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# RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS (SECOND PART OF THE TOPIC)

[Agenda item 9]

DOCUMENT A/CN.4/L.383 and Add.1-3

## The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities

*Supplementary study prepared by the Secretariat*

[Original: English]  
[27 May, 27 June and 28 July 1985]

### CONTENTS

|   |                   | <i>Page</i> |
|---|-------------------|-------------|
| Principal instruments cited in the present study.....   |                   | 148         |
| List of abbreviations.....  |                   | 149         |
|   | <i>Paragraphs</i> |             |
| INTRODUCTION.....   | 1-4               | 151         |
| <b>A. Summary of practice relating to the status, privileges and immunities of the United Nations</b>                     |                   |             |
| <i>Chapter</i>  |                   |             |
| I. JURIDICAL PERSONALITY OF THE UNITED NATIONS.....   | 1-10              | 152         |
| Section 1. Contractual capacity.....  | 1-4               | 152         |
| (a) Recognition of the contractual capacity of the United Nations .....   | 1                 | 152         |
| (b) Choice of law; settlement of disputes and system of arbitration .....   | 2-4               | 152         |
| Section 2. Capacity to acquire and dispose of immovable property .....  | 5-8               | 160         |
| (b) Acquisition and disposal of immovable property .....  | 5-8               | 160         |
| Section 4. Legal proceedings brought by and against the United Nations.....   | 9                 | 160         |
| (c) Claims of a private law nature made against the United Nations and steps taken to avoid or mitigate such claims ..... | 9                 | 160         |
| Section 6. Treaty-making capacity.....  | 10                | 160         |
| (a) Treaty-making capacity of the United Nations .....  | 10                | 160         |
| II. PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS IN RELATION TO ITS PROPERTY, FUNDS AND ASSETS .....                   | 11-45             | 161         |
| Section 7. Immunity of the United Nations from legal process .....  | 11-14             | 161         |
| (a) Recognition of the immunity of the United Nations from legal process.....   | 11-14             | 161         |
| Section 8. Waiver of the immunity of the United Nations from legal process .....  | 15-21             | 162         |
| (a) Practice relating to waiver by the United Nations of its immunity from legal process .....                            | 15-20             | 162         |
| (c) Interpretation of the phrase "any measure of execution" .....   | 21                | 162         |
| Section 10. Immunity of United Nations property and assets from search and from any other form of interference.....       | 22                | 163         |
| Section 11. United Nations name, emblem and flag.....   | 23-25             | 163         |
| (a) United Nations name and emblem .....  | 23-24             | 163         |
| (b) United Nations flag.....  | 25                | 163         |
| Section 14. Direct taxes.....   | 26-36             | 163         |
| (a) Definition of direct taxes .....  | 26-34             | 163         |
| (iii) Taxes on United Nations financial assets .....  | 26-28             | 163         |
| (iv) Taxes in respect of the occupation or construction of United Nations premises..                                      | 29-32             | 164         |
| (v) Hotel taxes.....  | 33-34             | 164         |
| (b) Practice in respect of "charges for public utility services" .....  | 35-36             | 165         |

| Chapter  | Paragraphs | Page |
|--|------------|------|
| Section 15. Customs duties .....   | 37-38      | 166  |
| (b) Imposition of customs duties, prohibitions and restrictions .....  | 37-38      | 166  |
| Section 16. Publications .....   | 39-41      | 167  |
| (a) Interpretation of the term "publications" and problems relating to the distribution of publications .....  | 39-40      | 167  |
| (b) United Nations copyright and patents .....   | 41         | 167  |
| Section 17. Excise duties and taxes on sales; important purchases .....  | 42-45      | 168  |
| (a) Excise duties and taxes on sales forming part of the price to be paid .....  | 42-43      | 168  |
| (b) Important purchases .....  | 44-45      | 168  |
| III. PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS IN RESPECT OF COMMUNICATION FACILITIES .....  | 46         | 169  |
| Section 18. Treatment equal to that accorded to Governments in respect of mails, telegrams and other communications .....  | 46         | 169  |
| IV. PRIVILEGES AND IMMUNITIES OF OFFICIALS OF THE UNITED NATIONS .....   | 47-76      | 170  |
| Section 22. Categories of officials to which the provisions of articles V and VII of the Convention on the Privileges and Immunities of the United Nations apply ..... | 47-52      | 170  |
| Section 23. Immunity of officials in respect of official acts .....  | 53-59      | 170  |
| (a) General .....  | 53-58      | 170  |
| (c) Cases of detention or questioning of United Nations officials; testifying before public bodies .....   | 59         | 172  |
| Section 24. Exemption from taxation of salaries and emoluments .....   | 60-65      | 173  |
| (b) Position in the United States of America .....   | 60-63      | 173  |
| (f) National taxation on non-exempt income .....   | 64-65      | 173  |
| Section 25. Immunity from national service obligations .....   | 66-68      | 174  |
| Section 26. Immunity from immigration restrictions and alien registration .....  | 69         | 175  |
| (b) Practice in respect of the United States of America .....  | 69         | 175  |
| Section 29. Importation of furniture and effects .....   | 70         | 175  |
| Section 30. Diplomatic privileges and immunities of the Secretary-General and other senior officials .....   | 71-74      | 175  |
| Section 31. Waiver of the privileges and immunities of officials .....   | 75-76      | 177  |
| V. PRIVILEGES AND IMMUNITIES OF EXPERTS ON MISSION FOR THE UNITED NATIONS AND OF PERSONS HAVING OFFICIAL BUSINESS WITH THE UNITED NATIONS .....                        | 77-78      | 179  |
| Section 33. Persons falling within the category of experts on mission for the United Nations .....   | 77         | 179  |
| Section 35. Privileges and immunities of persons having official business with the United Nations .....  | 78         | 180  |
| VI. UNITED NATIONS <i>LAISSEZ-PASSER</i> AND FACILITIES FOR TRAVEL .....   | 79-83      | 181  |
| Section 36. Issue of United Nations <i>laissez-passer</i> and their recognition by States as valid travel documents .....  | 79-80      | 181  |
| Section 39. Issue of visas for holders of United Nations <i>laissez-passer</i> .....   | 81         | 181  |
| Section 41. Diplomatic facilities for the Secretary-General and other senior officials while travelling on official business .....                                     | 82-83      | 181  |
| <b>B. Summary of practice relating to the status, privileges and immunities of the specialized agencies and of the International Atomic Energy Agency</b>              |            |      |
| I. JURIDICAL PERSONALITY OF THE SPECIALIZED AGENCIES AND OF THE INTERNATIONAL ATOMIC ENERGY AGENCY .....   | 1-4        | 182  |
| Section 1. Contractual capacity .....  | 1-14       | 182  |
| (a) Recognition of the contractual capacity of the specialized agencies and of IAEA .....  | 1-2        | 182  |
| (b) Choice of law; settlement of disputes and system of arbitration .....  | 3-14       | 182  |
| Section 2. Capacity to acquire and dispose of immovable property .....   | 15-26      | 184  |
| Section 3. Capacity to acquire and dispose of movable property .....   | 27-28      | 185  |
| (a) Recognition of the capacity of the specialized agencies and of IAEA to acquire and dispose of movable property .....   | 27         | 185  |
| (b) Licensing and registration of land vehicles, vessels and aircraft .....  | 28         | 185  |
| Section 4. Legal proceedings brought by and against the specialized agencies and IAEA .....  | 29-38      | 185  |
| Section 5. International claims brought by and against the specialized agencies and IAEA .....   | 39         | 186  |

| <i>Chapter</i>  | <i>Paragraphs</i> | <i>Page</i> |
|---|-------------------|-------------|
| Section 6. Treaty-making capacity .....   | 40-41             | 186         |
| (a) Treaty-making capacity of the specialized agencies and of IAEA .....  | 40                | 186         |
| (b) Registration, or filing and recording of agreements on the status, privileges and immunities of the specialized agencies and of IAEA.....   | 41                | 186         |
| II. PRIVILEGES AND IMMUNITIES OF THE SPECIALIZED AGENCIES AND OF THE INTERNATIONAL ATOMIC ENERGY AGENCY IN RELATION TO THEIR PROPERTY, FUNDS AND ASSETS .....   | 42-112            | 187         |
| Section 7. Immunity of the specialized agencies and of IAEA from legal process.....   | 42-54             | 187         |
| Section 8. Waiver of the immunity from legal process of the specialized agencies and of IAEA .....  | 55-57             | 189         |
| Section 9. Inviolability of the premises of the specialized agencies and of IAEA and exercise of control by the specialized agencies and by IAEA over their premises .....  | 58-65             | 189         |
| Section 10. Immunity of the property and assets of the specialized agencies and of IAEA from search and from any other form of interference.....  | 66                | 190         |
| Section 11. Name and emblem of the specialized agencies and of IAEA: United Nations flag .....  | 67-68             | 191         |
| Section 12. Inviolability of archives and documents .....   | 69                | 191         |
| Section 13. Immunity from currency controls .....   | 70-71             | 191         |
| Section 14. Direct taxes.....   | 72-76             | 191         |
| Section 15. Customs duties .....  | 77-87             | 192         |
| (a) Imports and exports by the specialized agencies and by IAEA "for their official use" .....  | 77-78             | 192         |
| (b) Imposition of customs duties, prohibitions and restrictions .....   | 79-83             | 193         |
| (c) Sales of articles imported by the specialized agencies and by IAEA.....   | 84-87             | 193         |
| Section 16. Publications.....   | 88-91             | 193         |
| Section 17. Excise duties and taxes on sales; important purchases.....  | 92-112            | 194         |
| (a) Excise duties and taxes on sales forming part of the price to be paid.....  | 92-97             | 194         |
| (b) Important purchases .....   | 98-104            | 195         |
| (c) Remission or return of taxes paid.....  | 105-112           | 196         |
| III. PRIVILEGES AND IMMUNITIES OF THE SPECIALIZED AGENCIES AND OF THE INTERNATIONAL ATOMIC ENERGY AGENCY IN RESPECT OF COMMUNICATION FACILITIES.....  | 113-120           | 197         |
| Section 18. Treatment equal to that accorded to Governments in respect of mails, telegrams and other communications.....  | 113-115           | 197         |
| Section 19. Use of codes and dispatch of correspondence by courier or in bags .....   | 116-120           | 197         |
| IV. PRIVILEGES AND IMMUNITIES OF OFFICIALS OF THE SPECIALIZED AGENCIES AND OF THE INTERNATIONAL ATOMIC ENERGY AGENCY.....   | 121-205           | 198         |
| Section 22. Categories of officials to which the provisions of articles VI and VIII of the Convention on the Privileges and Immunities of the Specialized Agencies apply .....  | 121-130           | 198         |
| Section 23. Immunity of officials in respect of official acts .....   | 131-136           | 199         |
| Section 24. Exemption from taxation of salaries and emoluments.....   | 137-176           | 200         |
| Section 25. Immunity from national service obligations .....  | 177-180           | 203         |
| Section 26. Immunity from immigration restrictions and alien registration .....   | 181-185           | 204         |
| Section 27. Exchange facilities.....  | 186-187           | 204         |
| Section 28. Repatriation facilities in time of international crisis.....  | 188-189           | 204         |
| Section 29. Importation of furniture and effects.....   | 190-193           | 204         |
| Section 30. Diplomatic privileges and immunities of the executive heads and other senior officials of the specialized agencies and of IAEA .....  | 194-198           | 205         |
| Section 31. Waiver of the privileges and immunities of officials .....  | 199-201           | 205         |
| Section 32. Co-operation with the authorities of member States to facilitate the proper administration of justice.....  | 202-205           | 206         |
| V. PRIVILEGES AND IMMUNITIES OF EXPERTS ON MISSION FOR THE SPECIALIZED AGENCIES AND THE INTERNATIONAL ATOMIC ENERGY AGENCY AND OF PERSONS HAVING OFFICIAL BUSINESS WITH THE SPECIALIZED AGENCIES AND THE INTERNATIONAL ATOMIC ENERGY AGENCY ..... | 206-210           | 206         |
| Section 33. Persons falling within the category of experts on mission for the specialized agencies and IAEA .....   | 206-209           | 206         |
| Section 34. Privileges and immunities of experts on mission for the specialized agencies and IAEA.....  | 210               | 206         |
| VI. UNITED NATIONS LAISSEZ-PASSER AND FACILITIES FOR TRAVEL .....   | 211-225           | 207         |
| Section 36. Issue of United Nations <i>laissez-passer</i> and their recognition as valid travel documents .....   | 211-212           | 207         |

| Chapter  | Paragraphs | Page |
|--|------------|------|
| Section 37. Freedom of movement of personnel of the specialized agencies and of IAEA; inapplicability of <i>persona non grata</i> doctrine .....   | 213-218    | 207  |
| Section 38. Issue of visas for holders of United Nations <i>laissez-passer</i> .....   | 219-220    | 207  |
| Section 39. Certificates issued by the specialized agencies and by IAEA .....  | 221-224    | 207  |
| Section 40. Diplomatic facilities for the executive heads and other senior officials of the specialized agencies and of IAEA while travelling on official business .....                           | 225        | 208  |
| VII. SETTLEMENT OF DISPUTES .....  | 226-237    | 208  |
| Section 41. Settlement of disputes .....   | 226-229    | 208  |
| Section 42. Settlement of disputes regarding alleged abuses of privileges .....  | 230-233    | 208  |
| Section 43. Reference to the International Court of Justice of differences arising out of the interpretation of the Convention on the Privileges and Immunities of the Specialized Agencies .....  | 234-237    | 209  |
| VIII. ANNEXES AND FINAL PROVISIONS .....   | 238-247    | 209  |
| Section 44. Annexes to the Convention on the Privileges and Immunities of the Specialized Agencies .....   | 238-239    | 209  |
| Section 45. Supplemental agreements .....  | 240-243    | 209  |
| Section 46. Accession to the Convention on the Privileges and Immunities of the Specialized Agencies by Member States of the United Nations and by member States of the specialized agencies ..... | 244-247    | 210  |

#### PRINCIPAL INSTRUMENTS CITED IN THE PRESENT STUDY

##### Conventions and Agreements

- Convention on the Privileges and Immunities of the United Nations (New York, 13 February 1946) (United Nations, *Treaty Series*, vol. 1, p. 15, and *ibid.*, vol. 90, p. 327)
- Convention on the Privileges and Immunities of the Specialized Agencies (New York, 21 November 1947) (United Nations, *Treaty Series*, vol. 33, p. 261)
- Agreement on the Privileges and Immunities of the International Atomic Energy Agency (Vienna, 1 July 1959) (United Nations, *Treaty Series*, vol. 374, p. 147)
- Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961) (United Nations, *Treaty Series*, vol. 500, p. 95)
- Vienna Convention on Consular Relations (Vienna, 24 April 1963) (United Nations, *Treaty Series*, vol. 596, p. 261)
- Convention on Special Missions (New York, 8 December 1969) (United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), p. 125)
- Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975) (United Nations, *Juridical Yearbook 1975* (Sales No. E.77.V.3), p. 87)

##### Headquarters Agreements

###### United Nations Organization (New York)

Headquarters Agreement concluded between the United Nations Organization and the United States of America (Lake Success, 26 June 1947) (United Nations, *Treaty Series*, vol. 11, p. 11)

###### United Nations Organization (Geneva) (Office of the United Nations at Geneva)

Interim Arrangement on Privileges and Immunities of the United Nations concluded between the Secretary-General of the United Nations and the Swiss Federal Council (Bern, 11 June 1946, and New York, 1 July 1946) (United Nations, *Treaty Series*, vol. 1, p. 163), modified by an exchange of letters of 5 and 11 April 1963 between the Swiss Federal Council and the United Nations and thereafter entitled "Agreement on the Privileges and Immunities of the United Nations concluded between the Swiss Federal Council and the Secretary-General of the United Nations" (United Nations, *Juridical Yearbook 1963* (Sales No. 65.V.3), pp. 43-44)

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###### ECA

Agreement relating to the Headquarters of the United Nations Economic Commission for Africa (Addis Ababa, 18 June 1958) (United Nations, *Treaty Series*, vol. 317, p. 101)

###### ECLA

Agreement regulating the conditions for the operation, in Chile, of the Headquarters of the United Nations Economic Commission for Latin America in Chile (Santiago, 16 February 1953) (United Nations, *Treaty Series*, vol. 314, p. 49)

###### ECWA

Agreement relating to the Headquarters of the United Nations Commission for Western Asia (Baghdad, 13 June 1979) (United Nations, *Treaty Series*, vol. 1144, p. 213)

###### ESCAP

Agreement relating to the Headquarters of the Economic Commission for Asia and the Far East in Thailand (Geneva, 26 May 1954) (United Nations, *Treaty Series*, vol. 260, p. 35)

## FAO

Agreement regarding the Headquarters of the Food and Agriculture Organization of the United Nations (Washington, D.C., 31 October 1950) (United Nations, *Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations*, vol. II (Sales No. 61.V.3), p. 187)

## IAEA

Agreement relating to the Headquarters of the International Atomic Energy Agency (Vienna, 11 December 1957) (United Nations, *Treaty Series*, vol. 339, p. 110)

## IBRD

Articles of Agreement of the International Bank for Reconstruction and Development (Bretton Woods, 27 December 1945) (IBRD, *Articles of Agreement of the International Bank for Reconstruction and Development* (Washington, D.C., 1980), art. VII)

## ICAO

Agreement relating to the Headquarters of the International Civil Aviation Organization (Montreal, 14 April 1951) (United Nations, *Treaty Series*, vol. 96, p. 155)

## IDA

Articles of Agreement of the International Development Association (Washington, D.C., 24 September 1960) (IDA, *Articles of Agreement of the International Development Association* (Washington, D.C., 1974), art. VIII)

## IFC

Articles of Agreement of the International Finance Corporation (Washington, D.C., 25 May 1955) (IFC, *Articles of Agreement of the International Finance Corporation* (Washington, D.C., 1986), art. VI)

## IMF

Articles of Agreement of the International Monetary Fund (Bretton Woods, 27 December 1945) (IMF, *Articles of Agreement of the International Monetary Fund* (Washington, D.C., 1978) art. IX)

## ITU

Agreement between the Swiss Federal Council and the International Telecommunication Union concerning the legal status of that organization in Switzerland (Geneva, 22 July 1971) (United Nations, *Juridical Yearbook 1971* (Sales No. E.73.V.1), p. 26)

## UNEP

Agreement relating to the Headquarters of the United Nations Environment Programme (Nairobi, 26 March 1975) (United Nations, *Treaty Series*, vol. 962, p. 91)

## UNESCO

Agreement relating to the Headquarters of the United Nations Educational, Scientific and Cultural Organization and to its privileges and immunities on French territory (Paris, 2 July 1954) (United Nations, *Treaty Series*, vol. 357, p. 3)

## UNIDO

Agreement between the United Nations and Austria regarding the Headquarters Seat of the United Nations Industrial Development Organization (Vienna, 19 January 1981) (United Nations, *Juridical Yearbook 1981* (Sales No. E.84.V.1), p. 11), confirmed by an exchange of letters dated 20 December 1985

## UPU

See the Headquarters Agreement of the United Nations Office at Geneva, rendered applicable to the Universal Postal Union by an exchange of letters of 5 February/22 April 1948 between UPU and the Swiss Federal Council

## WHO

Agreement between the Swiss Federal Council and the World Health Organization regulating the legal status of that organization in Switzerland (Bern, September 1955) (Switzerland, *Recueil systématique du droit fédéral*, Bern, 1970 (0.192.120.281))

## LIST OF ABBREVIATIONS

|              |  |
|--------------|--|
| CFA          | Communauté financière africaine  |
| ECA          | Economic Commission for Africa   |
| ECLA         | Economic Commission for Latin America  |
| ECWA         | Economic Commission for Western Asia   |
| ECAFE        | Economic Commission for Asia and the Far East                                  |
| FAO          | Food and Agriculture Organization of the United Nations                        |
| IAEA         | International Atomic Energy Agency   |
| IBRD         | International Bank for Reconstruction and Development                          |
| World Bank } |  |
| ICAO         | International Civil Aviation Organization                                      |
| ICC          | International Chamber of Commerce  |
| I.C.J.       | International Court of Justice   |
| IDA          | International Development Association  |
| IDB          | Inter-American Development Bank  |
| IFAD         | International Fund for Agricultural Development                                |
| IFC          | International Finance Corporation  |
| ILO          | International Labour Organisation  |
| IMF          | International Monetary Fund  |
| ITU          | International Telecommunication Union  |
| UNDP         | United Nations Development Programme   |
| UNEF         | United Nations Emergency Force   |
| UNEP         | United Nations Environment Programme   |
| UNESCO       | United Nations Educational, Scientific and Cultural Organization               |
| UNICEF       | United Nations Children's Fund   |
| UNIDO        | United Nations Industrial Development Organization                             |
| UNITAR       | United Nations Institute for Training and Research                             |
| UNRRA        | United Nations Relief and Rehabilitation Administration                        |
| UNRWA        | United Nations Relief and Works Agency for Palestine Refugees in the Near East |
| UNTSO        | United Nations Truce Supervision in Palestine                                  |
| VAT          | Value-added tax  |

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|------|--|
| UPU  | Universal Postal Union                   |
| WFP  | World Food Programme                     |
| WHO  | World Health Organization                |
| WIPO | World Intellectual Property Organization |

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*I.C.J. Reports*      *ICJ, Reports of Judgments, Advisory Opinions and Orders*

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#### NOTE CONCERNING QUOTATIONS

Unless otherwise indicated, quotations from works in languages other than English have been translated by the Secretariat.

## Introduction

1. At its thirty-fifth session, in 1983, the International Law Commission requested the Secretariat "to revise the study prepared in 1967 on 'The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities'"<sup>1</sup> and to update that study in the light of the replies to the further questionnaire sent on 13 March 1978 by letter of the Legal Counsel of the United Nations addressed to the legal counsels of the specialized agencies and IAEA in connection with the status, privileges and immunities of those organizations, except in matters pertaining to representatives of States, and which complemented the questionnaire on the same topic sent out on 5 January 1965"<sup>2</sup>.

2. The present study was prepared by the Secretariat in accordance with that request. It constitutes a supplement to Part Two of the 1967 study, entitled "The organizations",<sup>3</sup> and closely follows its structure and format. The table of contents is based upon that of Part Two of the 1967 study. Part A, entitled "Summary of practice relating to the status, privileges and immunities of the United Nations", is based upon the provisions of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946, and part B, entitled "Summary of practice relating to the status, privileges and immunities of the specialized agencies and the International Atomic Energy Agency", upon those of the Convention on the Privileges and Immunities of the Specialized Agencies,

adopted by the General Assembly on 21 November 1947.<sup>4</sup>

3. The present study summarizes the major features of the practice followed since 1966 by the United Nations, the specialized agencies and IAEA in respect of their status, privileges and immunities. An attempt has been made to avoid, as far as possible, repeating those features of the practice indicated in the 1967 study which remained valid in 1985 (in particular, the sections for which the Secretariat had received no additional information have been omitted); hence the need to read this supplement in conjunction with the previous study. Part A was prepared on the basis of material taken largely from the records of the Office of Legal Affairs of the United Nations Secretariat. Part B was prepared on the basis of replies to the questionnaire transmitted to the heads of the specialized agencies and IAEA by letter of the Legal Counsel dated 13 March 1978. In the course of preparing the present study, the Legal Counsel addressed a further letter, dated 24 October 1984, to the heads of the specialized agencies and IAEA, inviting them to submit any information additional to that submitted in response to the earlier letter.

4. As in the 1967 study, most of the international agreements and national enactments mentioned in the present supplement are contained in the two volumes of the United Nations Legislative Series entitled *Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations*.<sup>5</sup> In addition, legislative texts and treaty provisions concerning the legal status of the United Nations and the specialized agencies and IAEA may be found in the successive issues of the United Nations *Juridical Yearbook*, beginning in 1962.

<sup>1</sup> *Yearbook . . . 1967*, vol. II, p. 154, document A/CN.4/L.118 and Add.1 and 2.

<sup>2</sup> *Yearbook . . . 1983*, vol. II (Part Two), pp. 80-81, document A/38/10, para. 277 (e).

<sup>3</sup> *Yearbook . . . 1967*, vol. II, p. 154, document A/CN.4/L.118 and Add.1 and 2. Part One of the 1967 study, entitled "The representatives of Member States", concerned matters relevant to the first part of the topic, which was the subject of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.

<sup>4</sup> The provisions of the Agreement on the Privileges and Immunities of IAEA are the same as or closely similar to those contained in the Convention on the Privileges and Immunities of the Specialized Agencies.

<sup>5</sup> United Nations publications, Sales Nos. 60.V.2 and 61.V.3.

## A. SUMMARY OF PRACTICE RELATING TO THE STATUS, PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

### CHAPTER I

#### Juridical personality of the United Nations

##### Section 1. Contractual capacity

###### (a) Recognition of the contractual capacity of the United Nations

1. Questions are raised from time to time concerning the legal personality and status of subsidiary bodies of the Organization such as UNDP, UNRWA or UNICEF. In response to an inquiry regarding the legal status of WFP, which was established by concurrent resolutions of the United Nations General Assembly and the FAO Conference, the Office of Legal Affairs, in an unpublished memorandum of 24 March 1969, examined the contractual capacity of WFP and its juridical status as follows:

We concur with your view that WFP possesses the legal capacity to acquire and dispose of movable property, enter into contracts, and be sued. We further agree that WFP possesses, under the General Regulations, the authority to enter into project agreements, that, subject to the considerations set forth below in this letter, its capacity to enter into international agreements is not to be restrictively interpreted, and that WFP must be deemed to possess various implied powers, in addition to those expressly conferred by the United Nations and FAO. As regards the entry by WFP into agreements with Governments relating to the administration of contributions under the 1980 Food Aid Convention, . . . such an agreement has been concluded by the United Kingdom and WFP through an exchange of letters.

We do, however, have reservations concerning the view . . . that the possession by an entity of the capacity to perform the legal acts referred to in your memorandum necessarily signifies that it enjoys an independent juridical personality. While the converse of this proposition—that a body enjoying independent juridical personality necessarily possesses legal capacity—is manifestly valid, it seems to us that whether a body possessing legal capacity may also be deemed to enjoy an independent juridical personality depends in each case upon the relevant terms of its constituent instrument. These views are based upon the practice observed by the United Nations with respect to various subsidiary bodies. For example, UNDP, while enjoying the capacity to enter into international agreements in its own name and the competence to perform other legal acts, is not considered to possess a juridical personality separate and distinct from the United Nations. International agreements entered into by UNDP are registered *ex officio* by the Secretariat under article 4 of the Regulations concerning the registration and publication of treaties and international agreements. Similarly, UNDP is entitled to the privileges and immunities of the United Nations by virtue of its status as a subsidiary body of the Organization, and this entitlement, therefore, subsists with respect to all Governments, whether or not they have entered into a basic agreement with UNDP stipulating that the Convention on the Privileges and Immunities of the United Nations shall apply to UNDP.

###### (b) Choice of law; settlement of disputes and system of arbitration

2. The attribution to properly constituted arbitral bodies of jurisdiction for the settlement of disputes concerning contract claims has not been considered as implying a choice as to the applicable law. In the rare cases where the problem has arisen, the determination of the law applicable to the contract has been left to the parties

to the dispute. One such case may be cited in this connection, namely, that of *Starways Limited v. United Nations Organization* (1969),<sup>1</sup> which is summarized in the memorandum of the Office of Legal Affairs reproduced in the present study (see p. 155 below).

3. More generally, the determination of the applicable law has been left to the arbitrators. The overwhelming majority of commercial contracts which have been entered into by the United Nations have been performed without the occurrence of any serious difficulties. The number of disputes presented to arbitration, therefore, is not great and few formal written opinions have been rendered. See also the following cases: *Balakhany (Chad) Limited v. Food and Agriculture Organization of the United Nations* (1972),<sup>2</sup> *Aerovías Panama, S.A. v. United Nations* (1965),<sup>3</sup> *Lamarche v. Organisation des Nations Unies au Congo* (1965).<sup>4</sup> Very few cases regarding commercial contracts to which the United Nations was a party have come before municipal courts; in instances in which the United Nations was the plaintiff the most frequent issue was the capacity of the Organization to institute proceedings. In one case it was held that a subsidiary organ of the United Nations bringing an action arising out of a contract was obliged to comply with venue requirements.<sup>5</sup>

4. An inquiry received from the Institute of International Law in 1976 provided the Office of Legal Affairs with the occasion for a comprehensive review of the questions of the law applicable to contracts concluded by the United Nations with private parties and the procedures for settling disputes arising out of such contracts. In its reply to a questionnaire submitted by the Institute, the Office of Legal Affairs provided the following information:<sup>6</sup>

1. *Do the Constitution, the internal rules of your organization, or international conventions (headquarters agreements, etc.) provide any indication as to the law applicable to contracts concluded with private parties?*

<sup>1</sup> Arbitral award of 24 September 1969, under the rules of the American Arbitration Association, rendered by Howard H. Bachrach, sole arbitrator. For a summary of the case, see United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), pp. 233-234.

<sup>2</sup> Arbitral award of 29 June 1972 (arbitrator, Barend van Marwijk-Kooy). See United Nations, *Juridical Yearbook 1972* (Sales No. E.74.V.1), p. 206.

<sup>3</sup> Arbitral award of 14 January 1965, rendered under the rules of the American Arbitration Association.

<sup>4</sup> Arbitral award of 6 August 1965, rendered under the rules of ICC.

<sup>5</sup> *United Nations Korean Reconstruction Agency v. Glass Production Methods* (1956) (*Federal Supplement*, vol. 143, 1957, p. 248).

<sup>6</sup> United Nations, *Juridical Yearbook 1976* (Sales No. E.78.V.5), pp. 159-176.

The legal capacity of the Organization to contract is derived from Article 104 of the United Nations Charter<sup>1</sup> and granted express recognition in section 1 (a) of the Convention on the Privileges and Immunities of the United Nations (hereinafter referred to as the "General Convention").<sup>2</sup> This capacity has been fully acknowledged in practice. Recognition of United Nations capacity in this sphere has been given both by State organs on which the Organization has needed to rely in connection with the performance of its contracts and by official bodies, private firms and individuals with whom the United Nations has wished to enter into contractual relations. The United Nations has exercised its contractual capacity both through officials of the Secretariat acting on behalf of the Secretary-General, in his capacity as chief administrative officer of the Organization, and through subsidiary bodies established for particular purposes by one of the principal organs. Subsidiary organs, such as UNICEF and UNRWA, which have been entrusted by the General Assembly with a wide range of direct functions, have regularly entered into commercial contracts in their own names.<sup>3</sup>

In addition, legal capacity to contract has been given express recognition in the statutes and regulations of United Nations organs, e.g. in the Regulations of UNEF,<sup>4</sup> in the Agreement with Thailand concerning the Headquarters of ECAFE,<sup>5</sup> and in the Regulations for the United Nations Force in Cyprus.<sup>6</sup>

So far as is known, no State has placed any express limitation upon its recognition of the contractual capacity of the United Nations. The Organization may therefore use its contractual powers, subject to the limitations imposed by its own structure and the authority given by resolutions adopted by its organs, for the same purposes as any other legal entity recognized by particular municipal systems.<sup>7</sup>

Neither the United Nations Charter, the General Convention nor any of the regulations granting legal capacity to contract to subsidiary organs of the Organization have specified the law applicable to contracts concluded with private parties.

Regarding the application of article III, section 7 (b), of the Headquarters Agreement between the United Nations and the United States of America (the "Headquarters Agreement"),<sup>8</sup> we wish to make the following observations.

Article III, section 7 (b) of the Headquarters Agreement provides:

"Except as otherwise provided in this agreement or in the General Convention, the federal, State and local law of the United States shall apply within the headquarters district."

Whether such a provision applies to contracts concluded in the Headquarters district must be interpreted in conjunction with both the Charter of the United Nations and the General Convention.

This principle of interpretation may be drawn from the Headquarters Agreement itself. In section 26<sup>9</sup> thereof, it is stated that the

provisions of that Agreement and those of the General Convention are to be treated as complementary. Section 27<sup>10</sup> of the Agreement further states that the provisions of that Agreement are to be construed so as to enable the United Nations to discharge its responsibilities and fulfil its purposes.

The Organization executes a great number of its contracts at Headquarters. However, a substantial number of contracts are also executed either by the United Nations itself or through its subsidiary organs under a variety of conditions and in numerous countries. If the Headquarters Agreement were interpreted to apply the federal, State and local law of the United States to contracts signed at Headquarters, there would arise a dichotomy of practice in the interpretation of the law to be applied to such contracts. Contracts signed at Headquarters would be governed by United States law, whereas contracts signed elsewhere (including all other places in the United States) would be governed by general principles of law or by the law specified in the contract.<sup>11</sup> This could result in confusion and in difficulties not consonant with the proper and efficient performance of the functions of the Organization. The position of the Organization has been that the place of the signing of a contract can at most be considered only as one of many factors in a determination of the law of the contract. For this reason, it has never recognized article III, section 7 (b), of the Headquarters Agreement as imposing local law upon contracts concluded at Headquarters.

Consistent with this interpretation, the Organization relies on general principles of law in the interpretation of contracts concluded by it with private parties. Neither the United States nor any other State has placed any express limitation upon this interpretation of the relevant law to be applied in the construction of contracts entered into by the United Nations.

The application of general principles of law to contracts entered into by the United Nations may be seen, paraphrasing Judge Jessup, as an invocation of conflict rules and principles themselves.<sup>12</sup> It may be presumed that the forum called upon to adjudicate a dispute arising out of a contract between the United Nations and a private party would be guided by these principles. In such a case, the selection of the relevant law governing the contract, as suggested by Professor Cavers, would not be the result of the automatic operation of a rule or principle of selection but of a search for a just decision in the principal case.<sup>13</sup>

## II. (a) *What are the purposes of the principal contracts which your organization concluded with private parties? Could you classify the different types of contracts involved?*

The United Nations has entered into a variety of contracts of a private law character. At the Headquarters of the United Nations, these include, for example, contracts for maintenance, for purchase of office equipment, for the leasing of premises, for printing, etc.<sup>14</sup> They further include contracts between private parties and the United Nations for materials, supplies, equipment, studies, etc., when the Organization acts as the executing agency for contracts with private parties under agreements concluded with Governments by other United Nations agencies, e.g. UNDP. In addition, the United Nations

<sup>1</sup> Article 104 of the Charter states:

"The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes."

<sup>2</sup> United Nations, *Treaty Series*, vol. 1, p. 15. Article I, section 1 (a) of the General Convention states in part:

"The United Nations shall possess juridical personality. It shall have the capacity:

"(a) to contract; . . ."

<sup>3</sup> *Yearbook . . . 1967*, vol. II, p. 207, document A/CN.4/L.118 and Add.1 and 2.

<sup>4</sup> ST/SGB/UNEF/1. Article 27 of those Regulations provided: "The Commander shall enter into contracts and make commitments for the purpose of carrying out his functions under these regulations."

<sup>5</sup> United Nations, *Treaty Series*, vol. 260, p. 35, art. II, sect. 2.

<sup>6</sup> ST/SGB/UNFICYP/1, art. 22. Reproduced in United Nations, *Juridical Yearbook 1964* (Sales No. 66.V.4), p. 181. The regulations came into force on 10 May 1964.

<sup>7</sup> See *Yearbook . . . 1967*, vol. II, p. 208, document A/CN.4/L.118 and Add.1 and 2.

<sup>8</sup> United Nations, *Treaty Series*, vol. 11, p. 11.

<sup>9</sup> "Section 26

"The provisions of this agreement shall be complementary to the provisions of the General Convention. In so far as any provision of this agreement and any provisions of the General Convention relate to the same subject matter, the two provisions shall, wherever possible, be treated as complementary so that both provisions shall be applicable and neither shall narrow the effect of the other; but in any case of absolute conflict, the provisions of this agreement shall prevail."

<sup>10</sup> "Section 27

"This agreement shall be construed in the light of its primary purpose to enable the United Nations at its headquarters in the United States fully and efficiently to discharge its responsibilities and fulfil its purposes."

<sup>11</sup> The Organization does not consider it to be inconsistent with these principles for it to rely upon the law imposed by the contract itself. In a limited number of cases a contract may specify a particular law of applicability. In such cases, the contract may be construed consistently with such a provision. Clauses of the latter description have now almost ceased to be used (see *Yearbook . . . 1967*, vol. II, p. 208, document A/CN.4/L.118 and Add.1 and 2). More often the contract is silent on the law of applicability. In such cases, general principles of law are invoked.

<sup>12</sup> P. C. Jessup, *Transnational Law* (New Haven, Conn., Yale University Press, 1956), p. 94. It should be noted also that Jessup refers to the *Serbian Loans* case (1929) before the Permanent Court of International Justice, concerning which he states: "It (the Court) noted that some rules of private international law are to be found in treaties and are thus transformed into 'true international law'." (*Ibid.*, p. 95.)

<sup>13</sup> *Ibid.*, p. 99.

<sup>14</sup> United Nations, *Repertory of Practice of United Nations Organs*, vol. V, *Articles 92-111 of the Charter* (Sales No. 1955.V.2 (vol. V)), p. 332.

contracts with private parties, both individuals and institutional or corporate entities, for work on a short-term basis supplemental to its work at Headquarters, e.g. research, editing, translation. It also concludes contracts with private individuals for their services as consultants or experts. These contracts are, then, classifiable as contracts for materials and equipment and contracts for services.

Of course, the Organization concludes a large number of contracts for the services of staff members.<sup>15</sup> However, such contracts are considered by the Organization to be governed by its internal administrative law as established by the Staff Regulations,<sup>16</sup> Staff Rules<sup>17</sup> and Administrative Instructions<sup>18</sup> of the United Nations.

II. (b) *Do the contracts concluded between your organization and private parties generally (or occasionally, in which case on what occasions?) specify the law or legal system which governs them?*

Generally speaking, United Nations contracts (both those of a commercial nature and employment contracts) have not specified the law considered to be applicable to such agreements.<sup>19</sup> In the case of employment contracts, the contract itself has formed part of a growing system of international administrative law, independent of given systems of municipal law. The references to municipal law contained in employment contracts have therefore been specific rather than general (e.g. social security laws). Very occasionally, they have been introduced for the purpose of providing a convenient yardstick for measuring compensation or separation benefits.<sup>20</sup> As indicated above, clauses of the latter description have now almost ceased to be used. In any case, at no time did they amount to a choice of an actual system of municipal law to govern the entire terms of an employment contract. An internal appellate system has been established to consider disputes of a serious nature regarding employment contracts of staff members. The United Nations Administrative Tribunal has referred both to the internal administrative law of the Organization and to general principles of law in interpreting employment contracts. It has largely avoided references to municipal systems.

In the case of commercial contracts, express reference has rarely been made to a given system of municipal law. The standard practice is for the contract to contain no choice-of-law clause as such; provision is made, however, for the settlement of disputes by means of arbitration when agreement cannot be reached by direct negotiations.<sup>21</sup> For example, in the case of contracts concluded with parties resident

in the United States, reference may be made to arbitration in accordance with the procedures established by the American Arbitration Association, by the Inter-American Arbitration Association in respect of contracts with Latin American suppliers, or by ICC in many of the remaining cases. No further reference is made in the contract to the legal system to be applied.<sup>22</sup>

In an opinion of the General Legal Division of the Office of Legal Affairs of the United Nations, drafted in reply to an inquiry of the Legal Office of FAO, the question of specifying a legal system in United Nations contracts was addressed. That opinion, dated 10 December 1962, stated:

"You have deliberately omitted from your proposed standard form any provision making the law of a particular State applicable to the particular contract, and have expressly provided instead in your article 17 that the rights and obligations of the parties would be governed by the agreement and by generally recognized principles of law, to the exclusion of any given municipal law. The idea behind your practice is not to volunteer to make the laws of any particular State applicable to our contract. However, our feelings on this point are reflected in the contract by means of a complete absence of any provision on this matter rather than an express provision such as you have included in your own contract.

"We have felt that it would be preferable as a matter of normal practice to deal with the question only if and when it actually arises, and in the light of the circumstances of the case, rather than in advance by means of a provision in the contract on this point. However, some of our contracts have included a provision making a particular law applicable because of the importance of such a provision to the other party. When the proposal is to make New York law applicable, our familiarity with that law makes it relatively easy for us to accept such a proposal. We try to avoid laws with which we are unfamiliar, but have on occasion had to accept. In such cases, the law is usually that of the country of residence of the other party or in which he has a place of business, and I cannot recall any instance in which the laws of a third State (that is, other than the country of residence of the other party or New York State) has been made the applicable law."

The view expressed in that opinion reflects what has continued to be the approach of the United Nations with regard to specifying any governing law or legal system.

II. (c) *If the contracts concluded between your organization and private parties generally specify the law or legal system which govern them, do they refer to international legal rules (international law, the internal law of the organization or general principles of law) or to a national legal system (which one)? In the latter case, is the law considered "frozen" as of a particular date or is there no limitation of this sort? Is there reference in the contract to the national law on a subsidiary basis? Is there reference to a combination of the national law and general principles of law? Or does the applicable law vary according to the contract? In the last alternative, do you make the distinction on the basis of the importance of the contract, its subject matter, the fact that it is concluded and carried out in one country or in several, the public or private status of the other party to the contract, etc.? What are the effects of such distinctions? Please provide examples of the clauses used.*

The contracts in question do not specifically refer to any international legal rules. However, it has been the practice of the United

<sup>15</sup> The Organization is empowered to contract for the services of staff members, through the Secretary-General, under Article 101, paragraph 1, of the United Nations Charter, which states:

"The staff shall be appointed by the Secretary-General under regulations established by the General Assembly."

<sup>16</sup> The General Assembly established the Staff Regulations of the United Nations in accordance with Article 101 of the United Nations Charter by resolution 590 (VI) of 2 February 1952. They have thereafter been amended from time to time by that body.

<sup>17</sup> ST/SGB/Staff Rules/1/Rev.4 and Corr.1, 1977.

<sup>18</sup> Administrative instructions are internal Secretariat documents that contain or deal with Staff Regulations and Staff Rules, interpretations of those regulations and rules, the Secretary-General's policy for implementation of those regulations and rules, instructions and procedures and statements of established policy. They are the principal means by which the Secretary-General communicates with the staff on matters of financial, administrative and personnel policies. The authority for the issuance of administrative instructions is the circular ST/SGB/100, dated 14 April 1954. See ST/A/1/226 and Amend.1.

<sup>19</sup> See *Yearbook . . . 1967*, vol. II, p. 208, document A/CN.4/L.118 and Add.1 and 2.

<sup>20</sup> *Ibid.* For examples of employment contracts containing clauses of this nature, see the decisions in the following cases: *Hilpern v. United Nations Relief and Works Agency for Palestine Refugees in the Near East* (1955, 1956, 1956) and *Radicopoulos v. United Nations Relief and Works Agency for Palestine Refugees in the Near East* (1957), in United Nations, *Judgments of the Administrative Tribunal, Nos. 1-70, 1950-1957*, (Sales No. 58.X.1), judgments Nos. 57, 63, 65 and 70.

<sup>21</sup> Although informal negotiations between the parties are preferred before the contractual provision on arbitration is invoked, no specific provision is made for such process in contracts concluded by the Organization at Headquarters. However, under the governing procedures for contracts concluded by the Geneva Office of the United Nations, provision is made for such negotiations through the prior use of a designated expert. Article 25 of the *Cahier des clauses et conditions générales applicables aux marchés de fournitures* (MUN/251/68-GE.68-6632) provides:

"Expert opinions

"1. If any dispute arises as to the interpretation of execution of the contract, the parties shall arrange to obtain an expert opinion prior to the institu-

tion of any judicial proceedings. The more expeditious of the two parties shall notify the other party in writing of the subject of the dispute and shall propose the name of an expert. The other party shall, within 10 days, signify whether or not it agrees to the appointment of that expert and, if it does not so agree, shall make a counter-proposal, to which a reply shall be given within 10 days after notification thereof. This exchange of correspondence shall be by registered letter with acknowledgement of receipt.

"2. If the two parties fail to agree, the expert shall be appointed, at the request of the more expeditious party, by the President of the International Chamber of Commerce.

"3. The expert shall have full powers to require the submission to him of any documents, of whatever kind, and to seek such explanations from the parties as he deems necessary in order to determine the nature and cause of the dispute. His function shall be to draw up and communicate to the parties, within one month after the date of his appointment, a report analysing the origin and nature of the dispute which has arisen and to propose a settlement.

"4. The costs of the expert opinion shall be apportioned equally between the two parties."

<sup>22</sup> See *Yearbook . . . 1967*, vol. II, p. 209, document A/CN.4/L.118 and Add.1 and 2.

Nations to interpret the contracts concluded by it on the basis of general principles of law, including international law, and upon the standards and practice established by its internal law, including its Financial Regulations,<sup>23</sup> principles of delegation of authority under the United Nations Charter and the internal rules and procedures promulgated thereunder.

The law considered to apply would be for matters of substance all applicable laws to which it may refer which were in force at the time of the conclusion of the contract.<sup>24</sup> For matters of adjective or procedural law which might arise in connection with the resolution of a dispute, the applicable law would be that law in effect at the time of the resolution of the dispute.

No reference is generally made to municipal law either as a primary or subsidiary basis.

No reference is made to the application of any combination of municipal law and general principles of law. However, from a practical point of view special attention is given in the making of contracts that such contracts be in general conformity with the law of the place where the contract is made and is to be executed and the national law of the private parties with which the contract is concluded. Similar considerations of a general character may be given to municipal laws in the resolution of disputes which may therefrom arise. However, in no case does the United Nations consider the law of any national system to be binding upon it either in the execution of contracts or in the settlement of disputes arising therefrom.

As a result, while no reference will be made to applicable law in its contracts, the United Nations may give special attention to laws of national jurisdictions and may on occasion consult with local authorities as to the current status of municipal laws as a matter of comity.

#### II. (d) *What is the most recent trend in the contractual practice of your organization?*

The most recent trend in United Nations contractual practice is to avoid wherever possible reference to any specific law of application, especially any system of national law, and to consider the governing law of the contract to be found in general principles of law, including international law, as well as in the terms of the contract itself.

#### III. *Is there any case law or established practice concerning the law applicable to contracts concluded by your organization? If so, please give examples and the transcripts of the main decisions taken in this respect.*

The established practice concerning the law applicable to contracts is, as stated otherwise herein, to reject any specific reference to municipal laws and to rely on general principles of law in the interpretation of contracts with private parties.

Section 1 (c) of the General Convention refers expressly to the capacity of the United Nations "to institute legal proceedings". This capacity has been widely recognized by judicial and other State authorities.<sup>25</sup> United Nations practice in respect of the receipt of

<sup>23</sup> ST/SGB/Financial Rules of 2 July 1975, and successive revisions.

<sup>24</sup> Attention must be called, however, to the special circumstances governing an employment contract of a staff member of the United Nations. In addition to the letter of appointment, which forms the primary basis for the contractual relationship, the Staff Rules and Regulations may also form part of the basis of the contract. In that regard, the Administrative Tribunal of the United Nations, in particular in its judgment No. 19 in *Kaplan v. Secretary-General of the United Nations* (1953), has distinguished between the contractual and statutory elements in the relation between staff members and the Organization:

"All matters being contractual which affect the personal status of each staff member, e.g. nature of his contract, salary, grade;

"All matters being statutory which affect in general the organization of the international civil service, and the need for its proper functioning, e.g. general rules that have no personal reference.

"While the contractual elements cannot be changed without the agreement of the two parties, the statutory elements on the other hand may always be changed at any time through regulations established by the General Assembly, and these changes are binding on staff members." (United Nations, *Judgments of the Administrative Tribunal*, Nos. 1-70, 1950-1957 (Sales No. 58.X.1), p. 74.)

See also judgment No. 202 in *Queguiner v. Secretary-General of the Inter-Governmental Maritime Consultative Organization* (1975). (*Ibid.*, Nos. 167-230, 1973-1977 (Sales No. E.78.X.1), p. 317).

<sup>25</sup> *Yearbook . . . 1967*, vol. II, p. 216, document A/CN.4/L.118 and Add.1 and 2.

private law claims, specifically claims in contract, and steps taken to mitigate or avoid such claims, is not extensive.

One example of judicial action may be cited with reference to the resolution of disputes in respect of contracts to which the United Nations was a party.

In *Balfour, Guthrie & Co. Ltd. v. United States* (1950),<sup>26</sup> the United Nations brought an action arising out of the loss of and damage to a cargo of milk which had been shipped on behalf of UNICEF on a United States vessel; the United Nations action was joined with that of six other shippers. The Court, having regard to the terms of Article 104 of the United Nations Charter which, as a treaty ratified by the United States of America, formed part of the law of the United States, stated that: "No implemental legislation would appear to be necessary to endow the United Nations with legal capacity in the United States." It noted further: "The President, however, has removed any possible doubt by designating the United Nations as one of the organizations entitled to enjoy the privileges conferred by the International Organizations Immunities Act", under section 2 (a) of that Act. These privileges included "to the extent consistent with the instrument creating them" the capacity "to institute legal proceedings".

In addition, a number of arbitrations have been conducted in which the United Nations was a party. In *Starways Limited v. United Nations* (1969),<sup>27</sup> the United Nations had contracted with Sabena airlines for the charter of several DC-4 aircraft to be stationed in the Democratic Republic of the Congo, in connection with the United Nations mission in the Congo. One such aircraft belonged to and was operated by Starways Limited, a subcontractor of Sabena. The aircraft was destroyed by fire on 17 September 1961, having been attacked by rebel forces hostile to the United Nations mission. A claim was brought and submitted to arbitration. The arbitration agreement stipulated that the question of contractual liability was excluded from the terms of reference.

However, of special interest is the fact that the applicable law was stipulated to be that of the (former) Belgian Congo. The Arbitration Agreement stipulated:

"Except for the conduct of the case and the procedure indicated in this agreement, the law applied by the Arbitrator shall be the codes and legislation of the Belgian Congo which remained in force in the Democratic Republic of the Congo pursuant to article 2 of the *Loi fondamentale* of 19 May 1960."

It should, however, be pointed out that the applicable law here was established by agreement between the parties. It was neither stipulated by the contract nor automatically applied as a matter of conflict of law principles.

#### IV. *Is the establishment of contracts (for supplies, etc.) preceded by calls for tenders on a competitive basis? What rules govern such procedures?*

The Office of General Services of the United Nations Secretariat is responsible for procuring equipment, supplies and services in accordance with the prescribed Financial Regulations and Rules of the United Nations<sup>28</sup> (regulation 10.5 and rules 110.16-110.24). Financial regulation 10.5 provides that tenders for such equipment, supplies and other requirements are normally to be invited by advertisement. Contracts may be entered into only by duly authorized officers of the Organization. That authority normally rests with the Assistant Secretary-General, Office of General Services, or that officer's authorized delegate (rule 110.16). A Committee on Contracts has been established to render advice to the Assistant Secretary-General, Office of General Services, in matters involving, but not limited to, single requisitions of \$10,000 or more; contracts involving income to the Organization of \$5,000 or more, and proposals for modifications and renewals of contracts (rule 110.17).

Normally, contracts are let after competitive bidding. Tenders are invited by advertising through publication or distribution of formal invitations to bid. However, in cases where the nature of the work involved precludes invitation of tenders and where proposals are called,

<sup>26</sup> *Federal Supplement*, vol. 90, 1950, p. 831.

<sup>27</sup> Arbitral award of 24 September 1969, under the rules of the American Arbitration Association, rendered by Howard H. Bachrach, sole arbitrator. For a summary of the case, see United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), pp. 233-234.

<sup>28</sup> See footnote 23 above.

a comparative analysis of such proposals is kept on record (rule 110.18). Contracts may be awarded without advertising or formal invitations to bid when the contract involves a commitment of less than \$2,500 in the case of United Nations Headquarters, the United Nations Office at Geneva and UNIDO, Vienna, and \$1,000 in the case of regional commissions, provided that the award is made in conformity with designated specifications (rule 110.19). Other exceptions concern cases where prices are fixed by national legislation (rule 110.19 (b)), where standardization of supplies or equipment has received prior approval of the Committee on Contracts, or where the subject of the contract is considered to be a matter of special priority or urgency for the Organization (rule 110.19 (c) to (g)), or where the Assistant Secretary-General, Office of General Services, determines that competitive bidding would not give satisfactory results (rule 110.19 (h)). All bids are publicly opened at the time and place specified in the invitation to bid (rule 110.20). Contracts are awarded to the lowest acceptable bidder. However, when the interests of the Organization so require, all bids may be rejected (rule 110.21). Written contracts or purchase orders are required to be made for every purchase beyond specified amounts. Those amounts vary according to the agency of the United Nations executing the contract (rule 110.22).

V. *Do you find it useful to draw up as detailed contracts as possible, for instance by establishing standard models, in order to avoid disputes?*

Contracts are generally on a fixed price basis with firm specifications describing the work to be done. The performance of the contractor is controlled, where applicable, by progress reports and results. The policy of the Organization is to avoid "open-ended" contracts with regard to time and costs. On the other hand, certain types of work call for payment on a time/rate basis. Time/rate contracts are appropriate when the work to be executed is of a measurable quality. For example, when a contract stipulates a certain amount of drilling work, payments may be based on a fixed rate per foot or per type of operation.

Contracts are amended only when there exist legitimate and agreed reasons for so doing, i.e. an extension of work to be executed, a change in the scope of the work or a change in emphasis resulting in a change in or extension of time or personnel. All amendments involving financial modifications must be submitted to the Committee on Contracts. This body endorses the general terms of the amendments and ensures that they are consistent with those set out in the original contract.

The final text of a contract may be subject to review and approval by the Office of Legal Affairs, the Office of the Controller and the substantive division. This is not always the case, and is generally not true of routinely recurring contracts. Contracts are generally signed by the Chief, Purchase and Transportation Service, on behalf of the United Nations. Copies of the contract are then forwarded to the contracting body. The contractor retains its copy (copies) and returns the others to the Organization.

The degree to which a detailed contract proves to be useful varies according to a number of conditions, including its nature and the purposes underlying it. Contracts may take a variety of forms, including purchase orders, letters of agreement and formal contracts. In principle, the "boiler plate" or standardized "general conditions" clauses of the contract are uniformly applied to contracts entered into by the United Nations with private parties. However, the Geneva Office of the United Nations has developed its own set of "general conditions" in contract making. In the case of contracts of a less important nature, or those in which certain provisions of the "general conditions" would be inapplicable, such conditions may be partially deleted or included in abbreviated form.

In March 1975, there was held a meeting of the Agency Contract Specialists Group of the Working Group on Administration and Finance Matters of the United Nations and its specialized agencies. That meeting was held in pursuance of a decision taken by the Group at its fifteenth session, in the course of which it considered a draft standard contract form prepared by the United Nations for use of all the specialized agencies.<sup>29</sup> At the meeting of the Group, the United Nations representative stated that, from a study of the comments received from the specialized agencies, it was obvious that, with the exception of "General conditions", a single standard form for use by all the agencies was difficult to design in view of the different cir-

cumstances. The United Nations representative therefore proposed that, rather than a rigid standard form contract, a model contract outline would be more suitable as a tool for the standardization of contracts within the United Nations system. A contracting officer might then use the elements of the model outline as appropriate to the special requirements of the contract.<sup>30</sup> The components of the proposed model included: (a) a model contract cover page, and (b) a model schedule of contractual provisions. The production of such standard models for contracting within the United Nations system is an example of the current trend within the system towards establishing universally applied norms. This effort towards creating standard approaches to contract-making has been conducted within the United Nations for some time, and guidelines have been issued in an effort to maintain uniform approaches to contracts whenever possible.<sup>31</sup>

VI. *Would you consider that the elaboration of international substantive rules and uniform laws in the field of contract (for instance by means of international conventions) and the widest possible use of the result in international commercial relations could play a useful role in the emergence of an international legal system applicable to the contracts here under consideration?*

Yes, this Organization would consider that such elaboration and use could play a useful role in the question under consideration.

PROCEDURES FOR SETTLING DISPUTES

VII. *Do the Constitution, the internal rules of your organization or international conventions (headquarters agreements, etc.) make any provision as to procedures for settlement of, and the body competent to deal with, disputes arising from contracts concluded between your organization and private parties?*

Section 29 of the General Convention states that:

"The United Nations shall make provision for appropriate modes of settlement of:

"(a) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party;"

In order to provide a suitable means of settlement of any disputes of a private law character, the United Nations has regularly made provision in its contracts for recourse to arbitration.<sup>32</sup>

VIII. *Do the contracts in question generally (or occasionally, in which case on what occasions?) contain a provision designating the body to which any disputes arising under such contracts are to be referred?*

The contracts in question generally contain provisions designating arbitration as the manner in which any disputes are to be resolved.

In addition, special attention has been given to the preferred place of arbitration and its designation in such contracts. In 1964, the Office of Legal Affairs advised the Office of General Services regarding a proposal that the United Nations standard bid form and United Nations contracts should specify that the place of arbitration would be New York. An extract from that opinion is reproduced below:

"There would naturally be practical advantages from our point of view should arbitrations be held in New York. On the other hand, there is the consideration that a requirement to this effect might dissuade parties either not resident or not represented in New York from bidding for United Nations contracts, and such a possibility should be avoided. To provide therefore in the standard bid form that arbitration should be in New York would not seem to us to be entirely advisable.

"On the other hand, when it is apparent at the time of contracting that a strong conflict of interest would exist between the United Nations and the contracting party in respect to the place of arbitration, it would be advisable to include agreement on the place of

<sup>29</sup> DP/WGAFM/WP.3/R.1, para. 3.

<sup>30</sup> Two manuals are currently published by the Office of General Services of the United Nations Secretariat for the purpose of supplying guidelines in contract-making procedures, namely, *Manual of Procedures for Purchase and Standards Section* (New York, 1971) and *Manual of Procedures for Contracts Section* (New York, 1971). The latter manual is designed to supply models for contracts entered into by the United Nations as the executing agency for UNDP projects.

<sup>31</sup> See *Yearbook . . . 1967*, vol. II, p. 296, document A/CN.4/L.118 and Add.1 and 2.

<sup>29</sup> DP/WGAFM/R.15.

arbitration in the disputes clauses. In such cases, should the United Nations consider it advisable that arbitration in the particular case should be in New York, it would be advisable to try to reach agreement on the inclusion of the words 'Any arbitration hereunder shall take place in New York unless otherwise agreed by the parties' in the arbitration clause of the contract."<sup>33</sup>

IX. *If the contracts in question do contain a provision on machinery for the settlement of disputes, to what type of body is such competence ascribed: international or national arbitration bodies, an international administrative tribunal or a national court? Please provide examples of such provisions.*

Competence for the resolution of disputes that may arise out of such contracts is ascribed to arbitration bodies. There have been various clauses on arbitration used by the United Nations in contracting. These provisions designate the structuring of the arbitration either under the rules of the American Arbitration Association or ICC, or they may designate the structuring of an *ad hoc* panel with final recourse, in case of dispute, to the President of the United Nations Administrative Tribunal. Three examples of these clauses are set out below:

- (a) "Any controversy or claim arising out of or in connection with the interpretation or enforcement of this Agreement or any breach thereof shall be settled by arbitration in New York City in accordance with the then obtaining rules of the American Arbitration Association. The parties hereto agree to be bound by any arbitration award rendered as a result of such arbitration as the final adjudication of any such controversy or claim."
- (b) "Any dispute arising out of the interpretation or application of the terms of this contract shall, unless it is settled by direct negotiations, be referred to arbitration in accordance with the rules then obtaining of ICC. The United Nations and the contractor agree to be bound by an arbitration award rendered in accordance with this section as the final adjudication of any such dispute."
- (c) "Any dispute arising out of or in connection with this contract shall, if attempts at settlement by negotiation have failed, be submitted to arbitration in New York by a single arbitrator agreed to by both parties. Should the parties be unable to agree on a single arbitrator within 30 days of the request for arbitration, then each party shall proceed to appoint one arbitrator and the two arbitrators thus appointed shall agree on a third. Failing such agreement, either party may request the appointment of a third arbitrator by the President of the United Nations Administrative Tribunal. The arbitrator shall rule on the costs which may be divided between the parties. The decision rendered in the arbitration shall constitute the final adjudication of the dispute."

The choice as to which of the three arbitration provisions is selected in any given case is based to some degree on the particular exigencies of each contract, on the convenience of the parties and their familiarity with the rules and procedures referred to, and on the prospective costs which might be involved in case of invocation of this procedure for the settlement of disputes.

X. *Have the bodies in question had to meet frequently? Has their activity given rise to difficulties?*

The United Nations has had recourse to arbitral proceedings in only a limited number of cases. The arbitral awards which have been made have been very largely based on the particular facts relating to the contract concerned and have not raised points of general legal interest regarding the status, privileges and immunities of the Organization.<sup>34</sup> Very few cases regarding commercial contracts to which the United Nations was a party have come before municipal courts; in instances in which the United Nations was the plaintiff the most frequent issue was the capacity of the Organization to institute proceedings. In one case,<sup>35</sup> it was held that a United Nations subsidiary organ bringing an action arising out of a contract was obliged to comply with venue requirements.

Such difficulties as have arisen regarding the contractual capacity of the Organization have usually followed a dispute over the execution of

a particular contract. On several occasions, it has been alleged by the other party that the United Nations lacked juridical personality and thus could not enforce its contractual rights before a local court. These arguments, in which the legal personality of the Organization was denied as part of a denial of its capacity to institute legal proceedings, do not appear to have been raised in any commercial dispute in which the United Nations took action as a plaintiff, although they have been presented in correspondence.<sup>36</sup> In *United Nations v. B.* (1952),<sup>37</sup> and in *UNRRA v. Daan* (1950),<sup>38</sup> however, arguments denying the legal personality of the two organizations were presented by former staff members when action was brought to recover sums paid to them in error under their contracts of employment; these arguments were rejected by the courts. It may also be noted that, in a dispute which arose in 1952 with a private firm with which the United Nations had entered into a commercial contract, the firm sought to halt arbitration proceedings by means of a court order on the grounds that the Organization's immunity from suit and execution rendered its contracts unenforceable. In correspondence, the Office of Legal Affairs denied this argument, relying on precedents with respect to State immunities and the firm's acceptance of an arbitral procedure for the settlement of disputes. The request of a motion to stay arbitration was subsequently dropped by the firm concerned.<sup>39</sup>

In 1958, following a dispute as to the execution of a commercial contract, UNRWA sought to enter into arbitration with the other party. The other party having declined to appoint an arbitrator in accordance with the terms of the contract, UNRWA requested the President of the Court of Arbitration of ICC to appoint one. The latter appointed Professor Henri Batiffol of the Faculty of Law of the University of Paris. The section of Professor Batiffol's award dealing with the question of the competence of the arbitrator included the following passage which is of general interest regarding the capacity of an international organization, or of its subsidiary organs, to enter into contracts and to secure their enforcement:

"... Whereas UNRWA, an organ of the United Nations, derives from the treaties under which it was constituted, especially the Convention on the Privileges and Immunities of the United Nations of 13 February 1946, juridical personality and the capacity to contract; and whereas the stipulation of an arbitration clause, implied by such capacity, thus derives its legal basis from an instrument of public international law and is valid under that law without any need in that respect for reference to a national law, as would be the case for a contract between private parties, who to this day are subject to the authority of a State and hence to a national legal system, whether by reason of their nationality or domicile, the location of their property or their place of business or employment;

"Whereas, although certain legal systems do allow the signatory to an arbitration clause to petition an ordinary court of justice to supervise the arbitration proceedings or even, if the court deems it appropriate, to act as a substitute for the arbitrator, such substitution presupposes that the action is brought under a national system which has made provision for that possibility and regulated its consequences; and whereas, inasmuch as the present case does not involve an action brought under a national legal system but is governed by public international law, which has not made provision for such a possibility and does not, moreover, possess any organization of its own capable of regulating the consequences, the stipulated arbitration clause must be read according to its terms, which preclude recourse to the ordinary courts in case of disputes to which it refers, that being the only solution compatible with the immunity from jurisdiction of international agencies;

"Whereas the refusal of the respondent company to co-operate in the appointment of the arbitrator and in drawing up a settlement cannot bar the implementation of the arbitration clause; whereas, although national legal systems make varying assessments of the respective roles of damages and of performance in kind in the event of non-performance of a contract attributable to the debtor, all such systems recognize, in varying degrees, the right to require performance in kind wherever possible; and whereas, inasmuch as international law, on which the present arbitration clause is based,

<sup>36</sup> *Yearbook . . . 1967*, vol. II, p. 207, document A/CN.4/L.118 and Add.1 and 2.

<sup>37</sup> *Pasicrisie belge, 1953*, part 3, p. 66, decision of the Brussels Civil Court of 27 March 1952.

<sup>38</sup> *Annual Digest and Reports of Public International Law Cases, 1949* (London, 1955), vol. 16, p. 337.

<sup>39</sup> *Yearbook . . . 1967*, vol. II, p. 208, document A/CN.4/L.118 and Add.1 and 2.

<sup>33</sup> *Ibid.*, p. 209.

<sup>34</sup> See however the award rendered by H. Batiffol (below).

<sup>35</sup> See *United Nations Korean Reconstruction Agency v. Glass Production Methods* (1956) (*Federal Supplement*, vol. 143, 1957, p. 248).

makes no provision on this subject, it is necessary to adhere to the general principle of the binding effect of contracts and to consider whether implementation of the arbitration clause in accordance with the terms thereof is possible despite the refusal of the respondent to co-operate;

“Whereas appointment of the arbitrator despite respondent’s failure to act is possible, at least where the contract, as in the present case, provided for recourse to a third party for the purpose of such appointment in case of disagreement between the parties; whereas no distinction is to be made between disagreement concerning the person to be appointed and disagreement concerning the desirability of an appointment; and whereas the wording of article 12 (‘should the parties not agree within 30 days as to the choice of the arbitrator, the appointment will be made by the President of the Court of Arbitration of the International Chamber of Commerce’) covers both eventualities, in accordance with the genuine will of the parties, which was to submit to arbitration any dispute arising from the contract;

“Whereas the refusal of the respondent to co-operate in drawing up a settlement can be made good by the submission to arbitration of the draft settlement proposed to the respondent, whereupon the arbitrator will decide whether the proposed wording adequately and correctly sets out the subject of the dispute, having regard to the documents produced and particularly the correspondence between the parties; and whereas such replacement of the contract by a judgment, which is admissible, *inter alia*, in case of refusal to fulfil a promise of sale, is purely and simply the performance, upon a ruling by the judge, of the original contract, such ruling standing, in these circumstances, in lieu of a settlement;

“Whereas in the present case the complainant requested the President of the Court of Arbitration of the International Chamber of Commerce, in accordance with article 12 of the general conditions annexed to the contract, to appoint the arbitrator; whereas that request was acted upon; whereas, the complainant having submitted to the appointed arbitrator the draft settlement proposed by the complainant to the respondent, the arbitrator found, in the light of the documents produced, that the said draft adequately and correctly set out the subject of the dispute; whereas the arbitrator was therefore validly seized of the dispute and is competent to take cognizance of it.”<sup>40</sup>

The arbitrator found in favour of UNRWA as regards the merits of the dispute.

XI. *Is the attribution of jurisdiction to be considered as implying a choice as to the applicable law? Or is the question left to the appreciation of the bodies in question? Are there any decisions by these bodies on the subject?*

The attribution of jurisdiction for the settlement of disputes or contract claims to properly constituted arbitral bodies has not been considered as implying a choice as to the applicable law. The determination of the applicable law of the contract is left to the arbitrators. The number of disputes presented to arbitration for settlement is not great and few formal written opinions have been rendered. Reference may however be made to the opinion of Professor Batiffol (see sect. X above) and to the following cases: *Balakhany (Chad) Limited v. Food and Agriculture Organization of the United Nations* (1972);<sup>41</sup> *Aerovías Panamá, S.A. v. United Nations* (1965);<sup>42</sup> *Lamarche v. Organisation des Nations Unies au Congo* (1965).<sup>43</sup>

XII. (a) *In case of an action by a private party against your organization on the basis of a contract, do you generally rely on such immunity from jurisdiction as the organization may enjoy or do you agree to waive such immunity?*

The United Nations normally does not waive its immunity except in cases of third party liability covered by insurance. Rather than waive immunity, it submits to arbitration. However, as to its immunity, it may be noted that, as stated in section 2 of the General Convention:

“The United Nations, its property and assets, wherever located and by whomsoever held, shall enjoy immunity from every form

<sup>40</sup> *Ibid.*, p. 208.

<sup>41</sup> Arbitral award of 29 June 1972 (arbitrator, Barend van Marwijk Kooy) (United Nations, *Judicial Yearbook 1972* (Sales No. E.74.V.1), pp. 206-207).

<sup>42</sup> Award of the arbitration dated 14 January 1965, under the rules of the American Arbitration Association.

<sup>43</sup> Award of the arbitration dated 6 August 1965, under the rules of ICC.

of legal process except in so far as in any particular case it has expressly waived its immunity.”

Similar provisions are contained in the majority of other international agreements relating to the privileges and immunities of the United Nations.<sup>44</sup> Article I, section 1, of the Agreement with Switzerland expresses the privilege as one derived from international law:

“The Swiss Federal Council recognizes the international personality and legal capacity of the United Nations. Consequently, according to the rules of international law, the Organization cannot be sued before the Swiss courts without its express consent.”<sup>45</sup>

Immunity from legal process is not one of the privileges granted to the Organization under the Headquarters Agreement with the United States of America. Until the United States became a party to the General Convention,<sup>46</sup> the Organization’s immunity from suit in that country had been based on national enactments.<sup>47</sup> Title I, section 2 (b), of the International Organizations Immunities Act provides:

“International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign Governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract.”<sup>48</sup>

One judicial decision may be noted relating to the immunity of the United Nations. In *Curran v. City of New York* (1947),<sup>49</sup> the plaintiff brought an action against the City of New York, the Secretary-General of the United Nations and others, to set aside grants of land and easements by the City to the United Nations for its headquarters site, exemption of the site from taxation and the allocation of funds by the City for the improvement of nearby streets. The Secretary-General moved to dismiss the action against him on grounds of his immunity from suit and legal process. The United States Attorney for the Eastern District of New York informed the court that the State Department recognized and certified the immunity of the United Nations and of the Secretary-General. The City of New York sought to dismiss the complaint on the ground that it failed to state a sufficient cause of action. The court held that the complaint should be dismissed and stated:

“The Department of State, the political branch of our Government, having without any reservation or qualification whatsoever, recognized and certified the immunity of the United Nations, and the defendant Lie to judicial process, there is no longer any question for independent determination by this court.”<sup>50</sup>

On a number of occasions, most notably in the case of actions involving United Nations immunities brought before United States courts, the United Nations has entered an *amicus curiae* brief. The majority of these cases, however, were in the early years of the

<sup>44</sup> For the regional commissions, see section 7 of the Agreement concerning the Headquarters of ECLA (United Nations, *Treaty Series*, vol. 314, p. 49) and section 6 of the Agreement concerning the Headquarters of ECFAE (*ibid.*, vol. 260, p. 35). In the case of the Agreement concerning the Headquarters of ECA (*ibid.*, vol. 317, p. 101), no immunity from legal process is provided for the Commission itself, *expressis verbis*, although the Headquarters of the Commission are declared inviolable (sect. 2), its officials are granted immunity in respect of official acts (sect. 11 (a)), and the Executive Secretary himself and his immediate assistants are granted diplomatic privileges and immunities (sect. 13); the Agreement and the General Convention are to be treated as complementary, however, in so far as their provisions relate to the same subject matter (sect. 17).

<sup>45</sup> United Nations, *Treaty Series*, vol. 1, p. 163.

<sup>46</sup> The United States of America acceded to the General Convention on 29 April 1970.

<sup>47</sup> Even prior to the accession of the United States to the General Convention, the United Nations had taken the position that its immunity from suit formed part of general international law, and thus part of the law of the United States, even in the absence of any legislation and, moreover, that the Organization’s immunity from suit was derived from Articles 104 and 105 of the United Nations Charter, a treaty to which the United States was a party and which similarly formed part of the law of the land. United States courts have preferred to rely on national legislation, however, in upholding the Organization’s immunity. See *Yearbook . . . 1967*, vol. II, p. 223, footnote 49, document A/CN.4/L.118 and Add.1 and 2.

<sup>48</sup> United Nations, *Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations*, vol. 1 (Sales No. 60.V.2), p. 129.

<sup>49</sup> *New York Supplement, 2nd series*, 1948, vol. 1977, p. 206. The United Nations was not a defendant as such. It may be assumed, however, that the Secretary-General was named in his representative capacity.

<sup>50</sup> *Yearbook . . . 1967*, vol. II, p. 223, document A/CN.4/L.118 and Add. 1 and 2.

Organization's history. The established practice at the present time is to assert the immunity from suit of the United Nations in a written communication to the Ministry of Foreign Affairs of the State concerned. When time permits, this communication is sent through the Permanent Representative of the State concerned at United Nations Headquarters. In the written communication, the Ministry of Foreign Affairs is requested to take the necessary steps to inform the appropriate office of government (usually the Ministry of Justice or the Attorney-General's Office) to appear or otherwise move the court to dismiss the suit on the grounds of the Organization's immunity. When a summons or notification of appearance has been received, this is returned to the Ministry of Foreign Affairs. In cases brought by former staff members, the United Nations has usually referred in its note to the Ministry of Foreign Affairs to the fact that an alternative means of recourse exists for the staff member in the internal appellate machinery maintained by the Organization for its staff.<sup>51</sup>

In some instances local courts have taken decisions denying the immunity of the Organization or of its subsidiary organs despite the non-waiver of immunity.<sup>52</sup>

The case of *Bergaveche v. United Nations Information Centre* (1958)<sup>53</sup> concerned an employee of the United Nations Information Centre in Buenos Aires. In 1954, when his fixed-term contract was not renewed, he brought an action before the local labour court for termination indemnities. The United Nations Information Centre did not submit to the jurisdiction and requested the Ministry of Foreign Relations to notify the court of its immunity from suit. The court dismissed the action on the grounds that under the terms of Article 105 of the Charter and of the General Convention it lacked jurisdiction.

In response to a fresh submission by Mr. Bergaveche, another labour court gave a decision on 7 February 1956, in which it assumed jurisdiction by virtue of the fact that Argentina was not a party to the General Convention. Argentina acceded to the Convention on 31 August 1956 and in April 1957 the Ministerio Público advised the labour court that the action should be dismissed since the United Nations and its agencies enjoyed immunity from suit under the Convention and the Convention had become law in Argentina. The court therefore dismissed the action on 23 April 1957. On appeal, it was argued that, since the employment of Mr. Bergaveche had ended in 1954, the Statute adopted in 1956 could not be applied retroactively to his case, or, if retroactivity was intended, this could not affect rights under labour legislation already acquired. In its decision of 19 March 1958, the court held that the appellant's argument did not succeed since the statute concerned was a procedural one which was immediately applicable in the case of both pending and future proceedings.<sup>54</sup>

In an internal memorandum prepared by the Office of Legal Affairs in 1948 it was stated, with reference to section 2 of the General Convention, that, since the words "except in so far as in any particular case it shall have waived its immunity" must refer to the immediately preceding words ("shall enjoy immunity from every form of legal process"),

"it would appear that by this article permission is given to the United Nations to waive its immunity only in so far as legal process in any particular case is concerned, and such waiver cannot extend to any measure of execution".

This conclusion was said to be in accordance with a number of municipal decisions, notably those given by English and United States courts, in respect of the waiver of State immunities. The memorandum continued:

<sup>51</sup> *Ibid.*, pp. 223-224.

<sup>52</sup> *Ibid.*, p. 224. A number of these decisions, for the most part rendered by courts of first instance, involved UNRWA. They are briefly described in the annual report of the Secretary-General on the activities of the Organization during the period 1 July 1953 to 30 June 1954 (*Official Records of the General Assembly, Ninth Session, Supplement No. 1 (A/2663)*, pp. 106-107), and in *Repertory of Practice of United Nations Organs, Supplement No. 2*, vol. III (United Nations publication, Sales No. 63.V.7), pp. 518-519. Further information is contained in the annual reports of the Director of UNRWA for the years 1953/54 to 1957/58 (*Official Records of the General Assembly, Ninth Session, Supplement No. 17 (A/2717)*, annex G, para. 11 (i); *ibid.*, *Tenth Session, Supplement No. 15 (A/2978)*, annex G, para. 19; *ibid.*, *Eleventh Session, Supplement No. 15 (A/3212)*, annex G, para. 19; *ibid.*, *Thirteenth Session, Supplement No. 14 (A/3931)*, annex H, para. 26.

<sup>53</sup> Argentina, *Cámara Nacional de Apelaciones del Trabajo de la Capital Federal*, decision of 19 March 1958.

<sup>54</sup> See *Yearbook . . . 1967*, vol. II, p. 224, document A/CN.4/L.118 and Add.1 and 2.

"According to the reports of the Preparatory Commission of the United Nations, article 2 of the General Convention was based on similar articles in the constitutions of international organizations. Some of their constitutional instruments, such as that of UNRRA, provide that the member Governments accord to the administration the facilities, privileges, exemptions and immunities which they accord to each other, including immunity from suit and legal process except with the consent of or so far as is provided for in any contract entered into by or on behalf of the administration.

"A similar provision is contained in article IX, section 3, of the Articles of Agreement of IMF" providing for waiver of immunity for the purposes of any proceedings or by the terms of any contract, thereby differentiating between the two forms of waiver. Apparently, it was not the intention of the Preparatory Commission or the General Assembly to extend waiver this far in so far as the United Nations was concerned, or such a provision would have been included, rather than just the words 'legal process'. In fact the words used in the original draft of this section were: 'The Organization, its property and its assets wherever located and by whomsoever held shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity for the purpose of any proceedings or by the terms of any contract.'

"This wording was changed by the Legal Committee of the Preparatory Commission to read in the more restrictive fashion in which it now stands. It must be concluded, therefore, that it was not the intention of the Preparatory Commission, or of the General Assembly, to extend the right of waiver to waiver in future by the terms of a contract.

"Since permission is given by the General Convention to the United Nations to waive its immunity in any particular case in so far as legal process is concerned, it is to be supposed that the authority to carry out such a waiver is placed with the Secretary-General, since the Secretary-General is responsible for the administration of the United Nations. It would not be possible to expect the Secretary-General to ask further authority from the General Assembly in each instance that legal process is to be served upon the United Nations; also the fact that the General Assembly found it necessary to write in a limitation upon the extent of any waiver, in so far as execution was concerned, would indicate that the General Assembly intended to transfer this authority to the Secretary-General, since if it were itself the waiving authority, there would be no necessity for making a limitation for its own right of waiver. This argument might be countered by stating that it is specifically provided in the General Convention that the Secretary-General may waive immunity in so far as officials and experts of the United Nations are concerned (sections 20, 23, 29). However, such a provision would be necessary in this instance since otherwise it might be supposed that the official or expert was entitled to waive his own immunity. In the case of the United Nations, the Secretary-General is 'the chief administrative officer of the Organization' and therefore such a clarification concerning his ability probably did not appear to be necessary to the Preparatory Commission or the General Assembly."<sup>55</sup>

In practice, the Secretary-General has determined in all cases whether or not the immunity of the Organization should be waived.

## XII. (b) *Does your attitude regarding waiver of immunity depend on the jurisdiction seized of the case and the law which would be applied by it?*

The only situation in which the Organization might normally waive its immunity would be one involving third party liability insurance.

One example of this situation would be a contract of insurance for motor vehicles. By resolution 23 (I), section E, of the General Assembly, the Secretary-General was instructed to ensure that drivers of the United Nations and all members of the staff who owned or drove motor cars should be properly insured against third party risk. In a 1949 memorandum, the Office of Legal Affairs stated:

"As it is really not feasible to take out insurance without permitting the insurance carrier the right to defend any suits which might be brought against the United Nations, the Secretary-General clearly has the power to waive immunity of the United Nations for the purpose of permitting such suits to be brought."<sup>56</sup>

<sup>55</sup> IMF, *Articles of Agreement of the International Monetary Fund* (Washington, D.C., 1978).

<sup>56</sup> *Yearbook . . . 1967*, vol. II, p. 225, document A/CN.4/L.118 and Add.1 and 2.

<sup>57</sup> *Ibid.*, p. 226.

XII. (c) *What is your position when the contract at issue does not provide for procedures for the settlement of disputes?*

There are very few cases in which provision is not made for arbitration. If the other party prefers, the United Nations does not insert the arbitration clause but includes a provision that no waiver of immunity is intended. Current practice requires that all contracts provide for arbitration to be specified as the method of dispute settlement. However, were the situation to arise, the United Nations would not generally waive its immunity from jurisdiction but would seek resolution of the dispute through a forum other than national courts, most usually arbitration.

GENERAL QUESTION

XIII. *Do you consider present practice satisfactory? In what way do you think it should be directed or developed?*

In general, the present practice is deemed to be satisfactory.<sup>18</sup>

<sup>18</sup> The above reply was communicated to the Rapporteur of the Institute of International Law on the question of contracts concluded by international organizations with private parties, for the purposes of the preparation of his report to the fourth committee of the Institute. On 6 September 1977, the Institute adopted a resolution on the question, which is reproduced in its report on its Oslo session in 1977 (*Annuaire de l'Institut de droit international*, 1977, vol. 57, t. II, p. 264).

**Section 2. Capacity to acquire and dispose of immovable property**

(b) *Acquisition and disposal of immovable property*

5. The expansion of the United Nations Secretariat in New York has led to the rental under leasehold agreements of space in several buildings in the vicinity of the Headquarters district. Under the terms of a Supplemental Agreement of 9 February 1966 between the United States of America and the United Nations,<sup>7</sup> as amended by an exchange of notes of 8 December 1966,<sup>8</sup> and a Second Supplemental Agreement of 28 August 1969,<sup>9</sup> as amended by an exchange of notes of 9 March and 25 May 1970, these premises were to be considered as included under the terms of the original Headquarters Agreement of 1947, with consequent privileges and immunities. A Third Supplemental Agreement was concluded on 10 December 1980.<sup>10</sup>

6. With the consolidation of United Nations premises in two new buildings built by the United Nations Development Corporation and completed in 1983, a proposal for a fourth supplemental agreement was submitted to the United States in November 1984.

7. In addition to the expansion of facilities at Headquarters, in New York, a number of property transactions have occurred at the seats of the regional commissions or with respect to the establishment of major centres of United Nations activities, such as Nairobi and Vienna. In Vienna, the United Nations leases the Vienna International Centre from the Austrian Government for one Austrian schilling per annum pursuant to an Agreement between the United Nations and Austria signed on 19 January 1981.<sup>11</sup> In Nairobi, the Government of

<sup>7</sup> United Nations, *Treaty Series*, vol. 554, p. 309.

<sup>8</sup> *Ibid.*, vol. 581, p. 363.

<sup>9</sup> *Ibid.*, vol. 687, p. 409.

<sup>10</sup> United Nations, *Juridical Yearbook 1980* (Sales No. E.83.V.1), p. 18.

<sup>11</sup> United Nations, *Juridical Yearbook 1981* (Sales No. E.84.V.1), p. 11.

Kenya has provided the United Nations with a 100-acre site upon which the Organization has constructed its headquarters for UNEP and other offices. An Agreement between the Kenyan Government and the United Nations was signed on 11 December 1980 for the use of land by the United Nations.<sup>12</sup> In Baghdad, the Government of Iraq has leased the premises for the permanent headquarters of ECWA to the United Nations for one dinar per annum. An Agreement to this effect between the United Nations and the Iraqi Government was concluded on 13 June 1979<sup>13</sup> and confirmed on 30 June 1983. Finally, a memorandum was signed on 2 November 1981 by the Rector of the United Nations University and the Governor of Tokyo regarding the donation of land to the University for its permanent headquarters site.

8. The United States Foreign Missions Act was enacted on 24 August 1982<sup>14</sup> and became effective on 1 October 1982. The Act is intended to regulate the operation in the United States of foreign missions and public international organizations and the official missions to such organizations, including the permissible scope of their activities and the location and size of their facilities. Application of the provisions of the Act to international organizations is subject to a determination by the Secretary of State. Except for the question of automobile liability insurance, no such determinations have thus far been made with respect to the United Nations.

**Section 4. Legal proceedings brought by and against the United Nations**

(c) *Claims of a private law nature made against the United Nations and steps taken to avoid or mitigate such claims*

9. The Standard Basic Assistance Agreement of UNDP<sup>15</sup> (which, in the case of countries that have signed the Agreement, replaces the Special Fund and technical assistance agreements and which is now in widespread use) provides, in article X, paragraph 2, that:

Assistance under this Agreement being provided for the benefit of the Government and people of \_\_\_\_\_, the Government shall bear all risks of operations arising under this Agreement. It shall be responsible for dealing with claims which may be brought by third parties against UNDP or an Executing Agency, their officials or other persons performing services on their behalf, and shall hold them harmless in respect of claims or liabilities arising from operations under this Agreement. The foregoing provision shall not apply where the Parties and the Executing Agency are agreed that a claim or liability arises from the gross negligence or wilful misconduct of the above-mentioned individuals.

**Section 6. Treaty-making capacity**

(a) *Treaty-making capacity of the United Nations*

10. On 16 December 1982, by its resolution 37/112, the General Assembly decided that an international con-

<sup>12</sup> United Nations, *Treaty Series*, vol. 962, p. 89.

<sup>13</sup> *Ibid.*, vol. 1144, p. 213.

<sup>14</sup> Public Laws 97-241 of 24 August 1982, *United States Statutes at Large*, 1982 (1984), vol. 96.

<sup>15</sup> See DP/107.

vention should be concluded on the basis of the draft articles on the law of treaties between States and international organizations or between international organizations adopted by the International Law Commission

at its thirty-fourth session. On 13 December 1984, by its resolution 39/86, the General Assembly decided to convene a plenipotentiary conference in 1986 for this purpose.

## CHAPTER II

### Privileges and immunities of the United Nations in relation to its property, funds and assets

#### Section 7. Immunity of the United Nations from legal process

##### (a) Recognition of the immunity of the United Nations from legal process

11. The United States of America became a party to the Convention on the Privileges and Immunities of the United Nations on 29 April 1970. This accession strengthened the legal position of the United Nations with regard to immunity from legal process in the United States, which until that time had been based on domestic legislation and general international law derived, in particular, from Articles 104 and 105 of the United Nations Charter. This action was all the more significant for the Organization as it came at a time when the doctrine of sovereign immunity was undergoing a rapid evolution. A more restrictive doctrine was being developed in many countries, culminating in the enactment of national legislation such as the United States Foreign Sovereign Immunities Act of 1976.<sup>16</sup> Although not directly applicable to international organizations, the changing doctrine of sovereign immunity and in particular the more restrictive approach to the commercial activity of foreign sovereigns will inevitably have an impact on the way national courts view the activities of international organizations. The United Nations, however, has continued to enjoy unrestricted immunity from legal process and has experienced no particular difficulties in this regard, unlike other organizations which do not enjoy the same legal protection under agreements in force.

12. In the *Menon* case (1973),<sup>17</sup> the estranged wife of a non-resident United Nations employee challenged the refusal of family court judges to order the United Nations to show cause why her husband's salary should not be sequestered to provide support for herself and her minor child. Her application was dismissed by a decision of the New York County Supreme Court, special term. The court declared that the law specifically exempted a sovereign from the jurisdiction of the United States courts, unless the sovereign consented to submit itself. The court further held that the United Nations "holds sovereign status and may extend that protection over its agents and employees . . ." and that "the sovereign status of the United Nations, concerning its personnel and its financial agents, is beyond this or

the family court authority to challenge". The *Means v. Means* case (1969)<sup>18</sup> also concerns the immunity of a United Nations staff member from attachment of salary.

13. In the *Manderlier v. United Nations and Belgian State* case (1966),<sup>19</sup> before the Brussels court of first instance, the plaintiff had instituted proceedings with a view to obtaining compensation from the United Nations or the Belgian Government, or from both jointly, for damage he claimed to have suffered "as the result of abuses committed by the United Nations troops in the Congo". The court dismissed the proceedings in so far as they pertained to the United Nations on the grounds that the Organization enjoyed immunity from every form of legal process under section 2 of the Convention of 13 February 1946 on the Privileges and Immunities of the United Nations. By its decision of 15 December 1969, the Brussels Court of Appeals pointed out that the immunity from legal process granted to the United Nations under the Convention on the Privileges and Immunities of the United Nations was in no way conditional upon the respect by the Organization of other obligations imposed by the same Convention, more particularly by article VIII, section 29, and that, although it was true that article 10 of the Universal Declaration of Human Rights stated that everyone was entitled to a hearing by a tribunal, the Declaration was not legally binding and could not alter the rule of positive law constituted by the principle of immunity from every form of legal process formulated in the Convention.<sup>20</sup>

14. With regard to the argument invoked by the plaintiff that Article 105 of the United Nations Charter limited the privileges of immunity to the minimum necessary to enable the United Nations to fulfil its purposes, the Brussels court of first instance replied that section 2 of the Convention conferred on the United Nations a general immunity from legal process and that, since the Convention and the Charter had equal status, the former, which was dated 13 February 1946, could not limit the scope of the latter, which dated from 26 June 1945. This judgment was upheld by the Brussels Appeals Court in its decision of 15 September 1969. The

<sup>16</sup> Public Law 94-583 of 21 October 1976, *United States Statutes at Large*, 1976 (1978), vol. 90.

<sup>17</sup> See United Nations, *Juridical Yearbook 1973* (Sales No. E.75.V.1), p. 198.

<sup>18</sup> See United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), p. 243. In that case the court stated that the United Nations had sovereign immunity and therefore its "monies which it is in the process of transmitting to its own employees cannot be interfered with *en route* unless and to the extent the sovereign consents . . .".

<sup>19</sup> See United Nations, *Juridical Yearbook 1966* (Sales No. E.68.V.6), p. 283.

<sup>20</sup> See United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), pp. 236-237.

Court added that, in acceding to the Convention of 13 February 1946, the signatories to the Charter had defined the necessary privileges and immunities and that the courts would be exceeding their authority if they were to arrogate to themselves the right of determining whether the immunities granted to the United Nations by that Convention were or were not necessary.<sup>21</sup>

### Section 8. Waiver of the immunity of the United Nations from legal process

#### (a) Practice relating to waiver by the United Nations of its immunity from legal process

15. The accession by the United States of America to the Convention on the Privileges and Immunities of the United Nations has been referred to above (para. 11). The practice of the United Nations with regard to waiver of immunity has been maintained.

16. In 1969, the Office of Legal Affairs advised the Personnel Service that the Secretary-General's delegation of authority to the Administrator of UNDP and to the Executive Director of UNICEF could not be viewed as including authority to permit staff members to waive the privileges and immunities of the United Nations. The Office of Legal Affairs explained in its opinion that "the Secretary-General's authority with respect to the Organization's privileges and immunities (of which those applicable to officials are, of course, only a part) is not essentially a personnel matter and, without an express provision on this point, no such delegation could be inferred from the delegation of powers relating to administration of the Staff Regulations and Rules on appointment and selection of staff". The opinion concluded: "In our view, the authority has not been formally delegated and, moreover, it should not be."

17. In practice, the Secretary-General has determined in all cases whether or not the immunity of the Organization should be waived. In the instances where the Secretary-General judged it proper to waive the immunity of the United Nations from legal process, he was guided by a general sense of justice and equity.

18. In 1949, a suit was commenced by a private individual against the United Nations for damages arising out of an automobile accident in New York in which a United Nations vehicle was involved. Under the terms of the insurance policy held by the Organization, the insurers were ready to defend the action in court. Before they could do so, however, it was necessary for the United Nations to waive its immunity. In an internal memorandum, the Office of Legal Affairs recommended that this should be done "for the purpose of allowing this particular suit to go to trial and that, as a matter of policy, it also be prepared to waive its immunity in any other case of a similar nature, subject to each such case being first reviewed by the Office of Legal Affairs to make sure that it has no complication such as might merit special treatment". The memorandum continued:

The question arises as to how this immunity may be waived. By its resolution 23 (1), section E, of 13 February 1946 [concerning third

party accident insurance for vehicles of the Organization and of staff members], the General Assembly instructs the Secretary-General "to ensure that the drivers of all official motor cars of the United Nations and all members of the staff who own or drive motor cars shall be properly insured against third party risk".

Under this resolution, the Secretary-General has clear authority to take whatever steps he may deem necessary to implement its terms. As it is really not feasible to take out insurance without permitting the insurance carrier the right to defend any suits which might be brought against the United Nations, the Secretary-General clearly has the power to waive the immunity of the United Nations for the purpose of permitting such suits to be brought.

This memorandum is only intended to deal with the waiver of the Organization's immunity in insurance cases. The question as to the circumstances in which the United Nations might be prepared to waive its immunity in other cases is complex, but as this question has no bearing on insurance cases, which are in a class by themselves, the necessity for discussing the waiver of immunity as a whole does not arise at this time.

In accordance with the conclusions reached in this memorandum, it is proposed that the Office of Legal Affairs should authorize the insurance carrier to defend this particular suit on behalf of the United Nations, thereby, of course, resulting in the United Nations waiving its immunity for this particular case and that the Office of Legal Affairs take similar action in all other insurance cases where it considers it would be within the spirit of the relevant General Assembly resolution so to do.<sup>22</sup>

19. The policy of waiving immunity to permit the resolution of insurance claims against the United Nations has been continued. In *Gibson v. United Nations liability insurance*, where the question was raised whether the United Nations would exceptionally permit the Security Mutual Insurance to plead immunity in response to summons and complaint in action involving a claim for damages by a child who fell off a slide in the United Nations playground, the Office of Legal Affairs, following earlier practice, explained that, "in maintaining insurance for third party liability claims, the United Nations intended that the claims be defended and liability would be determined like liability of any other insured, including, if need be, by court adjudication. United Nations practice is . . . to authorize and request the insurance companies to enter a voluntary appearance on the United Nations behalf in defence of the action."

20. The foregoing policy, however, has not been applied with regard to risks in respect of operations arising under basic agreements between Governments and the United Nations on technical assistance. Under these agreements, the Government concerned assumes responsibility for the handling of claims arising from those programmes of assistance. In view of these arrangements, the Office of Legal Affairs advised the Insurance Unit in 1975 that, if the vehicle involved in an accident was part of a programme of this nature, "waiver of United Nations immunity from legal process in the United States would not be in accordance with the principles incorporated in the said international agreements or the practices observed by the United Nations pursuant to those agreements".

#### (c) Interpretation of the phrase "any measure of execution"

21. In 1968, the Office of Legal Affairs had occasion to reaffirm its position with regard to measures of ex-

<sup>21</sup> *Ibid.*

<sup>22</sup> *Yearbook . . . 1967*, vol. II, p. 226, document A/CN.4/L.118 and Add.1 and 2.

ecution. In response to a request for advice from UNIDO regarding a hypothetical situation where a court of law, in execution of a judgment against a staff member, attempted to attach the salary of the staff member, the Office of Legal Affairs stated:

There is no doubt that such a proceeding with respect to UNIDO is null and void. In the first place, service of the court order upon UNIDO is a legal process from which UNIDO is immune. This is in virtue of section 2 of the Convention on the Privileges and Immunities of the United Nations and section 9 (a) of the UNIDO Headquarters Agreement.<sup>23</sup> Secondly, the proceeding would be tantamount to a seizure of the assets of UNIDO from which UNIDO is exempt under section 3 of the Convention on the Privileges and Immunities of the United Nations. It should be noted that any such court order would be directed to UNIDO and the "salary" to be seized is, before it is actually paid to the staff member, a part of the assets of UNIDO.<sup>24</sup>

#### Section 10. Immunity of United Nations property and assets from search and from any other form of interference

22. In 1974, the Secretary-General was advised by UNDP that a UNDP project account had been blocked by a judicial decision in a Member State as a result of a claim arising out of an accident involving a project vehicle in which a government employee assigned to the project had been injured. In an *aide-mémoire*, prepared by the Office of Legal Affairs and handed to the Permanent Representative of the State concerned, attention was drawn to section 3 of the Convention on the Privileges and Immunities of the United Nations. The UNDP account was unblocked shortly thereafter.

#### Section 11. United Nations name, emblem and flag

##### (a) United Nations name and emblem

23. The decision on the use of the United Nations name and emblem has generally proceeded on an *ad hoc* basis, although in general conformity with certain "rules of procedure" enunciated in a memorandum by the Office of Legal Affairs dated 5 April 1972. The memorandum suggested, *inter alia*, that United Nations associations with national coverage might use the United Nations emblem side by side with the national insignia of the country concerned, while those with local coverage might be permitted to use the emblem, although not next to the insignia of the local body. Organizations authorized by the Secretary-General to use the words "for the support of the United Nations" or "for the United Nations" in their titles would also be permitted to use the United Nations emblem, although not side by side with the insignia of the Organization, and only with the addition of the words "Our hope for mankind" beneath the emblem. In addition, authorization might be granted for use of the United Nations emblem with suitable words showing support for the United Nations in press notices by commercial bodies, when the notice was found to contain a genuine expression of support for the United Nations and not to imply endorsement of a particular product or firm.

<sup>23</sup> See footnote 11 above.

<sup>24</sup> United Nations, *Juridical Yearbook 1968* (Sales No. E.70.V.2), pp. 215-216.

24. The Office of Legal Affairs has continued to take whatever action may be necessary to protect the use of the United Nations name and emblem, particularly in regard to commercial exploitation. The legal basis of the protection of the flag and emblem was set out in a letter to the International Olympic Committee in 1973.<sup>25</sup> The Office of Legal Affairs also provided advice to the Office of Technical Co-operation on whether non-United Nations bodies established or maintained with the participation of the Organization might use the emblem of the United Nations on their stationery. The use of the emblem by such bodies was deemed inappropriate. The Office of Legal Affairs has also objected to the use of pictures or the name of the United Nations for commercial purposes.

##### (b) United Nations flag

25. In an internal memorandum from the Legal Counsel to the Chef de Cabinet of the Secretary-General dated 13 November 1969, it was agreed that the United Nations flag might be displayed on vessels of the Lake Nasser Development Centre Project. In the operative segment of his reasoning, the Legal Counsel stated:

As the Centre is a UNDP project and in view of the circumstances referred to by the Acting Project Manager, it seems to us that use of the flag may be authorized as an exceptional measure.

#### Section 14. Direct taxes

##### (a) Definition of direct taxes

##### (iii) Taxes on United Nations financial assets

26. On 11 July 1977, the Legal Counsel wrote in the following terms to the Permanent Representative of the United States to the United Nations:

I wish to call to your attention a matter of very serious concern both to the Secretary-General of the United Nations and to the United Nations Joint Staff Pension Fund and its participants. Those participants are in the employ of nearly all the intergovernmental organizations which make up the United Nations family of organizations. This matter relates to the recognition by the competent authorities of your country of the exemption of the United Nations under, *inter alia*, the Convention on the Privileges and Immunities of the United Nations, from the stock transfer tax levied in one of the States of your country in relevant transfers executed on behalf of all United Nations assets, in particular the United Nations Joint Staff Pension Fund.

It is our position that the exemption from taxation of the United Nations extends to all funds of the Organization, whatever their form or purpose. This position derives from Article 105 of the Charter of the United Nations and is supported by and is a logical interpretation of section 7 (a) of the Convention on the Privileges and Immunities of the United Nations, to which your country is a party. It is further supported by practice in other Member States where similar taxes are levied on non-United Nations institutions or individuals. While in 1967 the State legislature amended the stock transfer tax law to exempt international organizations from the provisions of that law, we have unfortunately not been able to obtain from the State authorities effective recognition of this exemption as applied to stock transfers executed by or on behalf of the United Nations Joint Staff Pension Fund. A considerable portion of the assets of the Fund have been and are being invested through the Stock Exchange, and the imposition of the stock transfer tax in regard to such transactions imposes an unwarranted and very heavy burden on the Fund, and thus on the contributors to the Fund, including States Members of the United Nations.

<sup>25</sup> See United Nations, *Juridical Yearbook 1973* (Sales No. E.75.V.1), pp. 136-137.

Consequently, the Organization attaches the greatest importance to the recognition of its rights in the present matter, rights which derive from international law and the treaty obligations of your country. It is the position of the United Nations that the practice of the State concerned must be conformed to the international obligations of your country and that the stock transfer tax law must be interpreted in this light.

Before considering recourse to the other remedies available to us under international law, we are seeking your assistance and that of the Department of State in intervening with the appropriate State tax authorities in an effort to seek an effective and full recognition of the exemption granted to the Organization under section 7 (a) of the Convention and under the law of the State concerned.<sup>26</sup>

27. In 1980, the Legal Counsel was advised by the United States Permanent Mission to the United Nations that, following a study of the matter by the New York State Commission on Taxation and Finance, a ruling had been made to the effect that the United Nations Joint Staff Pension Fund was exempt from the New York stock transfer tax.

28. A somewhat similar problem has concerned the imposition of withholding taxes on cash dividends paid on securities, including securities forming part of the assets of the United Nations Joint Staff Pension Fund. While the Organization has obtained exemption from the tax in some countries parties to the Convention on the Privileges and Immunities of the United Nations, certain other countries have refused to take such measures. In an internal memorandum dated 28 October 1969 to the Office of the Treasurer, the Office of Legal Affairs analysed the status of such a tax:

. . . the tax in question is a tax on the dividends and, as such, would be a direct tax levied on income and assets of the owner of the securities. The fact that it is withheld at the source does not convert it into a tax against the corporation as such.

On the above basis there would appear to be no doubt that the United Nations would be entitled to exemption from the tax in question. The Government of Japan acceded without reservation to the Convention on the Privileges and Immunities of the United Nations on 18 April 1963. Section 7 (a) provides that the "United Nations, its assets, income, and other property shall be exempt from all direct taxes . . .".

#### (iv) *Taxes in respect of the occupation or construction of United Nations premises*

29. In a memorandum addressed in 1971 to the Assistant Secretary-General, General Services, the Legal Counsel responded to the question whether the United Nations could be relieved of the increases in rent resulting from increases in real estate taxes payable by landlords of premises leased by the United Nations. He stated in part:

It is well established that immunity or exemption from tax on the part of a mission or an international organization does not affect the tax liability of the owner of premises leased to the mission or international organization.

The fact that part or all of the landlord's tax liability is passed on to the Government or international organization as rent does not change the character of the tax from a tax on the property payable by the owner to a tax on the immune organization; the tenant's obligation to pay the amount of the tax is, from the legal viewpoint, part of his rent obligation to the landlord.

So far, therefore, as concerns the increases in rent payable by virtue of the tax escalation clauses in the various United Nations leases to which your memorandum refers, I can see no basis on which the landlord could claim exemption from the proportionate part of the

property tax represented by the United Nations leased premises; nor can I see any basis on which the United Nations could relieve itself of the obligation to pay the landlord the share of the tax increase specified in the lease as additional rent.

30. This position was subsequently confirmed in further correspondence between the Office of Legal Affairs and the Assistant Secretary-General, General Services. In a memorandum dated 2 December 1974, it was stated, regarding property taxes levied on the common gardens of 3-5 Sutton Place, that the exemption under section 7 of the Convention

applies only to taxes imposed directly on the United Nations or on United Nations property; . . . there is no basis in the Convention for asserting that the Organization should as a matter of right be reimbursed for increased costs resulting from tax payments collected by the State from a non-exempt owner who, pursuant to a private law agreement, passes the charge on to the United Nations.

31. Another longstanding question concerns the tax-exempt status of UNITAR premises. On 27 October 1964, the United Nations, on behalf of UNITAR, purchased for \$450,000, from the Ninth Federal Savings and Loan Association of New York City, the building and ground lease with all the estate and rights of the Association. Since the assumption of the lease, the United Nations has paid the real property taxes on the building in conformity with article IV, paragraph 1, of the lease, which provides that "the tenant shall also pay from time to time, when and as the same become due and payable, all such taxes, duties, assignments for local improvements, and all other governmental impositions extraordinary as well as ordinary".

32. Despite its assumption of this obligation under the lease, the United Nations has consistently claimed that it should be exempted from payment of these taxes. There exist a number of bases on which such an exemption might be claimed, including the Convention on the Privileges and Immunities of the United Nations and the Headquarters Agreement. However, the basis upon which such a claim has been pressed in the past is the statutory exemption provided by section 416 of the New York real property tax law.<sup>27</sup> That law grants a tax exemption to "real property owned by the United Nations". All prior attempts to secure an exemption under the terms of the law have been to no avail. The argument used to frustrate the exemption in the past appears to have been based on the fact that the United Nations-interest in the property was construed to be a leasehold. The reasoning, succinctly put, has been that a leasehold interest must be considered as less than a fee simple ownership in the premises and furthermore that a lease is not real property but rather personal property.

#### (v) *Hotel taxes*

33. The exemption from direct taxes has also been applied to hotel charges paid directly by the United Nations. Such was the view of the Office of Legal Affairs in a memorandum of 9 January 1969 concerning taxes on hotel charges for room and board of United Nations personnel in Korea, where it was concluded that

The United Nations has a legal basis (in the Convention on the Privileges and Immunities of the United Nations, which is applicable to personnel in Korea under the UNICEF and UNDP agreements) for insisting on exemption from direct taxes on the Organization itself.

<sup>26</sup> United Nations, *Juridical Yearbook 1977* (Sales No. E.79.V.1), pp. 238-239.

<sup>27</sup> *Laws of the State of New York, 1958*, vol. 11, p. 2134.

Where the taxes, however, are on hotel charges which are in turn paid by the staff members themselves, rather than the Organization, the Convention does not require exemption.

34. In another memorandum, dated 22 November 1976, where the question was whether the exemption from New York hotel occupancy tax was applicable to non-local short-term staff members whose remuneration consisted of monthly allowance and subsistence allowance, the Office of Legal Affairs wrote:

3. The exemption from hotel occupancy tax was accorded to the Organization by a letter from the Office of the Controller of the City of New York dated 17 July 1946. A subsequent letter, dated 6 March 1953, purported to clarify the scope of the exemption while at the same time imposing certain conditions upon the Organization, namely, rent must be paid directly by the United Nations or the employee must be reimbursed directly or on the basis of a *per diem* expense allowance.

4. The material question is whether the Organization derives the benefit to which it is entitled or whether on purely technical and administrative grounds it is deprived of that benefit. It does not seem reasonable to suppose that the applicability of the exemption accorded to the Organization should depend on a particular salary structure to be determined not by the Organization but by the authority granting the exemption.

6. . . . When it can be shown that the burden of the hotel tax falls on the Organization directly or indirectly, the exemption should be invoked regardless of the particular administrative arrangements in force.

(b) *Practice in respect of "charges for public utility services"*

35. In a case which arose in 1968, the Office of Legal Affairs drew an important distinction between charges for municipal services billed according to real estate evaluation and not according to the services actually rendered, and concluded that the former constituted a direct tax. In a memorandum of 27 February 1968, the Office of Legal Affairs noted *inter alia* that,

. . . under the fifth clause of the proposed lease, the obligation to pay for waste removal and "any other service" falls on the tenant, i.e. UNDP. It would appear that waste removal and the other "services" are in fact services rendered by the municipality concerned. The Office of Legal Affairs has always held the view that, where services furnished by municipalities are charged not according to the value of the services but according to property evaluation or other independent criteria, the payment thus made constitutes a tax. Under section 7 (a) of the Convention on the Privileges and Immunities of the United Nations, the Organization and its subsidiary organs, such as UNDP, are exempted from such taxes. In our opinion, the Resident Representative of UNDP should seek exemption from these charges if they are billed according to real estate evaluation and not according to the service actually rendered.<sup>28</sup>

36. The question has also arisen whether taxes on air travel characterized as user charges for specific services, and levied in accordance with a national legislation, would constitute a direct tax under section 7 (a) of the Convention. Here the Office of Legal Affairs, in a letter dated 20 June 1973 addressed to the permanent representative of the State concerned,<sup>29</sup> examined (see below) the nature of the tax and the definition of charges for public utility services, and concluded that such a tax on air travel would in fact come under section 7 (a):

<sup>28</sup> United Nations, *Juridical Yearbook 1968* (Sales No. E.70.V.2), p. 184.

<sup>29</sup> United Nations, *Juridical Yearbook 1973* (Sales No. E.75.V.1), pp. 133-136.

I. CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

7. The exemption is sought on the basis of the Convention on the Privileges and Immunities of the United Nations, which has been acceded to by your country. Section 7 (a) of the Convention provides:

"The United Nations, its assets, income and other property shall be:

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

It is submitted that the taxes for which exemption is sought are within the purview of the exemption provided in section 7 (a).

8. There can be no doubt that the charges in question constitute direct taxes. This appears clearly, *inter alia*, from the reports and proceedings quoted in the Treasury Counsel's opinion. The fact that they are characterized as "user taxes" does not remove them from the category of direct taxes; it merely describes their incidence.

9. The question, therefore, is whether these taxes are "no more than charges for public utility services". In this connection it should be noted that the term "public utility services" is much narrower than the term "public services" and has been interpreted most restrictively in the application of the Convention. The taxes here in question cannot, for a number of reasons, be considered as coming within the quoted phrase.

10. In the first place, the term "public utility services" has a restricted connotation applying to particular supplies or services rendered by a Government or by a corporation under government regulation, for which charges are made at a fixed rate according to the amount of supplies furnished or services rendered.

11. In the second place, the "charges", in accordance with established practice in applying the Convention, must be for services that can be specifically identified, described, itemized and calculated according to some predetermined unit. While "transportation" is an accepted public utility, it is the fare for such transportation (exclusive of taxes) that is a charge for that public utility service. For example, in the case of a government-owned bus company it is the fare, and not any tax added thereto for any purpose, such as the construction of highways, that would qualify as a charge for public utility services.

12. Moreover, the purpose of the tax clearly indicates that it is more than a charge for public utility services. It appears from the 1970 Act that the Trust Fund into which the taxes in question are to be paid is to be utilized primarily for the capital expenditures incurred in establishing and developing a national system of airports. The Act sets out, as the reason for its adoption,

"That the nation's airport and airway system is inadequate to meet the current and projected growth in aviation.

"That substantial expansion and improvement of the airport and airway system is required to meet the demands of interstate commerce, the postal service, and the national defence.

". . ."

13. The Act also specifies that the assets in the Trust Fund be available to meet expenditures incurred under title I of the Act, which provides for the preparation and implementation of a "national airport system plan for the development of public airports" and those "which are attributable to planning, research and development, construction, or operation and maintenance" of air traffic control, navigation and communication for the airways system.

14. The expenditures in question are clearly intended to be largely of a capital nature, and would, if the airways system were in private hands, be financed from capital funds raised by the sale of stocks or bonds, and not from current revenues. Since the system is government-owned, these capital expenditures would normally be borne by the general tax revenues either immediately or gradually, as bonds issued for the purpose are repaid.

15. While it is true that public utility charges normally do include an element for return on or repayment of capital, this is generally merely incidental to the portion of the charges designed to cover current expenditures for labour and materials. Moreover, the capital in question would be that already invested in the infrastructure used to provide the services for which the charges are rendered, rather than that required for the future expansion of the system, the cost of which must in the first instance be borne either by existing stockholders

through retained earnings or by new investors in equity or debt securities.

16. While some of the revenues produced by the taxes here under consideration may be used for current operation and maintenance, and thus are of the type for which a utility could normally charge its customers, this is clearly not the principal destination of these taxes. It cannot therefore be said that these taxes are “no more” than public utility charges, as specified by section 7 (a) of the Convention for taxes as to which no exemption is to be claimed by the United Nations.

17. If such exemption were not claimed by and granted to the United Nations, then the Organization would, in effect be forced to use its resources to build up the aeronautical infrastructure of one of its members, that is, of a host State, in which of necessity a significant proportion of flights by its staff members originate or terminate.

18. It is not disputed that the United Nations through its staff members travelling on official business will benefit from the proposed national airport system, but that is not the criterion specified in section 7 (a) of the Convention. Staff members also benefit from police and fire protection, public health and sanitary measures, the work of the meteorological office and the countless other protective and supportive services of a modern government. These are financed by taxes paid by the nationals and residents of the country, except to the extent that certain persons are exempted from such contributions for various policy reasons, such as international civil servants whose taxation by national authorities would merely burden the coffers of the organization employing them. It appears to the United Nations Secretariat that the aeronautical facilities and charges here under consideration, which later would burden directly the Organization itself, fall within the category of services and taxes covered by the above principle.

19. The United Nations has therefore consistently taken the position that taxes that are not merely substitutes for charges for current services are covered by the general exemption granted by section 7 (a) of the Convention. This issue is discussed in a Secretariat study on relations between States and intergovernmental organizations, which is cited in the Treasury Counsel’s opinion. The citation concerns a letter from the Legal Counsel of the United Nations, reading in pertinent part as follows:

“... I am sure it is not necessary to refer to the fact that the public utilities supervised by such governmental bodies in any of a large number of countries are principally gas and electricity, water and transport. For example, Quemner, *Dictionnaire juridique*, gives the following entry:

“Public utilities, public services corporation—*services publics concédés (transport, gaz, électricité, etc.)*.”

...

“I think it is clear that the Convention had specifically in mind the payment by the United Nations of water and electricity charges on the grounds that the costs as billed are no more than the *quid pro quo* for commodities or services received. . .

...

“The authorities in international law generally seem to make a distinction as to whether the services rendered by a municipality or other public agency are special ones for which a special charge is made, with definite rates payable by the individual in his character as a consumer and not as a general taxpayer according to fixed principles of real property taxation.”<sup>a</sup>

This reasoning is equally applicable, *mutatis mutandis*, with respect to the taxes in question, as is the argument set forth in the memorandum of the Office of Legal Affairs of 27 February 1968.<sup>b</sup>

...

21. The position taken by the United Nations as to the interpretation of the Convention has generally been accepted by its Members, and indeed the effectiveness of a multilateral instrument of this type requires that the parties thereto accept such uniformity of interpretation. The summary of international practice in part V of the Treasury Counsel’s opinion, which asserts that in a number of countries aviation-related taxes are imposed on international organizations, does not indicate either the nature of these taxes, which in some instances are purely public utility charges (such as those discussed in the note quoted in the previous paragraph), or whether any genuine taxes

are imposed on the United Nations by States parties to the Convention.

## II. INTENT OF THE LEGISLATIVE AUTHORITIES

22. The Treasury Counsel’s opinion demonstrates that the legislative authorities of your country intended that the taxes here in question be charged to all users of the civil aviation system, including international organizations. However, it is by no means clear that in so doing those authorities expressed an intention “to abrogate or restrict the application” of any relevant treaties; therefore, such a purpose should not be implied.

23. As pointed out in the opinion, your country has in the past granted and at present still grants exemptions from various excise taxes to diplomatic, consular and international personnel and organizations, on various bases and for different reasons: as a customary courtesy, on the basis of reciprocity, because of the requirements of customary international law, because of provisions of domestic legislation or administrative rulings, etc. While the legislative authorities evidently decided that these considerations should not limit the imposition of the taxes here in question on normally protected persons and organizations, there is no evidence that it was aware that in some instances exemptions are required by treaties or that it in any way wished to abrogate or limit such treaties. Indeed, it appears more than likely that the impact of that treaty on the legislation then under consideration was never explicitly taken into account.

## III. CONCLUSION

24. On the basis of the foregoing considerations, the Secretariat of the United Nations trusts that the Government of your country will agree that the United Nations is, by virtue of section 7 (a) of the Convention on the Privileges and Immunities of the United Nations, entitled to exemption from the taxes imposed under the Act of 1970. Consequently it is hoped that the Government will find it possible to review and reverse the position taken by the Department of the Treasury concerning the liability of the United Nations in the payment of those taxes.

## Section 15. Customs duties

### (b) *Imposition of customs duties, prohibitions and restrictions*

37. A decree adopted in a Member State provided that “foreign missions and international organizations, as abstract individuals, are not exempted from the rules of prohibition of import imposed on the products of foreign companies subject to the decisions of boycott, no matter whether these products are new or used, nor if the import is temporary or for transit passage”. A vehicle consigned for UNTSO official use in the country which fell within the terms of the circular was refused import clearance and held by the customs officials. The Legal Counsel, in a letter of 9 August 1971 to the permanent representative of the country concerned, contended that the circular was contrary to the provision of section 3 of the Convention (immunity of United Nations property from requisition and confiscation) and also section 7 (b), exempting articles imported or exported by the United Nations for official use from prohibitions and restrictions. Moreover, such restrictions “would obviously deny to the United Nations the facility to obtain for the official purposes of UNTSO vehicles and equipment under the most favourable contractual terms”.

38. Upon learning that the customs officials intended to sell the detained vehicle at auction, the Secretary-General, in an *aide-mémoire* dated 13 October 1971, reiterated the arguments put forward in the letter of the Legal Counsel, concluding that, because of the para-

<sup>a</sup> Yearbook . . . 1967, vol. II, p. 247, document A/CN.4/L.118 and Add.1 and 2.

<sup>b</sup> United Nations, *Juridical Yearbook 1968* (Sales No. E.70.V.2), p. 184.

mount importance of the above-mentioned provisions on privileges and immunities, it would appear necessary, should a difference arise in their interpretation or application, to have recourse to the International Court of Justice pursuant to section 30 of the Convention. The dispute was ultimately satisfactorily resolved.

## Section 16. Publications

### (a) Interpretation of the term "publications" and problems relating to the distribution of publications

39. A new press law in a Member State required that all periodical publications should record the name of the editor. In a memorandum of 16 January 1970 to the External Relations Division of the Office of Public Information, the Office of Legal Affairs stated:

The purpose of the provision referred to above of the press law in question is obviously to identify the author of any periodical publication so as to hold him responsible under the law of the Member State concerned. In the distribution of United Nations publications in that State, the Director of the United Nations Information Centre would be performing a United Nations function in his capacity as a United Nations official. He cannot be held accountable to the Government concerned or, for that matter, to any other authority external to the United Nations, in virtue of Article 105 of the United Nations Charter and section 18 (a) of the Convention on the Privileges and Immunities of the United Nations. The said provision of the law in question obviously has no application with respect to United Nations publications, including those issued by the Information Centre.

Accordingly, the Director of the Centre should take the necessary steps to request recognition of the exemption from the application of the law in question.<sup>30</sup>

40. The question of censorship of United Nations films under the censorship laws of a Member State was dealt with by the Office of Legal Affairs in a memorandum addressed to the Office of Public Information on 7 January 1970.<sup>31</sup> In its memorandum, the Office of Legal Affairs stated *inter alia*:

2. The United Nations is not in a position to submit its films to censorship, since it would be contrary to the United Nations Charter and to the Convention on the Privileges and Immunities of the United Nations to which the Member State concerned acceded without reservations. The position of the United Nations in this regard derives, in general terms, from Article 105 of the Charter and, more specifically, from sections 3, 4 and 7 (c) of the Convention on the Privileges and Immunities of the United Nations. These sections of the Convention provide as follows:

"Section 3. 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.

"Section 4. The archives of the United Nations, and in general all documents belonging to it or held by it, shall be inviolable wherever located.

" . . .

"Section 7. The United Nations . . . shall be

" . . .

"(c) exempt from customs duties and prohibitions and restrictions on imports and exports in respect of its publications."

3. As you will appreciate, a demand to censor United Nations films would constitute interference as prohibited in section 3 of the

<sup>30</sup> United Nations, *Juridical Yearbook 1970* (Sales No. E.72.V.1), p. 167.

<sup>31</sup> United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), pp. 205-206.

Convention. As regards section 4, United Nations films are part of United Nations documentation, and censorship therefore would be in violation of this section, which provides for inviolability of documentation "wherever located". United Nations films are also covered by the exemption under section 7 (c), since they are a part of United Nations publications.

4. Furthermore, if a Government were to demand, in particular, the right to censor United Nations material and if that demand were complied with, the question would arise of a contravention of Article 100 of the Charter, under which a Member State is required to refrain from influencing the Secretariat in the discharge of its responsibilities and the latter is prohibited from receiving instructions from any authority external to the Organization.

5. The concrete case described in your memorandum concerns United Nations films proposed for screening in commercial cinemas in the Member State concerned by the United Nations Information Centre. The question was raised whether a distinction could be drawn between United Nations films intended "for screening in commercial cinemas" and films "shown at public or private group-screenings".

6. It is our opinion that no such distinction can be made in relation to the Convention on the Privileges and Immunities of the United Nations. The establishment of the Information Centre on the territory of the Member State concerned was, as is always the case, effected in accordance with resolutions of the General Assembly under which both Member States and the Secretary-General are to further the public information work of the United Nations as spelled out in General Assembly resolutions 13 (I) of 13 February 1946, 595 (VI) of 4 February 1952 and 1405 (XIV) of 1 December 1959.

7. In particular, resolution 595 (VI) approved the "Basic principles underlying the public information activities of the United Nations", as suggested by Sub-Committee 8 of the Fifth Committee on Public Information.<sup>a</sup> Under paragraph 8 of the basic principles, it is anticipated that the Department of Public Information of the United Nations Secretariat should "promote and where necessary participate in the production and distribution of documentary films, film strips, posters and other graphic exhibits on the work of the United Nations". Concerning the mode of distribution, paragraph 10 of the annex to the basic principles states:

"Free distribution of materials is necessary in the public information activities of the United Nations. The Department should, however, as demands increase and whenever it is desirable and possible, actively encourage the sale of its materials. Where appropriate, it should seek to finance production by means of revenue-producing and self-liquidating projects."

8. It is thus a long-established principle that distribution of United Nations public information material may take place through commercial channels. It follows that there is no foundation for distinguishing between various forms of distribution as long as the activities are performed within the scope of the above-mentioned General Assembly resolutions.

<sup>a</sup> See *Official Records of the General Assembly, Sixth Session, Annexes*, agenda item 41, document A/C.5/L.172, annex.

### (b) United Nations copyright and patents

41. In a memorandum of 19 September 1966 to the Bureau of Operations and Programming of UNDP, the Office of Legal Affairs discussed United Nations patent practice and policy:<sup>32</sup>

1. The practice of the United Nations with respect to work financed by it which is susceptible to patent or copyright is to retain for itself the proprietary rights in the work, including the right to take out any copyright or right in such work. Provisions reflecting this practice may be found in Staff Rules 112.7 and 212.61, in United Nations special service agreements and in other agreements relating to projects in which the United Nations is Executing Agency for UNDP (Special Fund).

2. The foregoing practice is a manifestation of a general policy aimed at the widest possible dissemination and use of work performed

<sup>32</sup> United Nations, *Juridical Yearbook 1966* (Sales No. E.68.V.6), pp. 225-226.

under the auspices of or financed by the Organization and is thus directed not so much towards acquiring a source of revenue in the form of royalties from the use of patent rights but to ensuring the general availability of techniques developed by the Organization or under its aegis. In retaining the rights in question, the Organization prevents any single individual or entity from taking out a patent or copyright over a work and from acquiring exclusive rights to control its exploitation and use. The Organization itself does not normally take out patents or copyrights. It achieves its purpose by publication or disclosure of the work, which has the effect of yielding it into the public domain.

3. It has of course been recognized that cases may arise in which it is necessary or appropriate to grant to an outside entity or person the right to take out a patent or a copyright on work performed under the auspices of the United Nations, such as when the provision of a financial incentive to others is required to encourage the development or exploitation of a work.

4. The foregoing practice and policy would seem to be as valid for UNDP as for the United Nations, if not more so.

5. In this connection, it may be noted that patent rights are assets in the same way as other intangible assets and thus constitute property from the point of view of both the Organization and the Special Fund. There is no provision in the Financial Regulations of the Special Fund which relates specifically to such assets, but the Financial Rules of the United Nations contain provisions dealing with the disposal of property in general, e.g. United Nations Financial Rules 110.32 (c) and 110.33 (a) (ii). The Financial Regulations of the Special Fund (SF/2/Rev.1) stipulate (art. 22.2) that the appropriate provisions of the United Nations Rules should apply in regard to any matter not specifically governed by the Special Fund Regulations.

### Section 17. Excise duties and taxes on sales; important purchases

#### (a) Excise duties and taxes on sales forming part of the price to be paid

42. With the introduction of VAT in a number of European countries and Israel, the definition of that tax became a matter of importance. As early as 1972, the Office of Legal Affairs, in examining the character of VAT, concluded that:

VAT can be regarded as a direct tax to the extent to which it is readily identifiable, i.e. not incorporated in the price but, for example, shown separately on the invoice and assessed against the purchases as offered to the manufacturer or seller.

It was noted, however, that it was difficult to persuade Governments to accept such an argument, since VAT "is commonly regarded as a more sophisticated form of sales tax, which indeed it often replaces. Since sales taxes and turnover taxes are in general dealt with under 'the important purchases' provision, there is a tendency to argue that VAT should be dealt with under the 'remission or return' arrangements for important purchases."

43. Following the decision that VAT was to be regarded as an indirect tax, the question arose as to what constituted an important purchase so as to qualify for a remission. Studies have shown that, in countries where VAT has been introduced, the United Nations and its agencies have been granted exemption on both goods and services or reimbursement with respect to all transactions above a low threshold price. For example, in the case of UNESCO and the United Nations Information Centre in Paris, the minimum value of an important purchase has been set at 250 francs; while in the case of IAEA and UNIDO, the minimum has been 20,000 Austrian schillings, although there were negotiations with the Austrian authorities to lower it to 1,000 schil-

lings. The details of exemptions or reimbursements vary in different agreements. The following exchange of notes between the United Kingdom and the United Nations concerning reimbursements for VAT on goods and services may be cited as an example.

NOTE No. 1, addressed to the Secretary-General of the United Nations by the Secretary of State for Foreign and Commonwealth Affairs

London  
16 May 1974

Your Excellency,

I have the honour to refer to the Convention on the Privileges and Immunities of the United Nations adopted by the General Assembly on 13 February 1946 and to correspondence between the Government of the United Kingdom of Great Britain and Northern Ireland and the United Nations regarding the application in the United Kingdom of article II, section 8, of the Convention in view of alterations in the tax system of the United Kingdom.

I now have the honour to propose that section 8 should be interpreted and applied in the United Kingdom so as to accord the United Nations a refund of car tax and value added tax on the purchase of new motor cars of United Kingdom manufacture, and of value added tax paid on the supply of goods or services necessary for its official activities and which are supplied on a recurring basis or involve considerable quantities of goods or considerable expenditure.

If the foregoing proposals are acceptable to the United Nations, I have the honour to propose that this note, together with Your Excellency's reply in that sense, shall constitute an agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the United Nations which shall enter into force on the date on which the United Kingdom legislation giving effect to the agreement comes into operation, which date will be notified to the United Nations.

For the Secretary of State  
(Signed) J. N. O. Curle

NOTE No. 2, addressed by the Secretary-General of the United Nations to the Secretary of State for Foreign and Commonwealth Affairs

London  
14 June 1974

Sir,

I have the honour to refer to your note of 16 May 1974, which reads as follows:

[See note No. 1 above]

I have the honour to inform you that the foregoing proposals are acceptable to the United Nations, which therefore agree that your note and the present reply shall constitute an agreement between the United Nations and the Government of the United Kingdom which shall enter into force on the date on which the United Kingdom legislation giving effect to the agreement comes into operation.

For the Secretary-General  
(Signed) Michael Popovic

#### (b) Important purchases

44. A question which has arisen in this connection has been gasoline taxes forming part of the price to be paid. In an opinion of 26 February 1974, the Office of Legal Affairs wrote:

... It has been the consistent position of the Office of Legal Affairs that a petrol tax forming part of the price to be paid is to be considered as falling under the terms of section 8 of the Convention and that the question whether or not a rebate should be granted should be determined by reference to the importance, quantitatively or financially, of the purchase. In the case of petrol, which is a recurring purchase, the amounts involved would normally qualify as important.

The United Nations is furthermore normally exempted from excise duty on gasoline required for its operations in the territories of Member States.<sup>33</sup>

45. Similarly, in an earlier memorandum, dated 26 January 1972, the Office of Legal Affairs dealt with the question whether the United Nations might claim exemption from "production duties" levied on gasoline by a Member State and discussed in detail the nature of such "production taxes":

1. You have asked for our views on a statement by the authorities of a Member State that the granting to UNTSO of exemption from "production duties" on gasoline is not legally justified.

2. Section 7 of the Convention on the Privileges and Immunities of the United Nations provides that the United Nations shall be "exempt from all direct taxes; it is understood, however, that the United Nations will not claim exemption from taxes which are, in fact, no more than charges for public utility services".

3. With regard to the definition of the term "direct" taxes, the principle is that the Convention should be uniformly applied in all Member States and therefore the characterization given to that term by municipal law or municipal officials cannot be controlling if the nature and incidence of the tax affect the United Nations and increase the financial expenses of the Organization to the advantage of a Member State. The interpretation of the term "direct" in accordance with the stated principle is intended to achieve equality in the implementation of the Convention among Member States within the spirit and the provision of Article 105 of the Charter and to relieve the Organization from undue financial burdens.

4. It is foreseen, however, that the authorities of the Member State concerned may maintain that excise duties on gasoline are indirect taxes which form part of the price of sale and from which the Convention does not accord to the United Nations automatic exemption. Even assuming for the purpose of argument that excise duties on gasoline constitute an indirect tax, the Organization is entitled to request that the Government make administrative arrangements for the remission or return of the amount of the excise duty under section 8 of the Convention, which provides:

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

5. Where the United Nations purchases goods or commodities on a recurring basis in the territory of a Member State, such purchases constitute "important" purchases on which the United Nations is entitled to request the remission or return of the amount of duties. Particularly in the case of purchases of gasoline, the amount of duty and the proportion that amount bears to the total purchase price is sufficient to consider the purchases as "important" and the tax as an undue burden upon the Organization. Moreover, whether characterized as "direct" or "indirect", all taxes which are important enough to make their remission or return administratively possible fall within the provisions of Article 105 of the Charter, which clearly contemplates the exemption of the United Nations from the financial burden of taxation.

6. It may be mentioned, incidentally, that the United Nations is normally exempted from excise duties on gasoline required for its operations in the territories of Member States.<sup>34</sup>

<sup>33</sup> United Nations, *Juridical Yearbook 1974* (Sales No. E.76.V.1), p. 147.

<sup>34</sup> United Nations, *Juridical Yearbook 1972* (Sales No. E.74.V.1), p. 158.

## CHAPTER III

### Privileges and immunities of the United Nations in respect of communication facilities

#### Section 18. Treatment equal to that accorded to Governments in respect of mails, telegrams and other communications

46. Following the adoption in 1966 of a Convention between the Latin American States, Canada and Spain, signed at Mexico on 16 July,<sup>35</sup> which granted special franking privileges to the correspondence of diplomatic missions of the members of the Postal Union of the Americas and Spain, the Secretary-General, in a letter of 24 August 1971 to the permanent representatives of the States concerned to the United Nations, claimed those privileges for the United Nations under section 9 of the Convention on the Privileges and Immunities of the United Nations.

<sup>35</sup> Postal Union of the Americas and Spain, "Convention, Final Protocol and Regulations of Execution between the United States of America and other Governments", *Treaties and Other International Acts Series 6354* (Washington, D.C., 1969).

## CHAPTER IV

**Privileges and immunities of officials of the United Nations****Section 22. Categories of officials to which the provisions of articles V and VII of the Convention on the Privileges and Immunities of the United Nations apply**

47. While the formal categories established in General Assembly resolution 76 (I) of 7 December 1946 have remained unchanged, the Secretary-General found it necessary in 1973 to draw the attention of Member States to instances where the General Assembly had appointed or participated in the appointment of members of subsidiary bodies and where he considered that it would be appropriate to apply the provisions of section 17 of article V ("Officials") of the Convention.

48. The Secretary-General proposed that such cases be determined according to two criteria: (a) the official in question must be engaged on a full-time or substantially full-time basis to the point where he is effectively precluded from accepting other employment; (b) the official must be a member of a body responsible directly to the General Assembly. On the basis of these criteria, the Secretary-General proposed that the inspectors serving the United Nations Joint Inspection Unit and the Chairman of the Administrative Committee on Administrative and Budgetary Questions be included within the purview of articles V and VII ("United Nations *laissez-passer*") of the Convention. The General Assembly endorsed that proposal in its resolution 3188 (XXVIII) of 18 December 1973.

49. It was recognized that that action would serve as a precedent in any similar cases that might arise in the future. Similar action has since been taken with respect to the Chairman and Vice-Chairman of the International Civil Service Commission, the President of the Third United Nations Conference on the Law of the Sea and the Co-ordinator of International Assistance for the Reconstruction of Viet Nam.

50. The provisions of the UNDP Standard Basic Assistance Agreement extend the protection of article V of the Convention on the Privileges and Immunities of the United Nations to "persons performing services on behalf" of UNDP, a category which includes operational experts, volunteers, consultants and juridical as well as natural persons and their employees.<sup>36</sup>

51. While the United Nations has generally enjoyed the understanding and co-operation of Member States, problems have arisen from time to time with regard to recognition of the status of locally recruited officials, and it has been necessary to reaffirm, clarify and restate the policy of the United Nations as established in resolution 76 (I), of the General Assembly.

52. A proposal by a Member State in 1973 that its nationals should not enjoy privileges and immunities on its territory was not agreed to by the Office of Legal Af-

fairs on the grounds that "it could not be considered to be in accord with the Convention on the Privileges and Immunities of the United Nations", to which the Member State was a party. In its memorandum addressed to the Technical Assistance Recruitment Service, the Office of Legal Affairs noted that the Convention provided in article V for privileges and immunities to be accorded to "officials of the United Nations" and that "it is required under the Convention, therefore, that nationals of the Member State concerned who are officials of the United Nations be accorded privileges and immunities in accordance with the Convention".

**Section 23. Immunity of officials in respect of official acts****(a) General**

53. In 1980, concerned by reports alleging that the privileges and immunities of officials of the United Nations and the specialized agencies had been encroached upon or ignored, the General Assembly requested the Secretary-General to submit to it a report on such cases. A report entitled "Respect for the privileges and immunities of officials of the United Nations and the specialized agencies" is now submitted annually by the Secretary-General to the General Assembly. The report, which is prepared by the Office of Legal Affairs, is introduced in the Fifth Committee by the Legal Counsel.

54. In connection with the submission of that report by the Secretary-General to the thirty-sixth session of the General Assembly, in 1981,<sup>37</sup> the Legal Counsel made the following statement in which he outlined the general views of the Organization with regard to the question of immunity of international officials:

The first question concerns what I might call the character of the immunity of international officials and the nature of its violation. The law of international immunities, which is based principally on the Charter, the conventions on privileges and immunities and other instruments referred to in paragraph 3 of the Secretary-General's report (A/C.5/36/31), distinguishes between diplomatic and functional immunities. The very great majority of officials of the United Nations and specialized agencies are accorded functional rather than diplomatic immunities. This distinction is significant not only from the point of view of the scope and content of the immunity but also because of the fundamentally different character of the two types of immunity. While diplomatic immunity attaches to the person, the functional immunity of international officials is organizational rather than personal. This is made clear by the conventions on privileges and immunities: section 20 of the Convention on the Privileges and Immunities of the United Nations provides that: "Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves". An identical provision is contained in the Convention on the Privileges and Immunities of the Specialized Agencies.

This distinction is important to an understanding of the nature of the violation of immunities reported by the Secretary-General in his annual report. It is essential to understand that the various cases referred to in the report involve a breach of the organizations' rights.

<sup>36</sup> See DP/107, annex I, art. IX.

<sup>37</sup> A/C.5/36/31.

Thus, for example, if we may refer to violations involving immunity from legal process, the type of case most frequently cited in the report of the Secretary-General, the substance of the Secretary-General's protest in such cases is not that a particular staff member was subjected to legal process but that the Secretary-General was prevented from exercising his right under the international instruments in force to determine independently whether or not an official act was involved. The position of the Secretary-General in this regard is set out in paragraphs 7-9 of the report. Where a determination is made that no official act is involved, the Secretary-General has, by the terms of the Convention on Privileges and Immunities, both the right and the duty to waive the immunity of any official.

As the Secretary-General has stated in his report, Member States have on the whole respected and complied with the Secretary-General's right of functional protection, which was clearly enunciated by the International Court of Justice in its advisory opinion of 11 April 1949 in the Bernadotte case (Reparation for injuries suffered in the service of the United Nations, *I.C.J. Reports 1949*, p. 174) and which now forms part of generally accepted international law. It is not the intent of the provisions regarding immunity from legal process or the principle of functional protection to place officials above the law but to ensure, before any action is taken against them, that no official act is involved and that no interest of the Organization is prejudiced.

A second and related question concerns who is entitled to privileges and immunities. It has been suggested by some delegations that locally recruited staff members are not officials of the United Nations and the specialized agencies for the purposes of privileges and immunities and that as local recruits they are first and foremost nationals of that country and subject to its laws. On this point, I should like to clarify and reaffirm the meaning of the term "officials" as it is used in the conventions on privileges and immunities. Section 17 of the Convention on the Privileges and Immunities of the United Nations states that the Secretary-General shall specify the categories of officials to which articles V and VII of the Convention shall apply. The Convention on the Privileges and Immunities of the Specialized Agencies and the Agreement on the Privileges and Immunities of IAEA contain similar provisions. In 1946, the General Assembly adopted resolution 76 (I), in which it approved the granting of the privileges and immunities referred to in articles V and VII of the Convention on the Privileges and Immunities of the United Nations to "all members of the staff of the United Nations, with the exception of those who are recruited locally and are assigned to hourly rates". The specialized agencies and IAEA have taken similar action. Consequently, all staff members, regardless of rank, nationality or place of recruitment, whether professional or general service, are considered as officials of the organizations for the purposes of privileges and immunities, except those who are both locally recruited and employed at hourly rates. United Nations locally recruited staff such as clerks, secretaries and drivers are in nearly every case paid in accordance with established salary or wage scales and not at hourly rates, and they are therefore covered by the terms of General Assembly resolution 76 (I).

55. In a memorandum of 1968, the General Counsel of UNRWA provided the following rationale for section 18 (a) of the Convention on the Privileges and Immunities of the United Nations:

... The extreme importance of this provision lies in the fact that, when acting in their official capacity, the acts of the official are in effect the acts of the United Nations itself, and the nationality of the official is totally irrelevant. Without this immunity, officials would be liable to be sued or prosecuted for acts done in their official capacity; they would be liable to be forced to appear as witnesses in court to give evidence on official matters; they would be liable to arrest and interrogation by State authorities on matters arising out of their official duties. Removal of such protection would place officials in a situation where they could be subjected to external pressures and influence directly contrary to Article 100 of the Charter. ... Admittedly, there can be borderline cases in which it may be disputed whether the act is "official" or "non-official" and, as the employer, the agency must reserve the right to make this decision.<sup>39</sup>

56. The exclusive competence of the Secretary-General to decide what constitutes an "official" act was the subject of a letter from the Office of Legal Affairs to the

Permanent Representative of the United States following a decision rendered by the Criminal Court of the City of New York in the case of *People of the State of New York v. Mark S. Weiner* (1976).<sup>39</sup> In that case, a United Nations security officer appeared as a complainant on behalf of the United Nations in a matter relating to his official duties. The Office of Legal Affairs took issue with certain *obiter dicta* made by the judge:

First and foremost, in the view of the United Nations Secretariat, it is exclusively for the Secretary-General to determine the extent of the authority, duties and functions of United Nations officials. These matters cannot be determined by or be subject to scrutiny in national courts. It is clear that, if such court could overrule the Secretary-General's determination that an act was "official", a mass of conflicting decisions would be inevitable, given the many countries in which the Organization operates. In many cases it would be tantamount to a total denial of immunity.

Likewise, the Secretariat cannot accept that what is otherwise an "official act" can be determined by a local court to have ceased to have been such an act because of alleged excess of authority. This, again, would be tantamount to a total denial of immunity. It may be noted, in addition to what is said in the paragraphs that follow, that the Secretariat has its own disciplinary procedures in cases where an official has acted in excess of his authority, and also the power to waive the immunity, particularly where the course of justice would otherwise be impeded. The Secretariat realizes that cases of conflict may arise as to whether an act was "official" or whether an official had overstepped his authority, but the Convention on the Privileges and Immunities of the United Nations expressly provides procedures for waiver of immunity, or for the settlement of disputes by the International Court of Justice. These are the appropriate procedures for settlement, not the overruling of the Secretary-General's determinations by national courts.<sup>40</sup>

57. In a letter to the Legal Liaison Officer of UNIDO in 1977,<sup>41</sup> the Office of Legal Affairs drew a distinction between acts to be considered as service-related for the purposes of staff regulations and rules and acts performed by officials "in their official capacity" within the meaning of the Convention, in cases involving traffic violations or traffic accidents:

This is in reply to your letter of 25 November 1977 on the question of the status of staff members when travelling directly from their home to the Organization and vice versa. Your inquiry and this reply relate solely to the question of immunity from legal process in connection with traffic violations or traffic accidents involving staff members travelling directly between their homes and the Organization. This reply also assumes that the staff member does not have diplomatic immunities by virtue either of his rank or under the particular host country agreement.

As indicated in my letter of 29 September, travel between home and office is not in itself considered to be an official act within the meaning of section 18 (a) of the Convention on the Privileges and Immunities of the United Nations, which provides for immunity from legal process in respect of acts performed by officials "in their official capacity".

To avoid confusion stemming from the phrase "on duty", I would emphasize the difference between the basis for the immunity for official acts under the Convention and the basis for various entitlements under the Staff Regulations and Rules.

The immunity of an official from legal process in respect of acts performed in his official capacity (i.e. on behalf of the United Nations) must be distinguished from service-related benefits under the Staff Regulations and Rules, such as compensation for injuries at-

<sup>39</sup> *Reports of Cases decided in the Court of Appeals of the State of New York, 2d Series*, 1976, vol. 378, p. 966.

<sup>40</sup> United Nations, *Juridical Yearbook 1976* (Sales No. E.78.V.5), pp. 237-238.

<sup>41</sup> United Nations, *Juridical Yearbook 1977* (Sales No. E.79.V.1), pp. 247-248.

<sup>39</sup> United Nations, *Juridical Yearbook 1968* (Sales No. E.70.V.2), p. 213.

tributable to United Nations service or travel entitlements for service-related trips, including home leave travel. An injury may be compensable as service-related under appendix D to the Staff Rules without having been incurred by the staff member acting in his official capacity; the fact that a staff member's travel expenses are paid by the United Nations does not render his journey or his actions on the journey "official actions". Driving is, of course, official action by United Nations chauffeurs and such staff members may engage the United Nations liability as well as their own, and hence they are covered by the United Nations automobile liability insurance. Their immunity (and that of the United Nations) is frequently waived for the purpose of litigating damages, but the practice with respect to their immunity from charges of traffic violation is highly flexible.

As far as the General Assembly is concerned, one of its very first actions in the field of privileges and immunities was directed towards the prevention of abuse of privileges and immunities in connection with traffic accidents. Resolution 22 (I) E instructed the Secretary-General to ensure that staff members be properly insured against third-party risks, an instruction which finds its implementation in Staff Rule 112.4.

The functional and non-personal nature of the privileges and immunities of United Nations officials is made clear by the language of the Convention on the Privileges and Immunities of the United Nations and Staff Regulation 1.8.<sup>a</sup> The Secretary-General's position with respect to suggestions of immunity has always been that he and he alone may decide what constitutes an official act, when to invoke immunity and when to waive immunity.

There is no precise definition of the expressions "official capacity", "official duties" or "official business". These are functional expressions and must be related to a particular context. Indeed, it is doubtful whether a definition would be desirable since it would not be in the interest of the Organization to be bound by a definition which may fail to take into account the many and varied activities of United Nations officials.

Finally, there are certain pragmatic considerations which must be taken into account. While Headquarters practice does not exclude invoking immunity in certain traffic cases, a reverse practice in which immunity is automatically raised would give rise to considerable difficulties with the police and in the courts, not to mention the political consequences at a time when the general public and legislative bodies are opposed to privileges and immunities.

The practical handling of this question at Headquarters has not given rise to any difficulties, probably because of the firm position taken by the Secretary-General from the very beginning. Staff members are expected to obey local laws and regulations and, as the Secretary-General stated in a 1949 press release: "If there is any infringement of any laws, traffic violations for example, a Secretariat member is in the same group—unless on official business—as the average citizen who may pass a red light . . . He just pays his fine, and many already have."

<sup>a</sup> Reading as follows:

"The immunities and privileges attached to the United Nations by virtue of Article 105 of the United Nations Charter are conferred in the interests of the Organization. These privileges and immunities furnish no excuse to the staff members who enjoy them for non-performance of their private obligations or failure to observe laws and police regulations. In any case where these privileges and immunities arise, the staff member shall immediately report to the Secretary-General, with whom alone it rests to decide whether they shall be waived."

58. In 1978, in a letter to the Legal Liaison Officer of the United Nations Office in Geneva,<sup>42</sup> the Office of Legal Affairs restated the policy of the Organization with respect to testimony by United Nations officials in domestic courts as follows:

I refer to your letter of 7 February asking advice on how to handle a summons addressed to a United Nations official for the purpose of eliciting testimony about salaries, pension, career prospects, etc. of a staff member victim of an automobile accident which is the subject of a suit for damages. You particularly ask whether United Nations officials can take an oath in court consistently with their obligations under the Staff Regulations.

<sup>42</sup> United Nations, *Juridical Yearbook 1978* (Sales No. E.80.V.1), pp. 191-192.

We have a longstanding United Nations policy with respect to requests for staff members to appear as witnesses in court proceedings, in cases in which the United Nations as such has no interest, to testify on matters within their knowledge as United Nations officials or to provide information contained in United Nations files. Our policy is based on the Secretary-General's duty under section 20 of the Convention on the Privileges and Immunities of the United Nations "to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations".

The United Nations authorizes officials to appear and to testify on specific matters within their official knowledge provided (1) that there is no reasonable effective alternative to such testimony for the orderly adjudication or prosecution of the case; and (2) that no significant United Nations interest would be adversely affected by the waiver. The authority to waive the immunity and to authorize the testimony has been delegated to the Legal Counsel.

Occasions for the authorization and waiver are limited to cases in which the subject matter within the official's knowledge may be made public without giving rise to any problem as regards, for example, privileged papers or controversial political issues. Most frequently, where testimony by officials is required for criminal cases where cross examination is anticipated, we have had prior consultation with the attorneys requesting the appearance concerning the area of questioning.

We have on frequent occasions received summonses or subpoenas in connection with matrimonial and personal injury cases where United Nations salary entitlements and allowances are relevant. Our usual practice is to reply stating that the United Nations is immune but that information may be provided in relation to specific questions on a voluntary basis. Frequently, letters or documentary material are sufficient. In some instances, Personnel officers have appeared in judicial or quasi-judicial proceedings to provide information on United Nations salaries and emoluments. In cases where the staff member is a party to the dispute and the opposing party needs information about his United Nations emoluments, we sometimes provide the information to the staff member and require him to transmit the material required in the court proceedings so as to relieve the United Nations of the need to waive. In other words, our effort is to provide the information other than by court appearance if possible.

When staff members are authorized to appear and to testify on a particular subject matter, they are implicitly authorized to take whatever oath or to make whatever affirmation is necessary for the testimony to be admissible. Given the conditions for the waiver and authorization, the oath to testify truthfully would not, in our view, give rise to a conflict with the staff member's obligations under the Staff Regulations.

### (c) *Cases of detention or questioning of United Nations officials; testifying before public bodies*

59. The arrest and detention of United Nations officials has been the subject of annual reports to the General Assembly by the Secretary-General since 1981. At the same time, the Secretary-General has instituted a number of administrative reforms in order to improve the response of the Organization to cases of arrest and detention. These reforms have been embodied in a circular by the Secretary-General entitled "Security, safety and independence of the International Civil Service"<sup>43</sup> and in an administrative instruction entitled "Reporting of arrest or detention of staff members and other agents of the United Nations and members of their families",<sup>44</sup> both of which were issued on 10 December 1982. These documents outline the procedures to be followed in the event of arrest or detention and clarify the nature and scope of the privileges and immunities of officials in the light of the United Nations Charter, the Convention on the Privileges and Immunities of the United Nations and the Staff Regulations and Rules.

<sup>43</sup> ST/SGB/198.

<sup>44</sup> ST/AI/299.

## Section 24. Exemption from taxation of salaries and emoluments

### (b) *Position in the United States of America*

60. The accession by the United States to the Convention on the Privileges and Immunities of the United Nations on 29 April 1970 did not materially alter the position of principle adopted by the United States with regard to exemption from taxation of its nationals or permanent residents. The United States accession was accompanied by a reservation to the effect that:

... paragraph (b) of section 18 regarding immunity from taxation ... shall not apply with respect to United States nationals and aliens admitted for permanent residence.

61. In accepting this reservation, the Secretary-General was guided by the fact that the tax equalization system effectively placed all staff members in a position of equality and that in this way the principle underlying section 18 (b) of the Convention was preserved.

62. In a letter to the Permanent Mission of the United States to the United Nations in 1975, the Office of Legal Affairs explained how the United States reservation was a formality in the light of the tax equalization system:

In accordance with section 18 (b) of the Convention on the Privileges and Immunities of the United Nations, all members of the United Nations Secretariat stationed at Headquarters in New York, with the exception of those who are recruited locally and are assigned to hourly rates, are exempt from taxation on the salaries and emoluments paid to them by the United Nations. The only exception at Headquarters results from the special situation in which officials of the United Nations who are nationals or permanent residents of the United States of America find themselves. When acceding to the Convention on the Privileges and Immunities of the United Nations on 29 April 1970, the United States Government reserved its position with respect to section 18 (b) in the case of nationals and permanent residents of the United States. Those officials therefore continued to be subject to the tax levied by the United States authorities on the salaries and emoluments paid to them by the United Nations. In establishing the Tax Equalization Fund (resolutions 973 (X) and 1099 (XI)), the General Assembly did all that could be done in practice to remedy the inequality which would otherwise have existed between officials who are subject to taxation and those who are exempt, and between the United States and the other Member States. Under this arrangement, United Nations officials at all levels are subject to assessment by the Organization in lieu of payment of national taxes, the total amount of the assessment being credited to the Member States; taxes paid by nationals and permanent residents of the United States are refunded to them and the refunds are charged against the sums standing to the credit of the United States in the Tax Equalization Fund.<sup>45</sup>

63. From time to time, the tax exemption of locally recruited officials is queried by national tax authorities. Following representations made by the United Nations, recognition is usually given to the provisions of section 18 (b) of the Convention. In the rare instances where such recognition is withheld, the United Nations has, where possible, applied the provisions of the Tax Equalization Fund to reimburse the staff member for any taxes paid.

### (f) *National taxation on non-exempt income*

64. In recent years the question has arisen whether national tax authorities may take into account United

Nations salaries and emoluments when setting the tax rate on non-exempt income. The United Nations has not considered it legally correct for a State party to the Convention on the Privileges and Immunities of the United Nations to take into account United Nations salaries in establishing tax rates on non-exempt private income. In the Organization's opinion, the exemption provided for in section 18 (b) of the Convention precludes any tax assessment based directly or indirectly on the exempted income. That position was set forth in a memorandum dated 16 October 1969 from the Office of Legal Affairs to the Director of the Accounts Division, Office of the Controller:<sup>46</sup>

1. You raise the question whether a Member State party to the Convention on the Privileges and Immunities of the United Nations is entitled to enforce a law providing that United Nations emoluments of staff members are to be taken into account in establishing the rate of tax on their non-exempt private income. Our view is that a party to the Convention is not entitled to make use of United Nations emoluments for any tax purposes.

2. The same position has been taken by UNESCO. It may also be mentioned that, in a case decided by the Court of Justice of the European Communities in December 1960 [Court of Justice of the European Communities, *Reports of Cases before the Court*, Luxembourg, 1960, p. 559], the Court held that article 11 (b) of the Protocol on the Privileges and Immunities of the European Coal and Steel Community,<sup>a</sup> which *mutatis mutandis* is identical with section 18 (b) of the Convention on the Privileges and Immunities of the United Nations, prevented the Belgian Government from taking the official salary of an official of the Coal and Steel Community into account in setting the rate of tax on non-exempt income. It may be convenient to summarize the more important lines of reasoning in the correspondence and the judgment referred to above.

3. *Literal meaning of the Convention.* Section 18 (b) of the Convention on the Privileges and Immunities of the United Nations provides that officials of the United Nations "shall be exempt from taxation on the salaries and emoluments paid to them by the United Nations". If the rate of tax on non-exempt income is set by taking account of exempt income from the United Nations, then the exempt income is part of the legal basis for the tax. If that is the case, then there is "taxation on the [United Nations] salaries and emoluments", which is forbidden by the Convention. The Court of Justice of the European Communities held that the literal meaning of the same language in the Protocol on the Privileges and Immunities of the European Coal and Steel Community prevented the exempt income from being taken into account.

4. *Purposes of the immunity: independence of the staff.* The principal purpose of the immunities which staff members enjoy under the Convention on the Privileges and Immunities of the United Nations is to protect and ensure the independent exercise of their functions with the Organization (Article 105 of the Charter). Accordingly, their official salaries are intended to be wholly exempt from national jurisdiction; but if they are taken into account in setting the tax on other income, they must be reported on in national tax returns, there are various governmental controls and administrative steps which apply to them, and a means exists by which the independence of the staff may be impaired.

5. *Purposes of the immunity: independence and efficiency of the Organization.* The United Nations must have complete freedom to select the best possible staff. If, however, official salaries are to be taken into account in setting taxes on non-exempt income, there may be a serious deterrent to persons considering service with the United Nations. This is particularly true with short-term service, where United Nations compensation is often substantial, but will be far less attractive if it has the effect of putting earnings during the rest of the year into a much higher tax bracket.

6. *Inequities among international officials.* The Court of Justice of the European Communities found that there would be a serious in-

<sup>a</sup> See United Nations, *Treaty Series*, vol. 261, p. 242.

<sup>45</sup> United Nations, *Juridical Yearbook 1975* (Sales No. E.77.V.3), p. 192.

<sup>46</sup> United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), pp. 226-228.

equity between two officials who had the same gross salaries from a Community and the same private income from outside sources, if the Government of one of them took the Community salary into account in setting tax rates and the other did not. It may be pointed out that the effect of the judgment of the Court of Justice of the European Communities was probably to free all the officials of all the Communities (European Economic Community, European Atomic Energy Community (Euratom), European Investment Bank as well as the Coal and Steel Community), in all the countries members of those Communities, from having their official salaries used as the basis of their private taxes. Some of those countries are the ones that have sought to take United Nations salaries into account in setting the rates on private incomes. It would be obviously unjust to United Nations officials if they—who are protected by exactly the same treaty language as officials of the Communities—suffered a tax disadvantage from which the latter were free.

7. *Analogy to diplomatic immunities.* The best analogy to the immunity of United Nations salaries is that of diplomatic salaries in the receiving State; full exemption is required, although for somewhat different reasons, in both cases. No State, as far as we are aware, has ever tried to take the salaries of diplomats into account in setting taxes on their non-official incomes, and some of the countries that have tried to do so with United Nations officials have clear statutory provisions preventing it in the case of diplomats.

8. *False analogy to double taxation arrangements.* The attempt to take exempt United Nations salary into account for tax purposes seems to have originated in misapplication of a device found in some double taxation agreements. But the situation under discussion, where there is on the one hand a complete exemption and on the other taxable income, is completely different from that dealt with in double taxation arrangements, where both States have the undoubted legal right to tax the full income at their usual rates but wish, for reasons of policy and fairness, to avoid doing so. United Nations salaries are exempt, and it is not a matter of option for Governments bound by the Convention to decide whether to tax them or not.

9. *Conclusion.* For the foregoing reasons we are of the opinion that it is not legally correct for a State party to the Convention on the Privileges and Immunities of the United Nations to take account of United Nations salaries in establishing tax rates on non-exempt private income. We also agree with you that such a State should not ask for nor be informed about United Nations salaries and, if a case arises which is not merely a low-echelon discussion between an individual staff member and subordinate officials but rather a dispute between the United Nations and a Member State, we could consider submitting the matter to the General Assembly with the object of securing a request for an advisory opinion from the International Court of Justice. If the General Assembly took such action, the advisory opinion would, under section 30 of the Convention, be binding.

65. A similar position has been taken with regard to the filing of an annual income tax return in respect of United Nations salaries and emoluments. In a *note verbale* of 9 January 1973 to the Permanent Representative of a Member State, the Secretary-General stated:

... in accordance with the principle of exemption, United Nations salary and emoluments are considered as nonexistent for income tax purposes. United Nations officials are in consequence not required to submit a return unless the income from non-United Nations sources is in excess of the specified amount, nor may United Nations income be taken into account in determining the rate of tax on any additional income. Thus, in the opinion of the Secretary-General, United Nations officials of the nationality of the State concerned would be obliged to submit an income tax return only in so far as they may have other income in excess of the specified amount referred to in the first paragraph above.

The note [of the Permanent Representative] states that a fine is payable when a national passport is extended or renewed and the holder did not file a return. Since, for the reasons explained, United Nations officials are not, in the view of the Secretary-General, under an obligation to file a return where their sole source of income is from the United Nations, and since their need for a passport is directly related to their United Nations employment, the Secretary-General would express the wish that the authorities concerned would take the necessary steps to waive this fine, at least in the case of officials whose

income from non-United Nations sources is below the specified amount.<sup>47</sup>

## Section 25. Immunity from national service obligations

66. Section 18 (c) of the Convention on the Privileges and Immunities of the United Nations, which provides that United Nations officials are immune from national service obligations, has not given rise to any difficulties, largely because appendix C to the United Nations Staff Rules makes detailed provision for cases in which the staff members concerned may perform military service with the consent of the Secretary-General. Five member States have made reservations or declarations regarding the application of section 18 (c) when acceding to the Convention.

67. In an internal memorandum of 24 December 1975, the Office of Legal Affairs gave an opinion regarding the applicable law relating to military service of a staff member who had requested special leave from the Organization to complete such service:

1. Under article V, section 18 (c), of the Convention on Privileges and Immunities of the United Nations, officials of the Organization are immune from national service obligations. The Member State of which the staff member concerned is a national has acceded to the Convention without declaration or reservation. The Member State in question would therefore be obligated to recognize the immunity of an official under the terms of article V, section 18 (c). The staff member has a contract with the Organization which qualifies him as an official under the terms of article V, section 17, of the Convention.

2. Under section (c) of appendix C of the Staff Rules, a staff member who has completed one year of satisfactory probationary service or who holds a permanent or regular appointment may, if called by the Government of a Member State for military service, be granted special leave without pay by the Organization for the duration of that service. This is true even though section (a) of appendix C recognizes that staff members who are nationals of those Member States having acceded to the Convention on the Privileges and Immunities of the United Nations are immune from such service. Section (f) of appendix C furthermore states that the Secretary-General may apply the provisions of that appendix where a staff member volunteers for military service or requests a waiver of his immunity under article V, section 18 (c) of the Convention.

3. The Secretary-General, therefore, has discretionary authority to grant special leave in the case of the staff member in question, even though the staff member is exempt from national service obligation. The staff member may not waive his own immunity. Such immunity may be waived only by the Secretary-General in conformity with article V, section 20, of the Convention.<sup>48</sup>

68. Section 18 (c) has been held by the Office of Legal Affairs not to be applicable to jury duty. Practice at Headquarters in New York is to give special leave with full pay for 10 days and annual leave or special leave with pay thereafter where jury duty is compulsory and cannot be excused on other grounds. In practice, the United States authorities have, where necessary, interceded on behalf of the Organization to obtain a waiver of jury duty.

<sup>47</sup> United Nations, *Juridical Yearbook 1973* (Sales No. E.75.V.1), p. 168.

<sup>48</sup> United Nations, *Juridical Yearbook 1975* (Sales No. E.77.V.3), pp. 190-191.

## Section 26. Immunity from immigration restrictions and alien registration

### (b) Practice in respect of the United States of America

69. Prior to the accession of the United States to the Convention, the legal basis of United States practice resided in the United Nations Charter, the Headquarters Agreement concluded between the United Nations and the United States of America, and the United States International Organizations Immunities Act.<sup>49</sup> In reply to an inquiry in 1969, the Office of Legal Affairs provided the following information:

Article 105, paragraph 2, of the Charter of the United Nations provides: "Representatives of the Members of the United Nations and officials of the Organization shall . . . enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization."

The General Assembly, in accordance with Article 105, paragraph 3, of the Charter, proposed to the Members of the United Nations the Convention on the Privileges and Immunities of the United Nations, which sets forth in detail the obligations of Members under Article 105, paragraph 2, of the Charter. Under Article V, section 18 (d), of the Convention, officials of the United Nations shall "be immune, together with their spouses and relatives dependent on them, from immigration restrictions and alien registration".

Apart from the Charter and the Convention, the Agreement between the United Nations and the United States on the Headquarters of the United Nations provides in article IV, section 11:

"The federal, State or local authorities of the United States shall not impose any impediments to transit to or from the headquarters district of: (1) representatives of Members or officials of the United Nations, or of specialized agencies as defined in Article 57, paragraph 2, of the Charter, or the families of such representatives or officials."

The requirement of reasonable evidence to establish that the persons claiming the rights granted by section 11 come within the classes described in that section is specifically envisaged in section 13 (c) of the Agreement.

From the point of view of the United Nations, the United States statutory provision for entry of officers and employees of the United Nations [United States, International Organizations Immunities Act, 22 USCA, section 288 (a); 8 USCA, section 1101 (a) (15) G (iv)] implements the United States obligations as a Member of the United Nations and as the host country for the United Nations Headquarters. The procedure followed by the United Nations for securing entry for family members of officials is as follows. The official himself completes a United Nations form entitled "Request for Visa". In making this request, the staff member accepts responsibility for keeping the United Nations Office of Personnel informed of members of his family residing in the United States. On the basis of this request, the United Nations itself requests (if considered proper) the issuance of a visa.<sup>50</sup>

## Section 29. Importation of furniture and effects

70. The Organization and its officials have in general encountered few difficulties in regard to the implementation of section 18 (g) of the Convention. Questions have been raised from time to time regarding the meaning of the term "effects" and the entitlement to duty-free importation of officials who are assigned to their own country after having served in a third country.

<sup>49</sup> United Nations, *Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations*, vol. 1 (Sales No. 60.V.2), p. 128.

<sup>50</sup> United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), p. 226.

After consultations with the authorities concerned, such questions have been resolved satisfactorily.

## Section 30. Diplomatic privileges and immunities of the Secretary-General and other senior officials

71. The most important issue which has arisen in recent years in regard to diplomatic privileges and immunities of senior officials is whether, under section 19 of the Convention, Member States are under an obligation to accord such privileges and immunities to their own nationals residing in their own countries. A number of States have taken the position that international law as codified in the 1961 Vienna Convention on Diplomatic Relations does not so oblige them, whereas the United Nations and the specialized agencies have taken the position that section 19 of the Convention on the Privileges and Immunities of the United Nations allows of no discrimination based on nationality.

72. In a letter addressed to the Permanent Representative of the United States of America in 1971, the Legal Counsel stated:

I am directed by the Secretary-General to bring to your personal attention an important question bearing upon the status of the highest officials of the United Nations under section 19 of the Convention on the Privileges and Immunities of the United Nations, 1946, to which the United States acceded on 29 April 1970. The said section 19 of the Convention reads as follows:

"Section 19. In addition to the immunities and privileges specified in section 18, the Secretary-General and all Assistant Secretaries-General shall be accorded in respect of themselves, their spouses and minor children, the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law."

By a letter dated 4 May 1971, Mr. Albert F. Bender, Counsellor, on instruction of the Department of State of the United States, informed me of the position of the Department with respect to the application of section 19 of the aforesaid Convention, in the following terms:

"The Department of State notes that section 19 of the Convention provides that certain United Nations officials shall be accorded the privileges and immunities, exemptions and facilities accorded to diplomatic envoys 'in accordance with international law'. On the basis of international practice, the Department of State has decided that United States nationals are not entitled by section 19 to tax or customs privileges or to immunity from civil or criminal process except with respect to official acts."

After careful consideration of the above-quoted position, we find ourselves unable to agree with the conclusion of the Department of State and, under instruction of the Secretary-General, I set forth the view of the Secretariat of the United Nations with the request that the Department of State reconsider its position in the matter.

It appears to us that the above-quoted interpretation of section 19 of the Convention on the Privileges and Immunities of the United Nations by the Department of State—in excluding United States nationals from the enjoyment of certain specified privileges and immunities otherwise available to non-United States nationals in similar status in the United Nations—is at variance with the plain meaning of the words of the section; is contrary to the intention of the General Assembly, which adopted the Convention on 13 February 1946, as may be seen from the preparatory work on the Convention; and is inconsistent with the principle of an international civil service based on the United Nations Charter in which there is no inequality by reason of nationality.

In the first place, by the plain meaning of the words used, section 19 of the Convention on the Privileges and Immunities of the United Nations accords the Secretary-General and all Assistant Secretaries-General in respect of themselves, their spouses and minor children, the privileges and immunities, exemptions and facilities accorded to

diplomatic envoys, in accordance with international law. It contains no exception excluding nationals from the benefits envisaged in the section. All Assistant Secretaries-General, without exception, are granted the benefits. As regards the phrase in section 19 "in accordance with international law", it is meant to indicate the scope of "privileges and immunities, exemptions and facilities". The phrase obviously does not qualify the words "the Secretary-General and all Assistant Secretaries-General" so as to exclude some of them from "the privileges and immunities, exemptions and facilities accorded to diplomatic envoys", because international law prevailing at the time of the adoption of the Convention could not have regulated a category of persons which had not previously existed. From these considerations, one cannot but conclude that, by its plain meaning, section 19 of the Convention cannot be read as envisaging any exception excluding nationals from the benefits provided therein.

Furthermore, reference to the *travaux préparatoires* of the Convention shows that the intention of the General Assembly, in adopting the Convention at the first part of its first session, was not to exclude nationals from the benefits provided in section 19 of the Convention. This intention is clearly manifested by the fact that the General Assembly deliberately deleted from the draft convention on privileges and immunities submitted by the Preparatory Commission a clause providing for such an exclusion (but with respect to only one form of immunity). Article 6 of the draft convention read as follows:

"Article 6

"1. All officials of the Organization shall:

"(a) be immune from legal process with respect to acts performed by them in their official capacity;

"... .

"2. In addition to the Secretary-General, all Assistant Secretaries-General, their spouses and minor children shall be accorded the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, their spouses and minor children in accordance with international law, but shall not be entitled to invoke immunity from legal process as regards matters not connected with their official duties, before the courts of the country of which they are nationals."<sup>a</sup>

The final clause in the above-quoted paragraph 2 was clearly intended to exclude nationals, but only with respect to one form of immunity, from the benefits provided for the Secretary-General and all Assistant Secretaries-General, etc. in the paragraph. This exclusion clause was deleted by the General Assembly and the paragraph thus amended became section 19 of the Convention. I submit that the deletion of the exclusion clause related above is significant, in that it shows conclusively that the authors of the Convention intended that the benefits of section 19 should be enjoyed by all the persons therein referred to, without distinction as to nationality.

The interpretation of the intention of the General Assembly finds corroboration, *a contrario*, by reference to section 15 of the same Convention on the Privileges and Immunities of the United Nations. This section 15 effectively excludes any representative, as against the authorities of the State of which he is a national, of any Member State from all the privileges and immunities provided in the Convention for representatives of Members in article IV of the Convention. The section reads as follows:

"Section 15. The provisions of sections 11, 12 and 13 are not applicable as between a representative and the authorities of the State of which he is a national or of which he is or has been the representative."

(Sections 11, 12 and 13 provide for various privileges and immunities for representatives of Member States.)

Thus it will be seen that, where the General Assembly, at the time of the preparation of the Convention, intended to provide for an exclusion on account of nationality, it did so by inserting an express provision to that effect. And it may be noted that section 15 follows in substance paragraph 3 of article 5 of the draft convention on privileges and immunities submitted by the Preparatory Commission.<sup>b</sup> This legislative history corroborates our view that no exclusion on the grounds of nationality was intended by the authors of the Convention in respect of the high officials of the United Nations

referred to in section 19 of the Convention, and that that section therefore admits of no interpretation that justifies any such exclusion.

In the third place, while I have shown, by the foregoing, that by its plain meaning section 19 of the Convention on the Privileges and Immunities of the United Nations admits of no interpretation that entails, among high officials of the United Nations, a distinction on the grounds of nationality, and that the *travaux préparatoires* of the Convention show that the authors of the Convention deliberately took action to remove such a distinction from the draft text, our objection to the position of the Department of State is, above all, motivated by a desire to uphold a principle that, we believe, is vital to the effective functioning of an international organization. This is the principle that the staff of the United Nations are "international officials responsible only to the Organization". Under Article 100 of the Charter: "Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities." The same article provides that the staff of the United Nations "shall not seek or receive instructions from any Government or from any authority external to the Organization". And "they shall refrain from any action which might reflect on their position as international officials responsible only to the Organization". Thus it is this Charter concept that the staff of the United Nations are in the position of "international officials responsible only to the Organization" that precludes any distinction, or any discrimination, among the staff on the basis of nationality. Any distinction or discrimination not tolerated by the Charter itself runs counter to the Charter and we deem it our duty to strive for its rectification.

Accordingly, the Secretary-General wishes me to request that you may be good enough to convey our view as stated herein above to the competent authorities in Washington so that the same treatment provided for in section 19 of the Convention on the Privileges and Immunities of the United Nations may be accorded to all persons described therein, without distinction as to nationality. The number of persons involved is only a handful but the principle is of paramount importance to the Organization.

I should add, before concluding, that the Department of State has declared that it based its decision to discriminate against United States nationals "on the basis of international practice". This assertion is so obviously without foundation that I have thus far tended to disregard it. In point of fact, the practice of States Members of the United Nations is contrary to the position taken by the Department of State; no State to our knowledge has evinced an attitude with respect to section 19 of the Convention similar to that position; certainly no State on acceding to the Convention has made a reservation to that section.

73. The same matter was taken up in relation to United Kingdom legislation in a letter from the Legal Counsel to the Adviser for International Organizations Affairs of ILO in 1975 as follows:<sup>1</sup>

This is further to your letter of 28 January 1975 in which you refer to "the Specialized Agencies of the United Nations (Immunities and Privileges) Order 1974"<sup>2</sup> and "the United Nations and International Court of Justice (Immunities and Privileges) Order 1974"<sup>3</sup> of the United Kingdom (Statutory Instruments 1974 Nos. 1260 and 1261). You have mentioned article 15, paragraph 2, of the two orders, which deny the diplomatic privileges provided for high officials in section 21 of the Convention on the Privileges and Immunities of the Specialized Agencies and section 19 of the Convention on the Privileges and Immunities of the United Nations to "any person who is a citizen of the United Kingdom and Colonies or a permanent resident of the United Kingdom". You have asked for the matter to be considered at the forthcoming session of the Preparatory Committee of the Administrative Committee on Co-ordination.

In the first place, I would like to stress that the privileges granted by sections 19 and 20 of the Convention concerning the specialized agencies, like those under section 18 of the Convention concerning the United Nations, are and must be enjoyed by all officials, regardless of nationality. Sections 21 and 19 of the respective conventions,

<sup>1</sup> United Nations, *Juridical Yearbook 1975*, (Sales No. E.77.V.3), pp. 184-186.

<sup>2</sup> United Nations, *Juridical Yearbook 1974* (Sales No. E.76.V.1), p. 7.

<sup>3</sup> *Ibid.*, p. 11.

<sup>a</sup> United Nations, *Report of the Preparatory Commission of the United Nations*, PC/20, 23 December 1945, p. 73.

<sup>b</sup> *Ibid.*

however, refer to "the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law", and two interpretations of that phrase seem to be possible.

In the ordinary diplomatic context, States are not required to extend full diplomatic privileges to persons who are their nationals or permanent residents, even if they have consented to receive such persons in a diplomatic capacity. Article 38 of the 1961 Vienna Convention on Diplomatic Relations provides in paragraph 1:

"Except in so far as additional privileges and immunities may be granted by the receiving State, a diplomatic agent who is a national of or permanently resident in that State shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions."

Similar provisions are to be found in article 71 of the 1963 Vienna Convention on Consular Relations and article 40 of the 1969 Convention on Special Missions. Substantially the same wording is used in the draft articles on the representation of States in their relations with international organizations prepared by the International Law Commission in 1971<sup>34</sup> and now being considered by the plenipotentiaries at the United Nations Conference on the Representation of States in their Relations with International Organizations meeting in Vienna. Article 37, paragraph 1, of that draft reads as follows:

"Except in so far as additional privileges and immunities may be granted by the host State, the head of mission and any member of the diplomatic staff of the mission [to an international organization] who are nationals of or permanently resident in that State shall enjoy only immunity from jurisdiction and inviolability in respect of official acts performed in the exercise of their functions."

Article 68 makes the same provision in respect of delegations to organs and conferences, and article V of the annex to the draft (relating to observers) repeats it yet again.

Those articles have not yet been discussed by the current Vienna Conference, which will end only on 14 March 1975. If, however, provisions like those in the Commission's draft articles are adopted, it will appear that the States participating do not consider that international law requires a host State to accord full diplomatic privileges to diplomatic envoys accredited to an international organization who are nationals of or permanently resident in that State. If that view is taken, sections 21 and 19 of the respective conventions on privileges and immunities would tend to be interpreted in the same way in regard to high officials. As a practical matter, it does not seem that arguments to the effect that high officials of organizations ought to be treated more favourably than diplomatic envoys sent to those organizations would meet with much support.

On occasion in the past, the United Nations Secretariat, without success, has taken a position against discrimination on grounds of nationality in the application of section 19 of the Convention on the Privileges and Immunities of the United Nations. After the United States became a party to that Convention, the question arose as to the privileges to be accorded to high officials of United States nationality. In May 1971, the United States informed us that it would not extend diplomatic privileges to them. We replied, requesting the Department of State to change its position, and arguing:

(i) that the plain meaning of "all Assistant Secretaries-General" was obvious; and that "in accordance with international law" referred only to the scope of the privileges to be accorded rather than to the persons entitled to them;

(ii) that the original draft of the Convention prepared by the Preparatory Commission had contained a limitation that high officials could not invoke immunity as regards matters not connected with their official duties before courts of their country of nationality, but that this limitation had been rejected by the General Assembly at its first session;

(iii) that section 15 of the Convention on the Privileges and Immunities of the United Nations expressly provided that immunities were not applicable as between a representative and the State of which he was a national or which he represented, while there was no such express limitation in the case of high officials; and

<sup>34</sup> For the text of the draft articles, see *Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations, Vienna, 4 February-4 March 1975*, vol. II (United Nations publication, Sales No. E.75.V.12), p. 5.

(iv) that the status of "international officials" provided in the Charter implied a prohibition of discrimination among them on grounds of nationality.

The United States, however, upon reconsideration maintained its position and did not accept our arguments. We have not pursued the matter further, nor has the Secretariat protested the new United Kingdom Order relating to the United Nations.

You have referred to the Italian instrument of accession to the Convention on the Privileges and Immunities of the Specialized Agencies, which was transmitted to us in 1952 but has not been registered owing to objections. That instrument contained two reservations, of which the second related to the immunities of high officials under section 21, but the first and more important related to the immunities of the organizations themselves under section 4. Both reservations were objected to, and thus, even if it comes to seem futile to insist on the diplomatic immunities of high officials in their own countries, no change of attitude is necessary in respect of the instrument of accession as a whole.

I shall of course be glad to provide any further information that the Preparatory Committee may desire.

74. The question has been the subject of discussion in the Administrative Committee on Co-ordination, which has maintained the position outlined in the two letters cited above (p. 159, para. 72). For their part, neither the United Kingdom nor the United States has accepted the United Nations position and the matter remains unresolved.

### Section 31. Waiver of the privileges and immunities of officials

75. In a memorandum to the Office of Personnel Services in 1969, the Office of Legal Affairs advised that the Secretary-General's delegation of authority in personnel matters to the Administrator of UNDP did not include authority to waive the privileges and immunities of a staff member, which was vested exclusively in the Secretary-General. Regarding the conditions under which a staff member might be permitted to waive immunity, the policy formulated and maintained by the Secretary-General, pursuant to expressions of intention and understanding by the General Assembly, was against permitting staff members in the professional category to do so for the purpose of acquiring permanent residence status in a Member State; permission has, however, been granted to staff members who were stateless, *de facto* or *de jure*, and to general service staff.

76. In a letter of 11 February 1976 addressed to the Permanent Representative of the United States,<sup>35</sup> the Legal Counsel registered the Organization's concern with regard to remarks made by a judge in the Criminal Court of the City of New York. The question at issue was the exclusive competence of the Secretary-General to determine whether in any given instance a staff member had performed an official act and whether immunity should be waived. The letter stated:

I have the honour to refer to a decision rendered in the Criminal Court of the City of New York, on 19 January 1976, in the case of *People of the State of New York v. Mark S. Weiner* (published 20 January 1976 under *New York County, Criminal Court, Trial Term, Part 17*).<sup>36</sup> In this case a United Nations security officer is appearing on

<sup>35</sup> United Nations, *Juridical Yearbook 1976* (Sales No. E.78.V.5), pp. 236-239.

<sup>36</sup> See p. 155 above, footnote 39.

behalf of the United Nations as complainant, in a matter relating to his official duties, and the judge's decision contains a number of remarks which bear upon the privileges and immunities of the United Nations and which give rise to the most serious concern on the part of the Organization. This concern compels me to bring the matter to your attention and to place on record the position of the Secretary-General on the major legal issues involved.

#### *Facts of the case*

Before turning to the legal issues, it is necessary to give a brief account of the facts surrounding the case.

On Friday, 14 November 1975, at approximately 0300 a.m., the defendant in the case in question sprayed red paint on the wall dividing the circular driveway to the Secretariat building at the entrance to the Headquarters Division at 43rd Street. He was immediately detained by United Nations security officers, who also called in police officers from the 17th precinct of New York City Police Department. The defendant was then arrested, charged with criminal mischief (a class A misdemeanour under section 145.00 of New York Penal Law) and he was taken to the 17th precinct station in the custody of the officers of the New York City Police Department.

As already indicated, one of the United Nations security officers who detained the defendant is the chief witness and complainant on behalf of the Secretariat. The security officer was therefore directed by his supervisors to appear voluntarily, as and when requested by the Court, and to testify as to his personal knowledge of facts and circumstances relevant to the complaint and the charge.

There have been four hearings in the case, all of which were held before the same judge. Responding to pleadings by counsel for the defendant, the court, at the hearing held on 25 November 1975, requested the Secretariat to submit a legal memorandum on the question of the court's jurisdiction over acts against United Nations property situated within the Headquarters district. On 9 December, 1, as United Nations Legal Counsel, wrote to the judge stating the Secretariat's view on the jurisdictional issue<sup>77</sup> and, at the hearing held on 12 December 1975, the judge indicated that he did not intend to sustain the objections made against the court's jurisdiction.

At the hearing held on 12 December, counsel for the defendant raised objections to the admission of the testimony by the United Nations security officer, who was present, on the grounds of the security officer's immunity from jurisdiction for official acts. As a result of this objection, the court requested the Secretariat to submit a further legal memorandum on the extent of the immunity from jurisdiction possessed by the security officer in connection with his appearance as a witness for the prosecution in the criminal proceeding against the defendant. The judge ruled that, for the court to proceed with the case, the Secretariat should state in a memorandum its view on whether the security officer had acted in his official capacity and whether he—were he to appear as a witness—would be immune from contempt of court citations, perjury charges or "cross complaints".

Pursuant to this request, on 8 January 1976, the officer-in-charge of the Office of Legal Affairs wrote to the judge stating the Secretariat's position on the extent of the immunity from jurisdiction enjoyed by United Nations officials appearing voluntarily as witnesses in criminal proceedings.<sup>78</sup>

In his written ruling on 19 January 1976, referred to at the outset of this letter, the judge denied the motion by the defence to dismiss for lack of jurisdiction and ordered a hearing held on 9 February 1976.

At the hearing on 9 February, the District Attorney proposed adjournment of the case in contemplation of dismissal. However, this was refused by the defendant and his attorney, both of whom insisted on a full hearing. The judge fixed such a hearing for 27 February 1976, at 9.30 a.m.

#### *Legal position of the Secretariat*

The Secretariat has no comments on the actual decision of the judge to deny the motion to dismiss for lack of jurisdiction in his ruling of 19 January. Its concern, however, is raised by some of the reasoning advanced on the matter of the security officer's privileges and im-

munities. In effect, it would seem, the judge was arguing that it was in the last instance for him, and not for the Secretary-General, to determine whether the security officer was acting in an official capacity and, furthermore, whether the guard had exceeded his authority through the use of excessive force, such excess, in the judge's view, rendering inapplicable the guard's immunity for official act. While the judge's remarks are in the nature of *obiter dicta*, their circulation in published form, without the Secretariat's contrary views being on record, could have a most serious effect upon the position of United Nations officials in countries throughout the world.

First and foremost, in the view of the United Nations Secretariat, it is exclusively for the Secretary-General to determine the extent of the authority, duties and functions of United Nations officials. These matters cannot be determined by or be subject to scrutiny in national courts. It is clear that, if such courts could overrule the Secretary-General's determination that an act was "official", a mass of conflicting decisions would be inevitable, given the many countries in which the Organization operates. In many cases it would be tantamount to a total denial of immunity.

Likewise, the Secretariat cannot accept that what is otherwise an "official act" can be determined by a local court to have ceased to have been such an act because of alleged excess of authority. This again would be tantamount to a total denial of immunity. It may be noted, in addition to what is said in the paragraphs that follow, that the Secretariat has its own disciplinary procedures in cases where an official has acted in excess of his authority, and also the power to waive immunity, particularly where the course of justice would otherwise be impeded. The Secretariat realizes that cases of conflict may arise as to whether an act was "official" or whether an official had overstepped his authority, but the Convention on the Privileges and Immunities of the United Nations expressly provides procedures for waiver of immunity, or for the settlement of disputes by the International Court of Justice. These are the appropriate procedures for settlement, not the overruling of the Secretary-General's determinations by national courts.

In the present case, the Secretary-General at no point waived the immunity of the security officer concerned, under section 18 (a) of the Convention on the Privileges and Immunities of the United Nations and also section 288 d (b) of the United States International Organizations Immunities Act.<sup>a</sup> The authority granted in section 20 of the Convention to waive the immunity of any official is enjoyed exclusively by the Secretary-General, and waiver cannot be effected instead by the Court. That this is a reasonable understanding of the Convention is borne out not only by the specification in section 20 of the conditions under which the Secretary-General may waive, but also by the provisions in article VIII for the settlement of disputes regarding all differences arising out of the interpretation or application of the Convention. As already mentioned, the Convention foresees that disputes are not to be settled by the courts of a Member State party to the Convention, but that differences between the United Nations on the one hand and a Member State on the other hand are to be decided by an advisory opinion of the International Court of Justice. The fact that such a procedure is available conclusively demonstrates the weakness of the assumption by the judge that national courts may determine the extent of immunity from jurisdiction enjoyed by a United Nations official acting in his official capacity as directed by the Secretary-General.

I trust that the foregoing will serve to explain the very real concern which the Secretariat feels over the reasoning of the judge, and its need to place its absolute reservations to that reasoning on record. The Secretariat cannot accept an approach which would submit the official acts of its officials to the scrutiny of national courts throughout the world. To do so, as already pointed out, would be tantamount to

<sup>a</sup> The opinion of the judge is inaccurate and misleading in not referring to these sources of immunity, which were made plain in the Secretariat's letter to him of 8 January 1976. The judge instead refers in his opinion to Articles 104 and 105 of the United Nations Charter and the Headquarters Agreement of 1947. The Charter articles are worded only in the most general terms, which are subsequently spelt out in specific detail in the Convention on the Privileges and Immunities of the United Nations, and the Headquarters Agreement does not deal with the privileges and immunities of United Nations officials. The judge is further in error when he cites the decision in *United States ex relatione Casanova v. Fitzpatrick* (1963) (*Federal Supplement*, vol. 214, 1963, p. 425) as a precedent, as that case related to a member of a permanent mission and turned on the interpretation of section 15 of the Headquarters Agreement, not upon the Convention on the Privileges and Immunities of the United Nations which is here involved.

<sup>77</sup> See United Nations, *Juridical Yearbook 1975* (Sales No. E.77.V.3), pp. 157-159.

<sup>78</sup> See United Nations, *Juridical Yearbook 1976* (Sales No. E.78.V.5), pp. 234-236.

stripping officials of their immunity. The Organization frequently operates in areas of tension and conflict, in which immunity for official acts is essential if United Nations officials are to function at all.

Finally, I trust you will agree that it is crucial that testimony by United Nations security officers be admitted and accepted as competent by criminal courts in cases that involve the safety of United Nations personnel or property. The absolute need for such testimony, both by officials and by members of permanent missions in relation to complaints made by such missions, has been constantly stressed by

United States representatives in the Committee on Relations with the Host Country. The Secretariat, however, would be most reluctant to instruct its officials to testify if it is accepted that the particular court before which they are to appear may strip them of the proper immunities accorded to them by international and national law.

I very much hope that, in the light of the above, we may arrive at a mutual understanding on the procedures and issues to be taken into account when United Nations officials are called upon to testify as witnesses in courts in the United States.

## CHAPTER V

### Privileges and immunities of experts on mission for the United Nations and of persons having official business with the United Nations

#### Section 33. Persons falling within the category of experts on mission for the United Nations

77. The scope and meaning of the category of "experts on mission" in relation to the members of a treaty organ, as distinct from a subsidiary organ, was the subject of a memorandum from the Office of Legal Affairs to the Director of the Division of Human Rights dated 15 September 1969, as follows:<sup>99</sup>

1. I have received your memorandum inquiring about the status, privileges and immunities of the members of the Committee on the Elimination of Racial Discrimination and members of *ad hoc* conciliation commissions established under article 12 of the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>a</sup> In our opinion, members of the Committee and members of the conciliation commissions are to be considered experts on mission for the United Nations within the meaning of sections 22, 23 and 26 of the Convention on the Privileges and Immunities of the United Nations and section 11 of the Headquarters Agreement with the United States, and are entitled to the privileges, immunities and facilities therein laid down.

2. The International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature on 7 March 1966, does not expressly provide for the status of the members of the Committee. Nevertheless the Convention gives indications from which that status can be inferred.

3. There is a group of organs which, although their establishment is provided for in a treaty, are so closely linked with the United Nations that they are considered organs of the Organization. These include the former Permanent Central Opium Board (established by an Agreement of 1925<sup>b</sup> but made a United Nations organ by General Assembly resolution 54 (I) of 19 November 1946 and the protocol of amendment annexed thereto), the former Drug Supervisory Body (established by a Convention of 1931<sup>c</sup> but made a United Nations organ by the same resolution and protocol), the International Bureau for Declarations of Death (established by the Convention on the Declaration of Death of Missing Persons,<sup>d</sup> adopted by a United Nations conference on 6 April 1950), the Appeals Committee established under the Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium<sup>e</sup> (adopted by a United Nations conference on 23 June 1953), and the International Narcotics Control Board (estab-

lished under the Single Convention on Narcotic Drugs,<sup>f</sup> adopted by a United Nations conference on 30 March 1961). Other similar organs are provided for in United Nations conventions which have not yet entered into force. Except for the mode of their creation, these organs are in the same position as recognized subsidiary organs of the United Nations. The Committee established under the Convention on the Elimination of All Forms of Racial Discrimination falls in the same category.

4. That Convention, which in article 8 (para. 1) establishes the Committee, was adopted by the General Assembly in resolution 2106 (XX) of 21 December 1965. On the organs referred to in the preceding paragraph, only the Permanent Central Opium Board and the Drug Supervisory Body share with the Committee on the Elimination of Racial Discrimination the distinction of having been made United Nations organs by a treaty which is at the same time a decision of the General Assembly. In the other cases, it has been necessary for the Assembly to decide to undertake the functions conferred on the United Nations by treaties adopted at a conference, and thereby to confer the status of United Nations organs on the bodies in question. Where the treaty itself is also a decision of the Assembly, however, no such separate decision on assumption of functions and conferment of status is required.

5. The mode of creation of the Committee, the nature of its functions, their similarity to those of subsidiary organs, and the continuing administrative and financial ties which bind it to the United Nations remove all doubt that it is a United Nations organ, and it is thus without significance that the Third Committee rejected a proposal of the name "United Nations Committee on Racial Discrimination".<sup>g</sup> As none of the other organs referred to in paragraph 3 above has the words "United Nations" in its name, that decision is not a strong basis for argument.

6. The purpose of the Convention, and consequently of the Committee, is, according to the preamble, to advance certain principles of the United Nations Charter. One of the main functions of the Committee (art. 9) is to make annual reports to the General Assembly, and that function is like the typical activity of subsidiary organs. Another main function of the Committee is consideration of allegations by a party that another party is not giving effect to the provisions of the Convention (art. 11), and the Committee may also be given competence by a declaration of a party to consider claims of violation submitted by individuals or groups of individuals (art. 14). Under article 15 and General Assembly resolution 2106 B (XX), the Committee has functions relating to petitions from inhabitants of Trust and Non-Self-Governing Territories. These functions seem to be of a judicial or quasi-judicial character; that character, however, does not prevent the Committee from being a United Nations organ. The various narcotics bodies referred to in paragraph 3 above perform quasi-judicial functions, and the Appeals Committee established under the 1953 Opium Protocol is of a fully judicial nature. Functions of these types can also be performed by subsidiary organs; the International Court of Justice, in its advisory opinion of 13 July 1954 on the Effect of Awards of Compensation made by the United Nations Administrative Tribunal

<sup>a</sup> United Nations, *Treaty Series*, vol. 660, p. 195.

<sup>b</sup> League of Nations, *Treaty Series*, vol. LI, p. 337.

<sup>c</sup> *Ibid.*, vol. CXXXIX, p. 301.

<sup>d</sup> United Nations, *Treaty Series*, vol. 119, p. 99.

<sup>e</sup> *Ibid.*, vol. 456, p. 56.

<sup>f</sup> *Ibid.*, vol. 520, p. 151.

<sup>g</sup> *Official Records of the General Assembly, Twentieth Session, Annexes*, agenda item 58, document A/6181, paras. 104 (a) and 110 (a) (i).

<sup>99</sup> United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), pp. 207-210.

(*I.C.J. Reports 1954*, p. 47) has recognized the legal capacity of the General Assembly to establish judicial bodies for the fulfilment of its purposes.

7. Under article 10, the secretariat of the Committee is provided by the Secretary-General of the United Nations, and the meetings of the Committee are normally held at United Nations Headquarters. These are important connections with the Organization, and they ensure that the bulk of the expenses of the Committee, which will be for servicing meetings and for the secretariat, will be borne by the regular budget of the United Nations. Article 8, paragraph 6, of the Convention provides that: "States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties." The travel and subsistence costs of members, however, are a minor fraction of the total expenses of the Committee, and the payment of part of the expenses of an organ by some means other than the regular budget of the United Nations does not prevent that body from being a United Nations organ. As regards the expenses of the Permanent Central Opium Board, the Drug Supervisory Body and the International Narcotics Control Board, there are special arrangements for the assessment of contributions from States not members of the United Nations which take part in activities concerning narcotic drugs. It may be added that in practice the members of the Committee will be paid their travel and subsistence costs from a suspense account alimented by the United Nations Working Capital Fund, as the contributions of the parties are not paid in advance of expenditure. Recognized subsidiary organs can also be financed by other means than the regular budget (e.g. UNIDO, UNRWA etc., which depend upon voluntary contributions, and UNCTAD, to which contributions are made by participating States which are not members of the United Nations). In view of all these facts, the rejection by the Third Committee of a proposal to have all the expenses of the Committee borne by the regular budget of the United Nations<sup>h</sup> is not significant.

8. The General Assembly rejected a proposal that it should itself elect the members of the Committee<sup>i</sup> and provided in article 8 of the Convention that the members should be "elected by States Parties from among their nationals". This does not prevent the Committee from being a United Nations organ. Two members of the Drug Supervisory Body were appointed by WHO, the International Bureau for Declarations of Death is appointed by the Secretary-General, and the Appeals Committee under the Protocol of 1953 is appointed by the President of the International Court of Justice or the Secretary-General; thus the status of United Nations organs does not require any particular mode of election. The same is true of ordinary subsidiary organs. Thus, for example, under General Assembly resolution 1995 (XIX) of 30 December 1964, the Trade and Development Board is elected by the United Nations Conference on Trade and Development, and the membership of other subsidiary organs has been left to be decided by the President of the General Assembly (e.g. the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States) or by the Secretary-General (e.g. the tribunals for Libya and Eritrea).

9. What has been said above concerning the Committee applies with equal force to *ad hoc* conciliation commissions established under article 12 of the Convention. Those commissions, like the Committee itself, are part of the machinery for the execution of the Convention and for the settlement of disputes about its application and interpretation; and the Convention aims at applying principles of the Charter. The secretariat of the Committee, provided by the Secretary-General, also serves commissions (art. 12, para. 5), and their meetings "shall normally be held at United Nations Headquarters ..." (art. 12, para. 4), with the result that the bulk of the expenses of commissions will be borne by the United Nations. The fact that commissions have judicial or quasi-judicial functions, that members are appointed by the Chairman of the Committee, and that the expenses of their members are to be shared by the parties to the dispute does not prevent them from being United Nations organs.

10. Members of the Committee and members of commissions serve "in their personal capacity" (art. 8, para. 1 and art. 12, para. 2), and are therefore not representatives of Governments. It follows that they have the same status, privileges and immunities as those of members of other United Nations organs who serve in a personal capacity, that is, those of experts on mission.

### Section 35. Privileges and immunities of persons having official business with the United Nations

78. Although difficulties have arisen from time to time with regard to the entry into the United States of America of representatives of non-governmental organizations, these matters have usually been resolved following the intervention of the Secretariat. In 1982, a major difficulty arose in connection with the participation of certain non-governmental organizations and their representatives at the second special session of the General Assembly devoted to disarmament. The issues that arose concerned the proper interpretation of section 11, paragraph 4, of the Headquarters Agreement in connection with that special session and the limitations, if any, that could properly be placed upon the number of representatives of each non-governmental organization attending the session. A note prepared by the Office of Legal Affairs set out the views of the United Nations as follows:

The Office of Legal Affairs has never had the occasion to seek a general definition of what constitutes, under the Headquarters Agreement, an invitation to United Nations Headquarters requiring the host State to grant admission to the invitee. Nor is this a matter which has been considered by the General Assembly, although immigration procedures are on the agenda of the Committee on Relations with the Host Country and it is open to any member of that Committee to raise at any time with the Committee a particular case or cases or the question of a general definition. No member of the Committee has asked for a meeting in connection with admission to the United States for the present special session on disarmament.

This is a matter which it has been found best to deal with on a pragmatic basis in the context of the particular meeting concerned, and there would appear to be no reason to believe that a general definition would necessarily obviate difficulties. In the past, since the conclusion of the Headquarters Agreement in 1947, there have been very few occasions where differences over admission between the United Nations and the United States have arisen which could not be resolved. Such occasions have in the past not turned on the issue of what constitutes an invitation but on assertions by the host State that the invitee would abuse or had previously abused the privilege of admission by engaging in activities other than those for which admission was ostensibly sought.

Without seeking to be comprehensive in any way, and in the present context relating to non-governmental organizations, the Office of Legal Affairs considers that an invitation under the Headquarters Agreement to the special session on disarmament is clearly involved where a non-governmental organization has been invited by name by the General Assembly. This applies to the organizations listed in annex III of the report of the Preparatory Committee for the second special session of the General Assembly devoted to disarmament.<sup>60</sup> The Preparatory Committee further refers in paragraph 28 of its report in a general way to other "non-governmental organizations concerned with disarmament", without naming them. Obviously, interpretations of this phrase can differ. In the view of the Office of Legal Affairs, to qualify for an invitation in terms of the Headquarters Agreement, these other organizations would have to be recognized by the United Nations, for instance under the procedures for consultative status with the Economic and Social Council, with the Centre for Disarmament or with the Department of Public Information.

When an organization is entitled to participate in a United Nations meeting, its participation is necessarily through a reasonable number of representatives of the organization concerned, and not of all its members. It is manifestly unreasonable to expect the host State to accept that it is under an obligation to grant admission to the entire populations of States because the General Assembly has asked "all States" to attend a meeting, or that all members of organizations and liberation movements having invitations to participate in the Assembly have a right of admission to the host State. It is within the

<sup>h</sup> *Ibid.*, paras. 109 and 110 (f) (i).

<sup>i</sup> *Ibid.*, paras. 104 (c) and 110 (a) (vi).

<sup>60</sup> *Official Records of the General Assembly, Twelfth Special Session, Supplement No. 1 (A/S-12/1)*.

discretion of the host State to decide to what extent it is prepared to grant visas to large numbers of members of an invited group, although the United Nations would insist that a reasonable number of representatives of the group should be admitted to follow the proceedings and, if so invited, to address the meetings concerned. So far, in connection

with the present special session, there have been no instances of which the Office of Legal Affairs is aware where a particular representative of a non-governmental organization whose name has been communicated by the Secretariat as invited has been denied a visa, although there have been delays in granting visas.

## CHAPTER VI

### United Nations *laissez-passer* and facilities for travel

#### Section 36. Issue of United Nations *laissez-passer* and their recognition by States as valid travel documents

79. The issue of *laissez-passer* continues to be carefully regulated and restricted to officials travelling on official business. A notable exception to this rule, which derives from the Convention on the Privileges and Immunities of the United Nations, concerned a United Nations external auditor of Pakistan nationality.

80. External auditors, who under the Convention are considered experts on mission and not officials of the Organization, are entitled to a United Nations certificate but not to a *laissez-passer*. Since Pakistani passports do not authorize travel in Israel and since in the performance of their duties it was necessary for them to visit UNRWA offices in territory under Israeli occupation, the Legal Counsel on 30 October 1968 wrote that:

The decision to issue the *laissez-passer* is taken in the very special circumstances of the present case and is based solely on the agreement of the Government (of Israel), which is asked to recognize the *laissez-passer*. It is not to be considered a precedent with respect to any case in which such agreement of the Government concerned has not been expressly obtained.

#### Section 39. Issue of visas for holders of United Nations *laissez-passer*

81. In 1973, the question arose of the legal right of a member of the staff of a regional commission to obtain a visa from the host country in order to return to his duty station. In a memorandum of 13 November 1973 to the Regional Commission Section of the Department of Economic and Social Affairs, the Office of Legal Affairs stated:

2. The Convention on the Privileges and Immunities of the United Nations to which the country concerned is a party provides in article V, section 18, that "officials of the United Nations shall be immune, together with their spouses and relatives dependent on them, from immigration restrictions and alien registration". This provision has been taken to mean that States parties to the Convention are bound to issue visas to officials of the United Nations without any restrictions. In addition, the Convention, in article VII, section 25, provides for a speedy handling of applications for visas from the holders of United Nations *laissez-passer* when such applications are accompanied by a

certificate that the applicants are travelling on the business of the United Nations.

3. The headquarters agreement for the regional commission concerned provides that the appropriate authorities shall impose no impediment to transit to or from the headquarters of the commission of, among others, officials of the commission and their families.

4. In view of the foregoing, there can be no doubt that from a legal point of view an official of the commission concerned, regardless of his nationality, has the right to return to his duty station and to the issuance of any visa which may be required for entry into the host country.<sup>61</sup>

#### Section 41. Diplomatic facilities for the Secretary-General and other senior officials while travelling on official business

82. Following the reorganization of the top echelon of the United Nations Secretariat in 1967, the stickers or inserts to be attached to the *laissez-passer* issued to Under-Secretaries-General or Assistant Secretaries-General, which dated from 1955, were revised. According to a memorandum from the Legal Counsel dated 28 May 1968, *laissez-passer* issued to Under-Secretaries-General and officials of equivalent rank would bear the following stamp or notation:

[Diplomatic]

The bearer of this *laissez-passer* is an Under-Secretary-General and, under section 19 of article V of the Convention on the Privileges and Immunities of the United Nations, is entitled to the privileges and immunities, exemptions and facilities accorded to diplomatic envoys in accordance with international law.

83. Similarly, *laissez-passer* issued to Assistant-Secretaries-General and officials of equivalent rank would bear the following stamp or notation:

[Diplomatic]

The bearer of this *laissez-passer* is entitled under section 19 of article V of the Convention on the Privileges and Immunities of the United Nations to the privileges and immunities, exemptions and facilities accorded to diplomatic envoys in accordance with international law.

<sup>61</sup> United Nations, *Juridical Yearbook 1973* (Sales No. E.75.V.1), p. 168.

## B. SUMMARY OF PRACTICE RELATING TO THE STATUS, PRIVILEGES AND IMMUNITIES OF THE SPECIALIZED AGENCIES AND OF THE INTERNATIONAL ATOMIC ENERGY AGENCY

### CHAPTER I

#### Juridical personality of the specialized agencies and of the International Atomic Energy Agency

##### Section 1. Contractual capacity

###### (a) *Recognition of the contractual capacity of the specialized agencies and of IAEA*

1. The capacity of the specialized agencies and of IAEA to enter into contracts continues to be recognized. There have been no decisions of courts or of arbitral tribunals.

2. The question of the juridical personality of UPU in Switzerland arose in 1926 on the occasion of the acquisition of a building to house the International Bureau of UPU. The Swiss Federal Council and Federal Tribunal were asked to consider whether UPU, or the International Bureau representing it, could under Swiss law acquire a building. The answer was in the affirmative and this was later expressly recognized by statutory provision. When UPU became a specialized agency of the United Nations, the Federal Council declared the Interim Arrangement on Privileges and Immunities of the United Nations in Switzerland applicable by analogy to UPU as from 1 January 1948, and the legal capacity of UPU was thus confirmed.

###### (b) *Choice of law; settlement of disputes and system of arbitration*

3. The practice of the specialized agencies is, for the most part, not to provide in contracts for the applicability of a particular national law.

4. On this question, and in the absence of any provision on the matter in the contract, reference was made to the position of FAO in an arbitral award of 1972 (*Balakhany (Chad) Limited v. Food and Agriculture Organization of the United Nations*).<sup>1</sup> That position was not the subject of a ruling, since choice of law was not at issue. The arbitrator stated that, as to the law applicable to the contract, the respondent (the organization) had declared that the contract "deliberately contained no choice of law"; as an international organization, FAO "considered that such contract should not be governed by any particular system of municipal law but [exclusively] by generally accepted principles of law". WHO maintains that this is self-evident and applies to contracts between the organization and outside entities, such as contracts for the purchase of supplies and equipment or service contracts, which are governed by the principles of private law; there is no generally accepted international law of contract, international contracts being generally subject to the proper law of the con-

tract. In the case of leases contracted by IBRD as a tenant or lessor, contracts are executed in accordance with local usage and the *lex situs* normally governs, even if it is not expressly stipulated in the lease. Contracts between IBRD and consulting firms do not normally contain express stipulations on the applicable law although, inasmuch as these contracts are governed by municipal law, such stipulations could be made.

5. In the event of a dispute requiring settlement by arbitration, the positions of FAO and WHO do not preclude an arbitrator from referring to a particular system of law in order to ascertain the intention of the parties with respect to certain contractual provisions. For example, contracts concluded by FAO for services sometimes contain a clause requiring the party supplying the services to observe certain provisions of the local law; reference would have to be made to the law concerned if a question arose as to the application of that clause.

6. In some cases, contracts made by specialized agencies include express reference to a specific system of municipal law. From time to time, ICAO contracts contain a provision stating that the interpretation of the contract shall be construed in conformity with the laws of the Province of Quebec. While many contracts between IMF and local suppliers make no mention of any kind as to the law applicable, some contracts concluded by IMF for goods and services specify that they will be governed by the law of the site of the main office of the commercial company, usually that of the District of Columbia. In addition, certain financial obligations are subject to the law of the State of New York. On occasion, WHO contracts specify that they are subject to application and interpretation in accordance with a particular system of municipal law, where technical reasons make this desirable, e.g. building contracts and civil engineering contracts. In FAO practice, on rare occasions, as in contracts for the rental of premises, reference is made to interpretation of the contract in accordance with a system of municipal law in case of arbitration. Moreover, in FAO contracts for the provision of certain services, particularly those to be performed on headquarters premises (cleaning, catering, etc.), the concessionaire is specifically required by the contract to apply to his personnel all relevant local laws, regulations and collective agreements governing such matters as conditions of work and social security. IAEA contracts do not refer to a complete system of municipal law as applicable to the contractual relations between the parties, but occasionally an understanding between the parties is recorded in the contract as to the settlement of a particular problem in accordance with national law.

<sup>1</sup> Arbitral award of 29 June 1972 (United Nations, *Juridical Yearbook 1972* (Sales No. E.74.V.1), pp. 206-207).

7. The practice of IFC has varied from case to case, guided always by the paramount consideration of enforceability of IFC contracts. Consequently, whenever the circumstances of the investment have made it desirable, IFC contracts have made specific reference to a given system of municipal law. Most frequently this has been the case where the parties have wished to stipulate that the governing law shall be a municipal law different from the law of the jurisdiction where the enterprise in question is located.

8. The general practice of UPU is that private law contracts concluded by the International Bureau include explicit references to Swiss law (rental, leasing and publishing contracts, etc.), but there are exceptions to this practice. It may happen that contracts concluded with various Swiss or foreign commercial firms make no reference to a positive law.

9. The majority of contracts entered into by specialized agencies and IAEA continue to provide for the settlement of disputes by arbitration, after recourse to direct negotiation. Considerable variety exists as to the form or mode of such arbitration. Several agencies (FAO, IFAD, ITU and IAEA) include in their arbitration clauses reference to arbitration under the rules of ICC. For example, as a general rule, FAO makes every attempt to reach an amicable settlement of a dispute, failing which it would seek to have the matter resolved in accordance with the arbitration procedures set out in the contract. FAO has recently submitted two cases to the ICC Court of Arbitration; one was withdrawn upon a settlement being reached, while the other is still pending. In some cases of FAO contracts with United States firms, the rules of the American Board of Arbitration have been declared applicable. WHO contracts provide for arbitration, the form or mode of which is to be agreed between the parties; failing that, the dispute is to be settled under the ICC rules. The WHO standard agreement with consulting firms for pre-investment projects provides for three stages of dispute settlement: negotiation, conciliation by a conciliator jointly nominated by the parties, and arbitration under the ICC rules. IAEA contracts may include one of two models for arbitration: (a) submission of the dispute to arbitration under ICC rules, which have been used in recent years as appropriate; or (b) submission of the dispute to three arbitrators, one appointed by each party and the third by the two appointed arbitrators. Failing agreement on the appointment of the third arbitrator, the Secretary-General of the United Nations may be requested to appoint him. IBRD contracts with consulting firms normally provide for arbitration by *ad hoc* arbitrators or by reference to the ICC rules. When IBRD lease contracts contain provision for dispute settlement, which is not always the case, they may refer to settlement by arbitration or submission of disputes to the jurisdiction of the local courts. Contracts between IMF and local construction companies and certain suppliers have provided for the submission of disputes to arbitration. In certain of its borrowing agreements, IMF has agreed to settlement of disputes by arbitration. No such disputes have arisen. Agreements providing for IFC investments do not refer to arbitration. Occasionally, however, IFC has agreed that disputes may arise in respect of a contract for ser-

vices required by it for its operations, or in respect of certain arrangements between creditors of a company, be submitted to arbitration. In such cases, *ad hoc* arrangements are made. It may be recalled that, under certain jurisdictions, disputes between shareholders or partners in a company may not be submitted to the ordinary courts of the country and can only be adjudicated by arbitrators.

10. Thus far, no lawsuit relating to the private law contracts of UPU has been brought before a Swiss or foreign court. On the other hand, disputes concerning the interpretation of the Acts of UPU,<sup>2</sup> or liability resulting from the application of the Acts, are subject to the special arbitration procedure provided for in article 127 of the General Regulations of UPU.

11. IBRD and IDA have maintained their distinct body of practice as regards those contractual transactions that constitute their field of activity. IBRD practice varies depending upon the type of contract involved.

12. The practice of IBRD as a lender has been fully explained in several publications.<sup>3</sup> With respect to loans made by IBRD, international arbitration is the method for settling disputes. Standard provisions for arbitration are found in section 10.04 of the IBRD General Conditions applicable to loan and guarantee agreements dated 15 March 1974.

13. As a borrower, IBRD practice varies depending on the custom in the particular market in which the issuance of bonds takes place and on the character of the lender. As to the custom in a particular market, IBRD bonds issued in continental markets are expressly governed by the law of the relevant market, while IBRD bonds issued in the United States of America, the United Kingdom or Canada contain no stipulation of applicable law. It may be assumed, however, that in both cases the law of the relevant market applies. As to the character of the lender, loans made by the Swiss Government to IBRD are governed by international law. Loans raised by IBRD from certain national institutions, such as the Deutsche Bundesbank, while governed by municipal law, contain no express stipulation of applicable law. Under annex VI, paragraph 1, of the Convention on the Privileges and Immunities of the Specialized Agencies (hereinafter referred to as the "specialized agencies Convention"), IBRD, as a borrower, enjoys no general immunity from suit. It may be sued by its creditors in "a court of competent jurisdiction in the territories of a member . . . in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has

<sup>2</sup> Organic texts concerning the structure, operation and legal status of UPU (United Nations, *Treaty Series*, vol. 611, p. 7), revised at Hamburg in 1984 (International Bureau of UPU, *Acts of the Universal Postal Union*, Bern, 1985).

<sup>3</sup> See A. Broches, "International legal aspects of the operations of the World Bank", *Recueil des cours, Académie de droit international, 1959-III*, vol. 98 (Leyden, Sijthoff, 1960), p. 301. See also G. R. Delaume, *Legal Aspects of International Lending and Economic Development Financing* (Dobbs Ferry, N.Y., Oceana Publications, 1967), pp. 81-85, 88-91 and 108-110, and *Transnational Contracts, Applicable Law and Settlement of Disputes* (Dobbs Ferry, N.Y., Oceana Publications, 1986), paras. 1.12 and 2.12.

issued or guaranteed securities". Moreover, in certain markets, especially those in Europe, bonds issued by IBRD expressly provide for the jurisdiction of local courts.<sup>4</sup>

14. IDA has so far made credits available only to Governments of member States. Relations arising under the relevant credit agreements are governed by international law. The IDA General Conditions applicable to development credit agreements, dated 15 March 1974, contain substantially the same provisions as to enforceability and arbitration (sections 10.01 and 10.03) as the corresponding provisions of the IBRD General Conditions.

## Section 2. Capacity to acquire and dispose of immovable property

15. The specialized agencies and IAEA report that no problems have been encountered with regard to their capacity to acquire and dispose of immovable property, as provided for in section 3 (b) of the specialized agencies Convention. It may be noted, however, that the deposit by the Government of Indonesia in 1972 of its instrument of accession to the Convention was accompanied by a reservation to that provision. The reservation reads: "The capacity of the specialized agencies to acquire and dispose of immovable property shall be exercised with due regard to national laws and regulations." In 1973, the Indonesian Government informed the Secretary-General, in reference to that reservation, that it would grant to the specialized agencies the same privileges and immunities as it had granted to IMF and IBRD.<sup>5</sup>

16. Instances of the use, acquisition or disposal of immovable property by the specialized agencies and IAEA are given below.

### (i) ILO

17. In 1967, ILO concluded a contract with the Property Foundation for International Organizations, which acted on behalf of the Swiss authorities, by which ILO transferred to the Foundation the ownership of the land on which the former ILO building was located and the Foundation transferred to ILO the ownership of the land on which the present ILO building was to be constructed. The ownership of the former ILO building was also transferred to the Foundation in return for monies to be used by ILO in the construction of the new building.<sup>6</sup> In 1975, ILO concluded a contract with the Etat de Genève by which the organization transferred to the Etat de Genève the ownership of land in the vicinity of the old ILO building in exchange for a piece of land

adjoining the site of the new ILO building. The transfers were made in the form required by Swiss law and registered. No fee or charges were paid by ILO.

### (ii) FAO

18. FAO has not acquired title (freehold or leasehold) to real estate. Land and buildings with appurtenances for headquarters and regional offices, and more recently for the offices of FAO representatives in various countries, have generally been made available to FAO directly by the host Government on the basis of an agreement with that Government, or have been rented by FAO from the owner.

### (iii) UNESCO

19. In 1973, UNESCO acquired a property at San Isidro (Villa Ocampo) and another property at Mar del Plata (Villa Victoria), in Argentina. At Villa Ocampo, which it had acquired by deed of gift, UNESCO has established an Iberoamerican Research and Study Centre for Scientific and Cultural Translation. A headquarters agreement is to be concluded between UNESCO and Argentina to that effect.

### (iv) ICAO

20. ICAO owns its regional office building in Paris (in co-ownership with the French Government).

### (v) WHO

21. WHO has acquired immovable property which it has either bought or had donated to it exempt from duties. So far it has disposed of only one such property, namely, a villa situated in Florence, Italy, which had been bequeathed to it by a private individual. As the legatee, WHO disposed of the property after the death of the testator in 1975.

### (vi) IBRD/IDA/IFC

22. IBRD has purchased, sold, rented and leased property at its headquarters and in various member countries. It has concluded leases with other international organizations (e.g. with IMF), Governments and private entities. IFC leases necessary office space in various member States. For example, it holds a long-term lease on a house in London for use as the residence of the IFC Special Representative in Europe. In addition, IFC acquired two parcels of forest land in Paraguay in foreclosure proceedings initiated by IFC against a company that had not serviced a loan IFC had made to it.

### (vii) IMF

23. IMF has purchased and sold property in Washington, D.C. and adjoining areas; it has also leased property from private parties, in Washington, D.C. and Geneva, and from the World Bank in Paris.

### (viii) UPU

24. Since 1926, UPU has owned the three buildings which have housed its headquarters. The first building was sold to a commercial firm. The one that it occupied from 1953 to 1970 was transferred to the UPU provi-

<sup>4</sup> Delaume, *Legal Aspects of International Lending* . . . , pp. 171-175, and *Transnational Contracts* . . . , para. 11.03.

<sup>5</sup> United Nations, *Multilateral Treaties deposited with the Secretary-General: Status as at 31 December 1982* (Sales No. E.83.V.6), chap. III.2.

<sup>6</sup> See International Labour Office, *Official Bulletin*, vol. L. No. 3, July 1967, p. 335. For a detailed study on the question, see B. Knapp, "Questions juridiques relatives à la construction d'immeubles par les organisations internationales", *Annuaire suisse de droit international*, vol. XXXIII (Zurich, Société suisse de droit international, 1977), p. 51.

dent scheme and forms part of its assets.<sup>7</sup> When the present UPU building in Bern was under construction, UPU had to pay compensation to the owners of three neighbouring buildings who had objected to the construction of the building because its height exceeded the maximum permitted under the district plan in force at the time.

(ix) *ITU*

25. ITU has constructed an office tower with right of superficies.

(x) *IAEA*

26. IAEA has no title to immovable property. The buildings that it occupies are either rented or occupied free of charge.

### Section 3. Capacity to acquire and dispose of movable property

#### (a) *Recognition of the capacity of the specialized agencies and of IAEA to acquire and dispose of movable property*

27. The specialized agencies and IAEA have generally not encountered problems concerning their capacity to acquire and dispose of movable property. FAO, however, has found that it is often difficult to maintain direct title to vessels and aircraft in view of the fact that such title would require registration under the laws of a particular country. The specific problem that arises, as far as the registration of vessels is concerned, is that, under the legislation of many countries, intergovernmental organizations are not among the entities recognized as entitled to register vessels. The normal practice when vessels are assigned to a project is for FAO to conclude an agreement with the Government receiving assistance, under which title is transferred to the Government or a government agency and the vessel is registered accordingly. Title is normally transferred back to FAO upon completion of the assignment. Where necessary, the vessel remains registered in the name of the Government or agency for a short period following such completion, pending its reassignment by FAO to another project. Under some agreements of the kind referred to, title is retained by FAO, but registration is in the name of the government agency. However, FAO has occasionally registered vessels in a member State.

#### (b) *Licensing and registration of land vehicles, vessels and aircraft*

28. Most specialized agencies and IAEA have licensed or registered land vehicles with the appropriate local authorities and in accordance with local law. In 1974,

<sup>7</sup> The UPU provident scheme is not affiliated with the United Nations Joint Staff Pension Fund. It is independent of the Fund and constitutes a foundation within the meaning of articles 80 *et seq.* of the Swiss Civil Code. It enjoys the same exemptions, immunities and privileges as UPU with regard to its activity on behalf of staff members of the International Bureau of the Union and within the limits of the Agreement between the United Nations and Switzerland, which is applicable by analogy to UPU (see p. 182, para. 2, above).

ILO acquired ownership of a seagoing vessel for training purposes. The vessel was registered in Bangladesh in accordance with local law. The practice of FAO with regard to registration of vessels has been described above (para. 27).

### Section 4. Legal proceedings brought by and against the specialized agencies and IAEA

29. The capacity of the specialized agencies and IAEA to institute legal proceedings before national tribunals has not been questioned. However, these organizations have seldom instituted such legal proceedings.

30. FAO has instituted legal proceedings or filed claims in legal proceedings on a number of occasions. In 1969, FAO filed a proof of debt with a United States court in proceedings for an arrangement under the United States Bankruptcy Act.<sup>8</sup> More recently, a proof of claim and release has been filed on behalf of FAO with a United States court in a class action of stockholders of a United States corporation. In November 1974, FAO retained local legal counsel and initiated action in Italian courts to obtain payments due under a mortgage loan which had been bequeathed to FAO by an Italian citizen; the matter is still pending in the Italian courts. In March 1981, FAO retained local legal counsel and filed a claim together with other major creditors in a bankruptcy proceeding in the State of Vermont, in the United States. FAO and the other creditors agreed to a plan of reorganization which was confirmed by the Vermont bankruptcy court and is at present being carried out under the supervision of the court. In June 1981, FAO retained local legal counsel and initiated legal action in the courts of the Philippines for damages arising from the loss of a marine cargo shipment in June 1980. The shipment had been insured and action was instituted by FAO against both the shipping company and the insurers. The shipping company made a counterclaim for the cost of salvage operations. The case is still pending before a court of first instance. In November 1981, FAO, acting jointly with the United Nations, retained local legal counsel and initiated legal action in the United Republic of Tanzania following the crash of an aircraft in which four staff members of FAO died. The action is for third party compensation on behalf of the dependants of the deceased FAO staff members. FAO entitlements with respect to any award or settlement would be limited to legal costs and the amounts charged to the FAO Staff Compensation Plan Reserve Fund, for compensation payments made by FAO to the deceased staff members' dependants. The case is still pending.

31. IMF instituted legal proceedings in the District of Columbia for recovery of compensation for water damage caused to IMF premises.<sup>9</sup> The suit was settled in June 1984. IMF has also filed an opposition to a trademark application made by a private Canadian company before the Canadian Registrar of Trademarks. The case is still pending.

<sup>8</sup> *United States Code, 1982 Edition*, vol. IV, 1983, title 11.

<sup>9</sup> *International Bank for Reconstruction and Development v. Charles H. Tompkin Co.* (No. 83-1045 (D.D.C.)).

32. In 1972, WHO instituted legal proceedings, jointly with a staff member, before the Supreme Court of the Philippines, against the decision of a judge in a court of first instance, not to quash a search warrant. The Supreme Court declared null and void the search warrant in question.<sup>10</sup>

33. UNESCO was involved as a third party in a case brought before a French tribunal between the heirs of a former UNESCO official, victim of a road accident, and the insurance company of the author of the accident (a private company). In another case, where a building society claimed payment of additional costs, UNESCO was defendant in the proceedings brought before an arbitration tribunal. The decisions in both cases were favourable to UNESCO.

34. IFC has brought legal proceedings before the municipal courts of Argentina, Brazil, Chile, Costa Rica, Indonesia, Paraguay and Spain, the majority of which were bankruptcy proceedings.

35. With regard to steps to avoid or mitigate liability, other than the purchase of insurance, the practice varies. UPU and IFC have taken no particular measures. WHO, so far as possible, endeavours to contract out of liability, particularly in cases where liability arises out of aid or assistance provided to Governments. Only where this is not possible is recourse made to insurance. IAEA has either disclaimed liability (such disclaimer being effective in relation to the other party to the agreement) or has tried to obtain hold-harmless undertakings, from the other parties to the agreement, against third party liability.

36. Under the FAO Staff Compensation Plan for service-incurred injury, staff members or their survivors may be required to sue third parties as a prior condition for receipt of compensation. Provision is made for compensation thus recovered to be set off against FAO liability under the Compensation Plan. In three cases, actions that were brought in Senegal, Canada and Algeria substantially reduced FAO liability.

37. FAO practice in technical assistance projects is normally to include "hold-harmless" clauses, worded in substantially the same way as in article X, paragraph 2, of the UNDP standard basic technical assistance agreement,<sup>11</sup> in agreements with Governments receiving technical assistance. Such agreements usually contain a provision whereby the Government undertakes to provide adequate insurance for counterpart personnel. Moreover, subcontractors are normally required to make provision for third-party liability insurance, in addition to the insurance of their own staff. With regard to projects executed by IBRD for UNDP, the Bank in-

corporates in the project documents the clauses on privileges and immunities of the basic agreements between the country concerned and UNDP.

38. The practice adopted by IMF is often to clarify the limits on its liability in the course of its varied financial and other activities. For example, following a decision in 1975 to sell gold for the benefit of developing countries, the Executive Board in May 1976 adopted a four-year gold sales programme in which one sixth of the Fund's gold was to be sold at public auctions. Under the "Terms and Conditions" for such auctions, title to gold purchases passes to the purchaser upon delivery made to the carrier designated by him. After passage of title, all risk of loss or damage, from any cause whatsoever, is to be borne by the purchaser. In 1952, the Fund established a gold transaction service to assist members and certain international organizations in their gold transactions by trying to match prospective purchasers and sellers of gold. One of the terms on which the service was provided was that the Fund would not become a party to any contract of purchase or sale and would incur no liability or obligation in connection with the transactions.

#### **Section 5. International claims brought by and against the specialized agencies and IAEA**

39. In the period under review, neither any specialized agency nor IAEA has instituted international claim proceedings against another subject of international law, or has been a respondent in an international claim proceeding.

#### **Section 6. Treaty-making capacity**

##### *(a) Treaty-making capacity of the specialized agencies and of IAEA*

40. The specialized agencies and IAEA have experienced no special problems concerning their treaty-making capacity. A number of them have entered into agreements with non-member States as well as member States.

##### *(b) Registration, or filing and recording of agreements on the status, privileges and immunities of the specialized agencies and of IAEA*

41. Most of the agreements entered into by the specialized agencies and IAEA concerning their status, privileges and immunities have been registered or filed and recorded with the United Nations Secretariat. Agreements not registered or filed and recorded relate to arrangements with Governments hosting conferences, seminars, meetings, etc., outside the headquarters or established regional offices of an agency. Such agreements often take the form of an exchange of letters.

<sup>10</sup> *World Health Organization and Dr. L. Verstuylt v. Benjamin Aquino* (1972) (United Nations, *Juridical Yearbook 1972* (Sales No. E.74.V.1), pp. 209-211).

<sup>11</sup> DP/107, annex I.

## CHAPTER II

**Privileges and immunities of the specialized agencies and of the International Atomic Energy Agency in relation to their property, funds and assets****Section 7. Immunity of the specialized agencies and of IAEA from legal process**

42. Most specialized agencies and IAEA state that their immunity from legal process has been fully recognized by the competent national authorities.

43. ILO reports that in 1966 a private person filed a claim against the organization in Costa Rica. Following assertions of immunity by ILO to the Government of Costa Rica, the Government informed the court of the privileges and immunities of ILO. The matter is considered closed. IMF was the subject of a claim filed by a private person in 1974 before the United States Equal Employment Opportunity Commission, and later before a United States federal district court.<sup>12</sup> In both instances, the immunity of IMF was upheld. In 1975, IMF was notified to appear in a hearing before the District of Columbia Minimum Wage and Safety Board. The District's counsel, following assertion of immunity by IMF, concluded that the Fund was immune from prosecution. UPU has in one case invoked its immunity from jurisdiction in order not to appear as a witness in a criminal proceeding.

44. FAO reports that, since 1978, legal proceedings have been instituted against it in nine cases before national tribunals, seven in the host country and two in other countries. Of the nine cases, six were brought by private citizens or private companies, while three were instituted by parastatal corporations. Such proceedings were instituted notwithstanding the existence of applicable international agreements according FAO immunity from legal process. Except in two of the proceedings that had been instituted before local courts in the host country by a parastatal corporation, FAO did not appear before local courts in any of the cases referred to. However, in every case it formally advised the Government that legal proceedings had been instituted against FAO in a local court; called the attention of the Government to the specific provisions of the international agreement that provided for the organization's immunity from legal process; and requested that the judicial authority concerned be informed.

45. With respect to the two proceedings instituted before local courts in the host country, Italy, by a parastatal corporation, FAO, on the advice of the Ministry of Foreign Affairs, made a limited appearance before the local court, for the sole purpose of invoking its immunity from legal process as provided for under the relevant provision of its Headquarters Agreement. In 1982, the Supreme Court of the host country rendered a judgment denying immunity. Since then, FAO, following the instructions of its governing council, has declined to appear in court even on a limited

basis. It is the present policy of FAO not to appear in proceedings before courts of the host country.

46. FAO has continued to contest jurisdiction in actions brought against it in local courts. It has always raised the question of jurisdiction with the Government of the country concerned and in two cases (para. 44, above) the jurisdiction of the court was also contested in a local court.

47. The facts relating to six of the nine proceedings instituted against FAO, have been reported by the organization. They are described in paragraph 48.

48. The following cases were brought before courts of the host country, Italy:

(a) A parastatal corporation which, on behalf of persons employed in the performing arts, collects contributions from employers to pension and social security benefits, instituted proceedings against FAO for failing to make such contributions on emoluments paid to a citizen who had been engaged from time to time by FAO over a period of years as a non-staff member under a series of special service agreement contracts. The claim was brought to the attention of the permanent representative of the host country. FAO did not consider negotiation or settlement, since it was fundamental for the organization to remain independent of application of local labour laws. This position was communicated to the Italian Government.<sup>13</sup> The corporation obtained a court judgment in October 1982 against FAO for payment of contributions on the payments made to the non-staff member. There have been no further developments since the judgment.

(b) Two legal proceedings were instituted against FAO by a parastatal corporation that manages a pension fund for directors and managers of private industry. The actions were for rental arrears and for eviction. The dispute concerned the applicability or non-applicability of rent control laws to FAO tenancy of part of an office building owned by the corporation. The two proceedings resulted in a number of court decisions on procedural and substantive questions. In one case, a judgment by a local tribunal did not recognize FAO immunity from legal process. FAO submitted the issue of its immunity to the Supreme Court of the host country. The Supreme Court held that FAO did not enjoy immunity from legal process in the proceedings in question. There followed a judgment to the effect that the corporation did not have the right to evict FAO and another judgment in favour of the corporation for pay-

<sup>12</sup> *Kissi v. de Larosière* (No. 82-1267 (D.D.C.)).

<sup>13</sup> FAO noted a 1969 opinion of an Italian court of first instance whereby the agency's plea of immunity from jurisdiction was accepted in a case brought against it by a former staff member. In the court's opinion, "such immunity could only be recognized with regard to public law activities, i.e., in the case of an international organization, with regard to the activities by which it pursues its specific activities". United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), pp. 238-239.

ment by FAO of rental arrears. The Court, in the latter judgment, considered the relevant section of the Headquarters Agreement with the host country, providing for “immunity from every form of legal process”. The Court concluded that FAO immunity from legal process extended only to matters relating to activities undertaken in carrying out the purpose and functions of the organization, i.e. acts *jure imperii*, and not to transactions of a private law nature that might arise out of other activities, i.e. *jure gestionis*. Measures of execution have not been sought against FAO. Negotiations between FAO and the corporation are proceeding with a view to an extrajudicial settlement of the question of rental arrears. Nevertheless, the interpretation placed upon the relevant section of the Headquarters Agreement by the Court is of great concern to the FAO governing bodies, which disagree with the interpretation and maintain that the provisions of the headquarters agreement should be given their full literal meaning. Otherwise, it is considered, FAO would be open to litigation detrimental to effective implementation of its programmes. Other organizations of the United Nations system with immunities covered by analogous provisions are likely to be in a similar position. The FAO governing bodies will in 1985 consider whether an advisory opinion of the International Court of Justice should be sought as to the interpretation of the relevant provisions of the Headquarters Agreement with the host country.

(c) While negotiations with respect to a contractual dispute were continuing between FAO and a contractor who had been engaged by FAO for services to be performed at FAO headquarters, a subcontractor of the contractor instituted legal proceedings against FAO with respect to the subject matter of the dispute. The subcontractor is not a party to the organization’s contract with the principal contractor and thus is not bound by the arbitration clause in the contract.

49. Legal proceedings were instituted against FAO in Honduras for compensation for personal injury and property damage caused by an FAO vehicle engaged on a UNDP project. It was the position of FAO that the Government was responsible for dealing with the claim under the “hold-harmless” clause in the UNDP standard basic technical assistance agreement with the Government (see p. 186, para. 37, above). The Government declined to assume responsibility on the grounds that the vehicle had not been used for project purposes at the time of the accident. The Government declined to intervene in court on behalf of FAO, and maintained that the organization should itself invoke its immunity. FAO did not appear in court and in September 1984 a judgment was entered in favour of the plaintiff. FAO declined thereafter to receive service of the judgment. An extrajudicial settlement was finally arranged with the collaboration of the Ministry of Foreign Affairs.

50. Legal proceedings were instituted against FAO in Bangladesh by a locally employed FAO staff member who had been separated upon expiry of his appointment. Summons addressed to FAO by the local court were returned by the organization to the Ministry of Foreign Affairs under a *note verbale* recalling FAO immunity from legal process. In August 1984, judgment of court, holding the plaintiff’s termination void and il-

legal and providing for re-employment of the plaintiff and an award of damages, was communicated to FAO. FAO advised the Government of the judgment. Execution of the judgment has not been sought.

51. IBRD, IDA and IFC do not enjoy general immunity from suit. Their immunity is limited to actions brought by member States or persons acting for or deriving claims for such States. Actions by other persons may be brought in a court of competent jurisdiction in the territory of a member State in which the organization has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No cases have been reported by IBRD, IDA or IFC in which their limited immunity has not been recognized. IBRD and IDA state that actions have been brought against them on rare occasions (no more than eight in number) in conformity with the relevant annexes of the specialized agencies Convention. Such cases have been settled amicably, discontinued or dismissed. One case is of special interest. In 1972, a complaint filed in a United States federal district court was served on IBRD, IDB and Uruguay. The plaintiff alleged that a contract for consulting services had been broken by Uruguay and brought action for damages. IBRD and IDB moved to dismiss the action on the grounds that the court lacked jurisdiction, that the case should be transferred to the court of first instance of the District of Columbia and that the complaint did not state a cause of action against either Bank. The motion was granted. The action against Uruguay was dismissed on the grounds that the court lacked jurisdiction in light of the choice of forum clause in the contract, in favour of the courts of Uruguay, a clause deemed not unreasonable and therefore enforceable.<sup>14</sup>

52. As to the provision in section 4 of the specialized agencies Convention concerning immunity “from every form of legal process”, most of the specialized agencies and IAEA report no special difficulties of interpretation, although it would seem that occasions requiring such interpretation have seldom arisen. IMF has taken the view that the term is to be interpreted broadly, as extending to the exercise of all forms of judicial power. The Fund has received notices of attachment of funds due to taxpayers and bankrupt persons, as well as subpoenas requiring staff members to appear as witnesses. It has asserted its immunity from judicial process and the inviolability of its archives. Such immunity has been recognized whenever it has been invoked. Apart from cases where legal proceedings have been instituted against FAO, the organization has successfully invoked its immunity from “every form of legal process” whenever it has been ordered, by a national court or other authority, to disclose information (concerning in particular salaries) relating to a staff member, or where national courts have sought to attach the salary due to staff members before salary payment has been made (see also sections 23 and 32 below).

53. IBRD reports that on three occasions attempts were made by self-styled creditors of member States of the World Bank to attach funds allegedly held by the

<sup>14</sup> *Republic International Corporation v. Amco Engineers* (1975) (*Federal Reporter*, 2nd Series, 1975, vol. 516, p. 161).

Bank on behalf of those members. IBRD claimed immunity on several grounds, arguing that: (a) under article VII, section 3, of its Articles of Agreement, the proceeds of its loans to member States were its property and, as such, could not be attached prior to the delivery of a final judgment against it (as distinguished from a judgment against a member); (b) under the terms of the second sentence of the same provision, the self-styled creditors, who "derived" their claims from member States, were as such barred from bringing action against the Bank; (c) under article III, sections 1 (a), 5 (b) and 5 (c) of the same Articles of Agreement, loan agreements between IBRD and member States were governed by international law and were intended for public purposes that could not be compromised by private self-styled creditors, especially since the use of IBRD resources and withdrawals of loan proceeds were subject to strict conditions. In one case the action was discontinued, one case appears to be at a standstill, and the last is still pending. It is to be noted that the United States Foreign Sovereign Immunities Act of 1976 provides expressly that the property of international organizations designated by the President of the United States (IBRD, IDA and IFC are among the organizations designated) "shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign State as the result of an action brought in the courts of the United States or of the States".<sup>15</sup> This provision does not add to the immunities derived by IBRD from its Articles of Agreement; it simply puts an end to the speculation that has sometimes arisen that loans made by IBRD might be a source of attachable funds.<sup>16</sup>

54. There have been no cases in which the question of immunity from measures of execution has been addressed. FAO reports, however, that, at the eighty-sixth session of the FAO Council, in November 1984, the representative of the host country, Italy, made a declaration on the agency's immunity from legal process and measures of execution in the host country. The declaration is incorporated in the Council's report and includes the following statement:

The other point that deserves the utmost attention is the clear distinction which exists between, on the one hand, the general concept of immunity from legal process, with which I dealt at the beginning of my speech, and, on the other hand, the concept of immunity from measures of execution. While the former concept has some limits (i.e. it applies only to acts *jure imperii* as opposed to acts *jure gestionis*), the immunity from measures of execution enjoyed by FAO under the [host country] legal system is full and complete. It is true that there has never been any test case to prove that the courts would uphold such immunity, but it is not difficult to understand that the reason why no one has ever tried to attach FAO property (for instance [a para-statal corporation] which had already obtained a court judgment condemning FAO to pay) is exactly the legal impossibility to carry out measures of execution against the organization. In this connection, too, however, it is important to realize that, if someone attempted to carry out measures of execution against FAO (by initiating an *ad hoc* proceeding before the competent "judge of the execution" in accordance with the code of civil procedure), the organization

would have to appear before the judge in order to point out the existence of its immunity under . . . the Headquarters Agreement.<sup>17</sup>

FAO considers that the words "every form of legal process", used in its Headquarters Agreement, also covers immunity from measures of execution. On the other hand, the statement cited above indicates a limitative interpretation of these words.

#### Section 8. Waiver of the immunity from legal process of the specialized agencies and of IAEA

55. There have been a few cases of agencies waiving their immunity from legal process in particular cases. ILO reports that in 1980 testimony was sought by Canadian provincial authorities in relation to prosecution of a third party under the Occupational Health and Safety Act. ILO waived the immunity of the Director of its Ottawa Branch Office. IMF has waived its immunity for the purpose of leases. Bearer notes associated with certain IMF borrowing agreements provide waiver by IMF of its immunity from judicial process and submission to designated national courts with respect to both actions and execution. UPU has recognized the jurisdiction of Swiss tribunals in litigation cases, but no suits have been brought in such tribunals.

56. FAO reports that, by initiating legal proceedings under national law, it has implicitly waived its immunity with respect to counter-claims that might be raised by the defendant in the proceedings. A counter-claim was made against FAO when it initiated action against a shipping company in the Philippines. A statement by FAO concerning certain pesticides at public hearings of the United States Environmental Protection Agency brought FAO within the scope of a rule of practice which made statements made at the hearing subject to the availability for cross-examination of persons making such statements. In another case, when invoking immunity with respect to proceedings brought against it before a national court, FAO informed the Government of the country concerned that it did not consider that its liability was involved (the claim related to the actions of a person who was not a staff member), but undertook to make further investigations.

57. The majority of contracts entered into by the specialized agencies and IAEA provide for settlement of disputes by arbitration (see p. 182, section 1 (b) above).

#### Section 9. Inviolability of the premises of the specialized agencies and of IAEA and exercise of control by the specialized agencies and by IAEA over their premises

58. The inviolability of the premises of the specialized agencies and IAEA has in general been recognized. The specialized agencies and IAEA have for the most part remained immune from search and from any other form of interference.

59. IMF reports that on a number of occasions local police have attempted unsuccessfully to serve subpoenas

<sup>15</sup> Public Law 94-583 of 21 October 1976 (*United States Statutes at Large*, 1976 (1978, vol. 90), section 1611 a).

<sup>16</sup> Delaume, "Public debt and sovereign immunity revisited: some considerations pertinent to H.R. 11315", *The American Journal of International Law* (Washington, D.C.), vol. 70, No. 3, July 1976, p. 529, and *Transnational Contracts* . . . , paras. 12.02 and 12.04.

<sup>17</sup> FAO, *Report of the Council of FAO, Eighty-sixth Session, Rome, 19-30 November 1984* (CL 86/REP), annex J.

and arrest warrants on the Fund's premises. IMF has taken the position that its premises may not be entered for such purposes without its express consent. ILO has in some cases authorized the police to enter its premises in Switzerland but there has been no waiver of immunity. The WHO Headquarters Agreement provides that no agent of the Swiss public authority may enter the organization's premises without the express consent of WHO or at its request. The premises are thus inviolable. The same appears to be the case in the WHO regional offices. IBRD and IDA report that there have been no problems with respect to the immunity of their premises. Some of their member countries, however, in which IBRD or IDA have offices, have not adhered to the specialized agencies Convention. IBRD and IDA rely, in such countries, on the pertinent provisions of their Articles of Agreement.

60. FAO reports that in 1984 it rejected work done by a contractor on FAO headquarters premises. The contractor requested a local court to designate an expert to provide a technical evaluation of the work. A copy of the court order was transmitted to FAO with a *note verbale* by the permanent representative of the host country. FAO returned the court order with a *note verbale* pointing out that, in addition to the organization's immunity from legal process, its headquarters were inviolable under section 7 of the FAO Headquarters Agreement with the host country. FAO could not therefore accept the court order. The matter was amicably settled with the contractor in February 1985 and no further court action was taken.

61. Difficulties have on occasion arisen with regard to the inviolability of the premises of regional offices of certain agencies. In 1967, the police entered ILO premises in Lagos and arrested a member of the local staff. Following intervention by the Director of the ILO regional office, the staff member was promptly released and the Nigerian Government indicated that steps to avoid a recurrence had been taken. In 1973, an ILO office in Santiago was searched by the police. The matter was referred to the Chilean Government, which sent ILO a satisfactory reply. There have lately been some cases of arrest of locally recruited officials on the premises of the ILO office in Addis Ababa. ILO has referred the matter to the Minister of Foreign Affairs, drawing attention to the provisions of the Agreement concerning the ILO regional office in Ethiopia. WHO has also reported violations of its premises in some of its field offices. In Rio de Janeiro, in the zone office of the WHO regional office for the Americas and in the Pan American Foot-and-Mouth Disease Centre, difficulties arose in connection with claims made, under local labour laws, by locally recruited staff, which had repercussions on the jurisdictional immunity of WHO and the inviolability of its premises and property. The difficulties were resolved to the satisfaction of the organization through negotiations involving the good offices of the Ministry of Foreign Affairs of Brazil.

62. As to the authority of the specialized agencies and IAEA to adopt regulations superseding municipal law within their premises, FAO points out that, under section 6 (a) of its Headquarters Agreement, the Italian

Government recognizes the extraterritoriality of the "headquarters seat", "which shall be under the control and authority of FAO". Section 6 (b) provides that, "except as otherwise provided in this agreement", the laws of the Italian Republic apply within the headquarters seat, and section 6 (c) provides that the Italian courts have jurisdiction over acts done and transactions taking place at the headquarters seat. These provisions ensure that the extraterritoriality of the headquarters seat does not lead to private acts and transactions performed there being in what might be termed a legal vacuum. FAO considers that it has exclusive authority to regulate all matters within its competence, namely, matters connected with the carrying out of its purposes and functions. Under article 5, paragraph 2, of the UNESCO Headquarters Agreement, the organization has the right to make internal regulations applicable throughout its headquarters premises in order to enable it to carry out its work. The Staff Regulations and Staff Rules of the organization, in particular, have been drafted in conformity with this provision.

63. WHO reports that municipal law is not applicable on its premises and that it has the right to adopt regulations applicable thereto. Such regulations have been adopted in connection with parking in the WHO headquarters underground garages and in connection with security measures for the protection of persons and property in case of fire, flood, earthquake and loss and theft of property. It is pointed out, however, that Swiss municipal law has been taken into account in formulating certain regulations, such as fire regulations.

64. Although IAEA is not empowered to adopt regulations superseding municipal law, section 8 (a) of its Headquarters Agreement authorizes it "to make regulations, operative within the headquarters seat, for the purpose of establishing therein any conditions necessary for the full execution of its functions". The effect of such regulations is to exclude the application, within the headquarters seat, of any Austrian laws inconsistent therewith, and their texts are to be notified to the Government from time to time.

65. Other specialized agencies report that they do not have such a right and that it has not been contemplated. IMF adds that it does not have such a right, except with regard to the adoption of administrative and personnel regulations.

#### **Section 10. Immunity of the property and assets of the specialized agencies and of IAEA from search and from any other form of interference**

66. Only one case has been reported involving difficulty with recognition of the immunity of a specialized agency's property and assets from search and from any other form of interference. A problem arose in 1976 when a consignment purchased by WHO for assistance to a member State was sold by the customs authorities in Kenya. WHO initiated consultations, which are continuing, to recover the value of the consignment with the authorities of the State concerned.

### Section 11. Name and emblem of the specialized agencies and of IAEA: United Nations flag

67. In connection with the display or use by the specialized agencies and IAEA of the flag, official emblem or seal of their own organization, of the United Nations or of a member State, no major problems are reported to have arisen. Minor problems are reported to have arisen from time to time by FAO regarding the appropriate place on which to display the United Nations flag on FAO vessels. In the case of WHO, doubts arose on one occasion as to the circumstances in which the WHO flag should be flown at half-mast. Such issues have not given rise to difficulties.

68. Certain agencies have had occasion to protect their name, emblem or flag from unauthorized use, through adoption of resolutions, codes or other measures. WIPO, for instance, has done so in accordance with the Paris Convention for the Protection of Industrial Property (Stockholm, 14 July 1967).<sup>18</sup> ILO has brought such measures to the attention of certain States in order to avoid the unauthorized use of its name, and it reports that the competent authorities in the countries concerned have always lent their support. No legal proceedings have been necessary. Problems have arisen involving the unauthorized use of the name and official emblem of WHO by firms (mostly pharmaceutical) in connection with their publicity or promotional material for their products. The practice of WHO in such cases is to write to such firms requesting them to desist from any such use, and in the great majority of cases the firms have complied with such requests. UPU has been obliged to intervene on numerous occasions to prevent the misuse of its name, emblem or flag for philatelic or commercial purposes. IMF recently filed an opposition to a trademark application in Canada in which the applicant sought to register the abbreviation "IMF". IMF has also asserted against private parties its exclusive entitlement to the use of the name "International Monetary Fund". On occasion, IFC has taken steps relating to the use of the initials "IFC" by others.

### Section 12. Inviolability of archives and documents

69. No controversies regarding recognition of the inviolability of the archives and documents of the specialized agencies and of IAEA have been reported. IMF, however, notes that its staff members on mission carry an IMF briefcase for papers and documents. On a few occasions, customs officials have insisted on searching the briefcase even when informed of the inviolability of the organization's archives, and documents including codes have been examined. No documents, however, have been confiscated. IMF has protested these actions, and assurances have been received that such incidents would be avoided. Similarly, there have been some incidents of interference with IMF documents sent by private courier.

<sup>18</sup> United Nations, *Treaty Series*, vol. 828, p. 305.

### Section 13. Immunity from currency controls

70. Most of the specialized agencies and IAEA have encountered no legal problems regarding immunity from currency controls. In 1965, ILO informed the Government of Brazil that its office in Brazil should, by virtue of section 7 of the specialized agencies Convention, be exempt from a tax of 1 per cent on all exchange operations to which it had been subjected. The exemption was obtained. In 1979 and the following years, representations were made to the authorities in Ethiopia by agencies operating in the country (including ILO) concerning restrictive exchange laws.

71. Each investment agreement entered into by IFC requires that arrangements satisfactory to IFC be made for the remission to IFC or its assigns of all monies payable in respect of the investment. Particular agreements have been made between IFC and States with regard to repatriation rights and privileges in respect of investments made, or caused to be made, by IFC in enterprises in the States concerned. Problems have been encountered in India, Nigeria, Zaire and Zambia, where the receipt by IFC of dividends usually takes several months due to a shortage of foreign exchange. In Peru, there is delay, from time to time, in the repatriation of dividends in excess of varying stated percentages of the funds invested. In Brazil, interim dividends may not be repatriated until the company declaring the dividend closes its books for its fiscal year and its accounts are audited. Such interim dividends are invested in treasury bills. Interest on such investments may be repatriated with the approval of the central bank of the State concerned. Since 1978, similar problems have continued to arise from time to time. The specifics of each case have not been indicated by IFC in light of the rapidly evolving foreign exchange situation of many of the countries in respect of which such problems have arisen. IFC notes, however, that it must be borne in mind that paragraph 2 of annex XIII, relating to IFC, of the specialized agencies Convention,<sup>19</sup> provides that subsection 7 (b) thereof, concerning transfers of funds, gold or currency, shall apply to IFC subject to article III, section 5, of the IFC Articles of Agreement.

### Section 14. Direct taxes<sup>20</sup>

72. Few controversies appear to have arisen concerning the immunity of the specialized agencies and IAEA from direct taxes, and when such controversies have arisen, they have normally been resolved satisfactorily. For example, income from FAO investments has sometimes been taxed, but the amounts withheld have been refunded. In addition, FAO reports that the Peruvian Government had imposed a tax on air fares and sojourn abroad with respect to residents of Peru, with no exception being made for residents travelling on behalf of the United Nations or its specialized agencies. The matter was taken up by UNDP and as a result exemption from the tax has now been accorded in the case of travel for the United Nations or its specialized agencies.

<sup>19</sup> *Ibid.*, vol. 327, p. 326.

<sup>20</sup> See also sections 17 and 24 below.

In the case of WHO, a controversy arose in its Regional Office for South-East Asia when the Indian Government, in October 1971, imposed a tax on all international travel for which the fare was paid or was payable in local currency, as well as a tax on internal travel. WHO claimed exemption from these taxes by virtue of its local agreement with the Government of the host country. With regard to the tax on international travel, WHO obviated the difficulty by purchasing tickets in foreign currency, but it had to pay the other tax pending the conclusion of negotiations. After prolonged correspondence between WHO and the Indian authorities, the latter decided, in May 1972, to exempt the organization from these taxes. WHO claimed reimbursement of the taxes it had had to pay on internal travel and, after some correspondence, it obtained satisfaction.

73. WHO also states that a controversy arose in 1975 when the organization was required to pay certain taxes in Italy on the sale of a villa that had been bequeathed to it. The matter is still under negotiation with the Italian authorities. In 1975, a request for refund of stamp duty paid on the lease of the ILO Branch Office in London received a negative reply from the British Government on the grounds that exemption from such duty was not provided for in the specialized agencies Convention.

74. As provided in section 9 (a) of the specialized agencies Convention, the specialized agencies pay taxes corresponding to "charges for public utility services". Questions have arisen regarding the interpretation of that phrase. In 1966, the ILO Area Office in Beirut was requested to pay municipal taxes, *inter alia*, on telephone and electricity bills, as well as taxes on air tickets bought in the country. Discussions were held between UNRWA, on behalf of all United Nations agencies operating in the country, and the Lebanese Government. ILO reports that United Nations agencies seem to have been subsequently exempted from most of these taxes.

75. In 1975, the city of Bern requested UPU to contribute to the financing of the construction of a road adjacent to the land on which the present headquarters of UPU stands. This request was based on a practice whereby, in certain cases, the residents concerned participated in the cost of building a road. UPU claimed exemption under its Headquarters Agreement and the general practice followed at the headquarters of the other specialized agencies of the United Nations. Switzerland maintained its position, referring to longstanding practice in the country with respect to such contributions and to Swiss legal theory, and did not agree that the contribution represented a tax from which UPU was exempt under its Headquarters Agreement. In its view, what was involved was not a tax but a "preferential charge" (*charge de préférence, Vorzuglasten*), comparable to the utility charges for water, electricity, gas, etc. UPU questioned such a view in a letter dated 27 January 1977, which was accompanied by an opinion by the United Nations Legal Counsel. There have been no further developments in the matter.

76. ILO reports three cases arising in the host country. An annual autoroute tax came into effect in Switzerland in 1985. The Swiss Government decided that there would be no immunity from payment for residents en-

joying financial privileges and immunities on the grounds that the tax was in the nature of a payment for services rendered. No disagreement with this view was expressed by United Nations agencies in Geneva, including ILO. In 1981/82, the Geneva authorities required a university tax to be paid by international officials whose child or spouse attended the University of Geneva. For these purposes, officials were treated in the same way as Swiss citizens domiciled in a canton other than Geneva and subjected to a more modest tax than that applying to other non-Swiss residents. The Swiss authorities took the view that this was in effect a charge for services rendered and, while the United Nations agencies, including ILO, did not fully accept this view, they did not challenge the decision in view of the small amount involved and as a gesture of goodwill towards the University of Geneva. In 1983, payment of a similar tax was required, after non-collection of the tax from international officials for many years, for secondary schools in Geneva, except in the case of nationals of countries with reciprocal exemption agreements with Switzerland. The Swiss Government justified the tax as a charge for services rendered. United Nations agencies, including ILO, expressed serious reservations as to the charge, which was not however withdrawn.

## Section 15. Customs duties

### (a) Imports and exports by the specialized agencies and by IAEA "for their official use"

77. The question whether a given item has been imported or exported "for . . . official use" has rarely given rise to difficulties. Where difficulties have arisen, they have usually been resolved by communication with the appropriate officials. WHO reports that the customs authorities in the United Kingdom refused to allow a consignment addressed to it to enter the country without an attestation that the consignment was the property of WHO and intended for use in connection with the functions of the organization. The attestation was provided and the consignment was allowed to enter the country. ILO reports that, in a case involving machinery purchased with funds provided by a private foundation for use at a Turkish institution beneficiary of a project of which the ILO was executing agency, it was considered that the element of official use was absent and that there were no grounds for exemption.

78. FAO states that in early 1982 the Ministry of Finance of the host country, Italy, initiated the practice of issuance of import licences, which affected equipment and materials required for FAO purposes. The Ministry interpreted the relevant section of the FAO Headquarters Agreement in such a manner as to justify the Government's making a determination in each case whether the equipment and materials imported by FAO were for official use and the quantities reasonable. Such a procedure implied the right of the Government to deny duty-free importation of equipment and material. Although in no case has an import licence been categorically refused, inordinate delays have been experienced which in some cases have caused extra costs to FAO in the form of demurrage or the necessity to buy supplies locally at higher prices. The matter was the sub-

ject of discussion at the eighty-sixth session of the FAO Council, in November 1984. At that time the representative of the host country stated that his Government recognized that the organization was entitled, in accordance with the relevant section of the Headquarters Agreement, to import and export all the equipment and materials it required for official purposes without limitation as to quantity or nature, and that further efforts were being made to convince the Ministry of Finance to accept this interpretation. It would appear that the problem is now in the process of resolution.

(b) *Imposition of customs duties, prohibitions and restrictions*

79. As a general rule, customs duties, prohibitions and restrictions have not been imposed on official imports and exports. In one case involving FAO, a Government placed restrictions on the importation and transportation of ammunition for harpoon guns. FAO took no action in the matter, considering the restrictions to be reasonable as normal security measures for the control of explosives.

80. Most specialized agencies and IAEA have found it unnecessary to enter into any standard arrangements with respect to non-imposition or automatic refund of customs duties.

81. The practice of WHO, however, has been to include in all host agreements provisions granting to the organization complete exemption from customs, statistical and similar duties on all goods for its official use, imported or exported. Where customs duties are levied in the form of purchase or turnover taxes, these are reimbursed to WHO under administrative arrangements concluded with the States concerned.

82. For all materials imported by UPU, arrangements have been made for formalities to take place at Bern, with reception at the frontier. This procedure was also followed for the import of certain materials used for the construction of the building which now houses the headquarters of UPU.

83. IBRD, IDA and IFC have occasionally made requests for refunds of customs duties and have successfully secured them. Similarly, in the case of IAEA, if customs duties should be charged by error, refund is secured within a period of approximately six weeks. However, no refund is possible regarding customs duties which have already been paid by the importer. FAO has taken no action in cases where there was a possibility that the purchase price of equipment procured in the field from local suppliers included import duties.

(c) *Sales of articles imported by the specialized agencies and by IAEA*

84. Some specialized agencies, such as IBRD, IDA and IFC, have on occasion made arrangements with Governments on an *ad hoc* basis regarding sales of imported articles. In the case of FAO, in the execution of field projects, imported equipment is sometimes sold within a country, also under an *ad hoc* arrangement with the Government concerned. Expendable goods—such as food aid provided by WFP, or fer-

tilizers supplied under the FAO International Fertilizer Supply Scheme—are sometimes supplied to Governments as grants, but with a view to sale. The agreements concerned normally provide that the Government concerned shall grant exemption from, or bear the cost of, any customs duties, levies and charges on such commodities and that the proceeds from sales shall be deposited in a special account, to be used for a related development activity to be agreed between the Government and FAO.

85. Some agencies, however, have made standing arrangements with Governments for the resale of imported items under certain agreed conditions. The practice followed by WHO is that, in the case of the import of articles, whether for official use or otherwise, customs exemption is subject to an understanding that articles imported under customs franchise will not be sold in the country into which they were imported except under conditions agreed with the Government of the country. In all WHO offices, arrangements have been made concerning the resale of articles imported duty free, whether by WHO or its staff members. No difficulties have been encountered except in the WHO Regional Office for Western Asia, in the Philippines, where in two cases staff members had to pay customs duties on cars that had been imported duty free but had been sold three years later, in accordance with the relevant section of the agreement with the host country. It was considered that, by requiring payment of these duties, the authorities of the host country were departing from the practice followed in that regional office since the conclusion of the agreement. The matter is still pending.

86. The standing arrangement of ICAO with the host country, Canada, in regard to sales of imported articles is incorporated in its Headquarters Agreement. Section 7 of that Agreement reads:

When goods are purchased under appropriate certificates from manufacturers or wholesalers who are licensed under the Excise Tax Act, the organization should be eligible to claim for the remission or refund of the excise tax and/or consumption or sales tax for goods imported or purchased in Canada for the official use of the organization as a body, provided, however, that any article which is exempted from these taxes, other than publications of the organization, shall be subject thereto at existing rates if sold or otherwise disposed of within a period of one year from the date of purchase, and the vendor shall be liable for such tax.

87. IAEA has entered into an arrangement with Austria allowing duty-free disposal of goods imported by the agency two years after their import. This two-year period also applies to automobiles. IAEA has also made arrangements with Italy in connection with the International Centre for Theoretical Physics at Trieste, whereby automobiles may be sold free of tax after four years.

## Section 16. Publications

88. Most of the specialized agencies and IAEA have encountered no problems as to the interpretation of the term "publications". The term has in practice been understood to include films, photographs, prints and recordings (prepared as part of an organization's public information programme and exported or imported for

exhibition or broadcasting), as well as books, periodicals and other printed material. Since the exemption accorded in respect of publications is an exemption from customs duties, prohibitions and restrictions, no import or export licences have been required. However, in some cases it is required that customs clearance forms accompany the material.

89. The FAO Headquarters Agreement contains a provision similar to that in section 19 (b) of the specialized agencies Convention, but with the explanation, in section 19 (c) of the Agreement, that the term "articles" includes "publications, still and moving pictures, and film and sound recordings". Similar provisions are included in FAO regional office agreements. FAO reports that, while no controversies have arisen concerning the scope of the term "publications", it has encountered difficulties in the application of the relevant provisions and also of the UNESCO Agreement for Facilitating the Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character.<sup>21</sup> For example, some countries impose import duties on the organization's publications and documents, and the circulation of books, film strips and microfiches is sometimes hampered by restrictions or by long delays in customs clearance.

90. IBRD and IDA state that there have sometimes been difficulties with regard to the requirement that customs clearance forms should accompany materials in transit. The difficulties that have arisen relate to films, especially at the United States-Canadian border, where officials do not always act uniformly. Some prints have been lost while crossing international borders. This is thought to be due to the fact that authorities at certain ports of entry have been instructed to keep film from entering and they fail to discriminate between IBRD film, which is immune, and other types of film which are not.

91. In connection with the dispatch and receipt of films, FAO states that, with the exception of those forwarded by FAO pouch, films are covered by a blanket export/import permit which has to be reissued to the organization each year by the host country. Exhibits sent outside the host country, however, are subject to specific permits.

#### **Section 17. Excise duties and taxes on sales; important purchases**

##### *(a) Excise duties and taxes on sales forming part of the price to be paid*

92. Section 10 of the specialized agencies Convention provides that the specialized agencies will not, as a general rule, claim exemption "from excise duties and from taxes on the sale of movable and immovable property, which form part of the price to be paid". The words "excise duties" and "taxes" are deemed to include turnover taxes, designated differently in various States but often known as VAT. A number of agencies report that the terms of their respective headquarters agreements contain different language, often providing

for exemptions broader than those envisaged in section 10 of the Convention. IMF has claimed exemption from payment of manufacturer's excise taxes, stamp taxes, recording taxes, air ticket taxes and head taxes, as well as sales taxes.

93. The experience of FAO has been that the interpretation of the terms "excise duties and . . . taxes . . . which form part of the price to be paid", in section 10 of the specialized agencies Convention, varies from country to country. No uniform definition or interpretation has so far been devised or applied. The provisions of sections 19 (b) of the FAO Headquarters Agreement are fairly comprehensive. They read:

Regarding indirect taxes, levies and duties on operations and transactions, FAO shall enjoy the same exemptions and facilities as are granted to Italian governmental administrations. In particular, but without limitation by reason of this enumeration, FAO shall be exempt from the registration tax (*imposta di registro*); the general receipts tax (*imposta generale sull'entrata*) on wholesale purchases, on contractual services and on tenders for contractual supplies (*prestazioni d'opera, appalti*), on leases of lands and buildings; from the mortgage tax; and from the consumption taxes on electric power for lighting, on gas for lighting and heating, and on building materials.

In 1972, the host country, Italy, introduced VAT to replace the turnover tax. For many years, FAO had unsuccessfully sought exemption from that tax on all transactions in respect of goods and services procured by the organization pursuant to section 19 (b) of the Headquarters Agreement. FAO made a similar claim in 1972, when VAT was introduced. Finally, a decree was issued on 2 July 1975 which, read in conjunction with the basic legislation of 1972, expressly stipulated exemption on all transactions exceeding 100,000 Italian lire. As small purchases of goods and services could be grouped together, FAO decided not to insist on exemption for invoices of less than 100,000 Italian lire.

94. Section 16 (a) of the Agreement regarding the African Regional Office of FAO<sup>22</sup> at Accra, Ghana, contains somewhat different provisions on the subject of exemption from indirect taxes:

FAO shall be exempt from levies and duties on operations and transactions, and from excise duties, sales and luxury taxes and all other indirect taxes when it is making important purchases for official use by FAO of property on which such duties or taxes are normally chargeable. However, FAO will not, as a general rule, claim exemption from excise duties, and from taxes on the sale of movable and immovable property which form part of the price to be paid, and cannot be identified separately from the sale price.

95. ITU pays neither duties nor taxes, but pays the turnover tax included in the price of items purchased. Article 2, paragraph 2, of the Arrangement made for the execution of the Agreement between the Swiss Federal Council and ITU concerning the legal status of the organization in Switzerland<sup>23</sup> provides:

With regard to federal turnover tax, however, whether included in the price or patently transferred, the exemption shall apply only to purchases intended for the Union's official use and provided that the amount invoiced for one and the same purchase exceeds 100 Swiss francs.

96. In section 6 of the UPU Headquarters Agreement, the reference is not to "excise duties and . . . taxes on

<sup>22</sup> See *Report of the FAO Conference, Tenth Session, Rome, 31 October-20 November 1959*, resolution 75/59, annex D.

<sup>23</sup> United Nations, *Juridical Yearbook 1971* (Sales No. E.73.V.1), p. 33.

<sup>21</sup> United Nations, *Treaty Series*, vol. 197, p. 3.

the sale of movable and immovable property which form part of the price to be paid", as in section 10 of the specialized agencies Convention, but instead to "indirect taxes or sales taxes included in the price of movable or immovable property". The application of this provision of the Agreement has not given rise to difficulties. It has been agreed that UPU would not ask for reimbursement of indirect taxes amounting to less than 100 Swiss francs.

97. None of the specialized agencies nor IAEA has encountered difficulties in determining whether or not excise duties and taxes "form part of the price to be paid" on the sale of property. In most cases, such duties and taxes are readily identifiable and are stated separately from the purchase price.

#### (b) Important purchases

98. The question of what constitutes an important purchase for the purposes of section 10 of the specialized agencies Convention has arisen in connection with a number of organizations. In the case of ILO, the amount of what constitutes an important purchase is at present 105 Swiss francs; for IAEA, the minimum total sum of the invoice on which VAT remission may be claimed is 1,000 Austrian schillings, exclusive of VAT.

99. WHO notes that the term "important purchase" is nowhere specifically defined, nor has it acquired any standard and uniform interpretation, although *prima facie* any purchase made by the organization for its official use may be deemed "important". WHO takes the view that what constitutes an "important purchase" can in practice be stated only in monetary terms. In an exchange of letters concerning the interpretation and implementation of the 1955 Headquarters Agreement between WHO and the host country (Denmark) of a regional bureau, the term "minor purchases" was defined as purchases the amount of which did not exceed 200 Danish kroner. By implication, purchases in excess of such a sum are "important", and WHO is thus entitled to remission or return of the amount of duty or tax paid on such purchases. The principle of tax reimbursement also applies in Switzerland in respect of purchases exceeding 100 Swiss francs; in the Congo, where the amount involved may not be less than CFA 10,000; and in France, where purchases entail the collection of a turnover tax of at least 250 French francs. Thus it would seem that purchases made in Switzerland, the Congo and France exceeding the amounts mentioned above constitute "important purchases". An exchange of letters between WHO and the United Kingdom on the application of section 10 of the specialized agencies Convention to goods and services purchased by WHO in the United Kingdom uses the expression "considerable quantities of goods or services" and interprets the expression as goods or services the aggregate cost of which is at least £50 sterling per claim. Applications for refunds will be considered where the aggregate cost exceeds such an amount.

100. For a number of agencies, section 10 of the specialized agencies Convention has not given rise to questions of interpretation. In the case of ICAO, IBRD, IDA, IFC and IMF, no distinction is made as to the

amount of purchases or whether purchases are important or not. FAO and UNESCO report that their host country agreements do not limit exemption from indirect taxation to important purchases.

101. IAEA reports that, in the case of goods delivered for the IAEA commissary, the turnover tax is reimbursed for foodstuffs, alimentary products and tobacco products. Reimbursement of turnover tax for other goods is made only if such goods have been exempted from import duties in accordance with the provisions of its Headquarters Agreement and the relevant supplemental agreements and if appropriate evidence thereof can be furnished.

102. UNESCO notes that the UNESCO commissary is an integral part of the organization's secretariat and is operated under the authority of the Director-General in accordance with the regulations of the commissary and the appropriate procedures established for the various services of the organization. The employees of the commissary are not governed by the organization's staff regulations and consequently are not entitled to the privileges, immunities and facilities accorded to UNESCO staff members under its Headquarters Agreement. The finances of the commissary are governed by the financial regulations of UNESCO and the commissary's own financial regulations and rules. All staff members of UNESCO and all other employees of the organization at headquarters are eligible to participate in and benefit from the facilities of the commissary, subject to payment of a deposit in an amount determined by the Director-General on the recommendation of the general assembly of the commissary. Assimilated personnel, such as retired employees of UNESCO, staff members of the United Nations and the specialized agencies stationed in Paris, or staff members of permanent delegations officially accredited to UNESCO may, at the discretion of the Director-General and subject to payment of the required deposit, be permitted to make purchases at the commissary. At the discretion of the Director-General, temporary permission may be granted to persons temporarily at headquarters such as field staff members, consultants and members of delegations to the General Conference. Goods sold at the commissary are not acquired duty free or imported tax free. The commissary is simply a co-operative shop.

103. As noted above (p. 194, para. 93), the Headquarters Agreement between FAO and Italy does not limit exemption from indirect taxation to "important" purchases. The FAO commissary, which is part of the organization, was established on the basis of an exchange of letters between the Italian Government and FAO, pursuant to section 27 (j) (ii) of the Headquarters Agreement, under which officers of FAO have the right to import, free of duty "through the medium of FAO, reasonable quantities . . . of foodstuffs and other articles for personal use and consumption". The organization is responsible for ensuring the appropriate administration and distribution of the duty-free items provided. The entitlements of the staff are set out in the FAO Administrative Manual. The Government of the host country, Italy, establishes yearly quotas with respect to various categories of foodstuffs and other items on the basis of the number of entitled staff at FAO headquarters.

104. Since the beginning of 1984, FAO has experienced difficulties and delays in the issuance by the Italian Government of duty-free import licences for the benefit of the staff, and there was delay in the issuance of licences for 1984. It was stated, moreover, that, after 1 January 1985, FAO staff members of Italian nationality would no longer be granted the duty-free import privileges that had been extended to them, at the initiative of the host Government, since 1971. The duty-free privileges accorded to non-Italian staff, especially in respect of tobacco, alcoholic beverages and petrol, were also called into doubt. As a result of the withdrawal or reduction of these privileges, FAO would incur extra costs in the form of upward adjustments of staff remuneration, since some duty-free privileges are taken into account in the calculation of such remuneration. The FAO Council, at its eighty-sixth session, in November 1984, expressed concern about the matter, particularly with regard to the additional costs to all member States if the privileges accorded to FAO staff and taken into account in establishing the levels of staff remuneration were reduced, and opposed reduction of the privileges accorded to non-Italian staff since the organization's transfer to Rome in 1951. The Council urged the Italian Government to take into consideration the financial and other implications of any reduction of privileges on the FAO budget and the considerable benefits to the local economy deriving from the presence of the organization in Italy. The Council unanimously adopted resolution 4/86 to that effect.<sup>24</sup> As of this date, the Italian Government has not withdrawn the duty-free privileges accorded to FAO officials of Italian nationality, and the import quotas for various items are currently under discussion.

(c) *Remission or return of taxes paid*

105. The specialized agencies and IAEA have made administrative arrangements with most of the States in which they are active for the remission or return of the amount of duties not payable. Except for occasional delay in the receipt of such remission or return, these administrative arrangements appear to work satisfactorily. Some examples are given below.

106. In 1974, the ILO Branch Office in Brussels was transformed into a Liaison Office with the European Communities and the BENELUX countries. Treatment in regard to exemption from VAT is the same as that formerly accorded to the Branch Office. The amount of tax is deducted directly by suppliers from all invoices except those for stationery and office supplies amounting to less than 5,000 Belgian francs. Although France is not party to annex I of the specialized agencies Convention, concerning ILO, in accordance with a decision by the Ministry of Foreign Affairs (March 1967), the Paris Branch Office of ILO obtains reimbursement of VAT paid on all purchases of goods and services except those relating to the construction and maintenance of premises, provided that the tax amounts to 250 French francs or more.

107. WHO has made administrative arrangements, in the form of an exchange of letters, with the Swiss auth-

orities under which the Federal Tax Administration reimburses the organization the sums levied as taxes on purchases exceeding 100 Swiss francs made by the organization for its official use. To facilitate implementation of the arrangements, statements serving as a basis for reimbursement are submitted periodically (every month or at longer intervals) to the Swiss federal tax authorities.

108. ITU submits a half-yearly statement, including a copy of all invoices of purchases exceeding 100 Swiss francs, to the Swiss federal tax authorities for remission of taxes paid. No difficulties have arisen concerning this arrangement.

109. IAEA has made administrative arrangements with the Government of the host country, Austria, to submit every six months a list of invoices paid by the organization and for which a claim for refund of turnover tax is made. The arrangements work satisfactorily, although sometimes with delay.

110. IBRD, IDA and IFC report that, except in Belgium, where they have been granted full exemption from payment of VAT, they have made administrative arrangements with member States under which they pay the tax but are reimbursed upon presentation of the relevant invoices to the appropriate authorities.

111. IMF notes that no special arrangements in this regard have been made and that it has encountered only occasional problems, principally with taxes on air transportation tickets.

112. The UNESCO Headquarters Agreement provides for the exemption of the organization from indirect taxes which form part of the cost of goods sold and services rendered. Prior to 1967, regardless of the importance of the purchase or transaction and of the provisions of the Headquarters Agreement, the exemption was obtained not by later reimbursement of the tax levied but at the time of the purchase or transaction, when the supplier was authorized upon receipt of a written declaration from the organization to exempt the sale or transaction from domestic taxes. This procedure had been set out in an exchange of letters and had produced excellent results. In 1967, however, the Government of the host country, France, decided to change this procedure, but without questioning the terms of the agreement whereby the organization received a reimbursement of the turnover taxes for all purchases, remuneration of services or transactions effected for its official use; in particular, for construction work and improvements at headquarters. In July 1967, following a decision of the UNESCO Executive Board and an exchange of letters constituting an agreement, an arrangement was established whereby the organization would be reimbursed for all indirect taxes concerning transactions undertaken for its official use which formed part of the cost of goods sold to it, services rendered to it and transactions involving movable or immovable property, including construction work. For this purpose, UNESCO sends to the Ministry of Foreign Affairs each month a request for reimbursement of tax, enclosing the suppliers' invoices relating to expenditure incurred during the preceding month and a statement of the expenditure. Each month, the Ministry of Economy and Finance makes an advance to the organization in

<sup>24</sup> FAO, *Report of the Council of FAO, Eighty-sixth Session, Rome 19-30 November 1984*, para. 206.

anticipation of the amount of such taxes. This advance is reconciled each month with the amount actually spent. Thus the arrangement currently in force may be

considered as tax exemption by reimbursement of the amounts levied, in which the reimbursement is effectively made before the expenditure is incurred.

### CHAPTER III

#### Privileges and immunities of the specialized agencies and of the International Atomic Energy Agency in respect of communication facilities

##### Section 18. Treatment equal to that accorded to Governments in respect of mails, telegrams and other communications

113. For the most part, the specialized agencies have reported no particular difficulties in the application of section 11 of the specialized agencies Convention, which provides that the agencies shall enjoy treatment equal to that accorded to Governments in respect of mails, telegrams and other communications. As regards telegrams and telephone calls, however, the discrepancy subsists between section 11 and annex IX of the Convention, relating to the International Telecommunication Union, which does not provide for such equal treatment.<sup>25</sup> As of 1 June 1985, eight Governments had declared their inability to comply fully with the provisions of section 11 until such time as all other Governments had decided to co-operate in granting such treatment to the agencies.<sup>26</sup>

114. The ITU Plenipotentiary Conference held in Nairobi in 1982 adopted resolution No. 40 entitled "Possible revision of article IV, section 11, of the Convention on the Privileges and Immunities of the Specialized Agencies".<sup>27</sup> By that resolution, the ITU Plenipotentiary Conference of 1982 resolved *inter alia* to confirm the decisions of the Plenipotentiary Conferences of Buenos Aires (1952), Geneva (1959), Montreux (1965) and Malaga-Torremolinos (1973) not to include the heads of the specialized agencies among the authorities listed in annex 2 of the International Telecommunication Convention<sup>28</sup> as entitled to send government telegrams or to request government telephone calls, and expressed the hope "that the United Nations will agree to reconsider the matter and, bearing in mind the above decision, will make the necessary amendment to article IV, section 11, of the Convention on the Privileges and Immunities of the Specialized Agencies". The Plenipotentiary Conference instructed the ITU Administrative Council to take the necessary steps with the appropriate organs of the United Nations with a view to reaching a satisfactory solution.

115. IBRD, IDA and IFC report that difficulties have sometimes been encountered when claiming preferential

cable rates. As this might have been due to lack of adequate identification, for several years after 1965 IBRD issued credit/identification cards to staff members going on mission. This proved to be administratively unworkable and was discontinued. It should be noted that, in States not parties to the specialized agencies Convention but parties to the Articles of Agreements of IBRD, IDA and IFC, the relevant provisions of the respective Articles of Agreement apply.

##### Section 19. Use of codes and dispatch of correspondence by courier or in bags

116. None of the specialized agencies nor IAEA reports having experienced any problem concerning the interpretation of the terms "correspondence" and "other official communications" appearing in the first paragraph of section 12 of the specialized agencies Convention. The specialized agencies and IAEA also state that they are not aware of any censorship by State authorities being applied to their official correspondence and communications.

117. Generally, recognition has always been given to the rights and related immunities and privileges referred to in the second paragraph of section 12 of the specialized agencies Convention, namely, "the right to use codes and to dispatch and receive correspondence by courier on in sealed bags, which shall have the same immunities and privileges as diplomatic couriers and bags". FAO, however, reports that in one case a Government refused to recognize diplomatic immunity with respect to the FAO pouch. The matter was later resolved following intervention by UNDP. IMF states that it has taken measures to ensure that its property, correspondence, etc. are clearly identifiable as pertaining to the Fund, together with a clearly displayed statement of the Fund's privileges and immunities under its Articles of Agreement.

118. Most specialized agencies and IAEA have not formally adopted "appropriate security arrangements" as envisaged in the third paragraph of section 12 of the Convention. In accordance with airport security regulations, FAO pouches arriving from certain points have been subject to X-ray examination.

119. A number of WHO agreements, however, are subject to the condition that they shall not derogate from or abridge the right of the Government of the host country to take the precautions necessary to protect the security of the State. State authorities are none the less

<sup>25</sup> United Nations, *Treaty Series*, vol. 79, p. 326.

<sup>26</sup> *Multilateral Treaties deposited with the Secretary-General* . . . (see p. 184, footnote 5 above) and *Supplement* (Sales No. E.84.V.4), chap. III.2.

<sup>27</sup> ITU, *International Telecommunication Convention, Nairobi, 1982* (Geneva), p. 293.

<sup>28</sup> *Ibid.*, p. 147.

obliged, whenever they deem it necessary to adopt measures for the protection of security, to approach WHO as rapidly as circumstances allow to determine by mutual agreement the measures required to ensure such security. Likewise, WHO is required to collaborate with the authorities of the host countries to avoid any prejudice to security that might be occasioned by the organization's activities.

120. Section 40 of the ICAO Headquarters Agreement provides that nothing in the Agreement "shall be construed as in any way diminishing, abridging, or weakening the right of the Canadian authorities to safeguard the security of Canada, provided the organization shall be immediately informed in the event that the Canadian Government shall find it necessary to take any action against any person enumerated in the Agreement".

## CHAPTER IV

### Privileges and immunities of officials of the specialized agencies and of the International Atomic Energy Agency<sup>29</sup>

#### Section 22. Categories of officials to which the provisions of articles VI and VIII of the Convention on the Privileges and Immunities of the Specialized Agencies apply

121. Most specialized agencies and IAEA send to member States, on a periodic basis, a list of officials to which the provisions of article VI ("Officials") and ar-

ticle VIII (*Laissez-passer*) of the specialized agencies Convention apply. For example, IBRD, IDA and IFC periodically notify the Secretary-General of the United

<sup>29</sup> On 17 December 1980, the General Assembly, on the recommendation of the Fifth Committee, adopted resolution 35/212 entitled "Respect for the privileges and immunities of officials of the United Nations and the specialized agencies". That resolution reads in part:

"The General Assembly,

"...  
"Recalling that, under Article 105 of the Charter, officials of the Organization shall enjoy in the territory of each of its Member States such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization, which is indispensable for the proper discharge of their duties,

"Realizing that staff members of the specialized agencies enjoy similar privileges and immunities,

"Mindful of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 and of the Convention on the Privileges and Immunities of the Specialized Agencies of 21 November 1947,

"Concerned about reports alleging that the privileges and immunities of officials of these organizations have been encroached upon,

"1. Appeals to all Member States to respect the privileges and immunities accorded to officials of the United Nations and the specialized agencies by the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 and by the Convention on the Privileges and Immunities of the Specialized Agencies of 21 November 1947;

"2. Requests the Secretary-General to bring the present resolution to the attention of all organs, organizations and bodies of the United Nations system with the request to furnish information on cases in which there are clear indications that the status of the staff members of such organizations has not been fully respected;

"3. Requests the Secretary-General to submit, on behalf of the Administrative Committee on Co-ordination, a report to the General Assembly containing any cases in which the international status of the staff members of the United Nations or of the specialized agencies has not been fully respected."

On 18 December 1981, the General Assembly, on the recommendation of the Fifth Committee, adopted resolution 36/232 entitled "Respect for the privileges and immunities of officials of the United Nations and the specialized agencies and related organizations". That resolution reads in part:

"The General Assembly,

"...  
"Recalling the Convention on the Privileges and Immunities of the United Nations of 13 February 1946, the Convention on the Privileges and Immunities of the Specialized Agencies of

21 November 1947, the Agreement on the Privileges and Immunities of the International Atomic Energy Agency of 1 July 1959 and the agreements between the United Nations and the specialized agencies and related organizations and the respective host Governments,

"...  
"Noting also the position consistently upheld by the United Nations in the event of the arrest and detention of United Nations-staff members by governmental authorities,

"...  
"Mindful of Article 100 of the Charter of the United Nations, under which each Member State has undertaken to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities,

"Mindful also of the fact that, under the same Article of the Charter, the Secretary-General and the staff shall not, in the performance of their duties, seek or receive instructions from any Government or from any other authority external to the Organization,

"Recalling that the International Court of Justice has held that international organizations have the power and responsibility to protect members of their staff,

"Recalling also the obligations of the staff in the conduct of their duties to observe the laws and regulations of Member States,

"Reaffirming the relevant staff regulations,

"Aware of the absolute necessity that staff members be enabled to discharge their tasks as assigned to them by the Secretary-General without interference on the part of any Member State or any other authority external to the Organization,

"Realizing that staff members of the specialized agencies and related organizations enjoy similar privileges and immunities in accordance with the instruments mentioned in the second preambular paragraph above,

"1. Appeals to any Member State which has placed under arrest or detention a staff member of the United Nations or of a specialized agency or related organization to enable the Secretary-General or the executive head of the organization concerned, in accordance with the rights inherent under the relevant multilateral conventions and bilateral agreements, to visit and converse with the staff member, to apprise himself of the grounds for the arrest or detention, including the main facts and formal charges, to enable him also to assist the staff member in arranging for legal counsel and to recognize the functional immunity of a staff member asserted by the Secretary-General or by the appropriate executive head, in conformity with international law and in accordance with the provisions of the applicable bilateral agreements between the host country and the United Nations or the specialized agency or related organization concerned;

"2. Requests the Secretary-General and the executive heads of the organizations concerned to ensure that the staff observe the obligations incumbent upon them, in accordance with the relevant staff rules and regulations, the Convention on the Privileges and

Nations and the Governments of all States that have acceded to the Convention, each for its own organization, of the categories of officials to which the provisions of articles VI and VIII of the Convention shall apply. Each such list contains the names of all executive directors, alternate executive directors and all officials of each organization. IBRD, IDA and IFC additionally make specific notification to member States in individual cases as required.

122. IMF has a similar practice whereby a list of the members of the Executive Board, officers and staff is sent to States parties to the Convention with a letter of transmittal.

123. ITU sends a list of all staff members on 1 January of each year to the Governments of member States.

124. ICAO and IAEA issue once a year a staff list which is circulated to the Governments of member States.

125. In the case of FAO, upon request, the Government of member States are annually sent computer listings containing the names of their nationals who worked for FAO during the previous year. This information can be furnished more than once a year if requested. In accordance with instructions contained in the FAO Manual, appointments are communicated to certain Governments for information or clearance.

126. UPU transmits to the Department of Foreign Affairs of the Swiss Confederation a list of all new staff members engaged on a permanent or temporary basis.

127. The practice of IAEA is to inform the Government of Austria of every arrival and departure of agency staff immediately.

128. The Twelfth World Health Assembly approved in May 1959, by resolution WHA 12.41,<sup>30</sup> granting of the privileges and immunities referred to in articles VI and VIII of the specialized agencies Convention to all WHO officials, with the exception of those recruited locally and paid at hourly rates. In practice, therefore, WHO officials who enjoy the benefit of these articles of the Convention are those who occupy posts subject to international recruitment and locally recruited staff who are not paid at hourly rates.

Immunities of the United Nations, the Convention on the Privileges and Immunities of the Specialized Agencies and the Agreement on the Privileges and Immunities of the International Atomic Energy Agency;

"3. Requests the Secretary-General to bring the present resolution to the attention of all specialized agencies and related organizations of the United Nations system, with the request that they furnish information to him on cases where there are clear indications that the principles expressed in paragraph 1 above or the status of the staff members of such an organization have not been fully respected;

"4. Requests the Secretary-General to submit to the General Assembly at each regular session, on behalf of the Administrative Committee on Co-ordination, an updated and comprehensive annual report relating to cases in which the Secretary-General or the competent executive head has not been able to exercise fully his responsibility in respect of the protection of staff members of the United Nations or of a specialized agency or related organization in accordance with the multilateral conventions and applicable bilateral agreements with the host country."

<sup>30</sup> WHO, *Handbook of Resolutions and Decisions of the World Health Assembly and the Executive Board*, vol. I, 1948-1972 (Geneva, 1973), p. 356.

129. With regard to technical assistance experts, Governments have for the most part recognized their status as staff members. ILO, however, reports that Indonesia declared by decree, in 1981, that no privileges or immunities might be enjoyed by persons employed on projects financed from funds other than foreign grants. Discussions on the matter are proceeding between the Indonesian Government and the United Nations agencies.

130. When technical assistance is provided by IMF, at the request of Governments of member States, through employment of outside experts on a contractual basis, the Fund requests the Government concerned for written assurance that the expert will be accorded at least the same privileges and immunities as are granted to staff members under the Fund's Articles of Agreement. In some instances, problems have arisen when the Government concerned does not provide such assurance promptly and the programme is thereby delayed.

### Section 23. Immunity of officials in respect of official acts

131. The legal controversies that have arisen concerning the immunity of officials in respect of their official acts have related mainly to the question of what constitutes "acts performed by them in their official capacity", as provided in section 19 (a) of the specialized agencies Convention. In the few cases that have arisen, neither the specialized agencies nor IAEA have accepted or referred to municipal law definitions of "official acts".

132. ILO reports having experienced some problems concerning recognition of immunity for locally recruited personnel in respect of their official acts. One case concerned a motor vehicle accident in Bangladesh involving an ILO driver on official duty. The ILO position was that immunity should be claimed from criminal jurisdiction while ensuring that civil claims would be met. However, the UNDP Resident Representative on the spot considered that such a position would not be appropriate. In that connection, ILO drew attention to the constant practice in Switzerland, where immunity from jurisdiction was always recognized in cases of traffic offences committed in the exercise of official functions.

133. FAO states that one controversy of a legal nature has arisen with respect to section 19 (a) of the Convention. The FAO project manager and another staff member working on a project in Kenya had been summoned to appear as witnesses in criminal proceedings against a person who had been assigned to the project and had been charged with an offence relating to the use of counterpart funds contributed by Governments participating in the project. Since the organization had waived the immunity from legal process of the officials concerned, the controversy between the Government and FAO was one of principle only. It concerned the question whether or not section 19 (a) was applicable. The Government considered that there was no need for it to request a waiver of immunity since the officials were not being required to testify with respect to "acts performed by them in their official capacity". In its opi-

nion, where a privileged person saw a crime being committed, this could not be said to be an act performed by him in the course of his official duties, since it was not part of his official duties to witness the commission of crimes. The organization's position, with which the Legal Counsel of the United Nations concurred, was that immunity from legal process under section 19 (a), which was granted to officials in the interests of the organization and not for the personal benefit of the individuals concerned extended to all forms of legal process which were in any way connected with the performance by an official of his official functions, regardless whether proceedings had been brought against him or against a third party. The Government concerned reserved its position on the organization's understanding of "official acts". In a recent case, two officials of FAO made a special appearance and successfully invoked their immunity before a court of the host country when requested to give evidence concerning the salary of a staff member in a case involving a lease. While not disputing the immunity, the Government subsequently informed the organization of its view that the principle of secrecy should cover acts of the organization other than purely administrative acts relating to payments made to staff members. No request for waiver of immunity was made. FAO also reports that there have been problems arising out of the arrest of staff members where the Government concerned has maintained that the arrest arose out of non-official acts.<sup>31</sup>

134. WHO reports that controversies have arisen in some of its regional offices where staff members have been subject to prosecution or civil suits on grounds determined unilaterally by the authorities of the host country as not connected with the exercise by the staff member concerned of official duties. While WHO would not invoke immunity in circumstances where this would not be justified under the terms of the specialized agencies Convention or of the headquarters agreement, it considers that the organization must be in a position, if appropriate, to invoke immunity in cases where it considers that the staff member was acting in exercise of official duties.

135. UPU reports that, while its officials have generally not encountered difficulties, in 1967 an adviser travelling on home leave with his family was detained and held without valid reason for over three months in a country to which the aircraft in which he was travelling had been re-routed because of atmospheric disturbances. UPU representations to the authorities of the country concerned emphasized that travel on home leave was equivalent to a mission and that the authorities had therefore detained the official and his family illegally.

136. UNESCO reports that one of its senior officials was arrested in his home country and condemned to three years of imprisonment despite several protests and

requests for his release by the Director-General and the Executive Board. The immunity of this official was not waived and no request to that effect was ever addressed to UNESCO.

#### Section 24. Exemption from taxation of salaries and emoluments

137. Some States do not accord staff members of the specialized agencies or IAEA exemption from taxation of salaries and emoluments.

138. Some countries do not exempt locally recruited ILO staff from taxation. In such cases, taxes are paid under protest by the officials concerned and are reimbursed by ILO. The matter has been raised at various times with the Governments concerned, either by ILO or on an inter-organizational basis.

139. In the case of the IFC Regional Mission in the Middle East, based in Cairo, IFC staff assigned from headquarters, Egyptian or foreign, are exempt from taxation of IFC earnings, but not staff appointed locally.

140. As regards FAO, a number of countries have on occasion assessed taxes on the FAO-derived income of their citizens who are deemed to have maintained residence in their countries (e.g. Australia, Canada). Citizens and alien residents of the United States of America are subject to taxation whether or not they actually reside in the United States. There have also been isolated cases where the tax authorities of other countries (Brazil, France, Libyan Arab Jamahiriya, Sudan, Turkey, Uganda, United Republic of Tanzania, Venezuela, Yemen, etc.) have levied taxes on FAO-derived income. FAO-derived income was taken into account in the United Kingdom for determination of tax relief under the Income and Corporation Taxes Act of 1970.<sup>32</sup> Representations were made to the United Kingdom authorities that it was contrary to the specialized agencies Convention to take FAO-derived income into account in any manner for assessment of income tax on other sources of income. It seems that the United Kingdom no longer takes FAO-derived income into account for the purposes of the 1970 Act. There have been certain instances where local Italian authorities have taken FAO-derived income into account in determining the rate of taxation applicable to other sources of income. Representations have been made to the Italian Government, on the grounds that such action is contrary to the provision in the Headquarters Agreement which, in effect, corresponds to section 19 (b) of the specialized agencies Convention. The cases in question have not yet been settled.

141. WHO reports that in States that are parties to the specialized agencies Convention the salaries of WHO officials are exempt from taxation, pursuant to section 19 (b) of the Convention. Where a Government taxes the salary of a WHO official and he is unable to obtain exemption, WHO reimburses the official the amount of the tax if the terms of his appointment provide for such reimbursement. However, in the host country,

<sup>31</sup> Information regarding the arrest of staff members is contained in the annual report of the Secretary-General to the General Assembly in connection with the agenda item entitled "Personnel questions. Respect for the privileges and immunities of officials of the United Nations and the specialized agencies and related organizations". See e.g. the report submitted to the General Assembly at its thirty-ninth session (A/C.5/39/17).

<sup>32</sup> *The Public General Acts, 1970, 1971*, part 1, chap. 10, p. 111.

Switzerland, the authorities have refused to grant exemption to short-term consultants employed by WHO for less than three months. WHO does not therefore reimburse such consultants of Swiss nationality for any taxes paid to the Swiss authorities, whether federal or cantonal.

142. IBRD, IDA and IFC report that a number of member States have not adhered to the relevant provisions of the specialized agencies Convention. In such cases, the relevant provisions of the Articles of Agreement of the agency concerned apply.

143. UPU reports that the tax authorities in certain countries have sought to tax the income of UPU staff members who are nationals of those countries. UPU has in such cases successfully obtained the relevant tax exemptions, but the staff members concerned have had to forego participation in the social security system of their country.

144. ITU states that the United States does not provide for exemption of its citizens from taxation. ITU refunds tax to staff members who are United States nationals and in turn charges the United States Government for the amount in question.

145. UNESCO states that the United States terminated, as of 1 January 1982, an agreement providing for reimbursement of United States income tax levied on salaries and emoluments of United States nationals employed by the organization. Negotiations are under way to conclude a new agreement.

146. IAEA states that Indonesia, the Federal Republic of Germany, the Republic of Korea and Turkey have made reservations concerning the application of the tax exemption clause of the IAEA Agreement on Privileges and Immunities to their nationals when present in their respective countries. The Agency reimburses its staff members for taxes paid, pursuant to its Staff Regulations and Rules. Such reimbursement is subject to the limitations contained in the relevant staff rule. Arrangements have been made with the United States under which United States taxes paid by IAEA staff members of United States nationality on IAEA emoluments are reimbursed by the Agency, which in turn reimburses by the United States.

147. As noted in the present section, certain Governments impose income tax on the salaries and emoluments of their nationals or permanent residents employed as staff members of the specialized agencies or IAEA. In the case of non-nationals, however, Governments as a general rule exempt staff members from payment of such taxes. Staff members may, however, be subject to the payment of other taxes.

148. FAO reports that as a general rule in many countries staff members are not exempt from payment of capital gains taxes, real property taxes, sales taxes and VAT. In the host country, only non-Italian staff members with diplomatic status under the FAO Headquarters Agreement, namely, staff members with the grade P-5 and above, are exempt from payment of VAT on invoices of 100,000 Italian lire or over. Professional non-Italian staff members are exempt from the registration tax on leases. Since 1979, the Italian Government has maintained that non-Italian professional staff

members with non-diplomatic status are not entitled to exemption from the road circulation tax, and government exemption vignettes are no longer issued to such staff members. FAO is of the view that this is inconsistent with the Headquarters Agreement and with a related exchange of letters between FAO and the Italian Government. FAO provides such staff members with a certificate stating that they are exempt from payment of the road circulation tax; notifications of impositions of fines are returned by FAO to the Ministry of Foreign Affairs.

149. UNESCO staff members with the grade P-5 and above who are not French nationals are exempt within the host country from the annual occupiers' tax (*taxe d'habitation*) in respect of their residential premises. They are also in practice exempt from the annual television tax and from value added and sales taxes in respect of certain goods imported by them for their personal use. Apart from these exemptions, and the exemption from direct taxation enjoyed by all staff members irrespective of grade in respect of UNESCO salaries and emoluments, UNESCO staff are usually required to pay all other taxes.

150. UPU staff members with the grade P-5 and above and having diplomatic status are not subject to turnover tax, duties or taxes on liquor and tobacco, and goods imported free of duty. Other non-Swiss staff members are exempt from such duties and taxes on first installation in Switzerland and when transferred. Non-Swiss staff members are also exempt from tax on insurance premiums.

151. IAEA staff members with the grade P-5 and above are exempt, under certain conditions, from VAT.

152. There has been no uniform interpretation of the terms "salaries and emoluments paid to them [staff members] by the specialized agencies" (section 19 (b) of the Convention). ILO considers that the terms include anything of financial value derived from ILO, with the exception of pension benefits.

153. FAO interprets "salaries and emoluments" as including base salary and allowances (family, language, non-resident and rent), plus overtime bonuses and separation payments.

154. The WHO Headquarters Agreement and its related arrangements extend tax exemption to WHO indemnities, capital sums due from the pension fund or any other provident fund, and all WHO indemnities for sickness or accident.

155. The question has arisen at IBRD and IDA whether a pension to a former employee or his beneficiary is an "emolument". IBRD experience provides no comprehensive answer. It is understood that in Austria such pensions are exempt from taxation because they are deemed to fall within the meaning of "salaries and emoluments". The view in the Netherlands is that such pensions are not exempt from taxation and a 1977 Supreme Court decision held that a pension paid by the United Nations Joint Staff Pension Fund to a former official of the International Court of Justice resident in the Netherlands was not exempt from income tax. The Netherlands tax authorities have also held that the pension of a widow of a deceased IBRD staff member was

not exempt from taxation. In the United States, pensions are not considered as a part of the “salaries and emoluments” referred to in article VII, section 9 (b), of the IBRD Articles of Agreements, even in the case of non-nationals who intend to remain in the United States and receive their pensions there.

156. Benefits under the IMF staff retirement plan payable to the estate of a deceased IMF staff member have not been considered as coming under the heading of “salaries and emoluments”. The Executive Board of IMF, under the terms of a 1960 decision, does not consider the United States social security tax as falling within the category of reimbursable taxes on salaries and allowances.

157. UPU considers the term “salaries and emoluments” to include the total sum paid by the Union to staff members in service.

158. IAEA reports that at least one member State considers all benefits paid to a staff member, including tax reimbursement, as taxable emoluments.

159. As to what constitutes “emoluments”, FAO has found that some States give the term a broad interpretation. For example, the United States considers as emoluments paid to a staff member the moving expenses paid by FAO in connection with the appointment, transfer, home leave and repatriation travel of the staff member. India does not consider the honorariums paid to consultants as emoluments but as taxable income. The question has arisen whether lump-sum withdrawals from the United Nations Joint Staff Pension Fund should be considered as emoluments due and received from FAO and, as such, be exempt from taxation. FAO, however, has not yet decided how these withdrawals are to be interpreted. Accordingly, it has not sought tax exemption on such sums, nor does it reimburse taxes paid on them.

160. There is no uniform definition of the types of taxes included under the term “taxation in respect of . . . salaries and emoluments”.

161. ILO staff employed by the ILO London Branch Office, are subject to the national social security scheme and contribute thereto. ILO (like other employers benefiting from immunities) is considered liable for payment of the employer’s contribution, but such liability is not enforced. Non-payment of the employer’s contribution does not diminish the rights of the employee provided the employee’s contribution is paid. In 1973, locally recruited ILO staff in Cairo were obliged to contribute to the national social security scheme. ILO declined to pay the employer’s contribution for its staff, maintaining that the benefits under ILO schemes to which it contributed were equivalent or superior to those provided under the national social security legislation. In Romania, locally recruited ILO staff are subject to the compulsory national social security scheme.

162. ILO reports that, in 1975, the Swiss authorities informed the international organizations with headquarters in Geneva that the reason previously accepted for exemption from AVS (*Assurance vieillesse survivants*) (Old age and survivors insurance), namely, that it was “excessively burdensome”, no longer existed and that they intended to subject officials of international

organizations of Swiss nationality to such insurance. A reply was sent to the Swiss authorities on behalf of all United Nations agencies in Geneva. The matter is still under discussion. As for the application of such insurance to Swiss UPU officials in Bern, UPU reports that, after lengthy negotiations, it was agreed that Swiss staff members would be free to pay or not to pay the insurance. If they chose not to pay, they would be able to rejoin the insurance scheme later if they wished, provided that they did so on a permanent basis and that the contributions due from self-employed persons were paid. ILO reports that questions had arisen earlier (in connection with the imposition of school taxes (1968) and certain communal taxes) as to the imposition of taxes, solely on persons otherwise enjoying immunity from taxation, for services provided free to the population as a whole. ILO took the position that, while taxes corresponding to services should be paid, when such taxes were imposed exclusively on tax-exempt officials they constituted a method of circumventing the general tax exemption provided for in the Headquarters Agreement. As far as school taxes are concerned, however, the relevant provisions imposing such taxes were modified in 1971, putting on an equal footing exempt officials and other persons domiciled in Geneva. For example, WHO notes that, since 1971, its officials living in the canton of Geneva have been exempt from “school taxes”. See however section 14 of part B of the present study.

163. FAO practice in regard to United States nationals who are required to make social security payments is to reimburse them in part (that is, to reimburse the difference between the amount of the contribution required of an official of FAO and the amount that he would have had to pay if he worked for an employer subject to United States taxation). Under FAO rules, States and/or city taxes levied on FAO-derived income are reimbursed only to United States nationals and to non-national residents stationed in the United States. However, exceptions may be made from time to time with respect to Canadian provincial taxes or to State taxes in the United States imposed on United States staff members or on alien residents stationed outside the United States who are regarded as residents of a State on the grounds, for example, of owning property there.

164. ICAO reports that Canadian provincial health taxes are considered as a tax on “salaries and emoluments”.

165. IBRD, IDA and IFC report that federal and State income taxes and social security taxes are considered as taxes on “salaries and emoluments”. IMF does not consider social security taxes as a tax on “salaries and emoluments” but reimburses staff members obliged to pay the tax in the amount of the difference between the amount the staff member pays and the lesser amount he would pay if the employer contributed.

166. Tax exemption for UPU salaries and emoluments covers income tax, social security deductions (old age and survivors’ insurance and disability insurance), the ecclesiastical contribution and the national defence tax.

167. For WHO, taxes levied on salaries and emoluments are the only type of taxes considered as covered by the relevant provision of the specialized

agencies Convention. WHO does not include other types of taxes, such as personal income tax on income not derived from WHO, social security contributions, the ecclesiastical contribution, local taxes and school taxes.

168. In the case of IAEA, the relevant income tax exemption provision covers personal income tax on emoluments paid by the Agency, but no other taxes.

169. ILO and ITU report that in Switzerland the spouses of tax-exempt international officials who are taxable on their own income may either not declare their international income and pay tax essentially as if they were unmarried or declare their international income and pay tax at a rate which takes it into account. The procedure followed in such cases, and in cases of officials having taxable income in addition to their international income, is currently under consideration with the Swiss authorities.

170. FAO reports that certain countries exempt FAO staff members from even filing a tax return, but that in other countries tax returns are filed and are required to show income derived from FAO or to provide evidence of FAO employment and consequent tax exemption.

171. UNESCO reports that, under French law, the salaries of French staff members of international organizations should be taken into account in calculating the rate of tax applicable to the income (including accessory income or professional earnings) of the spouse. Following representations from UNESCO, the French Government ceased to apply this provision to UNESCO. Thus salaries and emoluments of UNESCO staff members, whether of French or other nationality, are not taxed directly or indirectly in France.

172. UPU staff members who are not Swiss nationals are not required to file an income tax return. Staff members of Swiss nationality are required to do so but it is UPU that certifies information as to UPU salaries and emoluments.

173. As regards ICAO, only Canadian staff members have to file federal and provincial income tax returns.

174. IFC reports that occasional difficulties arise in relation to taxation, for example where a staff member is designated by IFC to serve as director of a local development finance company in which IFC has invested and where the local development finance company pays the director's remuneration. That remuneration is due to IFC but, because it is paid to (or through) the individual, municipal law frequently requires the payee to deduct income tax, which must then be subject to a complex reclaim procedure.

175. IBRD, IDA, IFC and IMF report that, in calculating income tax payable, the United Kingdom formerly took into account the remuneration and emoluments received from those agencies in calculating the rate of tax on the income of its nationals, but later decided to exclude from such calculation the remuneration and emoluments received by its nationals who were officials of the United Nations and non-resident in the country. IBRD has requested confirmation that its officials will be accorded similar treatment, but a reply has not yet been received. IMF states that this decision

has not been interpreted to include the Fund. Again with respect to IBRD, the policy of Malaysia is to impose income tax on non-IBRD income at rates fixed by taking into account the amount of non-taxable IBRD income. No effort is currently being made by the Bank to have this policy changed.

176. Concerning the issue of calculation of rate of tax, the Supreme Court of the Netherlands held in 1972<sup>33</sup> that no account should be taken of tax-exempt United Nations salary in determining the rate of tax on the non-exempt income of a United Nations official. The Court of Justice of the European Communities, in a decision of 16 December 1960,<sup>34</sup> held that Community salaries might not be taken into account in determining marginal tax rates.

### Section 25. Immunity from national service obligations

177. WHO reports that staff members other than temporary staff engaged for conference and other short-term service, or temporary consultants, may on application be granted leave of absence to fulfil national service obligations. Such absence, charged to annual leave and thereafter to leave without pay, extends for a period not exceeding one year in the first instance, subject to extension on request. Upon application, within 90 days after release from national service, the staff member is restored to active duty in the organization, usually with the same status as at the time he left for national services. These provisions have so far been made use of only by Swiss nationals. The organization has not had requests for such leave from staff members of other nationalities.

178. UPU states that only Swiss staff members have to fulfil national service obligations. All other staff are exempt while in the employment of the organization. If the dates for national service obligations in respect of officials of Swiss nationality, are not suitable, a request for postponement is addressed to the Swiss authorities. UPU and ITU have prepared a list of officials whom they would wish to have exempted from national service. UPU notes that the Swiss authorities have been increasingly restrictive in the granting of such dispensation, and that currently no Swiss staff member is exempt from national service obligations.

179. FAO states that, at its request, the Italian Government has granted temporary deferment of national service requirements for Italian staff. The organization has not been called upon to take action with respect to staff members of other nationalities.

180. IMF states that, while it has taken no action under section 20 of the specialized agencies Convention, it has adopted a liberal leave policy for individuals responding to national service obligations. IAEA has not compiled a list of officials for exemption from

<sup>33</sup> Netherlands, Supreme Court, "Beslissingen in Belastingzaken", *Nederlandse Belastingrechtspraak* [Fiscal jurisprudence], case No. 25, June 1972, Deventer-Amsterdam, 1972.

<sup>34</sup> Court of Justice of the European Communities, *Reports of cases before the Court* (Luxembourg, 1960), p. 559.

national service obligations. However, special paid leave is granted to staff members who have to serve in Austria. IAEA notes that Luxembourg and Switzerland have made reservations to the relevant provisions of its Headquarters Agreement.

#### **Section 26. Immunity from immigration restrictions and alien registration**

181. ILO reports that in 1968 the Chilean immigration authorities refused admission to an official of the International Labour Office because of his political activities in Chile prior to his service with the Office. On the personal intervention of a high official of the Chilean Government, the official was admitted to the territory on a provisional basis. Shortly thereafter, the Government decided to authorize him to remain in the country on the understanding that it did so out of respect for its international obligations concerning the admission of staff members of the International Labour Office on official mission, but required the official to sign a statement promising strict observance of the requirements of article 1.2 of the Staff Regulations of the Office, namely, that staff members "shall not engage in any political . . . activity".

182. FAO states that since 1965 minor problems have arisen. These have been resolved after consultations. It is reported in this connection that one country withholds immunity with respect to officials' children over the age of 18.

183. WHO states that, so far as can be ascertained, only three cases have been encountered in this regard. The first was in 1965, when the Egyptian Government claimed that non-nationals residing in the country at the time of appointment continued to be subject to alien registration while in the service of WHO. The matter was finally settled to the organization's satisfaction. The second case, which was similar to the first, arose in 1968 but was also settled to the organization's satisfaction. The third case arose in Geneva in 1978, when the son of a staff member of the organization residing away from his parents and who was seeking employment in Geneva was ordered to leave Switzerland by the Swiss authorities. The matter was settled to the satisfaction of WHO when the person concerned took up residence with his parents.

184. UPU notes that in its experience the expression "relatives dependent on them" applies to children and sometimes to others (father, mother, sister, brother) for whom a dependency allowance is payable under the UPU Staff Regulations.

185. IAEA reports that Austria does not impose restrictions on immigration nor does it have a system of alien registration. There exists, however, an obligation on both the lessee and the lessor of an apartment or house to register with the local police whenever residence in Austria is taken up or changed. However, after amendment of the Law of Registration (*Meldegesez*) in 1979, staff of international organizations, including IAEA, holding valid identity cards issued by the Federal Ministry of Foreign Affairs are exempt from such obligation.

#### **Section 27. Exchange facilities**

186. Nearly all the specialized agencies and IAEA state that no problems have arisen under paragraph (d) of section 19 of the specialized agencies Convention concerning exchange facilities. FAO, however, reports that staff members in the field sometimes have difficulties in converting accumulated local currency when leaving a country at the end of an assignment.

187. UNESCO states that, according to the Banque de France, French exchange control is applicable to all natural and legal persons (whatever their nationality) who are resident—as defined under the French exchange control—in one of the countries of the *Zone franc* and that accordingly such persons may have only internal accounts in France. Inasmuch as this requirement would apply to certain UNESCO officials, it could be interpreted as incompatible with article 22 (e) of the UNESCO Headquarters Agreement, which reads:

Officials governed by the provisions of the Staff Regulations of the organization:

. . .

(e) shall, with regard to foreign exchange, be granted the same facilities as are granted to members of diplomatic missions accredited to the Government of the French Republic.

The issue has not yet been resolved with the French authorities.

#### **Section 28. Repatriation facilities in time of international crisis**

188. Most of the specialized agencies and IAEA have had no recourse to the provisions of section 19 (e) of the specialized agencies Convention relating to repatriation facilities in time of international crisis. FAO states that adequate arrangements have been made whenever necessary with host countries for the evacuation of FAO staff and their families, on occasion within the framework of the United Nations emergency evacuation scheme.

189. IMF reports that IMF staff members have on a limited number of occasions of official travel experienced a threat of physical injury because of civil disturbances. Arrangements for possible repatriation have been made on an *ad hoc* basis, at times in co-operation with the host country. In addition, IMF personnel are instructed to follow the advice of the "designated official" of the United Nations.

#### **Section 29. Importation of furniture and effects**

190. No major difficulties have arisen concerning the interpretation of the words "furniture and effects" and "at the time of first taking up their post" in section 19 (f) of the specialized agencies Convention. The term "furniture and effects" has been generally construed to include a car, which may be imported by the staff member within a period of from three to 18 months of arrival, depending on the country concerned. IBRD and IDA state that a limited number of problems have arisen in connection with the importation of cars. In one in-

stance, IBRD decided as a matter of practical policy not to insist on its rights.

191. FAO reports that in one country the phrase "at the time of first taking up their post in the country" has been understood as not applying to non-nationals already residing in the country when appointed to FAO. FAO also reports that the Italian authorities have recognized small motorcycles as part of "effects", while a large motorcycle is considered a substitute for a car.

192. FAO notes that import privileges are generally granted on the understanding that the articles are imported for the personal use of the official and his dependants, and not for gift or sale. FAO staff members who leave Italy for a field assignment of one year or more must request duty-free importation of their personal effects within six months of their re-entry on duty at FAO Headquarters in Rome. Furniture and vehicles imported by FAO officials should be re-exported on transfer or termination of employment. In some cases, arrangements have been made to permit the transfer of property (by gift, loan or sale) to other persons enjoying similar import privileges and/or sale of the articles on the local market subject to payment of import duties (full or reduced rate). Currency conversion, however, is the responsibility of the staff member, in compliance with local regulations.

193. WHO notes that, when a person ceases to be an international official, he automatically ceases to enjoy privileges and immunities under the specialized agencies Convention. On his return to his home country, he is treated like any other national. The question whether furniture and effects imported into a country on such an occasion are subject to taxation depends upon the municipal regulations of the country concerned. IBRD, IDA, IFC and IMF report that no problems have arisen in connection with the removal of effects by a staff member at the end of a tour of duty.

### **Section 30. Diplomatic privileges and immunities of the executive heads and other senior officials of the specialized agencies and of IAEA**

194. The privileges and immunities, exemptions and facilities of the executive heads of specialized agencies and of IAEA have been fully recognized. In the case of UPU, full recognition is granted provided that the executive head, the Director-General, is not of Swiss nationality. A minor problem arose with respect to a request by IMF for a diplomatic parking space at National Airport in Washington D.C. for the Managing Director's car. The request was denied on the grounds that the car provided to the Managing Director did not have diplomatic licence plates.

195. Section 20 of the Agreement on the Privileges and Immunities of IAEA provides that diplomatic privileges and immunities be accorded not only to the Director-General but also to Deputy Directors-General. The United Kingdom has made a reservation concerning that provision with respect to citizens of the United Kingdom and colonies.

196. UPU states that senior officials of UPU not of Swiss nationality are accorded diplomatic privileges and

immunities on the basis of a 1947 decision of the Swiss Federal Council, later confirmed by letter when the present Headquarters Agreement came into force. UPU also notes that a senior Swiss staff member, who because of his nationality does not enjoy the privileges and immunities accorded to other staff members of similar rank, was unable to purchase a car from a third country at the diplomatic price because he did not enjoy diplomatic status in Switzerland.

197. ITU reports that five elected officials (above D-2 level) enjoy the same privileges and immunities as the Executive Head of ITU; and that non-Swiss staff at the P-5 level and above enjoy limited diplomatic privileges.

198. IMF states that many resident representatives, as well as some staff members of IMF offices in Paris and Geneva, have been granted diplomatic privileges as a matter of courtesy.

### **Section 31. Waiver of the privileges and immunities of officials**

199. Most specialized agencies and IAEA state that they have received no requests for waiver of immunity in respect of acts performed or words spoken or written by staff members in their official capacity. FAO reports that in cases of traffic violations FAO would usually accede to requests for waiver of immunity. FAO officials are aware of this policy and usually endeavour to settle fines imposed by police authorities as well as any third-party liability claims without invoking immunity.

200. Where proceedings have been instituted against a third person and an official of WHO is requested to appear as a witness, the organization generally allows a written deposition, which may be used as evidence, but is reluctant to extend the waiver of immunity to appearance in court or to oral examination and cross-examination. The Director-General has exceptionally waived the immunity of staff members involved in proceedings. In such cases, the Director-General was satisfied that such waiver was in the interests of justice and that the interests of the organization would not be adversely affected. WHO notes that the general policy of non-waiver of immunity does not mean that the organization would not, in appropriate cases, be prepared to assume responsibility for compensation in respect of injury or damage caused by a staff member in the exercise of official functions. Governments of countries receiving technical assistance from FAO are generally under the obligation, except in cases of gross negligence or wilful misconduct on the part of the official who caused the injury or damage, to assume responsibility for third-party claims.

201. In the experience of WHO, UNESCO and IAEA, waiver of immunity has generally been sought in respect of private matters, as in questions relating to family law. WHO notes that, as such cases do not engage the official responsibility of the staff member concerned, waiver has always been granted. UNESCO reports that it has granted waiver of immunity in two divorce cases. IAEA, however, on the occasions when it has been requested to waive immunity, has declined to do so.

**Section 32. Co-operation with the authorities of member States to facilitate the proper administration of justice**

202. Most specialized agencies and IAEA report that they have little experience of co-operation with the appropriate authorities of member States to facilitate the proper administration of justice, to secure observance of police regulations, and to prevent the occurrence of abuse in connection with the privileges, immunities and facilities accorded by the specialized agencies Convention.

203. FAO notes that the FAO Staff Regulations provide that privileges and immunities are granted in the interests of the organization and furnish no excuse to staff members for non-performance of their private obligation or failure to observe laws and police regulations. The FAO Manual enumerates types of conduct that may give rise to disciplinary measures, *inter alia* conduct detrimental to the name of the organization, serious violation of any applicable national law, conduct tending to endanger lives or property, and neglect or avoidance of just claims for debts or comparable obligations. Officials are reminded from time to time of their responsibility for enrolment of their domestic staff in the social security system and for the regular payment of contributions thereto. Where the organization has invoked its immunity in the case of orders for disclosure

of information, it requests the staff member concerned to communicate the information required and is prepared to certify the accuracy of information relating to the staff member's salary.

204. WHO and IAEA state that they maintain close liaison with the host country authorities, particularly in cases of violations of traffic regulations. When police reports in such cases are received, they are transmitted to the staff members concerned, whose attention is drawn to their obligations to respect local laws and regulations. IAEA co-operates with the local authorities by directly providing the necessary information, without waiving the immunity of the staff member.

205. IMF has acceded in exceptional cases to court requests for the appearance of staff members to provide evidence on matters connected with their official duties. However, it has refused to recognize court orders summoning the organizations as such to appear in court. IMF has also declined to observe court orders aimed at attaching its funds or requiring it to make deductions from salaries or terminal emoluments of staff members with a view to settling debts that the latter may have contracted. However, the Fund will, in accordance with its Staff Rules, make deductions from staff members' salaries or terminal emoluments and make payments to third parties where indebtedness has been established by a final judgment or is admitted by the staff member.

## CHAPTER V

### **Privileges and immunities of experts on mission for the specialized agencies and the International Atomic Energy Agency and of persons having official business with the specialized agencies and the International Atomic Energy Agency**

**Section 33. Persons falling within the category of experts on mission for the specialized agencies and IAEA**

206. FAO regards the following as "experts" within the meaning of paragraph 2 of annex II to the specialized agencies Convention: (a) experts participating in committees of the organization in their individual capacity; (b) experts not staff members of the organization (in other words, not subject to its staff regulations and rules or responsible to the Director-General) performing services for the organization either on a contractual basis or on the basis of an agreement with a Government or of designation by a governing body; (c) staff of the External Auditor's Office, while on the business of FAO.

207. WHO considers persons appointed in an advisory capacity to the organization or to a Government for temporary periods, and who are not staff members, to be "experts".

208. IAEA considers safeguard inspectors, project examiners and persons other than officials travelling on mission for the Agency to be experts.

209. It should be noted that the annexes to the specialized agencies Convention, each of which concerns a particular agency, do not all contain a reference to the privileges and immunities to be accorded to experts on mission.

**Section 34. Privileges and immunities of experts on mission for the specialized agencies and IAEA**

210. With regard both to the specialized agencies for which the relevant annexes of the specialized agencies Convention make reference to the privileges and immunities to be accorded to experts on mission and to IAEA (article XVI of the IAEA Headquarters Agreement, and article VII of the Agreement on the Privileges and Immunities of IAEA), the granting of privileges and immunities to the experts concerned has raised virtually no problems or difficulties. There have been no cases where waiver of immunity has been requested. WHO states that it would waive the immunity of experts in private matters not related to their official duties, in conformity with its practice concerning staff members. ILO, however, reports that in one case an ILO expert was arrested (see section 42 below).

## CHAPTER VI

United Nations *laissez-passer* and facilities for travel**Section 36. Issue of United Nations *laissez-passer* and their recognition as valid travel documents**

211. The specialized agencies and IAEA state that practice varies from country to country regarding recognition of the *laissez-passer* as a valid travel document. IMF, IBRD, IDA and IFC state that a number of countries which have not adhered to the specialized agencies Convention recognize the *laissez-passer*. IMF and UPU emphasize the usefulness of the *laissez-passer* for the official travel of an official where his national passport is not recognized. Several countries require a national passport in addition to the *laissez-passer* before permitting entry, while others recognize the *laissez-passer* without production of a national passport. FAO notes that visas in *laissez-passer* are accepted.

212. IAEA reports however that, while the *laissez-passer* has been recognized, bilateral agreements between States providing for waiver of visa requirements in the case of their nationals are not applicable to the *laissez-passer*, which does not specify nationality.

**Section 37. Freedom of movement of personnel of the specialized agencies and of IAEA; inapplicability of *persona non grata* doctrine**

213. Difficulties have seldom arisen in the exercise of the right of transit for persons (officials, experts on mission or other persons), other than representatives of States, in connection with the performance of official functions, e.g. attendance at meetings, or travel on mission. FAO reports one difficulty that arose in the case of experts who arrived in a country without visas and were required to remain at the airport until the question could be settled.

214. UNESCO reports one case in which a staff member on mission to the country of which he was a national was prevented from leaving the country. Following a number of representations by the Director-General and the Executive Board to the Government concerned, the staff member was permitted to leave, after a period of more than one year.

215. IBRD states that although several problems (delay or denial of visas, restriction of transit, etc.) have arisen since 1965, these have involved member States not parties to the specialized agencies Convention with respect to the World Bank (annex VI of the Convention).

216. There have been few cases in which officials of the specialized agencies or IAEA have been declared *persona non grata* or in which expulsion proceedings have been initiated. FAO states that on a few occasions it has spontaneously withdrawn an official when difficulties arose in his relations with the national authorities.

217. WHO reports occasions when expulsion proceedings have been taken against officials taking part in

technical projects. In the majority of cases, such action was taken on purely political grounds and was not justified. Where there was a manifestly improper motivation, WHO has requested the official to protest the expulsion proceedings and has assigned the official elsewhere.

218. IAEA states that occasional difficulties have been experienced in obtaining visas for persons of certain nationalities who are required to attend meetings convened by the Agency.

**Section 38. Issue of visas for holders of United Nations *laissez-passer***

219. For the most part, neither the specialized agencies nor IAEA have encountered problems with respect to the speedy issuance of visas. A few problems are reported by some organizations. FAO states that a project in a country was prejudiced by delays in obtaining transit permits in a neighbouring country. IBRD reports substantial delay in one State in obtaining visas for staff members of a certain nationality. ITU has experienced substantial delays in obtaining visas for official travel from certain countries.

220. As a general rule, no charge is made by States for the issue of a visa for a *laissez-passer* or a national passport accompanied by a *laissez-passer*. WHO reports, however, that a number of countries generally impose a charge for visas sought on national passports for official travel, notwithstanding the presentation of a certificate showing the official nature of the travel.

**Section 39. Certificates issued by the specialized agencies and by IAEA**

221. There is no standard definition by the specialized agencies and IAEA of the term "experts" and "other persons" in section 29 of the specialized agencies Convention. FAO issues such certificates to subcontractor personnel employed on field projects, persons employed under special services agreements, and experts "employed on missions" within the meaning of annex II, paragraph 2, of the Convention.

222. WHO considers all persons appointed by WHO in an advisory capacity, and who are not staff members, as within the purview of the terms "expert" and "other persons".

223. IBRD, IDA and IFC employ these terms only with reference to consultants. IMF and UPU use them to refer to technical assistance experts who are engaged on a contractual basis and are not members of the regular staff. ITU uses the terms to refer to subcontractors and individuals employed under special service agreements. IAEA refers to persons attending IAEA advisory group meetings as experts.

224. All the specialized agencies and IAEA report that adequate recognition is usually given to certificates

issues to experts and other persons travelling on the business of these organizations who are not holders of United Nations *laissez-passer*.

**Section 40. Diplomatic facilities for the executive heads and other senior officials of the specialized agencies and of IAEA while travelling on official business**

225. No problems are reported concerning the application of section 30 of the specialized agencies Con-

vention, which provides that executive heads and other senior officials travelling on the United Nations *laissez-passer* on official business are to be accorded the same travel facilities as are accorded to officials of comparable rank in diplomatic missions. UPU notes that only the Director-General's *laissez-passer* is marked "diplomatic", thus giving him the status of ambassador. Other UPU senior officials carrying the red *laissez-passer* (D-2 and above) do not seem to enjoy any greater facilities than staff members carrying the blue *laissez-passer*.

## CHAPTER VII

### Settlement of disputes

**Section 41. Settlement of disputes**

226. The modes of settlement of disputes have in the case of the specialized agencies and IAEA included negotiation, conciliation and arbitration (see p. 182 above, section 1 (b)). FAO has had recourse to arbitration in three cases: once by ICC and twice by an individual arbitrator chosen by the parties. In one of the two latter cases the result was unsatisfactory, since the parties were in dispute as to the interpretation of the arbitrator's findings. FAO is at present endeavouring to reach agreement on the settlement. In general, however, the parties have been satisfied with the fairness of settlements.

227. FAO notes that a problem has arisen in a case brought against it in the host country, Italy, by a parastatal corporation (see p. 187 above, section 7) relating to a lease. FAO informed the Corte di Cassazione that no denial of justice would ensue since the dispute could be settled by arbitration, as provided in the relevant lease. The court, however, considered the standard arbitration clause used in FAO contracts inoperative, since (a) the parties could not by mutual consent extend the organization's immunity as established under international law, nor (b) could they limit the court's jurisdiction pursuant to article 2 of the Italian Code of Civil Procedure. Such limitation could be made only with respect to a contractual dispute between foreigners or between a foreigner and a citizen who was neither resident nor domiciled in Italy. The conclusions of the Corte di Cassazione, in the view of FAO, were inconsistent with a statement on the organization's immunity from legal process and measures of execution in Italy made by the representative of Italy at the eighty-sixth session of the FAO Council, reading in part as follows:

The first point concerns the validity of arbitration clauses (which FAO might include in all the contracts it executes in Italy) aimed at avoiding that any dispute arising from the contract be subjected to the jurisdiction of Italian courts.

This matter was dealt with briefly and incidentally, as an *obiter dictum*, in the 1982 judgment of the Corte di Cassazione. The court stated that the particular arbitration clause contained in the FAO/INPDAI contract (which clause had not even been invoked by FAO) was not valid under Italian law, and that therefore it could not possibly derogate from the jurisdiction of Italian courts.

The matter, however, deserves much more attention. Italy has become a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958).<sup>35</sup> Not only has the said Convention been approved by the Italian Parliament (thus acquiring force of law in Italy), but the Corte di Cassazione has maintained in numerous judgments that arbitration clauses providing for foreign arbitral awards in accordance with the New York Convention do have the power to derogate from the jurisdiction of Italian courts. In practice, therefore, FAO could very well make use of such clauses in the contracts it executes in Italy, and would thus be no longer subjected to Italian courts in any dispute arising from its contracts. It goes without saying, however, that, if the other contractor attempted to ignore the arbitration clause and initiated legal proceedings against FAO before an Italian court, the organization would have to appear before the judge in order to demonstrate to him the existence of a valid arbitration clause; otherwise, the proceedings would continue *in absentia* until the issuance of a final judgment. Under the Italian laws of civil procedure, it is not conceivable that anyone else but FAO should appear before the court to protect its own interests. In particular, the Italian Government could not defend the interests of FAO before a court, but could at most put at the disposal of FAO, with no charge, the Avvocatura dello Stato, which is a body of lawyers by which the Italian State itself is represented and defended in court disputes.<sup>36</sup>

228. WHO has on two occasions settled, by conciliation, disputes that had arisen between it and firms carrying out UNDP-supported projects. The settlements were satisfactory to both parties.

229. IMF states that a small number of disputes have been settled through negotiations to the satisfaction of both parties. IMF has also agreed in its contracts to the submission of disputes to arbitration. One matter of contention is the applicability of section 31 of the specialized agencies Convention to staff members. IMF takes the view that the provision is not applicable.

**Section 42. Settlement of disputes regarding alleged abuses of privileges**

230. A few cases have arisen in respect of alleged abuses of privileges.

231. ILO reports that in Ecuador, in 1971, the apartment of an ILO expert was searched by the army and the

<sup>35</sup> United Nations, *Treaty Series*, vol. 330, p. 3.

<sup>36</sup> See p. 189 above, footnote 17.

expert arrested. No charge, however, was made against the expert, who was promptly released. ILO took the position, transmitted to the Resident Representative to be used in his representations to the Government, that, while it recognized that the immunity of officials was limited to official acts, measures such as search of a residence created a sense of insecurity; ILO experts were often required to meet leaders of labour and co-operative movements and documents in their possession could be the property of the organization and inviolable. ILO considers it highly desirable that problems involving experts be resolved in consultation with the specialized agency concerned, as envisaged in article VII of the specialized agencies Convention.

232. WHO reports a case arising at its Regional Office in the Philippines where an abuse of privileges was alleged and a search warrant obtained from a judge, who ordered the seizure of dutiable items in the baggage of a WHO staff member. The warrant was quashed by the Supreme Court of the Philippines, which held that, if the judge has reason to suspect abuse of diplomatic immunity, he should have forwarded his findings to the Department of Foreign Affairs for action under article VII of the specialized agencies Convention.<sup>37</sup>

233. The instruments of accession to the specialized agencies Convention tendered for deposit by the Governments of Bulgaria, the Byelorussian SSR, Cuba, Czechoslovakia, the German Democratic Republic, Hungary, Mongolia, Poland, Romania, the Ukrainian SSR and the USSR were accompanied by reservations to the effect that these States did not consider themselves bound by sections 24 (concerning settlement of disputes regarding alleged abuses of privileges and immunities) and 32 (concerning reference to the International Court of Justice of differences arising out of the interpretation or application of the Convention).<sup>38</sup> The Government of the United Kingdom has notified the Secretary-General that it is unable to accept certain reservations made by those States because in its view they are not of the kind

<sup>37</sup> See United Nations, *Juridical Yearbook 1972* (Sales No. E.74.V.1), p. 209.

<sup>38</sup> *Multilateral treaties deposited with the Secretary-General . . .* (see p. 184 above, footnote 5) and *Supplement . . .* (p. 197 above, footnote 26).

which intending parties to the Convention have the right to make.

#### **Section 43. Reference to the International Court of Justice of differences arising out of the interpretation of the Convention on the Privileges and Immunities of the Specialized Agencies**

234. There have been no instances of reference of differences relating to the interpretation of the specialized agencies Convention to the International Court of Justice in accordance with section 32 of the Convention.

235. FAO, however, as noted above (p. 187, para. 48 (b)), reports that, in 1985, its governing bodies would consider whether or not the organization should request an advisory opinion from the International Court of Justice on the interpretation of article VIII, sections 16 and 17, of the FAO Headquarters Agreement.

236. UPU notes that the possibility of recourse to the International Court of Justice should not be excluded if the existing differences between the host State and UPU in the case concerning contributions for road construction are not satisfactorily resolved (see p. 191 above, section 14).

237. As noted above (para. 233), the instruments of accession tendered for deposit by 11 States were accompanied by reservations regarding sections 24 and 32 of the specialized agencies Convention. In addition, the instruments of accession tendered by the Governments of China and Indonesia were accompanied by reservations concerning section 32 of the Convention.<sup>39</sup> The United Kingdom Government had notified the Secretary-General that it is unable to accept certain reservations made by these 13 States, for the reasons already noted (*ibid.*). The Netherlands Government has notified the Secretary-General of its opinion that the reservation made by one State to section 32, and similar reservations that other States have made or may make in the future, are incompatible with the objectives and purposes of the Convention. It does not however wish to raise a formal objection to these reservations.

<sup>39</sup> *Ibid.*

## CHAPTER VIII

### **Annexes and final provisions**

#### **Section 44. Annexes to the Convention on the Privileges and Immunities of the Specialized Agencies**

238. No legal controversies appear to have arisen with respect to the provisions of the annexes to the specialized agencies Convention. Most specialized agencies report that the privileges, immunities, exemptions and facilities granted by the pertinent annexes to the Convention have been generally accorded by States that are not parties to an annex. IBRD, IDA and IFC note that the relevant provisions of their Articles of Agreement would apply even where certain member States are not parties to the pertinent annex.

239. As to problems that might arise by reason of States being parties to different revised texts of an annex, FAO and WHO report that no such difficulties or problems have arisen.

#### **Section 45. Supplemental agreements**

240. Some specialized agencies have entered into agreements additional to the specialized agencies Convention. ILO states that many of the agreements relating to ILO offices in the field contain provisions under which the Government of the host country would

grant ILO and its staff privileges and immunities not less favourable than those granted to any other intergovernmental organization and its staff in the country.

241. Agreements between WHO and member States receiving assistance in the framework of technical cooperation extend to subcontractors engaged by WHO a measure of privileges and immunities with respect to jurisdiction, taxation and customs duties.

242. IMF states that it receives assurances from member States requesting technical assistance that they will grant experts the same privileges and immunities as would be granted to staff members. Several countries have granted additional privileges beyond those provided by the specialized agencies Convention.

243. Agreements concerning the status, privileges and immunities of the specialized agencies and of IAEA continue to be included in the United Nations *Juridical Yearbook*.

**Section 46. Accession to the Convention on the Privileges and Immunities of the Specialized Agencies by Member States of the United Nations and by member States of the specialized agencies**

244. As of 1 June 1985, ninety States were parties to the specialized agencies Convention in respect of one or more of the specialized agencies. As noted previously (p. 209, para. 233), the instruments of accession tendered for deposit by eleven States were accompanied by reservations regarding the application of sections 24

and 32, and those tendered for deposit by two States (see p. 209, para. 237, above) were accompanied by reservations regarding the application of section 32. Eight States have made declarations regarding the application of section 11. One State has made a declaration regarding the application of section 3 (b). One State has submitted notification of its inability to accept the reservations made by thirteen States concerning sections 24 and/or 32. Another State has submitted notification to the effect that present and future reservations concerning section 32 are incompatible with the objectives and purposes of the Convention, but that it did not wish to raise a formal objection and did not oppose entry into force of the Convention between itself and the States making such reservations.

245. States that are not parties to the specialized agencies Convention or that have not extended its application to all agencies have for the most part agreed to apply the provisions of the Convention to agencies operating in their territory. Such agreements concern technical assistance projects or conference agreements concluded for meetings held outside established headquarters or offices. In the case of IBRD, IDA, IFC and IMF, if a member State is not a party to the specialized agencies Convention, it is their Articles of Agreement that apply.

246. No cases have been reported of the withdrawal of privileges and immunities previously granted to an organization.

247. The Agreement on the Privileges and Immunities of IAEA, which is open to all 112 Member States of the Agency, had 56 States parties as of 1 June 1985.