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

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

Chapter VI

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

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

COMMERCIAL ISSUES

1. Operations of the United Nations Postal Administration—United Nations Postal Agreements

Memorandum to the Under-Secretary-General of the Office of Internal Oversight Services

Postal administration

1. This is with reference to your memorandum dated 23 October 2002, requesting our advice in connection with the ongoing discussions and analysis of alternative strategies for the United Nations Postal Administration (UNPA) business. Following receipt of your request, my Office also had informal discussions with the Office of Central Support Services and UNPA, which have been taken into account for the preparation of this advice.

2. You informed us that a number of ideas are being considered for enhancing the profitability of UNPA, as well as the option of discontinuing the UNPA service entirely. You state that your discussions and analysis require an understanding as to the possible extent of the legal obligations on the part of the United Nations for United Nations stamps that have been sold if the Organization were to discontinue UNPA operations, i.e. the extent of our possible liability for unmailed stamps. As discussed below, in our view, the Organization would remain liable for the costs associated with any actual usage of such stamps, at least for a period of time following the decision to terminate the operations.

Analysis

3. As you know, UNPA operations are governed by the terms of the Postal Agreements entered into by the United Nations with the Governments of the United States of America (1951), Switzerland (1968) and Aus-

tria (1979). All three Agreements contain provisions dealing, respectively, with the sale of United Nations stamps for the franking of mail and stamps sold by the United Nations for philatelic purposes. All three Agreements provide that the postal stations at the United Nations premises in question shall only sell United Nations stamps, that the United Nations shall provide such stamps to the postal stations free of charge, and that the proceeds of the sales of the stamps are to be retained by the postal authority concerned. In respect of the United Nations stamps sold by the United Nations for philatelic purposes, all three Agreements provide that the United Nations shall retain all revenue derived from such sale. However, the Agreement with the United States of America also provides that, if any stamps sold by the United Nations for philatelic purposes are used as postage on mail, the United Nations must pay the United States of America postal authority the amount equal to the face value of any such stamp so used as postage. Similar provisions exist in the Agreements with Switzerland and Austria.

4. We understand that UNPA has never issued any General Conditions, which would bear on the scope of the liability of the United Nations for unmailed stamps in the event of discontinuation. Also, our preliminary research into the agreements concluded under the auspices of the Universal Postal Union (UPU) setting out the rules applicable to the international postal service failed to reveal any specific rule that would bear on this issue. However, there are situations that have arisen that may provide some guidance, such as in connection with a transition from one currency to another (e.g. 12 countries that have accepted the euro as their common currency) or the cessation of a State (e.g. the German Democratic Republic). The stamps issued by the national postal administrations with national currency denomination became invalid in light of the adoption of the euro as the new common currency. Similarly, in the case of the German Democratic Republic, the stamps previously issued by its former authorities became invalid in light of the reunification with the Federal Republic of Germany. To address these situations, the (national) postal administrations provided for a grace period during which the old stamps would still be recognized in conjunction with the provision of an exchange programme under which the old stamps could be exchanged against new ones. We note that the grace periods offered by the respective national postal administrations differ from country to country.

5. While we note that the reasons for discontinuing the issuance of national stamps and the transitional problems to be addressed by national postal administrations differ from the current situation relating to UNPA, the above examples reflect a general principle that the issuing entity would be entitled to terminate the validity of stamps previously issued, but that the buyer of stamps could also reasonably expect that a purchased stamp can be used for the franking of mail for some period following such termination. In other words, while there would be an obligation on the part of the United Nations to continue to accept responsibility for unmailed

United Nations stamps for a certain period, the Organization would also be entitled to terminate the obligation at the end of that period.

6. In the apparent absence of any specific international rules applicable to the possible scenario addressed in your memorandum, we believe that the standards for the activities of UNPA would need to be determined in accordance with the existing arrangements relating thereto, i.e. the Agreements with the Governments of the United States of America, Switzerland and Austria referred to above. We note that all three Agreements may be terminated by the United Nations by giving written notice "at least twelve (12) months in advance" (see section 8 (iii) of the 1951 Agreement with the United States of America; article 8 (2) of the 1969 Agreement with Switzerland; and article 7 (2) of the 1979 Agreement with Austria). In conjunction with such notice, the United Nations should make it known that all United Nations stamps will become invalid, i.e. could not be used for mailing purposes, following the expiration of the notice period.

7. Provided that there is adequate notice, we believe that the 12 months would be sufficient in order to inform each collector, holder or purchaser of United Nations stamps of the fact that the United Nations would discontinue to issue stamps and to recognize them for the purposes of franking of mail and would, therefore, meet the above-described buyer's reasonable expectation. We are further of the view that the 12 months' notice period would be consistent with the grace period applied by national postal administrations in the cases referred to in paragraph 4 above.

8. As stated in paragraph 3 above, the Postal Agreement with the United States of America provides that, if any stamps issued for philatelic purposes are used as postage on mail, the United Nations shall pay the United States postal authority the amount of the face value of any such stamp so used. Accordingly, if the Organization were to pursue the approach suggested in paragraphs 6 and 7 above and owners, collectors or other holders of United Nations stamps were to decide to use unmailed stamps for mailing purposes, the Organization would have to pay the postal administrations the value of such stamps so used during the 12 months. Since we have no information on how owners, collectors or other holders of United Nations stamps would react to a decision to terminate the validity of United Nations stamps, we are not in a position to assess this risk.

9. Of course, the proposed termination would require cooperation from the three national postal authorities concerned, in particular, in respect of the arrangements necessary for the 12 months' transitional period following the termination of the three Agreements and concerning the "phasing out" of the services and obligations set out therein. Please let us know if you require our assistance in addressing these arrangements.

10. Finally, as you know, by resolution 454 (V), the General Assembly "requested the Secretary-General to … [proceed with the] necessary arrangements for the establishment of a United Nations postal administra-

tion". It would therefore appear desirable, if not also required, to notify the General Assembly in advance of any decision to terminate such arrangements.

12 December 2002

COPYRIGHT ISSUES

2. Use of the United Nations logo and names of staff members on the Internet site located at http://Intersyndicale.org

Memorandum to the Senior Legal Officer, Office of the Director-General, United Nations Office at Geneva

1. This responds to your recent enquiries to the Legal Counsel regarding the above-referenced matter.

2. Based on the information you have provided, our review of the history of this matter, and our review of various information from the Internet, we understand that, pursuant to a decision of the staff associations of the United Nations and the United Nations Office at Geneva (UNOG), an entity was established known as: "Force Intersyndicale". That entity is supposed to be a forum for cooperation between the two staff associations. In addition to the establishment of such entity, a site on the World Wide Web has been established at <<http://Intersyndicale.org>>. A record-check revealed that the website for "Intersyndicale" is registered to the "Conseil de Coordination" at the Palais des Nations, Geneva (i.e. the Staff Coordinating Council), i.e. the UNOG staff association. The administrative contact for the registrant is also listed in the records of Network Solutions as "Conseil de Coordination" with an e-mail address listed as "bsecret@unog.ch", which used the name "UNOG". However, it is not clear to us that this is an official UNOG e-mail listing.

3. The website for "Intersyndicale.org" states that "Force Intersyndicale" is headed by ("*conduit par*") A, who, we understand, is a staff member of the UNOG Division of Conference Services, Interpretation Service. The website also refers to an entity called the "New Wood Syndicate", which is said to be headed by B, who, we understand, is a staff member of the UNOG Division of Administrative Support Services, Purchase and Transportation Service. We understand that A and B were formerly elected representatives of the UNOG Staff Coordinating Council but that, since last fall, they are no longer duly elected representatives. Thus, they may no longer hold themselves out as being authorized representatives of the staff of the Organization.

4. In both your recent and earlier correspondence regarding this matter, you requested advice as to how the Administration at UNOG should deal with this matter. You noted that UNOG was not aware that any authorization had been given by the Secretary-General (or anyone else at Headquarters) to the person(s) or entity involved with the website or with "Force Intersyndicale" to use the logo and name of the United Nations on the Internet or for any other purpose. In your recent enquiry, you also mentioned that the website for this entity has posted various communiqués on the website that allegedly are critical of the Organization and its staff members and that one or more of such communiqués conveys allegedly defamatory information regarding specific staff members. In this regard, you attached a memorandum of 14 January 2002 from the Executive Secretary of the Conseil de Coordination, or Coordinating Council, of the New York and Geneva Staff Councils, protesting such alleged defamation. Insofar as the Executive Secretary is complaining about the communiqués posted on the "Intersyndicale" website, it appears that the Conseil de Coordination does not continue to sponsor or condone the operation of the "Intersyndicale" website in its present form by A and B, who are no longer the elected representatives of the staff.

5. The right of the staff to form associations and to engage in staff-management consultations is governed exclusively by chapter VIII of the Staff Regulations and Rules. Under the Staff Regulations and Rules, all staff members may participate in the election of staff councils and other corresponding staff representative bodies established in accordance with the Staff Regulations. As we have observed in our prior opinions in 1973[1] and 1978,[2] the Administration may only deal with the authorized representatives of the staff duly elected in accordance with the Staff Regulations and Rules, as such representatives are the *exclusive* authorized representatives of the staff.

6. In our 1978 opinion, we reiterated the exclusivity of the Staff Regulations and Rules governing the collective bargaining process within the Organization. We further remarked that staff members nonetheless enjoyed rights of association with entities not necessarily recognized as authorized representatives of the staff under the Staff Regulations and Rules and that, accordingly:

> "Staff members are free to join with other staff members, and even with persons not affiliated with the United Nations in any association that is compatible with their status as international civil servants, that is which does not entail public espousal of political positions or inappropriate activities within or outside the United Nations. Staff members' freedom of association has been considered to encompass the right to organize a union of staff members other than the recognized staff association; but this freedom of association enjoyed by staff members is separate and distinct from rights accorded to a particular association that staff members may join. While there is no absolute

impediment to the administration's voluntarily having contact with representatives of any groups or associations to which staff members belong, the United Nations administration must respect the exclusive status and functions of the representatives recognized pursuant to chapter 8 of the Staff Regulations and Rules."[3]

7. In 1998, this Office was advised by the Office of Human Resources Management that an entity referred to as the "New Wood Staff Association" had sought to form part of the UNOG Staff Coordinating Council. We responded by reiterating the principles set forth in the two above-referenced legal opinions, namely that the Organization was obligated to deal only with, and to make facilities available only to, the authorized representatives of the staff as chosen in accordance with the Staff Regulations and Rules. We noted that, while staff members were entitled to affiliate with any other entity, including the New Wood Staff Association, their activities with such entities must be consistent with their obligations and status as international civil servants. We note that B had, at that time, represented himself as being affiliated with the New Wood Association and as a "*membre du Conseil de coordination du personnel des Nations Unies*". As noted in paragraph 3 above, B now holds himself out as the head of the "New Wood Syndicate" which is said to be part of the "Force Intersyndicale".

8. In addition to our prior opinions regarding this matter, we note that the Staff Regulations, Rules and relevant administrative issuances clearly define the obligations of the Organization in dealing with staff representatives and the facilities to be accorded by the Organization to such authorized representatives. In particular, staff rule 108.1 (*e*) provides: "In accordance with the principle of freedom of association, staff members may form and join associations, unions or other groupings. However, formal contact and communication on the matters [subject to staff-management consultation] shall be conducted at each duty station through the executive committee of the staff representative body, which shall be the sole and exclusive representative body for such purpose". In addition, paragraph 3 of administrative instruction ST/AI/293 of 15 July 1982 entitled "Facilities to be provided to staff representatives" provides: "Staff representatives as well as staff representative bodies shall be afforded such facilities as may be required to enable them to carry out their functions promptly and efficiently, while not impairing the efficient operation of the Organization. The precise nature and scope of the facilities to be provided at each duty station shall be determined in accordance with the procedures set out in chapter VIII of the Staff Rules".

9. In this case, the entity referred to as "Force Intersyndicale" appears to be holding itself out as a "joint cooperation and liaison platform" of the New York and Geneva Staff Councils that will be known as "Coopération Intersyndicale". While such a representation may indeed have been the case when A and B were duly elected staff representatives,

it is not clear that such representation continues to reflect the status of the entity. This is particularly the case insofar as the Executive Secretary now disavows the entity. This Office is not in a position to ascertain whether "Force Intersyndicale" continues to be recognized by either or both the New York and Geneva staff associations as an entity sponsored or controlled by them. Your Office may wish to consult with the Office of Human Resources Management and with the authorized staff representatives of the New York and Geneva staff associations in order to make such a determination.

10. On the basis of chapter VIII of the Staff Rules and the above-cited ST/AI/293, the Organization would not have any basis for providing facilities, including the use of the United Nations name and logo or the use of the Organization's Internet facilities, to "Force Intersyndicale" or any other entity affiliated therewith, unless such entities are part of the recognized staff associations in either or both New York and Geneva. Accordingly, if you determine that "Force Intersyndicale" is not, in fact, currently recognized as an entity sponsored or controlled by the recognized staff associations in either or both New York and Geneva, then we would recommend that their sponsors (i.e. A and B) be informed that they are not authorized to hold themselves out as authorized representatives of the staff, to use the name and logo of the United Nations in connection with their activities, and to use facilities of the Organization for their activities.

11. For this purpose, we have prepared the enclosed draft notice of cease and desist. In particular, that notice of cease and desist requests the recipient to refrain from using the name and the emblem of the Organization in connection with Force Intersyndicale or any affiliated entity or on any website. Insofar as the website is registered to facilities at the Palais des Nations, the draft notice also requests that such registration and any e-mail facilities of UNOG be removed from the website and from any registration thereof.

12. Your enquiries also raise the question of how to deal with alleged instances of defamation appearing on the website for "Force Intersyndicale". As noted above, staff members are free to associate with and even establish associations other than the recognized staff associations. In exercising such right of association, however, staff members must conform to their obligations as international civil servants. Certainly, defaming other staff members, if proven, would not be consistent with such obligations. In accordance with paragraph 2 of administrative instruction ST/AI/371 of 2 August 1991, concerning disciplinary measures and procedures, the head of office of the staff member accused of misconduct should conduct a preliminary investigation of any alleged misconduct, such as the alleged defamation, in order to determine whether such allegations of misconduct are well founded. If the head of office finds such allegations of misconduct are well founded, the matter should be referred to the Assistant Secretary-General for appropriate disciplinary action in accordance with chapter X

of the Staff Rules. Accordingly, we would recommend that the head of administration at UNOG should conduct a preliminary investigation into the alleged defamation in accordance with ST/AI/371 and, based on the results of any such investigation, should take any action specified in that administrative instruction and chapter X of the Staff Rules.

14 February 2002

FINANCIAL ISSUES

3. Question of whether clauses providing for the return to donors of all the interests accrued from their contributions are compatible with United Nations regulations, rules and policies

Memorandum to the Director of the Internal Audit Division, Office of Internal Oversight Services

1. I refer to your memorandum of 28 January 2001, in which you requested our advice on whether the clauses incorporated in certain agreements between donors and the United Nations, providing for the return to the donor of all interests accrued from its contribution, are compatible with United Nations Financial Regulations, Rules and policies. You attached to your memorandum excerpts of section F of the audit report on the management of Headquarters trust funds, in which the auditors, noting that two agreements with the United States Agency for International Development (USAID)[4] provided for the return to USAID of all interests accrued from its contribution, concluded that such provisions were incompatible with United Nations financial regulations 9.1 and 9.3 and financial rules 109.1 and 109.4 (*b*). You also attached to your memorandum the Controller's response on the matter, which reads as follows:

> "As concerns the interest earned on a donor's contribution, this is in effect in addition to the amount provided for by the donor for a specific activity. Accordingly, its disposition by returning the interest or a pro-rated share to the donor (normally at the closure of the trust fund or at the expiration/completion of the project or activity) is not in contravention of the rule."

The delay in our response is regretted. Please find below our comments.

Relevant provisions of the Financial Regulations and Rules

2. Financial regulations 9.1 and 9.2 provide that the Secretary-General may make short-term or long-term investments of monies standing

to the credit of trust funds, reserves or special accounts. Financial regulation 9.3 provides that "*Income derived from investments shall be credited as provided in the rules relating to each fund or account*". Financial rule 109.4 (*b*) provides that "*Income from investments of trust funds and special accounts shall include amounts from investments, royalties and other income derived from or accruing to such funds and shall be credited to the trust fund or special account concerned*".

United Nations practice

3. In most cases, donors do not require the return of all interest accrued on their contributions. In those cases the relevant agreements with the donors either are silent on the disposition of interest, or provide that any interest shall, in consultation or agreement with the donor, be used for purposes consistent with the terms of reference of the trust fund. Such agreements also typically provide that after the trust fund is closed or the project or activity funded from the contribution is completed or terminated, any surplus remaining in the trust fund (including any remaining interest income) shall, after all expenditures and liability incurred by the United Nations have been met, be either returned to the donor or otherwise disposed of in consultation or agreement with the donor.

4. In a few cases, donors request as a condition to making their contributions that all interest be returned to them, unencumbered, and the United Nations has agreed, in the case of USAID after arduous negotiations in which the Office of the Controller and this Office were involved, to provisions being made correspondingly in the relevant agreements. We understand that it is in respect of such provisions that you are seeking our advice.

Analysis and advice

5. It is our opinion that the practice referred to in paragraph 4 above, whereby the United Nations returns to a donor the interest accrued from the donor's contribution when this was a condition of the donor's offer incorporated in the relevant agreement between the donor and the United Nations, is not incompatible with the Financial Regulations and Rules cited in your memorandum. The reasons for our opinion are explained below.

6. From the outset, we will point out that financial rule 109.4 (*b*) merely specifies where interest derived from the investment of trust funds is to be credited, and does not regulate how such interest should be used or disposed of. We understand that all such interest is in practice credited to the relevant trust fund, irrespective of whether the interest is ultimately returned to the donor or not.

7. It is our understanding that, when a contribution is made for a specific project or activity within the terms of reference of a trust fund, its principal amount is expected to cover the costs to the United Nations of the project or activity concerned (including actual costs, support costs

incurred by the United Nations and, where relevant, appendix D contribution). The administrative issuances governing the establishment and administration of trust funds provide for several measures to address possible shortfalls in funding:

(*a*) The establishment of an operational cash reserve to cover shortfalls (ST/AI/285, section IV.B);

(*b*) The provision in trust fund agreements that: (i) in case of unforeseen expenditures, a supplementary budget showing the further necessary financing shall be submitted to the donor and, if such further financing is not available, the activity shall be reduced or terminated; (ii) the United Nations will in no event assume any liability in excess of funds provided in the trust fund (ST/AI/285, annex, article 111 (3)).

After the trust fund is closed, or the project or activity for which it has been established is completed or terminated and all expenditures thereunder are met, any remaining balance (including any remaining interest) is disposed of as agreed with the donor, which may include using the balance, in consultation with the donor, for purposes consistent with those of the trust fund, or returning the balance to the donor (see ST/AI/285, annex, article X).

8. On the other hand, interest that might accrue from such a contribution is not a priority taken into account in establishing the budget for the project or activity concerned. Thus, any such interest, if and when accrued, is in effect in addition to the amounts budgeted for the project or activity and which the donor has agreed to fund. While some donors, when pledging their contribution, do not put any conditions to the use of interest that may accrue therefrom, others require either that the interest be used by the United Nations in consultation or agreement with them or, as in the case of USAID, that the interest be returned to them. There is, in our view, no clear prohibition by the Financial Regulations and Rules to the United Nations agreeing to any of the above conditions regarding the use or disposition of interest when they are part of the terms of the offer made by the donor.

20 February 2002

4. Report to the General Assembly on multi-year payment plan—General Assembly resolution 56/243—Application of Article 19 of the Charter of the United Nations

Memorandum to the Chief of Contributions Service, Department of Management

1. This is in response to your memorandum of 25 February 2001 in which you refer to paragraph 3 of General Assembly resolution 56/243 of 24 December 2001, wherein the Assembly requested the Secretary-General to propose guidelines for multi-year payment plans through the

Committee on Contributions, and point out that the guidelines must address the issue of whether adoption of such plans could be linked to the application of Article 19 of the Charter of the United Nations.

Introduction

2. It is noted in the memorandum that, when the Committee on Contributions discussed this matter at its sixtieth session, some of its members questioned the legality of such a link and expressed the view that this would require a revision of the Charter.

3. Your assumption is that the linkage between adoption of a payment plan and permitting a Member State subject to Article 19 of the Charter to vote is acceptable, if the decision of the General Assembly is based on the failure of the Member State concerned to pay immediately being beyond its control. You further comment that a decision providing that payment plans may be linked in this way to the application of Article 19 of the Charter would not preclude the General Assembly from permitting a Member State to vote under Article 19 without the adoption of such a plan.

4. Our views in response to your enquiry as to whether the adoption of multi-year payment plans may be linked to the application of Article 19 of the Charter are the following.

Analysis of the relevant provisions of the Charter of the United Nations

5. In accordance with paragraphs 1 and 2 of Article 17 of the Charter, the General Assembly is entrusted with the authority to approve the budget of the United Nations and the expenses of the Organization shall be borne by its Members as apportioned by the General Assembly. Regulations 4.1 and 5.1 of the Financial Regulations and Rules of the United Nations, approved by the General Assembly in furtherance of the above provision of the Charter, provide that the appropriations voted by the General Assembly shall be financed by contributions from Member States, according to the scale of assessments determined by the General Assembly.

6. The Charter, thus, in unequivocal terms states that each Member of the Organization has an obligation to pay its contribution to the budget of the Organization as assessed by the General Assembly. As noted above, this commitment of Member States under the Charter in respect of their contributions to the budget of the Organization is confirmed and further elaborated in the Financial Regulations and Rules of the United Nations.

7. Article 19 of the Charter should, therefore, be viewed in the light of what is stated in paragraph 2 of Article 17 regarding the obligation of each Member State to bear its portion of the expenses of the Organization. Article 19 of the Charter states that:

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

By declaring that a Member State that fails to meet the obligation stipulated in paragraph 2 of Article 17 can no longer exercise its voting rights in the General Assembly, Article 19 reaffirms the importance attached under the Charter to strict observance by Member States of the obligation to pay their assessed contributions to the budget of the Organization. The importance of this obligation is also demonstrated by the fact that, as was noted in a letter of the Secretary-General, circulated during the twenty-second session of the General Assembly, the express language of the first sentence of Article 19 does not call for a decision of the General Assembly prior to deprivation of vote (circulated as document A/7146, mimeographed).

8. The second sentence of Article 19 addresses an exceptional situation which may arise when a Member State is unable to pay its assessed contributions to the United Nations budget because of conditions which are beyond its control. This sentence stipulates that the General Assembly *may* (emphasis added) under these circumstances allow the State concerned to continue to vote in the Assembly.

9. Under Article 4 of the Charter, membership in the United Nations is open to States which accept the obligations contained in the Charter and, in the judgement of the Organization, are able to carry out these obligations. Consequently, unless the circumstances referred to in the second sentence of Article 19 exist, Member States cannot claim that they are not in a position to pay their assessed contributions to the budget of the Organization. It appears that Articles 17 and 19 of the Charter were drafted on the assumption that periods during which Member States may be unable to pay their contributions due to conditions beyond their control would be relatively short-lived and that there would never be a situation whereby some Member States may find themselves being unable to pay the assessed contributions because of a huge debt accumulated by them under extraneous circumstances. It is worthy of note that according to the *Repertory of Practice of the United Nations*, in the first twenty-five years of the United Nations, the provisions of Article 19 concerning suspension of voting rights were not frequently invoked.

Summary of the position taken by the Committee on Contributions on multi-year payment plans

10. In its report to the fifty-fifth session of the General Assembly, the Committee on Contributions noted that a number of Member States

were faced by large and persistent arrears in the payment of their contributions to the United Nations and concluded that it was unlikely that they would be in a position to eliminate their arrears immediately. The Committee agreed that multi-year payment plans could be a useful tool in reducing arrears to the Organization in the case of those Member States that sought a rescheduling of the payment of their arrears. While the Committee noted that some other organizations had adopted decisions establishing a link between payment plans and the suspension of penalties for non-payment of assessed contributions, members of the Committee were divided on whether there should be a link between payment plans and the application of Article 19 (A/55/11, paras. 11-15).

Practice of the organizations of the United Nations system

11. The addendum to the report of the Committee on Contributions circulated at the fifty-sixth session of the General Assembly (A/56/11/Add.1) contains extensive information on arrangements made by various organizations of the United Nations system with regard to payment plans for the settlement of arrears of assessed contributions. These arrangements, of course, cannot have a direct bearing on how the question of establishment of linkage between adoption of payment plans and the application of Article 19 of the Charter should be resolved within the United Nations. The answer to this question depends on the interpretation of the relevant provisions of the Charter. However, the fact that governing organs of many of these organizations, which have in their constituent instruments provisions similar to Article 19 of the Charter, have adopted arrangements providing that permission to vote is conditional upon a Member State's observance of the recommendations for settlement of arrears approved by those organs, is symptomatic of a developing practice. It is also worthy of note that adoption of these arrangements did not raise the question of their inconsistency with the relevant provisions of the constituent instruments of the organizations concerned.

Conclusions

12. It follows from the text of the second sentence of Article 19 that, in order for the General Assembly to permit a Member State in arrears to continue to vote in the Assembly, it must be satisfied that the failure to pay is due to conditions beyond the control of the State concerned. The Assembly, therefore, should first be convinced that that State has made and will continue to make every effort to meet its obligation to pay the assessed contributions. Consequently, it would be quite appropriate for the General Assembly to decide that States that seek the suspension in their cases of penalties for non-payment of assessed contributions should demonstrate their commitment to eliminate their arrears by submitting in consultation with the Secretariat to the Assembly for

its approval multi-year payment plans. The introduction of this requirement will not, in our view, be inconsistent with Article 19 of the Charter because its purpose would be to facilitate the implementation by the Assembly of its responsibilities under that Article, namely, to assist the Assembly in deciding whether the State concerned is striving to meet its financial obligations under the Charter and non-payment is really due to conditions beyond its control.

13. We believe that the above conclusion is consonant with the position taken implicitly on this issue by the General Assembly in resolution 56/243 of 24 December 2001. In that resolution, which was adopted in connection with the aforementioned report of the Committee on Contributions, the Assembly recognized that multi-year payment plans, subject to careful formulation, could be helpful in allowing Member States to demonstrate their commitment under Article 19 of the Charter to pay their arrears, thereby facilitating consideration of applications for exemption by the Committee on Contributions.

6 March 2002

5. Financial responsibility of staff member (staff rules 112.3, 212.2 and 312.2 and financial rules 110.14 and 114.1)

Memorandum to the Assistant Secretary-General for Human Resources Management

1. I refer to your memorandums of 2 May 2002 and 10 June 2002 in which you requested comments regarding (*a*) the relationship between staff rules 112.3, 212.2 and 312.2 and financial rules 110.14 and 114.1; and (*b*) the possible legal implications of taking action against a staff member solely on the basis of the latter. Attached to your 10 June memorandum is the Controller's 21 May 2002 memorandum to the Joint Appeals Board Panel, which sets out the delegation of authority and existing procedures currently applicable under the financial rules at issue. Those procedures are essentially as follows. An investigation is initiated either by the relevant office or by the Office of Internal Oversight Services and a report is subsequently issued. Based on the comments contained in this report, the Controller would be approached for advice on the appropriate action to be taken under the United Nations Financial Regulations and Rules. At the same time, the staff member to whom responsibility is attached would be advised of the content of this report and given an opportunity to respond. On the basis of the above alone, the Organization would initiate a recovery action against the staff member.

2. For the reasons set forth below, I consider that the application of a simple negligence rather than a gross negligence standard, and the failure to provide an affected staff member the opportunity for a review by a duly constituted advisory body before withholding action is taken,

could, unless justified by clear and convincing policy considerations, expose the Organization to successful challenges before the United Nations Administrative Tribunal. In order to avoid such challenges and to better ensure that staff members are accorded appropriate due process in regard to these matters, I recommend regarding any decision to withhold funds that consideration be given to: (i) applying these rules on the basis of a finding of gross negligence (or wilful violation of the Organization's rules), and (ii) providing an opportunity before implementing any such decision for a review by a duly constituted advisory body; except possibly in regard to particular categories of staff members or particular categories of cases where clear and convincing policy and practical considerations justify a different treatment (cf. paras. 11 and 14 below).

Background

3. Staff rule 112.3[5] provides as follows:

> *"Financial responsibility*
>
> "Any staff member may be required to reimburse the United Nations either partially or in full for any financial loss suffered by the United Nations as a result of the staff member's negligence or of his or her having violated any regulation, rule or administrative instruction."

Financial rules 110.14 and 114.1 provide, respectively, as follows:

> *"Writing-off of losses of cash and receivables*
>
> "(*a*) The Controller may, after full investigation, authorize the writing-off of losses of cash and the book value of accounts receivable and notes receivable deemed to be irrevocable, except that the writing-off of amounts in excess of $10,000 shall require the approval of the Secretary-General.
>
> "(*b*) The investigation shall, in each case, fix the responsibility, if any, attaching to any official of the United Nations for the loss. Such official may be required to reimburse the loss either partially or in full."
>
> *"Personal responsibility*
>
> "Every official of the United Nations is responsible to the Secretary-General for the regularity of the actions taken by him or her in the course of his or her official duties. Any official who takes any action contrary to these financial rules, or to the administrative instructions issued in connection therewith, may be held personally responsible and financially liable for the consequences of such action."

4. Whereas both the aforementioned staff and financial rules impose financial liability in connection with staff members' actions, the Secretary-General's report entitled "Follow-up report on management irregularities causing financial losses to the Organization" (A/54/793), to which you referred in your 2 May 2002 memorandum, concentrated on and outlined "the procedures which the Secretary-General [was] developing for determining gross negligence for the effective implementation of staff rule 112.3 for financial recovery" (ibid., summary). Paragraph 8 of the report stated as follows:

> "The Secretary-General is of the view that the statutory basis for imposing financial liability for gross negligence is staff rule 112.3. While there are other rules (such as financial rules 114.1 and 110.14) on the basis of which financial recovery may be made from staff members, a finding of gross negligence is not necessarily required under them. Given that the emphasis of the present report should be on financial liability for gross negligence in connection with management irregularities, the discussion below focuses only on the implementation of staff rule 112.3."

Thus, the Secretary-General's report was not intended to and, accordingly, did not address the application of either financial rule 110.14 or 114.1, other than to note their application in cases like those before Property Survey Boards.

Analysis

5. To the extent that staff rule 112.3 and financial rules 110.14 (*b*) and 114.1 are essentially intended to serve similar purposes, in principle, the same standards of liability and due process should apply. In this respect, it would seem that the purposes underlying all three rules are: (*a*) to make staff members responsible and liable for financial losses suffered by the Organization because of those staff members' actions or inactions; and (*b*) to repair, partially or in full, such financial losses through deductions from the emoluments of the staff members concerned. This is not to deny that there may exist important distinctions vis-à-vis the purpose of the rules, or in some other manner—in respect of the particular categories of staff or staff activity involved. For example, certain staff may be held to a higher standard of duty due to the position they hold. These distinctions may be important at least for purposes of determining the degree of negligence involved in connection with the actions of those staff members, if not in other respects. Where the incumbent of a position is duty bound to ensure a high degree of care, what might otherwise be viewed as ordinary negligence could be viewed in regard to that individual as gross negligence. This is the situation, for example, in regard to trustees under the laws of many Member States.

6. In the end, the issue for the Organization is what should be the standard of care applied to impose financial liability on staff members for the actions of such staff members, and what procedures are necessary to ensure that staff members are accorded due process appropriate to their status as international civil servants.

Standard of care

7. As to the standard of care, the Office of Legal Affairs has consistently taken the position that, normally, staff members should not be liable for simple negligence. For example, the Office opined in 1995 on the subject of financial responsibility of United Nations staff members assigned to field missions for loss or damage to United Nations property and concluded:

> "To err is human. In whatever activity staff are engaged they will make mistakes; i.e., they will be found to be negligent with the clarity of vision that comes from hindsight. The human tendency to make mistakes is a major reason why there is commercial liability insurance. We are not aware of any national system that generally establishes such personal liability in relation to its civil servants. Such a system, in effect, would make staff the unpaid insurers of the Organization. For that reason and because there is no element of UN salaries that is paid for staff to be insurers of the Organization, we are convinced that such a system would have an extremely difficult time in the Tribunal. As we understand, this is why in the past the UN practice has been to limit recovery to cases of gross negligence. Of course, negligence can be reflected in the PAS reports and, if it is repeated, may be a reason not to renew an appointment or to terminate a permanent appointment."

8. While the 30 November 1995 advice concerned the subject of staff liability for damage to United Nations vehicles, the Office believes that, generally, the same standards should apply equally to other instances where the Organization seeks to hold staff members financially liable for their actions, for example under financial rules 110.4 and 114.1, recognizing that there may be policy or practical considerations for holding certain categories of staff members to a higher standard.

Due process

9. Similar conclusions might be drawn with respect to the procedures to be followed in applying this standard to staff members to ensure that appropriate due process has been accorded to staff members. The Office recommended in connection with the Secretary-General's report (A/54/793) with respect to the application of staff rule 112.3 to management irregularities that the procedures associated with the Joint Disciplinary Committee

be followed prior to the withholding of funds despite the fact that staff rule 112.3 makes no such provision (as is the case with financial rules 110.14 (*b*) and 114.1). As indicated in the Secretary-General's report (para. 11), due process under staff rule 112.3 would "generally be viewed as requiring at least notification to the staff member of an allegation of gross negligence and an opportunity to rebut the allegation. The application of staff rule 112.3 would therefore include preliminary fact-finding, notification to the staff member of an allegation of gross negligence, an opportunity to rebut the allegation and a referral to an advisory body, which would make a recommendation to the Secretary-General concerning the determination of gross negligence and the possible restitution."

10. The Office believes that consideration should be given to applying the same or similar procedures under financial rules 110.14 and 114.1, recognizing that there may be policy or practical considerations for applying different procedures to some categories of staff members or cases involving financial losses to the Organization resulting from the actions or inactions of staff members. Thus, there may be justification with regard to certain categories of staff or in certain cases for retaining the present procedures, relying on the opportunity for the concerned staff members to initiate a challenge in the United Nations Administrative Tribunal after the determination of liability and decision to withhold funds, rather than going through a procedure such as proposed in regard to staff rule 112.3 before imposing the deduction. However, the Office believes that the Tribunal is likely to look upon such a process with disfavour in the absence of clear and convincing policy and practical considerations.

11. In deciding on the procedures to be accorded to particular categories of staff members or cases, the Organization should keep in mind not only what is necessary and fair to protect the interests of the Organization, but also what is appropriate to protect the rights of staff members under the Charter of the United Nations, relevant General Assembly resolutions, rules and regulations of the Organization, and any relevant general principles of law. Ultimately, any procedures could be challenged by an affected staff member before the Tribunal.

12. In this respect, we have not been able to identify a precedent in the decisions of the Tribunal that is directly on point. As a general proposition, however, the Tribunal strives to ensure that staff members receive the due process to which they are expressly entitled pursuant to various regulations, rules or other administrative issuances, and are likely to give the staff the benefit of doubt if there is a serious question of whether a particular procedure applies to a staff member in a particular case. See, for example, Tribunal judgement No. 382, *Noble* (1987), paragraph XV, where the Tribunal ruled that the Administration's decision to withhold a staff member's wages because of her unauthorized absences was in gross derogation of the Applicant's rights; and judgement No. 551: *Mohapi* (1992), where the Tribunal rescinded the Administration's decision to recover ap-

proximately US$ 170 from the Applicant as a result of the latter's failure to comply with the applicable financial rules of UNDP.

Conclusion

13. I recommend that the Organization carefully review both the standard of liability and the due procedures that are to be applied under financial rules 110.14 and 114.1, in the light of our recommendation that any decision to withhold funds generally be on the basis of a finding of gross negligence, and provide an opportunity before implementing such a decision for review by a duly constituted advisory body. As I have previously indicated, such a review could include the possibility of applying a different standard of care or procedure for ensuring due process in regard to particular categories of cases, for example, as is at present the practice in regard to cases before the Property Survey Board. However, such exceptions, if there are any, would have to be based on clear and convincing policy and practical considerations. The Office of Legal Affairs looks forward to participating in such review.

14 August 2002

PERSONNEL ISSUES

6. Repatriation grant to a staff member who has resigned further to allegations of misconduct—Staff regulations 10.1 and 10.2—Disciplinary proceedings and the jurisprudence of the United Nations Administrative Tribunal

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

1. I refer to your memorandum of 26 March 2002 on the above-mentioned case. I note that a staff member of the Office of the United Nations High Commissioner for Refugees (UNHCR) had admitted in writing having participated in the submission of resettlement forms containing false information. While a letter containing allegations of misconduct was being prepared in accordance with administrative instruction ST/AI/371, the staff member submitted her resignation with immediate effect. You stated that, in view of the above-mentioned allegations, it was likely that the High Commissioner would have recommended that the staff member be summarily dismissed. You stated that you believed that the staff member was aware of such possibility. Moreover, you believed that the 30-day

notice period to which the Organization would be entitled would not have been sufficient to complete a disciplinary procedure against the staff member. Therefore, it was decided to accept her resignation with immediate effect. However, subsequently, the High Commissioner decided to suspend the payment of the repatriation grant due the staff member. He believed that the staff member had abused her right to resign in order to obtain those benefits. He therefore intends to permanently withhold such payment and pay her the costs of travel and transport of her personal effects to her place of home leave, thus treating her resignation as a summary dismissal. You seek our advice as to the legal implications of this course of action.

2. The course of action proposed in this case essentially means that the staff member's resignation would be treated as a summary dismissal and that she would be fined in the amount of the repatriation grant. If the former staff member decides to appeal against this decision to the United Nations Administrative Tribunal (which, in our view, is quite likely), the Tribunal would adjudicate this case on the basis of applicable United Nations rules and its jurisprudence on the matter. Staff regulations 10.1 and 10.2 and chapter X of the Staff Rules set out detailed provisions and procedures to be followed in disciplinary cases. As to the jurisprudence of the Tribunal, the most relevant cases are briefly described in paragraphs 3-5 below.

3. In judgement No. 877, *Abdulhadi* (1998), paragraph IV, the Tribunal noted "the Auditors' recommendation that disciplinary action be taken against the Applicant and that, based on the Auditors' 'strong suspicion' against the Applicant, suggested 'possible separation on grounds of serious misconduct'. Whatever were the Auditors' intentions, the Respondent should have interpreted such recommendation as suggesting that disciplinary proceedings be instituted … . The Tribunal finds that, considering the serious implications of the 'strong suspicion' voiced against the Applicant, as well as the Auditors' recommendation, the Respondent should not have terminated the Applicant without first holding disciplinary proceedings. Not only would such proceedings have been an appropriate forum to resolve the multiplicity of issues which had been raised in the Audit Report; such proceedings also would have had the added benefit of providing necessary due process to the Applicant …".

4. In judgement No. 610, *Ortega* (1993), the Tribunal held in paragraph VIII that "the option of administrative action (rather than disciplinary proceedings) should only be resorted to when it does not prejudice or damage the position of staff and is not detrimental to staff … . Despite the stated reason for termination, the Applicant was essentially accused of forgery and fraudulent conversion. Where, as here, gross misconduct is alleged, such allegations should be investigated by a disciplinary board or committee".

5. Finally, in judgement No. 742, *Manson* (1995), the Tribunal ruled, in paragraph VI, as follows:

"It appears to the Tribunal that the most elementary considerations of fairness and due process would dictate that when a resignation is tendered, whether in response to a request or not, the options open to the Secretary-General are the following: (1) to accept the resignation as offered; (2) to reject it; (3) to initiate termination proceedings for unsatisfactory performance under the Staff Rules; (4) to initiate disciplinary proceedings in accordance with the Staff Rules; or (5) to enquire of the staff member whether he wishes to waive his rights under the Staff Rules, and is agreeable to the resignation being treated as a summary dismissal for serious misconduct. If the staff member is not agreeable, options (1)-(4) would, of course, remain open to the Secretary-General. The Tribunal notes that rejection of a resignation does not mean that a staff member is barred from leaving the Organization. It simply negates any inference of approval by the Secretary-General."

6. In accordance with the above jurisprudence, a staff member who is accused of misconduct must be subjected to disciplinary proceedings and must be given the possibility to defend him/herself. Moreover, and particularly in view of the *Manson* judgement, a resignation cannot be considered as a summary dismissal unless the staff member has expressly waived his/her rights and agreed that such a voluntary resignation be treated as a summary dismissal. If that is not the case, the Secretary-General has various options, namely, to accept the resignation as such, to reject it and to initiate disciplinary proceedings.

7. From the information you provided, it does not appear that the staff member has ever waived her rights and agreed that her resignation should be treated as a summary dismissal. It is my view that, in the present case, the staff member's resignation should have been rejected and disciplinary proceedings instituted. However, since no such action was taken, it appears that at the present stage, there is no other choice than to treat the voluntary resignation as such and pay the repatriation grant. Otherwise, the staff member in question might successfully challenge the decision before the Tribunal if the course of action described in your memorandum were to be pursued. The Tribunal might order paying the former staff member the repatriation grant and would, most probably, award her additional compensation.

8. I note that in a subsequent memorandum of 22 April 2002 you advised us of a proposal consisting of "continuing disciplinary proceedings after the staff member's resignation. These proceedings could … then lead to the suspension of the repatriation grant if the misconduct were found to be serious enough to justify summary dismissal. If the misconduct was found to be proven, but not serious enough to warrant summary dismissal, a fine could be imposed, which could be charged against the repatriation grant that otherwise would have been paid."

9. In this regard, we note that, after a resignation of a staff member has been accepted, he/she is no longer under the authority of the Secretary-General and the latter has no power to institute disciplinary pro-

ceedings against the staff member. Accordingly, I share your view that, under United Nations Regulations and Rules, it is not possible to institute disciplinary proceedings against a former staff member whose resignation has already been accepted.

29 April 2002

7. Legal status of certain categories of United Nations personnel serving in peacekeeping operations—Civilian police and military observers—Military members of military components

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

Introduction

1. I wish to refer to your note dated 10 April 2002 forwarding two notes verbales each dated 27 March 2002 from the Government of [Member State] ("the Government") requesting the assistance of the Department of Peacekeeping Operations in clarifying the legal status of certain categories of United Nations personnel serving in peacekeeping operations. By your note, you request the input of the Office of Legal Affairs for a response to the Government, which "also reflects a desire expressed in the Special Committee on Peacekeeping Operations to seek a clarification of the status of civilian police".

2. The Government, in its correspondence, has requested advice on the status of the following personnel:

(*a*) Military observers in the United Nations Mission for the Referendum in Western Sahara (MINURSO), the United Nations Iraq-Kuwait observation Mission (UNIKOM), the United Nations Mission in Ethiopia and Eritrea (UNMEE), the United Nations Observer Mission in Georgia (UNOMIG), the United Nations Truce Supervision Organization (UNTSO) and the United Nations Interim Administration Mission in Kosovo (UNMIK) vis-à-vis the United Nations and the countries or territories hosting these operations;

(*b*) Civilian police in UNMIK and the United Nations Transitional Administration in East Timor (UNTAET); and

(*c*) Members of troop contingents in the United Nations Disengagement Observer Force (UNDOF) and the United Nations Peacekeeping Force in Cyprus (UNFICYP).

3. The Government has also requested "detailed information" on, inter alia, the "procedures for the handling of cases of alleged misconduct, misdemeanour and criminal acts as well as relevant agreements of the

United Nations with host countries and administrations for these specific missions".

Civilian police and military observers

Status

4. In accordance with customary principles and practices applicable to United Nations peacekeeping operations such as those mentioned above, civilian police monitors and military observers enjoy the status of "experts performing missions" for the United Nations under article VI of the Convention on the Privileges and Immunities of the United Nations (the Convention). This status is provided for in, inter alia, Status of Forces Agreements (SOFAs) or Status of Mission Agreements (SOMAs) that are concluded with Governments hosting peacekeeping operations. In the absence of such an agreement the legal basis for the status of civilian police monitors and military observers remains the Convention to which a Government hosting a peacekeeping operation is usually a party.

5. Unlike military personnel of national contingents who enjoy, inter alia, immunity from criminal jurisdiction in the State where the peacekeeping operation is deployed and are subject to the exclusive jurisdiction of their respective States, police monitors and military observers, as "experts performing missions" for the United Nations under article VI of the Convention, only enjoy immunity for purposes of the official acts they perform. Their privileges and immunities, which include immunity from personal arrest and detention, are granted solely to enable them to perform their official functions and, as such, they do not enjoy immunity from criminal jurisdiction in respect of criminal offences that they may commit in the host State.

6. Importantly, the United Nations is under a legal obligation vis-à-vis a host Government to uphold the provisions of a SOMA or SOFA. As these agreements provide that civilian police monitors and military observers enjoy the status of "experts performing missions" for the United Nations under article VI of the Convention, the United Nations recognizes that national authorities are in a position to take legal measures against a police monitor or military observer who has committed a criminal offence on its territory. To that end, the Secretary-General has, under article VI of the Convention, the right and duty to waive the immunity of an expert on mission such as a police monitor or military observer in any case where, in his opinion, this immunity would impede the course of justice. For these reasons, for example, repatriation is not provided for in either a SOMA or SOFA as the repatriation of a police monitor or military observer who has allegedly committed a criminal offence may give rise to a complaint from a host Government that the United Nations was acting in a manner that was inconsistent with the SOFA/SOMA.

7. As far as UNMIK and UNTAET are concerned, we wish to point out that the authority to administer East Timor and Kosovo was conferred

on the United Nations by the Security Council acting under Chapter VII of the Charter and, as such, no SOFAs were concluded for the United Nations peacekeeping operations in these territories. However, in UNMIK the Special Representative of the Secretary-General adopted a regulation (2000/47 of 18 August 2000) on the status, privileges and immunities of KFOR and UNMIK and their personnel in Kosovo. This regulation provides that UNMIK personnel only enjoy immunity for purposes of the official acts they perform and that the Secretary-General has the right and duty to waive immunity if this immunity would impede the course of justice and if the immunity can be waived without prejudice to the interests of UNMIK (section 6 of the regulation). In UNTAET, while there was no separate regulation on privileges and immunities, the same principle applies, i.e. that UNTAET personnel only enjoy immunity for purposes of the official acts they perform. Furthermore, the SOFA to be concluded with the Government of an independent East Timor for the successor mission to UNTAET will provide, consistent with the practice mentioned above, that civilian police monitors and military observers enjoy the status of "experts performing missions" for the United Nations under article VI of the Convention.

Investigations

8. In the light of the above, it is important to determine the facts by way of an investigation into alleged acts of misconduct; in particular, whether it involves a criminal offence. Procedures for convening and conducting investigations including boards of inquiry (BOI) are, inter alia, set out in the draft Field Administration Manual and can also be provided for in the standing operating procedures (SOPs) of civilian police and military observers. If an investigation determines that a police monitor or military observer has violated internal rules or procedures, such as the SOP or the code of conduct, which per se does not involve the commission of a criminal act, then disciplinary action, which could include repatriation on these grounds, can be an appropriate sanction and would not be inconsistent with the obligations of the United Nations under the SOFA/SOMA and the Convention. However, if an investigation finds that an act of misconduct involves the alleged commission of a criminal offence that could lead to prosecution in the host State, the United Nations and the host Government would have to agree on whether or not criminal proceedings should be instituted and that this is specifically provided for in SOFAs concluded with host Governments.

Military members of military components

Status

9. In accordance with the customary principles and practices applicable to United Nations peacekeeping operations, military personnel of national contingents assigned to the military component of a United Nations

peacekeeping operation are subject to the exclusive jurisdiction of their respective participating States in respect of any criminal offences, which may be committed by them in the host territory.

10. This status is provided for in SOFAs, which contain a provision on the status of military components based upon article 47 (*b*) of the model SOFA (A/45/594), which provides as follows:

> "Military members of the military component of the United Nations peacekeeping operation shall be subject to the exclusive jurisdiction of their respective participating States in respect of any criminal offences which may be committed by them in [host country/territory]."

11. Furthermore, paragraph 41 of the model SOFA provides that:

> "The military police of the United Nations peacekeeping operation shall have the power of arrest over the military members of the United Nations peacekeeping operation. Military personnel placed under arrest outside their own contingent areas shall be transferred to their contingent Commander for appropriate disciplinary action."

Investigations

12. However, even though military members of the military component are subject to the exclusive jurisdiction of their respective States in relation to criminal offences committed by them in the host country, such members are expected to cooperate with any investigation if directed to do so by the Special Representative of the Secretary-General or Force Commander. Such cooperation is provided for in the mission SOPs, as well as the draft Field Administration Manual mentioned above, which, in addition to setting out procedures for BOIs, also provides that the contingent commander should convene a contingent board of inquiry to investigate incidents involving any of his military personnel and the mission.

13. Finally, on this matter, we wish to point out that, if necessary, the reports of United Nations investigations are forwarded to the Governments concerned for appropriate action, including disciplinary action and, if necessary, prosecution.

3 May 2002

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8. Status of United Nations Relief and Works Agency for Palestine Refugees in the Near East area staff

Note to the Assistant Secretary-General of the Office of Human Resources Management

A facsimile, dated 3 May 2002, from the Executive Secretary of the International Civil Service Commission (ICSC) to the Assistant Secretary-General in charge of the Office of Human Resources Management, containing a number of questions concerning the status of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) area staff, was transmitted to the Office of Legal Affairs. The responses to these questions are set forth below.

Question 1. What is the legal status of UNRWA area staff?

UNRWA employs both internationally recruited staff and "area" staff. UNRWA area staff are not covered by the United Nations Staff Regulations and Rules. They are covered by the UNRWA Area Staff Regulations and Rules. (International UNRWA staff are covered by UNRWA International Staff Regulations and Rules.) The UNRWA International and Area Staff Rules are promulgated pursuant to General Assembly resolution 302 (IV) of 8 December 1949, which established UNRWA. Under that resolution, the Commissioner-General has general authority over Agency staff and has, with the agreement of the Secretary-General, promulgated regulations and rules governing the Agency's staff.

Question 2. What kinds of contracts apply to area staff?

Area staff serve under letters of appointment that designate them as "Area Staff" and are signed by the Commissioner-General. The Area Staff Regulations provide for temporary indefinite appointments which have no expiration date specified in the letter of appointment and fixed-term appointments which have such an expiration date (regulation 4.4).

Question 3. The Executive Secretary has also sought a legal opinion on whether hazard pay should apply to area staff, if operative at the location where area staff work.

Administrative instruction ST/AI/2000/6 sets forth special entitlements for United Nations staff members serving at designated duty stations. Section 12 of that instruction on "Exceptional measures" provides, "At duty stations where very hazardous conditions, such as war or hostilities, prevail and where non-essential internationally recruited staff and family members of internationally recruited staff have been evacuated, the Chairman of the International Civil Service Commission may authorize the application of exceptional measures such as hazard-duty pay or a

special bonus to internationally recruited staff and locally recruited staff who remain at those duty stations and continue to report to work". This administrative instruction applies to United Nations staff recruited under the United Nations Staff Regulations and Rules.

The question whether UNRWA area staff should be entitled to hazard pay, "if operative" at the duty stations where area staff work, would be a policy decision to be taken in accordance with the established procedures.

7 May 2002

9. Gratis personnel—Voluntary contribution of services to the Department of Public Information by a private communications company

Memorandum to the Chief of the Rules and Regulations Unit of the Office of Human Resources Management

1. I refer to your memorandum of 24 April 2002 seeking our advice on the offer by a company to provide the services of two of its officers, free of charge, to the Department of Public Information. In particular, at the suggestion of the Controller, you seek our advice as to whether this offer would be subject to the restrictions on accepting "gratis personnel".

2. Pursuant to General Assembly resolution 51/243 and administrative instruction ST/AI/1999/6, "gratis personnel" are personnel provided to the United Nations by a Government "or other entity" that is responsible for the remuneration of the services of the personnel. Your memorandum to us of 24 April 2002 suggests that, despite the words "or other entity" in the General Assembly resolution and its implementing administrative instruction, "the main focus is clearly on personnel provided by Governments or governmental/quasi-governmental entities". We find no such limitation of the words "or other entity" in the wording of either the resolution or the administrative instruction, the report of the Secretary-General which led to the resolution (A/51/688 and Corr.1 and Add.1-3) or the report of the Advisory Committee on Administrative and Budgetary Questions on the subject (A/51/813).

3. Indeed, to interpret the words in this manner would practically read them out of the resolution and the administrative instruction. Thus, such an interpretation would have the result that not only personnel offered by commercial entities but also personnel offered by non-governmental organizations and intergovernmental organizations would be excluded from the restrictions established by the General Assembly on the acceptance and use of gratis personnel. We are unaware of anything in the background to the consideration by the General Assembly of the subject of gratis personnel, let alone the wording of its resolutions on the subject, to support such intent.

4. You have suggested that section 3.1 of administrative instruction ST/AI/1999/6 provides an indication that the restrictions in the resolution and administrative instruction on the use of gratis personnel extend only to personnel provided by Governments or governmental/quasi-governmental entities. That provision states:

> "When, at the time of preparation of a budget, it is foreseen that, under that budget, there will be needs which fulfil the conditions of section 2.1 (*a*) of the present instruction, the department or office where the services are to be rendered shall approach all Member States to inform them of the specific needs to be met by gratis personnel, and shall request Member States to identify within two months one or more individuals who could provide the required expertise."

5. We do not see that this provision necessarily supports the conclusion that the words "or other entity" are intended to refer only to governmental/quasi-governmental entities. This provision implements paragraph 11 (*d*) of resolution 51/243, which states:

> "The selection process for gratis personnel should be transparent and conducted on as wide a geographic basis as possible, and, if there is a need for gratis personnel as provided for in the present resolution, all Member States should be informed".

6. Seen in this light, it seems at least equally plausible that this provision is intended to promote transparency and geographic breadth in the selection of gratis personnel, rather than to limit the restrictions on the acceptance and use of gratis personnel to personnel provided by Governments or governmental/quasi-governmental entities. Moreover, one can find in the relevant documentation indications that the wording is not intended to be so limited. For example, the model Memorandum of Agreement between the United Nations and the donor of gratis personnel, annexed to ST/AI/1999/6, states, in a footnote to the title of the model agreement, "[i]n the event an 'other entity' provides personnel under the agreement, rather than a Government, the name of that entity would be used".

7. For the foregoing reasons, we believe that the restrictions on the acceptance and use of gratis personnel apply to the personnel offered to the Department of Public Information by a company. However, we would of course be willing to consider any further views that you may have on this point.

8. There are two types of gratis personnel. "Type I" gratis personnel have a historical association with the United Nations and serve under established regimes, including associate experts and Junior Professional Officers for technical cooperation projects, technical cooperation experts on non-reimbursable loans and interns. "Type II" gratis personnel go beyond the traditional area of technical cooperation and do not serve under any such established regime.

9. The memorandum of 11 March 2002 from the interim Head, Department of Public Information, to the Controller (attached to your memorandum to us) states that the personnel offered by a company would provide public relations services in connection with the worldwide awareness campaign in support of the International Conference on Financing for Development. It seems doubtful to us that such personnel could be considered type I gratis personnel. We assume that they would not be associate experts, Junior Professional Officers or interns. As to whether they could be regarded as technical cooperation experts who would serve under non-reimbursable loans, we point out that the report of the Secretary-General on gratis personnel, which forms the basis of the decisions of the General Assembly on this subject, makes it clear that such technical cooperation experts "assist in the execution of the technical cooperation programme of the United Nations" in accordance with the policies and procedures established in administrative instruction ST/AI/231/Rev.1 (see A/51/688, paras. 19 and 21). Administrative instruction ST/AI/231/Rev.1 specifies that such non-reimbursable loans may be negotiated for the acquisition of services required to assist in the execution of technical assistance activities, that they may not be used for secretariat-type posts or for functions normally authorized under the regular programme budget and that they may be used only in respect of services away from United Nations Headquarters or the United Nations Offices at Geneva and Vienna (excluding UNCTAD and ECE) (see ST/AI/231/Rev.1, paras. 4 and 5). From the description of the services to be provided by the (company) personnel, it is doubtful that they would meet these requirements.

10. If the personnel would be type II gratis personnel, as seems more likely, the relevant provisions of resolution 51/243 of 15 September 1997 would apply. In that resolution, the General Assembly decided that the Secretary-General can accept type II gratis personnel only in the following circumstances:

(*a*) After the approval of a budget, to provide expertise not available within the Organization for very specialized functions, as identified by the Secretary-General, and for a limited and specified period of time;

(*b*) To provide temporary and urgent assistance in the case of new and/or expanded mandates of the Organization, pending a decision by the General Assembly on the level of resources required to implement those mandates.

11. In several subsequent resolutions, the General Assembly reaffirmed its decisions in resolution 51/243 and repeatedly requested the Secretary-General to ensure strict compliance with its provisions.

12. Pursuant to these resolutions, ST/AI/1999/6 provides, among other things, that the Secretary-General may accept type II gratis personnel "only on an exceptional basis", and provided that the conditions referred to in (*a*) or (*b*) in paragraph 7 above are met (see ST/AI/1999/6, sec-

tion 2.1). It is for the relevant operational units to determine whether these and the other conditions for the acceptance of gratis personnel are met with respect to the offer by the company.

8 May 2002

10. Gratis personnel—Regime with respect to personnel of the United Nations Monitoring, Verification and Inspection Commission—Security Council resolution 1284 (1999)

Memorandum to the Assistant Secretary-General for Human Resources Management

Introduction

1. I refer to your memorandum of 6 November 2002, seeking our views on a paper submitted to you by the Permanent Mission of [Member State] contending that the General Assembly resolutions on gratis personnel, including the restrictions on the acceptance of gratis personnel, do not apply to the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC). You also asked whether, in the event that we were to conclude that the resolutions do not apply to UNMOVIC and gratis personnel were to be accepted for UNMOVIC, the Secretary-General should inform the General Assembly of this.

2. It is our understanding that the Permanent Mission of [Member State] has raised this issue in the particular context of the UNMOVIC inspection teams. The contention in the note from the Permanent Mission that the General Assembly resolutions on gratis personnel do not apply to UNMOVIC is based on the argument that the resolutions apply only to activities that are financed by assessed budgets approved by the General Assembly, i.e. activities financed from the regular budget, peacekeeping activities and the war crimes tribunals. The note argues that, since UNMOVIC is financed from the proceeds of Iraqi oil sales under the oil-for-food programme, the resolutions on gratis personnel do not apply to UNMOVIC. In this regard, it is our understanding that the budget of UNMOVIC is not approved by the General Assembly, but is established by UNMOVIC itself.

3. For reasons discussed below, we conclude that UNMOVIC is not subject to the restrictions in the General Assembly resolutions relating to the acceptance of gratis personnel by the Secretary-General, but for reasons different from those advanced in the note from the Permanent Mission of [Member State]. As will be elaborated below, the Security Council has established a regime with respect to personnel of UNMOVIC, which includes the possibility of accepting experts contributed cost-free by Governments.

4. In view of this, there is no need to address in this context the question of whether the General Assembly resolutions on gratis personnel apply only to activities financed by assessed budgets approved by the Assembly, or to regular budget activities, peacekeeping activities or the tribunals. In this regard, however, we would note that the resolution does not by express terms limit its application to such activities. Moreover, it appears from the basic General Assembly resolution on gratis personnel, 51/243 of 15 September 1997, and from the report of the Secretary-General on which it was based (A/51/688 and Corr.1 and Add.1-3; see e.g. paras. 10 and 13), that a principal motivation for the resolution was the General Assembly's "serious concern at the impact on the geographical balance in some parts of the Secretariat of the presence of gratis personnel …", and related concerns. Such concerns were not necessarily limited to activities financed from assessed budgets approved by the General Assembly, although it is true that the Secretary-General and the General Assembly had such activities particularly in mind.

Personnel of UNMOVIC

5. The mandate of UNMOVIC was established in Security Council resolution 1284 (1999). Paragraph 6 of that resolution requested the Executive Chairman of UNMOVIC to submit to the Council, "in consultation with and through the Secretary-General", for the Council's approval, an organizational plan for UNMOVIC, including, among other things:

> "… staffing with suitably qualified and experienced personnel, who would be regarded as international civil servants subject to Article 100 of the Charter of the United Nations, drawn from the broadest possible geographical base, including, as [the Executive Chairman] deems necessary, from the international arms control organizations …".

6. In its resolution 1441 (2002), adopted on 8 November 2002, the Security Council stated, in paragraph 7, that "UNMOVIC and IAEA shall determine the composition of their inspection teams and ensure that these teams are composed of the most qualified and experienced experts available". It further provided in that paragraph that "[a]ll UNMOVIC and IAEA personnel shall enjoy the privileges and immunities corresponding to those of experts on mission, provided in the Convention on the Privileges and Immunities of the United Nations and the Agreement on the Privileges and Immunities of the IAEA".

7. On 6 April 2000, the Secretary-General transmitted to the Security Council the organizational plan requested by the Council in its resolution 1284 (1999) (S/2000/292). The operational plan was prepared by the Executive Chairman, in consultation with the Secretary-General. The operational plan stated:

"The staff [of UNMOVIC] will be paid by the United Nations and serve under the appropriate United Nations conditions of employment. Rosters will be prepared with the names of persons with special skills and expertise to supplement UNMOVIC staff on inspection teams as required. … When called upon to serve, they will be given United Nations contracts. *Cost-free experts may be engaged only in special circumstances and with the express approval of the Executive Chairman*" (emphasis added) (para. 3).

"While the United Nations Special Commission (UNSCOM) relied mainly on staff seconded from and paid by national Governments, the present plan envisages that *most* staff [of UNMOVIC] will be United Nations employees subject to Article 100 of the Charter, which requires that they shall neither seek nor receive instructions from any Government and that Member States shall not seek to influence them in the discharge of their responsibilities. The staff will be required to respect strict rules of confidentiality. This will contribute to giving 'a clear United Nations identity' to the Commission … (emphasis added) (para. 5).

"Staff recruitment will take place with the aim of securing the highest standards of efficiency, competence and integrity, in accordance with Article 101 of the Charter, and staff, including the staff of the inspection teams, will be drawn from the broadest possible geographic base. In recruiting UNMOVIC staff, the gender balance will also be a consideration" (para. 7).[6]

8. The Security Council approved the operational plan, as being consistent with paragraph 6 of Security Council resolution 1284 (1999) (see S/2000/311).

9. Accordingly, in its resolutions, and by virtue of its approval of the operational plan referred to above, the Security Council has established a regime for personnel of UNMOVIC. In recruiting such personnel, the Executive Chairman must be guided by the resolutions and the operational plan. While, under the operational plan, "most" personnel of UNMOVIC, including its inspection teams, are to be staff members of the United Nations, the plan specifically provides the Executive Chairman with authority to accept contributions of experts from Governments cost-free, particularly where, in his opinion, this would be the most expeditious, and possibly the only, way of obtaining specialized skills and experience required to carry out the mandate of UNMOVIC. Such experts, as well as the other UNMOVIC inspectors, would have the status of experts on mission. Of course, the Executive Chairman may decide not to accept such personnel. In this regard, the Executive Chairman has, through the Secretary-General, reported to the Security Council that he is attempting to avoid relying heavily on such personnel (see fourth quarterly report of the Executive Chairman, S/2001/177, annex, para. 2).

Reporting to the General Assembly

10. Finally, I turn to your question as to whether the Secretary-General should report to the General Assembly should gratis personnel be accepted for UNMOVIC. In this regard, I refer to the comments above regarding the scope of the interest of the General Assembly with respect to the use of gratis personnel in the Secretariat. I also note that past reports of the Secretary-General to the General Assembly on the use of gratis personnel in the Secretariat included gratis personnel serving with UNSCOM and UNMOVIC (see, for example, A/52/709, A/55/728 and A/56/839). I see no reason why this practice should not continue. In doing so, however, the Secretary-General might indicate that the personnel in UNMOVIC are subject to the regime established by the Security Council for personnel of UNMOVIC.

11 November 2002

11. Regulations governing the status, basic rights and duties of officials other than Secretariat officials, and experts on mission (ST/SGB/2002/9)—Status of members of the Board of Auditors and their staff—United Nations Financial Regulations

Memorandum to the Executive Secretary of the Board of Auditors

1. This is in response to your memorandum, dated 29 October 2002, seeking our advice whether members of the Board of Auditors and their staff and any other personnel contracted by the members to carry out audit work are covered by the Secretary-General's Bulletin ST/SGB/2002/9, "Regulations governing the status, basic rights and duties of officials other than Secretariat officials, and experts on mission" (hereafter, the Bulletin).

Scope of the Bulletin

2. Since Board members may also perform external audits for other organizations, let me at the outset make clear that the Bulletin only covers external audit work performed for the United Nations and its funds and programmes. It has no application to missions performed (i.e. external audit work) for other international organizations.

3. The Bulletin covers two classes of persons. The first class is "officials other than Secretariat officials" and the second class is "experts on mission". Paragraph 2 of the Bulletin explains that "officials other than Secretariat officials" cover a very limited class of persons so designated by the Assembly who provide full-time services to the United Nations. Paragraph 3 of the Bulletin explains that experts on mission are accorded that status either by virtue of a contract with the United Nations or because they are *designated* by a United Nations organ to carry out missions or functions for the United Nations, such as rapporteurs for the human rights bodies.

4. The description of "experts on mission" in paragraph 3 of the Bulletin originates from the definition by the International Court of Justice in the *Mazilu* case (*I.C.J. Reports*, 1989, p. 177) which noted that although the Convention did not define experts on mission "the purpose of Section 22 is nevertheless evident, namely, to enable the United Nations to entrust missions to persons who do not have the status of an *official of the Organization* and to guarantee them 'such privileges and immunities as are necessary for the independent exercise of their functions'. *The experts thus appointed or elected* may or may not be remunerated, may or may not have a contract, may be given a task requiring work over a lengthy period or a short time" (para. 47) (emphasis added). The Court, in the *Cumaraswamy* case (advisory opinion of 29 April 1999), cited this approach with approval, emphasizing that an expert was entrusted with a mission *by the United Nations* (para. 43) (emphasis added). The Court also noted, as a corollary to the concept that an expert was acting for the United Nations, that the United Nations had to accept responsibility for the acts of such agents (para. 66). Underlying the notion of an expert on mission is that they are appointed by the Secretary-General or a United Nations organ.

Members of the Board of Auditors

5. The members of the Board of Auditors are appointed by the General Assembly to carry out the mandate set out in article XII and the annex to the United Nations Financial Regulations.

6. It is clear that the members of the Board of Auditors are experts on mission since they are designated by the General Assembly and perform a mission or function for a principal organ of the United Nations (the General Assembly) and are accountable to the Assembly to carry out that function in accordance with the mandate of the General Assembly set out in article XII and the annex to the United Nations Financial Regulations. It is also clear that a member cannot be an "official other than a Secretariat official" since the member must be the Auditor-General of his or her State and can remain a member of the Board of Auditors only as long as he or she holds that office (see financial regulation 12.3). By definition, the member is performing *independent external audits* of the organization and its Secretariat and other organs and thus is not an "official other than a Secretariat official".

7. The instructions to new members should thus request them to make the written declaration required by regulation 1 (*b*), which requires them to discharge their audit duties with only the interests of the United Nations in view and we understand that the current members could sign the declaration at the next meeting in December. The declaration seems quite consistent with the duties conferred on the Board by article XII of the Financial Regulations and its annex since the Board reports and is responsible to the General Assembly. It ought also to be recalled that provisions in the Regulations governing the duties of experts on mission are

general provisions which must yield to the *specific mandate* placed by the Assembly on the members by the terms of article XII and the annex to the Financial Regulations (for example regulation 2 (*g*) prohibits an expert from accepting payments from a national Government, which is permitted in the case of members by the Financial Regulations with the United Nations reimbursing the Government for the costs). Should any member have difficulties with the wording in the declaration, please contact us.

8. You, as Executive Secretary to the Board of Auditors and a staff member of the United Nations, could witness the signature of the members as an authorized representative of the Secretary-General.

Staff and other personnel of members of the Board of Auditors

9. The letters sent by the Secretariat at the end of 2000, informing members of the terms and conditions of appointment, note that members are entitled to an amount in excess of $3.5 million for performing the external audits in a biennium. That amount is to defray the cost of audits undertaken by the staff and any personnel engaged by the member to carry out external audit functions. You informed us that members have two levels of staff: a full-time Director of External Audit and, for at least one member, a full-time deputy. Members also have teams from their audit office who come for a few weeks to carry out specific audit duties and members may also engage consultants or firms to carry out special tasks.

10. The staff and other personnel contracted by a member to help discharge the functions bestowed on the member have a contractual relationship with the member *and not with the United Nations*. They are accountable only to the member.

11. We consider that the audit teams are clearly not experts on mission since they are not appointed by the Secretary-General or by a United Nations organ, but are assigned or hired by a member of the Board of Auditors. Such staff and consultants thus do not have to sign the declaration required of experts on mission.

Full-time Directors of External Audit

12. The rules of procedure of the Board of Auditors envisage that the full-time Directors of External Audit *represent the members* as the members cannot be continually present at Headquarters. However, they are neither appointed by the Secretary-General or by the General Assembly, nor are they accountable to the Secretary-General or the General Assembly. They are solely accountable to the member of the Board of Auditors who appointed them. In my view, therefore, the Directors of External Audit are not experts on mission for the United Nations and thus they do not have to sign the declaration required of experts on mission.

United Nations travel certificates

13. The full-time Directors of External Audit and other personnel and consultants engaged by the members may, however, continue to be given United Nations travel certificates since section 26 of the Convention on the Privileges and Immunities of the United Nations enables certificates to be given to "experts on mission and other persons" who are travelling "on the business of the United Nations", and it is clear that the duties of the Directors and other personnel and consultants may be described as being engaged "on the business of the United Nations" even though they do not work for the United Nations.

22 November 2002

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

[No legal opinions of secretariats of intergovernmental oranizations to be reported for 2002.]

Notes

[1] *United Nations Juridical Yearbook 1973*, pp. 171-174.

[2] *United Nations Juridical Yearbook 1978*, pp. 192-195.

[3] Ibid., pp. 193-194.

[4] We were informed by your Office that the donor involved in the second agreement cited in paragraph 38 of the attachment to your memorandum was also USAID.

[5] Since staff rules 212.2 and 312.2 contain provisions similar to those of staff rule 112, references to staff rule 112.3 in this legal opinion should be understood to include staff rules 212.2 and 312.2.

[6] In this regard, the Executive Chairman has reported to the Security Council, through the Secretary-General, that he has approached all Member States seeking their assistance in identifying potentially interested candidates for UNMOVIC (first quarterly report of the Executive Chairman, S/2000/516, annex, para. 12).