution of UNIDO it is confirmed that the Convention on the Privileges and Immunities of the United Nations (1946) applies to the Service in [State] and its personnel."

The agreement was entered into "... pending the conclusion of a detailed agreement on basic terms and conditions governing the legal status of UNIDO's Office in [State]. . .". The Ministry of Foreign Affairs is aware that no further agreement has been concluded in relation to the said Office.

Accordingly, the following provision of the Convention on the Privileges and Immunities of the United Nations applies to the salaries and emoluments of UNIDO's officials in the offices of [. . .] and [. . .]:

> *"Article V*
> *Officials*
>
> *Section 18.* Officials of the United Nations shall:
> *(b)* be exempt from taxation on the salaries and emoluments paid to them by the United Nations;"

Consequently, UNIDO is not in a position to accept that its officials who are [State] citizens and foreigners permanently resident in [State] might be taxed by the Government on incomes and emoluments paid by the organization.

The secretariat of UNIDO would appreciate it if the Government were not to insist on the implementation of presidential decrees Nos. [. . .] and [. . .] but were to apply the exemptions from taxation in respect of the salaries and emoluments of UNIDO's officials providing services in the [UNIDO Center] and the [UNIDO Services] in [city] and [city] as established for in the Convention of the Privileges and Immunities of the Specialized Agencies and the Convention of the Privileges and Immunities of the United Nations.

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

The secretariat of the United Nations Industrial Development Organization avails itself of this opportunity to renew to the Ministry of Foreign Affairs of [State] the assurances of its highest consideration.

23 June 2003

2. Validity of service agreement signed "under protest" —National expert v. national officer

Interoffice memorandum re: Validity of service agreement with [a] national expert of [State]

1. This is with reference to your e-mail dated 17 June 2003 concerning the validity of the service agreement between the United Nations Industrial Development Organization (UNIDO) and [name] as a national expert. [Name] signed this contract on [date] and attached a covering letter in which he mentioned that he was *"signing the service agreement* ***under protest****"* (emphasis added).

2. I note that the service agreement and the letter were signed on the same date, [date]. The service agreement was signed in a normal fashion without any comments on the contract itself.

3. Regarding his covering letter it seems that [name] wants to be a "national officer" instead of a "national expert", i.e., an employee of UNIDO rather than a consultant for UNIDO. The question is whether his statement *"I am signing the service agreement* ***under protest****"* (emphasis added) does make the service agreement itself invalid.

4. The letter does not state that he wants to rescind the agreement, which he could do under its paragraph 5 with one month's written notice.

5. To the contrary, in accordance with the letter, he assumes that the agreement is valid because he states that he "will strive [his] very best to do an excellent job and live up to your expectations."

6. The letter, therefore, does not have the legal effect of invalidating the signed service agreement.

7. Nevertheless, it states that "I am sure you will understand my concerns as noted above and take appropriate action". This needs to be replied to in writing by the organization explaining why the type of service agreement offered to [name] is deemed to be the appropriate one by the organization also in order to avoid any dispute with the contractor (see paragraph 13 of the Service Agreement).

3. Arbitration clauses in cooperation agreements between organizations of the United Nations system (including related organizations)—Obligations *vis-à-vis* member States

Interoffice memorandum (signed by the Chief, Legal Affairs Unit, UNIDO) re: Final Draft Memorandum of Understanding between UNIDO and an organization of the UN system

After receipt of your e-mail in the afternoon of 12 August 2003, I contacted the Legal Office of [international organization] on 13 August to hear their position and arguments on the proposed arbitration clause. In fact, they had received a copy of my memorandum and had already, on their own, contacted the United Nations Office of Legal Affairs in New York

through the Senior Legal Liaison Officer at United Nations, Geneva, to obtain the United Nations legal position on the point that I had made that no arbitration clause was used in cooperation agreements between United Nations organizations. It should be recalled that the [international organization] is a related organization just like the International Atomic Energy Agency and not a specialized agency proper. By Friday 15 August 2003, they had received the opinion from the Office of Legal Affairs, New York, which together with their views they communicated to me in the afternoon by e-mail, after which we discussed the matter over the phone.

The United Nations[Office of Legal Affairs] legal opinion in fact confirmed my view that no binding arbitration clause is used between United Nations system organizations as far as cooperation agreements of a general nature were concerned since it is assumed that the organizations will always be able to resolve their differences in an amicable manner. The opinion added that if services of the United Nations and financial aspects were involved in such agreements, they sometimes went to the General Assembly to have it approved or [they] included an article in the agreement stating that the matter will be subject to supplementary arrangements. In the case of joint implementation of projects, provisions are included in the general cooperation agreement stating that special arrangements will define the modalities of participation and financial matters.

In the light of this legal opinion the [international organization] Legal Office felt that:

(a) Their position did not materially depart from the United Nations practice since the proposed arbitration clause did not only cover the memorandum of understanding but also any exchanges of letters or other implementation agreements that subsequently might be adopted between the [international organization] and UNIDO, and which might contain additional financial obligations for the parties. In that context, the situation was different from that of a cooperation agreement cast in very general terms;

(b) The [international organization] secretariat had some kind of obligation *vis-à-vis* their member States to insert such an arbitration clause in their agreements. While it was highly unlikely that any party would ever have recourse to it, as a result of the above arguments they would like to retain the arbitration clause.

In my opinion, the clause proposed by UNIDO is fully sufficient and it would be my preference not to have the arbitration clause in accordance with United Nations system practice. Regarding the arguments put forward by [international organization], the more relevant one to me is the second one, i.e., their apparent commitment to their members to protect the organization's interests by arbitration clauses in their agreements. A departure from that practice in the case of the memorandum of understanding with UNIDO would seem to require from them an explanation to their members, which could be based on the argument that no arbitration clauses are used between United Nations system organizations in cooperation agreements.

In the light of the above considerations, I believe that a decision needs to be obtained from the Director-General whether to accept the arbitration clause as proposed by the [international organization]. In case of a positive decision, however, it should be clearly remembered that this would be an exception for the [international organization] without relevance for the practice among United Nations system organizations and for future cooperation agreements that UNIDO might conclude with other United Nations organizations.

4. Independence and reporting of the Legal Advisor of an agency of the United Nations system—Structure and role of the Legal Office—Specialized agencies v. subsidiary organs of the United Nations

Interoffice memorandum re: Certain aspects regarding the Legal Adviser/Legal Office

1. Further to our conversation of 20 December 2002 and to my memorandum to you dated 11 December 2002, I wish to provide you with the following additional comments regarding the functions/structure and location of the legal adviser/legal office in an agency of the United Nations system. [. . .]

Functions and structure of the Legal Office

(a) *Independence and reporting of the Legal Adviser*

2. As set out in my memorandum dated 9 December 2002 [. . .], the central role of the legal adviser in the United Nations and the 16 specialized agencies of the United Nations system is to provide legal advice to the secretariat and the governing bodies and thereby to contribute to the rule of law by independently interpreting the legal framework of the organization. Legal advice is provided directly to those who ask for it and not through other officials, who could in that case dilute the integrity of legal advice and assume the role of legal advisers themselves. The independence of the legal adviser is an essential element in the discharge of his/her functions. This is true regardless of the actual location of the legal office in the structure of each organization (see paragraph 14 below).

3. It is in that sense that the Legal Adviser reports directly to the Director-General, i.e., that he is not under the instruction of another official who has not been appointed as legal adviser. Reporting to the Director-General does not, therefore, technically mean that all legal advice goes to him.

4. To illustrate this aspect I am attaching for sake of example the organizational charts[41]of the United Nations, the International Atomic Energy Agency (IAEA), the World Health Organization (WHO), the Food and Agriculture Organization (FAO), the International Civil Aviation Organization (IACO), and the International Fund for Agricultural Development (IFAD) which [. . .] show the existence of a legal office. In all cases the direct line to the Office of the Secretary-General/Director-General/President demonstrates what I said in the preceding paragraphs. The organizational charts show that the principle of independence of the legal adviser is common to the entire United Nations system.

5. Regarding the intended restructuring as far as the Legal Office is concerned, it may be useful to seek the views and comments of the Legal Counsel of the United Nations, who is the most prominent among the legal advisers of the United Nations system.

6. . . .

(b) *Structure and role of the Legal Office*

7. The practice in the United Nations and the specialized agencies has been unfailingly to have an *independent unified legal service* headed by one legal adviser and not several legal advisers dispersed in different offices of the organization. The reason is that an international organization needs to be consistent in its legal practices and relations and in

[41] The attachments are not reproduced herein.

the interpretation of its rules. Otherwise it will be open to legal challenge and criticism from contractors, staff members, governments and other entities. The necessary consistency in the legal area is ensured by the legal adviser who reviews the drafts prepared by his office.

8. It should be noted that apart from the professional experience and thorough knowledge of international and administrative law and the working of the Organization shared among the legal adviser and the lawyers working with him or her and on which all legal advice is necessarily based, the Legal Office is also the depository of the centrally collected relevant legal documentation that is indispensable for researching precedents in given cases. Presently, the Legal Library comprises approximately 1,000 chronological and subject files as well as an extended collection of other legal documents and literature.

9. It should also be clearly understood that the role of the legal service in any organization is to independently assist the secretariat and its divisions, branches and sections in the day-to-day administration of their mandates and programmes through the provision of legal services. In accordance with its terms of reference, the role of any legal service is advisory. It does not administer. In other words, in accordance with their terms of reference, the day-to-day administration of the work pursuant to the applicable rules is the job of the respective branches and units. For example, the financial services administer the financial regulations and rules, the human resources management branch the staff regulations and rules, and procurement section the financial rules concerning procurement. The administration of these rules is therefore the professional responsibility of the respective staff under the supervision and guidance, as required, of their directors who are responsible for the proper functioning of their services. The legal service comes in when there is a question with legal implications that cannot be solved by the institutional knowledge of the service involved.

(c) *The United Nations Development Programme (UNDP)*

10. It appears likely that some elements of the structure of UNDP have played a role in the recommendations to the Director-General prior to the issuance of UNIDO/DGB(M).91.

11. In this connection, it is necessary to recall that UNIDO, pursuant to the political will of its founders, is an independent specialized agency with its own legal personality, 169 member States, an elected head, and its own budget, like the United Nations and the 15 other specialized agencies. Careful account should therefore be taken of the fact that what is relevant to UNIDO in questions of structure is the practice of the United Nations Secretariat and the specialized agencies, and not the practices at [. . .] a subsidiary organ of the United Nations and not a specialized agency. It stands to reason and conforms to established practice that the sole model, and source of precedent for a specialized agency, are organizations of similar legal structure and not a subsidiary organ of the United Nations that is not an independent intergovernmental organization.

12. [. . .]

Location of the Legal Office

14. As is evident from the organizational charts of selected specialized and related agencies, the established practice in the United Nations and the specialized and related agencies point to the legal office being entirely on its own. For example, in the United Nations, the Legal Office is a separate office, in IAEA it is now again a separate office reporting to the Director-General after having been n office in the Department of Management. In

WHO, the Legal Office is a separate office, reporting to the Director-General. In FAO, the Office of the Director-General is surrounded by a cluster of independent offices fulfilling a variety of functions, among them the Legal Office, the Office of the Inspector-General, the Special Advisers to the Director-General, the Office of Programme Budget and Evaluation. Likewise, in ICAO and IFAD the Legal Offices are separate offices, with direct reporting lines to the Secretary General and the President, respectively.

Conclusion

15. In all organizations of the United Nations system, the legal adviser provides independent legal advice directly to those who request it and who, in the exercise of his/her mandate, does not receive instructions from another official. As a rule, the legal office is a separate and independent office reporting directly to the head of the organization. The possible locations of the legal office vary in different organizations. A brief survey indicates that:

(a) the most frequent situation is that the legal office is a separate entity (for example, United Nations, IAEA, WHO, FAO, ICAO, IFAD) with a reporting line to the Director-General/Secretary-General/President;

(b) until recently, in IAEA, the Legal Office was an office in the Department of Management, with a direct reporting line to the Director-General.