Extract from:

UNITED NATIONS JURIDICAL YEARBOOK

1994

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

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

C. DECISIONS OF THE WORLD BANK ADMINISTRATIVE TRIBUNAL

1. Decision No. 139 (14 October 1994): Jasbir Chhabra v. International Bank for Reconstruction and Development

Complaint against poor performance evaluations — Question of receivability — Allegations of harassment and prejudice must be supported by evidence — Question of a mismatch of staff member's capabilities and requirements of assigned post — Question of a remedy in a case of mismanagement of staff member's career 392

2. Decision No. 140 (14 October 1994): Safari O'Humay v. International Bank for Reconstruction and Development

Complaint against disciplinary proceedings concerning the hiring of a domestic employee on a G-5 visa — Question of whether a personal debt of the staff member pertains to the domain of official duties and conduct — Misrepresentations to foreign consular office regarding an agreement between staff member and G-5 domestic employee — Question of the consideration of staff member's performance report in the context of disciplinary proceedings — Question of appropriateness of disciplinary measures imposed 395

D. JUDGMENT OF THE ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

Judgment No. 1994-1 (31 August 1994): Mr. "X" v. International Monetary Fund

Request that the length of service period for Pension Fund calculation be extended from 30 September 1985 to 1 January 1986 — Jurisdiction of Tribunal — Administrative decision having later consequences 398

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) CLAIMS, COMPENSATION, CONTRACTS AND LIABILITY ISSUES

1. Claim for rental payment for the use of a compound by United Nations Mission in Somalia (UNOSOM II) — General principles concerning provision of premises in peacekeeping operations — the case of UNOSOM II (26 January 1994) 403

2. Contractual arrangements established for the purchase of the goods and services requested by a Government — UNICEF Financial Regulations and Rules — Requirement that payments be made in advance of purchase and delivery of the goods and services obtained through UNICEF by Governments (28 February 1994) 407

3. Contracts awarded to licensed operators acting as brokers in aircraft chartering — Standard United Nations aircraft charter agreement — Short-term charters (17 May 1994) 408

4. Disclosure of contracts with firms to a non-official body of the United Nations Environment Programme (23 August 1994) 411

5. Administrative instructions — Policies of the United Nations in regard to transportation on United Nations-chartered aircraft — Issues of liability of the Organization and necessary insurance coverage for injuries, death or loss sustained during travel on United Nations-chartered aircraft (22 September 1994) 412

6. Compensation for service-incurred death, injury or illness of consultants employed by the United Nations under a special service agreement (7 October 1994) 416

7. Conclusion of a contract — General terms and conditions applicable to contracts for goods and services — Liability for United Nations-authorized purchase order (8 November 1994) 418

8. Compensation for alleged damage to a United Nations Development Programme office — Termination of a lease based on "compelling circumstances" (17 November 1994) 420

COMMERCIAL ISSUES

9. United Nations policy concerning gifts and commercial credits — Financial regulation 7.2 to 7.4 and financial rule 107.5 to 107.7 — Use of the United Nations name — General Assembly resolution 92(I) of 7 December 1946 (7 July 1994) 422

COMMUNICATIONS

10. Legality of radio broadcasting by the United Nations towards a State from international waters or from a third State — General Assembly resolution 13(I) of 13 February 1946 — Article 39 of the International Telecommunication Convention — Article XVI of the Agreement between the United Nations and the International Telecommunication Union — Article 109 of the 1982 United Nations Convention on the Law of the Sea — ITU Radio Regulations (3 February 1994) 423

11. Question of possible private ownership and operation of the United Nations telecommunications network — 1989 International Telecommunication Union resolution No. 50 (15 July 1994) 426

12. Radio broadcast systems for United Nations peacekeeping operations — Provisions on communications in the status of forces agreements — Article XVI of the Agreement between the United Nations and the International Telecommunication Union — Legal bases for the establishment of radio broadcasting by the United Nations (21 December 1994) 429

PEACEKEEPING

13. Compatibility of security issues and the mandate peacekeeping forces — Mandate of UNOSOM II — Security Council resolution 897 (1994) — Licence agreement between the United Nations and the United States (25 February 1994) .. 431

14. United Nations operation in Rwanda — Mandate of United Nations Assistance Mission for Rwanda — Security Council resolutions 872 (1993), 912 (1994), 918 (1994), and 929 (1994) (21 July 1994) 433

PERSONNEL ISSUES

15. Conditions of service of police observers in the United Nations Observer Mission in El Salvador — Designation of beneficiary in case of death while in service — Question of applicability of national laws — Nature of P.2 form (5 January 1994) 435

16. Question of whether the Department of Public Information can become a member of a national foundation (10 February 1994) 437

17. Legal or contractual ties between the United Nations and individual United Nations guards — Status of United Nations Guards in connection with repatriation requests — Administrative instruction ST/AI/295 (18 April 1994) 438

18. Status of air crew and support personnel provided by a Member State to the United Nations High Commissioner for Refugees airlift for Rwandan refugees — Section 22 of the Convention on the Privileges and Immunities of the United Nations (28 July 1994) 440

19. Status of military officers on loan from Governments at no cost to the United Nations — ROle of the General Assembly and consideration of the status of a new category of personnel prior to the issuance of an administrative instruction (24 October 1994) 441

PRIVILEGES AND IMMUNITIES

20. Applicability of labour law of a receiving State to labour relations between members of missions and officials of international organizations and their private household personnel — Articles 33(2), (4) and 37(4) of the 1961 Vienna Convention on Diplomatic Relations (24 January 1994) 443

21. Question of whether the staff of permanent missions are obliged to reside in Switzerland — Section 11 of the 1946 Agreement with the Swiss Federal Council on Privileges and Immunities of the United Nations — Article 7 of the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (7 February 1994) 444

22. Dual registration of aircraft — Article 18 of the Convention on International Civil Aviation (Chicago Convention) — Exemption for United Nations aircraft from the compulsory requirement by one State of registration therein of aircraft validly registered in another State — UNICEF Standard Basic Cooperation Agreement — Agreement between the United Nations and a Member State for the establishment of UNEP headquarters (10 February 1994) 447

23. Legal basis for not explicitly accepting in United Nations contracts a reference to national law as the proper law in the settlement of disputes — Section 29(a) of the Convention on the Privileges and Immunities of the United Nations (27 April 1994) 449

24. Question of whether the United Nations should be held responsible for violations of the Convention on International Trade in Endangered Species of Wild Fauna and Flora committed by servicemen of UNOSOM II (28 April 1994) 450

25. Federal excise tax on vaccines — Question of whether the United Nations is exempt from paying such tax — Article II, sections 7 and 8, of the Convention on the Privileges and Immunities of the United Nations (9 May 1994) 451

26. Landing and parking fees levied on the United Nations — Sections 7(a) and 34 of the Convention on the Privileges and Immunities of the United Nations — Article 105 of the Charter of the United Nations (17 June 1994) 452

27. Exemption from direct taxation of the United Nations — Nature of royalty fees — Incompatibility of measures increasing the financial burdens of the Organization with the Convention on the Privileges and Immunities of the United Nations (3 August 1994) 454

28. Exemption of military component of United Nations Peacekeeping Force in Cyprus from registration fees and road tax — Scope of the expression "members of the Force" — Exchange of letters of 31 March 1964 between the United Nations and the Government of Cyprus (19 September 1994) ... 455

29. Status of UNICEF Goodwill Ambassadors — Entitlement to privileges and immunities of the United Nations (18 October 1994) 455

30. Question of applicability of local law to United Nations Truce Supervision Organization special service agreements — Article 105 of the Charter of the United Nations — Convention on the Privileges and Immunities of the United Nations (1 December 1994) 457

PROCEDURAL AND INSTITUTIONAL ISSUES

31. Status of national human rights institutions in United Nations bodies — Palestinian Independent Commission on Human Rights (4 January 1994) 458

32. Question of whether the first session of the Conference of the Parties to the United Nations Framework Convention on Climate Change would take place on a different date than the one stipulated in the Convention (25 January 1994) 459

33. Status of the Federal Republic of Yugoslavia after General Assembly resolution 47/1, especially with regard to the publication Multilateral Treaties Deposited with the Secretary-General (31 January 1994) 460

34. Observer status in the General Assembly of entities other than States — Status of the Sovereign Military Order of Malta (3 February 1994) 463

35. Conditions of access to internal United Nations documentation and to archives of peacekeeping operations (30 March 1994) 464

36. Question of whether a system of United Nations awards could be created by the Secretary-General for providers of assistance — Power to establish and grant awards is a power of the Organization — Express or implied authority vested in the Secretary-General (31 March 1994) 465

37. Suspension of a member of World Meteorological Organization from its rights and privileges — Renewal of membership rights — Articles 14 and 31 of the WMO Convention (case of South Africa) (8 April 1994) 467

38. Procedures required for an organization to obtain observer status with the United Nations (21 April 1994) 468

39. Status of the Global Environment Facility (31 May 1994) 469

40. Question of credentials, voting rights and financial obligations of South Africa upon resumption of its participation in the work of the General Assembly — Article 17 of the Charter of the United Nations (1 June 1994) 474

41. Question whether the World Health Organization can establish entities within the Organization or whether it can participate in the establishment, under the national laws of a Member State, of a private entity — Possibility of participation of a WHO staff member in his official capacity in the operation and management of such entity (1 June 1994) 475

42. Establishment of diplomatic mission of a Member State to the Conference on Disarmament — Rules of procedure of the Conference — General Assembly resolution 257(III) (22 June 1994) 477

43. Question of juridical personality and legal capacity in relation to United Nations agencies, programmes and funds (26 July 1994) 478

44. Conditions of use of United Nations premises — Charge of rental costs — General Assembly resolution 41/213 — Status of United Nations Institute for Training and Research (12 August 1994) 480

45. Procedure for dealing with communications relating to violations of human rights and fundamental freedoms — Paragraph 10 of Economic and Social Council resolution 1503 (XLVIII) (12 August 1994) 483

46. Subsidiary organs — Question whether the United Nations Development Programme, United Nations Population Fund and United Nations Children's Fund Executive Boards are subsidiary organs of the Economic and Social Council or the General Assembly — Chapters IX and X of the Charter of the United Nations (22 August 1994) 487

47. Nominations to the Advisory Committee on Administrative and Budgetary Questions — General Assembly resolution 47/1 of 22 September 1992 (17 October 1994) 490

48. Succession in the membership of the International Cocoa Organization — Succession of States in respect of State property — 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (10 November 1994) 491

PROCUREMENT

49. Legal regime of the charter of aircraft — United Nations standard air charter agreements — Question of whether United Nations aircraft charter standard forms can be used to obtain scheduled international and transport services (17 May 1994) 495

50. Interpretation of United Nations financial rule 110.20 — Meaning of the term "publicly opened" as applied to bids — General procurement practice (29 July 1994) 497

51. Conditions for United Nations acceptance of voluntary contributions of assistance from Member States (12 August 1994) 498

SECURITY COUNCIL ISSUES

52. Question of whether export of freon gas to Iraq would constitute a violation of the Montreal Protocol on Substances that Deplete the Ozone Layer — Security Council resolutions 661 (1990) and 687 (1991) — Functions of the depositary; article 20 of the Vienna Convention on the Law of Treaties (3 June 1994) 500

53. Status of the "United Nations Command" in the Republic of Korea — Security Council resolution 84 (1950) (16 June 1994) 501

54. Resolutions under Chapter VII adopted by the Security Council — Practice of the Council (21 November 1994) 502

TREATIES

55. Acceptance of depositary functions by the Secretary-General (27 May 1994) 503

56. Full powers according to the practice of the Secretary-General as depositary of multilateral treaties — Question of full power and instruments emanating from various authorities of a federal state — Registration of treaties concluded by such authorities (29 June 1994) 504

B. LEGAL OPINIONS OF THE SECRETARIATS OF INTERGOVERNMENTAL ORGANIZATIONS RELATED TO THE UNITED NATIONS

United Nations Industrial Development Organization

1. Commissary access for staff of the secretariat of the Conference on Security and Cooperation in Europe 506

2. Comments on paragraphs 11, 12 and 24 of Industrial Development Board draft document entitled "Administrative Matters: International Civil Service Commission", relating to adjustments to the salary and other entitlements of the Director-General 507

3. Cooperation between UNIDO and the Palestine Liberation Organization 509

Part Three. Judicial decisions on questions relating to the United Nations and related intergovernmental organizations

CHAPTER VII. DECISIONS AND ADVISORY OPINIONS OF INTERNATIONAL TRIBUNALS 519

CHAPTER VIII. DECISIONS OF NATIONAL TRIBUNALS

1. Argentina

Judgments of the Supreme Court 519

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)

CLAIMS, COMPENSATION, CONTRACTS AND LIABILITY ISSUES

1. CLAIM FOR RENTAL PAYMENT FOR THE USE OF A COMPOUND BY UNITED NATIONS MISSION IN SOMALIA (UNOSOM II) — GENERAL PRINCIPLES CONCERNING PROVISION OF PREMISES IN PEACEKEEPING OPERATIONS — THE CASE OF UNOSOM II

Memorandum to the Under-Secretary-General for Peacekeeping Operations

1. This is with reference to your memorandum of 15 September 1993 forwarding for our advice copies of correspondence between the owner of a compound (Mr. A) and various United Nations officials concerning the occupancy by UNOSOM of his property and known as KM7 compound in Mogadishu.

(*a*) The facts

2. We understand that the compound consists of a plot of land of 10 thousand square meters containing both high-rise and singly built houses, a recreation club and a swimming pool. From June 1964 to May 1992 the compound was leased to the United States State Department. According to Mr. A, in December 1992 he was "evicted" from the compound, which was first occupied by United States Marine Forces participating in the Unified Task Force (UNITAF) and subsequently by troops participating in UNOSOM.

3. Mr. A claims compensation in the amount corresponding to the rental value of the compound since December 1992 on the basis of the rent paid by the United States State Department "before the war": US$ 15,000 per month.

4. In his letter of 21 July 1993 addressed to Mr. A, the Legal Advisor of UNOSOM II rejected the claim on the basis that UNOSOM was not responsible for the original seizure of the compound by UNITAF, that UNOSOM's subsequent possession of the compound was legitimized by military reasons since the position of the building presented a security risk for the Force and that the compound "has no value, it is not rentable".

(*b*) Comments

(i) *Mandate and operational arrangements of UNOSOM*

5. UNOSOM (I) was established by Security Council in its resolution 751 (1992) of 24 April 1992 in support of the Secretary-General's continuing mission in Somalia to, *inter alia*, facilitate the cessation of hostilities and the maintenance of a cease fire throughout the country and to provide urgent humanitarian assistance.

6. By its resolution 794 (1992) of 2 December 1992, the Security Council, acting under Chapter VII of the Charter of the United Nations, authorized the Secretary-General as well as the Member States, which had offered to establish an operation (subsequently called UNITAF) to create a secure environment for humanitarian relief operations in Somalia, to use all necessary means to that effect. Those Member States were further authorized by the Council "to use all necessary means" in order to fulfill the mandate of the operation (see para. 7-10 of the resolution).

7. Unlike UNOSOM (I),[1] UNITAF was not established "under the authority" of the Security Council. UNITAF's operations were conducted by the participating Member States, in "coordination" with the United Nations.[2]

8 The expanded mandate of UNOSOM (II), following the completion of UNITAF, was approved by Security Council resolution 814 (1993) of 26 March 1993 in order to create a secure environment for humanitarian relief operations in Somalia. By endorsing the recommendations contained in paragraphs 56 to 88 of the report of the Secretary-General of 3 March 1993 (S/25354), the Security Council, acting under Chapter VII, entrusted UNOSOM, *inter alia*, with the following military tasks established in paragraph 57 of that report:

> "… (*b*) To prevent any resumption of violence and, if necessary, take appropriate action against any faction that violates or threatens to violate the cessation of hostilities;
>
> "… (*f*) To protect, as required, the personnel, installations and equipment of United Nations and its agencies, the International Committee of the Red Cross as well as NGOs and to take such forceful action as may be required to neutralize armed elements that attack, or threaten to attack, such facilities and personnel, pending the establishment of a new Somali police force which can assume this responsibility."

9. The Secretary-General was also requested, in paragraph 14 of Security Council resolution 814 (1993), to direct the Force Commander of UNOSOM II, through his Special Representative, to "assume responsibility for the consolidation, expansion and maintenance of a secure environment throughout Somalia."

10. Thus, UNOSOM II has a comprehensive and far-reaching mandate allowing it to take whatever action is necessary for attaining the operation's objectives.

(ii) *General principals concerning provision of premises in peacekeeping operations and the special case of UNOSOM II*

11. The provisions of past status of forces agreements and the practice allowed in past and present peacekeeping operations have established the principle that it is the host Government's responsibility to provide a peacekeeping force, at no cost to the United Nations, with all the facilities to fulfill the functions of the force. This principle is reflected in the first sentence of paragraph 16 of the model status of forces agreements.[3]

12. The corollary of the Government's obligation to provide such facilities is its responsibility for dealing with, and settling any claims made by landowners in respect of the temporary appropriation of land or premises by reason of military necessity, or in respect of property damage resulting from operational activities of troops participating in a United Nations peacekeeping operation.

13. In the absence of a status of forces agreement and of the host Government that could undertake the responsibility of providing UNOSOM II with the necessary facilities, the Organization itself had to assume this responsibility and to make appropriations in the UNOSOM II budget for rental and alteration/renovation of premises needed for operational purposes.

(iii) *Analysis of Mr. A's claims*

14. According to Mr. A, the compound was originally occupied by United States Marine Forces participating in UNITAF in December 1992. As indicated in paragraph 7 above, the operations of UNITAF were not conducted under United Nations command and thus UNOSOM is not responsible therefor. Any claim which Mr. A might have with regard to UNITAF occupation of the compound should be addressed to the appropriate United States authorities. Therefore, we need not analyze the legitimacy of, or the need for, occupation of the compound by UNITAF. As far as the United Nations is concerned, Mr. A's claim has to be considered exclusively within the framework of the mandate of UNOSOM II and with regard to the period of occupancy of the compound by UNOSOM II troops.

15. We understand from the UNOSOM II Legal Advisor's letter of 21 July 1993 to Mr. A that the location of the compound "constitutes a serious security risk", since it "prominently overlooks the Forces Headquarters" and UNOSOM II had to move its forces into the compound to "protect and secure the [UNOSOM] headquarters".

16. Subject to the authority of the Secretary-General, the responsibility for decisions on strategic aspects of an operation rests with the Force Commander. If it is established under the latter's authority that occupation of the compound by hostile factions would have exposed UNOSOM II to serious threat so that effective protection to "the personnel, installations and equipments of United Nations and its agencies, ICRC as well as NGOs" (see para. 8(f) above) could not have been assured without UNOSOM II taking physical possession of the compound, the occupation thereof may be considered as an act of military necessity to ensure the achievement of the objectives laid down in Security Council resolution 814 (1993).

17. From this perspective, the occupation of the compound may be considered legal. It should be noted in this regard that, judging from numerous letters of the claimant, he himself does not question the legality of the occupation and limits his claims to receiving compensation.

(iv) *Question of compensation*

18. It should therefore be considered whether Mr. A is entitled to any compensation for loss of use of, or damage to, the compound and, in the affirmative case, whether the Organization should undertake to pay such compensation.

19. As mentioned above, in traditional peacekeeping operations the host Government assumes responsibility for dealing with the settling of claims of property owners for compensation regarding property occupied for reasons of, or damage by, military necessity. The present case is unique as no status of force agreement was entered into between the Organization and Somalia there is no national administrative authority that might undertake the responsibilities usually assumed by host Governments. In the light of these circumstances, general principles of international law might be referred to provide guidance in dealing with the claim in question.

20. The rights to compensation of owners of private property temporarily appropriated for reasons of military necessity or damage in the course of armed conflict are generally recognized under international law.

21. The Hague Convention Respecting the Laws and Customs of War on Land of 18 October 1907 ("The Hague Convention IV")[4] embodies the principle that private property should be respected in times of armed conflict. Article LII of section III (Military Authority over Hostile Territory) of the Convention's Annex, entitled "Regulations Respecting the Laws and Customs of War on Land", requires that contributions in kind made upon requisition "shall, as far as possible, be paid for in ready money".

22. Although peacekeeping operations differ from armed conflicts to which the Hague Convention IV applies, the past practice of peacekeeping operations indicates that the Organization has endeavored to ensure that the owners of private property receive adequate compensation for the use of their property because of operational necessity. In the case of the United Nations Emergency Force (UNEF), the Organization even undertook to pay such compensation directly without prejudice to its rights to obtain eventual reimbursement, as explained in paragraph 142 of the report of the Secretary-General, entitled "Summary study of the experience derived from the establishment and operation of the Force":[5]

> "UNEF agreed that it should pay for damages to real property arising out of negligence or other causes not related to the necessary functions of the Force, and that it should pay reasonable rentals for property utilized by UNEF for the comfort and convenience of the Force. The question of privately owned land used because of operational necessity, and the for that reason to be provided under the Agreement, has been the subject of discussions between —— Authorities and the Secretary-General, resulting in a procedure whereby UNEF surveys the sites together with representatives of local authorities and, on the basis and on the assumption that it is established that the —— Government would have honored the claim, makes payment to the owners, reserving its rights under the Agreement and the possibility, in due course, of raising with the Government such demands for reimbursement as those rights warrant."

23. In our view, there seem to be even stronger reasons for the United Nations to assume the responsibility for settling the claims by owners of property used because of operation necessity in the absence of a status of forces agreement or an effective Government in the country in which the operation is deployed.

24. However, as the decision to be taken with regard to the present case might have important practical ramifications for the Organization both in respect of UNOSOM II and any similar operation, and since there appears to be no specific budgetary appropriation for claims settlement by UNOSOM II,[6] it would appear advisable that the general issue of compensation in cases such as the present be brought to the attention of the Security Council, in forthcoming reports of the Secretary-General on the situation in Somalia, and the attention of the Advisory Committee on Administrative and Budgetary Questions, in future reports on the financing of the United Nations Operation in Somalia. In that respect, the Secretary-General might wish to propose to the Advisory Committee that the Organization would pay compensation for private property used because of operational necessity, or damaged in the course of military actions.

26 January 1994

2. Contractual arrangements established for the purchase of the goods and service requested by a government — UNICEF Financial Regulations and Rules — Requirement that payments be made in advance of purchase and delivery of the goods and services obtained through UNICEF by Governments

Draft letter to a government representative

In your facsimile message of 7 February 1994, you wished to know the authority of the Executive Board and how its members are related to the top level of the United Nations, in order to have a clear understanding of the international relevance of the Executive Board's resolutions. You also requested a copy of the UNICEF Financial Regulations and Rules.

In order to provide you with an appropriate response to the first question, the advice was sought of the United Nations Office of Legal Affairs in New York, and I have now been requested to provide you with the following information:

The UNICEF Financial Regulations were promulgated by the UNICEF Executive Board, by its decision 1986/181 of 23 July 1986, and the General Assembly, by its decision 41/461 of 11 December 1986. The Economic and Social Council is the principal organ of the United Nations charged under the Charter of the United Nations, with making recommendations to the General Assembly with respect to international, economic, social, cultural, educational, health and related matters. The General Assembly having authorized the promulgation of the Regulations by the UNICEF Executive Board, these Regulations enjoy for UNICEF the highest possible legal force in exercise of its mandate.

The Executive Board of UNICEF was established under General Assembly resolution 57 (I) of 11 December 1946 as the Governing Body of UNICEF and is composed of representatives of Governments designated by the Economic and Social Council. The Board has most recently been reconstituted by the General Assembly as part of the restructuring and revitalization of the United Nations in the economic, social and related fields, by its resolution 48/162 of 20 December 1993. This resolution explains in annex I the institutional framework for the operation of the Executive Boards of the various funds and programmes of the United Nations, including UNICEF. The composition and functions of these Executive Boards are provided in part III, section 3, annex I to the resolution.

The requirement that payments be made in advance of purchase and delivery of the goods and services obtained through UNICEF by Governments is based on the principle that these purchasing activities are undertaken by UNICEF as special arrangements for the benefit and at the expense of these Governments. The core resources of UNICEF, obtained through voluntary contributions, are budgeted by the Executive Board to finance UNICEF programmes of cooperation with the Governments and are not to be used for such activities.

The purchasing activities have been authorized by the UNICEF Executive Board under UNICEF financial regulation 5.2, to provide additional assistance to Governments to purchase supplies, equipment and services funded by the Governments themselves to supplement the UNICEF funded programmes. The regulation provides that such activities be provided on the basis of an Agreement which ensures that they be fully funded by the requesting Government, covering all actual and incidental expenses connected with the goods and services supplied. It is in this

connection that UNICEF insists that funds for carrying out such activities be paid for by the requesting Government before the procurement activities are commence. The payment in full of the costs estimated for provision of the goods and services through UNICEF constitutes, in fact, a pre-payment condition not to be mistaken for advance payments under ordinary contracts.

As regards the international relevance of the UNICEF regulations, we believe that the answer to this is that in the case of UNICEF, these regulations are binding on it. Since these regulations are internal to the United Nations, they cannot be said to be equally binding on an interested State, but it is expected that as a State Member of the United Nations it would respect the necessity for UNICEF to comply with such regulations.

A copy of the UNICEF Financial Regulations and Rules is attached, as requested.

28 February 1994

3. Contracts awarded to licensed operators acting as brokers in aircraft chartering — Standard United Nations aircraft charter agreement — Short-term charters

Memorandum to the Acting Chief, Field Missions Procurement Section, Purchase and Transportation Service, Office of General Service

1. This is in response to your memorandum of 2 May 1994, in which you sought "clarification on the policy of awarding contracts to licensed operations acting as brokers, who have subcontracted to licensed operators who are willing to sign the contract".

2. The policy concerning the use of brokers was established by the Secretary-General in his note verbale of 5 November 1993 to the Permanent Representative of a State concerned. In that note verbale, the Secretary-General wrote:

> "Additionally, United Nations aircraft charter bid invitation and contract documents have been substantially modified to include *only licensed operators possessing valid air operator certificates, authorizing them to operate the types of aircraft in the areas required, as being eligible to render air charter services to the United Nations*. Consequently, … air charter service brokers are not now being invite to bid for such services. This action was taken upon the advice of the ICAO and our Office of Legal Affairs." (emphasis added)

3. According to the policy established by the Secretary-General and as that policy is implemented in the standard United Nations aircraft charter agreement (see the annex to the present memorandum), a company that does not possess a valid license, in conformity with applicable international and national laws and regulations, to operate the type of aircraft in question in the areas required, is not eligible to render air charter services to the United Nations. This policy is sound and, in fact, necessary to ensure that the United Nations complies with the legislative requirements and policies of the various countries entered by the United Nations chartered aircraft. These countries insist on strict compliance with all licensing requirements.

4. In the example referred to in paragraph 3 of your memorandum of 2 May 1994, you stated that air company X had offered aircraft "which they do not have on their licence but are subcontracted from another operator licensed for the specific aircraft offered". That a company has a valid licence to operate certain aircraft in certain areas is not sufficient for it to be eligible to render aircraft charter services to the United Nations; it must be licensed to operate the types of aircraft in question in the areas required. Unless its license covers those aircraft and those areas of operation, the company is in the same position as one that has no operator's license at all. For reasons discussed below, allowing such a company to subcontract with a licensed operator is not an acceptable substitute, even if both the contractor and subcontractor sign the contract.[7]

5. The company with which the United Nations contracts must bear full legal and operational responsibilities for the performance of the air transportation services.[8] These include, for example, responsibilities to operate and maintain the aircraft and ensure its fitness and safety, and to ensure the quality and performance of the crew.[9] Under the arrangement referred to in your memorandum, the United Nations would be relying on the subcontractor for the performance of those essential core functions and responsibilities. However, the subcontractor would presumably[10] not have undergone the pre-qualification screening that we understand is now engaged in by the Purchase and Transportation Service in order to identify operators that are qualified, capable and reliable and have sufficient assets to cover their liability in the event of a problem with their performance. Indeed, the United Nations could be criticized, and perhaps even held legally liable, if it allowed its passengers to be carried by a company that it had not vetted through its own pre-qualification procedures.

6. In addition, a company that is not licensed to operate the aircraft in question cannot exercise the essential core responsibilities and functions referred to above. If the United Nations were to enter into a contract with such a company, knowing that it was legally incapable of performing those responsibilities and functions itself, and allow it to subcontract them to a licensed operator which co-signs the contract, an arbitral tribunal might find that the company was not bound by those obligations and responsibilities. Thus, in the event of an accident or other problem with the performance of the air transport services, the United Nations would have to rely on its ability to obtain legal redress from a subcontractor which it had not vetted through its pre-qualification procedure.

7. There is an additional legal difficulty with the course of action proposed in your memorandum. Under the process established by the Purchase and Transportation Service for the procurement of aircraft charter services, bids are solicited only from operators that have undergone the formalized pre-qualification procedure; indeed, we understand that some companies that have expressed interest in submitting bids have been told that they cannot be invited to bid because they have not yet been pre-qualified. It would be inconsistent with those procurement procedures, and unfair to companies that have been precluded from bidding, for the United Nations to sign a contract with a company that has not undergone the pre-qualification process, as a co-signatory to a contract with the pre-qualified firm.

8. In summary, the United Nations should be contracting only with properly licensed operators that have been vetted through the pre-qualification procedure and possess appropriate licenses to operate the aircraft offered for charter to the United Nations.

9. In connection with short-term charters, the Task Force recommendation was as follows:

> The Purchase and Transportation Service in consultation with the OLA should explore the possibility of employing identified correspondents in different parts of the world to receive and distribute the aircraft requirements and advertisements. In view of the possible savings to the United Nations, it is considered desirable that means be determined such that correspondents be sent copies of invitations to bid (ITB) and be allowed to submit bids on behalf of carriers/operators on the condition that the contractual documents be signed between the United Nations and actual aircraft operators."

10. The procedures contemplated, essentially, using correspondents as a possible means of disseminating awareness of United Nations aircraft requirements, but not contracting with them directly.

11. With respect to the possibility of correspondents being sent copies of ITBs and being allowed to submit bids on behalf of operators, the Task Force acknowledged that this could only be done "*on the condition that contractual documents be signed between the United Nations and actual aircraft operators*" (emphasis added), and recognized that the "means by which this could occur had "to be determined". This would require the development of appropriate legal mechanisms (e.g., perhaps a power of attorney from the operator authorizing the correspondent to act on its behalf) as well as appropriate provisions and requirements in the ITB itself. The question of how the procedures referred to above could be accommodated within the pre-qualification process would also have to be explored.

ANNEX

The new standard United Nations aircraft charter agreement referred to by the Secretary-General, which was prepared by this Office in consultation with attorneys from ICAO, includes, *inter alia*, the following provisions:

Article 4.3

> "The Charter shall retain operational responsibility for the air transportation services under this Charter Agreement and assures that those services will be performed in accordance with all applicable national and international regulations, rules, standards and recommended practices. In particular, the Carrier shall:
>
> "(*a*) Maintain the Aircraft in a fully safe and operative condition, and completely airworthy for the duration of this Charter Agreement, in accordance with laws and regulations which conform to applicable international regulations, rules, standards and recommended practices, in particular, annex 8 to the Convention on International Civil Aviation;[11]
>
> "(*b*) Safely operate the Aircraft at all times in compliance with laws and regulations which conform to applicable international regulations, rules, standards and recommended practices, in particular, annex 6 to the Convention on International Civil Aviation."

Article 4.4

"The carrier shall ensure that it has obtained all necessary certifications and authorizations by appropriate governmental authorities to perform the air transportation services required un-

der this Charter Agreement, and shall maintain such certifications and authorizations current and in good standing for the duration of this Agreement, and will avoid any actions which may lead to the cancellation of such certifications and authorizations In addition, the Carrier shall ensure that the air transportation services under this Agreement do not violate the terms and conditions of any lease agreement, mortgage or other relevant agreement."

Article 5.1

"It is understood that the Carrier is an independent contractor and shall remain in control of the Aircraft and shall be responsible for navigation, operation and maintenance of the Aircraft, and that the flight crew and maintenance personnel shall at all times remain the servants of the Carrier. The United Nations shall have the right to provide reasonable instructions to the Carrier and shall provide to the Carrier the schedule of flights, as required. However, the pilot in command shall retain the right to make decisions as to the feasibility of a flight in the light of weather and other conditions, for the safety of the passengers."

Article 6.3

"The Carrier shall possess and maintain a valid Air Operator Certificate or equivalent document issued by the appropriate governmental authority authorizing the Carrier to conduct air transport operations in the country and appropriate authorization to operate outside the country, in particular in the country or countries for which this Charter is intended. The Air Operator Certificate or equivalent document shall be issued under laws and regulations which conform to applicable international regulations, rules, standards and recommended practices, in particular, annex 6 to the Convention on International Civil Aviation."

In addition, the General Conditions for Aircraft Charter Agreements, which is annexed to the standard United Nations aircraft charter agreement, provides, in article 2(d):

"[T]he condition of the aircraft(s) and its operation shall conform to applicable national and international air navigation laws and regulations."

17 May 1994

4. Disclosure of contracts with firms to a non-official body of the United Nations Environment Programme

Memorandum to the Officer-in-Charge, CGCS, United Nations Environment Programme

1. This is in response to your memorandum of 11 August 1994 requesting the advice of the Office of Legal Affairs as to whether members of the Committee of Permanent Representatives of UNEP, which, we understand, is not an official body of UNEP, "could be given copies of certain contracts that are of particular interest to them".

2. According to a long-standing practice of the Secretariat, contracts entered into by the United Nations, including its subsidiary organs, are treated as privileged information in accordance with section 4 of the Convention on the Privileges and Immunities of the United Nations,[12] adopted by the General Assembly on 13 February 1946 ("the General Convention"), which provides that the archives of the United Nations, and in general all documents belonging to it or held by it (and contracts are documents of such a nature), shall be inviolable wherever located. Inspection or control of United Nations contracts by a Government or Governments would contravene that provision of the General Convention and adversely reflect on Article 100 of the Charter of the United Nations, under which Member States undertook to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities.

3. In the light of the above, the Committee of Permanent Representatives of UNEP should be advised that it is not possible for UNEP to provide the Committee with copies of specific contract. However, there would be no legal objection to providing the Committee of Permanent Representatives of UNEP with copies of standard texts normally used by the United Nations in negotiations with its suppliers and contractors (e.g., the United Nations General Conditions for General Contracts, the United Nations General Conditions for Purchase Orders, etc.). In this case, the Committee of Permanent Representatives of UNEP should be advised that such standard texts represent a basis for negotiation and that the actual contract documents may vary from case to case. We should be happy to provide you with samples of such standard texts, should the Committee request them.

23 August 1994

5. Administrative instructions— Policies of the United Nations in regard to transportation on United Nations-chartered aircraft — Issues of liability of the Organization and necessary insurance coverage for injuries, death or loss sustained during travel on United Nations-chartered aircraft

Memorandum to the Acting Director, Field Operations Division, Department of Peacekeeping Operations

1. This refers to a memorandum of 24 June 1994 requesting our advice on the proposal by the United Nations operation in Somalia UNOSOM II to issue the above-referenced administrative instruction on access to United Nations-chartered aircraft by non-UNOSOM passengers and cargo.

2. The proposed draft administrative instruction is to be issued by the Director of Administration of UNOSOM II and is addressed to:

(a) United Nations Agencies operating in Somalia;

(b) Non-Governmental Organizations (NGOs) operating in Somalia; and

(c) contracts providing goods and services to UNOSOM II.

The draft instruction sets out the criteria for the provision of transportation on United Nations-chartered aircraft to the personnel and cargo of the above three categories of entities, as well as to journalists and their cargo, and further proposes financial charges that are to be paid by such passengers for their travel and the transportation of their cargo.

3. In responding to this request, we shall first address the appropriateness of UNOSOM II issuing an administrative instruction and using it for the purpose of effecting arrangements for travel of non-UNOSOM personnel on United Nations-chartered aircraft. This opinion will then examine the policies of the Organization in regard to transportation on United Nations-chartered aircraft and the liability of the Organization and necessary insurance coverage for injuries, death or loss sustained during travel on United Nations-chartered aircraft, including the execution of release forms.

(*a*) Draft administrative instruction

4. We would first point out that an administrative instruction is used to "prescribe instructions and procedures for implementation of Secretary-General's bulletin and … to set forth office practices and procedures relating to more than one Department of the Secretariat".[13] It is the "principal means by which the Secretary-General and the heads of central services in the Secretariat communicate with the staff … on matters of financial, administrative and personnel policies and related instructions and procedures for implementing these policies".[14]

5. In the light of the foregoing, administrative instructions are issued at the United Nations Headquarters, are addressed to staff members and are sources of and constitute internal administrative law. Accordingly, and in order to avoid confusion with administrative instructions issued at United Nations Headquarters, a different term should be used for administrative issuances by the Director of Administration/Chief Administrative Officer (DOA/CAO) of a mission to personnel of that mission, e.g., [name of mission] administrative circular.

6. As is evident from foregoing, administrative issuances, whether administrative instructions issued at United Nations Headquarters or circulars issued at other duty stations and missions, are addressed to United Nations personnel and not to entities or individuals outside the United Nations. Accordingly, the proposed issuance by the DOA of UNOSOM II, which is addressed to non-UNOSOM entities, i.e., journalists, UNOSOM contracts and personnel of United Nations agencies and NGOs, is not the proper means for effecting the proposed arrangements. Different instruments would have to be used for each category of non-UNOSOM entities (e.g., contracts, memoranda of understanding or other types of agreements) for the purpose of agreeing on arrangements, such as the ones proposed by UNOSOM II in this case. It should be further pointed out that any arrangements to be contained such instrument would have to take into account, and conform to, the policies of the Organization in respect to transportation on United Nations-chartered aircraft, as elaborated in the following sections.

(*b*) Policies of the Organization with respect to transportation on United Nations-chartered aircraft

7. Transportation on United Nations-chartered aircraft in the context of peacekeeping missions is regulated by the applicable provisions of the Field Administration Handbook (FAH)[15] and, with respect to relocation/evacuation, the United Nations Field Security handbook (FSH).[16] Pursuant to the FAH and FSH:

(*a*) Staff members of the United Nations and United Nations specialized agencies The CAO of a mission may authorize international staff members of the specialized agencies of the United Nations to travel on United Nations-chartered aircraft for official travel on duty.[17] The CAO of a mission may also authorize international staff members of the United Nations and specialized agencies of the United Nations to travel on United Nations-chartered aircraft for non-duty purposes, provided that such travel must be on a "space available non-interference basis".[18] In emergency situations, internationally recruited staff members of the United Nations and United Nations specialized agencies may be relocated/evacuated from the mission area as part of a security plan;[19]

(*b*) Non-United Nations personnel. The CAO may authorize non-United Nations personnel, e.g., journalists, UNOSOM contractors and personnel of NGOs, to travel on United Nations-chartered aircraft if they are "traveling on or in connection with United Nations business including official guests of the United Nations", or because they have been "designated or named by the Secretary-General" to undertake official travel.[20] In regard to non-official travel, non-United Nations personnel could travel only if they have been "designated or named by the Secretary-General" and such travel must be on a "space available non-interference basis".[21] Non-United nations personnel could be relocated/evacuated from the mission area "when possible and to the extent feasible" if they are not nationals of the host country and if they are working in cooperation with the United Nations on the basis of contracts, special agreements or arrangements concluded between them and the Organization; travel for purposes of relocation/evaluation should be on a reimbursable basis[22] unless otherwise agreed to by the United Nations in the arrangements concluded between the United Nations and such non-United Nations entities.[23]

8. With respect to journalists, we understand that a policy decision has been made by the Under-Secretary-General for Peacekeeping Operations that journalists who have been duly accredited by the United Nations should be allowed to travel on aircraft operated in connection with United Nations peacekeeping missions. Accordingly, accredited journalists who have been authorized or named by the Secretary-General, or by the Under-Secretary-General for Peacekeeping Operations on behalf of the Secretary-General, could be permitted by the CAO of the mission to travel on United Nations-chartered aircraft. Such travel should be on a reimbursable, space available and non-interference basis.

9. In regard to UNOSOM contractors, their rights and obligations are set out in the contracts concluded between them and the United Nations. In fact, this Office had reviewed and cleared several contracts between the United Nations and contractors providing services to UNOSOM, pursuant to which the said contractors may travel on United Nations-charted aircraft for medical or security purposes. If the contracts with the UNOSOM contractors, which the mission currently proposes to provide with transportation on United Nations-charted aircraft, do not include such provisions, travel by such contractors on aircraft chartered by the United Nations, and the costs thereof, should be negotiated on a case-by-case basis and set out in the contracts with them, or provided in amendments to such contracts. Please note that the contractual provisions regulating such travel must be consistent with the applicable provisions of the FAH and FSH. Pursuant to those provisions, the CAO of the mission could authorize UNOSOM contractors to travel on United Nations-chartered aircraft on a reimbursable basis if such travel is "on or in connection with United Nations business", namely, in the event that their travel relates to the performance of their obligations under the contracts. If UNOSOM contractors are not traveling on United Nations business, they could only travel if they have "been designated or named by the Secretary-General" to so travel, and such travel should be on a reimbursable, space available and non-interference basis. UNOSOM contractors could also be relocated/evacuated for their protection, when possible and the extent feasible, and, again, on a reimbursable basis.

10. If the United Nations had concluded specific arrangements with NGOs whereby the NGOs provide services to, or cooperate with, UNOSOM II in connection with the mission's mandate, then the personnel of said NGOs could be authorized by the CAO of the mission to travel "on or in connection with United Nations

business", to the extent that such travel would be duty-related. Said personnel could also be relocated/evacuated for their protection , when possible and to the extent feasible, and on a reimbursable basis. If the personnel of the NGOs are not traveling on United Nations business and in connection with the mandate of UNOSOM II, they could only travel on United Nations-chartered aircraft if they have "been designated or named by the Secretary-General" to so travel, and such travel should be on a reimbursable and space available, non-interference basis.

(*c*) *Liability of the Organization and insurance coverage*

11. The liability and insurance considerations set forth in paragraphs 12 to 16 below must be taken into account in connection with requests by the individuals mentioned in paragraphs 7 to 10 above for transportation on United Nations-charted aircraft.[24]

12. The transport of non-united nations personnel should not be allowed to travel on aircraft chartered by the United Nations unless: (a) adequate insurance coverage exists to cover claims by such persons for death, injury, or loss of, or damage to, their property; and (b) a release form is executed by every non-United Nations individual prior to being provided with United Nations transportation.

13. With respect to insurance, we note that the Organization itself does not at present maintain insurance which would cover claims for compensation by non-United Nations personnel for death, injury or loss of, or damage to, their property sustained by them while on board United Nations-chartered aircraft. However, in the event the United Nations is chartering civil aircraft from commercial aircraft operators under the standard aircraft charter agreement currently used by the United Nations for such purpose, the Agreement requires in article 9.1 that the carrier maintain comprehensive third-party liability insurance to cover all persons authorized by the United Nations to travel on the aircraft. Article 9.1 states:

> "9.1. The Carrier shall provide and maintain for the duration of this Charter Agreement from an insurance carrier acceptable to the United Nations comprehensive insurance coverage to cover its liability under this Charter Agreement. Such insurance shall, *inter alia*, consist of:
>
> "(a) Comprehensive third-party liability insurance, including passenger legal liability, sufficient to cover all persons authorized by the United Nations to use the Aircraft, and protecting the United Nations and the Carrier against claims for bodily injury or death and property damage up to a combined minimum of US$ 20 million per occurrence. Notwithstanding the generality of the foregoing, such insurance shall be sufficient to cover, at a minimum, passenger liability for death or bodily injury up to $75,000 per passenger, as provided in paragraph 4 of the United Nations General Conditions for Aircraft Charter Agreement set forth in Annex B."

If such aircraft are not provided to the United Nations under the standard aircraft charter agreement, the particular agreement with the carrier would have to be examined to ascertain the individuals allowed to be taken on board the aircraft and the extent of insurance coverage for those individuals. We would emphasize that, should the agreement with the carrier prohibit transportation of certain categories of persons, e.g., non-United Nations personnel, the carrier would have the right to

reject any liability regarding injury sustained by such persons on board the aircraft. It is thus of critical importance that the CAO of the mission for which the aircraft is chartered be familiar, and ensure conformity, with the terms of the agreement with the carrier, in particular those provisions concerning the individuals that are allowed to be taken on board the aircraft.[25]

14. In addition to commercial carriers providing civil aircraft, air transportation services are provided to the United Nations by Governments under letters of assist. Such services involve the use of civil and/or military aircraft. In this connection, we would urge that non-United Nations personnel should not be permitted to travel on aircraft provided under letters of assist. As the United Nations does not carry insurance for such aircraft, there is no passenger liability insurance to cover any claims by non-United Nations personnel for death, injury, or loss of, or damage to their property sustained by them during travel on such aircraft. We also strongly recommend that, with respect to military aircraft provided under letters of assist, only military personnel, as agreed to with the Government providing such aircraft, should be allowed on board those aircraft.

15. With respect to release forms, this Office has, when giving advice on previous occasions, pointed out that, while the use of the release form might not afford the United Nations full protection from legal liability,[26] it could, in conjunction with adequate insurance coverage for passengers, at least serve to minimize the exposure of the Organization in respect of third party claims. Having regard to the fact that even with insurance coverage and a signed release form the Organization could still face potential residual financial liability in the event that non-United Nations personnel suffered death, injury or loss on board United Nations-chartered aircraft, we would recommend that, prior to authorizing non-United Nations personnel on board United Nations-chartered aircraft, the concurrence of the ACABO and the Under-Secretary-General for Administration and Management be obtained.

22 September 1994

6. Compensation for service-incurred death, injury or illness of consultants employed by the United Nations under a special service agreement

Memorandum to the Secretary of the Advisory Board on Compensation Claims

1. Please refer to your memorandum of 22 September 1994 on the above-captioned subject. You requested our advice concerning the issue of compensation benefits for service-incurred death, injury or illness to be provided to Government-supplied consultants, employed by the United Nations under a special service agreement (SSA) on a *pro bono* (i.e., non-reimbursable) basis. You noted that, pursuant to the relevant provisions of Appendix D to the Staff Rules,[27] the basis for the calculation of such compensation in cases of service-incurred death, injury or illness is the claimant's annual pensionable remuneration which in the case of *pro bono* consultants does not exist (since they work for the Organization free of charge) and therefore "would not give rise to any compensation".

2. The policy of the Organization with regard to employment of consultants is reflected in ST/AI295 of 19 November 1982 on the subject of "Temporary staff and individual contractors". Paragraph 15 of that instruction provides, *inter alia*, that:

> "If the services of an individual as an individual contractor are provided free of charge, a special service agreement may be issued with nil or token (e.g., one dollar a year) remuneration for the purpose of providing the individual with the appropriate status while performing the services specified in the agreement and in order to cover travel costs and related expenses as appropriate."

3. Paragraph 22 of the same instruction provides that:

> "An individual contractor engaged under a special service agreement … shall be entitled in accordance with the terms of the special service agreement in the event of death, injury or illness attributable to the performance of services on behalf of the United Nations … to compensation equivalent to the compensation which would be payable under Appendix D to the Staff Rules of the United Nations (ST/SGB/Staff Rules/Appendix D/Rev.1) to a staff member performing similar functions."

4. Thus, in view of its paragraph 15, ST/AI/295 is applicable to *pro bono* consultants. However, paragraph 22 does not make any distinction in the treatment of contractors who receive remuneration from the Organization and those whose services are provided free of charge: both categories appear to be entitled to compensation payable under Appendix D to the Staff Rules.

5. Accordingly, the dilemma to which you referred in your memorandum seems to be not of a substantive character (i.e., whether *pro bono* consultants are entitled to Appendix D coverage: they are pursuant to ST/AI/295), but rather of a technical nature (i.e., how the amount of compensation under Appendix D should be calculated). In this connection, we note that the General Assembly in paragraph 11 of resolution 45/258, "Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations", endorsed the proposals made by the Secretary-General on the use of civilian personnel in peacekeeping operations[28] contained in his report of 18 September 1990 (A/45/502). Paragraph 16 of that report provided that:

> "Although the civilian personnel concerned would have no contractual relationship with the United Nations, the Organization would recognize claims for compensation for death, disability and illness attributable to service with the United Nations. It is proposed that the arrangements governing the payment of such compensation should be the same as those applying to military observers."

6. According to a standard clause contained in Notes for the Guidance of Military Liaison Officers (MLOs)/Police Monitors on Assignment:

> "The United Nations provides MLOs/Police Monitors with compensation coverage for death, injury or illness, determined by the Secretary-General to be attributable to the performance of official duties on behalf of the United Nations, to the maximum amount of US$ 50,000, or twice the MLO/Police Monitor's annual base salary, less allowances, whichever is greater."

7. Since military observers do not receive salary from the United Nations, it appears that the "annual base salary" referred to in the above citation can only mean salary received by observers from their respective governments. In other words, the calculation, by the United Nations, of compensation for death, injury or illness in case of military observers seems to be based on their national salaries. We would suggest, however, that you verify with the Controller and the Assistant Secretary-General for Human Resources Management whether their offices have difficulties with our view.

8. It should also be noted that the legal status of a military observer is not identical to that of a *pro bono* consultant: the latter, for example, concludes an SSA with the United Nations, while the former has no direct contractual relationship with the Organization. We therefore support the view expressed in the final sentence of paragraph 3 of the memorandum of 10 August 1994 that the issue of "adapting" the above formula for compensating government-supplied *pro bono* consultants should be examined in consultation with relevant units of the Office of Human Resources Management.

9. In our view, such "adaptation" could be carried out in the form of an addendum to or a revision of ST/AI/295 clarifying that, for Government-supplied *pro bono* consultants, the calculation of compensation under Appendix D is based on their national salaries.

7 October 1994

7. Conclusion of a contract — General terms and conditions applicable to contracts for goods and services — Liability for United Nations-authorized purchase order

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

1. This refers to your memoranda of 8, 13 and 14 July 1994 forwarding our comments on a draft memorandum from you to the Director, Division of Administration, United Nations Office at Geneva, in connection with the question of whether a contract has been concluded between the United Nations and a company for the purchase of additional equipment for a sorting/packing machine, and for which additional equipment this company seeks payment.

2. We have received your draft memorandum together with the accompanying documents that you forwarded to us. We have some comments on the draft memorandum which are set out below and are based on our understanding of the facts from the documents presented to us.

Outline of facts

3. We understand that an unauthorized purchase order was sent to Company A on 4 January 1994 for additional equipment for a sorting/packing machine previously purchased from that Company. The purchase of the additional equipment had not been recommended by the Contracts Committee or approved by the Director-General of the United Nations Office at Geneva. At the request of the Office, the

Company returned the purchase order on 14 January 1994 under the pretext advanced by the Office that an authorized signature was missing from the purchase order. The Company wrote to the United Nations Office at Geneva on 5 and 17 May 1994, stating that it had returned the purchase order relying on the fact that the order would be returned after the missing signature was added, and protesting that the order had not yet been sent back. On 17 May 1994, the Office advised the Company that the purchase order had been sent out by mistake and that the matter remained "suspended." On 27 June 1994, the Company informed the Office that after receiving the purchase order it had proceeded to prepare and assemble the equipment ordered by the United Nations, for which it now claims payment.

Conclusion of contract

4. We agree with your conclusion that a contract has been concluded between the United Nations and the company for the additional equipment. Therefore, the United Nations must either accept delivery and pay the price for the equipment or cancel the contract and pay cancellation costs.

5. With respect to the General Terms and Conditions Applicable to Contracts for Goods and Services concluded by the United Nations Office at Geneva (hereinafter "General Terms and Conditions"), discussed in paragraphs 19 to 21 of your draft memorandum, we agree that the purchase orders used by the United Nations Office at Geneva should physically attach the General Terms and Conditions rather than merely refer to another document containing those General Terms and Conditions. Indeed, the General Terms and Conditions should be provided to all potential contractors at the time of soliciting bids, offers or proposals as well as be included in the contracts concluded with the contractors.

6. However, the present case does not appear to involve a dispute as to the validity or applicability of the General Terms and Conditions. We thus suggest that you advise the Administration that the General Conditions of Contract included in the purchase order sent to the Company stated that the General Terms and Conditions govern procurement of equipment by the United Nations Office at Geneva and that receipt of the purchase order connotes acceptance of the General Terms and Conditions. Article 5(a) of those General Terms and Conditions provides that a contract will be binding on the United Nations Office at Geneva when the Office "has notified the successful bidder of its acceptance of his bid by sending him" the purchase order, upon its receipt, and that the purchase order will be considered by the Office as having been concluded if the contractor does not acknowledge receipt thereof within a reasonable period of time. In other words, the Office's own General Terms and Conditions make the purchase order, upon its receipt, a concluded contract without the need for acceptance by the contractor. Thus, the purchase order became a contract in January 1994 when the Company received the purchase order.[29]

7. It could also be noted that, even if a formal contract had not been concluded pursuant to the express terms of the General Terms and Conditions, under generally accepted principles of commercial law, a written order by one party which reasonably induces action causing expense by another person would entail liability for the person sending the order. In the present case, the company reasonably relied on the purchase order to its detriment, i.e., it spent time and money in assembling the equipment. The United Nations is thus liable as its actions caused this expense.

Claim for payment

8. In our view, there are therefore two options open to the Office in connection with the Company's claim for payment: (1) the Office could take delivery of, and pay for, the equipment under the terms of the purchase order; or (2) the Organization could cancel the purchase order since the purchase was not approved, and pay reasonable compensation to the Company relating such cancellation.[30]

9. We note that the present claim stems from an unauthorized purchase order. In this regard, we would recommend that, after the claim is settled, the matter be referred to the Office of Internal Oversight Services for advice as to whether there is any need for modification of the United Nations Office at Geneva contracting procedures to ensure that unauthorized purchase orders are not sent to contractors.

8 November 1994

8. Compensation for alleged damage to a United Nations Development Programme Office — Termination of a lease based on "compelling circumstances"

Memorandum to the Coordinator, CPSP/DAIS, United Nations Development Programme

1. This is in reference to your memorandum dated 5 November 1994 in which you sought our advice on the compensation claimed by the landlord of the UNDP premises in Aden for alleged damage to his property during the war of the Yemens. Attached to that memorandum you enclosed a letter from the landlord in which he raised several legal points to support his claim for compensation from UNDP. We also make reference to your two facsimiles, the first, dated 9 November 1994, by which you provided us with the lease agreement concluded between UNDP and the landlord, on 13 November 1993, and the second, dated 11 September 1994, with the letter, reference ADM/250/23, dated 11 September 1994, that the UNDP Resident Representative in Yemen addressed to the landlord communicating the decision by UNDP to terminate the lease.

2. The issue in this matter is whether compensation is due to the landlord for alleged damage caused to the premises and for termination of the lease before the date of its agreed expiration.

3. We note that, in accordance with article 1, the lease was to expire on 31 October 1998. However, UNDP decided to terminate the lease before that date, based on "compelling circumstance" and citing articles 6 and 16 of the lease agreement (see letter ADM/250/23):

(*a*) Article 6 and of the lease agreement refers to the case where UNDP decides to close down its office in Yemen, or to remove it from Aden, or to change the level of the UNDP representation in Yemen or to acquire its own property in Yemen;

(*b*) Article 16 envisages three different situations: first, total destruction of the premises; second, the premises are rendered unfit for further tenancy or for the use of UNDP; third, partial destruction of the premises. The first two give the

right to UNDP to immediately terminate the lease. The third one gives UNDP the right to choose between termination (giving notice within 30 days after the destruction) or remain on the premises, with a proportionate reduction of the rent.

It seems that the decision to terminate the lease was essentially based on the damage to the premises covered by article 16.[31] This decision owould not result in any legal liability for UNDP *vis-à-vis* the landlord, since article 16 gives UNDP the right to terminate the lease in case of partial or total destruction of the premises, or if the premises are rendered untenantable. The full article reads:

> "Should the Building or any part thereof be damaged by fire or any other cause, this Lease shall, in case of total destruction of either the Building or the Premises or upon either the Building or the Premises or upon either the Building or the Premises being rendered unfit for further tenancy or for use by UNDP, immediately terminate and, in case of partial destruction or damage of either the Building or the Premises, shall terminate at the option of the UNDP upon given notice in writing to the Lessor within thirty days after such fire or partial destruction or damage. In the event of termination of the Lease under this paragraph, no rent shall accrue to the Lessor after such total or partial destruction or damage. Should the UNDP elect to remain on premises rendered partially untenantable, it shall have the right to a proportionate rebate or reduction of the rental payments."

4. As regards the responsibility for the damage caused to the premises, the lease agreement provides, under article 10, that the lessor shall insure the premises against damage by fire other causes and shall hold UNDP harmless from any liability for such damage. Thus, the lessor has the sole responsibility for the damage caused to the premises. Furthermore, UNDP is not responsible for the damage caused by circumstances over which UNDP has no control at all, and, in this case, it is not disputed that the damage to the premises was due to the landing of rockets in a war situation. UNDP is, however, exclusively responsible for the loss of its own property, in accordance with article 12 of the lease agreement. We would also like to underline that UNDP cannot be held responsible for the looting which followed the damage caused by the landing of the rockets, as this would be a direct consequence of an event over which UNDP had no control. In the war situation which prevailed at that time in Yemen, it could not have been possible for UNDP to secure the premises after damage occurred.

5. As a conclusion it is the opinion of this Office that no compensation is due to the lessor for early termination of the lease and UNDP cannot be held responsible for the damage caused to the premises by the rockets which landed in the vicinity of the UNDP Office, or the loss of the landlord's property due to looting. The UNDP Resident Representative suggests that UNDP should make and *ex gratia* payment to cover the loss sustained by the landlord. We believe that such a payment is a matter of policy for UNDP to take in accordance with UNDP financial regulation 14.3 and rule 114.14.

17 November 1994

COMMERCIAL ISSUES

9. United Nations policy concerning gifts and commercial credits — Financial regulation 7.2 to 7.4 and financial rule 107.5 to 107.7 — Use of the United Nations name — General Assembly resolution 92(I) of 7 December 1946

Memorandum to the Senior Legal Officer, Executive Director and Management, United Nations Conference on Trade and Development (UNCTAD)

1. Please refer to your memorandum of 20 June 1994 concerning preparation for the United Nations International Symposium on Trade and Efficiency to be held from 17 to 21 October 1994 in Columbus, Ohio. You noted that one of the subjects of the Symposium is the application of electronic data transmission techniques to the possibility of distributing, free of charge, to the Symposium participants video cassettes and CD-ROMs with basic information on the subjects of the Symposium, and also the possibility of making short films for panel discussions. You further noted that certain private commercial companies are prepared to make those cassettes, CD-ROMs and films free of charge to the United Nations. You requested advice concerning the policy of the United Nations in respect of: (a) accepting gifts from commercial companies, and (b) commercial credits for such gifts (e.g., this video cassette was manufactured by [name of corporation] for the United Nations").

(a) Gifts

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

"*Rule 107.5*

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

"*Rule 107.6*

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

"*Rule 107.7*

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

3. Although it appears that the proposed gifts would be consistent with the policies and aims of the Organization and that their acceptance would not directly or

indirectly involve additional financial liability for the Organization, you must seek the concurrence of the Controller prior to taking any further action in this case as his Office has the authority delegated pursuant to financial rule 107.5.

(b) Commercial credits

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

5. The same policy and practice must be applied in this case, notwithstanding the fact that the cassettes, CD-ROMs and films in question would be donated to the United Nations free of charge. The rationale behind this is that the donations would be effected by commercial entities and that the United Nations cannot allow its name to be used in connection with a company or its services and/or products. However, it would be permissible if, on a separate film or CD-ROM frame, it was stated that that film, cassette or CD-ROM was made available free of charge by [name of corporation]. That corporation would have to agree not to otherwise publicize the donation to the United Nations.

7 July 1994

COMMUNICATIONS

10. Legality of radio broadcasting by the United Nations towards a State from international waters or from a third State — General Assembly resolution 13(I) of 13 February 1946 — Article 39 of the International Telecommunication Convention — Article SVI of the Agreement between the United Nations and the International Telecommunication Union — Article 109 of the 1982 United Nations Convention on the Law of the Sea — ITU Radio Regulations

Memorandum to the Director, Department of Political Affairs

1. This is in response to your two memoranda, dated 11 January and 25 January 1994, in which you requested the views of the Office of Legal Affairs on the legality of radio broadcasting by the United Nations towards Haiti from international waters or from a third country. We set forth below our views based on the Charter of the United Nations, relevant General Assembly resolutions and law of the sea and telecommunications act.

Radio broadcasting by the United Nations

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

> "The United Nations should also have its own radio broadcasting station or stations, with the necessary wavelengths, both for communications with Members and with branch offices, and for the information of United Nations programmes."[32]

3. Moreover, article 39 of the International Telecommunication Convention[33] recognizes that "the telecommunication operating services of the United Nations shall be entitled to the rights and bound by the obligations of this Convention and of the Administrative Regulations annexed thereto"; and article XVI of the Agreement between the United Nations and the International Telecommunication Union (Atlantic City, 1947)[34] states:

> "1. The Union recognizes that it is important that the United Nations shall benefit by the same rights as the Members of the Union for operating telecommunication services.
>
> "2. The United Nations undertakes to operate the telecommunication services under its control in accordance with the terms of the International Telecommunication Convention and the regulations annexed thereto…"

Radio broadcasting from international waters

4. We understand that one suggestion has been made according to which radio broadcasts by the United Nations to Haiti would emanate from a station located on a platform in "international waters". Article 109 of 1982 United Nations Convention on the Law of the Sea[35] provides:

> "1. All States shall cooperate in the suppression of unauthorized broadcasting from the high seas.
>
> "2. For the purposes of this Convention, 'unauthorized broadcasting' means the transmission of sound radio or television broadcasts from a ship or installation on the high seas intended for reception by the general public contrary to international regulations, but excluding the transmission of distress calls."

5. Moreover, paragraph 1(1) of article 30 of the ITU Radio Regulations, to which telecommunication operations of the United Nations must conform (see para. 3 above), provides that:

> "The establishment and use of broadcasting stations (sound broadcasting and television stations) on board ships, aircraft or any other floating or airborne objects outside national territories is prohibited."

Paragraph 6 of article 59 of the ITU Radio Regulations provides that:

"The operation of a broadcasting service[36] by a ship station at sea is prohibited."

6. In view of the above, we conclude that the operation of a radio station in international waters transmitting to Haiti would be in violation of applicable international legal rules.

Radio broadcasting from a third country

7. In order for the United Nations to be able to install and operate its own radio station in a third country for broadcasting to Haiti, the United Nations would have to conclude a formal agreement with the third country. The agreement would, *inter alia*, grant to the United Nations the right to install and operate the radio station, establish the inviolability of the premises and determine the status of the personnel attached to the radio station.

8. In addition, the United Nations would have to obtain registration of its radio frequencies under the International Telecommunication Convention. The United Nations has the rights of a Telecommunication Administration, including the registration of radio frequencies with the International Frequency Registration Board, an organ of ITU. Radio Regulations adopted pursuant to the ITU Convention lay down procedures for consultations that would be applied in the event that United Nations broadcasts might cause technical interference with telecommunications activities of ITU Member States.

9. If the United Nations were to enter into a lease or other arrangements for the use of the facilities and frequencies of an already existing radio station in a third country (the transmissions of which can reach Haiti), an appropriate agreement would have to be concluded with the station establishing the terms and conditions of usage.

10. We understand that the proposal for broadcasting by the United Nations to Haiti has arisen in the context of the efforts of the United Nations to promote a resolution of the political situation in that country and as a means of enabling the United Nations to keep the population of Haiti informed of its activities. In this respect we note that, in somewhat comparable contexts in the past, broadcasting by the United Nations has been on the basis of a specific legislative mandate. We consider that authorization by the Security Council would be advisable in the present case, particularly in view of the possibility that the broadcasts in question might be alleged by some parties to be contrary to the principle of non-interference in matters essentially within the domestic jurisdiction of a State. We note that, under paragraph 7 of Article 2 of the Charter of the United Nations, that principle shall not prejudice the application of enforcement measures under Chapter VII. In addition, we point out that, if the arrangements for broadcasting by the United Nations would require financial expenditures, authorization by the General Assembly would be required.

3 February 1994

11. Question of possible private ownership and operation of the United Nations Telecommunications Network — 1989 International Telecommunication Union resolution No. 50

Memorandum to the Director, Office of General Service, Department of Administration and Management

1. Please refer to your memorandum, on the above-captioned subject, dated 1 July 1994. It is noted that the Secretary-General of the United Nations has proposed adding seven antennae to the United Nations satellite telecommunications system which presently consists, among other facilities, of 11 satellite antennae. This proposal was reviewed and, with some qualifications, endorsed by the Advisory Committee on Administrative and Budgetary Questions. It is also noted that, in the course of the informal consultations in the Fifth Committee at the current session of the General Assembly, some delegates asked whether the United Nations network facilities could be owned, operated and/or maintained by an outside private entity or telecommunications authority. You seek our views on the issue of possible private ownership and operation of the United Nations telecommunications network; in particular, whether the United Nations would be in violation of ITU resolution No. 50 of 1988 if the antennae in question were to be owned by a private commercial operator. We set out our views below.

General comments

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

> "The United Nations should also have its own radio broadcasting station or stations, with the necessity wavelengths, both for communications with Members and with branch offices, and for the information of United Nations programmes."[37]

3. Article 39 of the 1982 International Telecommunication Convention (Nairobi)[38] recognized that "the telecommunication operating services of the United Nations shall be entitled to the rights and bound by the obligations of this Convention and of the Administrative Regulations annexed thereto"; and article XVI of the Agreement between the United Nations and the International Telecommunication Union (ITU) (Atlantic City, 1947) states:

> "1. The Union recognizes that it is important that the United Nations shall benefit by the same rights as the Members of the Union for operating telecommunication services.
>
> "2. The United Nations undertakes to operate the telecommunication services under its control in accordance with the terms of the International Telecommunication Convention and the regulations annexed thereto…"

4. Pursuant to the above provisions, the United Nations has the same rights and is bound by the same obligations as the States Members of ITU. Accordingly the United Nations, similarly to States, appears to have its own authority to exercise

those rights and to discharge those obligations in the way which the Organization deems most appropriate.

Possible private ownership and operation of the United Nations telecommunication network

5. The question, as formulated in the Fifth Committee, involved a number of aspects which will be considered separately below.

(*a*) *Private operation of the United Nations-owned network*

6. If the United Nations telecommunication network continues to be owned by the Organization, the choice of the operation and/or maintenance of the network remains an internal affair of the United Nations. In other words, if the Organization believes that it would be in its best interest to have its telecommunication network operated and/or maintained by an outside private commercial entity, the United Nations may enter into a contract with such entity setting out specific terms and conditions under which the system may be operated.

7. Naturally, specific provisions of such a contract will have to be in full accord with all relevant international obligations of the United Nations under applicable agreements in order to ensure that actual operation and/or maintenance of the network will not be in violation of those obligations.

(*b*) *Use by the United Nations of a telecommunication network owned and operated by an outside private commercial entity*

8. If the United Nations decides to use a telecommunication network owned and operated by an outside private entity, that network will no longer be considered a United Nations network for the purposes of the above-cited international agreements. In this case, the Organization will have to conclude a contract with such entity outlining all specific terms and conditions of United Nations use of the network.

9. Under this scenario, the entity itself will have primary responsibility for discharging all relevant obligations under international telecommunication law (registration of radio frequencies, etc.) in accordance with the procedures established in the national legislation of a State on which territory this entity operates.

10. It should also be borne in mind in this connection that telecommunication facilities to be used by the United Nations under this scenario would no longer enjoy the status of United Nations facilities. For example, the entity operating those facilities will not be immune from legal process; its property, including facilities used by the Organization under the above contract, will not be inviolable, etc. This change of status may, at least in theory, adversely affect such valuable features of the current United Nations-owned network as its confidentiality.

(*c*) *Possible transfer of ownership of existing United Nations telecommunication facilities to an outside private entity*

11. In principle, the Organization has the right to dispose of its own property, but possible sale of United Nations telecommunication facilities should not be in contradiction with the existing obligations of the Organization under applicable international agreements and the legal arrangement between the United Nations and governments on the territory of which those facilities are located.

12. For example, as far as United Nations Headquarters is concerned, section 4 of the Agreement between the United Nations and the United States regarding the Headquarters of the United Nations, of 26 June 1947,[39] contains a specific list of radio facilities which the United Nations "may establish and operate in the headquarters district" and requires that "other radio facilities" should be "specified by supplemental agreements between the United Nations and the appropriate American authorities". In view of this provision, it appears that there would be no legal impediment for the Organization to sell a telecommunication facility which is currently located in the headquarters district if, after the sale, the facility is removed from the district.

13. If, however, the facility is not removable or the seller and the buyer would prefer to keep it on the territory of the Headquarters district, the concurrence of the appropriate American authorities will be necessary in accordance with the relevant provisions of the 1947 Headquarters Agreement. It is not evident that those authorities would agree that non-United Nations facilities could be located and operated on the territory of the United Nations Headquarters district.

ITU resolution No. 50

14. ITU resolution No. 50 of 1989, entitled "Use of the United Nations Telecommunications Network for the Telecommunication Traffic of the Specialized Agencies," adopted by the ITU Plenipotentiary Conference (Nice, 1989), does not specifically address the question of ownership of the United Nations telecommunication network or of parts thereof. The resolution's objective seems to authorize the use of the network by the specialized agencies and to establish certain conditions for such use (see paras. 1–4 of the resolution).

15. However the resolution appears to be based on the assumption that the telecommunication network in question indeed belongs to the United Nations. Thus, if ownership of the existing United Nations telecommunication network is transferred to an outside private entity, the question as to whether and under which terms and conditions the network may carry traffic of the specialized agencies will have to be re-examined by all parties concerned: ITU, United Nations, specialized agencies and the new owner of the network.

Conclusion

16. In view of the above, we share your view that there are significant practical difficulties in turning over the ownership, operation or maintenance of the whole existing United Nations telecommunication network to an outside commercial entity. Therefore, if this option is indeed contemplated, a thorough and comprehensive analysis (after consultations with ITU and host Government) of such an idea would be necessary.

15 July 1994

12. Radio broadcast systems for United Nations peacekeeping operations — Provisions on communications in the status of forces agreements — Article XVI of the Agreement between the United Nations and the International Telecommunication Union — Legal bases for the establishment of radio broadcasting by the United Nations

Memorandum to the Acting Director, Field Operations Division, Department of Peacekeeping Operations

1. This is with reference to your memorandum of 16 November 1994 on the above subject. We understand that the Director of Peacekeeping Operations intends to establish a policy to set up and operate radio broadcasting stations in all future peacekeeping mission areas. In this connection, you requested to know: (a) whether the provisions on communications in the status-of-forces agreements concluded between the United Nations and States on whose territories peacekeeping operations are deployed would serve the purpose; (b) what would be the appropriate procedure to follow when no status of forces agreement has yet been concluded; and (c) whether specific provisions in the relevant Security Council resolution establishing a peacekeeping operation would ensure the establishment of radio broadcasting.

2. The provisions regarding communications in existing status of forces agreements are similar to those contained in paragraphs 10 and 11 of the model agreement.[40] Paragraph 10 provides for the application of article III of the Convention on Privileges and Immunities of the United Nations concerning facilities in respect of communications. Paragraph 11 provides, as far as the use of radio is concerned, for the general legal framework for the United Nations and satellite network. Such provisions are intended to ensure that peacekeeping operations are equipped with a reliable telecommunication network to communicate by all appropriate means, including radio satellite, without delay or restriction, with United Nations offices located within the territories where peacekeeping operations are deployed and outside such territories. Therefore, the communications facilities provided for under the model status-of-forces agreement are designed to ensure official communications within and between all United Nations offices.

3. While the above-mentioned telecommunications facilities serve the purpose of United Nations internal communications, the facilities to operate United Nations radio broadcasting would serve the purpose of disseminating information to the general public to promote accurately the activities of the United Nations peacekeeping operation concerned. Therefore, the relevant provisions on communications in the model status-of-forces agreement may not be understood as constituting a sufficient basis for United Nations peacekeeping operations to engage in radio broadcasting.

4. The authority of the United Nations to engage in radio broadcasting derives from the approval by the General Assembly in its resolution 13 (I), dated 13 February 1946, of a recommendation of the Technical Advisory Committee on Information concerning Policies, Functions and Organization of the Department of Public Information, as follows:

> "The Department should actively assist and encourage the use of radio broadcasting for the dissemination of information about the United Nations. To this end it should, in first instance, work in close cooperation with radio

broadcasting organizations of the Members. The United Nations should also have its own radio broadcasting station or stations, with the necessary wavelengths, both for communication with Members and with branch offices, and for the origination of United Nations programmes. The station might also be used as a centre for national broadcasting systems which desire to cooperate in the international field. *The scope of the radio broadcasting activities of the United Nations should be determined after consultation with national radio broadcasting organizations*." (emphasis added)

5. Therefore, the General Assembly has provided the legislative authority for the United Nations to operate its own radio broadcasting stations.

6. Moreover, article XVI of the Agreement concluded between the United Nations and the International Telecommunication Union (ITU) defining the relationship between the two organizations provides as follows:

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

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

7. Pursuant to the above-mentioned provisions, the United Nations has the same rights and is bound by the same obligations as the States members of ITU in operating its telecommunication services, including radio broadcasting.

8. However, in order for the United Nations to exercise the authority conferred upon it by the General Assembly resolution 13 (I) and to exercise the rights and discharge the obligations provided for in the International Telecommunication Convention and the Regulations annexed thereto, the consent of the State on whose territory radio broadcasting station(s) will be installed is required and an agreement between the United Nations and that State is necessary. Such agreements are required in the context of the United Nations activities including peacekeeping. Precedents for such agreements exist. United Nations Headquarters Agreements with several States, such as with the United States and Kenya, contain specific provisions on radio broadcasting facilities.

9. As to whether specific provisions in the relevant Security Council resolution establishing a peacekeeping operation would ensure the establishment of radio broadcasting, unless the relevant paragraph of the resolution is adopted under Chapter VII of the Charter, the aforementioned requirements must be met.

10. Accordingly, in the context of United Nations peacekeeping operations, the consent of the State on whose territory radio broadcasting will be installed is necessary and appropriate legal arrangements should be reached between the United Nations and that State. This could be done either through the inclusion of the relevant provisions into the status-of-forces agreement or by special arrangement in the form of an exchange of letters. Such an exchange of letters will be particularly necessary in case a status-of-forces agreement has already been concluded. As indicated in paragraph 3 above, existing status-of-forces agreements do not provide a sufficient legal basis for United Nations peacekeeping operations to engage in radio broadcasting.

11. Based on the foregoing, until such time as the consent of the State on whose territory radio broadcasting stations will be installed is obtained and appropriate legal arrangements are made, the decision to proceed with the establishment and operation of such radio stations in peacekeeping operations is not advisable.

12. However, if the consent of the State on whose territory a peacekeeping operation is deployed proves to be difficult to obtain as far as United Nations radio broadcasting is concerned and such broadcasting is deemed essential to the activities of the operation, the Organization might consider using a third country for the purpose. In that instance, the consent of the Government of the host country concerned would also be required and necessary legal arrangements would have to be made. In considering such an alternative, the political sensitivities which it may cause for the State to which the radio broadcasting would be transmitted should be taken into account.

21 December 1994

PEACEKEEPING

13. Compatibility of security issues and the mandate of peacekeeping forces — Mandate of (UNOSOM II) — Security Council resolution 897 (1994) — Licence Agreement between the United Nations and the United States

Memorandum to the Under-Secretary-General for Peacekeeping Operations

1. This is with reference to your memorandum of 31 January 1994 transmitting to us a cable sent by the Special Representative of the Secretary-General, UNOSOM II, seeking authorization to accede to a request by the [name of State] Mission in Somalia[41] to relocate to the UNOSOM compound for security reasons. It is noted that, according to the Special Representative's cable, the State concerned would need space for 20 to 25 trailers to provide housing and office space for approximately 10 staff and 16 security guards, that they would be "fundamentally self-sufficient and independent" and that "they simply want some secure space". It is also noted that on 18 February 1994 the Permanent Representative of the State concerned to the United Nations sent to you a letter on this subject by which he officially communicated the above request and provided certain details thereof. You requested our legal advice on the matter.

2. We agree with you assessment that, while the request by that State may seem to be, *prima facie*, a practical matter, it does have legal, political and financial implications which should be examined and taken into account.

3. The very first issue which has to be considered is whether the provision of security for foreign missions in Mogadishu or elsewhere in Somalia would be consistent with the UNOSOM mandate.

4. The mandate of UNOSOM II was approved by the Security Council resolution 814 (1993) of 26 March 1993 in order to create a secure environment for humanitarian relief operations in Somalia. By endorsing the recommendations contained in paragraphs 56 to 88 of the report of the Secretary-General of 3 March 1993

(x/25354), the Security Council, acting under Chapter VII of the Charter of the United Nations, entrusted UNOSOM, *inter alia*, with the following military task set forth in paragraph 57 of that report:

> "(f) *To protect, as required, the personnel, installations and equipment of the United Nations and its agencies, the International Committee of the Red Cross as well as NGOs* and to take such forceful action as may be required to neutralize armed elements that attack, or threaten to attack, such facilities and personnel, pending the establishment of a new Somali police force which can assume this responsibility." (emphasis added)

The Secretary-General was also requested, in paragraph 14 of Security Council resolution 814 (1993), to direct the Force Commander of UNOSOM II, through his Special Representative, to "assume responsibility for the consolidation, expansion and maintenance of a secure environment throughout Somalia".

5. The mandate of UNOSOM II was revised by the Security Council resolution 897 (1994) of 4 February 1994, in which the Council approved the Secretary-General's recommendations for the continuation of UNOSOM II, as set out in particular in paragraph 57 of his report (S/1994/12), "with a revised mandate for the following":

> "(g) Providing protection for the personnel, installations and equipment of *United Nations and its agencies, as well as of non-governmental organizations* providing humanitarian relief and reconstruction assistance." (emphasis added)

6. Thus, while UNOSOM II has a comprehensive and far-reaching mandate, it expressly limits the task of providing protection in Somalia to the protection of the personnel, installations and equipment of the United Nations, its agencies and relevant non-governmental organizations.

7. In view of this, it is our opinion that any activity of UNOSOM forces aimed at providing protection to personnel, installations and equipment other than those indicated above may be carried out only if this activity does not interfere with the implementation of the UNOSOM mandate and does not have financial implications for the Organization. We assume that the proposed relocation of the [name of State] Mission to the territory of the UNOSOM compound, in either of the forms set out in paragraphs 9 and 10 below, would satisfy those conditions since it would not require additional measures for protecting the territory of the compound and would not lead to additional expenses for the Organization. If this assumption is incorrect, we consider that explicit authorization of the Security Council would be needed for the proposed relocation.

8. The obligations of the United Nations *à-vis* the UNOSOM compound in Mogadishu are set out in the Licence Agreement signed by the United Nations and the United States Government on 6 July 1993. That Agreement does not address the question of locating diplomatic missions of States on the territory of the compound. However, paragraph 10 of the agreement provides that the compound is "to be used in connection with the United Nations peacekeeping activities in Somalia mandated by the Security Council". Although, as indicated in paragraph 5 above, it appears that the proposed relocation would not be in contradiction with the UNOSOM mandate as established by the Security Council, we would suggest that the consent of the United States authorities to the request by the State in question should be sought,

since the licence appears to contemplate occupation of that compound only by the licensee (the United Nations). Besides, this consent is needed since the proposed relocation would involve action which may be considered as erection of "permanent structures" (digging a water well and installing a septic tank as referred to in the above letter of the Permanent Representative of the State concerned) for which purposes prior written consent of the United States is required in accordance with paragraph 4 of the License Agreement.

9. Once this consent is received, one possibility would be to conclude an agreement between the United Nations and the Mission of the State regulating various terms and conditions of its using the territory of the compound for the above purposes. Prior to drafting this agreement, all specific practical requirements and needs for the Mission (e.g., duration of the arrangement; use of various utilities, if any; identification for entry into the territory of the compound, etc.), in case it is located on the territory of the compound, should be clarified with the State in question in order to adequately address those requirements and needs in the agreement. In addition, such agreement will have to regulate a number of legal issues (e.g., indemnification in connection with possible claims of the Mission's employees or of third parties, settlement of disputes, etc.). This Office will be prepared to provide assistance in drafting the agreement, if it is decided to take this course of action.

10. Another possibility would be for the Mission of the State concerned to conclude a direct agreement with the United States concerning the use by the Mission of a part of the territory of the compound for the purposes indicated by the Ambassador of that State. If this option is acceptable to the parties concerned, the United Nations and the United States would make a simple amendment to the current Licence Agreement to the effect that a certain designated part of the compound's territory is excluded from the United Nations' licence and all other issues arising from the use of that part of the excluded territory by the Mission of the State in question would be dealt with directly in the agreement between the United States and that State. It appears that this option might be preferable since it would allow the Organization to avoid creating a precedent the implications of which are not entirely clear and also enable the Organization to avoid dealing with quite complicated legal issues arising out of this novel case: for example, the legal status of the territory occupied by the Mission of the State concerned as contrasted with that of the UNOSOM compound as a whole.

25 February 1994

14. United Nations operation in Rwanda — Mandate of United Nations Assistance Mission for Rwanda (UNAMIR) — Security Council resolutions 872 (1993), 912 (1994), 918 (1994) and 929 (1994)

Memorandum to the Assistant-Secretary-General for Peacekeeping

1. This is with reference to your note date 18 July 1994 to which was attached copy of the letter dated 15 July 1994 ("the communication") that the Charge d'affaires a.i. of the Permanent Mission of France addressed to the President of the Security Council and which has been issued as an official document of the Security Council

(S/1994/832). In this respect, you requested our views on the communication in the framework of the current mandate of UNAMIR's present and previous relevant situations.

2. By the communication, the Government of France indicated that the presence of the "President" of the "Interim Government" of Rwanda and four of his "Ministers" had been observed in Cyangugu, one of the districts within the humanitarian zone established by the French forces pursuant to Security Council resolutions 925 (1994) and 929 (1994). The position of the French Government in this respect is that no political or military activity will be tolerated in this humanitarian zone and all necessary measure will be taken to ensure compliance with the rules applicable to the area concerned. Furthermore, the French Government expressed its willingness to lend its support to any Security Council decision relating to the persons referred to above and to consider any decision in respect of which the United Nations might wish France to lend its support.

3. It is necessary to point out that, in Rwanda, two distinct operation shave been authorized by the Security Council, one being conducted by UNAMIR and the other by the temporary operation under national command and control of Member States. The mandate of UNAMIR, which was initially authorized by the Security Council resolution 872 (1993) of 5 October 1993, has been adjusted following the tragic events of 6 April 1994, when the President of Rwanda was killed in a plane crash. Pursuant to Security Council resolution 912 (1994) of 21 April 1994, the mandate of UNAMIR was adjusted as follows:

— To act as an intermediary between the parties in an attempt to secure their agreement to the cease fire;

— To assist in the resumption of humanitarian relief operations to the extent feasible;

— To monitor and report on developments in Rwanda, including the safety and security of the civilians who sought refuge with UNAMIR.

Subsequently, pursuant to Security Council resolution 918 (1994) of 17 May 1994, the above-mentioned mandate of UNAMIR was expanded:

— To contribute to the security and protection of displaced persons, refugees and civilians at risk in Rwanda, including through the establishment and maintenance, where feasible, of secure humanitarian areas;

— To provide security and support for the distribution of relief supplies and humanitarian relief operations.

4. Taking into account the time needed to gather the necessary resources for the effective deployment of UNAMIR for the fulfillment of the objective set out in resolution 918 (1994) as reaffirmed by the Security Council in its resolution 925 (1994), and the offer by Member States to cooperate with the Secretary-General toward the fulfillment of such objectives, the Security Council, acting under Chapter VII of the Charter of the United Nations, authorized pursuant to resolution 929 (1994) of 22 June 1994 the establishment of a temporary operation under national command and control of the Member States concerned. In accordance with paragraphs 2 and 3 of the above-mentioned resolution, the temporary operation was "aimed at contributing, in an impartial way, to the security and protection of dis-

placed persons, refugees and civilians at risk in Rwanda" and to use "all necessary means to achieve the humanitarian objects set out in paragraphs 4(a) and (b) or resolution 925 (1994)".

5. Accordingly and since France is one of the Member States conducting the above-mentioned temporary operation, we note that the position expressed by the Government of France in the communication is consistent with the relevant provisions of Security Council resolution 929 (1994).

6. As to any decision that the Security Council may wish to take in connection with the persons referred to in the communication, and should such a decision address issues relating to the maintenance of law and order, it should be borne in mind that in Rwanda a Broad-Based Government of National Unity was sworn in on 19 July 1994. The maintenance of law and order therefore rests with that Government. Accordingly, issues which might arise in connection with law and order in the case of the persons referred to in the communication will have to be addressed in consultation with the Government in place in Rwanda.

7. In the case of Somalia, which could be considered a previous relevant situation, no Government of Somalia was in existence to deal with issues relating to the maintenance of law and order. In the absence of such a governmental infrastructure, UNOSOM II was authorized pursuant to Security Council resolution 814 (1193) under Chapter VII of the Charter and placed under United Nations command and control. Subsequently, UNOSOM II was further authorized by the Security Council in its resolution 837 (1993) "to take all necessary measures against all those responsible for armed attacks … including to secure the investigation of their actions and their arrest and detention for prosecution, trial and punishment".

24 July 1994

PERSONNEL ISSUES

15. Conditions of service of police observers in the United Nations Observer Mission in El Salvador — Designation of beneficiary in case of death while in service — Question of applicability of national laws — Nature of P.2 form

Memorandum to the Chief of the Field Personnel Section, Field Operations Division, Department of Peacekeeping Operations

1. Please refer to your memorandum of 18 October 1993 on the above subject requesting our advice with regard to payment of monies due to a [name of State] Police Observer who passed away during services with the United Nations Observer Mission in El Salvador (ONUSAL). We note that, on arrival at the mission, the Police Observer filled out a designation of beneficiary form (P.2) indicating that, in case of his death, his mother should receive 75 per cent of the monies standing to his credit, and his fiancee 25 per cent. We also note that the corresponding cheques made out in the names of the above beneficiaries to be delivered to them through the Chief of the [name of State] Police Contingent in ONUSAL (as required by the

applicable rules), were returned by the authorities of the State of his nationality with the explanation that "in accordance with the State's law, when there is no legal testament, the inheritance will be divided in two: half going to the legal ascendents and the other half to the natural children. Further, according to the State's law, a United Nations document is only valid if authenticated and even then, it is not possible to recognize the P.2 form as valid as, according to article 1167 of that State's Civil Code, the person filling such a form must leave half of the monies due to him to his legal ascendents and natural children".

2. The letter of the ONUSAL Chief Administrative Officer, attached to your memorandum, states that the authorities of the State concerned object to the payments to the designated beneficiaries on two ground. First, "there is no legal testament", and the P.2 form filled out by the deceased cannot be viewed as such testament because it was not "authenticated". Second, even if the P.2 form were properly authenticated, it would have not been valid because half of the monies still "must" be left to legal ascendents and natural children.

3. United Nations rules governing the conditions of service of Police Observers in ONUSAL are contained in "Notes for the Guidance of Military Liaison Officers (MLOs)/Police Monitors on Assignment" of July 1991. Paragraph 83 of those Notes provides as follows:

"D. *Beneficiary*

"83. An MLO/Police Monitor is at liberty to name his own beneficiary, whether the latter be a recognized dependent or not. For this purpose, each MLO/Police Monitor, upon arrival at ONUSAL, is required to complete, in triplicate, a designation of beneficiary form."

Paragraph 84 of the Notes provides as follows:

"E. *Death*

"84. In the event of death in the service of the United Nations, *the award of compensation* will follow a similar procedure, but the payment will be made to the duly designated beneficiary of the MLO/Police Monitor, *subject to the requirement of the laws of the MLO/Police Monitor's own country*. If no beneficiary has been named, the payment will be made to the deceased's estate. In either case, payment will be made by the United Nations through the MLO/Police Monitor's Government" (emphasis added).

4. The two above provisions, read together, create a certain ambivalence: the first established "liberty" to name a beneficiary, while the second indicates that the payment to the beneficiary will be made "subject to the requirements" of national laws, which condition is open to different interpretations. However, the reference to the requirements of national laws in paragraph 84 of the Guidelines relates to the award of compensation (e.g., in the event of death), and not to the monies standing to the credit of a deceased at the time of death. The Guidelines therefore do not require reference to national laws in distributing monies standing to the credit of a deceased at the time of death.

5. As for the position of the concerned State's authorities, the P.2 is not and was not intended to be a testament. The purpose of this form is solely to allow the Organization to discharge its obligations *à-vis* the deceased. It is therefore within the

United Nations authority to determine whether the P.2 was filled out and signed correctly, and whether it is valid or not for intended purposes. We understand that, in case of the deceased police observer, there are no doubts as to the validity of the P.2 form.

6. In view of the foregoing, we share the opinion of the Chief Administrative Officer of ONUSAL that the monies paid by the United Nations to the Police Observer in respect of his services with the mission, and standing to his credit at the time of death, should be distributed in accordance with the P.2 form filled out specifically for this purpose. Any other action by the United Nations would constitute a breach of obligation assumed by the Organization at the commencement of the police observer's service in the mission.

5 January 1994

16. Question of whether the Department of Public Information can become a member of a national foundation

Memorandum to the Director, Media Division, Department of Public Information

1. This is in response to your memorandum of 12 November 1993 seeking our advice "on possible legal implications were the Department of Public Information to accept membership in a foundation being set up by the International Foundation for the Acquisition of Distribution Rights of Videos and Television Programmes dealing with the environment and development, in a joint enterprise with Television Environment".

2. In light of the information provided in your memorandum, we understand that the proposed foundation (the Foundation) is to be a French entity, partially financed by the French Government and governed by French law. We also have taken note of your indication that the membership of the Department of Public Information in that Foundation would be in "an advisory role only, with prospects for facilitating the distribution of video products from the Media Division but with no financial involvement". However, no information is provided as to the responsibilities that the Department would be assuming by virtue of its membership in a private non-United Nations entity. In particular, it is not clear that: (a) the Department would not be required to participate in the establishment of the Foundation, e.g., by participating in the application for incorporation under French law and by contributing to the initial capital required for the incorporation; (b) the Department would not be required to participate in the management and administration of the Foundation; and that (c) the Department would have no financial responsibility for the debts of the Foundation.

3. As the Department of Public Information is an integral part of the United Nations Secretariat, any responsibility it assumes by virtue of its membership in the Foundation also involves the Secretariat and ultimately the United Nations as a whole. From a legal point of view, therefore, the proposed membership of the Department in a private non-United Nations entity could confound the separate status and identity of the Foundation with that of the United Nations and associate the United Na-

tions with the Foundation's activities. Furthermore, the participation of the Department as a minority member in the Foundation might place it in the awkward position of appearing to endorse activities and policies that could be in conflict with those of the United Nations. We therefore advise that the Department should not become a member in the Foundation, irrespective of whether or not such membership is only in an advisory capacity.

4. While, therefore, the membership of the Department of Public Information in the Foundation would be legally unacceptable, it could, of course, enter into cooperative arrangements with the Foundation, which would outline the areas of common interest, the objectives sought by the parties and the types of corporation activities considered to be necessary and beneficial for the Department. We would be prepared to assist in reviewing the text of such cooperative arrangements between the Department and the Foundation, once that entity is established.

10 February 1994

17. Legal or contractual ties between the United Nations and individual United Nations guards — Status of United Nations Guards in connection with repatriation requests — Administrative instruction ST/AI/295

Memorandum to the Deputy Director for Humanitarian Affairs

1. This is with reference to your memorandum of 14 April 1994, in which you seek the advice of this Office concerning the nature of the legal or contractual ties between the United Nations and the individual United Nations Guards. In the memorandum you also inquire as to whether the United Nations can legally reject a general request for repatriation and whether it can reject a specific request based on the deterioration of the security situation in [name of State concerned].

Regime applicable to United Nations Guards

2. As far as the first question is concerned, it is our understanding, on the basis of information which has been provided by your Office and the Field Operation Division of the Department of Peacekeeping Operations, that basic aspects of legal relations between the United Nations and members of the United Nations Guards Contingent are regulated by a document entitled "General Conditions Governing Assignment of Members of the United Nations Guards Contingent" (hereafter the "General Conditions"). Apparently this document was issued by the Field Operations Division and was sent to Governments, together with requests that they assist in identifying suitable individuals who might be recruited as United Nations Guards.

3. In accordance with the provisions of annex II to the General Conditions, United Nations Guards are considered by the United Nations as experts on mission within the meaning of article VI of the Convention on the Privileges and immunities of the United Nations. United Nations Guards are required to sign a so-called "letter of undertaking" contained in annex II to the General Conditions. Paragraph 1 of the letter provides that a United Nations Guard undertakes to avoid any action which may adversely reflect on his/her status as a member of the United Nations Guards Contingent in the State in question.

4. We note that these terms of employment are general in that there is no reference to salary or emoluments of an individual United Nations Guard. Nor is there any provision for the duration of the appointment, or the way in which it can be terminated by the Organization. It should also be noted that the General Conditions do not contain provisions specifying conditions under which an individual United Nations Guard can terminate his/her assignment before expiration of its term or the conditions under which he can ask for repatriation.

5. We note that the policies for obtaining the services of individuals (who are not staff) are prescribed in Secretary-General's bulletin ST/SGB/177 of 19 November 1982. That bulletin states that such individuals must be contracted with in accordance with administrative instruction ST/AI/295. That instruction does not contain any provision on repatriation, but it does contain a provision for termination of such agreements, which reads as follows:

> "27. The special service agreement of an individual contractor may be terminated either by the individual or by the United Nations before the expiry date of the agreement by the party wishing to terminate the agreement giving notice in writing to the other party. The period of notice shall be five days in the case of agreements for a total period of less than two months and fourteen days in the case of agreements for a longer period."

6. The Chief, Emergency Programme for [State concerned], Department of Humanitarian Affairs, in his memorandum dated 15 April 1994 on the question of the status of United Nations Guards, a copy of which was forwarded to this Office, states that, except for the "letter of undertaking, the Guards do not sign any other "biding" document, such as a special service agreement (SSA). In this connection this Office holds the view that if, as stated above, no SSA or other individual contractual document is signed by a United Nations Guard then in the absence of such provisions in the General Conditions governing the appointment of United Nations Guards the procedures for advance termination of assignments of United Nations Guards and subsequent repatriation to their home countries should be those applied in standard SSAs regulating contractual arrangements between the United Nations and individuals who are not staff members, including experts on mission for the Organization.

General request for repatriation

7. Under paragraph 27 of ST/AI/295, referred to above, a United Nations Guard could give notice that he wished to terminate his appointment. He would then be entitled to leave at the expiration of the notice period. The instruction provides that an assignment may be terminated by either party before the expiry date by giving notice in writing to the other party. The period of notice shall be five days in the case of assignments for period of less than two months and fourteen days in the case of assignments for a longer period.

8. Similarly, if a United Nations Guard refuses to carry out assigned duties the United Nations can terminate his/her appointment.

Specific request for repatriation based on the deterioration of the security situation

9. With reference to your second question concerning the situation should a United Nations Guard request repatriation specifically on the grounds of fear for his safety, we would like to note that ST/AI/295 does not have provisions dealing with

such requests. As stated above, a United Nations Guard can always terminate his/her contract in accordance with the conditions specified in paragraph 27 of ST/AI/295. However, this Office is of the view that, if there is a reasonable basis for the fear, the Organization, as a good employer, would waive the time limit.

10. At the same time, we would like to point out that the question of whether the situation in a country, or in a portion of a country, is safe cannot be determined by individual employees of the Organization. Decisions concerning security and safety of employees of the Organization, including those related to relocation, suspension of activities and evacuation (phases 2, 3 and 4 of the security plan) should be taken by the responsible United Nations officials in accordance with the respective provisions of the United Nations Security Handbook.

18 April 1994

18. Status of air crew and support personnel provided by a Member State to the United Nations High Commissioner for Refugees airlift for Rwandan refugees — Section 22 of the Convention on the Privileges and Immunities of the United Nations

Facsimile to the Acting Chief, Personnel Administration Section, United Nations High Commissioner for Refugees (UNHCR)

1. This is with reference to your memorandum dated 27 July 1994 requesting our advice on the status to be accorded to the air crew and support personnel to be provided by the Government of a Member State to the UNHCR airlift for Rwandan refugees.

2. The status which seems appropriate to accord to the personnel concerned is that of experts on mission for the United Nations within the meaning of section 22 of the Convention on Privileges and Immunities of the United Nations of 13 February 1946. Zaire and Rwanda, which are the States on whose territories the personnel concerned are to perform activities for UNHCR are both parties to the above-mentioned Convention.

3. As experts on mission, the personnel concerned should therefore be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their mission, including the time spent on journeys with their mission. Furthermore, they should be issued a United Nations travel certification pursuant to section 26 of the above-mentioned Convention.

4. I wish to point out that as experts on mission, the personnel concerned shall remain the responsibility of the Government of the State concerned and shall not be considered officials of the United Nations. The Government of that State should ensure that each member of the air crew is covered by adequate medical and life insurance, as well as insurance coverage for service-incurred illness, injury, disability or death. The United Nations does not accept any liability for claims for compensation in respect of illness, injury or death arising out of the activities performed by the personnel concerned. The status accorded to these personnel does not engage the financial responsibility of the United Nations. The United Nations will, however, provide these personnel with the assistance normally accorded to experts on mission.

5. I suggest that UNHCR address a letter to the Government of the State concerned confirming the status of the personnel concerned and outlining the terms and conditions described above.

28 July 1994

19. Status of military officers on loan from Governments at no cost to the United Nations — General Assembly's role and consideration of the status of a new category of personnel prior to the issuance of an administrative instruction

Memorandum to the Director of Recruitment and Placement, Office of Human Resources and Management

1. This is further to your memorandum of 23 June 1994. In your memorandum you had indicated that Office of Human Resources and Management would establish an inter-departmental working group to examine issues concerning the status of military officers who serve at Headquarters on loan from their Governments at no cost to the United Nations. I understand that the working group met several times in the last two months on the above issue and that the advice of this Office has been requested in respect, in particular, to the status of those individuals with the Organization which is a major concern, particularly as the individuals in question are often required to undertake official travel.

2. Following a thorough review of, and several consultations on, this matter by this Office, and having regard to the professional and specialized nature of the functions these military officers perform for the United Nations, this Office considers that the most suitable status for their case would be that of "experts on mission" within the meaning of article VI, section 22, of the Convention of the Privileges and Immunities of the United Nations.

3. It has further been deemed necessary that the terms and conditions governing the deployment of the military officers in question would be included in bilateral agreements/arrangements entered into between the United Nations and the Member States contributing such personnel. The preparation of such agreements/arrangements would have to be undertaken by the Office of Legal Affairs.

4. Prior to considering the specific terms and conditions that would need to be included in the aforementioned agreements/arrangements, the following issues still require clarification:

Visa status

5. The United States authorities should be advised that the Organization contemplates granting to those individuals the status of "expert on mission" during the period of their service with the United Nations. This is necessary to ensure that the G-2 visa granted to those individuals by the United States authorities does not conflict with the status of "expert on mission".

Service-incurred death and disability benefits

6. A decision should be reached in respect of the coverage of those individuals for service-incurred death and disability benefits during their period of service with the United Nations. If it is contemplated that such coverage would not be provided by the Member States contributing such personnel, it should be noted that coverage of these individuals by Appendix D to the Staff Rules would have significant financial implications for the Organization and would therefore need to be cleared by the Controller's Office.

Health insurance coverage

7. Another issue that needs to be decided upon concerns health insurance coverage for these individuals. In view of the fact that they are not staff members of the United Nations, such coverage cannot be provided or subsidized by the United Nations. Such coverage will have to be provided by the Member States contributing such personnel to the United Nations. In this respect, however, we understand from discussions held during the meetings of the working group that certain Member States have indicated that it would be difficult for them to meet the high costs of health insurance coverage in the United States. Another alternative would be that such coverage would be obtained directly by the individuals themselves at full premium. In view of the high costs involved, we understand that the Insurance Section indicated that the Van Breda Emergency Insurance might be a suitable solution of the health insurance issue, as its premium is very low (some $20 per month). This policy, however, is limited to emergency situations and cannot be used for ongoing medical problems.

8. Once a decision has been taken on the issues indicated above, it would seem advisable that a report should be submitted to the General Assembly which will include specific proposals concerning the status of those individuals. We consider that the preparation of such a report would have be coordinated with, *inter alia*, this Office.

9. I understand that the Office of Human Resources and Management considers preparing and issuing a new administrative instruction pertaining to this new category of personnel. In our view, the regularization of the status of a new category of personnel cannot properly be effected by means of an administrative instruction, but must first be approved by the General Assembly. Accordingly, the issuance of an administrative instruction must follow the Assembly's consideration of the report indicated in paragraph 8 above and approval of the recommendation of the Secretary-General contained therein.

24 October 1994

PRIVILEGES AND IMMUNITIES

20. Applicability of labour law of a receiving State to labour relations between members of missions and officials of international organizations and their private household personnel — Articles 33(2), (4) and 37(4) of the 1961 Vienna Convention on Diplomatic Relations.

Cable to the Senior Legal Officer, Legal Liaison Office, Geneva

This is in response to your facsimile of 22 December 1993 to which was attached for our comments a letter from the [name of State] Mission, dated 17 December 1993, concerning private servants, who are not nationals of or permanently resident in [name of State], of diplomats and officials of international organizations entitled to diplomatic privileges and immunities.

We note that the receiving State is envisaging making applicable its law to labour relations between members of missions and concerned officials of international organizations, and their private household personnel. In this context they intended to subject the granting of authorizations of private servants to enter into [name of State] to the conclusion by them of work contracts with their employers.

These matters should be considered in the light of the pertinent provisions of the 1961 Vienna Convention on Diplomatic Relations.[42] According to article 37, paragraph 4 of the Vienna Convention, "Private servants of the Mission shall, if they are not nationals or permanently resident in the receiving State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. The Convention does not foresee for them any other privileges, immunities or exemptions. It unequivocally stipulates that such additional privileges and immunities may be enjoyed by private servants "only to the extent admitted by the receiving State."

In the light of these provisions, the receiving State in this case would not seem to be in contravention of the Vienna Convention in generally applying its domestic law to the labour relations between diplomats and concerned officials of international organizations and their private servants. Accordingly, it would seem to be entitled to expect that persons concerned regulate this type of their relations on the basis of a work contract under the State's law.

In this connection, it is also to be recalled that, pursuant to paragraph 2 of article 33, private servants who are not nationals of or permanently resident in the receiving State and who are in the sole employ of the persons concerned shall be exempt from social security provisions which may be in force in the State. This exemption is applicable on condition that private servants are covered by the social security provisions of the sending State or a third State. It should, however, be borne in mind that under paragraph 4 of article 33, the exemption in questions shall not preclude voluntary participation in the social security system of the receiving State provided that such participation is permitted by that State.

In the context of the matter under consideration, an important principle, codified in paragraph 4 of article 37 of the Vienna Convention, should be stressed, that in exercising its jurisdiction over foreign servants, the authorities of the receiving State must do this "in such a manner as not to interfere unduly with the performance of the functions of the mission."

We are of the view that, in relation to this matter, any measure of a punitive character against diplomats and/or their foreign private servants would not be consonant with either the spirit or the letter of the Vienna Convention. Attempts to enforce the labour law of the receiving State in relation to this matter would not be consistent, in particular, with diplomatic immunity from criminal, civil and administrative jurisdiction of the receiving State and other corresponding provisions set out in the Vienna Convention. Therefore, the labour law of the receiving State should be made applicable to this type of relations between persons concerned in such a manner which would not infringe upon the jurisdictional diplomatic immunities or otherwise.

24 January 1994

21. Question of whether the staff of permanent missions are obliged to reside in Switzerland — Section 11 of the 1946 Agreement with the Swiss Federal Council on Privileges and Immunities of the United Nations — Article 7 of the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character

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

1. This is with reference to your memorandum of 4 January 1994, with attachments, requesting our observations on the question as to whether the request by the Swiss authorities for mission personnel to reside in Switzerland is in violation of the Vienna Convention on Diplomatic Relations.[43] Our observations on this matter are set out as follows:

2. None of the provisions of the applicable international agreements governing the legal status of diplomatic personnel of missions accredited to the United Nations Office at Geneva, namely, the 1946 Agreement with the Swiss Federal Council on Privileges and Immunities of the United Nations and the 1961 Vienna Convention on Diplomatic Relations, seems to unequivocally require that diplomatic personnel reside permanently or continuously in that country during their assignment to the United Nations Office at Geneva.

3. The 1946 Agreement, generally based on the corresponding provisions of the 1946 Convention on the Privileges and Immunities of the United Nations, does not foresee the institution of "permanent" or "resident" representatives. It speaks in general terms of "the representatives of Members of the United Nations" who should enjoy certain privileges and immunities, mainly functional, "while exercising their functions and during their journey to and from the place of meeting".

4. The term "permanent representative" became the prevailing pattern in the statutory law and practice of international organizations following the adoption by the General Assembly, on 3 December 1948, of resolution 257 A(III). The Headquarters Agreement of the United Nations with the United States, the Headquarters Agreement of the International Atomic Energy Agency with Austria and the Headquarters Agreement of the Food and Agriculture Organization of the United Nations with Italy use the term "resident representative".

5. It maybe be noted that the 1958 Agreement between the United Nations and Ethiopia regarding the Headquarters of the United Nations Economic Commission for Africa expressly provides, in article V, for a clear distinction between the "representatives of Governments, participating in the work of the ECA" and the "resident representatives of Governments to the ECA". The term "resident representative" could be interpreted to mean that such representatives would normally reside in the host country during their official accreditation to the Organization concerned.

6. One provision reflecting the factor of residence is, however, incorporated in the 1946 Agreement with Switzerland in the context of the question of taxation. In particular, section 11 of that Agreement stipulates as follows:

> "If the incidence of any form of taxation *depends upon residence* in Switzerland, periods during which the representatives of Members of the United Nations on its principal subsidiary organs and at conferences convened by the United Nations are present in Switzerland for the discharge of their duties shall not be considered as periods of *residence*" (emphasis added).

Nevertheless, no matter how broad an interpretation one could give to this provision, it would not seem to allow a conclusion that "the representative of Members" must reside only in Switzerland during their assignment to the United Nations Office at Geneva.

7. Likewise, the Vienna Convention does not directly address the issue of residence of diplomatic agents. It appears to be based on a general assumption that diplomatic agents would normally reside in the country of accreditation out of practical necessity. However, it does not expressly set out such a rule. Our analysis of the legislative history of the Vienna Convention leads to the conclusion that its drafters did not intend to regulate this issue in the Convention.

8. It would seem, however, important to note that the Vienna Convention specifically regulates the case of accreditation of a head of mission and the assignment of a member of the diplomatic staff "to more than one State, unless there is express objection by any of the receiving States".[44] Obviously, in such situations, a request by one of the States of dual accreditation that diplomats of the sending State should reside only in that State of accreditation would not be fully consonant with the intent of this article, inasmuch as it would not allow them to properly discharge their functions in another State of accreditation.

9. A somewhat analogous approach has been adopted in the 1975 Vienna Convention on the Representation of States in Their Relations With International Organizations of a Universal Character.[45] Although that Convention is not yet in force, its provisions are of interest in the context of this matter, since they represent an attempt to codify customary rules and practices in the area of representation of States in their relations with any international organization of a universal character. The question of multiple accreditation or appointment is addressed in article 7 of the Convention, as follows:

"1. The sending State may accredit the same person as head of mission to two or more international organizations or appoint a head of mission as a member of the diplomatic staff of another of its missions.

"2. The sending State may accredit a member of the diplomatic staff of the mission as head of mission to other international organizations or appoint a member of the staff of the mission as a member of the staff of another of its missions.

"3. Two or more States may accredit the same person as head of mission to the same international organization."

10. In the context of the matter under consideration, an interesting fact could be recalled which was reflected in the 1967 study of the United Nations Secretariat for the International Law Commission on the practice of the United Nations, the specialized agencies and the IAEA concerning their status, privileges and immunities.[46] The study mentioned that at that time "all permanent missions at the [United Nations] Geneva office [were] located in Geneva, with the exception of two in Bern and *one in Paris*" (emphasis added). This fact was also reproduced in paragraph 3, on page 146, of the third report of the Special Rapporteur of the International Law Commission on relations between States and intergovernmental organzations[47] setting out draft articles, with commentaries, of the above-referenced 1975 Vienna Convention. Whether or not the current situation in this regard has changed, the fact remains, at least in one case, that the premises of a permanent mission were not located in Switzerland and apparently diplomatic personnel of that mission although being assigned to the United Nations Office at Geneva were not residing in Switzerland.

11. According to information available in our files, Switzerland did not object in the past to the practice of diplomats accredited to the United Nations Office at Geneva residing in a neighboring State. If this is the case and in view of the absence of the clear-cut provisions in the applicable agreements to the contrary, one could argue as to whether a customary rule has not been established in this area of relations.

12. In the light of the foregoing observations, it is our view that it would not be appropriate for the receiving State to categorically request that diplomatic personnel of missions reside within the boundaries of that State.

7 February 1994

22. Dual Registration of Aircraft — Article 18 of the Convention on International Civil Aviation (Chicago Convention) — Exemption for United Nations aircraft from the compulsory requirement by one State of registration therein of aircraft validly registered in another State — UNICEF Standard Basic Cooperation Agreement — Agreement between the United Nations and a Member State for the establishment of UNEP headquarters

Memorandum to a United Nations Development Programme Resident Representative

1. This is in reference to our conversation of 8 February 1994 and your memorandum of 7 February 1994 concerning the registration of aircraft operated in the State in question.

2. As I indicated, it is quite clear from the [State's] Civil Aviation (Air Navigation) Regulations, 1979, that fresh registration in that State of foreign-registered aircraft is not permitted. In that respect, part II, paragraph 4(2), of the Regulations reads:

> "…an aircraft *shall not be registered* or continue to be registered in [name of State] if it appears…that —
>
> "(a) the aircraft *is registered* outside [the State]" (emphasis added).

This provision is in conformity with the Convention on International Civil Aviation (Chicago Convention), which prohibits dual registration of aircraft (see article 18).

3. We understand, however, that the [State's] authorities are considering requiring foreign-registered aircraft operating in that State to change their foreign registration. Since the aircraft have the nationality of the State of their registration, such change would also mean a change in nationality to that of the State. While the Chicago Convention provides that the registration of an aircraft may be changed from one State to another (see article 13), it does not make provision for such change to be imposed as a compulsory requirement by one State in respect to aircraft validly registered in another State.

4. The proposed requirement for change in registration is currently not provided for under the [State's] Regulations. Since the [State's] Regulations are consistent with the provisions of the Chicago Convention, we assume that the proposed requirement will be effected through a change in existing legislation and coordinated with ICAO.

5. In the event that the State decides to amend its legislation to require aircraft operating in that State to change their nationality through a change of registration, you should request an exemption from such a requirement on the following grounds:

(*a*) Aircraft chartered by the United Nations are not operated in that State for any commercial gain or purpose. They are being used for specific purposes in connection with the mandate of the United Nations under Security Council resolutions for peacekeeping and for provisions of humanitarian assistance. The

fact that such aircraft are based in the State in the course of performing those services does not in any way imply an intention to remain there permanently or establish residence or domicile, which alone would justify a requirement to change their nationality

(*b*) Under the Standard Basic Cooperation Agreement between the United Nations Children's Fund and the Government of the State, which was signed in January 1993, the Government has undertaken to facilitate the use and operation of aircraft by UNICEF in that State and not to impose any undue restrictions on the acquisition, use or maintenance of such aircraft for its programme activities (see article XIX). Article XIX reads:

> "The Government shall grant UNICEF necessary permits or licenses for, and shall not impose undue restrictions on, the acquisition or use and maintenance by UNICEF of civil aeroplanes and other craft required for programme activities under the present Agreement."

You should urge that the Government extend to the United Nations and its other agencies the same privilege,

(*c*) The United Nations has instituted procedures to ensure that the aircraft and operators used for its peacekeeping and humanitarian operations comply with international aviation requirements, and in particular, the provisions of the Chicago Convention. In this connection, we attach hereto a copy of the model aircraft charter agreement which is used by the United Nations for the provision of air transportation services for peacekeeping operations. On the basis that the aircraft meets all international civil aviation requirements, the State in questions, as a Contracting State to the Chicago Convention, is required to accord valid certifications reciprocity. This would only entail establishing a procedure for verification and validation of current aircraft registration, operation and airworthiness certificates. The United Nations should be able to assist the authorities in this exercise by requesting its operators to cooperate,

(*d*) You mentioned on the phone that the United Nations could also seek exemption from registration fees, should the [State] authorities insist on requiring change of registration of foreign registration aircraft. We believe this is possible and you may in fact rely on provisions in the Agreement concluded between the United Nations and the State for establishment of UNEP headquarters. That State has undertaken section 17(c) of the Agreement to exempt UNEP from all taxes, "recording fees, and documentary taxes". In section 45 of the Agreement, the Government has agreed to apply the Agreement, *mutatis mutandis*, to the other offices of the United Nations.

…

10 February 1994

23. Legal basis for not explicitly accepting in United Nations contracts a reference to national law as the proper law in the settlement of disputes — Section 29(A) of the Convention on the Privileges and Immunities of the United Nations

Facsimile to a Legal Officer from the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

The legal basis for not explicitly accepting in United Nations contracts a reference to national law as the proper law in the settlement of disputes stems from the immunity of the United Nations from every form of legal process under section 2 of the Convention of the Privileges and Immunities of the United Nations (the General Convention). Section 29(A) of the General Convention further provides that the United Nations shall nevertheless make provisions for appropriate modes of settlement of disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party. As a matter of policy and absent another practical alternative to judicial proceedings, the United Nations offers arbitration to its contractors, normally under the auspices of the International Chamber of Commerce or the American Arbitration Association.

On 15 December 1976, the General Assembly adopted resolution 31/98, by which it recommended "the use of the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) in the settlement of disputes arising in the context of international commercial relations, particularly by reference to the arbitration rules in commercial contracts" and requested "the Secretary-General to arrange for the widest possible distribution of the arbitration rules".

Following the adoption of that resolution, it has been the consistent policy of the Organization to propose the UNCITRAL arbitration rules for insertion into contractual instruments to govern arbitration of claims with contractors. Under article 33(1) of the UNCITRAL rules, in the absence of an agreed choice of law by the parties, the arbitral tribunal is to apply "the law determined by the conflict of laws rules which it considers applicable". In the case of leases which concern real property, the *lex situs* governs.

The United Nations consistently refuses to include a choice of law clause in its contracts because agreement on such a choice is often difficult to achieve and even where this is possible, the choice of the applicable law could be construed as a waiver of the immunity of the United Nations from the jurisdiction of the courts, since national laws regulate, *inter alia*, arbitral proceedings and provide for interim measures and regulate execution of awards, in addition to making provisions for the substantive rules.

27 April 1994

24. Question of whether the United Nations should be held responsible for violations of the Convention on International Trade in Endangered Species of Wild Fauna and Flora committed by servicemen of UNOSOM II

Memorandum to the Chief of Staff

I refer to your note of 20 April 1994 concerning the allegations of violations of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) [48] contained in a letter of 23 February 1994. This letter raises a number of legal issues, our views on which are set out below:

…

2. Pursuant to article VIII, paragraph 1, of the Convention,

> "The parties shall take appropriate measures to enforce the provisions of the present Convention and to prohibit trade in violation thereof. These shall include measures:

(*a*) To penalize trade in, or possession of, such specimens, or both; and

(*b*) To provide for the confiscation or return to the State of export such specimens."

The Convention defines trade as "export, re-export, import and introduction from the sea". Based on the information provided, the alleged actions of the servicemen are clearly in violation of the terms of the Convention and, as such, the troop-contributing Governments concerned have an obligation to take preventive and corrective measures against the import of the protected species into their territory.

3. It was suggested that the alleged violations may be considered an abuse of United Nations privileges and immunities. In the absence of a status-of-forces agreement in the context of UNOSOM II, legal arrangements that would regulate the status of the troops and their privileges and immunities might be contained in agreements concluded between the United Nations and troop-contributing countries. If such agreements do exist, military personnel would enjoy immunity from the criminal jurisdiction of the State in which they serve but remain subject to the laws and jurisdiction of their own State. Since the Convention places the responsibility for enforcing its provisions on the States parties and since the troop-contributing States retain jurisdiction over the criminal acts of their military personnel, the responsibility for enforcing the provisions of the Convention rests with those troop-contributing States which are parties to the Convention. As States parties to the Convention, if they fulfill their obligations to prevent and punish trade in endangered species of wild fauna and flora upon a determination that their respective nationals have violated or are violating the provisions of the Convention, no abuse of privileges and immunities will arise. The questions remains, however, whether the acts alleged in this instance constitute criminal or civil offenses.

4. There was also a concern that if the United Nations fails to take preventive or corrective measures it may be held responsible for the actions of the servicemen. Although UNOSOM II may be the effective authority in Somalia, neither UNOSOM II nor the United Nations have any obligations under the Convention and therefore cannot be held responsible for the violation of its provisions.

5. While the United Nations may appropriately provide information concerning the prohibitions and obligations contained in the Convention to the various peacekeeping contingents and troop-contributing countries, no further action by the United Nations is required.

28 April 1994

25. Federal excise tax on vaccines — Question of whether the United Nations is exempt from paying such tax — Article II, sections 7 and 8, of the Convention on the Privileges and Immunities of the United Nations

Memorandum to the Chief, Headquarters and Regional Offices, Procurement Section, Purchase and Transportation, Unit

I refer to your memorandum of 4 May 1994 concerning the above-captioned matter.

1. Based on the information provided, the federal vaccine compensation tax is an excise tax that is levied on the manufacturer, not on the purchaser, but is passed on to the purchaser upon sale of the product and is individually shown in the invoice.

2. To the extent that the federal vaccine compensation tax is not a direct tax, the Organization is not entitled to the automatic exemption provided under section 7 of article II of the Convention on the Privileges and Immunities of the United Nations.

3. The federal vaccine compensation tax is, however, an excise tax which is subject to the provisions of section 8 of the Convention on the Privileges and Immunities of the United Nations. Section 8 refers specifically to exemption from excise duties and from taxes on the sale of movable and immovable property which form part of the price to be paid. Section 8 provides as follows:

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

Section 8 of the Convention, therefore, also does not accord to the United Nations an automatic exemption. However, the Organization is entitled to request that the United States Government make administrative arrangements for the remission or return of the excise tax if an important purchase for official use is made.

4. It has been a consistent position of the Organization that a purchase constitutes an "important purchase" when (a) the amount of tax and the proportion that mount bears to the total purchase price is sufficient to consider the tax as an undue

burden upon the Organization or (b) the purchases occur on a recurring basis.

5. In this regard, we note that the United States regulations specifically exclude normally tax-exempt legal entities such as state and local governments and non-profit educational organizations from tax exemption. [Name of laboratory], may be advised that the regulations do not exclude normally tax-exempt international organizations from tax exemption.

6. Although the federal vaccine compensation tax is an excise tax and falls clearly within section 8 of the Convention, as explained above, that section merely entitles the Organization to request the remission or return of excise tax from the United States Government. Accordingly, the Purchase and Transportation Unit should seek to implement section 8 either by use of an appropriately drafted federal excise tax exemption certificate or by appropriate representations to the United States Government.

9 May 1994

26. Landing and parking fees levied on the United Nations — Sections 7(a) and 34 of the Convention on the Privileges and Immunities of the United Nations — Article 105 of the Charter of the United Nations

Letter to the Minister of Foreign Affairs and International Cooperation of a Member State

The Secretary-General of the United Nations presents his compliments to the Minister for Foreign Affairs and International Cooperation of [name of State] and has the honour to refer to the Ministry's note verbale dated 15 June 1994 concerning landing and parking fees and associated charges levied on the United Nations in connection with the use of the airport facilities by UNOSOM II.

The Secretary-General has taken due note of the position of the Government of [name of State] as outlined in the above-mentioned note verbale, according to which landing and parking fees are considered to be services rendered and not direct taxes from which the United Nations would be exempt under the Convention on the Privileges and Immunities of the United Nations of 1946 (the "Convention").

In this respect, the Secretary-General wishes to reiterate the position of the United Nations as far as charges such as landing and parking fees are concerned, and thereby clarify the fiscal regime to which the Organization is entitled.

The United Nations has consistently taken the position that landing and parking fees are direct taxes from which the Organization is exempt pursuant to the provisions of section 7(a) of the Convention, to which [name of State] is a party. This position is as set out in the study prepared in 1967 by the Secretariat on the practice of the United Nations, the Specialized agencies and the International Atomic Energy Agency (*Yearbook of the International Law Commission*, 1967, vol. II, document A/CN14/L.118 and Add. 1 and 2). Under that study, landing and parking fees are considered as being imposed for the mere fact of calling or stopping at an airport. Therefore, they would not be charges for public utility services from which the United Nations would not claim exemption pursuant to the same section 7(a) of the Convention.

The United Nations position is based on the fundamental principle set out in Article 105, paragraph I, of the Charter of the United Nations which provides that: "The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes." This principle has been further elaborated in the Convention. Sections 7 and 8 of the Convention, which regulate the fiscal regime to which the United Nations and its subsidiary organs such as UNOSOM II are entitled, have consistently been made applicable. Section 7(a) of the Convention, which is relevant to the charges under consideration, provides that the United Nations, its assets, income and other property shall be "exempt from all direct taxes; it is understood, however, that the United Nations will not claim exemption from taxes which are, in fact, no more than charges for public utility services".

While landing and parking fees normally fall within the category of "direct taxes", the question arises as to whether associated charges thereto concerning the services described in the Ministry's note verbale are "no more than charges for public utility services". The latter expression has been interpreted in the enclosed study as having "a restricted connotation applying to particular supplies or services rendered by a Government or a corporation under Government regulation for which charges are made at a fixed rate according to the amount of supplies furnished or services rendered". While the United Nations will pay charges which relate to actual services rendered, such services must, as indicated in the study, be services which can be specifically identified, described and itemized.

The United Nations' right to exemption from direct taxes is not contingent on the domestic laws or regulations but derives from the international obligations States have assumed under the Convention. In this respect, it should be pointed out that by virtue of section 34 of the Convention, the Government of [name of State] has undertaken to be "in a position under its own law to give effect to the terms of this Convention". Consequently, in the event of a conflict between domestic law and the Convention, the Convention must prevail.

Furthermore, it is necessary to recall that in order to properly regulate the presence of UNOSOM II and its personnel in [name of State], the Secretary-General initiated an exchange of letters to constitute an agreement between the United Nations and the Government of [the State concerned]. In the Secretary-General's letter dated 8 February 1994, to which no reply has yet been received, the privileges and immunities necessary to facilitate the tasks of UNOSOM II are set forth. Such privileges and immunities which include "exemption from all direct taxes, import and export duties, registration fees and charges on its personnel, property, supplies, equipment, spare parts and means of transports" are consistent with the provisions of the Convention.

In light of the foregoing clarifications, the Secretary-General trusts that the Government of [name of State] will reconsider its position and therefore exempt UNOSOM II from charges such as landing and parking fees and associated services which do not constitute charges for public utility services. The Secretary-General is prepared to examine the charges which are presented with a view to determining which of them constitute charges for public utility services in order to reach a final settlement of pending claims…

17 June 1994

27. Exemption from direct taxation of the United Nations — Nature of royalty fees — Incompatibility of measures increasing the financial burdens of the Organization with the Convention on the Privileges and Immunities of the United Nations

Memorandum to the Movement Officer, Movement Control Centre, Logistics and Communications Service, Department of Peacekeeping Operations

I refer to your memorandum of 27 July 1994 concerning a 15 percent royalty payment claimed by authorities in a Member State against the total price of a contract between the United Nations and — Airlines. Please advise the Movement Control Centre to inform the competent local authorities in that State of the following:

1. Pursuant to section 7(a) of the Convention on the Privileges and Immunities of the United Nations, to which the State became a party effective 13 January 1978, "the United Nations, its assets, income and other property shall be exempt from all direct taxes; it is understood, however, that the United Nations will not claim exemption from taxes which are, in fact, no more than charges for public utility services".

2. Based on the information provided, the royalty fee is to be assessed against the actual contract price and not against the fuel, handling, landing or parking charges. To the extent that the royalty fee in question is not a charge for public utility services such as fuel, handling, landing or parking charges, the royalty fee constitutes a direct tax within the meaning of section 7(a) of the Convention on the Privileges and Immunities of the United Nations. Accordingly, the United Nations contract with the Airlines is automatically exempt from such a fee.

3. Under section 34 of the Convention on the Privileges and Immunities of the United Nations, the State concerned has an obligation to be "in a position under its own law to give effect to the terms of this Convention".

4. Furthermore, any interpretation of the provisions of the Convention on the Privileges and Immunities of the United Nations must be carried out within the spirit of the underlying principles of the Charter of the United Nations, and in particular Article 105 thereof, which provides that the Organization shall enjoy such privileges and immunities as are necessary for the fulfillment of its purposes. Measures which might, *inter alia*, increase the financial or other burdens of the Organization have to be viewed as being inconsistent with this provision.

3 August 1994

28. Exemption of military component of United Nations Peacekeeping Force in Cyprus from registration fees and road tax — Scope of the expression "members of the Force" — Exchange of letters of 31 March 1964 between the United Nations and the Government of Cyprus

Memorandum to the Acting Director, Asia and Middle East Division, Department of Peacekeeping Operations

1. This is with reference to the letter dated 29 July 1994, with attachments, that the Military Adviser of the United Kingdom Mission addressed to you in connection with the subject matter. Copy of this letter and attachments thereto has been forwarded to my attention.

2. I understand that, unlike members of the civilian component of UNFICYP, members of the military component, with the exception of the Force Commander and Chief of Staff, are required to pay registration fees and road tax for their cars. …

3. In this respect, I wish to confirm that as indicated by the Senior Legal Adviser who reviewed the matter in the field, members of the military component of the United Nations Peacekeeping Force in Cyprus are entitled to the exemption from registration fees and road tax in accordance with the provisions of article 26 of the Agreement concluded by exchange of letters dated 21 March 1964 between the United Nations and the Government of Cyprus on the status of UNFICYP (the Agreement). Article 26 of the Agreement provides as follows: "Members of the Force shall be exempt from taxation on the pay and emoluments received from their national Governments or from the United Nations. They shall be exempt from all other direct taxes except municipal rates for services enjoyed, and from all registration fees, and charges." It is also necessary to point out that the expression "members of the Force" as referred to in the above-mentioned provisions is defined in article 1 of the Agreement to mean "*any person, belonging to the military service a State*, who is serving under the Commander of the United Nations Force *and to any civilian* placed under the Commander by the State to which such civilian belongs" (emphasis added).

4. In light of the above, no distinction should apply between members of the civilian and military components of UNFICYP as far as the exemption provided in article 26 of the Agreement is concerned.

19 September 1994

29. Status of UNICEF Goodwill Ambassadors — Entitlement to privileges and immunities of the United Nations

Memorandum to the Chief, Public Advocacy Unit, Department of Public Affairs, UNICEF

1. This refers to your telephone conversation with a member of this Office, of 11 October 1994, in which you explained that UNICEF wishes to appoint a Goodwill Ambassador who is also an actual member of the European Parliament.

2. On the basis of the records available to us, it appears that in the past, candidates for designation as UNICEF Goodwill Ambassadors have been selected on the basis of their distinguished position in society and willingness to lend their wide and acknowledged international prestige and good name to the cause and purpose of UNICEF. With respect to their status, the Goodwill Ambassadors are not considered staff members of the United Nations and are therefore not subject to the Pension Fund Regulations or the Staff Assessment or the Staff Regulations and Rules. Accordingly, Goodwill Ambassadors cannot be granted a United Nations "letter of appointment". However, a letter of designation is issued by the Executive Director of UNICEF, setting out briefly the duties of the Goodwill Ambassador, as well as the privileges and immunities, exemptions and facilities to be accorded to them. The letter from the Executive Director of UNICEF to designate the Goodwill Ambassador is usually submitted to this Office for review and clearance.

3. It should be noted that Goodwill Ambassadors, when performing functions in their official capacity, are entitled to the privileges and immunities set out in article VI, sections 22 and 23, and article VII, section 26, of the Convention on the Privileges and Immunities of the United Nations ("General Convention"), as experts on mission. In addition, Appendix D to the Staff Regulations is applicable to experts on mission in the event of injury, illness or death. Therefore, even though Goodwill Ambassadors are not staff members and should not be subject to the Staff Rules and Regulations, as we pointed out in the above paragraph, they are covered, while working for UNICEF, by these provisions of Appendix D.

4. We also point out that Goodwill Ambassadors are not paid a salary (a symbolic payment of one dollar per year), although they may be given travel and per diem allowances when they are travelling on UNICEF business. They should be granted a certificate that they are travelling on the business of the United Nations, in accordance with article VII, section 26, of the General Convention. Such certificate cannot be considered as a laissez-passer, which is exclusively granted to United Nations officials (article VII, section 24, of the General Convention). Nevertheless, such a certificate will allow the Goodwill Ambassador to travel with similar facilities to those accorded to holders of United Nations laissez-passer.

5. Although a Goodwill Ambassador cannot be considered a staff member, as we pointed out in paragraph 2 above, in light of the association created between such person and UNICEF by designating her/him as Goodwill Ambassador, and according such person certain privileges, immunities and facilities, the Goodwill Ambassador should, for all intents and purposes, be assimilated to an international civil servant. In this respect, and according to the 1954 "Report on Standards of Conduct in the International Civil Service" from the International Civil Service Advisory Board, international civil servants should be politically impartial, as stated in its paragraph 33:

> "In view of the independence and impartiality required by their status, it is an essential principle that international civil servants, while retaining their right to vote, should refrain from political activities."

Moreover, taking the examples from the same report, paragraph 34 establishes that "[Similar], public support of a political party by speeches, statements to the press, or written articles, is inadmissible"; and paragraph 36 says that "[w]ithin the broad field of political and public affairs, it is not sufficient to abstain from activities in the cause of a particular party. Public participation in any matters of national or international controversy must be ruled out by the staff member's code of conduct."

7. In the circumstances, therefore, we are of the view that it would not be advisable to designate an active member of a political party, who is also elected to Parliament, as a UNICEF Goodwill Ambassador.

8. We understand that if not designated as UNICEF Goodwill Ambassador, there are suggestions that that person would be considered for designation as "Honorary UNICEF Representative". It should be noted that the title "UNICEF Representative" is already used in respect to staff members appointed as "Representatives" of UNICEF in countries in which UNICEF is established under the Basic Cooperation Agreement. It thus would be confusing to accord an honorary title of such a name to a non-staff member.

18 October 1994

30. Question of applicability of local law to United Nations Truce Supervision Organization special service agreements — Article 105 of the Charter — Convention on the Privileges and Immunities of the United Nations

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

1. Please refer to the memorandum on the above-caption subject of 22 September 1994.

2. It appears that Mr. A, who was employed by UNTSO as an individual contractor under a special service agreement (SSA), has initiated a legal action at the Jerusalem Regional Labour Court against UNTSO "for not complying with local Israel labour laws". The Chief Administrative Officer, UNTSO, asks for our guidance "regarding the obligation of the United Nations to comply with local labour laws in so far as the engagement of SSA contractors is concerned". We note that you indicate that "UNTSO's Legal Adviser has been in touch with local Israel authorities on this case", but we are unaware of the outcome of that effort.

3. The United Nations Truce Supervision Organization was established by the Security Council to supervise the truce in Palestine and to assist the parties in the supervision of the 1949 Armistice Agreements. A series of General Assembly and Security Council resolutions, including Assembly resolution 194(III) and Council resolutions 50 (1948) and 73 (1949), has authorized UNTSO to perform such tasks. UNTSO, therefore, is part of the United Nations, and, as far as its legal status and activities are concerned, it is entitled to the privileges and immunities of the United Nations under applicable international agreements.

4. Pursuant to paragraph 1 of Article 105 of the Charter of the United Nations, "the Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes". Pursuant to paragraph 2 of that Article, officials of the Organization enjoy privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization. The above provisions are confirmed and specified in the 1946 Convention on the Privileges and Immunities of the United Nations, which stipulates, *inter alia*, that the United Nations and its officials shall be immune from

legal process (article II, section 2, and article V, section 18). Israel is a party to both the Charter of the United Nations and the 1946 Convention, and those instruments are therefore applicable to UNTSO and its officials. Thus, UNTSO is immune from legal process, and the legal action against it in an Israeli Court cannot be taken unless the Secretary-General waives the immunity for this purpose.

5. As for the question of the applicability of local national laws to SSA contractors, it is necessary to distinguish between the situation of a contractor who is of course bound by national law and the situation of the United Nations that is accorded privileges and immunities necessary to discharge its functions. We consider that the privileges and immunities of the Organization extend also to the ability to set conditions for service of independent contractors. Furthermore, by entering into such agreements with the United Nations, individual contractors agree to those terms and conditions and are therefore stopped from invoking local labour laws which would be otherwise applicable to matters explicitly covered in SSAs. The Contractor however is bound by the law in so far as it relates to his obligations, for example, to pay taxes, to pay obligatory insurance, etc.

6. As indicated in your memorandum and attachments to it, Mr. A was employed by UNTSO under a series of SSAs. The specific terms and conditions of his employment with UNTSO were established in those SSAs. Paragraph 8, "Arbitration", of the SSA provides for a mechanism for settlement of disputes between the parties. Under that mechanism, any dispute arising under the Agreement shall, "if attempts at settlement by negotiation have failed, be submitted to arbitration", and "the decision rendered in the arbitration shall constitute final adjudication of the dispute". Therefore, Mr. A is contractually bound to have followed the dispute settlement procedures as set out in his SSA with the United Nations rather than seeking resolution of his claims against the Organization through an Israeli court. The Organization should thus request the Israeli authorities to plead, in accordance with established procedures, the Organization's immunities if Mr. A pursues his claims before the Israeli courts rather than arbitrate his claim.

1 December 1994

Procedural and Institutional Issues

31. Status of national human rights institutions in United Nations bodies — Palestinian Independent Commission on Human Rights

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

1. This is reply to your memorandum of 8 December 1993 on the above subject. You have requested our advice as to whether the "Palestinian Independent Commission on Human Rights" could be granted any sort of "status" *à-vis* the United Nations.

2. The question relates to a more general issue concerning the status of so-called "national human rights institutions" in United Nations bodies. More and more such institutions are created under national law to provide an internal control mechanism for the protection and promotion of human rights, but function independently of governmental authority. They do not therefore fall within the traditional categories of intergovernmental organizations or non-governmental organizations, but are governmental institutions albeit internally independent. For the 1993 World Conference on Human Rights, the General Assembly approved, for the first time, a separate rule of procedure providing for the participation of "representatives of national human rights institutions". However, the Economic and Social Council and the Commission on Human Rights have yet to amend their relevant rules and practices to provide for the participation of such institutions.

3. At present, we understand that the practice has been that States which have established such institutions allow the representatives of such institutions to participate in the work of the Commission on Human Rights as part of their own delegations. Thus, while maintaining internally their independence, such institutions speak from behind the nameplate of the State which created them. There is no legal objection to this procedure in the absence of a decision according such institutions separate rights of participation.

4. The present ad hoc situation is compounded in the case of the institution which is the subject of your memorandum because of the particular status of Palestine in the Organization. For the time being and absent any decision on the matter by a competent body, if Palestine and Palestinian Independent Commission on Human Rights agree that the Commission may speak from the observer seat of the delegation of Palestine in United Nations bodies and still internally maintain its status as an independent Commission, there is no legal objection to their doing so. Each entity admitted or invited to participate in the General Assembly decides on its own composition and who speaks for it.

4 January 1994

32. Question of whether the first session of the Conference of the Parties to the United Nations Framework Convention on Climate Change would take place on a different date than the one stipulated in the Convention

Facsimile to the Legal Adviser, Climate Change Secretariat, Geneva

This is with reference to your telephone conversation of 13 January 1994 with a member of this Office, in which you requested the views of this Office as to the situation determined by the entry into force, on 21 March 1994, of the United Nations Framework Convention on Climate Change[49]. According to your explanation, a problem arises from the fact that the General Assembly, by resolution 48/189 of 21 December 1993, has accepted the offer of Germany to host the first session of the Conference of the Parties to the Convention from 28 March to 7 April 1995. Under

article 7.4 of the Convention, the first Conference of the Parties to the Convention shall take place not later than one year after the date of entry into force of the Convention, i.e., by 21 March 1995.

We note that, in paragraph 1 of resolution 48/189, the General Assembly made the holding of the first session of the Conference of the Parties to the Convention on the dates indicated "subject to the applicable provisions of the United Nations Framework Convention on Climate Change". Thus, article 7.4, referred to above, is applicable. Therefore, the first session of the Conference of the Parties to the Convention should be held within the time limit indicated in article 7.4 of the Convention, namely, by 21 March 1995. However, the States parties could, after the entry into force of the Convention, decide by unanimous consent to hold the first session of the Conference of the Parties to the Convention on the date indicated in resolution 48.189. In the absence of such unanimous consent, the dates of the first session of the Conference of the Parties to the Convention will have to conform to the letter of the Convention.

25 January 1994

33. Status of the Federal Republic of Yugoslavia after General Assembly resolution 47/1, especially with regard to the publication *Multilateral Treaties Deposited with the Secretary-General*

Letter to the Permanent Representative of a Member State

On behalf of the Secretary-General, I have the honour to acknowledge receipt of your letter to him dated 14 January 1994 by which you, *inter alia*, requested that "appropriate corrections" be made in the publication entitled *Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 1992*[50] and in other relevant publications and that steps be taken to ensure that subsequent publications "will accurately reflect the situation resulting from the dissolution and extinction of the former Yugoslavia."

With regard to you request, I should like to make the following observations:

(*a*) As you know, by letters dated 27 April 1992, addressed to the President of the Security Council and to the Secretary-General,[51] the Charge d'affaires a.i. of the Permanent Mission of Yugoslavia to the United Nations transmitted the text of the "Declaration adopted on 27 April 1992 at the joint session of the Assembly of the Socialist Federal Republic of Yugoslavia, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro". Paragraph 1 of the said Declaration reads in part:

> "The Federal Republic of Yugoslavia, continuing the state, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally."

By the letter addressed to the Secretary-General, the Charge d'affaires also transmitted a noted dated 27 April 1992 which contained the following statement:

"Strictly respecting the continuity of the international personality of Yugoslavia, the Federal Republic of Yugoslavia shall continue to fulfill all the rights conferred to, and obligations assumed by, the Socialist Federal Republic of Yugoslavia in international organizations and participation in international treaties ratified or acceded to by Yugoslavia."

(*b*) Following the issuance of said Declaration, various States rejected, or reserved their position on, the claim of the Federal Republic of Yugoslavia to continue the membership of the former Yugoslavia in international organizations and to continue its international legal personality (for example, the letter dated 27 May 1992 from the Minister for Foreign Affairs of your country addressed to the Secretary-General (A/47/234 - S/24028). Nonetheless, for approximately five months following the Declaration, from 27 April to 22 September 1992, representatives in the Federal Republic of Yugoslavia participated in United Nations meetings as representatives of Yugoslavia. On 22 September 1992, the "Prime Minister of the Federal Republic of Yugoslavia" spoke during the 7th plenary meeting of the forty-seventh session of the General Assembly.

(*c*) On 22 September 1992, the General Assembly, having received the recommendation of the Security Council of 19 September 1992 (resolution 777 (1992)) that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly, adopted resolution 47/1 by which the Assembly considered that the Federal Republic of Yugoslavia (Serbia and Montenegro) could not continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and, therefore, decided that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly.

(*d*) On 29 September 1992, I addressed separate letters to the Permanent Representatives of Bosnia and Herzegovina, and Croatia, to the United Nations setting out the considered view of the United Nations Secretariat regarding the practical consequences of the adoption by the General Assembly of resolution 47/1 (subsequently issued as a note by the Secretary-General (A/47/485)). I stated in those letters that "the resolution neither terminates nor suspends Yugoslavia's membership in the Organization… The resolution does not take away the right of Yugoslavia to participate in the work of organs other than Assembly bodies." Since the publication of that statement of the practical consequences of the adoption of resolution 47/1, that resolution has been recalled by the Security Council (resolution 821 (1993)) and both recalled and reaffirmed by the General Assembly (resolutions 47/229 and 48/88, respectively), without any criticism of the interpretation given by the Secretariat.

(*e*) For one year following the Declaration, from 27 April 1992 to 29 April 1993, representatives of the Federal Republic of Yugoslavia were entitled to represent Yugoslavia in meetings of the Economic and Social Council and of its subsidiaries. On 29 April 1993, the General Assembly adopted resolution 47/229 by which it decided that the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not participate in the work of the Economic and Social Council.

(*f*) By paragraph 19 of its resolution 48/88 of 20 December 1993, the Assembly reaffirmed its resolution 47/1 of 22 September 1992 and urged Member States and Secretariat in fulfilling the spirit of that resolution, "to end the de facto working status of Serbia and Montenegro". As indicated in the report of the Secretary-General submitted pursuant to paragraph 29 of that resolution, the considered view of the Secretariat noted in paragraph (d) above has not been affected by the adoption of paragraph 19 of resolution 48/88. As stated in the report, "the Secretariat is not in a position to take action with regard to questions relating to the status of Member States in the absence of the appropriate decisions being taken by the competent organs of the Organization".[52]

(*g*) Similarly, while aware that various States reject or question the claim of the Federal Republic of Yugoslavia that it continues the international legal personality of the Socialist Federal Republic of Yugoslavia, including participation in international treaties ratified or acceded to by Yugoslavia, the Secretary-General as depositary is not in a position to reject or disregard that claim, which relates to the general international law question of succession of States, in the absence of any decision taken by a competent organ representative of the international community of States as a whole or by a competent treaty organ with regard to a particular treaty or convention. None of the General Assembly resolutions referred to above address this general international law question.

(*h*) In the absence of a decision of such an organ providing guidance on the matter, the Secretary-General maintains the status quo with regard to treaty actions and references in publications to Yugoslavia. For example, since 27 April 1992, the Secretary-General has issued three depositary notifications concerning treaty actions transmitted by the Government of Yugoslavia relating to treaties which had been in force in the Socialist Federal Republic of Yugoslavia. Those actions were the following: deposit of instrument of acceptance of amendments to the Constitution of the World Health Organization (C.N.153.1993.TREATIES-3 of 19 July 1993); communication with respect to its position concerning the succession by Bosnia and Herzegovina of the Convention on the Prevention and Punishment of the Crime of Genocide (C.N.228.1992.TREATIES-3 of 26 August 1993); and notification of application of Regulations annexed to the Agreement concerning the Adoption of Uniform Conditions of Approval and Reciprocal Recognition of Approval for Motor Vehicle Equipment and Parts (C.N.219.1993.TREATIES-12 of 29 August 1993). No objections or communications have been received with regard to the aforementioned notifications.

(*i*) The foregoing is without prejudice to the application of the law of treaties under general international law or of provisions of particular treaties affecting the participation of States as parties.

In light of the above observations, I regret to inform you that the Secretary-General is unable to accede to your requests.

31 January 1994

34. Observer Status in the General Assembly of entities other than States — Status of the Sovereign Military Order of Malta

Memorandum to the Secretary-General

…

2. In the practice of the General Assembly, intergovernmental organizations, as well as other organizations mainly of a national liberation movement character, have been accorded observer status by a specific decision of the General Assembly in each case. This is achieved through the inscription of an appropriate item in the agenda of the Assembly at the initiative of one or more Member States, and the adoption of a resolution by the General Assembly according such status to the organization in question.

3. In the case of observer States, the General Assembly does not take any action; rather it is the Secretary-General who provides observer facilities to non-Member States which establish permanent offices at Headquarters. As you know, the Secretary-General is not in a position to alone decide whether or not a given entity possesses all the attributes of a sovereign State acting on the international plane. It has therefore been established by a practice which goes back to the 1950s that the decisive criterion for determining whether or not an entity is a "State" for purposes of according observer State facilities is whether or not the applicant in question has been admitted as a member State of one of the specialized agencies of the United Nations.

4. The Sovereign Military Order of Malta is neither a full nor an associate member of any specialized agency. The Order has attempted to establish observer status with various United Nations specialized agencies and programmes. As far as the United Nations itself is concerned, while the Order maintains informal links with UNICEF or other United Nations programmes, only one intergovernmental body has granted the status of observer to the Order of Malta: the Executive Committee of UNHCR in 1957.

5. As far as specialized agencies are concerned, the Order enjoys a limited form of observer status with UNESCO and WHO. In the case of UNESCO it was the Executive Board, an intergovernmental body, which decided in 1962 to authorize the Director-General to invite the Order of Malta to send observers to the General Conference. In the case of WHO, the Order applied unsuccessfully for full membership in the early 1950s. In 1962, the Director-General invited the Order to participate in the World Health Assembly as an observer whenever the agenda included items which might be of interest to it. The foregoing shows that the status of observer in international organizations is granted either by an intergovernmental organ or according to rules and practices which are specific to individual organizations. The example of WHO, in particular, shows that specialized agencies have their own rules and practices concerning inviting observers to meetings.

6. In light of the above, it is my view that it would not be advisable for the Secretary-General to depart from the established practice of the Organization. In the practice of the United Nations, the Secretary-General does not, absent authorization, invite non-members to participate in intergovernmental meetings as observers. Intergovernmental bodies should themselves determine which entities they wish to

invite to participate in their meetings as observers, with only one exception: State members of specialized agencies establishing permanent observer offices may be accorded observer facilities by the Secretary-General.

7. The General Assembly is, of course, free to decide to accord observer status to the Order of Malta as an intergovernmental or other organization. The precedent of according observer status to a *sui generis* organization already exists in the case of ICRC. This requires that Member States propose the inscription of an appropriate item on the agenda of the Assembly and sponsor the relevant draft resolution, and that said resolution be adopted by a majority of Member States present and voting.

3 February 1994

35. Conditions of access to internal United Nations documentation and to archives of peacekeeping operations

Letter to a researcher

This is in response to your letter of 25 March 1994, in which you indicate that, as a researcher with the Belgian National Fund for Scientific Research, you are preparing a doctoral thesis on the responsibility of international organizations. In this connection, you have asked "(a) to be verbally briefed on the procedure presently followed for the settlement of claims instituted by third parties against the United Nations for damages allegedly suffered in the course of peacekeeping operations, and (b) to be given access to the archives of some of the peacekeeping operations that have come to an end in order to discover through specific cases how such claims have been settled in the past".

As regards you request, we would like to inform you that access to United Nations documents and files are governed by the following considerations:

(*a*) Internal office files containing inter-office memoranda and correspondence are not open either to Governments or to members of the public;

(*b*) Official documents and records published with a United Nations document symbol and given general circulation are readily available for review by Governments and interested individuals;

(*c*) Certain official documents are given only limited circulation and are intended for use only by a particular United Nations organ. In these instances, circulation of the documents is limited to the membership of the organs concerned. However, documents with a restricted circulation become accessible to interested Governments and individuals in the United Nations Library when they are discussed in open meetings, which is normally the case. Occasionally, however, certain documents with a restricted circulation are considered in closed session and then they are available only to the participants in the meeting in question. In such cases, access to the restricted documents is governed by the United Nations body for whose considerations they were prepared.

Within this framework, we wish to indicate that the particular archives files relating to claims submitted by third parties for damages allegedly incurred as a result of the activities of a United Nations peacekeeping operation consist primarily of internal inter-office memoranda, containing information not intended for use out-

side the Secretariat, and other materials of a confidential and privileged nature. These materials include, *inter alia*, correspondence exchanged with the claimants concerned which, if divulged, could affect the privacy of the individuals named therein. Accordingly, these files are not open for inspection by the public.

30 March 1994

36. Question of whether a system of United Nations awards could be created by the Secretary-General for providers of assistance — Power to establish and grant awards is a power of the Organization — Express or implied authority vested in the Secretary-General

Memorandum to the Under-Secretary-General for Humanitarian Affairs

1. We refer to your memorandum of 24 March 1994 in which you seek our advice on a request addressed to the Secretary-General by Ministers representing various States, being States affected by the Chernobyl disaster, on a proposal to establish a series of awards, including medals, to honour prominent contributors of assistance to the victims of the disaster. You have requested our advice on the legal implications of the proposal.

…

3. In summary, our advice is that the creation of a system of awards as proposed would require a specific General Assembly resolution authorizing their inception, for the reasons outlined below.

(a) *Civilian awards*

4. The United Nations has the power to establish international awards for achievement in fields consistent with the purpose of the Organization under the Charter. Generally speaking, the power to establish and grant awards is a power of the Organization, as opposed to that of the Secretariat. As a result, United Nations practice has been for awards, including medals, to be established by resolutions of the General Assembly, which also set forth the criteria for their grant. The initiative for the creation of a new award thus ought to come from Member States or subsidiary organs who report to the General Assembly.

(b) *Military awards*

5. Another situation where this matter has arisen is in the establishment of medals by the United Nations for award to military personnel who have served on behalf of the Organization. In earlier advice of this Office, dated 10 November 1988, concerning the proposal to establish a medal commemorating the award of the 1989 Nobel Peace Prize to the United Nations Peacekeeping forces, we advised that the Secretary-General had the power to issue such military medal without express General Assembly resolution. In essence, this was because of the substantial administrative and executive powers given to the Secretary-General in respect of the various

United Nations peacekeeping missions. The issuance of medals to military (as opposed to civilian) personnel being an accepted and inherent part of the routine administration of armed forces. Consequently, the United Nations Emergency Force Medal for military personnel serving on assignment to the Force 1956-67,[53] the United Nations Medal, and the then proposed United Nations Commemorative Medal, and the regulations governing their award, in our view, did not require express specific authorization from the General Assembly.

6. Those awards can be contrasted with the United Nations Service Medal (Republic of Korea) which, in our view, required specific authorization of the General Assembly because of the markedly different role of the Secretary-General in that circumstance. There, the functions of the Secretary-General were limited. The military forces were made available to a Unified Command under the United States of America pursuant to Security Council resolution. However, the Secretary-General did not exercise express or implied authority over the Command or its Forces. In that situation, General Assembly resolution 483(V) of 12 December 1950 was required which expressly authorized the Secretary-General to make arrangements with the Unified Command in the Republic of Korea for the design and award of the medal.

(c) Chernobyl

7. With respect to the Chernobyl proposal, there is no express or implied authority vested in the Secretary-General that would, in itself, empower him to create the new awards.[54] I also observe that the potential recipients of the proposed awards would in all probability be comprised largely of non-United Nations personnel, therefore making it highly unlikely that the power to create the awards could be implied from the general powers of the Secretary-General vis-à-vis the Organization.

8. In conclusion, the proposal to create a system of awards for those prominent contributors of assistance to the Chernobyl disaster would in our view fall within the general rule outlined in paragraph 4 above, namely that a General Assembly resolution authorizing the creation of the awards is required. In addition, and of equal importance, would be the promulgation of regulations prescribing the criteria of eligibility for bestowal of the award which would cover such issues as the nature of the qualifying contribution, whether approval of national governments is required, posthumous awards, etc.

9. While the decision as to whether to proceed to promote a General Assembly resolution to establish a new system of awards is clearly a matter of a particular Member State or a subsidiary organ to the United Nations, we note that a resolution of the General Assembly would not be necessary if the system of awards and medals was established independently of the United Nations. This would not preclude the Secretary-General from playing a significant role in the presentation of the awards.

31 March 1994

37. Suspension of a member of the World Meteorological Organization from its rights and privileges — Renewal of membership rights — Articles 14 and 31 of the WMO Convention (Case of South Africa)

Memorandum to the Secretary-General of the World Meteorological Organization

1. This is in response to your letter dated 15 March 1994 in which you seek the advice of this Office concerning two alternative courses of action which can be taken by WMO with regard to the question of membership of South Africa in WMO after establishment of a democratic non-racial Government in South Africa and the adoption by the General Assembly of the United Nations of a resolution on restoring full membership rights to the Member State.

2. It is pointed out in your letter that the present policy of WMO regarding the South Africa was determined in 1975 by resolution 38 (Cg-VII) of the Seventh Congress of WMO providing that "the Government of the Republic of South Africa shall be immediately suspended from exercising its rights and enjoying privileges as a Member of WMO until it renounces its policy of racial discrimination, and abides by the United Nations resolutions concerning Namibia". Under the resolution the Secretary-General of WMO is also requested to implement its provisions and to bring the resolution to the attention of all concerned.

3. In the letter you inquire whether from a legal point of view the membership rights of South Africa should be restored by an action of the WMO Congress acting on the basis of article 31 of the WMO Convention[55] authorizing it to suspend a member from exercising its rights and enjoying the privileges, or such an action can be taken by the WMO Council by virtue of its function laid down in article 14, paragraph (a) of the Convention providing that the Council is responsible "to implement the decisions taken by the Members of the Organization either in Congress or by means of correspondence and to conduct the activities of the Organization in accordance with the intention of such decisions".

4. As noted above, article 31 of the WMO Convention provides that the WMO Congress may suspend a member from exercising its membership rights and enjoying privileges if that member fails to meet its obligations to the Organization under the WMO Convention. It could be noted, however, that according to that article such suspension should not be endless and is supposed to come to an end after a Member has fulfilled its obligations under the WMO Convention.

5. The text of article 31 leaves no doubts that the authority to determine whether membership rights and privileges should be suspended belongs only to the WMO Congress. It may also be logically concluded from the text of this article that the Congress can subsequently reverse its decision if it comes to a conclusion that the member concerned has fulfilled its obligations under the WMO Convention.

6. At the same time this Office is of the view that the aforementioned understanding does not necessarily mean that under article 31 the membership rights and privileges should only be restored through an act of the WMO Congress. To the contrary, article 31 in a quite explicit way provides that suspension of the membership rights and privileges should continue until a Member has met its obligations. Therefore, should a member fulfil its obligations under the WMO Convention, in accordance with article 31 its membership rights and privileges are to be restored.

7. In this connection a question may arise whether renewal of the membership rights and privileges can take place automatically or an action by one of the WMO principal organs would still be required. For example, would it be possible for a member of the Organization, the membership rights and privileges of which were suspended by the Congress, to submit a statement asserting that from now on it has the full membership rights and privileges because it has met its obligations under the WMO Convention. In this regard this Office is strongly of the view that article 31 does not provide grounds for such interpretation. We believe that under article 31 the question of renewal of the membership rights cannot be decided unilaterally by a Member of the Organization, because such renewal affects the interests of all members of WMO. Therefore, a competent organ of WMO should verify information concerning the fulfillment of the obligations under the WMO Convention, which may be submitted either by the secretariat or by the State concerned, and should decide whether it is in a position to concur with it.

8. It was pointed out above that under article 331 of the Convention the WMO Congress has the authority to make such determination. In our opinion this authority of the Congress also follows from article 8, paragraph (a) of the Convention, stating that the Congress shall be responsible to determine general policies for the fulfillment of the purposes of the Organization.

9. It is the view of this Office that, in accordance with the provisions of article 14, paragraph (a) of the WMO Constitution, in addition to the Congress, the Executive Council of WMO can also act as an organ competent to consider questions related to renewal of membership rights and privileges. Article 14, paragraph (a) of the WMO Convention provides that one of the primary functions of the Executive Council shall be to implement the decisions taken by the Congress. Therefore, if the Congress decides that a member shall be suspended from exercising its rights and enjoying privileges until it has fulfilled particular obligations under the WMO Convention, it is the responsibility of the Executive Council to implement all parts of that decision.

10. In the case of South Africa, the Seventh Congress of WMO in its resolution 38 (Cg-VII) established the conditions under which the Government of South Africa can resume exercising its rights and enjoying privileges as a Member of WMO. When these conditions are met, the Executive Council, in fulfillment of its responsibilities under article 14, paragraph (a) of the WMO Convention, should take an appropriate action implementing the respective part of the aforementioned decision of the Seventh Congress.

8 April 1994

38. Procedures required for an organization to obtain observer status with the United Nations

Memorandum to a Political Affairs Officer

I would like to refer to your memorandum of 15 April 1994 concerning the procedures for obtaining observer status with the United Nations.

1. The application for observer status may be made by either the South Pacific Forum or the South Pacific Forum Secretariat. Pursuant to article 1 of the Agreement Establishing the South Pacific Forum Secretariat,[56] the South Pacific Forum

comprises the heads of Government of the member States listed therein and such other heads of Government as may be admitted to the Forum with the approval of the Forum. Pursuant to articles IV and XII, the Governments of those same States mentioned in article I comprise the members of the South Pacific Forum Secretariat upon their signature of the Agreement and such other Governments admitted to membership of the Secretariat by acceding to the Agreement with the approval of the Forum. In that all States members of the Forum have signed the Agreement, the members of the Forum and the members of the Forum Secretariat are one and the same. It is important to note that the term "Secretariat" in the context of the South Pacific Forum Secretariat is not analogous to the use of the term with reference to the Secretariat of the United Nations. In the former context, the Secretariat is the body of Governments that comprise the intergovernmental organization itself.

2. With respect to the procedures for obtaining observer status, please be advised that the rules of procedure of the General Assembly area silent on the question of observers. In practice, however the General Assembly has adopted resolutions according observer status to various intergovernmental organizations. The first step is for Member States to request the inclusion of an appropriate item on the agenda of the General Assembly. Pursuant to the relevant rules, the request must be accompanied by an explanatory memorandum and, if possible, by basic documents or a draft resolution. The General Committee of the General Assembly then reviews the request and recommends to the General Assembly whether or not to include the item on the agenda.

3. Assuming the item is inscribed on the agenda, the next step is for Member States to sponsor a draft resolution by which the General Assembly would decide that the South Pacific Forum is invited to participate in the sessions and the work of the General Assembly in the capacity of observer. It is then a matter for the States Members of the Organization to take a decision on the proposed resolution, if necessary by a majority vote of the Members present and voting.

21 April 1994

39. Status of the Global Environment Facility

Memorandum to the Executive Secretary, Intergovernmental Committeee for the Convention on Biological Diversity

1. This is in response to your memorandum of 11 April 1994. In that memorandum you point out that in accordance with paragraphs 1 and 2 of article 21 of the Convention on Biological Diversity,[57] the first meeting of the Conference of the Parties to the Convention should, *inter alia*, consider the questions related to the selection of the institutional structure to operate the financial mechanism for the provision of financial resources to developing country parties, as well as the nature of the arrangements between the Conference of the Parties and the institutional structure selected by it. It is further noted in the memorandum that, so far, the financial mechanism has been operated on an interim basis by the Global Environment Facility (GEF), as a pilot programme of the World Bank, and that on 16 march 1994, the States participating in the pilot phase and other interested States accepted the Instrument for the Establishment of the Restructured GEF.

2. According to the memorandum, in the light of the foregoing, the Intergovernmental Committee for the Convention on Biological Diversity (ICCBD) would like to seek the advice of this Office regarding the following questions related to the legal status of the restructured GEF:

(*a*) Does the GEF, as established in March 1994, have the international legal personality to enter into legally binding arrangements under international law?

(*b*) If the answer to question 1 is yes, does the legal personality extend to its subsidiary bodies?

(*c*) If the answer to question 1 is no, is it possible for other entities to enter into legal arrangements on behalf of the GEF? If not, can the critical characteristics of such an entity be identified?

General observations

3. An international entity has legal personality if, in accordance with its constituent instrument, it is established as an international organization subject of international law. Under subparagraph (i) of article I of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations,[58] the term "international organization" is defined as "intergovernmental organization." Legal personality of an international entity/organization is determined and limited by the constituent instrument creating such an organization. Through its constituent instrument an international entity/organization has implied powers to carry out its purposes and duties and thus has the legal capacity to enter into treaties, contracts, acquire and dispose of property, be a party to judicial proceedings. The International Court of Justice (ICJ) in the 1949 advisory opinion Repatriation for Injuries Suffered in the Service of the United Nations reaffirmed that international entities/organizations would not be able to carry out the intentions of their founders if such organizations were devoid of international personality.

4. The 1986 Vienna Convention provides in article 6 that the capacity of an international organization to conclude treaties is governed by the rules of that organization. Under article 2 of the Convention the term "rules of the organization" means, in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization.

5. In the light of the foregoing, it should be pointed out that for an international entity to have the capacity to enter into legally binding agreements/arrangements, that entity should be established either as an international organization, with its own legal personality or as a subsidiary body of an international organization or organizations. In the latter case a decision on the establishment of a subsidiary body should make it clear that this body is entrusted by the parent organization or organizations with the legal capacity to enter into legally binding arrangements within its competence.

Distinct identity of the restructured GEF

6. The Global Environment Facility was originally established as a pilot programme/subsidiary body of the International Bank for Reconstruction and Development (World Bank). Resolution No. 91-5 of the Executive Directors of the World Bank, dated 14 March 1991, provided that the Facility was established, con-

sisting of the Global Environment Trust Fund, Co-financing Arrangements with the Global Trust Fund, the Ozone Projects Trust Fund, and such other funds and agreements as the Bank may from time to time establish or agree to administer within the Facility.

7. Under resolution 91-5 the GEF, as a subsidiary body of the World Bank, was not entrusted with the legal capacity to enter independently into agreements and arrangements with international organizations or States. The resolution is quite explicit in this regard. In paragraph 19, section D (Other Arrangements) it states: "The Bank is authorized to enter into other agreements and arrangements with countries party to international agreements for the protection of global environment, international organizations and other entities in order to administer and manage the financing for the purpose of, and on terms consistent with this Resolution." It should be further noted that under paragraph 3 (Global environment co-financing arrangements) of the resolution it is only the Trustee (the World Bank) which is authorized to enter into co-financing arrangements with participants (donor countries) and others for the purpose of, and subject to the terms of, the resolution.

8. For the purposes of the present study, it should therefore first be determined as to whether on 16 March 1994 the restructured GEF was established as a new entity, distinguished from the original GEF.

9. Paragraph 1 of the Instrument for the Establishment of the Restructured Global Environment Facility provides that "this Instrument, having been accepted by representatives of the States participating in the GEF at their meeting in Geneva, Switzerland, from 14 to 16 march 1994, shall be adopted by the Implementing Agencies (UNDP, UNEP and the World Bank) in accordance with their respective rules and procedural requirements". Under paragraph 32 of the Instrument, the World Bank is invited to terminate the former Global Environment Trust Fund and to transfer any funds, receipts, assets and liabilities, held in it upon termination, to the new GEF Trust Fund, established in accordance with paragraph 8 of the Instrument. Paragraph 4 of the Instrument further states that amendment or termination of it shall become effective only after the adoption by the implementing agencies in accordance with their respective rules and procedural requirements.

10. It appears from the above that the restructured GEF is no longer a body established by the Executive Directors of the World Bank. According to the Instrument on the Establishment of the Restructured GEF, the Facility will become operative after the Instrument is approved by the respective governing bodies of the Implementing Agencies. A similar act of approval on the part of the implementing agencies will also be required if subsequently, at some time in the future, it is determined that the restructured GEF is a new entity, which is distinct from the former GEF.

Question as to whether the restructured GEF has legal personality

11. It was noted above that an entity has legal capacity to enter into legally binding arrangements if it is established as an international organization or as a subsidiary body of an international organization or organizations entrusted by the latter with the capacity to enter into arrangements within the areas of its responsibilities.

12. The restructured GEF is established in accordance with the Instrument, which, having been accepted by representatives of States, requires adoption by the Implementing Agencies.

13. Having examined the text of the Instrument this Office is of the view that it does not constitute a treaty among the States participating in the negotiations on the establishment of the restructured GEF. Reference in the Instrument to the acceptance of its text by *representatives* (emphasis added) of States is an important factor indicating that the Instrument is supported by States members of the World Bank and of the United Nations (UNDP and UNEP as United Nations programmes are acting on behalf of the Organization) and therefore that its approval by the governing bodies of the implementing agencies is almost predecided. At the same time, such reference cannot be interpreted as amounting to the act of formal acceptance of the Instrument by States which took part in negotiations on it. Although representatives of States accepted the text of the Instrument at their meeting in Geneva, States as such did not become contracting parties to the Instrument at that meeting.

14. It should be noted in this regard that the Instrument does not contain provisions providing that States should give their consent to be bound by the Instrument. According to paragraph 7 of the Instrument, any State Member of the United Nations or of any of its specialized agencies may become a participant in the GEF by depositing with the secretariat an instrument of participation substantially in the form set out in Annex A. In the case of a State contributing to the GEF Trust Fund, an instrument of commitment shall be deemed to serve as an instrument of participation. Similarly, any participant may withdraw from the GEF by depositing with the secretariat an instrument of termination of participation substantially in the form set out in Annex A. A standard text of notification of participation/termination of participation contained in Annex A reads as follows:

> "The Government of … hereby notifies the Chief Executive Officer of the Global Environment Facility ("The Facility") that it will participate (terminate its participation) in the Facility."

15. In addition, it should be pointed out that under the Instrument its participants lack the final authority to amend or terminate the Instrument. Representatives of participants may only take part in the consideration and approval by the Assembly and the Council of the GEF of the documents containing suggestions for amendments or termination.

16. In the light of the above, this Office is of the view that the aforementioned notification of participation in the GEF is not equivalent to the expression of consent to be bound by the Instrument and that the status of a participant in the GEF is not equivalent to the status of a contracting party under the law of treaties.

Legal nature of the restructured GEF

17. Analysis of the GEF Instrument, in the opinion of this Office, proves that the restructured Facility is not established as a n international organization and therefore it does not have legal personality. We believe that the restructured GEF constitutes a joint subsidiary body, in the form of a financial mechanism created by the World Bank and UNDP and UNEP, acting on behalf of the United Nations. This conclusion is based on the provisions of the Instrument, referred to above, providing that in order to become legally effective the Instrument should be approved by parallel decisions of the governing bodies of the implementing agencies. If need be, the Instrument could be amended or terminated only by similar parallel decisions of the agencies.

18. It should be pointed out that although the GEF was created as a subsidiary body, its organs have considerable authority in governance of the GEF activities and the role of parent organizations in this regard is rather limited. This is evident from the provisions of the Instrument related to the governance and structure of the Facility (para. 11.21). At the same time, the Instrument is short in providing the restructured Facility with the legal capacity to enter into legally binding arrangements or agreements.

19. Under paragraphs 20(g) and 27 of the Instrument, the Council of the Facility is empowered with the authority to consider and approve cooperative arrangements or agreements with the Conferences of the parties of the United Nations Framework Convention on Climate Change and the convention on Biological Diversity. However, having been considered and approved by the Council, in accordance with paragraph 7 of Annex B, these cooperative arrangements and agreements will have to be formalized by the World Bank.

20. The Instrument is silent regarding the procedure which should be followed if the GEF decides to negotiate arrangements or agreements with entities other than the two Conventions. Nevertheless, it may be assumed that the intention of the drafters of the Instrument was to apply in such cases by analogy the aforementioned provisions of the Instrument relating to the conclusion of arrangements or agreements with the organs of the two Conventions.

Conclusions

21. Having reviewed the Instrument for the Establishment of the Restructured Global Facility and other relevant material, this Office is of the opinion that the restructured GEF is not established as a new internatioinal organization — new institution — and therefore it does not have legal personality under internation law. Consequently, subsidiary organs of the restructured GEF cannot have legal personality as well.

22. The restructured GEF is a subsidiary body, in the form of a financial mechanism, of the World Bank and United Nations, acting through UNDP and UNEP. Under the Instrument, the parent organization assigned to the GEF considerable autonomy in governance of its activities, including the authority to negotiate arrangements and agreements with other international entities for the purposes of the implementation of the objectives of the Facility. However, the Facility is not entrusted by the parent organizations with the legal capacity to enter into legally binding arrangements or agreements. Any arrangement or agreement negotiated by the GEF should be finalized by the World Bank. In most cases such formalization would probably represent a mere formality, but it remains a legal requirement. Therefore, from the legal point of view, under the Instrument, the World Bank is the entity which will enter into arrangements or agreements on behalf of the GEF. The World Bank shall also be the Trustee of the GEF Trust Fund. In accordance with paragraph 13 of Annex B to the instrument, the privileges and immunities accorded to the Trustee under its Articles of Agreement shall apply to the property, assets, archives, income, operations and transactions of the GEF Trust Fund.

31 May 1994

40. Question of credentials, voting rights and financial obligations of South Africa upon resumption of its participation in the work of the General Assembly — Article 17 of the Charter

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

1. In response to your request for comments in connection with a note on a meeting with the Permanent Representative of South Africa on the above subject, I would like to submit the following observations.

2. The resumption of participation by South Africa in the work of the General Assembly and other United Nations bodies raises the issues of credentials, voting rights and financial obligations under Article 17 of the Charter of the United Nations.

3. As far as the issue of credentials is concerned the situation is very simple. When the Government of South Africa submits credentials, they will be forwarded to the Credentials Committee of the General Assembly. It is our understanding that, since such credentials are now being issued by a legitimate Government, they will be accepted by the Credentials Committee, and subsequently, pursuant to the recommendation of the Credentials Committee, by the General Assembly.

4. The issue of South Africa's voting rights is more complicated. Article 19 of the Charter provides that a Member 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 contributions due from it for the preceding two full years. The second sentence of Article 19, however, provides that the General Assembly may 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". Such a decision is within the exclusive competence of the General Assembly, upon the advice of the Committee on Contributions. Rule 160 of the rules of procedure of the General Assembly provides in part, that the Committee shall "advise the General Assembly … on appeals by Members for a change of assessments and on the action to be taken with regard to the application of Article 19 of the Charter". There is a limited practice in this regard. However, typically the request is made by the country itself.

5. Pursuant to the first sentence of Article 19 of the Charter, South Africa is currently in arrears and thus may not vote in the General Assembly. Pursuant to the second sentence of Article 19 of the Charter, the General Assembly may nevertheless permit South Africa to vote if it is satisfied that South Africa's failure to pay is attributable to conditions beyond its control. That decision would allow South Africa to vote in the General Assembly notwithstanding the fact that its arrears have surpassed the limit provided for in Article 19. It should be noted that, so far, the General Assembly has never explicitly applied this provision of Article 19.

6. With reference to the issue of South Africa's financial obligations it must be pointed out that, although the Government of South Africa was unable to participate in the work of the General Assembly and other United Nations bodies, South Africa's continued membership as a State in the United Nations and its obligations under Article 17 of the Charter have never been in dispute. As a matter of law South Africa has a legal obligation to pay the arrears which are due under Article 17 of the Charter.

7. Thus, even if the General Assembly were to decide pursuant to Article 19 that it is satisfied that the failure of South Africa to pay is due to conditions beyond its control, that decision would only allow South Africa to vote in the general Assembly notwithstanding the fact that its level of arrearages had surpassed the limit in Article 19. The assessment of South Africa and its arrearage would remain unaffected. Article 19 only relates to voting in the General Assembly and contains no provision for deferring or suspending assessments or for relieving a State of its financial obligations. That would be a matter of basic policy for the Members of the Organization, through the General Assembly, to determine in accordance with Article 17, paragraph 2, of the Charter: "The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly."

…

9. In connection with the case of China, it is worth mentioning that by its resolution 2758 (XXVI) of 25 October 1971, the General Assembly decided to expel forthwith the representatives of Chiang Kai-Shek from the place which they unlawfully occupy at the United Nations and to restore all rights to the People's Republic of China. Under the resolution, the representatives of the People's Republic of China were recognized as the only legitimate representatives of China to the United Nations. In the light of that resolution, the Assembly subsequently decided by resolution 30-49 C (XXXVII) that the assessed contributions for China should be based on the period starting from 25 October 1971. By the same resolution, all unpaid assessed contributions for the period prior to 25 October 1971 were transferred to a special account and were included as a part of the short-term deficit of the Organization for the purposes of compute that deficit.

It appears from the foregoing that from the legal point of view the case of China is completely distinct from the situation of South Africa.

1 June 1994

41. Question whether the World Health Organization can establish entities within the Organization or whether it can participate in the establishment, under the national laws of a Member State, of a private entity — Possibility of participation of a WHO staff member in his official capacity in the operation and management of such entity

Letter to the Deputy Legal Counsel, Legal Office, World Health Organization

This is in reference tot he letter of 24 June 1993 from the Legal Counsel, informing us of the various proposals for establishing "independent entities" with WHO or under it auspices, to perform fund-raising activities in support of projects endorsed by WHO. In addition, we were requested to provide information on precedents of similar arrangements within the United Nations system, such as those governing the relationship between UNIVCEF and its National Committees, and the UNDP participation in the "Council on Health Research for Development" (COHRED).

At issue are the following questions: (a) whether WHO can establish an "independent entity" with the Organization or under its auspices; (b) whether WHO can participate in the establishment, under the national laws of a Member State, of a private entity; in which case, (c) whether a WHO staff member may participate, in his official capacity, in the operation and management of the said entity.

(a) Creation of "independent entities" within WHO or under its auspices

The question of whether WHO can establish "independent entities" within the Organization should be determined in accordance with the Constitution, Regulations and Rules and other policy directives of WHO. We note, however, that except for the creation of internal judicial bodies or groups of experts with advisory functions, subsidiary organs must operate within the mandate and guidance set out by the Organization and are subject to its ultimate authority. The "independence" of such subsidiary organs is, therefore, in many respects relative. We can confirm that this is also the case with the United Nations. The establishment of subsidiary bodies is, under the Charter of the United Nations, within the sole authority of the principal organs of the United Nations, e.g., the Security Council, the General Assembly and the Economic and Social Council.

The establishment of a non-United Nations body to support activities of the Organization is only possible pursuant to national legislation, and in such cases the actual incorporation of such a body is left to private parties, without the Organization participating in the establishment or operation of that body. This is the case with the National Committees for UNICEF, which are established by the individuals under national legislation and operate separately and independently of UNICEF. National Committees, however, support UNICEF programmes on the basis of a relationship agreement with UNICEF. In at least one case, a non-United Nations body was created "under the auspices" of the United Nations but this was only done on the basis of a legislative authority from the General Assembly. Thus, pursuant to paragraph 20 of General Assemgbly resolution 44/67 ("Implementation of the International Plan of Action on Aging and Related Activities"), an independent international foundation, the Banyan Foundation, was established "under the patronage of the United Nations" for the purpose of developing an international fund-raising strategy covering policies and programmes for the aging. The Banyan Foundation was incorporated under French Law and a Relationship Agreement between the Foundation and the United Nations was subsequently concluded.

The description of a non-United Nations entity as being established "under the United Nations auspices" is likely to create the false impression that the said entity is part of the Organization or that its activities are formally endorsed by the Organization and thus expose it to financial liability for activities carried out by that entity and for which it has no control. For this reason, legislative authority is required before creating such a body and even then it is necessary to supervise the formation and functioning of the body to ensure that no legal nexus is created that may impute an agency relationship or other connection entailing endorsement of its activities. This indeed was done in case of the Banyan Foundation.

(b) Participation of the Organization in the establishment of a private entity and participation of its staff in the operation and management of such entity

The participation of the Organization as a founding member of a private entity incorporated under the national law of a Member State raises a number of conceptual and practical problems pertaining to the legal capacity of the Organization, its character and the privileges and immunities to which it is entitled. As a consequence this Office has consistently advised against any such participation or membership.

The participation of a staff member of the Organization in the operation and management of the private entity raises similar issues. As a participating member, the staff would subject himself to the laws of the incorporating State in respect of his activities with the said entity. To the extent that the staff member performs his activities in a representative capacity of the Organization, his activities could equally entail the liability of the Organization. The very concept of the Organization or its staff being held liable in such circumstances is incompatible with the status of the Organization and that of its officials.

1 June 1994

42. Establishment of diplomatic mission of a Member State to the Conference on Disarmament — Rules of procedure of the Conference – General Assembly resolution 257 (III)

Facsimile to the Director-General, United Nations Office at Geneva

Reference is made to your facsimile of 20 June 1994 concerning the opening of a separate mission in Geneva by a State to the conference on Disarmament.

We note from a previous communication dated 16 June 1994, with attachments on the matter, that Switzerland, by its note verbale dated 20 May 1994 circulated in Geneva, stated that the interested States may establish "separate diplomatic representations" to: (a) the United Nations and the specialized agencies; (b) the Conference on Disarmament; and (c) the General Agreement of Tariffs and Trade. Switzerland further announced that each of these representatives, which may share the same premises, will benefit, by analogy, from the application of the 1961 Vienna Convention on Diplomatic Relations.

We further note that in accordance with his letter dated 8 June 1994, addressed to the Permanent Representative of Switzerland, the Permanent Representative of [name of State] announced a decision to establish in Geneva a separate diplomatic representation to the Conference on Disarmament. In the light of these facts the Deputy Permanent Observer of Switzerland, in his facsimile of 13 June 1994 addressed to the under-Secretary-General of the Conference on Disarmament, *inter alia*, inquired as to what are the criteria for the establishment of a separate diplomatic mission to the Conference on Disarmament in general and in particular whether [name of State] could establish such a representation in view of the fact that it was not a member of the Conference on Disarmament but an observer.

In this connection, it is to be noted that the rules of procedure of the Conference do not regulate the question of representation and accreditation of the delegation of a State member of the Conference (rules 4, 5 and 6). In particular, rule 5 provides that "each delegation shall be accredited by a letter on the authority of the Minister for Foreign Affairs of the member State, addressed to the President of the Conference". However, the rules of procedure do not address at all the questions as to whether a permanent representation /mission could be established by either a State member of the Conference or a State which is not a member thereof.

In view of the fact that the Conference on Disarmament is not a United Nations body, the request by [name of State] and the question of its representation should in our view be considered by the Conference itself with a view to making appropriate decisions on the matter.

In this connection, United Nations practice could be recalled. The institution of permanent observers of non-member States in United Nations practice is traced to the designation by Switzerland in 1946 of a permanent observer. From a formal point of view, this practice is based on an exchange of letters between the non-member State and the Secretary-General. It was subsequently followed by many other non-member States and the institution of permanent observer missions has developed correspondingly. In 1948, the General Assembly adopted resolution 257 (III) concerning permanent missions to the United Nations. Subsequently, the need to codify the evolving practice in this area led to the adoption in 1975 of the Vienna Convention on the Representation of States in Their Relations with International Organizations of Universal Character (not yet in force).

22 June 1994

43. Question of Juridical Personality and legal capacity in relation to United Nations agencies, programmes and funds

Note to the Legal Counsel

Juridical personality and legal capacity[59]

(*a*) *International Intergovernmental Organizations*

In the *Reparation for Injuries Suffered in the Service of the United Nations* case,[60] the international Court of Justice determined that the United Nations was an international person.[61] The Court recognized, in that regard, that the "subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community".[62] Thus, the Court distinguished between the international personality of the United Nations, whose legal capacities were limited to its functions and purposes, and the sovereignty of States.

The Court's conclusion that the United Nations was an international person was on the basis of the attributes of the United Nations under the Charter, including the provisions in the Charter as regards its functions, purpose, organs, legal capacities and privileges and immunities, including its ability to conclude agreements with each of its Member States. On this basis, therefore, there is no longer any dispute that other international intergovernmental organizations, similarly endowed, possess international personality separate from that of their member States. The possession of international legal personality means that the organization concerned can act on the international plane and exercise certain of the capacities of the subjects of international law, i.e., States. It is acknowledged, however, that organizations do not all have international legal personality and even those which do, have limited capacities on the international plane. They only exercise such legal capacities on the international plane as are necessary to achieve their purpose.[63]

As a consequence of the recognition of the international personality of international organizations, the constituent instruments of those organizations contain provisions granting them capacities to operate also at the municipal level. Such a provision in a treaty establishing the organization in question is in many respects sufficient to empower the organization to exercise legal capacities in the territories of its member States.[64] However, in some countries where treaties are not self-executing, internal national legislation may be necessary to achieve this effect.

As regards the United Nations, Article 104 of the Charter of the United Nations provides that the "Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes," and article 2 of the General Convention further elaborates on its legal capacities.[65] It is, however, still incumbent on the Member States to take the necessary action under their laws to meet their obligations under this provision of the Charter, except in countries where a treaty is self-executing.[66]

(*b*) Subsidiary bodies of international organizations

The legal status of subsidiary bodies of international organizations is not as clear. These bodies have proliferated and not all have a clear legal status, even under their own constituent instruments.

In the case of the United Nations, "such subsidiary organs as may be found necessary may be established in accordance with the present Charter" (see Article 7, para. 2, of the Charter).[67] For purposes of this note, the present discussion will focus on those bodies which have been established by the General Assembly, with their own governing bodies and are independently funded. Example of such bodies are UNDP, UNICEF, UNEP and UNFPA.

In some cases, like UNFPA, the General Assembly has expressly designated them as subsidiary organs and in others, such as UNICEF, it has accorded them expressly with certain legal capacities.[68] But the practice of the Assembly has not always been uniform.[69]

As indicated above, international organizations have been recognized to possess the requisite personality to exercise certain legal capacities, as necessary, to carry out their functions. There are equally compelling reasons for recognizing the capacity of defined subsidiary bodies of international organizations, for certain purposes, to perform legal acts and incur legal obligations in the name of their parent body, or in their own names on behalf of such parent body.[70] This is essential in order to enable the subsidiary bodies to discharge their mandates, as well as to protect the parent organizations from liability resulting from the activities of their subsidiaries, which they form purposely separately with independent financial resources.[71] However, not all subsidiaries qualify for such recognition and the capacities they exercise need not be the same.

It is not denied that many of the subsidiary bodies have been provided broad functions in the economic and social sectors, to work with Governments in the design of capital development and other projects in the areas of trade, health, child welfare, the alleviation of poverty, illiteracy and disease. To the extent, therefore, that the subsidiary body's functions entail activities which cannot be performed without exercise of certain legal capacities, such bodies must be recognized as endowed with the authority to exercise such capacities.[72] However, the ability to exercise certain legal capacities does not mean that such subsidiary bodies possess their own international personality.[73] They do not possess international personality separate

from that of their parent organization and thus cannot perform international acts or incur international obligations, except as expressly authorized by their parent bodies upon demonstrations of possessing "full powers".[74] Their capacities are therefore derived from the personality of the parent body.

At the municipal level, and to the extent that they have been granted broad mandates to undertake and execute activities that engage legal responsibilities to third parties, subsidiary bodies do not act in their own name. However, before they can exercise the right to perform certain acts, such as acquisition of real property and institution of legal actions, internal legislative authorization may be required.[75] It is thus possible to argue that their capacities are essentially territorial in scope depending on whether the subsidiary body conducts operations in the country and whether the law of that particular country recognized such a body as possessing legal capacity.[76]

In the case of the United Nations subsidiary bodies, only a few can be said to possess the authority to exercise legal capacities. The various United Nations programmes and funds enumerated in the United Nations Office Agreement satisfy the main criteria for the exercise of legal capacities, in terms of their broad functions, organs, composition and funding. In order for them to exercise such capacities within the territory in which they conduct their activities, the consent of the State concerned is required, and the United Nations Office Agreement, in particular its article 3, is intended to serve that purpose.

At the current stage, when we are only dealing with amending the text of the United Nations Office Agreement so that it conforms to General Assembly resolution 48/209, it is suggested that article 3 should be left as is. Its text simply sets out the legal capacities that are necessary for the conduct of the activities of the United Nations programmes and funds in the territory of the State concerned. The text does not raise any issues of those United Nations programmes and funds being endorsed with international personality separate from that of the United Nations.

However, the reference to the "Office," as also entitled to exercise legal capacities, was deleted because resolution 48/209 makes it clear that there will no longer be an integrated United Nations office, and that the offices to be established will be field offices of the United Nations programmes and funds. As such, they are not separate from the United Nations programmes and funds themselves and cannot exercise any capacities separate from those accorded to and exercised by such programmes and funds.

26 July 1994

44. Conditions of the use of United Nations premises[73] — Charge of rental costs — General Assembly resolution 41/213 — Status of United Nations Institute for Training and Research

Memorandum to the Under-Secretary-General for Administration and Management

1. This is in reference to the matter of rent charged to UNITAR for the occupation of office space at the premises of the United Nations Office in Geneva, specifically, at the Petit Saconnex.

2. The matter of rent was raised with this Office by the Acting Executive Director of UNITAR, in a memorandum dated 16 may 1994.

…

4. We have carefully reviewed the pertinent documents on this matter, including the resolution of the General Assembly on the basis of which UNITAR has been charged rent. We note in this respect that, in resolution 41/213, the General Assembly did not itself determine the category of entities, including UNITAR, using United Nations premises which should be charged with rental costs. The conclusion that UNITAR must pay rent has been deduced from the approval by the General Assembly, in resolution 41/213, of the report of the Group of High-level Intergovernmental Experts to Review the Efficiency of the Administrative and Financial Functioning of the United Nations ("Group of Experts"), which recommends that Member States and other users occupying office space on United Nations premises should pay rent. The Assembly, after recalling its resolution 40/237 of 18 December 1985, by which it established the Group of Experts, decided that the recommendations, as agreed upon and as contained in the report of the Group of Experts, should be implemented by the Secretary-General, as well as by other relevant organs and bodies of the United Nations. A report, dated 15 August 1986, stated, *inter alia*, in its recommendation 36, that:

> "*Member States and other users* occupying office space on United Nations premises should pay a rent based on current commercial rates" (emphasis added).

5. We note that this matter has been the subject of discussion in the context of the Administration Committee on Coordination (ACC) machinery and, following the recommendation of the Group of Experts, the Consultative Committee on Administrative Questions on Financial and Budgetary Questions (CCAQ) was informed by the United Nations as follows:

> "24. Further to one of the provisions of General Assembly resolution 41/213, the United Nations had informed the Committee at the last session that it would be charging rent from 1990 onwards to *all agencies and other outside bodies which occupied space in United Nations premises*" (emphasis added).[77]

6. The recommendation of the Group of Experts stated that, as a cost-saving measure and optimum utilization of space, "Member States and other users" which occupy office space on United Nations premises should pay rent. The words "other users" in this context have to be interpreted *ejusdem generis*, in a manner consistent with the context in which they are used. In this case, these words follow an enumerated category (i.e., Member States), and therefore, such interpretation should be in keeping with this category. "Member States" are separate juridical persons from the United Nations and it is reasonable to assume that "other users," as used in the report, also referred to entities separate from the United Nations. "Member States and other users" should be understood as a *numerus clausus* enumeration, so that no other entity with a different legal nature from that of those enumerated in the recommendation of the Group of Experts should be included in such enumeration. This understanding is borne out by the information noted in the ACC report which limits rental payments to all agencies and outside bodies. The term "agencies" is used in

the United Nations to refer to the specialized agencies which, though part of the United Nations system, are nevertheless separate legal entities.[7 8]

7. The legal nature of UNITAR, however, departs substantially from that of specialized agencies or other outside bodies. This can be determined by a review of the statute of UNITAR promulgated in November 1965 and amended in December 1989. UNITAR, though called an autonomous institution within the framework of the United Nations, was actually established under a statute promulgated by the Secretary-General, pursuant to General Assembly resolution 1934 (XVIII) of 11 December 1963 and to resolution 42/197 of 11 December 1987. The statute provides that its goals and functions must be connected with the work of the United Nations (article II.2) and that:

> The Institute shall conduct research and study related to the functions and objectives of the United Nations. *Such research and study shall give appropriate priority to the requirements of the Secretary-General of the United Nations and of other United Nations organs and the specialized agencies*" (article II.3) (emphasis added).

The statute also provides that the Institute shall be financed "from voluntary contributions made by Governments, intergovernmental sources, as well as from the income generated by the Reserve Fund" (article VIII.2).[79]

8. Accordingly, under the statute, UNITAR is a part of the Secretariat and thus it is neither an "agency" nor an "outside bod[y]," and to include it in the category of "other users", as used in the report of the group of experts, may not be correct as it does not enjoy a separate legal status, like States, from the United Nations. In the light of the above, UNITAR is not an entity to which, apart from other policy considerations, rent would be charged for the occupancy of United Nations office space based on General Assembly resolution 41/213.

9. On the question of policy, we note that UNITAR occupied a building in New York acquired by the United Nations with a grant from the Rockefeller Foundation in 1964. On these premises UNITAR did not pay rent for the building to the United Nations; it only paid the net lease on the land to the original owners. This land was later acquired by the United Nations and except for the repayment of the debt incurred from other funds to purchase the land, no suggestion was made that it pay rent to the United Nations.

10. Furthermore, in the Secretary-General's recommendation to the General Assembly to transfer the UNITAR headquarters to Geneva,[80] the question of rental payment for the premises it would occupy in Geneva, at the United Nations Office at Geneva, does not seem to have been raised or addressed in the discussions preceding or leading to the decision. Besides, the report of the Secretary-General following the General Assembly resolution which decided the transfer,[81] pointed out that the financial situation of the Institute remained "very tight and fragile" and "there is serious danger of further financial difficulty" (A/48/574, para. 12). If UNITAR were to be charged rent for occupation of United Nations premises from funds contributed to UNITAR for United Nations programmes, in such a situation, this could result in reduced ability to fund vital programmes and defeat the very purpose for moving it to Geneva.

12 August 1994

45. Procedure for dealing with communications relating to violations of human rights and fundamental freedoms — Paragraph 10 of Economic and Social Council resolution 1503 (XLVII)

Opinion of the Legal Counsel of the United Nations on the "interpretation to be given to paragraph 10 of Economic and Social Council resolution 1503 (XLVIII)"

1. At its 45th session, in 1993, the Subcommission on Prevention of Discrimination and Protection of Minorities decided, by its decision 1993/104, to study at its 1994 session the question of the reform of the procedure governed by Economic and Social Council resolution 1503 (XLVIII) of 27 May 1970, "including the possible abolition of that procedure." It requested the Secretariat to prepare a working paper on the subject for consideration at that session and "to obtain the opinion of the United Nations Legal Counsel on the interpretation to be given to paragraph 10 of resolution 1503 (XLVIIII)." The present note is prepared in response to the latter request.

2. In dealing with this request, I first note that paragraph 10 of the resolution could give rise to a number of question, although the general meaning of the provision is plain enough. I have tried to identify some of these questions and to comment upon them. However, in order to make a proper analysis, I would need a more precise request. Pending such a request, I have chosen to submit the following in order to assist the Subcommission as far as possible.

3. The analysis touches upon the following questions: subject and scope of the review; the entity entitled to conduct a review; the timing of the review; the meaning of "such communication"; and the Optional Protocol to the Covenant on Civil and Political Rights[82] as distinct from the 1503 procedure.

4. Paragraph 10 of Economic and Social Council resolution 1503 (XLVIII) reads as follows:

> "10. The Economic and Social Council … decides that the procedure set out in the present resolution for dealing with communications relating to violations of human rights and fundamental freedoms should be reviewed if any new organ entitled to deal with such communications should be established within the United Nations or by international agreement."

5. The text of paragraph 10 was proposed by Italy when draft resolution 1503 was considered by the Social Committee in 1970. The sponsor's intention was to "avoid duplication and possible contradiction in the evaluation of the admissibility of communications relating to violations of human rights and fundamental freedoms in the event that new organs entitled to deal with such communications were established, either international agreement or within the United Nations".[83] As far as the "new organs" are concerned, the sponsor referred specifically to the Human Rights Committee envisaged under the Covenant on Civil and Political Rights and its Optional Protocol, as well as the proposal to establish an Office of High Commissioner for Human Rights which was then under consideration by the General Assembly.[84] Therefore, the purpose of paragraph 10 is to provide an opportunity for review of relevant subsequent developments so as to avoid any conflict with the functions and power of any new organ that may be created in the future in that field.

(a) Subject and scope of the review

6. Paragraph 10 refers to the "procedure" set out in the resolution for dealing with "communications relating to violations of human rights and fundamental freedoms." Essentially, the 1503 procedure is a system consisting of a stage-by-stage evaluation of communications received from persons and organizations to identify serious violations of human rights which appear to reveal a consistent pattern (i.e., situation). Thus, even though the term "procedure" is used, it should however be understood to cover the entire scope of resolution 1503 (XLVIII). Originally, the 1503 procedure had a three-stage mechanism involving the evaluation first by the Working group on Communications, then the Subcommission on Prevention of Discrimination and Protection of Minorities and then the Commission on Human Rights. The Working Group on Situations was subsequently added as the third stage before the final examination by the Commission. The functions and powers of each organ in dealing with communications relating to violations of human rights and fundamental freedoms are set out in resolution 1503 (XLVIII) and other relevant resolutions (e.g., Council resolutions 1990/41 of 25 May 1990).[85] The subject and scope of the review under paragraph 10 should therefore include not only such aspects as application, admissibility and confidentiality, but also the roles and functions of the organs involved at each stage identified in the various paragraphs of resolution 1503 (XLVIIII) and other relevant resolutions, and evolved through practice during those years.

7. The competent organ itself must however decide the precise scope of a particular review under consideration, in the light of, *inter alia*, the functions and powers of the new organ concerned and its own competence.

(b) The entity entitled to conduct a review

8. The wording of paragraph 10 does not specify the entities which are entitled to conduct a review. The wording does not however preclude each of the five organs involved (i.e., the Working Group on Communication, the Subcommission of Human Rights Prevention of Discrimination and Protection of Minorities, the Working Group on Situations, the Commission on Human Rights and the Economic and Social Council itself) to initiate reviews on aspects falling within their assigned functions under the 1503 procedure. Since a subsidiary organ only has competence over functions assigned to it under the 1503 procedure, any review of an overall nature falls primarily within the purview of the Council itself. This however does not prevent it from delegating this task to the Commission or other organs. Equally, since the 1503 system was created by the Council through its resolution 1503 (XLVIII), no other organ is competent to modify it without the authorization of the Council.

9. In March 1993, the Commission on Human Rights adopted resolution 1993/58, which addressed the question of "Effective functioning of the various mechanisms established for supervision, investigation and monitoring of the implementation of the treaty obligations entered into by States in regard to human rights and of the existing international standards in this regard." The Secretary-General was requested to prepare a report to focus on six thematic areas:

(a) Original mandates assigned to the various treaty and non-treaty mechanism;

(b) International legal norms and standards on which existing non-treaty mechanism currently based their activities;

(c) Conceptual framework, methods of work and procedural rules applied by each non-treaty mechanism in the discharge of its mandate;

(d) Various norms, criteria and practices established by each existing mechanism in regard to the admissibility of communications;

(e) Preliminary consideration and evaluation of communications, their referral to the interested parties and subsequent course of action;

(f) Criteria used in practice by the Centre for Human Rights for channeling communications either to an existing public machinery or into the confidential procedure governed by Economic and Social Council resolution 1503 (XLVIII), together with the legal foundation for such criteria.

The 1503 procedure formed part of the Secretary-General's report.[86] The Commission however postponed the review to its 1995 session. In August 1993, the Subcommission, by its decision 1993/104, decided to study the question of the reform of the 1503 procedure, including the possible abolition of the procedure. The Secretariat has prepared a working paper for that purpose (E/CN.4/Sub.2/1994/17).

10. Accordingly, two organs are conducting reviews pertinent to the 1503 procedure. Is there any conflict when concurrent reviews occur? Should there be a priority, and if so, which organ should have priority? Paragraph 10 of Economic and Social Council resolution 1503 (XLVIII) provides no answer to these questions. It seems that in such a situation, the organs concerned should bear in mind the scope of their own competence in this matter and the issues of how efficiency can best be achieved.

(c) Timing for the conduct of a review

11. Another question to be considered is when a review would be in order, pursuant to paragraph 10. The condition provided for in paragraph 10 is "… if any new organ entitled to deal with such communications should be established within the United Nations or by international agreement."

12. The word "organ" in paragraph 10 covers not only organs established within the Organization but also entities created by international agreements. The issue of review becomes pertinent for consideration when a new entity comes into existence, whether or not it is an organ within the Organization or a body under an international agreement.

13. In 1978, following the entry into force of the International Covenant on Civil and Political Rights and the Optional Protocol thereto in 1976, the Commission on Human Rights initiated a review of the 1503 procedure having regard to the coming into operation of the Human Rights Committee, a body entitled to deal with communications concerning violations of human rights under the procedure governed by the Optional Protocol. By its resolution 16 (XXXIV), the Commission requested the Secretary-General to prepare an analysis of existing United Nations procedures for dealing with communications concerning violations of human rights "to assist the Commission in studying measures to avoid possible duplication and overlapping of work in the implementation of these procedures." The requested analysis was prepared and submitted to the Commission the following year in 1979.[87] Subsequently, the Commission did not take any specific action in that regard.

14. Since 1979, no specific review has been conducted in respect of resolution 1503 (XLVIII) even though two further procedures for dealing with communications have come into existence. In this regard, the following may be mentioned as they are empowered to deal with complaints about alleged violations of the provisions of the respective United Nations international human rights treaties:

— The procedure governed by article 22 of the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment;[88]

— The procedure governed by article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination.[89]

It may also be mentioned that the procedure governed by article 77 of the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families[90] also provides for the consideration of communications (the Convention is not yet in force).

15. By its resolution 48/141, the General Assembly decided, *inter alia*, to create the post of United Nations High Commissioner for Human Rights. Paragraphs 3 and 4 of that resolution set out the responsibilities and functions of the High Commissioner. While the Office of the United Nations High Commissioner for Human Rights is a "new organ," the question whether a review is called for under paragraph 10 of resolution 1503 (XLVIII) depends, *inter alia*, on whether the High Commissioner is entitled to deal with "communications relating to violations of human rights and fundamental freedoms" within the meaning of resolution 1503. The Office of Legal Affairs does not possess sufficient information at this stage to provide a clear answer on this issue.

16. The words "should be reviewed" in paragraph 10 of resolution 1503 (XLVIII) suggest that initiation of a review is not automatic or mandatory, which means that the component organ concerned enjoys a certain degree of discretion as to when it should initiate a review. This interpretation is confirmed by the drafting history of paragraph 10.[91]

(d) Meaning of "such communications"

17. The words "such communications" in paragraph 10 refer to "communications relating to violations of human rights and fundamental freedoms." Here guidance could first be sought in procedures for dealing with the question of admissibility of communications embodied in subcommission resolution 1 (XXIV). These procedures set out: (i) standards and criteria; (ii) source of communications; (iii) contents of communications and nature of allegations; (iv) existence of other remedies; (v) timeliness. If admissible, such communications (together with the replies received from governments thereon) are evaluated by the organs concerned in order to determine whether they reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms. With this procedure and the legislative history of the 1503 procedure in mind, any review would have to make an evaluation of the corresponding procedures applied by "new organs." In this respect, the review might also consider procedures applied by organs operating at the regional level.

(e) Optional Protocol to the Covenant on Civil and Political Rights as distinct from the 1503 Procedure

18. According to paragraphs 1 and 2 of resolution 1503 (XLVIII) communications "received" under Economic and Social Council resolution 728 F (XXVIII) and in accordance with Council resolution 1235 (XLII) are to be channeled into the 1503 procedure.

19. The 1503 procedures is of a confidential nature in that all communications received thereunder are subject to the rule of confidentiality stated in paragraph 8 of resolution 1503 (XLVIII).[92] Communications under the Optional Protocol are treated as confidential, but the views of the Human Rights Committee and decisions of a final nature (e.g., decisions declaring communications inadmissible) are made public, after they have been communicated to the parties concerned.

20. The Optional Protocol procedure, which deals with individual complaints, is applicable only in respect of States that are parties to the Protocol and the content of a communication is limited to those rights specified thereunder (i.e., civil and political rights). The 1503 procedure, concerned with the examination of violations constituting a pattern, is applicable with regard to all States and covers communications from any individual, group of individuals or non-governmental organization. The content that may form part of a communication is very broad covering all human rights recognized in the Universal Declaration of Human Rights. This distinction should be borne in mind when the aspect of duplication is discussed.

21. Since 1979, a practical working method has been adopted by the Secretariat with the tacit approval of the Commission, to avoid possible duplication of communications under the Optional Protocol and the confidential procedure under resolution 1503 (XLVIIII).[93]

12 August 1994

46. Subsidiary organs — Question whether the United Nations Development Programme, United Nations Population Fund and United Nations Children's Fund Executive Boards are subsidiary organs of the Economic and Social Council or of the General Assembly — Chapters IX and X of the Charter

Memorandum to the Director, Division of External Relations, and Governing Council Secretariat

…

2. Your question is whether in the light of General Assembly resolution 48/162, "the recently established UNDP/UNFPA Executive Board is a subsidiary organ of the Economic and Social Council or of the General Assembly". You indicated that "there seems to be no doubt in anyone's mind that the UNICEF Board is a subsidiary of the Economic and Social Council…"

3. UNICEF was established by the General Assembly in its resolution 57(I) of 11 December 1946. The resolution provides in paragraph 3(a): "The Fund shall be administered by an Executive Director under policies, including the determination of programmes and allocation of funds, established by an Executive Board in accordance with such principles as may be laid down by the Economic and Social Council and its social commission." Furthermore, while specific countries were named in the resolution as composing the Board, the Economic and Social Council was given the authority to designate other Governments as members of the Board.

4. In order to determine the actual role of the General Assembly and the Economic and Social Council, it is important to refer to Chapters IX and X of the Charter of the United Nations. The responsibilities of the United Nations for international economic and social cooperation are provided for in Article 55, and Article 60 states:

> Responsibility for the discharge of the functions of the Organization set forth in this Chapter shall be vested in the General Assembly and, under the authority of the General Assembly, in the Economic and Social Council, which shall have for this purpose the powers set forth in Chapter X."

In addition to the specific functions relating to initiating studies and making recommendations to the General Assembly in respect to international economic, social, cultural, educational, health and related matters (Article 620), the Economic and Social Council is to perform functions "within its competence in connection with the carrying out of the recommendations of the General Assembly and, *inter alia*, as may be assigned to it by the General Assembly (Article 66, paragraph 3)."

5. For the performance of its functions, the General Assembly is authorized to establish "subsidiary organs as it deems necessary." Article 68 authorizes the Economic and Social Council to "set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions."

6. On the basis of the above analysis, there is no doubt that UNICEF is a subsidiary body of the General Assembly, but that the Assembly delegated much of its functions to the Economic and Social Council, including the approval of the UNICEF programmes and estimated expenditures. Paragraph 7 requires the Board to make "periodic reports of its operations, at such times and in such form as the Economic and Social Council shall provide." In this respect, the Council may have exercised more oversight over the activities of UNICEF and its Board than was the case for UNDP, but this did not alter the fact that UNICEF was a subsidiary organ of the General Assembly.

7. As you know, the establishment of UNDP can be traced back to General Assembly resolution 1240 (XIII), which established the Special Fund. It was provided in that resolution that "the Special Fund shall be an organ of the United Nations administered under the authority of the Economic and Social Council and of the General Assembly, which will exercise in respect of the Fund their powers under the Charter".[94] The resolution also provided that "the Economic and Social Council shall be responsible for the formulation of the general rules and principles which will govern the administration and operations of the Special Fund; the review of the operations of the Fund on the basis of the annual reports to be submitted by the Governing Council." With regard to the report of the Governing Council, paragraph 10 of the resolution provides that "the Economic and Social Council shall transmit the report of the Governing Council, together with its own comments, to the General

Assembly. The Assembly will review the progress and operations of the Special Fund as a separate subject of its agenda and make any appropriate recommendations." This function was continued in respect of UNDP and its Governing Council until the 48th session of the General Assembly.

8. It was also provided in resolution 1240 (XIII) that the immediate intergovernmental control of the policies and operations of the Special Fund shall be exercised by a Governing Council. The powers and functions of the Governing Council was to "provide general policy guidance on the administration and operations of the Special Fund." It had "final authority for the approval of the projects and programmes recommended by the Managing Director" and reviewed "the administration and execution of the Fund's approved projects", and could "submit reports and recommendations" as deemed appropriate.

9. When the Special Fund was merged with the Expanded Programme of Technical Assistance to form UNDP by the General Assembly in its resolution 2029 (XX) of 22 November 1965, a single intergovernmental committee known as the Governing Council of UNDP was established "to perform functions previously exercised by the Governing Council of the Special Fund and the Technical Assistance Committee including the consideration and approval of projects and programmes and the allocation of funds"; in addition it provided "general policy guidance and direction for the United Nations Development Programme as a whole as well as for the United Nations regular programmes of technical assistance."[95]

10. It was also provided that the Governing Council of UNDP "shall meet twice a year and shall submit reports and recommendations thereon to the Economic and Social for consideration by the Council at its summer session." The members of the Governing Council were to be elected by "the Economic and Social Council."

11. The recent General Assembly resolution 48/162 on the restructuring and revitalization of the United Nations in the economic and social and related fields has affected the governance of both UNDP and UNICEF. The most striking change is the reaffirmation of the principal and increased role of the General Assembly. It should be noted that paragraph 11 provides that "the General Assembly is the highest intergovernmental mechanism for the formulation and appraisal of policy on matters relating to the economic, social and related fields in accordance with Chapter IX of the Charter." Furthermore, the powers of the Economic and Social Council seem to have been enhanced with corresponding effects on the roles of the Executive Boards in policy matters. The Council is to provide coordination and guidance "so that policies formulated by the Assembly, particularly during the triennial policy review of operational activities, are appropriately implemented on a system-wide basis."[96] The Executive Boards are to provide "intergovernmental support to and supervision of the activities of each fund or programme in accordance with the overall policy guidance of the Assembly and the Council…" The Boards are subject to the authority of the Council. The Executive Boards submit their annual reports to the Council at its substantive session. It appears that there is no longer any separate consideration by the Assembly of the report of the Executive Board of UNDP and UNFPA.

12. This is a roundabout way of answering your question but at the current stage this is all one can do. A definitive legal opinion would have to be provided by the Legal Counsel at the request of the intergovernmental bodies themselves should this be an issue. On above analysis, however, it is clear that the role of the Economic and Social Council has been enhanced in terms of providing policy guidance to the various funds and programmes. But the Council operates under the overall supervision of the General Assembly, which has reserved to itself the role of policy formulation.

13. In spite of the changes which have resulted from the restructuring of the economic and social sector and the direct supervision of the work of the Board by the Council, it seems that in law, both UNICEF and UNDP remain subsidiary organs of the General Assembly, and not of the Economic and Social Council, under Articles 7 and 22 of the Charter of the United Nations.

22 August 1994

47. Nominations to the Advisory Committee on Administrative and Budgetary Questions — General Assembly resolution 47/1 of 22 September 1992

Memorandum to the Secretary of the Fifth Committee

1. I refer to your inquiry of 13 October 1994 transmitted to this Office concerning what effect should be given to the note verbale to the Secretary-General submitted by the Permanent Representative of Yugoslavia informing him that "Mr. — is a candidate for re-election" to the membership of the Advisory Committee on Administrative and Budgetary Questions.

2. Neither the initial General Assembly resolution 14(I)A of 13 February 1946 on the establishment of the Advisory Committee nor subsequent resolutions on the enlargement of the membership of the Committee contain explicit procedures on the nominations of candidates for election to the Committee.

3. In accordance with the clearly established practice, however, candidates are nominated by governments for appointment or reappointments to the Advisory Committee. This is indicated by the fact that at the first election of members of the Committee held during the second part of the first session of the General Assembly, on 12 November 1946, the Chairman of the Fifth Committee stated: "Each *delegation* had been asked to submit a list of one to nine names, which had made possible the drawing up of a list of candidates" (A/C.5/63, emphasis added). Furthermore, at the recently concluded forty-eighth session, the report of the Fifth Committee to the plenary of the Assembly on appointment of members of the Advisory Committee stated: "The Fifth Committee also had before it a note … containing the names of … persons *nominated by their respective Governments* for appointment or reappointment …" (A/48/692, emphasis added).

4. Thus, Mr. … may not nominate himself or declare his candidacy, either through a communication of his own or through one of the State of which he is a national. He must be nominated by a Member State.

5. If the note verbale submitted by Yugoslavia constitutes a nomination, such a nomination would not be received in the light of General Assembly resolution 47/1 of 22 December 1992. Pursuant to that resolution, the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not participate in the work of the General Assembly. Nominating candidates for appointment or election by the General Assembly is part of the election procedure — the work — of the General Assembly. Accordingly, candidatures nominated by the Government of the Federal Republic of Yugoslavia for General Assembly election or appointment are not receivable and the names of any candidates submitted by Yugoslavia should not appear in any Assembly document.

6. A note to the above effect should be addressed to the Permanent Representative of Yugoslavia.

17 October 1994

48. Succession in the membership of the International Cocoa Organization — Succession of States in respect of State property — 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts

Letter to the Executive Director, International Cocoa Organization

I wish to refer to your letter of 14 October 1994, which was received by this Office on 24 October 1994. In the letter, pursuant to the request of the eighteenth special session of the International Cocoa Council, hereinafter referred to as the "Council," you seek the advice of this Office with regard to the question of "whether the Russian Federation should be the sole recipient of the share of the proceedings of buffer stock liquidation to which the former USSR would have been entitled."

In connection with that request, we took note of the information contained in your letter according to which, in February 1992, the Council was informed by the Russian Federation that it had succeeded to the membership of the former USSR in the International Cocoa Organization and that since that time the Russian Federation had honored all obligations of the former USSR under the 1986 Agreement until its termination on 30 September 1993. We also took note of the fact that the payment of the levy for financing the buffer stock under the 1986 Agreement was discontinued in April 1990, when the USSR was still a party to that Agreement.

The question addressed to this Office relates to the issue of succession of States in respect of State property of the predecessor State. The only existing general legal instrument in this area is the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts.[97] Under that Convention the term "State property" is defined as property, rights and interests which, at the date of the succession of States, were, according to the internal law of the predecessor State, owned by that State (article 8).

The 1983 Convention is not yet in force and the USSR was not a contracting State. So far the Convention has acquired only 10 out of the 15 ratifications or accessions required for its entry into force. However, as was pointed out in our previous correspondence the principles embodied in some of its articles seem to accord with the practice followed in cases of succession of States. It is also worth mentioning that three States, former republics of the USSR, namely Estonia, Ukraine and Georgia, recently acceded to the Convention, on 21 October 1991 and 8 January and 12 July 1993, respectively.

Article 17 of the 1983 Convention addresses the issue of succession of States in respect of State property in cases of "Separation of part or parts of the territory of a State" and provides as follows:

"1. When part or parts of the territory of a State separate from that State and form a successor State, and unless the predecessor State and the successor State otherwise agree:

"(a) Immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State;

"(b) Movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State;

"(c) Movable State property of the predecessor State, other than that mentioned in subparagraph (b), shall pass to the successor State in an equitable proportion.

"2. Paragraph 1 applies when part of the territory of a State separates from that State and unites with another State.

"3. The provisions of paragraphs 1 and 2 are without prejudice to any question of equitable compensation as between the predecessor State and the successor State that may arise as a result of a succession of States."

The text of article 17 was adopted by the Committee of the Whole of the 1983 Vienna Conference by 46 votes to none, with 17 abstentions. In its commentary on the draft Convention submitted for the consideration of the 1983 Conference, the International Law Commission pointed out that the reference to equity in paragraph 1(c) of draft article 16 (subsequently article 17 of the Convention) was "a key element in the material content of the provisions regarding the distribution of property which thus has the character of rule of positive international law."

Article 17 of the 1983 Convention contains general provisions regarding succession of States in respect of State property in cases of separation of part or parts of the territory of a State. However, those provisions do not automatically entitle a successor State to property rights under an international treaty. First, it should be determined what is the position of a successor State as regards an international treaty in force for the predecessor State. Second, the text of an international treaty should be examined to find out whether it has any special provisions which might relate to the acquisition of property rights by a successor State.

The only general international instrument which addresses the issue of succession to international treaties is the 1978 Vienna Convention on Succession of States in Respect of Treaties.[98] Article 34 of that Convention entitled "Succession of States in cases of separation of parts of a State," provides the following:

"1. When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:

"(a) Any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed;

"(b) Any treaty in force at the date of the succession of States in respect only of that part of the territory of the predecessor State which has become a successor State continues in force in respect of that successor State alone.

"2. Paragraph 1 does not apply if:

"(a) The States concerned otherwise agree; or

"(b) It appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation."

The 1978 Convention has not entered into force and the USSR was not a party to it. Following the breakup of the USSR, this Office undertook a review of the legislative history of the 1978 Convention and the general practice of States regarding the succession in respect of treaties. That review led us to the conclusion that it is doubtful whether the Convention codifies existing rules of customary international law and that there is no clear rule of general international law governing the succession of States in respect of treaties in cases of separation of parts of that State, because the practice of successor States is not uniform.

In the light of the foregoing, it appears that as far as the issue of succession to treaties is concerned, the following two options are open to successor States:

The new States could address a notification of succession to the depositary of the international treaty in question. It should be noted in this respect that the practice of many newly independent States has been to address to the Secretary-General a statement to the effect that, pending a review on their part of the treaties in force for the predecessor State, it should be presumed that each such treaty has been succeeded to by the newly independent State and that action should be based on this presumption until a decision is reached that the treaty should be regarded as lapsed. The Secretary-General does not consider such statements as sufficient to list the new States as parties to treaties deposited with him, and requires a declaration of succession indicating to which specific treaties the States are succeeding.

Another option, which may be used in cases of multilateral treaties to which the Secretary-General serves as depositary, is to address a general notification to the depositary clarifying that all treaties in force for the predecessor State shall be continued by the successor State concerned.

It should be emphasized in this regard that a successor State's inaction cannot be construed as an expression of consent on its part to succeed to the treaty in question. It should also be observed that although it is difficult to give a precise answer to the question concerning the period of time within which a new State should communicate its intention to succeed to a treaty, in the interest of the stability of treaty relations, a successor State should not wait too long to communicate its intention.

It is our understanding that, so far, the first option has not been used by the new States, former republics of the USSR. The Baltic States take a position that they were never lawfully part of the Soviet Union and therefore cannot be considered as successor States to the USSR. Other States, former republics of the USSR, have expressed their consent to be bound by international treaties through the deposit of instruments of accession, rather than succession. Thus, they have become new contracting parties to international treaties through the process of accession and not as successors to the USSR.

No State which is a former republic of the USSR has opted for the second alternative either. None of them have submitted to the Secretary-General a general notification on the continuity of the application of the treaties in force for the USSR. The only exception is a position taken by Ukraine regarding its participation in the international organizations in which the USSR was a member. On 6 February 1992, the Minister for Foreign Affairs of Ukraine addressed a letter to the Secretary-General stating the following:

> "Having regard to the norms and principles of international law and its own domestic legislation in the field of succession, Ukraine declares that it is a successor of the former USSR with respect to membership in international

organizations in which the Ukrainian Soviet Socialist Republic, as a constituent part of the USSR, did not participate. Proceeding from its domestic political interests, national priorities and practical expediency, Ukraine can raise the question concerning membership in such organizations in accordance with existing international procedure."

In summation, it should be pointed out that the new States which are former republics of the USSR are successor States to the former Soviet Union and as such they are entitled under international law to its property located outside that country. Such property should be passed to the successor States in equitable portions. However, as was noted above, in cases where a predecessor State acquired property rights through its membership in a multilateral treaty, such rights are not automatically transferred to a new State or States and in order to acquire these rights such States should become contracting parties to that treaty through succession. No new State which is a former republic of the USSR had submitted a notification of succession with regard to the 1986 International Cocoa Agreement prior to its termination on 30 September 1993. Therefore, strictly legally speaking, these States did not establish under article 38 of that Agreement their eligibility to the share of the proceeds of buffer stock liquidation to which the former USSR would have been entitled.

At the same time, this Office is of the view that in this particular case there are special circumstances which should be taken into account. It goes without saying that the time period which elapse between the acquisition of statehood by the new States which are former republics of the USSR and the termination of the 1986 Cocoa Agreement was very short. A presumption can be made that some of these States were simply unaware of their potential rights under that treaty and therefore did not use in time the opportunities which were open to them. We took note in time the opportunities which were open to them. We took note in this connection of the fact that at the time of the consideration by the International Cocoa Council of distribution of the buffer stock liquidation proceeds a representative of the Russian Federation had informed the Council that the Russian Federation and the new States that were former republics of the USSR had entered into arrangements regarding the rights and obligations of the former Soviet Union. In view of that statement, the Council may wish to ask the Russian Federation to confirm in writing that should the Council decide to make the payment of the share of the proceeds of the buffer stock liquidation, to which the former USSR would have been entitled, to the Russian Federation, the latter would assume the responsibility of resolving any issue of property rights of the former republics to the portions of this share through its bilateral arrangements with those new States in accordance with the applicable principles of international law. Should the Council take such a decision, it may also wish to instruct the Secretariat of the International Cocoa Agreement to inform the former republics of the USSR of the decision.

10 November 1994

PROCUREMENT

49. LEGAL REGIME OF THE CHARTER OF AIRCRAFT — UNITED NATIONS STANDARD AIR CHARTER AGREEMENTS — QUESTION OF WHETHER UNITED NATIONS AIRCRAFT CHARTER STANDARD FORMS CAN BE USED TO OBTAIN SCHEDULED INTERNATIONAL AND TRANSPORT SERVICES

Memorandum to the Chairman, Committee on Contracts

1. This is with reference to Purchase and Transport Services case [number of case], which was reviewed by the Contracts Committee at its 10 may 1994 meeting, regarding the bid submitted by Japan Airlines (JAL), for the rotation of the Japanese contingent from Maputo to Tokyo. The invitation for bids issued by the United Nations included the following provisions:

> "1. The United Nations requests your all-inclusive bid in accordance with the requirements attached hereto as Annex A …"
>
> "…
>
> "3. The United Nations invites bids from qualified and duly certified carriers/operators for provision of aircraft charter services for use by the United Nations for its peacekeeping mission as provided in this invitation to bid. The successful bidder will be required to conclude an agreement with the United Nations on the basis of the attached Annex B, United Nations Standard Aircraft Charter Agreement (#CA-4) and the attached Annex C, United Nations General Conditions for Air Charter (#GC-2)."

2. Paragraph 1 of Annex A of the invitation for bids specifies as follows:

> "Air Transportation Services *by charter and/or scheduled flights* for the rotation of contingents for the United Nations Operation in Mozambique (ONUMOZ) as shown on the attached Annex A-2 'Comments by serial' …" (emphasis added).

3. We understand, from the explanations given by the Field Operations Division and Purchase and Transport Service representatives at the Contracts Committee meeting, that the bid submitted by JAL was for carriage of the troops on JAL scheduled flights.

…

5. We wish to note, firstly, that the charter of an aircraft on the one hand, and obtaining regular tickets for carriage by a scheduled airlines on the other hand, are two very different transactions in nature. Under the charter, the charterer has the right to the exclusive use of the carrying capacity of the aircraft for the movement of persons and their baggage or for the movement of property, on a time, mileage or trip basis, while carriage by scheduled airlines involves transportation of persons and their baggage under scheduled fares, times and destinations, in such a manner that each flight is open to use by members of the public.

6. There are, correspondingly, differences in the legal regime to which each of these two types of transactions is subject, at both the international and national level. For example, the Chicago Convention makes the difference between scheduled and non-scheduled international air transport and its article 5 addresses specifically the case of non-scheduled international air transport. Similarly, non-schedule air transport, including charter, has been regulated by a variety of bilateral or multilateral arrangements between States (for instance, the Multilateral Agreement on Commercial Rights of Non-Scheduled Air Services in Europe, opened for signature in Paris on 30 April 1956).

7. The United Nations standard air charter agreement and general conditions have been developed by this Office, in consultation with ICAO and members of the airlines industry, specifically for use for the charter of aircraft. They provide for the United Nations exclusive use of the aircraft load and for performance of the carrier's services in accordance with a schedule agreed upon between the carrier and the United Nations, and with United Nations' instructions. Many of their other provisions have no equivalent in the legal regime applicable to regular ticket carriage by scheduled airlines.[99]

8. In the light of the above, we strongly advise against the use of the United Nations aircraft charter standard forms to obtain scheduled international air transport service. In addition to the confusion that would result from the intermingling of two modes of carriage which differ in nature and in law, this would create, in case of any controversy or dispute during the implementation of the air transport services, inextricable difficulties in reconciling and determining the applicability of the provisions of the air charter agreement between the carrier and the United Nations, the provisions on the regular passenger ticket which the carrier would issue to each of the passenger carried on its schedule flights, which provisions would constitute a contract between the carrier and each such passenger, and the international and national regulations applicable to, respectively, scheduled airlines and charter. We have had cases in the past where United Nations personnel died in a plane crash and the question was raised whether the terms of a contract between the United Nations and an airlines could override the limits of liability on a ticket issued to the passenger.

9. We understand that during the discussions on this matter at the Contracts Committee meeting, the representatives of the Field Operations Division stated that they considered it necessary that the United Nations be able to obtain, on the open market, carriage services on scheduled flights, in particular when the number of troops to be transported was not sufficient to make the charter of aircraft(s) a rational and economical option.[100] We would have no problem accepting this rationale but this would require a different contractual regime from the charter. We will need to work in consultation with ICAO, with members of the airlines industry and the Purchase and Transportation Service, as we have done previously in respect with the charter modality, to design an acceptable contractual document against which bids can be made. Essentially, the United Nations is interested in maintaining the increased limits of liability insurance, provisions regarding delayed and canceled flights, termination, arbitration and privileges and immunities clauses in the United Nations General Conditions. It may very well be that a special passenger ticket, which would be subject to provisions similar to the above-mentioned ones found in the United Nations General Conditions, would have to be issued to each individual passenger. We would be glad to review a proposed draft along these lines.

10. In the meantime and in order to deal with this particular case alone, we suggest that JAL should be requested to provide the United Nations with a revised passenger ticket providing for the limits of liability specified in the General Conditions enclosed with the invitation for bids, and to sign an agreement with the United Nations which includes said General Conditions. The above-mentioned revised passenger ticket should be issued to each individual passenger carried under the agreement.

17 May 1994

50. Interpretation of United Nations financial rule 110.20 — Meaning of the term "publicly opened" as applied to bids — General procurement practice

Memorandum to the Officer-in-Charge, Purchase and Transportation Service, Office of General Services

1. This is with reference to your memorandum dated 25 July 1994, by which you requested our advice on the proper interpretation and application of United Nations financial rule 110.20 and, specifically, whether Purchase and Transport Service practice to invite only representatives of bidders to a bid opening is consistent with United Nations financial rule 110.20, or whether the rule requires that members of the general public, including representatives of the media, should also be allowed access to the bid opening, if they so request. You also asked what written material relating to tendering may be disclosed to members of the general public. Please find below our comments and suggestions.

Public opening of bids

2. Financia l rule 110.20 reads as follows:

"All bids shall be publicly opened at the time and place specified in the invitation to bid and an immediate record made thereof."

3. The plain meaning of the term "publicly opened" would be that the bid opening must be public, i.e., that access to bid opening should not be restricted or limited to any particular group or class of persons. However, if the term was to be strictly interpreted in the context of the rule's primary purpose, which is to afford bidders the opportunity to observe the bid opening so as to protect them against any fraud, favoritism or partiality and leave no room for suspicion of irregularity, it could be given the limited content of article 31(2) of the UNCITRAL Model Law on Procurement,[101] which provides that:

> "All suppliers or contractors that have submitted tenders, or their representatives, shall be permitted by the procuring entity to be present at the opening of tenders."

We believe that the practice of the Purchase and Transportation Service is consistent with general procurement practice as reflected in the above-quoted provision of the Model Law.

4. Nevertheless, we are constrained to give some effect to the world "publicly," and therefore in our view there would be no basis under rule 110.20 for not allowing persons lawfully present on United Nations premises, including representatives of the media, to attend a bid opening, if they so requested.

Information to be made available to persons other than representatives of bidders

5. We shall shortly send you a copy of a memorandum to the Director of the Building and Commercial Services Division, by which we are proposing a draft administrative instruction containing draft procurement procedures which we prepared on the basis of the UNCITRAL Model Law on Procurement of Goods, Construction and Services. Article 6 of those proposed procurement procedures, entitled "Records of procurement proceedings" and based on the corresponding article 11 of the UNCITRAL Model Law, addresses in its paragraph 6.2 and, by reference, its subparagraphs 6.1(a) and (b), the question of information to be made available, on request, to any person.

6. Under the above-mentioned provisions, the following part of the records of procurement proceedings would have to be made available, on request to any person after a tender, proposal or quotation, as the case may be, has been accepted or after procurement proceedings have been terminated without resulting in a procurement contract:

— A brief description of the goods or construction or services to be procured, or of the procurement need for which the procuring entity requested proposals;

— The names and addresses of suppliers or contractors that submitted bids, proposals or quotations, and the name and address of the supplier or contractor with whom the procurement contract is entered into and the contract price.

7. The part of the records of procurement proceedings to be made available to firms that submitted bids, proposals or quotations is more extensive, and will be covered by article 6.3 and, by reference, articles 6.1(c) to 6.1(g) and 6.1(k) of the proposed draft procurement procedures (corresponding to articles 11.3 and, by reference, article 11.1(c) to 11.1(g) and 11.1(k) of the UNCITRAL Model Law).

29 July 1994

51. Conditions for United Nations Acceptance of voluntary contributions of assistance from Member States

Memorandum to the Officer-in-Charge, Department of Humanitarian Affairs

1. Reference is made to your 27 July 1994 memorandum requesting our advice on whether a Government's proposal to provide humanitarian assistance to the United Nations demobilization efforts in Angola in the mode of a grant contribution, of in-kind services, is acceptable.

…

3. Section (a) below contains our general comments on the appropriate modalities for the United Nations acceptance of voluntary contributions of assistance from Member States.

(a) General comments

4. Provided that the acceptance of such a contribution does not involve additional financial liability for the Organization, financial regulation 7.2 provides that voluntary contributions, whether or not in cash, may be accepted by the Secretary-General if the contribution is consistent with United Nations policies, aims and activities.

5. To our knowledge, heretofore voluntary contributions to the United Nations by Member States have normally been in the form of cash to a United Nations Trust Fund or, if in kind, in the form of goods or equipment. An exception to this traditional mode of making voluntary contributions has been the modality under the Cooperation Service Agreement, such as was used in respect of the UNDP demining programme in Cambodia, where the voluntary contribution took the form of the donor Government's personnel providing services directly to the Organization.

6. The Government's proposal constitutes a further deviation in modality for the provision of voluntary, in-kind contributions. Under the terms of the proposed Grant Agreement, the United Nations would receive no cash, nor any goods or equipment. Instead unlike the case in which Member States provide the services of their personnel directly to the United Nations, the United Nations would be the beneficiary of a contract for services between the government agency and [name of corporation]. This modality gives rise to certain concerns that the in-kind voluntary assistance being offered might in effect be viewed as "tied procurement," in that the Organization would be offered a grant expressly providing that the grant be utilized to retain a particular contractor selected by the Member State.

7. In our view, an assistance modality pursuant to which the donor selects a contractor and where the United Nations is largely a passive beneficiary of services requires a policy decision, in this case by the Under-Secretary-General for Administration and Management who has the delegated authority for ensuring that voluntary contributions conform to the Financial Regulations and Rules of the United Nations. Moreover, we think the decision of the Under-Secretary-General for Administration and Management on the proposed modality is also necessary because of our further concern that acceptance of the Contractor might result in the United Nations having less control over the effective delivery of the services, as the contractor and its personnel would be selected, controlled and paid directly by the government agency.

8. It would be far more desirable for a donor to provide the United Nations directly with funds conditioned to be used for a specific purpose, so that the United Nations might thereafter decide, in accordance with its own rules and procedures, to obtain the appropriate contractor to provide the required services or equipment. Consideration can be given to meeting any urgent requirements (we understood there was an urgent need for the demobilization services) by engaging the contractor under an exception to the calling of competitive bids or requests for proposals under financial rule 110.19.

12 August 1994

SECURITY COUNCIL ISSUES

52. Question of whether export of freon gas to Iraq would constitute a violation of the Montreal Protocol on Substances that Deplete the Ozone Layer — Security Council resolutions 661 (1990) and 687 (1991) — Functions of the depositary; article 20 of the Vienna Convention on the Law of Treaties

Telefax to the Programme Office/Lawyer, Ozone Secretariat, United Nations Environment Programme, Nairobi

This is with reference to your telefax dated 31 May 1994, in which you point out that the export of 500,000 units of freon gas to Iraq, authorized on 15 March 1994 by the Security Council Committee established by resolution 661 (1990), would constitute a violation by the exporting State of article 4 of the Montreal Protocol on Substances that Deplete the Ozone Layer,[102] unless Iraq becomes party to the Vienna Convention for the Protection of the Ozone Layer[103] and the above-mentioned Protocol before the intended export takes place. You suggest that the Secretary-General, as depositary of the Convention, should bring the alleged violation to the attention of the Security Council and Iraq.

As you know, Iraq is subject to a comprehensive economic and financial embargo imposed by the Security Council with resolution 661 (1990). Pursuant to paragraph 20 of Security Council resolution 687 (1991), the prohibitions contained in resolution 661 (1990) do not apply, *inter alia*, to "materials and supplies for essential civilian needs." The supply of such materials or supplies, however, must be approved on a case-by-case basis by the 661 Committee; the document attached to your communication is in fact the letter of approval by the Chairman of the Committee for the intended supply of freon gas.

Under its mandate as spelled out in resolutions 661 (1990) and 687 (1991), it is not the task of the Committee to ensure that exports to Iraq are in conformity with international conventions. Under the relevant Security Council resolutions, the Committee has only to be satisfied that products to be supplied fall within the category of "essential civilian needs" (which is largely left to the discretion of Committee members) and that the intended transactions do not otherwise violate the mandatory sanctions against Iraq. It would indeed be regrettable if the transaction in question constituted a violation of the Montreal Protocol. However, neither the Security Council nor its Sanctions Committee are called to monitor the implementation of that instrument.

As to your suggestion that the Secretary-General, as depositary of the Vienna Convention and the Montreal Protocol, should bring the alleged violation to the attention of the Security Council and Iraq, I note that neither instrument contains provisions under which the depositary should raise the issue of alleged violations of the Protocol. Article 20 of the Vienna Convention, in particular, which spells out the functions of the depositary, is silent in this respect. I have inquired with the Treaty Section of this Office, and they confirm that the depositary is not called upon by the instrument in question to discharge such functions. In my view, it is rather the responsibility of the substantive secretariat to raise with the party concerned, i.e., the State concerned, the alleged violation in question. The substantive secretariat, if it

deems it advisable, could also raise the issue with Iraq pursuant to article 12(E) of the Protocol, under which the secretariat shall "encourage non-parties … to act in accordance with the provision of this Protocol".

In any case, however, for the reasons mentioned above, I am of the view that the episode reported by you does not fall within the competence of the Security Council and should not be brought to its attention.

3 June 1994

53. Status of the "United Nations Command" in Korea — Security Council resolution 84 (1950) of July 1950

Memorandum to the Under-Secretary-General for Political Affairs

1. This is with reference to your memorandum dated 13 June 1994 submitting for our review a draft letter of the Secretary-General in reply to the communication dated 28 May 1994 from the Minister for Foreign Affairs of the Democratic People's Republic of Korea. You specifically requested whether the wording used in the draft letter regarding the role of the Security Council in relation to the "United Nations Command" was appropriate. In a more general context, you sought our guidance as to the responsibility of any United Nations organ for the creation and/or dissolution of the "United Nations Command".

2. We would suggest that the wording used in the draft letter regarding the role of the Security Council in relation to the "United Nations Command" be advised to conform as closely as possible to the language of Security Council resolution 84 (1950) of 7 July 1950. Under paragraph 3 of that resolution, the Security Council recommended that all Members providing military forces and other assistance to the Republic of Korea "make such forces and other assistance available to a unified command under the United States of America". It follows from this that the Security Council did not establish the unified command but recommended the constitution of such a command specifying that it be under the United States. In other words, the military command of the operation in Korea was to be conducted under the control and authority of the United States. The status of the unified command and in particular the link between such command and the United Nations, has been extensively reviewed by this Office in briefing notes addressed to the Secretary-General.

3. As to responsibility of any United Nations organ for the creation and/or dissolution of the unified command, we would also refer to the analysis made in the enclosed briefing notes, from which it clearly emerges that the so-called "United Nations Command" is a misnomer. The Security Council recommended that the forces provided by Member States be made available to a unified command placed under the authority of the United States. Clearly, the Security Council did not establish the unified command as a subsidiary organ under its control. Therefore, the creation and/or dissolution of such command does not fall within the responsibility of any United Nations organ such as the Security Council but rather within that of the United States Government.

4. The unified command in the Republic of Korea is similar to the allied military coalition set up in the Gulf war inasmuch as it is an authorized use of force by individual States rather than an enforcement action under the command and control of the United Nations. The difference between Korea and the Gulf coalition is that the Security Council in the former case authorized the use of the United Nations flag and emblem. You will note that, in resolution 84 (1950), the Security council clearly determined that "the armed attack upon the Republic of Korea by forces from North Korea constitute[d] a breach of the peace". By virtue of that determination and the recommendation concerning the constitution of a unified command under the United States, the Security Council authorized the use of force in the Republic of Korea. It also authorized the unified command under resolution 84 (1950) to use at its discretion the United Nations flag "in the course of operations against North Korean forces concurrently with the various nations participating". However, and as indicated in the enclosed briefing notes, there was no United Nations involvement in the conduct of military operations and no United Nations budget for the unified command. The flying of the United Nations flag in the Republic of Korea is not related to any United Nations activities or programmes but is rather a relic of Security Council resolution 84 (1950). As the Security Council authorized the use of force and the United Nations flag in the context of the operation in Korea, it could also withdraw such authorization.

In the light of the above, while the creation and/or dissolution of the unified command falls within the responsibility of the United States Government, the authorization and/or withdrawal of the use of force and United Nations flag and emblem in the context of the operation in Korea falls within the competence of the Security Council.

16 June 1994

54. Resolutions under Chapter VII adopted by the Security Council — Practice of the Council

Memorandum to the Special Adviser to the Secretary-General

1. This is in reply to your note dated 16 November 1994 addressed to the Legal Counsel. You seek our views as to whether the adoption of a resolution under Chapter VII of the Charter of the United Nations must be indicated explicitly in its text, or whether this can be deduced from other factors.

2. This Office has always taken the position that in view of the consequences that flow from the adoption of a resolution under Chapter VII of the Charter, this determination must result from clear and incontrovertible textual elements in the resolution and cannot be based on "circumstantial evidence" left to the interpreter to ascertain.

3. The practice of the Security Council confirms that, when the Council has intended to place its resolutions within the purview of Chapter VII, it has so indicated through the following textual elements, which can appear jointly or alternatively:

(*a*) A statement, usually in the preamble, that the Council is acting under Chapter VII of the Charter (e.g., resolutions 253 (1968); 418 (1977); 794 (1992);

(*b*) A statement that the Council is acting under one of the Articles contained in Chapter VII (e.g., resolutions 54 (1948); 598 (1987); 660 (1990);

(*c*) A determination that a certain situation constitutes a threat to the peace, breach of the peace or act of aggression (e.g., resolutions 83 (1950); 221 (1966)). It should be noted that, in a number of resolutions, the Council has used similar but less definitive expressions which aimed at giving a particular political weight to the demands made by it while falling short of a clear determination under Article 39. Reference can be made to resolutions 132 (1960), in which the Council stated that "the situation in South Africa is seriously disturbing international peace and security".

4. An apparent exception to the foregoing is resolution 665 (1990), in which the Council called upon Member States cooperating with the Government of Kuwait to "use such measures … as may be necessary" to enforce at sea the embargo imposed against Iraq under resolution 661 (1990). This resolution contains none of the textual elements listed above. However, its preamble recalls previous resolutions unequivocally adopted under Chapter VII, and paragraph 1 states that the grant of authority given to States, which includes the use of force, is for the purpose of ensuring strict implementation of the sanctions contained in resolution 661 (1990). For these reasons, I believe that this exception does not contradict the above considerations, and rather confirms the rule.

21 November 1994

TREATIES

55. Acceptance of depositary functions by the Secretary-General

Facsimile to the Deputy Director and Officer-in-Charge, Environmental Law and Institutions Programme Activity Centre, Nairobi

With reference to your facsimile of 13 May 1994, the position of the United Nations has always been that only the Secretary-General as Chief Administrative Officer is to be entrusted with depositary functions with respect to multilateral treaties. Consequently all such treaties concluded under United Nations auspices should be worded to confer depositary (or possibly administrative) functions on the Secretary-General only, and not on any subordinate official because the Charter of the United Nations centralizes the authority and responsibility for secretariat actions in the Secretary-General. In turn, the Secretary-General has assigned the actual performance of his depositary functions to the Office Of Legal Affairs because of the extreme importance that those functions be performed in a legally correct and absolutely consistent manner, and also that all information on United Nations treaties be available in and published by one office. The above would apply even to limited multilateral agreements, such as agreements open only to members of a United Nations regional commission.

Under established practice, the Secretary-General does not accept depositary functions of very restricted multilateral agreements, as the Agreement on the Preparation of the Tripartite Environmental Management Programme for Lake Victoria appears to be. Thus, unless the Agreement is open to the additional participation of other States of the region, it would appear preferable that the depositary functions be performed by one of the three Governments concerned, as in the case, for example, for a number of treaties concluded by the five countries of the Nordic Council. If such a solution were adopted, the Treaty Section of the Office of Legal Affairs would, of course, if so requested, provide all possible assistance to the depositary thus designated.

27 May 1994

56. Full powers according to the practice of the Secretary-General as depositary of multilateral treaties — Question of full powers and instruments emanating from various authorities of a federal State — Registration of treaties concluded by such authorities

Note verbale to the Permanent Mission of a Member State

The United Nations Secretariat presents its compliments to the Permanent Mission of [name of State] to the United Nations and has the honor to refer to the Permanent Mission's memorandum concerning authorities with capacity to conclude treaties following the recent constitutional amendment. With regard to the questions contained therein, the Secretariat would like to make the following comments:

1. With regard to the signatures of federate authorities, it has already been pointed out that the depositary could accept them provided that the signatories in question were duly authorized by the federal authorities of [name of State] which, in accordance with international practice, were considered as representing the State, namely, the head of State or Government or the Minister for Foreign Affairs.

Full powers must come from one of the three above-mentioned authorities; in fact, the depositary could not accept any other authority as being authorized to grant full powers at the international level. (For this reason the phrase "under the umbrella of [name of State]" does not seem very clear. Full powers must be signed by one of the above-mentioned authorities and not by anyone else.)

2. The heading "[name of State]" on its own would not be enough to prompt the depositary to accept the participation of entities other than States in treaties deposited with him, unless the treaty itself provided for such participation. (Possible participation of Non-Self-Governing Territories or States.) In all other cases, full powers, the names of the signatories and any mention of federate authorities must come from one of the authorities which represent the State in accordance with the international practice which the depositary feels bound to follow, and from them alone.

3. As for the question concerning the instrument of ratification or accession, it should be pointed out that unless the treaty provides otherwise, the depositary would not be in a position to accept any instrument of ratification or accession to a treaty coming from a federate authority. Such "instrument" would not be "valid" in the view of the depositary, for the latter could accept only instruments that were signed

by one of the above-mentioned federal authorities (head of State or Government, Minister for Foreign Affairs) which represented [name of State] at the international level. It might be possible to conceive of a situation where, for internal reasons, the federal authority which signed the instrument in question might mention the various regions which constituted [name of State]. But this reference would have no validity at the international level, since the instrument, even without the specific reference, would be applicable in the entire State (unless the treaty itself provided for "independent" participation of territorial units, as is the case, for example, of the United Nations Convention on Contracts for International Sale of Goods,[104] concluded at Vienna on 11 April 1980).

4. With regard to bilateral treaties submitted for registration in accordance with Article 102 of the Charter of the United Nations, the Secretariat does not, in principle, examine either the full powers or the manner in which the treaties have been signed or ratified. In order to be registered, the only condition would be that the treaties were international treaties, namely, that they had been concluded between [name of State] (the State Member of the United Nations, not one of its federate states) and another entity having capacity to conclude treaties and that they were submitted for registration by [name of State], not by a province or community.

In short, the Secretary-General in his capacity as depositary on international treaties can recognize only [name of State] as having the capacity to conclude treaties. He cannot accept signatures or instruments of any entity other than a State, as defined by the general Assembly[105] unless the treaty itself provides for this specifically, as in the case, for example, of treaties which are open to the European Economic Community. The fact that the [State's] Constitution authorizes at the internal level regions or communities to conclude treaties in areas which are their responsibility (whether exclusive or not) is irrelevant so far as the depositary is concerned. Thus, all full powers and any instrument must be signed by one of the three authorities so empowered in [name of State] and by them alone.

On the other hand, if this is required on the domestic level, there is no reason why it should not be specified in the full powers, if need be, that a given province or community has consented to the issuance of the full powers. However, the full powers must come from and be signed by an authority of [name of State], not by a provincial or other authority. The fact that that authority was granting full powers "under the umbrella" of [name of State] would not be enough. At the very most, powers signed by a regional authority might be accepted but only if they were accompanied by an attestation issued by a "national" authority certifying that the full powers thus signed by the provincial authority were binding upon [name of State] as a whole.

However, such a practice seems extremely complex. The same applies *mutatis mutandis* to instruments. If the "national" authority sees fit to specify in the instrument that a given province or community has approved the instrument, the Secretary-General would have no objection, it being understood that this statement would have no effect at the international level.

29 June 1994

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

UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANIZATION

1. Commissary access for staff of the Secretariat of the Conference on Security and Cooperation in Europe

Memorandum to the Director, General Services

1. This is with reference to our conversation of 18 February 1994. In his memorandum of 10 January 1994, Mr. … (IAEA) … has asked for the UNIDO's agreement on access to the Commissary for Staff of the Conference on Security and Cooperation in Europe (CSCE) secretariat.

2. Article II of the Supplemental Agreement on the Commissary of 31 march 1972 between UNIDO and the Government of Austria, as amended on 23 November 1981, provides as follows in its relevant subparagraph:

> "(1) The following categories of persons shall have access to the Commissary:
>
> "…
>
> "…
>
> "(g) With the consent of the United Nations, officials of other international institutions with Headquarters in Vienna to whom the Government has granted the privilege to use Commissary facilities under specified conditions."

3. In its note verbale No. 2005.36/22-I.2/93 of 2 November 1993 to the Director-General of IAEA, the Austrian Government states that the "legal status of institutions of the Conference on Security and Cooperation in Europe, which have their headquarters in Austria, has been regulated by a Federal law promulgated on 30 July 1993 (*Bundesqesetz ueber die Rechtsstellung von Einrichtungen der KSZE in Oesterreich*, BGB1.Nr.511/1993) … Under the terms of the above-mentioned law, the Secretary General of CSCE and the staff of his office as well as the staff of the Secretariat of the CSCE Conflict Prevention Centre and the CSCE Executive Secretariat are granted privileges and immunities to the same extent as established for officials of comparable rank of the United Nations in Vienna. It is the understanding of the Austrian Government that these privileges should include access to the Commissary managed and operated by the International Atomic Energy Agency pursuant to the Memorandum of Understanding of 31 March 1977 between IAEA, the United Nations and the UNIDO concerning the allocation of common services at the Vienna International Centre.

4. It would appear therefore that the government has granted the privilege to use the Commissary to the Staff of CSCE, fulfilling the requirement of article II(1)(g) of the Commissary Agreement of 1972 referred to above. The consent of the United

Nations is also required in that article. In case this consent is forthcoming, access to the Commissary by the CSCE secretariat would be open under article II 1(g) of the 1972 Commissary Agreement between UNIDO and the Austrian Government.

5. Rule 1.04 of the Rules regarding the Commissary at the Vienna International Centre, agreed between the Director-General of IAEA and the Executive Director of UNIDO, effective July 1982, which was referred to in the memorandum of Mr. … of 10 January 1994, provides in part as follows:

> "Organizations other than IAEA, the United Nations (Vienna) and UNIDO may also be given the right of access to the Commissary upon agreement between IAEA, the United Nations (Vienna) and UNIDO on the one hand and the Republic of Austria on the other."

6. It follows from this provision that the agreement is between the three organizations on the one hand and the Republic of Austria on the other. In other words, UNIDO's agreement is necessary as well.

7. As far as the legal side is concerned, in my view, since as set out above, the condition of the 1972 Agreement between UNIDO and the Republic of Austria namely the granting of commissary privileges to the CSCE secretariat by the Government has been fulfilled, UNIDO could give its agreement to the access of CSCE staff to the Commissary, under rule 1.04 of the Commissary rules, if the United Nations agrees. May I suggest that this agreement be communicated by you to IAEA, with the concurrence of the Director-General.

8. For your information I am adding the memoranda date …

9. In accordance with Commissary rule 1.04 there would seem to be the further need for a communication to the Austrian side of the agreement of the United Nations Office at Vienna and UNIDO which could take the form of a letter or a note verbale from IAEA.

22 February 1994

2. Comments on paragraphs 11, 12 and 24 of Industrial Development Board draft document entitled "Administrative matters: International Civil Service Commission," relating to adjustments to the salary and other entitlements of the Director-General.

Memorandum to the Director, Personal Services

I have carefully reviewed paragraphs 11, 12 and 24 of the above-mentioned draft document as well as the contract for the appointment of the Director-General, and would like to make the following comments relating to the need to submit to the International Draft Board for approval adjustments to the net base salary and other entitlements of the Director-General.

1. The contract for the appointment of the Director-General (hereinafter Contract) contains two clauses which refer to adjustments.

The first clause refers only to net base salary and reads as follows:

> "The net base salary shall be adjusted whenever the General Assembly decides to incorporate multiplier points of post adjustment into the base salary of staff in the Professional and higher categories."

The second clause refers to "the above salary, allowances and benefits", i.e., as defined in subparagraphs 6(a) to 6(d) of the Contract and reads as follows: "The above salary, allowances and benefits to which the Director-general is entitled under this agreement shall be subject to adjustment by the Board, after this agreement shall be subject to adjustment by the Board, after consultations with the Director-General, to keep them in line with those of the executive heads of other specialized agencies within the common system of the United Nations or of members of the staff of UNIDO in the Professional category, as the case may be."

2. The adjustment of the "net base salary" as laid down under paragraph 6(a) is to be effected "whenever the General Assembly decides to …"; while the adjustment of "the above salary, allowances and benefits", as laid down in paragraph 6(e), is subject to action by the Board, after consultation with the Director-General.

3. Thus, the first basic difference between the two "adjustments" relates to the nature of the entitlements that are subject to adjustment: (a) "net base salary," as opposed to (b) "salary, allowances and benefits," or what I would call "package of entitlements".

4. The second basic difference between the two "adjustments" lies in the procedure contemplated for their implementation. With regard to the adjustment of the "net base salary," there is an element of automaticity in the contract, the trigger point being "whenever the General Assembly decides to incorporate multiplier points of post adjustment into the base salary of staff in the professional and higher categories".

5. Conversely, the adjustment of the "package of entitlements" is expressly subject to action by the Board "after consultations with the Director-General".

6. Consequently, there is nothing in the Contract which requires that a "net base salary" adjustment should either be reported to the Board or submitted to it for approval. Such a requirement exists only, in the terms of the Contract, with regard to a "package of entitlements" adjustment, in which case a factual report would presumably have to be submitted to the International Draft Board to assist in its consultations with the Director-General.

7. Turning now to the inclusion of the adjustment made to the "DG's emoluments" in the draft International Draft Board document on "Administrative matters: International Civil Service Commission", it is important to note the difference between the amendments made to staff emoluments as prescribed in staff regulation 13.3 and the above-described clauses of the contract for the appointment of the Director-General.

8. Firstly, there is a reporting obligation with respect to the amendments to schedules and annexes relating to staff entitlements (the Director-General shall report annually on such amendments to the International Draft Board); while the Contract contains no such obligation, particularly as regards "net base salary" adjustment.

9. Secondly, the amendments to the staff entitlements under regulation 13.3 are authorized "within the budgetary level approved by the General conference" and subject to the above-mentioned reporting obligation. However, no such limitations are attached to subparagraph 6(a) of the Contract.

10. It might of course be argued that the Director-General is subject to the staff regulations, in accordance with paragraph 5 of the Contract; consequently, regulation 13.3 should also apply to the amendments to his entitlements. Such an argument cannot however stand for the following reasons.

11. First, the Contract itself stipulates that the Director-General "shall be subject to the staff regulations of the organization … *in so far as they are applicable to him*" (emphasis added). Secondly, the reason why the specific benefits of the Director-General have been defined in the Contract is a clear indication of the "special contractual regime" to which they are subject as opposed to the general conditions applicable to all staff members laid down in the staff regulations with respect to emoluments. Thirdly, another reason for the "automaticity" of the adjustment to the "net base salary" of the Director-General stipulated in the Contract might have been that while for the staff it is the Director-General who is empowered to authorize such amendments under regulation 13.3, the General Conference saw it fit to write it directly into the Contract as far as the Director-General himself is concerned.

12. Thus, for the reasons given above, the amendments to staff emoluments should be treated separately from, and should not be lumped together with the adjustments to the "net base salary" of the Director-General.

13. Finally, it might be argued that, for the sake of good administration and transparency towards the policy-making organs of the organization (in this case the International Draft Board), it would be advisable at least to inform them of the adjustment made to the "net base salary" of the Director-General. Such an argument could have appeared plausible if financial implications emanated for the Organization from the implementation of the adjustment. However, this seems not be the case since it is unequivocally stated in paragraph 2 of the Draft Board document mentioned above that the adjustments are based on a no-loss, no-gain formula.

14. In conclusion, it is my view that, for the reasons explained above, there is neither a compelling reason nor a legal requirement which justifies the submission to the International Draft Board for approval, as suggested in the Draft Board document, the net base salary adjustment of the Director-General implemented with effect from 1 March 1994 in accordance with paragraph 6(a) of the contract for the appointment of the Director-General.

15. In the light of the above, I would recommend the deletion of the paragraphs and subparagraphs relating to the adjustment of the net base salary of the Director-General from the International Draft Board draft document entitled "Administrative matters; International Civil Service Commission: Issues related to the United Nations common system and the United Nations pension system."

1 September 1994

3. Cooperation between UNIDO and the Palestinian Liberation Organization

Memorandum to the Chief, External Liaison and Protocol Unit

1. I would like to refer to your routing slip of 19 October 1994 to which the documents that you received from Mr. … were attached, requesting legal advice on the possible conclusion of a memorandum of understanding between UNIDO and the Palestinian Liberation Organization (PLO).

2. As you know, the PLO has observer status both at the General Conference of UNIDO and at the International Draft Board (GC.1/D Sec.21 of 13 December 1985).

3. The General Assembly of the United Nations has also recently, by its resolution 48/213 of 21 December 1993, entitled "Assistance to the Palestinian people", urged "… international intergovernmental … organizations … to extend, as rapidly and as generously as possible, economic and social assistance to the Palestinian people in order to assist in the development of the West Bank and Gaza, and to do so in close cooperation with the Palestinian Liberation Organization and through official Palestinian institutions". In paragraph 7 of the same resolution the Assembly called upon "… relevant organizations and agencies of the system to intensify their assistance in response to the urgent needs of the Palestinian people, and to improve coordination through an appropriate mechanism under the auspices of the Secretary-General".

4. You may also recall General Conference resolution GC.4/Res.7, entitled "Technical assistance to the Palestinian people", whereby the Director-General was requested to "… increase UNIDO assistance to the Palestinian people in close cooperation with the Palestine Liberation Organization" and International Draft Board decision IDB.11/Dec.14, in which the Board requested the Director-General, in paragraph (g), to increase UNIDO assistance to the Palestinian people.

5. The Agreement on the Gaza Strip and the Jericho Area concluded between the Government of Israel and the Palestine Liberation Organization in Cairo on 4 May 1994 states in article VI (Powers and responsibilities of the Palestinian Authority) that the PLO may conduct negotiations and sign agreements with international organizations for the provision of assistance to the Palestinian authority and the implementation of the regional development plans.

6. Consequently, UNIDO may conclude a memorandum of understanding with the PLO for the provision of technical assistance to the Palestinian people. The preparation of the text should be done in collaboration with the substantive services involved since the content of the memorandum should reflect the purposes for which those services have requested the conclusion of such memorandum. The Legal Service is ready to comment on, and review from the legal standpoint, any such text submitted to it on this subject.

17 November 1994

NOTE

[1] See Security Council resolution 751 (1992), para. 2.

[2] See Security Council resolution 794 (1992), para. 13.

[3] "The Government of [host country] shall provide without cost to the United Nations peacekeeping operation and in agreement with the Special Representative/Commander such areas for headquarters, camps or other premises as may be necessary for the conduct of the operational and administrative activities of the United Nations peacekeeping operation and for the accommodation of the members of the United Nations peacekeeping operation." (A/45/594, annex: para. 16).

[4] United Kingdom, *Treaty Series*, vol. 9; United Kingdom Cmnd. 5030.

[5] A/3943

[6] Cf. A/47/916/Add.1 of 29 June 1993. It should be noted in this regard that, although the last budgetary presentation for UNOSOM II did not include a specific line item for the payment of third-party claims, such payments are currently charged against the funds allocated for "Supplies and services."

[7] In certain cases in the past, e.g., involving extensions of prior contracts, based on the "old" charter agreement, under which companies had subcontracted with licensed operators, this Office advised that the charter documents based on the new standard United Nations aircraft charter agreement must be signed by both the contractor and its subcontractor. However, we do not agree that the arrangement used in those cases should become standard contracting procedure by the United Nations.

[8] Article 4.3 of the standard United Nations aircraft charter agreement, quoted in the annex to the memorandum.

[9] Ibid.

[10] If it had, it should have been invited to bid in its own right.

[11] United Nations, *Treaty Series*, vol. 15, p. 295.

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

[13] See Secretary-General's bulletin ST/SGB100 of 14 April 1954.

[14] See administrative instruction ST/AI/226 of 18 February 1975.

[15]FAH, pp. D-49 to D-51A. These provisions have been further elaborated in pp. 264 to 267 of the Draft Field Administration Manual, as revised in 1992 (FAM).

[16] FSH, paras. 15, 49 and 54.

[17] FAH, p. D-50, subpara. 2(a) and (c).

[18] Ibid., p. D-51, subpara. 3(a) and (b).

[19] FSH, paras. 49 and 54.

[20] FAH, p. D-50, subpara. 2(d) and (g).

[21] Ibid., p. D-51, subpara. 3(e).

[22] Although the FAH does not provide that travel of non-United Nations personnel on United Nations-chartered aircraft should be on a reimbursable basis, the FSH provides that relocation/evacuation assistance extended to non-United Nations personnel should generally be on a reimbursable basis. We therefore consider that, by analogy to the provisions of the FSH, it would be appropriate that, unless the United Nations has otherwise agreed, all non-United Nations personnel authorized to travel on United Nations-chartered aircraft should reimburse the United Nations for the actual costs incurred in connection with their travel.

[23] FSH, para. 15.

[24] FAH, p. D-51A, para. 7.

[25] We also note that the CAO must ensure that all passengers on board the aircraft possess the appropriate valid customs and immigration documentation (see FAH, p. D-51, para. 4).

[26] Some legal rules imposing liability for death, personal injury or property damage incurred during air travel are mandatory and cannot be waived even by agreement of the passenger.

[27] The standard SSA form used for hiring consultants contains, *inter alia*, a provision that they are entitled to Appendix D coverage.

[28] Those proposals were endorsed by the General Assembly "taking into account" the comments of the report of the ACABQ dated 28 November 1990 (A/45/301). The comments, however, did not concern the specific subject under review and thus the proposals of the Secretary-General on compensation for death, disability and illness were endorsed by the Assembly without any modifications.

[29] We agree with your assessment in paragraph 22 of the draft memorandum that the return of the purchase order by the Company at the request of the United Nations Office at Geneva on the pretence of a need for insertion of a missing signature cannot be viewed as termination or cancellation of the purchase order: the Organization must act fairly, and obtaining the return of the contract on such a basis is acting in bad faith and cannot be relied on by the United Nations.

[30] See article 22 of the General Terms and Conditions.

[31] According to the documentation in our hands, the "destruction" of the premises was caused by at least two rockets that landed in the vicinity of the UNDP office during the recent war.

[32] General Assembly resolution 13 (I) of 13 February 1946, annex I, para. 10.

[33] United Kingdom, *Treaty Series*, vol. 33; United Kingdom Cmnd. 9557.

[34] United Nations, *Treaty Series*, vol. 30, p. 316.

[35] *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), document A/CONF.62/122; see also *The Law of the Sea: United Nations Convention on the Law of the Sea with Index and Final Act of the Third United Nations Conference on the Law of the Sea* (United Nations publication, Sales No. E.83.V.5).

[36] Paragraph 3.17 of article 1 of the ITU Regulations defines "broadcasting service" as "a radio communication service in which the transmission are intended for direct reception by the general public. This service may include sound transmission, television transmission or other types of transmissions."

[37] General Assembly resolution 13(I), annex I, para. 10.

[38] United Kingdom, *Treaty Series*, vol. 33; United Kingdom Cmnd. 9557.

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

[40] A/45/594.

[41] As indicated in the letter mentioned below, dated 18 February 1994, of the Permanent Representative of the State in question to the United Nations, the Mission of that State in Somalia is a "diplomatic Delegation." We assume, therefore, it has a status similar to that of an embassy.

[42] United Nations, *Treaty Series*, vol. 500, p. 95.

[43] Ibid.

[44] Ibid., article 5, para. 1.

[45] *Juridical Yearbook, 1975*, p. 87.

[46] *Yearbook of the International Law Commission, 1967*, vol. II, document A/CN.4/L.118 and Add. 1 and 2, p. 187, para. 155.

[47] *Yearbook of the International Law Commission, 1974*, vol. II, document A/CN.4/279 and Corr. 1.

[48] United Nations, *Treaty Series*, vol. 943, p. 243.

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

[50] United Nations publication, Sales No. 93.V.11.

[51] S/23877 and A/46/915, respectively.

[52] A/48/847, para. 16.

[53] UNEP was a subsidiary organ of the General Assembly and the Secretary-General was expressly given general administrative powers over the Force, although he had no express power to award a medal. The authority was implied because of the general encompassing nature of powers and the place the award of medals has as a usual adjunct to the functioning of military personnel.

[54] We are not aware of any General Assembly resolutions on the Chernobyl disaster which would, either expressly or impliedly, authorize the establishment of the system of awards. Please note in this regard we have considered General Assembly resolutions 45/190 of 21 December 1990; 46/150 of 17 December 1991; 47/165 of 18 December 1992;

and 48/206 of 21 December 1993.

[55] United Nations, *Treaty Series*, vol. 77, p. 143.

[56] United Nations, *Treaty Series*, vol. 1920, p. 95.

[57] UNEP/Bio.Div./N7-INC./5/4.

[58] A/CONF.129/15

[59] The terms "juridical personality," or "legal personality," are often used interchangeably. The General Convention uses "juridical personality"; Rama-Montaldo refers to "legal personality" (1970 BYBIL 123) and O'Connor uses the term "juristic personality." ICJ in the *Reparations* case talks of "international personality," but "legal personality" is more commonly used by legal writers.

[60] [1949] ICJ 174.

[61] States are the principal subjects of international law, and individual persons are the primary subjects under municipal law. Juridical personality is, however, accorded under municipal law to certain entities such as corporations. Juridical personality accorded under one legal system will be recognized by other municipal legal systems under private international law rules. However, such "reciprocity" does not exist between municipal law and international law.

[62] The Court added that throughout history, "the development of law has been influenced by the requirements of international life and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States".

[63] Examples of these organizations are ILO, FAO, UNESCO, IBRD and the European Community. In certain cases, member States have decided not to accord international personality to certain international organizations and incorporated them under municipal law. An example is the Bank for International Settlements which was established under the law of Switzerland. Most recently the Global Environment Facility (GEF) was established under the umbrella of the IBRD, though in composition and purpose it has the characteristics of a separate body.

[64] The Treaty of Rome states that the European Economic Community "shall enjoy legal personality" and article 211 explains that the community "shall possess the fullest legal capacity accorded to legal persons by the national laws; in particular it may acquire or dispose of movable and immovable property and be a party to legal proceedings. For this purpose, it shall be represented by the Commission."

[65] The Convention on the Privileges and Immunities of the United Nations, to which most States have acceded enumerates the legal capacities of the United Nations; the question whether such enumeration is exhaustive is beyond the scope of this note and is not discussed here.

[66] *United Nations v. Canada Asiatic Lines Ltd*., ILR, vol. 26, p. 622.

[67] Article 22 of the Charter authorizes the General Assembly to "establish such subsidiary organs as it deems necessary for performance of its functions". Article 29 similarly authorizes the Security Council to establish subsidiary organs.

[68] Paragraph 2(a) of General Assembly resolution 57(I) provides that the Fund "shall be authorized to receive funds, contributions or other assistance from any of the foregoing sources; to make expenditures and to finance or arrange for the provision of supplies, material, services and technical assistance for the furtherance of the foregoing purposes; and, generally, to acquire, hold or transfer property, and *to take any other legal action necessary or useful in the performance of its objects and purposes*" (emphasis added).

[69] UNITAR was, for example, established under a statute promulgated by the Secretary-General on the authority of the General Assembly. Its Board is appointed by the Secretary-General and the members of the Board serve in their individual capacity. The statute provides that UNITAR shall have the capacity to contract, etc. However, UNITAR cannot be equated to the major United Nations subsidiary organs such as UNDP. A distinction is thus necessary between these subsidiary bodies for purposes of identifying the

extent to which they can operate under law to engage the responsibility of the United Nations.

[70] "Legal capacity" as used here does not entail possession of an independent personality.

[71] States, in fact, form public corporations for this very purpose and endow them with separate legal personality.

[72] See *Balfour, Guthrie & Co. Ltd. vs. United States*, United States District Court, N.D. California, 1950 [90 F.Supp.831]. This was a case in admiralty and the issue was whether the United Nations Children's Fund could join other libelants in a libel case against the United States as the owner of the *Abraham Rosenberg*, a ship aboard which UNICEF had shipped goods (large quantities of milk) that were either lost or damaged on arrival to Italy and Greece. In that case, it was held that "the wide variety of activities in which they engage is likely to give rise to claims against [defendants] that can most readily be disposed of in national courts."

[73] See 1985 ILC study on, *inter alia*, the juridical personality of the Organization (A/CN.4/L.383/Add.1). ILC distinguished between the concept of "juridical personality" and that of "legal capacity" and indicated that, while a body endowed with independent juridical personality necessarily possessed legal capacity, the question whether a body possessing legal capacity "may also be deemed to enjoy an independent juridical personality depends in each case upon the relevant terms of its constituent instrument.." The study cites a 1969 opinion of the Office of Legal Affairs, which stated that WFP, a joint United Nations and FAO subsidiary body, "possesses the legal capacity to acquire and dispose of movable property entered into contracts, and be sued", but that the possession of legal capacity did not necessarily mean that the entity "enjoys an independent juridical personality."

[74] In this respect, these bodies may only enter into international agreements on the basis of full powers from the parent body for each agreement, and on terms approved by their governing bodies.

[75] In many cases, whether the subsidiary body contracts or institutes an action in its own name, the courts have regarded such action as that of the United Nations unless, under the municipal law of the country concerned, the particular subsidiary body has been recognized as having the capacity to contract and to sue. There have been inquiries as to whether such a body has capacity to sue, as in a recent case in Germany brought by the Inter-Agency Procurement Services Office, but rarely would such a body be denied the right to recover for lack of capacity once it is explained that it is part of the United Nations.

[76] For example, in Uganda by statute, UNDP and UNICEF, in addition to the United Nations, are listed among organizations accorded legal capacities.

[77] Report of the 69th session of ACC, New York, September 1988 (ACC/1988/13).

[78] A specialized agency is an agency established by intergovernmental agreement having wide international responsibilities, as defined in its basic instrument, in economic, social, cultural, educational, health, and related fields, and brought into relationship with the United Nations in accordance with Article 57 and 63 of the Charter by means of an agreement negotiated with the United Nations ("Summary of internal Secretariat studies of constitutional questions relating to agencies within the framework of the United Nations adopted by the General Assembly at its ninth session (A/C.1/785)). Therefore, a specialized agency is created by the States themselves and is not an integral part of the Organization.

[79] The fact that the Institute is self-financed does not change its legal nature and cannot equate UNITAR to specialized agencies or other outside bodies.

[80] A/47/458.

[81] General Assembly resolution 47/227.

[82] United Nations, *Treaty Series*, vol. 999, p. 171.

[83] See E/AC.7/L.572 and E/AC.7/SR.642. The Italian proposal was adopted with-

out a change at the 643rd meeting of the Social Committee, on 21 May 1970 by 17 votes to none, with 8 abstentions (E/AC.7/SR.643). The draft resolution as a whole was adopted by the Economic and Social Council as resolution 1503 (XLVIII) by 14 votes to 7, with 8 abstentions.

[84] E/AC.7/SR.642, p. 188.

[85] The role of each organ is summarized in document E/CN.4/1994/42, paras. 53 – 58 and 68 – 76.

[86] The Secretary-General's report (E/CN.4/1994/42) deals in some detail with the 1503 procedure and a range of other procedures, treaty-based and non-treaty based. See, for example paragraphs 50 to 58, 66 to 76 and 82 to 84, which deal respectively with the main features, the method of work and the criteria used for determining whether communications are channeled into a public machinery or into the 1503 procedure.

[87] The report of the Secretary-General was contained in E/CN.4/1317. Apparently, the report was not discussed by the Commission.

[88] United Nations, *Treaty Series*, vol. 1465, p. 85.

[89] Ibid.

[90] General Assembly resolution 45/158.

[91] See discussion on paragraph 10 at the Social Committee at its 642nd meeting, held on 21 May 1970 (E/AC.7/SR.642).

[92] Paragraph 8 states: "… all actions envisaged in the implementation of the present resolution by the Subcommission on Prevention of Discrimination and Protection of Minorities or the Commission on Human Rights shall remain confidential until such time as the Commission may decide to make recommendations to the Economic and Social Council."

[93] For background of this practice, see E/CN.4/1994/42, paras. 48 and 82.

[94] Resolution 1240, para. 8.

[95] Resolution 2029 (XX), para. 4.

[96] Resolution 48/162, para. 15.

[97] A/CONF.117/14.

[98] United Nations Publication, Sales No.F.79.V.10.

[99] *Inter alia*, those relating to fitness of the aircraft and the right of the United Nations to inspect it (Agreement, art. 13), the remedies of the United Nations in case of delay, cancellation of flight by the carrier or unavailability of the aircraft (Agreement, art. 13, and General Conditions, art. 6), the right of the United Nations to request withdrawal of the carrier's personnel attending the aircraft (Agreement, art. 13), the responsibility of the carrier for claims against the United Nations (Agreement, art. 15), the United Nations tax exemption (General Conditions, art. 3), the right of the United Nations to cancel flights (General Conditions, art. 7), the conditions for termination and modification of the charter agreement (General Conditions, arts. 8 and 12) and for arbitration of disputes (General Condition, art. 15), the United Nations privileges and immunities (General Conditions, art. 16), and the conditions applicable to insurance (the limits of liability insurance under the Warsaw Convention have been increased to $75,000 per passenger) (art. 9 of the Agreement and art. 4 of General Conditions), etc.

[100] The United Nations has concluded a contract with American Express for issuance of passenger tickets. This firm may be in a position to handle volume air travel on scheduled flights as well, where charter of the entire aircraft is uneconomical.

[101] *Official Records of the General Assembly, Forty-eighth session*, Supplement No. 17 (A/48/17), annex I.

[102] *International Legal Materials*, vol. XXVI, No. 6, p. 1541.

[103] Ibid., p. 1529

[104] A/CONF.97/18.

[105] See 2202nd plenary meeting of 14 December 1973 (A/Pr.2202) and *Yearbook of the International Law Commission, 1973*, vol. II, document A/CN.4/271, para. 38, p. 81.