International Court of Justice

REQUEST

FOR ADVISORY OPINION

transmitted to the Court pursuant to Economic
and Social Council decision 1998/297
of 5 August 1998

DIFFERENCE RELATING TO IMMUNITY FROM LEGAL PROCESS OF A SPECIAL RAPPORTEUR OF THE COMMISSION ON HUMAN RIGHTS

1998
General List
No. 100

I. THE SECRETARY-GENERAL OF THE UNITED NATIONS
TO THE PRESIDENT OF THE INTERNATIONAL
COURT OF JUSTICE

7 August 1998

I have the honour to inform you that pursuant to Article 96, paragraph 2, of the Charter of the United Nations and in accordance with General Assembly resolution 89 (I), authorizing the Economic and Social Council to request advisory opinions of the International Court of Justice, at its forty-ninth meeting of its resumed substantive session of 1998 held on 5 August 1998 the Economic and Social Council adopted by consensus decision 1998/297 (E/1998/L.49/Rev.1). By this decision, the Economic and Social Council requests, on a priority basis, from the International Court of Justice an advisory opinion on the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, taking into account the circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General, contained in document E/1998/94, and on the legal obligations of Malaysia in this case. A certified copy of the decision in English and French as well as the note by the Secretary-General (E/1998/94) and the Addendum thereto (E/1998/94/Add.1) on the subject are enclosed[1].

I also have the honour to inform you that materials for submission to the Court are being prepared pursuant to Article 65 of the Statute and will be submitted to the Court as soon as possible.

Please accept, Mr. President, the assurances of my highest consideration.

(Signed) Kofi A. Annan.

II. DRAFT DECISION SUBMITTED BY THE VICE-PRESIDENT OF THE COUNCIL, MR. ANWARUL CHOWDHURY (BANGLADESH), ON THE BASIS OF INFORMAL CONSULTATIONS

The Economic and Social Council,

Having considered the note by the Secretary-General on the privileges and immunities of the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers1,

Considering that a difference has arisen between the United Nations and the Government of Malaysia, within the meaning of Section 30 of the Convention on the Privileges and Immunities of the United Nations, with respect to the immunity from legal process of Dato' Param Cumaraswamy, the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers,

Recalling General Assembly resolution 89 (I) of 11 December 1946,

1. Requests on a priority basis, pursuant to Article 96, paragraph 2, of the Charter of the United Nations and in accordance with General Assembly resolution 89 (I), an advisory opinion from the International Court of Justice on the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, taking into account the circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General1, and on the legal obligations of Malaysia in this case;

2. Calls upon the Government of Malaysia to ensure that all judgements and proceedings in this matter in the Malaysian courts are stayed pending receipt of the advisory opinion of the International Court of Justice, which shall be accepted as decisive by the parties.

III. NOTE BY THE SECRETARY-GENERAL

Privileges and Immunities of the Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers 2

1. In its resolution 22 A (I) of 13 February 1946, the General Assembly adopted, pursuant to Article 105 (3) of the Charter of the United Nations, the Convention on the Privileges and Immunities of the United Nations (the Convention). Since then, 137 Member States have become parties to the Convention, and its provisions have been incorporated by reference into many hundreds of agreements relating to the headquarters or seats of the United Nations and its organs, and to activities carried out by the Organization in nearly every country of the world.

2. That Convention is, inter alia, designed to protect various categories of persons, including "Experts on Mission for the United Nations", from all types of interference by national authorities. In particular, Section 22 (b) of Article VI of the Convention provides:

> Section 22: "Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including time spent on journeys in connection with their missions. In particular they shall be accorded:
> (b) in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of any kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations".

3. In its Advisory Opinion of 14 December 1989, on the Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations (the so-called "Mazilu case"), the International Court of Justice held that a Special Rapporteur of the Subcommission on the Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights was an "expert on mission" within the meaning of Article VI of the Convention.

4. The Commission on Human Rights, by its resolution 1994/41 of 4 March 1994, endorsed by the Economic and Social Council in its decision 1994/251 of 22 July 1994, appointed Dato' Param Cumaraswamy, a Malaysian jurist, as the Commission's Special Rapporteur on the Independence of Judges and Lawyers. His mandate consists of tasks including, inter alia, to inquire into substantial allegations concerning, and to identify and record attacks on, the independence of the judiciary, lawyers and court officials. Mr. Cumaraswamy has submitted four reports to the Commission on the execution of his mandate: E/CN.4/1995/39, E/CN.4/1996/37, E/CN.4/1997/32 and E/CN.4/1998/39. After the third report containing a section on the litigation pending against him in the Malaysian civil courts, the Commission at its fifty-fourth session, in April 1997, renewed his mandate for an additional three years.

5. In November 1995 the Special Rapporteur gave an interview to International Commercial Litigation, a magazine published in the United Kingdom of Great Britain and Northern Ireland but circulated also in Malaysia, in which he commented on certain litigations that had been carried out in Malaysian courts. As a result of an article published on the basis of that interview, two commercial companies in Malaysia asserted that the said article contained defamatory words that had "brought them into public scandal, odium and contempt". Each company filed a suit against him for damages amounting to M$30 million (approximately US$12 million each), "including exemplary damages for slander".

6. Acting on behalf of the Secretary-General, the Legal Counsel considered the circumstances of the interview and of the controverted passages of the article and determined that Dato' Param Cumaraswamy was interviewed in his official capacity as Special Rapporteur on the Independence of Judges and Lawyers, that the article clearly referred to his United Nations capacity and to the Special Rapporteur's United Nations global mandate to investigate allegations concerning the independence of the judiciary, and that the quoted passages related to such allegations. On 15 January 1997, the Legal Counsel, in a note verbale addressed to the Permanent Representative of Malaysia to the United Nations, therefore "requested the competent Malaysian authorities to promptly advise the Malaysian courts of the Special Rapporteur's immunity from legal process" with respect to that particular complaint. On 20 January 1997, the Special Rapporteur filed an application in the High Court of Kuala Lumpur (the trial court in which the said suit had been filed) to set aside and/or strike out the plaintiffs' writ, on the ground that the words that were the subject of the suits had been spoken

by him in the course of performing his mission for the United Nations as Special Rapporteur on the Independence of Judges and Lawyers. The Secretary-General issued a note on 7 March 1997 confirming that "the words which constitute the basis of plaintiffs' complaint in this case were spoken by the Special Rapporteur in the course of his mission" and that the Secretary-General "therefore maintains that Dato' Param Cumaraswamy is immune from legal process with respect thereto". The Special Rapporteur filed this note in support of his above-mentioned application.

7. After a draft of a certificate that the Minister for Foreign Affairs proposed to file with the trial court had been discussed with representatives of the Office of Legal Affairs, who had indicated that the draft set out the immunities of the Special Rapporteur incompletely and inadequately, the Minister nevertheless on 12 March 1997 filed the certificate in the form originally proposed; in particular the final sentence of that certificate in effect invited the trial court to determine at its own discretion whether the immunity applied, that this was the case "only in respect of words spoken or written and acts done by him in the course of the performance of his mission" (emphasis added). In spite of the representations that had been made by the Office of Legal Affairs, the certificate failed to refer in any way to the note that the Secretary-General had issued a few days earlier and that had in the meantime been filed with the court, nor did it indicate that in this respect, i.e. in deciding whether particular words or acts of an expert fell within the scope of his mission, the determination could exclusively be made by the Secretary-General, and that such determination had conclusive effect and therefore had to be accepted as such by the court. In spite of repeated requests by the Legal Counsel, the Minister for Foreign Affairs refused to amend his certificate or to supplement it in the manner urged by the United Nations.

8. On 28 June 1997, the competent judge of the Malaysian High Court for Kuala Lumpur concluded that she was "unable to hold that the Defendant is absolutely protected by the immunity he claims", in part because she considered that the Secretary-General's note was merely "an opinion" with scant probative value and no binding force upon the court and that the Minister for Foreign Affairs certificate "would appear to be no more than a bland statement as to a state of fact pertaining to the Defendant's status and mandate as a Special Rapporteur and appears to have room for interpretation". The Court ordered that the Special Rapporteur's motion be dismissed with costs, that costs be taxed and paid forthwith by him and that he file and serve his defence within 14 days. On 8 July, the Court of Appeal dismissed Mr. Cumaraswamy's motion for a stay of execution.

9. On 30 June and 7 July 1997, the Legal Counsel thereupon sent notes verbales to the Permanent Representative of Malaysia, and also held meetings with him and his Deputy. In the latter note, the Legal Counsel, inter alia, called on the Malaysian Government to intervene in the current proceedings so that the burden of any further defence, including any expenses and taxed costs resulting therefrom, be assumed by the Government; to hold Mr. Cumaraswamy harmless in respect of the expenses he had already incurred or that were being taxed to him in respect of the proceedings so far, and, so as to prevent the accumulation of additional expenses and costs and the further need to submit a defence until the matter of his immunity was definitively resolved between the United Nations and the Government, to support a motion to have the High Court proceedings stayed until such resolution. The Legal Counsel referred to the provisions for the settlement of differences arising out of the interpretation and application of the 1946 Convention that might arise between the Organization and a Member State, which are set out in Section 30 of the Convention, and indicated that if the Government decided that it cannot or does not wish to protect and to hold

harmless the Special Rapporteur in the indicated manner, a difference within the meaning of those provisions might be considered to have arisen between the Organization and the Government of Malaysia.

10. Section 30 of the Convention provides as follows:

> Section 30: "All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties."

11. On 10 July yet another lawsuit was filed against the Special Rapporteur by one of the lawyers mentioned in the magazine article referred to in paragraph 5 above, based on precisely the same passages of the interview and claiming damages in an amount of M$60 million (US$24 million). On 11 July, the Secretary-General issued a note corresponding to the one of 7 March 1997 (see para. 6 above) and also communicated a note verbale with essentially the same text to the Permanent Representative of Malaysia with the request that it be presented formally to the competent Malaysian court by the Government.

12. On 23 October and 21 November 1997, new plaintiffs filed a third and fourth lawsuit against the Special Rapporteur for M$100 million (US$40 million) and M$60 million (US$24 million) respectively. On 27 October and 22 November 1997, the Secretary-General issued identical certificates of the Special Rapporteur's immunity.

13. On 7 November 1997, the Secretary-General advised the Prime Minister of Malaysia that a difference might have arisen between the United Nations and the Government of Malaysia and about the possibility of resorting to the International Court of Justice pursuant to Section 30 of the Convention. Nonetheless on 19 February 1998, the Federal Court of Malaysia denied Mr. Cumaraswamy's application for leave to appeal stating that he is neither a sovereign nor a full-fledged diplomat but merely "an unpaid, part-time provider of information".

14. The Secretary-General then appointed a Special Envoy, Maître Yves Fortier of Canada, who, on 26 and 27 February 1998, undertook an official visit to Kuala Lumpur to reach an agreement with the Government of Malaysia on a joint submission to the International Court of Justice. Following that visit, on 13 March 1998 the Minister for Foreign Affairs of Malaysia informed the Secretary-General's Special Envoy of his Government's desire to reach an out-of-court settlement. In an effort to reach such a settlement, the Office of Legal Affairs proposed the terms of such a settlement on 23 March 1998 and a draft settlement agreement on 26 May 1998. Although the Government of Malaysia succeeded in staying proceedings in the four lawsuits until September 1998, no final settlement agreement was concluded. During this period, the Government of Malaysia insisted that, in order to negotiate a settlement, Maître Fortier must return to Kuala Lumpur. While Maître Fortier preferred to undertake the trip only once a preliminary agreement between the parties had been reached, nonetheless, based on the Prime Minister of Malaysia's request that Maître Fortier return as soon as possible, the Secretary-General requested his Special Envoy to do so.

15. Maître Fortier undertook a second official visit to Kuala Lumpur, from 25 to 28 July 1998, during which he concluded that the Government of Malaysia was not going to participate either in settling this matter or in preparing a joint submission to the current session of the Economic and Social Council. The Secretary-General's Special Envoy therefore advised that the matter should be referred to the Council to request an advisory opinion from the International Court of Justice. The United Nations had exhausted all efforts to reach either a negotiated settlement or a joint submission through the Council to the International Court of Justice. In this connection, the Government of Malaysia has acknowledged the Organization's right to refer the matter to the Council to request an advisory opinion in accordance with Section 30 of the Convention, advised the Secretary-General's Special Envoy that the United Nations should proceed to do so, and indicated that, while it will make its own presentations to the International Court of Justice, it does not oppose the submission of the matter to that Court through the Council.

16. The Secretary-General considers it most important that the principle be accepted that it is for himself alone to determine, with conclusive effect (except as indicated in paragraph 17 below), whether a member of the staff of the Organization or an expert on mission has spoken or written words or performed an act "in their official capacity" (in the case of officials) or "in the performance of their mission" (in the case of experts on mission). Unless such conclusive effect is accorded to his determinations in this respect, it will be for national courts to determine - and in respect of a given word or act there may be several national courts - whether an official or an expert, or a former official or expert, enjoys immunity in respect of his words or acts. The adjudication of United Nations privileges and immunities in the national courts would be certain to have a negative effect on the independence of officials and experts, who would then have to fear that at any time, whether they were still in office or after they had left it, they could be called to account in national courts, not necessarily their own, civilly or criminally, for their words spoken or written or acts performed as officials or experts.

17. Although the decision of the Secretary-General must thus be considered as not subject to challenge in national courts, it can, of course, be challenged by a Government concerned pursuant to Section 30 of the 1946 Convention (quoted in paragraph 10 above), in which case the matter would be decided with binding effect by the International Court of Justice.

18. It should be pointed out that Section 23 of the 1946 Convention provides in respect of experts (and similarly Section 20 in respect of officials) that:

> Section 23: "Privileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individual themselves. The Secretary-General shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations."

Thus any abuse of the immunities of an expert (or an official) would be prevented by the right and duty of the Secretary-General to waive such immunity under the circumstances specified in those sections.

19. In connection with this case, it should also be noted that the Secretary-General received a communication from the Special Rapporteurs/Representatives/Experts and Chairpersons of Working Groups of the Commission on Human Rights and the Advisory Services Programme

of the United Nations Commission on Human Rights which indicated that "undermining the immunity accorded to one expert constitutes an attack on the entire system and institution of United Nations human rights special procedures and mechanisms". Moreover, on 29 May 1998, the Fifth Meeting of Special Rapporteurs/Representatives/Experts and Chairpersons of Working Groups of the Commission on Human Rights and of the Advisory Services Programmes adopted a statement entitled the "Judicial Harassment of a Special Rapporteur" urging the Secretary-General to refer the matter to the International Court of Justice pursuant to Section 30 of the Convention. The Secretary-General received innumerable interventions from representatives of the international human rights and legal community reflecting the overwhelming consensus in favour of referring the matter to the International Court of Justice.

20. Finally, it is necessary to point out that unless the Government of Malaysia accepts the responsibility, costs and expenses of ensuring respect for the Special Rapporteur's immunity through appropriate interventions in the Malaysian courts, then these considerable expenses might have to be assumed by the Organization itself as it considers that the words that constitute the basis of the plaintiffs' complaint were spoken by the Rapporteur in the course of his mission.

21. As the Organization and the Government of Malaysia agree that a difference has arisen between them out of the interpretation or application of the Convention and as they have been unable to agree on another mode of settlement, the difference should be referred to the International Court of Justice in accordance with Section 30 of the Convention and the following request for an advisory opinion should be made in accordance with Article 96 of the Charter of the United Nations and Article 65 of the Statute of the Court:

> "Considering the difference that has arisen between the United Nations and the Government of Malaysia with respect to the immunity from legal process of Mr. Dato' Param Cumaraswamy, the United Nations Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers, in respect of certain words spoken by him:
> 1. Subject only to Section 30 of the Convention on the Privileges and Immunities of the United Nations, does the Secretary-General of the United Nations have the exclusive authority to determine whether words were spoken in the course of the performance of a mission for the United Nations within the meaning of Section 22 (b) of the Convention?
> 2. In accordance with Section 34 of the Convention, once the Secretary-General has determined that such words were spoken in the course of the performance of a mission and has decided to maintain, or not to waive, the immunity from legal process, does the Government of a Member State party to the Convention have an obligation to give effect to that immunity in its national courts and, if failing to do so, to assume responsibility for, and any costs, expenses and damages arising from, any legal proceedings brought in respect of such words?
> Pending receipt of the advisory opinion of the International Court of Justice, which shall be accepted as decisive by the parties, the Government of Malaysia is called upon to ensure that all judgements and proceedings in this matter in the Malaysian courts are stayed."

IV. Addendum to the Note by the Secretary-General [3]

In paragraph 14 of the note by the Secretary-General on the privileges and immunities of the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers (E/1998/94), it is reported that the "Government of Malaysia succeeded in staying proceedings in the four lawsuits until September 1998". In this connection, the Secretary-General has been informed that on 1 August 1998, Dato' Param Cumaraswamy was served with a Notice of Taxation and Bill of Costs dated 28 July 1998 and signed by the Deputy Registrar of the Federal Court notifying him that the bill of costs of the Federal Court application would be assessed on 18 September 1998. The amount claimed is M$310,000 (US$77,500). On the same day, Dato' Param Cumaraswamy was also served with a Notice dated 29 July 1998 and signed by the Registrar of the Court of Appeal notifying him that the Plaintiff's bill of costs would be assessed on 4 September 1998. The amount claimed in that bill is M$550,000 (US$137,500).

1 These documents, reproduced below, have been certified as true copies by the Office of Legal Affairs of the United Nations. (Note by the Registry.)

2 E/1998/94.

3 E/1998/94/Add.1.

UNITED NATIONS

DIFFERENCE RELATING TO IMMUNITY FROM LEGAL PROCESS OF A SPECIAL RAPPORTEUR OF THE COMMISSION ON HUMAN RIGHTS

(Request for Advisory Opinion)

Documents relating to the Question on which the Economic and Social Council requested an Advisory Opinion, in its decision 1998/297 of 5 August 1998, transmitted to the International Court of Justice by the Secretary-General of the United Nations in accordance with Article 65 of the Statute of the Court

INTRODUCTORY NOTE

THE REQUEST

1. On 5 August 1998, the Economic and Social Council (hereinafter the "Council"), at its resumed substantive session of 1998, adopted decision 1998/297 by consensus (Dossier No. 61 below). By this decision, the Council decided to request an advisory opinion from the International Court of Justice.

FRAMEWORK OF THE DOSSIER

2. The Dossier, prepared pursuant to the Acting President's Order of 10 August 1998 and paragraph 2 of Article 65 of the Statute of the Court, contains the documents and other materials likely to throw light upon the question on which the advisory opinion of the Court is requested. The items in the Dossier are numbered consecutively and identified, as appropriate, by title or official United Nations symbol.

3. The Dossier is divided into three Parts. **Part I** contains materials relating to the appointment and mandate of the Special Rapporteur on the independence of judges and lawyers (hereinafter, the "Special Rapporteur"), the law suits against the Special Rapporteur, and the proceedings leading to the request by the Council for an advisory opinion. **Part II** contains materials relating to the Convention on the Privileges and Immunities of the United Nations adopted by the General Assembly of the United Nations on 13 February 1946 (hereinafter, the "Convention"). **Part III** contains materials relating to the practice of the Organization in relation to the assertion and waiver of the functional privileges and immunities which are accorded to its officials and experts-on-mission.

INTRODUCTION TO PART I

MATERIALS RELATING TO THE APPOINTMENT AND MANDATE OF THE SPECIAL RAPPORTEUR ON THE INDEPENDENCE OF JUDGES AND LAWYERS, THE LAW SUITS AGAINST THE SPECIAL RAPPORTEUR, AND THE PROCEEDINGS LEADING TO THE REQUEST BY THE COUNCIL FOR AN ADVISORY OPINION

A. MATERIALS RELATING TO THE APPOINTMENT AND MANDATE OF THE SPECIAL RAPPORTEUR ON THE INDEPENDENCE OF JUDGES AND LAWYERS

4. In its resolution 1994/41 of 4 March 1994, the United Nations Commission on Human Rights established the office and mandate of the Special Rapporteur on the independence of judges and lawyers. (Dossier No. 1)

5. By letter dated 21 April 1994, the Chairman of the Commission on Human Rights, following consultations with the Bureau, appointed Dato' Param Cumaraswamy, a national of Malaysia, as Special Rapporteur on the independence of judges and lawyers. (Dossier No. 2)

6. In its decision 1994/251 of 22 July 1994, the Council approved the afore-mentioned action by the United Nations Commission on Human Rights. (Dossier No. 3)

7. On 6 February 1995, the First Report of the Special Rapporteur (E/CN.4/1995/39) was issued. (Dossier No. 4)

8. In its resolution 1995/36 of 3 March 1995 (Dossier No. 5), the Commission on Human Rights "note[d] with appreciation the determination of the Special Rapporteur to achieve as wide a dissemination as possible of information about existing standards relating to the independence and impartiality of the judiciary and the independence of the legal profession in conjunction with the publications and promotional activities of the Centre for Human Rights". In this connection, see also its resolutions 1996/34 of 19 April 1996, 1997/23 of 11 April 1997 and 1998/35 of 17 April 1998 (Dossier Nos. 6, 7 and 8).

9. In a letter dated 29 August 1995, the Special Rapporteur wrote to the Chairman of the Fifty-first session of the Commission on Human Rights, also a national of Malaysia, indicating his obligation to investigate complaints regarding the Malaysian judiciary, and asking the Chairman to bring his concerns to the attention of the Prime Minister of Malaysia. (Dossier No. 9).

10. On 1 March 1996, the Second Report of the Special Rapporteur (E/CN.4/1996/37) was issued containing a section (paragraphs 158-165) on Malaysia similar in content to the information conveyed in the interview mentioned in paragraph 15 below. Paragraph 152 of the same report indicates that the Special Rapporteur also gave a press statement on Hong Kong. (Dossier No. 10)

11. On 18 February 1997, the Third Report of the Special Rapporteur (E/CN.4/1997/32) was issued also containing a section (paragraphs 122-134) on Malaysia and reporting on the litigation against him in the Malaysian civil courts. Paragraphs 32-34 of the same report contain reference to the promotional activities of the Special Rapporteur, including press interviews in Sri Lanka. Paragraph 39 contains the Special Rapporteur's press statement on his preliminary observations on his mission in Peru. (Dossier No. 11).

12. In its resolution 1997/23 of 11 April 1997 (see Dossier No. 7 above), the United Nations Commission on Human Rights decided to extend the mandate of the Special Rapporteur on the independence of judges and lawyers for a further period of three years.

13. On 12 February 1998, the Fourth Report of the Special Rapporteur (E/CN.4/1998/39 and Add.5) was issued also containing a section (paragraphs 106-116) on Malaysia and reporting on the status of the litigation. (Dossier No. 12)

B. MATERIALS RELATING TO THE LAW SUITS AGAINST THE SPECIAL RAPPORTEUR

14. On 24 August 1995, an article in a Malaysian newspaper (Dossier No. 13) reported that the United Nations Special Rapporteur on the independence of judges and lawyers will be investigating recent complaints of manipulation of the Malaysian system of justice and referred to a statement he had made on complaints about manipulation of that system.

15. In November 1995, an article "Malaysian Justice on Trial" was published in the British magazine International Commercial Litigation, containing quotes from an interview given by Dato' Param Cumaraswamy to the author. The article identifies Dato' Param Cumaraswamy as the Special Rapporteur on the independence of judges and lawyers and describes the mandate given to him by the United Nations Commission on Human Rights. (Dossier No. 14).

16. In three letters dated 18 December 1995 (Dossier No. 15), a lawfirm representing two commercial companies indicates its clients' intent to institute defamation proceedings against Dato' Param Cumaraswamy on the basis of his interview and the words attributed to him in the Article "Malaysian Justice on Trial". (See Dossier No. 14 above)

17. In a letter dated 22 December 1995, the law firm privately retained by Dato' Param Cumaraswamy notified plaintiffs' lawyers of the Special Rapporteur's immunity from legal process under section 22 of the Convention. (Dossier No. 16)

18. On 28 December 1995, the Secretariat of the United Nations issued a Note Verbale to the Permanent Mission of Malaysia in Geneva requesting that the competent Malaysian authorities be advised, and that they in turn advise the Malaysian courts, of the Special Rapporteur's immunity from legal process. (Dossier No. 17)

19. By letter of 1 March 1996, the United Nations Centre for Human Rights directly notified plaintiffs' lawyers of the Special Rapporteur's immunity from legal process. (Dossier No. 18)

20. In a Note Verbale dated 29 March 1996, the United Nations Legal Counsel, having considered the circumstances of the interview and of the passages of the article giving rise to the defamation proceedings, notified the Permanent Representative of Malaysia to the United Nations of the defamation proceedings and asserted the Special Rapporteur's immunity. (Dossier No. 19)

21. On 12 December 1996, the High Court of Kuala Lumpur issued a Writ of Summons against Dato' Param Cumaraswamy in two suits for 30 million Malaysian Ringgit each (US $ 24 million total at the then current exchange rate) filed by plaintiffs. (Dossier No. 20)

22. On 3 January 1997, the Director and Deputy to the Legal Counsel issued a letter addressed "To Whom it May Concern" notifying the competent Malaysian authorities that the United Nations was maintaining the immunity from legal process of its Special Rapporteur. (Dossier No. 21)

23. On 6 January 1997, the Director and Deputy to the Legal Counsel re-issued the letter addressed "To Whom it May Concern" to refer to the High Court of Kuala Lumpur and the docket number of the civil suit. (Dossier No. 22)

24. On 9 January 1997, Dato' Param Cumaraswamy filed an application with the High Court of Kuala Lumpur for leave to enter a Conditional Appearance. (Dossier No. 23)

25. On 10 January 1997, the Court granted leave for Conditional Appearance (Dossier No. 24) and Dato' Param Cumaraswamy filed an affidavit (Dossier No. 25) bringing to the Court's attention his immunity from legal process of any kind in respect of words spoken or written and acts done by him in the course of the performance of his mission. The affidavit made reference to and annexed the letters and Note Verbales issued by his law firm, the Secretariat of the United Nations, the Centre for Human Rights, and the Legal Counsel of the United Nations. (see Nos. 17, 18, 19 and 20 above)

26. In a Note Verbale dated 14 January 1997, the Permanent Representative of Malaysia informed the Legal Counsel that Malaysian legislation had been adopted to give effect to the Convention and that Malaysian law requires its courts to take judicial notice of that Malaysian legislation. (Dossier No. 26)

27. On 15 January 1997, the Legal Counsel addressed a Note Verbale to the Permanent Representative of Malaysia re-asserting the Special Rapporteur's immunity from legal process and indicating that, under Malaysian law, the courts have an obligation to take judicial notice of the United Nations assertion of its Special Rapporteur's immunity from legal process. (Dossier No. 27)

28. On 5 March 1997, the Director and Deputy to the Legal Counsel met with the Acting Permanent Representative of Malaysia to discuss the possible amendment of the Certificate of Immunity to be issued by Minister for Foreign Affairs of Malaysia to adequately uphold the privileges and immunities enjoyed by the Special Rapporteur under the Convention. (Dossier No. 28)

29. On 7 March 1997, the Secretary-General issued a certificate of immunity addressed "To Whom It May Concern", in which he confirmed that he had determined that the words which constitute the basis of plaintiffs' complaint were spoken by the Special Rapporteur in the course of the performance of his mission and that the Secretary-General therefore maintains that Dato' Param Cumaraswamy is immune from legal process with respect thereto. (Dossier No. 29)

30. On 11 March 1997, Dato' Param Cumaraswamy filed a further Affidavit in the High Court of Kuala Lumpur transmitting the Secretary-General's Note Verbale of 7 March 1997. (Dossier No. 30)

31. On 12 March 1997, the Malaysian Minister for Foreign Affairs issued a Certificate of Immunity which did not refer to the Note Verbale issued by the Secretary-General on 7 March 1997. (Dossier No. 31)

32. In a letter dated 14 April 1997, the United Nations Legal Counsel informed the Permanent Representative of Malaysia that, despite the certification made by the Secretary-General and the Minister for Foreign Affairs, the competent Malaysian courts were holding hearings on the question whether Dato' Param Cumaraswamy was acting within the course of the performance of his mission. The Legal Counsel called upon Malaysia to ensure that no Malaysian court undertake to consider whether or not the Secretary-General's determination is conclusive as to the official functions of a United Nations expert on mission. (Dossier No. 32)

33. On 2 May 1997, the Legal Counsel addressed a Note Verbale to the Permanent Representative of Malaysia requesting an amendment of, or supplement to, the Malaysian Foreign Minister's Certificate to refer to the Secretary-General's exclusive authority to determine whether the Special Rapporteur was immune from legal process with respect to the words giving rise to the complaint. (Dossier No. 33)

34. On 30 May 1997, the Chairman of the Fourth Meeting of Special Rapporteurs/ Representatives/Experts and Chairpersons of Working Groups of the Commission on Human Rights and of the Advisory Services Programmes wrote to the Secretary-General urging him to invoke Section 30 of the Convention for a request to be made to seek an advisory opinion from the International Court of Justice. (Dossier No. 34)

35. On 28 June 1997, a Judge of the High Court of Kuala Lumpur concluded that the Secretary-General's certification for the Special Rapporteur's immunity from legal process was merely an opinion which is not binding on the Court and that she had jurisdiction to hear the case. She ordered Dato' Param Cumaraswamy to file a substantive defence within two weeks. (Dossier No. 35)

36. On 30 June 1997, the Acting High Commissioner for Human Rights issued a Press Statement in Geneva expressing concern that the decision reached by the High Court of Kuala Lumpur presents a dangerous precedent, undermining the privileges and immunities of all special rapporteurs of the Commission on Human Rights, and a serious threat to the entire human rights system.(Dossier No. 36)

37. In a Note Verbale dated 30 June 1997, the Legal Counsel informed the Permanent Representative of Malaysia of the United Nations' views on the High Court's judgement of 28 June 1997. (Dossier No. 37)

38. On 7 July 1997, the Legal Counsel addressed another Note Verbale (Dossier No. 38) to the Permanent Representative of Malaysia concerning his Government's obligation to stay the proceedings pending the resolution of the difference that had arisen between the United Nations and Malaysia.

39. On 8 July 1997, the United Nations Legal Counsel addressed yet another letter to the Permanent Representative of Malaysia notifying him of the potential recourse to the International Court of Justice through the General Assembly. (Dossier No. 39)

40. Also on 8 July 1997, the Chairman of the Fourth Meeting of Special Rapporteurs/ Representatives/Experts and Chairpersons of Working Groups of the Commission on Human Rights and of the Advisory Services Programmes wrote to the Secretary-General again urging him to invoke Section 30 of the Convention for a request to be made to seek an advisory opinion from the International Court of Justice. (Dossier No. 40)

41. On 9 July 1997, a new plaintiff served a second Writ of Summons and Statement of Claims against the Special Rapporteur in an amount of MR 60 million (US $ 24 million at the then current exchange rate). (Dossier No. 41)

42. In a letter dated 10 July 1997, the United Nations Legal Counsel notified the Permanent Representative that a new lawsuit had been filed against the Special Rapporteur. (Dossier No. 42)

43. On 11 July 1997, the Secretary-General issued a second certificate of immunity in connection with the new suit (Dossier No. 43) which was transmitted, in the form of a Note Verbale with a covering letter signed by the Secretary-General, to the Permanent Representative of Malaysia. (Dossier No. 44)

44. On 20 October 1997, the Court of Appeals delivered its opinion denying Dato' Param Cumaraswamy's appeal with costs and upholding the High Court judgment of 28 June 1997. In its opinion, the Court of Appeal concluded that it was for the Malaysian courts to determine in which capacity Dato' Param Cumaraswamy had spoken the words giving rise to the complaint, and if in his official capacity, whether he had exceeded his mandate in doing so. (Dossier No. 45)

45. On 23 October 1997, new plaintiffs served a third Writ of Summons and Statement of Claims against the Special Rapporteur for MR 95 million (US $ 40 million at the then current exchange rate). (Dossier No. 46)

46. On 27 October 1997, the Secretary-General issued a third certificate of immunity addressed "To Whom It May Concern". (Dossier No. 47)

47. On 30 October 1997, the Legal Counsel addressed a Note Verbale to the Permanent Representative of Malaysia concerning the judgment of the Court of Appeal and asserting the Special Rapporteur's immunity from the latest lawsuit. (Dossier No. 48)

48. On 7 November 1997, the Secretary-General addressed a letter to the Prime Minister of Malaysia concerning the difference arising between the United Nations and the Government of Malaysia and suggested a possible resort to the International Court of Justice through the General Assembly pursuant to Section 30 of the Convention. (Dossier No. 49)

49. On 21 November 1997, new plaintiffs served a fourth Writ of Summons and Statement of Claims against the Special Rapporteur in an amount of MR 60 million (US $ 24 million at the then current exchange rate). (Dossier No. 50)

50. On the same day, 21 November 1997, the Secretary-General issued a fourth certificate of immunity addressed "To Whom It May Concern". (Dossier No. 51)

51. On 25 November 1997, the Legal Counsel addressed a Note Verbale to the Permanent Representative of Malaysia transmitting the Secretary-General's 21 November 1997 assertion of the Special Rapporteur's immunity from the latest lawsuit. (Dossier No. 52)

52. On 27 November 1997, the law firm representing Dato' Param Cumaraswamy applied to the Chief Justice of Malaysia for an early hearing for an application for leave to appeal to the Federal Court. (Dossier No. 53)

53. On 16 December 1997, the High Commissioner for Human Rights issued a Press Release in Geneva reiterating the importance that the international human rights community attached to the privileges and immunities of Special Rapporteurs of the Commission on Human Rights and urging the Government of Malaysia to implement fully the provisions of the Convention as a key component of international law. (Dossier No. 54)

54. On 19 February 1998, the Federal Court of Malaysia delivered an oral ruling denying Dato' Param Cumaraswamy's application for leave to appeal stating that "we are not dealing with a sovereign or a full-fledged diplomat ... he is someone called a Rapporteur who has to act, in the present case, within a mandate of, in layman's terms an unpaid, part-time provider of information." (Dossier No. 55)

C. MATERIALS RELATING TO THE PROCEEDINGS LEADING TO THE REQUEST BY THE COUNCIL FOR AN ADVISORY OPINION

55. In a letter dated 13 March 1998, the Government of Malaysia indicated its desire to reach a settlement of the matter outside both the national courts and the International Court of Justice following the visit by the Secretary-General's Special Envoy, Maitre Yves Fortier, to Kuala Lumpur on 26-27 February 1998. (Dossier No. 56)

56. Between 12 March and 23 July 1998, intensive efforts to settle the matter amicably failed to achieve any result save the postponement of all proceedings in the four lawsuits until September 1998.*

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* The documents relating to the efforts of the United Nations and the Government of Malaysia to reach a negotiated settlement are not included in the Dossier.

57. On 29 May 1998, the Fifth Meeting of Special Rapporteurs/Representatives/Experts and Chairpersons of Working Groups of the Commission on Human Rights and of the Advisory Services Programmes adopted a statement on the "Judicial Harassment of a Special Rapporteur" which was made public in Geneva and New York. (Dossier No. 57)

58. On 18 June 1998, the Assistant Secretary-General for Legal Affairs advised the Permanent Representative of Malaysia that unless the Government of Malaysia responded to the draft settlement agreement which had been previously transmitted to him by the Organization, the Secretary-General could not avoid referring the matter during the upcoming session of the Economic and Social Council and requesting it to seek an advisory opinion from the International Court of Justice. (Dossier No. 58)

59. Between 24 - 26 July 1998, The Secretary-General's Special Envoy, Maitre Yves Fortier, undertook a second visit to Kuala Lumpur for meetings with the Attorney-General in which he concluded it would not be possible either to settle the matter amicably or to jointly submit the matter to the Economic and Social Council to request an advisory opinion from the International Court of Justice.*

60. On 28 July 1998, the Secretary-General issued a note in the Economic and Social Council entitled "Privileges and immunities of the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers". (Dossier No. 59; E/1998/94)

61. On 30 July 1998, Maitre Fortier reported to the Secretary-General indicating Malaysia's agreement that the matter should be referred, although not jointly, to the International Court of Justice.*

62. On 3 August 1998, the Secretary-General issued an Addendum (Dossier No. 60; E/1998/94/Add.1) to his Note (see Dossier No. 59 above) informing the Council that, on 1 August 1998, Dato' Param Cumaraswamy had received a Notice of Taxation and Bill of Costs, dated 28 July 1998, indicating that costs for the application in Federal Court would be assessed on 18 September 1998 and that, on the same day, he had also received a Notice of Taxation and Bill of Costs, dated 29 July 1998, indicating that plaintiffs' costs for the Court of Appeal would be assessed on 4 September 1998.

63. On 5 August 1998, at its resumed substantive session, the Economic and Social Council adopted, by consensus, decision 1998/297 referring the matter to the International Court of Justice and calling upon the Government of Malaysia to stay all judgements and proceedings in its national courts pending receipt of the advisory opinion. (Dossier No. 61)

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* The documents relating to the efforts of the United Nations and the Government of Malaysia to reach a negotiated settlement are not included in the Dossier.

INTRODUCTION TO PART II

MATERIALS RELEVANT TO THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

64. In December 1945, the Preparatory Commission of the United Nations recommended, inter alia, in Chapter VII of its Report to the General Assembly, that the Assembly, at its first session, should make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of Article 105 of the Charter, or propose conventions to the Members of the United Nations for that purpose. It also transmitted, in Appendix B to the Charter, a draft convention on privileges and immunities (Dossier No. 62, Appendix B). The privileges and immunities of the "Representatives of Members" and "Officials of the Organization" were contained respectively in Articles 5 and 6 of the draft convention. The draft did not contain an article on "experts on missions" or provisions of a similar nature, but Article 7, paragraph 3, referred to facilities to be accorded to "experts and other persons who, though not officials of the United Nations, have a certificate that they are travelling on business of the Organization". Article 11 contained a settlement of dispute clause almost identical to that later included in Section 30 of the Convention. (excepting the last sentence)

65. The General Assembly, at the sixteenth plenary meeting of the first part of its session, held on 19 January 1946, referred to the Sixth (Legal) Committee for consideration and report Chapter VII of the Report of the Preparatory Commission. The Committee at its 6th meeting held on 24 January 1946 appointed a Sub-Committee on Privileges and Immunities to consider the matter. (Dossier No. 63)

66. On 28 January 1946, at the 7th meeting of the Sixth Committee, the Sub-Committee recommended, inter alia, to the Sixth Committee that the General Assembly should propose to the Members of the United Nations a general convention which would determine the details of application of paragraphs 1 and 2 of Article 105 of the Charter. (Dossier No. 64) The Sixth Committee unanimously adopted the recommendation of the Sub-Committee. (Ibid.)

67. The Sub-Committee prepared a series of documents concerning the privileges and immunities of the United Nations, among them a resolution relating to the adoption of a General Convention on Privileges and Immunities, to which the text of the draft Convention was annexed. These comments were submitted to the Sixth Committee on 7 February 1946 (Dossier No. 65). In his Report to the Sixth Committee, the Rapporteur stated that the discussion of the Convention on Privileges and Immunities was particularly "exhaustive and thorough" and that the text had been approved unanimously by the Sub-Committee. During its discussion in the Sixth Committee, some delegations expressed objections with respect to Sections 18 and 30. While the entire Article VI (Experts on Missions) was new, no special reference was made to it in the Report of the Sub-Committee or in the discussion of the Sixth Committee, nor was there any explanation of the origin of that provision. Before adoption, only a minor amendment was made to Section 14 in order to clarify the text, this being the only amendment made by the Sixth Committee (Ibid). At its 11th meeting held on 7 February 1946, the Sixth Committee unanimously adopted the draft recommendation concerning the Convention on Privileges and Immunities. (Ibid.)

68. At its 31st meeting, held on 13 February 1946, the General Assembly considered the Report of the Sixth Committee (Dossier No. 66). While some provisions of the Convention were commented upon (including Article VIII, Section 30), no delegations commented on any part of Article VI, nor was any amendment proposed thereto (Dossier No. 67). The General Assembly, without a vote, adopted resolution 22(I)A by which it approved the annexed Convention on the Privileges and Immunities of the United Nations, as recommended by the Sixth Committee, and proposed it for accession by each Member of the United Nations. (Dossier No. 68)

69. Dossier Nos. 69 and 70 contain a list of participants and factual information (accession, succession, and reservations) concerning the Convention on the Privileges and Immunities of the United Nations. It should be noted that there are 138 Parties to the Convention, including Malaysia which acceded to the Convention on 28 October 1957.

INTRODUCTION TO PART III

MATERIALS RELATING TO THE PRACTICE OF THE ORGANIZATION IN RELATION TO THE ASSERTION AND WAIVER OF FUNCTIONAL PRIVILEGES AND IMMUNITIES UNDER THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

A. OPINIONS PUBLISHED IN THE UNITED NATIONS JURIDICAL YEARBOOK (UNJY)

70. On 10 July 1963, in an internal memorandum, the Office of Legal Affairs, relying on the pronouncement of the ICJ in the Reparations Case (I.C.J. Reports, 1949, pp. 183-184), emphasized the importance of the protection afforded to its staff and agents by the United Nations privileges and immunities and the vital importance to staff that this United Nations protection can be relied upon. (Dossier No. 71; 1963 UNJY 191-192)

71. On 11 July 1963, in an internal memorandum, the Office of Legal Affairs emphasized the obligation of the Secretary-General to waive immunity where acts were not connected with official duties and that this was the practice of the Organization. (Dossier No. 72; 1963 UNJY 188)

72. On 22 October 1963, in an Aide-Mémoire to a Member State, the Office of Legal Affairs pointed out that the functional immunity of experts on missions for the Organization applies to nationals of a Member State performing official functions in that State. This flows from both the language of Articles 100 and 105 of the Charter and Article VI of the Convention. (Dossier No. 73; 1963 UNJY 188-191)

73. On 3 November 1964, in an internal memorandum, the Office of Legal Affairs noted that the Secretary-General has the right and the duty to waive immunity where that immunity would impede the course of justice and where that immunity can be waived without prejudice to the interests of the United Nations. (Dossier No. 74; 1964 UNJY 263)

74. On 6 December 1967 the Legal Counsel made a statement to the Sixth Committee on privileges and immunities of the United Nations noting that the granting of privileges and immunities necessary for the exercise of official functions is mandatory on Member States by virtue of Article 105 of the Charter. The Convention defines the immunities deemed essential in all Member States and each Member State is, in accordance with Section 34, bound to give effect to those privileges and immunities. (Dossier No. 75; 1967 UNJY 311-314)

75. On 15 May 1968, in an internal memorandum, the General Counsel of United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), a subsidiary organ of the United Nations, noted that privileges and immunities of officials, including locally recruited staff, were granted for the benefit of the Organization. This protection ensures that United Nations staff are free from local influence or pressure in the performance of their duties. The Secretary-General will only assert immunity for official acts and, where there is an abuse of immunity, the Secretary-General has the right and duty to waive the immunity if it impedes the administration of justice and if the immunity can be waived without prejudice to the interest of the United Nations. (Dossier No. 76; 1968 UNJY 212-215)

76. On 11 July 1969, in an internal memorandum, the Office of Legal Affairs noted that the authority to waive privileges and immunities was vested exclusively in the Secretary-General. (Dossier No. 77; 1968 UNJY 224-225)

77. On 1 April 1974, in a letter to the Assistant of the Secretary-General of another international organization, the Office of Legal Affairs noted that under section 20 of the Convention it would always be incumbent upon the Secretary-General to waive immunity from arrest or prosecution of a staff member where, in his opinion, the immunity would impede the course of justice and where the immunity can be waived without prejudice to the interests of the United Nations. (Dossier No. 78; 1974 UNJY 188)

78. On 21 October 1975, in an internal memorandum, the Office of Legal Affairs reaffirmed that the Convention gave the Secretary-General the right and the duty to waive the immunity of officials where, in his opinion, assertion of that immunity would impede the course of justice and where that immunity could be waived without prejudice to the interests of the United Nations. The Office also noted that, in case of a dispute with a Member State on this question, the Headquarters Agreement with that Member State provided for resort to arbitration. (Dossier No. 79; 1975 UNJY 188-190)

79. On 24 December 1975, in an internal memorandum, the Office of Legal Affairs noted that a staff member may not waive his own immunity and that such immunity may be waived only by the Secretary-General in conformity with section 20 of the Convention. (Dossier No. 80; 1975 UNJY 190-191)

80. On 11 February 1976, in a letter to the Permanent Representative of a Member State, the Office of Legal Affairs emphasized that it was exclusively for the Secretary-General to determine the extent of the authority, duties and functions of United Nations officials and that these matters cannot be subject to scrutiny in national courts for, if this were permitted, a mass of conflicting decisions would be inevitable given the many countries in which the Organization operates. Pursuant to the Convention, differences between the view of the Secretary-General and that of a Member State on the extent of immunity are to be decided by an advisory opinion of the ICJ. (Dossier No. 81); 1976 UNJY 236-239)

81. On 18 August 1976, in an internal memorandum, the Office of Legal Affairs noted that officials, other than those at the rank of Assistant Secretary-General and above, had immunity only in respect of official acts and it was for the Secretary-General to determine whether the immunity should be asserted or waived in accordance with Staff Regulation 1.8. (Dossier No. 82; 1976 UNJY 207-208)

82. On 12 December 1977, in a letter to the Legal Liaison Officer of the United Nations Industrial Development Organization, the Office of Legal Affairs again emphasized that it was for the Secretary-General alone to decide what constitutes an official act within the meaning of the Convention and when to invoke and when to waive that immunity. (Dossier No. 83; 1977 UNJY 246- 248)

83. On 1 December 1981 in a statement to the Fifth Committee of the General Assembly, the Legal Counsel noted that subjecting a staff member to legal process prevented the Secretary-General from exercising his right under the international legal instruments in force to independently determine whether or not an official act had been involved. Where a determination was made that no official act was involved, the Secretary-General had, by the terms of the Convention on the Privileges and Immunities of the United Nations, both the right and duty to waive the immunity of any official. It was not the intent of the provisions regarding immunity from legal process or the principle of functional protection to place officials above the law but to ensure, before any action was taken against them, that no official act was involved and that no interest of the Organization was prejudiced. (Dossier No. 84; 1981 UNJY 161-162)

84. On 5 April 1983, in an internal memorandum, the Office of Legal Affairs again emphasized that the United Nations has consistently maintained that it is exclusively within the competence of the Secretary-General to determine when an act is carried out in an official capacity and that this is not a matter which is subject to review by the local authorities. The Office also noted that, under section 29(b) of the Convention, the United Nations shall make provisions for appropriate modes of settlement of disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if that immunity has not been waived by the Secretary-General. (Dossier No. 85; 1983 UNJY 214-215)

85. On 28 February 1984, in a memorandum to the Legal Adviser of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, the Office of Legal Affairs indicated that it is not necessary for international organizations to claim the immunities to which they are entitled since such immunity exist as a matter of law and is a fact of which judicial notice must be taken. The memorandum also confirmed the practice that a suggestion of immunity is normally made to a court on behalf of an international organization by the competent executive authorities of the States concerned (Dossier No. 86; 1984 UNJY 188-189).

86. On 22 May 1985, in a letter to the Permanent Representative of a Member State, the Office of Legal Affairs again emphasized that it was for the Secretary-General alone to determine whether an activity was an official act. The Secretary-General was under an obligation to cooperate with the national authorities to ensure that there was no abuse of the privileges and immunities of the Organization. (Dossier No. 87; 1985 UNJY 154-155).

87. On 29 January 1991, in a memorandum to the Executive Director of United Nations Children's Fund (UNICEF), the Office of Legal Affairs noted that the Organization should not plead its immunity in national courts as it was the responsibility of the Government, and not the United Nations, to communicate with other branches of the Government on the international legal obligations of the Member State. (Dossier No. 88; 1991 UNJY 319-320)

88. On 5 April 1991, in a memorandum to the Director, Division of Personnel of UNICEF, the Office of Legal Affairs reaffirmed that, under section 20 of the Convention, the Secretary-General has the right and the duty to waive the immunity of any official where, in his opinion, that immunity would impede the course of justice and where that immunity can be waived without prejudice to the interests of the United Nations. (Dossier No. 89; 1991 UNJY 327-328)

89. On 23 January 1992, in a memorandum to the Senior Policy Officer (Legal), Division of Personnel in the United Nations Development Programme (UNDP), the Office of Legal Affairs noted that waiver of immunity of an official only arises if there was an official act and it was for the Secretary-General to determine if there was an official act and, if so, whether to assert or waive immunity. (Dossier No. 90; 1992 UNJY 481-483)

B. UNPUBLISHED OPINIONS

90. On 5 May 1982, in an internal memorandum, the Office of Legal Affairs emphasized that since privileges and immunities of United Nations officials attach not to the individual but to the Organization, only the Secretary-General may waive the immunity of those officials and the execution of such a waiver requires the express authority of the Secretary-General (Dossier No. 91)

91. On 2 April 1984, in an internal memorandum, the Office of Legal Affairs noted that the Secretary-General had agreed to a waiver of immunity, at the request of the Department of Justice and Police of Geneva, of a senior staff member in respect of actions arising from personal loans (Dossier No. 92)

92. On 23 July 1984, the Secretary-General informed the Minister of Foreign Affairs of a Member State that he had decided to waive the immunity from legal process of a staff member, in order not to permit the staff member to shelter behind that immunity in connection with litigation relating to his private debts (Dossier No. 93)

93. On 8 January 1985, in an internal memorandum, the Office of Legal Affairs advised that no immunity would be invoked by the Secretary-General in an action against an official in relation to an action against him which had no connection with official duties. (Dossier No. 94)

94. On 31 May 1988, in a letter to the insurance carrier for the Organization, the Office of Legal Affairs noted that the Convention requires that the United Nations provide appropriate modes of settlement of private law suits to which the Organization is party and the insurance policy provided such a mechanism and thus permits waiver of immunity from suit to enable adjudication of a claim (Dossier No. 95).

95. On 17 November 1989, in an internal memorandum, the Office of Legal Affairs noted that the Secretary-General had decided to waive the immunity of a staff member, in response to a request by a Government, in relation to the staff member's activities as the administrator of a bank account. (Dossier No. 96).

96. On 19 March 1990, in an internal memorandum, the Office of Legal Affairs emphasized that the decision whether to waive immunity of officials was a decision for the Secretary-General alone to make. (Dossier No. 97)

97. On 18 May 1992, in an internal memorandum, the Office of Legal Affairs noted that Staff Regulation 1.8 of the United Nations Staff Regulations provided, *inter alia*, that "in any case where ... privileges and immunities arise, the staff member shall immediately report to the Secretary-General, with whom alone it rests to decide whether they shall be waived" (Dossier No. 98).

98. On 26 April 1993, in a letter to a Permanent Mission, the Office of Legal Affairs, stated that the Secretary-General had decided to waive the immunity of an official and his family to enable divorce proceedings to proceed. (Dossier No. 99)

99. On 24 January 1995, in a letter to a Permanent Mission, the Office of Legal Affairs reminded the Mission of "a long-lasting and uncontested practice [of the Organization] that the competence to determine what constitutes an "official" or "unofficial" act performed by a staff member is vested solely in the Secretary-General" and that it was not acceptable that the question of whether the acts concerned were official acts would be determined by a national court. (Dossier No. 100)

100. On 20 September 1995, in a letter to a Governmental Commission in response to subpoenas ad testificandum issued by that Commission, the Office of Legal Affairs stated that the privileges and immunities accorded under the Convention were being maintained as the proceedings related to official acts of the staff concerned. (Dossier No. 101)

101. On 25 February 1998, in a Note Verbale to the Minister of Foreign Affairs of a Member State, the Secretary-General informed the Government that, under the Convention, it was exclusively for the Secretary-General, and not the Government, to determine whether certain words or actions of an expert on mission fell within the performance of that expert's mission for the United Nations and that, in order to enable such a determination to be made, the Secretary-General requested urgent access to the expert on mission concerned. (Dossier No. 102)

102. On 27 April 1998, in a Note Verbale to the Permanent Representative of a Member State, the Secretary-General confirmed that immunity from legal process was only functional and observed that, as the Government did not permit access to the expert on mission until after he was pardoned (see the preceding paragraph), the Secretary-General was unable to take a decision on whether the actions leading to the arrest and conviction were indeed related to his official duties until after his pardon. (Dossier No. 103)

103. On 27 April 1998, in a letter to the expert on mission referred to in the preceding two paragraphs, the Chef de Cabinet informed the expert on mission that the Secretary-General was unable to assert immunity in respect of the actions which led to his arrest and conviction since these actions were not related to his mandate as an expert on mission. (Dossier No. 104)

C. RELEVANT LEGISLATIVE INSTRUMENTS AND SECRETARY-GENERAL REPORTS

104. Staff Regulation 1.8, (Dossier No. 105), established by the General Assembly in accordance with paragraph 1, article 101 of the Charter of the United Nations provides, in part, that "[i]n any case where these privileges and immunities arise, the staff member shall immediately report to the Secretary-General, with whom alone it rests to decide whether they shall be waived".

105. General Assembly resolutions entitled "respect for the privileges and immunities of officials of the United Nations and the specialized agencies and related organizations" (Dossier Nos. 106-112)

Resolution 36/232 of 18 December 1981 (Dossier No. 106)
Resolution 41/205 of 19 December 1986 (Dossier No. 107)
Resolution 42/219 of 10 February 1988 (Dossier No. 108)
Resolution 43/225 of 21 December 1988 (Dossier No. 109)
Resolution 45/240 of 8 February 1991 (Dossier No. 110)
Resolution 47/28 of 25 November 1992 (Dossier No. 111)
Resolution 51/227 of 16 May 1997 (Dossier No. 112)

106. Reports of the Secretary-General on "respect for the privileges and immunities of officials of the United Nations and the specialized agencies and related organizations" (Dossier Nos. 113-115)

A/C.5/36/31 of 4 November 1981 (Dossier No. 113)
A/C.5/38/18 of 25 October 1983 (Dossier No. 114)
A/C.5/44/11 of 2 November 1989 (Dossier No. 115)

1994/41. Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers

The Commission on Human Rights,

Guided by articles 7, 8, 10 and 11 of the Universal Declaration of Human Rights and articles 2, 4 and 26 of the International Covenant on Civil and Political Rights,

Convinced that an independent and impartial judiciary and an independent legal profession are essential prerequisites for the protection of human rights and for ensuring that there is no discrimination in the administration of justice,

Bearing in mind the Vienna Declaration and Programme of Action (A/CONF.157/23) adopted by the World Conference on Human Rights, in particular Part I, paragraph 27 and Part II, paragraphs 88, 90 and 95,

Recalling its resolutions 1989/32 of 6 March 1989, 1990/33 of 2 March 1990, 1991/39 of 5 March 1991, 1992/33 of 28 February 1992 and 1993/44 of 5 March 1993,

Recalling also General Assembly resolution 45/166 of 18 December 1990, in which the Assembly welcomed the Basic Principles on the Role of Lawyers and the Guidelines on the Role of Prosecutors adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders and invited Governments to respect them and to take them into account within the framework of their national legislation and practice,

Bearing in mind the principles contained in the draft declaration on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers (E/CN.4/Sub.2/1988/20/Add.1 and Add.1/Corr.1), prepared by Mr. L.M. Singhvi, the importance of which was noted by the Commission on Human Rights, in its resolution 1989/32 of 6 March 1989,

Noting both the increasing frequency of attacks on the independence of judges, lawyers and court officials and the link which exists between the weakening of safeguards for the judiciary and lawyers and the gravity and frequency of violations of human rights,

1. Welcomes the final report on the independence of the judiciary and the protection of practising lawyers (E/CN.4/Sub.2/1993/25 and Add.1), prepared by Mr. Louis Joinet, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities;

2. Endorses the recommendation of the Sub-Commission, as contained in its resolution 1993/39 of 26 August 1993, to create a monitoring mechanism to follow up the question of the independence and impartiality of the judiciary, particularly with regard to judges and lawyers, as well as court officials, and the nature of potential threats to this independence and impartiality;

3. Requests the Chairman of the Commission to appoint, for a period of three years, after consultation with the other members of the Bureau, a special rapporteur whose mandate will consist of the following tasks:

(a) To inquire into any substantial allegations transmitted to him or her and report his or her conclusions thereon;

(b) To identify and record not only attacks on the independence of the judiciary, lawyers and court officials but also progress achieved in protecting and enhancing their independence, and make concrete recommendations including the provision of advisory services or technical assistance when they are requested by the State concerned;

(c) To study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers;

4. Urges all Governments to assist the Special Rapporteur in the discharge of his or her mandate and to transmit to him or her all the information requested;

5. Requests the Special Rapporteur to submit to the Commission, starting with its fifty-first session, a report on the activities connected with his or her mandate;

6. Requests the Secretary-General, within the limits of the resources of the United Nations, to provide the Special Rapporteur with any assistance needed for the discharge of his or her mandate;

7. Decides to consider this question at its fifty-first session;

8. Recommends the following draft decision to the Economic and Social Council for adoption:

[For the text, see chap. I, sect. B, draft decision 11.]

55th meeting
4 March 1994

[Adopted without a vote. See chap. X.]

Ministry of Foreign Affairs

The Hague

2

His Excellency Mr. Ibrahima Fall
Assistant Secretary-General for Human Rights
Palais des Nations
CH - 1211 GENEVA
SWITZERLAND

Date
21st April 1994

Reference
DIO/JS-2192

Mr Assistant Secretary-General,

I have the honour to inform you that after ample reflection and taking into account the discussions held during our bureau meetings immediately following the 50th session of the Commission on Human Rights, I have decided to appoint Mrs. Radhika Coomaraswamy from Sri Lanka as special rapporteur on violence against women, including its causes and consequences, and Dato Param Cumaraswamy from Malaysia as special rapporteur on the independence and impartiality of the judiciary. I am confident that both candidates amply meet the necessary requirements of independency, competence and experience for the fulfilment of these important mandates. I have also taken into account the recommendation of the Commission to reduce, as far as possible, the current imbalance in the geographical distribution of special rapporteur appointments. Please find enclosed the curriculum vitae of both candidates. I am happy to inform you that they have accepted their appointment.
As is customary, a copy of this letter has been sent to the members of the bureau. I would be most grateful if you could inform the regional coordinators as well as the Permanent Representatives of Sri Lanka and Malaysia of these appointments. I would also request the Secretariat to draft a formal communication to both candidates informing them of their appointment.
As for the appointment of a special rapporteur on Zaire and a special representative for Chad in the framework of the 1503-procedure, consultations continue. I will inform you of the outcome in due time.

Please accept Mr. Assistant Secretary-General, the assurances of my highest consideration.

Yours sincerely,

Peter P. van Wulfften Palthe
Chairman of the Commission on
Human Rights at its 50th session

1994/248. Report of the Working Group on Indigenous Populations of the Subcommission on Prevention of Discrimination and Protection of Minorities

At its 42nd plenary meeting, on 22 July 1994, the Economic and Social Council, taking note of Commission on Human Rights resolution 1994/29 of 4 March 1994,[40] authorized the Working Group on Indigenous Populations of the Subcommission on Prevention of Discrimination and Protection of Minorities to meet for five working days prior to the forty-sixth session of the Subcommission, and approved:

(*a*) The Commission's request to the Secretary-General to give all the necessary resources and assistance to the Working Group in the discharge of its tasks, including adequate dissemination of information about the activities of the Working Group to Governments, specialized agencies and non-governmental and indigenous organizations, in order to encourage the widest possible participation in its work;

(*b*) The Commission's decision to authorize the Chairperson-Rapporteur of the Working Group on Indigenous Populations to represent the Working Group at the International Conference on Population and Development to take place at Cairo from 5 to 13 September 1994;

(*c*) The Commission's endorsement of the proposal, made by the Subcommission at its forty-fifth session, to hold a seminar on indigenous land rights and claims, within existing resources, with the participation of representatives of Governments, indigenous people and experts.

1994/249. Human rights and forensic science

At its 42nd plenary meeting, on 22 July 1994, the Economic and Social Council, taking note of Commission on Human Rights resolution 1994/31 of 4 March 1994,[40] approved the Commission's request to the Secretary-General:

(*a*) To maintain and enlarge the list of forensic experts and experts in related fields who could be requested to help international mechanisms in the field of human rights, Governments and the Centre for Human Rights of the Secretariat in providing technical and advisory services, advice in regard to the monitoring of human rights violations and training of local teams and/or assistance in the reunification of families of the disappeared;

(*b*) To provide appropriate resources, within existing overall United Nations resources, to fund the activities of the Centre for Human Rights in implementation of Commission resolution 1994/31.

1994/250. Question of a draft optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

At its 42nd plenary meeting, on 22 July 1994, the Economic and Social Council, taking note of Commission on Human Rights resolution 1994/40 of 4 March 1994,[40]

(*a*) Authorized an open-ended working group of the Commission on Human Rights to meet for a period of two weeks prior to the fifty-first session of the Commission in order to continue the elaboration of a draft optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

(*b*) Requested the Secretary-General to extend to the working group all the necessary facilities for its meetings and to transmit the report of the Working Group[42] to Governments, the specialized agencies, the chairpersons of the human rights treaty bodies and the intergovernmental and non-governmental organizations concerned.

1994/251. Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers

At its 42nd plenary meeting, on 22 July 1994, the Economic and Social Council, taking note of Commission on Human Rights resolution 1994/41 of 4 March 1994,[40] endorsed the decision of the Commission to confirm the proposal of the Subcommission on Prevention of Discrimination and Protection of Minorities to create a monitoring mechanism to follow up the question of the independence and impartiality of the judiciary, particularly with regard to judges and lawyers, as well as court officials, and the nature of problems liable to attack this independence and impartiality, and recommended that the mechanism take the form of a special rapporteur whose mandate would consist of the following tasks:

(*a*) To inquire into any substantial allegations transmitted to him or her and to report his or her conclusions thereon;

(*b*) To identify and record not only attacks on the independence of the judiciary, lawyers and court officials but also progress achieved in protecting and enhancing their independence, and make concrete recommendations, including recommendations for the provision of advisory services or technical assistance when they are requested by the State concerned;

(*c*) To study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers.

The Council also approved the Commission's request to the Secretary-General to provide the Special Rapporteur with all the assistance necessary for the completion of his or her work.

1994/252. Question of human rights and states of emergency

At its 42nd plenary meeting, on 22 July 1994, the Economic and Social Council, taking note of Commission on Human Rights resolution 1994/43 of 4 March 1994[40] and resolution 1993/28 of 25 August 1993 of the Subcommission on Prevention of Discrimination and Protection of Minorities,[43] endorsed the requests made by the Subcommission:

(*a*) To Mr. Leandro Despouy, Special Rapporteur on human rights and states of emergency, to continue to update the list of states of emergency, and to include in his annual

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[42] E/CN.4/1994/25 and Add.1.

[43] See E/CN.4/1994/2-E/CN.4/Sub.2/1993/45 and Corr.1, chap. II, sect. A.

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Fifty-first session
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QUESTION OF THE HUMAN RIGHTS OF ALL PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT, IN PARTICULAR:

(a) TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT;

(b) STATUS OF THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT;

(c) QUESTION OF ENFORCED OR INVOLUNTARY DISAPPEARANCES;

(d) QUESTION OF A DRAFT OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers

Report of the Special Rapporteur, Mr. Param Cumaraswamy, submitted in accordance with Commission on Human Rights resolution 1994/41

GE.95-10600 (E)

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Introduction

A. The mandate

1. At its fiftieth session, in resolution 1994/41 of 4 March 1994, the Commission on Human Rights, noting both the increasing frequency of attacks on judges, lawyers and court officials and the link which existed between the weakening of safeguards for the judiciary and lawyers and the gravity and frequency of violations of human rights, requested the Chairman of the Commission to appoint, for a period of three years, a special rapporteur whose mandate would consist of the following tasks: (a) to inquire into any substantial allegations transmitted to him and to report his conclusions thereon; (b) to identify and record not only attacks on the independence of the judiciary, lawyers and court officials, but also progress achieved in protecting and enhancing their independence, and make concrete recommendations including the provision of advisory services or technical assistance when they were requested by the State concerned; and (c) to study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers.

2. In its decision 1994/251 of 22 July 1994, the Economic and Social Council approved the above requests.

3. In resolution 1994/41 also, the Commission on Human Rights urged all Governments to assist the Special Rapporteur in the performance of his mandate and to transmit to him all the information requested.

4. By letter dated 21 April 1994, the Chairman of the Commission on Human Rights, following consultations with the Bureau, appointed Dato' Param Cumaraswamy (Malaysia) as Special Rapporteur.

5. In this first report, the Special Rapporteur presents his reflections upon, and understanding of, the mandate in general and the standards to which he will refer in carrying out his mandate. Thereafter, the Special Rapporteur describes the methods of work he will employ in fulfilment of his functions. In the hope of realizing the objectives of his mandate, the Special Rapporteur then comments on the resources necessary for the effective implementation of his mandate. Finally, the Special Rapporteur sets out some conclusions and makes some initial recommendations relating to his mandate and its effective implementation.

B. Activities of the Special Rapporteur

6. The first act of the Special Rapporteur (acting in accordance with paragraph 6 of Commission resolution 1993/94 (A)) was his participation in the meeting of special rapporteurs/representatives/experts and chairmen of working groups of the special procedures of the Commission on Human Rights which was held at Geneva from 30 May to 1 June 1994, in accordance with part II, paragraph 95, of the Vienna Declaration and Programme of Action. As reflected in the report of the meeting (E/CN.4/1995/5, annex), the meeting provided the Special Rapporteur with a welcome opportunity to meet with most of the other special rapporteurs and independent experts engaged in the protection of human rights under procedures of the Commission and to consider a variety of issues

of mutual concern. While at the Palais des Nations, the Special Rapporteur took advantage of the occasion to meet with staff of the Centre for Human Rights.

7. The Special Rapporteur visited Geneva for a second time from 11 to 15 September 1994 in order to hold consultations with the Centre, including meetings with the High Commissioner for Human Rights and the Assistant-Secretary-General for Human Rights, concerning substantive and practical matters relating to implementation of the mandate. The Special Rapporteur also took the opportunity to meet representatives of some non-governmental organizations with a special interest in the mandate.

8. While at Geneva in September 1994, the Special Rapporteur undertook to establish initial direct contacts with all States Members of the United Nations, United Nations specialized agencies and bodies having a possible interest in his mandate, various intergovernmental organizations of both a universal and a regional nature, and all non-governmental organizations having a possible interest in his mandate. As a result, over 1,600 letters were sent over the subsequent months to Governments, heads of the judiciary, bar associations and a wide variety of intergovernmental and non-governmental organizations. These letters were intended not only to introduce the Special Rapporteur and his mandate to the various addressees, but also to obtain both general and specific information relating to the implementation of the mandate. Replies are being received, of which the Special Rapporteur is taking account. At the same time, the Special Rapporteur is continuing to compile lists of institutions and persons throughout the world with whom he has yet to establish direct contacts, with a view to achieving the greatest awareness concerning the existence of his mandate and the standards pertaining to the independence of the judiciary and the legal profession which are required in themselves under international law and are also necessary to achieve respect for human rights in general.

9. As it is of special importance for the Special Rapporteur to establish direct contact with national judicial institutions and professional associations of jurists, he has established such contact with most chief justices and bar associations throughout the world. This process is continuing (for example, the Special Rapporteur is soon to address himself to a number of national associations of judges) and it is hoped that close relationships will be formed between these institutions and the Special Rapporteur.

10. The Special Rapporteur is also endeavouring to establish contacts with parliamentary bodies throughout the world with a view to securing their fullest understanding of, and their active engagement in maintaining through legislative means, the independence of the judiciary and the legal profession. Positive contacts have already been established with international associations of parliaments and parliamentarians, and it is expected that the Special Rapporteur will build upon these contacts at the international, regional and national levels.

11. Pursuant to paragraph 3 (a) of Commission resolution 1994/41, the Special Rapporteur has enquired into several allegations of attacks on the judiciary. Some of his inquiries are ongoing, while others appear to have reached their

conclusion. However, in so far as the Special Rapporteur only really began his work subsequent to the Economic and Social Council's approval of his mandate near the end of July 1994, he prefers not to report at this time on any cases with which he has been concerned. It is his intention to report in detail on these matters, and on other substantive aspects of his mandate, in his report to the Commission at its fifty-second session in 1996.

12. Pursuant to paragraph 3 (b) of Commission resolution 1994/41, the Special Rapporteur is seeking to catalogue progress achieved in protecting and enhancing judicial independence and impartiality and the independence of the legal profession, partly through replies he is receiving as a result of his initial contacts with Governments and national judicial institutions and partly through studying selected country situations. In terms of making "concrete recommendations including the provision of advisory services or technical assistance when they are requested by the State concerned", as provided for in paragraph 3 (b) of resolution 1994/41, the Special Rapporteur is paying special attention to countries undergoing transition to democracy since their needs are generally considerable and since positive steps early in their transition will contribute significantly to achievement of the rule of law, respect for human rights and peace and prosperity. In this connection, the Special Rapporteur hopes to work closely with the advisory services programme of the Centre for Human Rights in matters concerning his mandate. To this end, the Special Rapporteur would welcome: (i) being apprised on a regular basis of present and planned involvement of the Centre in the provision of advisory services and technical assistance in the area of judicial independence and impartiality and the independence of the legal profession; and (ii) being consulted on specific services and assistance designed to secure judicial independence and impartiality and the independence of the legal profession.

13. Turning to paragraph 3 (c) of Commission resolution 1994/41, the Special Rapporteur has studied the previous important reports on the subject of judicial independence and impartiality and the independence of the legal profession submitted to the Sub-Commission on Prevention of Discrimination and Protection of Minorities. These reports amply illustrate that several questions of principle require further study and, ultimately, the elaboration of clear standards. While these questions are to be found mainly on the margin of the issues of independence, they nevertheless pose significant obstacles to the protection of human rights in general, for example in states of emergency. So far, the Special Rapporteur has merely taken note of a number of these questions, and it his intention to expound upon certain of them in the course of fulfilling his mandate.

14. With regard to a general matter, the Special Rapporteur wishes to comment upon his decision to choose an appropriate short title for his mandate. Upon taking up his mandate, the Special Rapporteur was referred to as the "Special Rapporteur on the independence and impartiality of the judiciary". However, he soon came to realize that this short title did not convey the breadth of his mandate, which is not well known even among those persons and institutions who hold, or should hold, an interest. For example, as was the case for the independent experts of the Sub-Commission on Prevention of Discrimination and Protection of Minorities who dealt with the subject, the early experience of the Special Rapporteur revealed that lawyers and bar associations are

inadequately aware of the mandate and even their rights and protections under international law. For these persons, the term "judiciary" does not immediately or sufficiently indicate the inclusion of lawyers and other court officers. Consequently, the Special Rapporteur has chosen to begin using the new short title "Special Rapporteur on the independence of judges and lawyers" as of the beginning of 1995, with the understanding that the term "independence", while technically different from "impartiality", tends to imply impartiality. However, the Special Rapporteur does not mean to give the impression that he will not be concerned with structural questions relating to the institutions of the judiciary and the legal profession, including bar associations. Nor should the short title of the Special Rapporteur be interpreted to mean that he will not concern himself with issues affecting the independence and impartiality of assessors. Similarly, the Special Rapporteur will be attentive to interferences with the independence and impartiality of jurors.

I. CONSIDERATIONS ON THE MANDATE

A. Introduction

15. The object of this chapter is to situate the mandate of the Special Rapporteur in the context of the considerable work which has been accomplished so far in elaborating international standards and seeking their full respect. To this end, the Special Rapporteur will briefly recount the historical antecedents of his mandate within the United Nations, describe the legal framework in which his work will be carried out, and identify some of the important questions of principle which he intends to address over the next two years. By doing so, the Special Rapporteur hopes that this report will provide continuity with the work which has come before and will contribute to the clarity and coherency of the work which he intends to carry out in fulfilment of his mandate.

B. Historical background of the mandate

16. The independence and impartiality of judges, lawyers and other actors within the judicial branch of government are considered essential elements in safeguarding human rights. This understanding has been incorporated into various international instruments for the protection of human rights. However, some of the practical difficulties experienced throughout the world in relation to the need for measures and conditions regarded as essential to ensure and secure the independence and impartiality of the judiciary inspired the Sub-Commission on Prevention of Discrimination and Protection of Minorities to request, in its resolution 5 E (XXXI) of 13 September 1978, the Secretary-General to prepare a preliminary study on the matter and to report to the Sub-Commission at its thirty-second session in 1979. Taking into account earlier work of the Sub-Commission related to the administration of justice, the Secretary-General accordingly sought relevant information from the Governments of member States and compiled the replies received in his subsequent report of 11 July 1979 (E/CN.4/Sub.2/428).

17. Following its consideration in 1979 of the report of the Secretary-General, the Sub-Commission sought and received the authorization of the Economic and Social Council (decision 1980/124 of 2 May 1980) to entrust

Mr. L.M. Singhvi with the preparation of a report on the independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers. Mr. Singhvi accordingly submitted a preliminary report on the subject in 1980 (E/CN.4/Sub.2/L.731) and progress reports in 1981 (E/CN.4/Sub.2/481 and Add.1), 1982 (E/CN.4/Sub.2/1982/23) and 1983 (E/CN.4/Sub.2/1983/16).

18. Based upon Mr. Singhvi's successive reports, the Sub-Commission adopted resolution 1984/11, in which it requested him to submit his final report to the Sub-Commission at its thirty-eighth session in 1985, and decided to consider it at that session with a view to the elaboration of a draft body of principles. This decision of the Sub-Commission, and the subsequent work of Mr. Singhvi, served as catalysts for activities by interested persons and non-governmental organizations throughout the world which reinforced and specifically contributed to the elaboration of a draft body of principles. In his final report (E/CN.4/Sub.2/1985/18 and Add.1-6), Mr. Singhvi submitted an initial draft declaration on the independence of justice (the "Singhvi draft declaration"). In addition to his own draft, Mr. Singhvi annexed to his report the Draft principles on the independence of the legal profession (formulated by a meeting of lawyers from throughout the world, held at Noto, Italy, from 10 to 14 May 1982, in which the Special Rapporteur had the honour to participate and contribute) and the Universal Declaration on the Independence of Justice (adopted by a meeting of eminent jurists in Montreal, Canada, on 10 June 1983).

19. Pursuant to Sub-Commission decision 1985/107, Mr. Singhvi's final report was circulated to the members of the Sub-Commission for their comments, upon which Mr. Singhvi was requested to report again to the Sub-Commission at its thirty-ninth session. A compilation of the comments made by members of the Sub-Commission is contained in document E/CN.4/Sub.2/1987/17.

20. Taking into consideration the comments he had received from members of the Sub-Commission and also from Member States (following circulation of the draft pursuant to Sub-Commission resolution 1987/23), Mr. Singhvi submitted a report reflecting these comments and suggestions on the draft declaration (E/CN.4/Sub.2/1988/20), together with a revised version of the draft declaration (E/CN.4/Sub.2/1988/20/Add.1 and Add.1/Corr.1), to the Sub-Commission at its fortieth session. By this time, the international community had already elaborated clear standards regarding specifically the judiciary: the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, meeting at Milan from 26 August to 6 September 1985, had adopted the Basic Principles on the Independence of the Judiciary (A/CONF.121/22, chap. I, sect. D.2), as endorsed by the United Nations General Assembly in its resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. At the same time, Draft Basic Principles on the Role of Lawyers were being considered under the auspices of the United Nations on the basis of a working paper prepared by the secretariat of the United Nations Office at Vienna – apparently without reference to the draft declaration prepared by Mr. Singhvi (see E/CN.4/Sub.2/1988/20, para. 53). These closely related activities of the United Nations contributed to Mr. Singhvi's revised draft declaration.

21. In its resolution 1988/25, the Sub-Commission expressed its appreciation and thanks to the Special Rapporteur, Mr. Singhvi, for the enduring and valuable contribution he had made to the legal doctrine relating to the independence of justice, which was one of the primary prerequisites for the promotion and protection of human rights, and decided to refer the Singhvi draft declaration, under the title "Draft declaration on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers", to the Commission on Human Rights for further consideration. It also decided to consider the draft declaration under a separate item of the agenda at its forty-first session.

22. The Commission on Human Rights, at its forty-fifth session, in resolution 1989/32, invited Governments to take into account the principles set forth in the Singhvi draft declaration in implementing the Basic Principles on the Independence of the Judiciary. The Commission also welcomed the decision of the Sub-Commission to consider an agenda item on the draft declaration at its forty-first session and requested the Sub-Commission, under the same agenda item, to consider effective means of monitoring the implementation of the Basic Principles on the Independence of the Judiciary and the protection of practising lawyers.

23. In its resolution 1989/22, the Sub-Commission, at its forty-first session, responded to the above request of the Commission by inviting Mr. Louis Joinet to prepare a working paper on means of monitoring implementation of the relevant standards. The Commission on Human Rights, in its resolution 1990/33, endorsed Sub-Commission resolution 1989/22 and recommended that the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders consider as a matter of priority the draft basic principles on the role of lawyers elaborated by the Committee on Crime Prevention and Control, with a view to their adoption. Meeting at Havana from 27 August to 7 September 1990, the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders did in fact adopt the aforementioned principles, together with Guidelines on the Role of Prosecutors.

24. In accordance with his mandate, Mr. Joinet submitted a working paper to the Sub-Commission at its forty-second session (E/CN.4/Sub.2/1990/35) in which he recounted the then current United Nations standard-setting and reporting activities, categorized violations of international norms relative to judicial independence and impartiality and the independence of the legal profession, surveyed positive experiences in protecting the independence of judges and lawyers, and drew some conclusions. In the same working paper, Mr. Joinet recommended that the Sub-Commission request one of its members to prepare a report which would (a) make a system-wide analysis of the advisory service and technical assistance programmes of the United Nations as regards the subject and (b) bring to the attention of the Sub-Commission cases of legislative and practical measures serving to strengthen judicial independence and impartiality and the independence of the legal profession or, on the contrary, cases which constituted violations of these norms (E/CN.4/Sub.2/1990/35, para. 76).

25. After considering the working paper submitted by Mr. Joinet, the Sub-Commission decided, in its resolution 1990/23, to entrust Mr. Joinet with the preparation of such a report as he had recommended. That decision was endorsed by the Commission in its resolution 1991/39.

26. In the meantime, the standard-setting activities had continued in relation to the roles of lawyers and prosecutors: both the Basic Principles on the Role of Lawyers and Guidelines on the Role of Prosecutors were adopted at the Eighth United Nations Congress on the Prevention and Treatment of Offenders, held at Havana from 27 August to 7 September 1990; the two instruments were subsequently welcomed by the General Assembly in its resolutions 45/121 of 14 December 1990 and 45/166 of 18 December 1990.

27. The following year, Mr. Joinet submitted a comprehensive report to the Sub-Commission at its forty-third session (E/CN.4/Sub.2/1991/30). In this report, Mr. Joinet surveyed the advisory services and technical assistance rendered by the United Nations in the field of human rights and other related fields; surveyed measures and practices which had strengthened, or to the contrary weakened, the safeguards of independence and protection; drew conclusions and made practical recommendations. While comprehensive in the matters addressed, the report was not, Mr. Joinet admitted, exhaustive. In relation to measures and practices which had served to strengthen or weaken the independence of the judiciary and the protection of lawyers, he had "intended merely to illustrate, from the standpoint of method, what a report on the subject might cover in relation to the international standards" (E/CN.4/Sub.2/1991/30, para. 301). In fact, in his report Mr. Joinet had given priority to the matter of advisory services and technical assistance and addressed only "the major obstacles – especially physical pressure", partly because "the information received or collected ... [was] too abundant to be dealt with in a single report" (para. 302). Consequently, Mr. Joinet made detailed recommendations with respect to advisory services and technical assistance, but, with regard to measures and practices which had served to strengthen or weaken the independence of the judiciary and the protection of lawyers, he recommended renewal of that part of his mandate to enable him to provide the Sub-Commission with the fullest possible information (para. 312).

28. In resolution 1991/35 of 29 August 1991, the Sub-Commission decided to entrust Mr. Joinet with the preparation of another report to bring to its attention information on practices and measures which had served to strengthen or to weaken the independence of the judiciary and the legal profession in accordance with United Nations standards. In its resolution 1992/33, the Commission on Human Rights endorsed the Sub-Commission's decision.

29. At its forty-fourth session, the Sub-Commission considered the further report of Mr. Joinet (E/CN.4/Sub.2/1992/25 and Add.1), in which he reported upon positive measures and practices aimed at strengthening the safeguards of independence and protection and cited cases of measures and practices which had served to weaken these safeguards. He divided those cases into those measures and practices which had: constituted "pressure" on judges and lawyers; been implemented during states of emergency and in the administration of military justice; weakened the application of statutory safeguards and the tenure of judges; weakened the application of the safeguards relating to

access to the assistance of a lawyer or to the practice of the profession; and weakened the application of the safeguards relating to the freedoms of association and expression of lawyers. After considering his report, the Sub-Commission decided, in resolution 1992/38 of 28 August 1992, to entrust Mr. Joinet with the preparation of a final report which, in addition to bringing to the attention of the Sub-Commission further information on practices and measures which had served to strengthen or to weaken the independence of the judiciary and the protection of practising lawyers in accordance with United Nations standards, would enable him: to make specific recommendations regarding the independence of the judiciary and the protection of practising lawyers to be taken into account in the United Nations advisory services and technical assistance programmes (following upon his earlier recommendations); to examine ways of enhancing cooperation and avoiding overlapping and duplication in the work of the Commission on Crime Prevention and Criminal Justice and that of the Sub-Commission; and to elaborate upon the recommendations made in his 1992 report. Sub-Commission resolution 1992/38 was subsequently endorsed by the Commission on Human Rights at its forty-ninth session in resolution 1993/44 of 5 March 1993.

30. In his final report to the Sub-Commission (E/CN.4/Sub.2/1993/25), in which he reported on what he termed "positive and negative measures and practices concerning guarantees of independence, impartiality and protection", Mr. Joinet provided: an update on the relevant activities under the United Nations programme of advisory services and technical assistance; a summary of the development of standards at both the universal and regional levels; and an update of his survey of positive and negative measures and practices by Governments within their own domestic jurisdiction. In relation to "negative measures and practices", Mr. Joinet addressed both de facto violations and violations in the operation of the law, under the following headings: "violence, physical threats and harassment"; "actions undermining the courts' need for objective and impartial information"; "declaration of states of emergency or establishment of courts of special jurisdiction"; "encroachments on professional or jurisdictional status"; and "violations of fundamental freedoms". Mr. Joinet concluded his report with suggestions for the reinforcement of cooperation between the United Nations human rights programme and the United Nations crime prevention and criminal justice programme and a recommendation for the establishment of a monitoring mechanism. Specifically, he recommended the creation of a special procedure capable of: examining what he characterized as "the still too numerous violations perpetrated today, only the most symptomatic of which have been described in the present report" (E/CN.4/Sub.2/1993/25, chap. II, para. 10); "eliciting the cooperation of Governments" (E/CN.4/Sub.2/1993/25, chap. II, para. 11) with a view to addressing relevant questions or situations; remedying "the insufficient involvement of judges' and lawyers' professional organizations in a question which is nevertheless of direct concern to them" (ibid.) - and for the broader interests of society at large, the Special Rapporteur would add; and "prospecting for new work areas whose importance and urgency, already considerable, will probably attain priority status: justice and the media, justice and reasons of state, justice and emergency situations, justice and anti-terrorism measures, etc." (ibid.).

31. On the basis of the various studies and reports prepared under Sub-Commission mandates during more than a decade, and taking into consideration especially the final report of Mr. Joinet (E/CN.4/Sub.2/1993/25 and Add.1), the Sub-Commission recommended, in its resolution 1993/39 of 26 August 1993, the creation of "a monitoring mechanism to follow up the question of the independence and impartiality of the judiciary, particularly with regard to judges and lawyers, as well as court officers, and the nature of problems liable to attack this independence and impartiality". The Commission on Human Rights, in its resolution 1994/41 of 4 March 1994, endorsed the recommendation of the Sub-Commission, and thereupon requested the Chairman of the Commission to appoint a special rapporteur. The substance of Commission resolution 1994/41, as approved by Economic and Social Council decision 1994/251, is recounted in paragraphs 1 to 3 above.

C. The legal framework

32. The Special Rapporteur observes that the requirements of independent and impartial justice are universal and are rooted in both natural and positive law. At the international level, the sources of this law are to be found in conventional undertakings, customary obligations and general principles of law.

33. The Special Rapporteur will not here embark upon a treatise intended to establish the basis and content of applicable law. Indeed, in each case, the specific combination of applicable standards will be a function of the conventional obligations binding upon the concerned State in conjunction with the equally binding customary obligations and general principles of law. However, in this section of his report, the Special Rapporteur wishes to clarify the rudimentary elements he will refer to in assessing compliance by a State with its obligations.

34. In relation to the underlying concepts of judicial independence and impartiality, which the Special Rapporteur asserts are "general principles of law recognized by civilized nations" in the sense of Article 38 (1) (c) of the Statute of the International Court of Justice, the Special Rapporteur can do no better than to quote the following passages of Mr. Singhvi's lucid final report to the Sub-Commission in 1985 (E/CN.4/Sub.2/1985/18 and Add.1-6):

> "75. Historical analysis and contemporary profiles of the judicial functions and the machinery of justice shows the worldwide recognition of the distinctive role of the judiciary. The principles of impartiality and independence are the hallmarks of the rationale and the legitimacy of the judicial function in every State. The concepts of the impartiality and independence of the judiciary postulate individual attributes as well as institutional conditions. These are not mere vague nebulous ideas but fairly precise concepts in municipal and international law. Their absence leads to a denial of justice and makes the credibility of the judicial process dubious. It needs to be stressed that impartiality and independence of the judiciary is more a human right of the consumers of justice than a privilege of the judiciary for its own sake.

"76. Judges must be impartial and independent and free from any restrictions, inducements, pressures, threats or interference, direct or indirect, and they should have the qualities of conscientiousness, equipoise, courage, objectivity, understanding, humanity and learning, because those are the prerequisites of a fair trial and credible and reliable adjudication ..."

"79. The concept of impartiality is in a sense distinct from the concept of independence. Impartiality implies freedom from bias, prejudice and partisanship; it means not favouring one more than another; it connotes objectivity and an absence of affection or ill-will. To be impartial as a judge is to hold the scales even and to adjudicate without fear or favour in order to do right ..."

"81. ... The duties of a juror and an assessor and those of a lawyer are quite different but their independence equally implies freedom from interference by the Executive or Legislative or even by the judiciary as well as by others in the fearless and conscientious discharge of their duties in the exercise of their functions ... Jurors and assessors, like judges, are required to be impartial as well as independent. A lawyer, however, is not expected to be impartial in the manner of a judge, juror or assessor, but he has to be free from external pressures and interference. His duty is to represent his clients and their cases, and to defend their rights and legitimate interests, and in the performance of that duty, he has to be independent in order that litigants may have trust and confidence in lawyers representing them and lawyers as a class may have the capacity to withstand pressure and interference."

35. Mr. Singhvi went on in his report to demonstrate that the principles of judicial independence and impartiality are reflected in the legal systems of the world by constitutional and legislative means supported by an overwhelming practice. As such, Mr. Singhvi was moved to observe that "there is in fact a coherent world profile of judicial independence and it is not merely a matter of ritual verbiage" (E/CN.4/Sub.2/1985/18/Add.1, para. 104). The Special Rapporteur fully shares the observation of Mr. Singhvi. Moreover, the Special Rapporteur is of the opinion that the general practice of providing independent and impartial justice is accepted by States as a matter of law and constitutes, therefore, an international custom in the sense of Article 38 (1) (b) of the Statute of the International Court of Justice.

36. While the basic obligations and their essential elements may be rooted in international custom and the general principles of law recognized by civilized nations, the specificities of these obligations have become the subject of some articulation in various international instruments at both the universal and regional levels. Although the Special Rapporteur has no authority to supervise compliance by States with obligations arising at the regional level, he observes that several of these instruments reiterate and reinforce universal obligations. At the universal level, the Special Rapporteur draws particular attention to the provisions of the 1948 Universal Declaration of Human Rights, the 1985 Basic Principles on the Independence of the Judiciary, the 1990 Basic Principles on the Role of Lawyers, and the 1990 Guidelines on

the Role of Prosecutors. It is to be noted in regard to the aforementioned instruments that their texts were elaborated by United Nations bodies and received full endorsement by the General Assembly.

37. With regard to conventional obligations, the Special Rapporteur draws attention first and foremost to the obligations emanating from the Charter of the United Nations. Specifically, the Charter refers in its Preamble, in Article 1 (3) and Article 55 (c), to the imperatives of universal respect for human rights. The Preamble also declares the determination "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained". The Special Rapporteur observes in this relation that the overall conception of "justice" embodied in the Charter and the work of the United Nations incorporates respect for human rights and is conditioned on judicial independence and impartiality as such and for the safeguard of other human rights.

38. The Special Rapporteur observes that the further specification of the conventional obligations of the Charter entailed the elaboration of the Universal Declaration of Human Rights and subsequent instruments for the international protection of human rights. As such, at least those articles of the Universal Declaration of Human Rights which are intrinsic to respect for human rights in general may be said to proceed from the conventional undertaking of States Members of the United Nations as embodied in the Charter. The Special Rapporteur holds this to be true of articles 7, 8, 10 and 11 of the Universal Declaration of Human Rights, which provide as follows:

"Article 7

"All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

"Article 8

"Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

"Article 10

"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

"Article 11

"1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

"2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."

39. The Special Rapporteur observes that whereas the requirements of independent and impartial justice are explicit in article 10 of the Universal Declaration, they are clearly implied in articles 7, 8 and 11. The Special Rapporteur also observes that this understanding has been upheld and repeated by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, the Commission on Human Rights and the General Assembly by way of consistent preambular references in virtually every resolution adopted by these bodies on the subject in question.

40. Turning to more specific conventional obligations, the Special Rapporteur refers to articles 2, 14 and 26 of the 1966 International Covenant on Civil and Political Rights, which provide as follows:

"Article 2

"1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

"2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

"3. Each State Party to the present Covenant undertakes:

"(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

"(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

"(c) To ensure that the competent authorities shall enforce such remedies when granted."

"Article 14

"1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the Parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

"2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

"3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

"(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

"(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

"(c) To be tried without undue delay;

"(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

"(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

"(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

"(g) Not to be compelled to testify against himself or to confess guilt.

"4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

"5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

"6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

"7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

"Article 26

"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

41. The Special Rapporteur observes that whereas the requirements of independent and impartial justice are explicit in article 14 quoted above, they are clearly implied in articles 2 and 26. The Special Rapporteur also observes that this understanding has been upheld and repeated by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, the Commission on Human Rights and the General Assembly by way of consistent preambular references in virtually every resolution adopted by these bodies on the subject in question.

42. The Special Rapporteur observes that the requirements of an independent and impartial judiciary, and independent lawyers, which are necessary for the implementation of articles 2, 14 and 26 of the International Covenant on Civil and Political Rights, are also necessary for the effective realization and enjoyment of most other rights and freedoms, especially with regard to those provisions which proscribe arbitrary acts and those provisions which prescribe judicial supervision. Articles 6.1, 6.2 and 9 of the Covenant are particularly relevant in this relation:

"Article 6

"1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

"2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not

contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court."

"Article 9

"1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

"2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

"3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

"4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

"5. Anyone who has been victim of unlawful arrest or detention shall have an enforceable right to compensation."

43. In interpreting the full implications of the provisions of the International Covenant on Civil and Political Rights (and those of the Universal Declaration of Human Rights) requiring or relating to judicial supervision, Mr. Singhvi observed that, in the elaboration of the instruments, "the concepts of independence and impartiality were not analysed or elucidated. These broad concepts were taken to be axiomatic and did not engender any controversy" (E/CN.4/Sub.2/1985/18, para. 28).

44. With respect to more specific interpretation, the Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights, and acting pursuant to article 40.4, stated in its General Comment 13 of 1984 that the notion of "a competent, independent and impartial tribunal established by law", as stipulated in article 14.1 of the Covenant, raises matters regarding "the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the condition governing promotion, transfer and cessation of their functions and the actual independence of the judiciary from the executive branch and the legislative" (HRI/GEN/1, General Comment 13, para. 3).

45. In the elaboration of its own jurisprudence, the Human Rights Committee, as expressed through its views upon individual communications received

pursuant to the Optional Protocol to the International Covenant on Civil and Political Rights, has stated in relation to article 14.1 that "the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception" (Communication No. 263/1987, González del Río v. Peru, Decision of 20 November 1992, CCPR/C/46/D/263/1987, para. 5.2). More specifically, the Human Rights Committee has stated:

> "'Impartiality' of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties. Where the grounds for disqualification of a judge are laid down by law, it is incumbent upon the court to consider ex officio these grounds and to replace members of the court falling under the disqualification criteria. A trial flawed by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be fair or impartial within the meaning of article 14." (Communication No. 387/1989, Karttunen v. Finland, Decision of 17 November 1992, CCPR/C/46/D/387/1989, para. 7.2)

46. Turning to other conventional obligations in the field of human rights which require judicial independence and impartiality, the Special Rapporteur refers to: articles 5.a and 6 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination; articles 2 (c), 15.1 and 15.2 of the 1979 Convention on the Elimination of All Forms of Discrimination against Women; article 2.1 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and articles 9.1 and 12.2 of the 1989 Convention on the Rights of the Child. The Special Rapporteur considers that the requirements of independent and impartial justice are implicit in, and are in fact or very closely related to the purpose of, the aforementioned provisions, which read as follows:

"International Convention on the Elimination of All Forms of Racial Discrimination

"Article 5

"...

"(a) The right to equal treatment before the tribunals and all other organs administering justice;

"..."

"Article 6

"States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination."

"Convention on the Elimination of All Forms of Discrimination against Women

"Article 2

"...

"(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;"

"Article 15

"1. States Parties shall accord to women equality with men before the law.

"2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals."

"Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

"Article 2

"1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."

"Convention on the Rights of the Child

"Article 9

"1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. ..."

"Article 12

"1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

"2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

47. Although the supervisory bodies established under the above-mentioned Conventions have not so far chosen to pronounce themselves, through such general recommendations as they are entitled to issue, on the implicit requirements of judicial independence and impartiality, the Special Rapporteur observes that at least the jurisprudence of the Committee on the Elimination of Racial Discrimination has confirmed the requirement of impartiality with respect to article 5 (a) of the International Convention on the Elimination of All Forms of Racial Discrimination (see Communication No. 3/1991, Narrainen v. Norway, Opinion of 24 March 1994, CERD/C/44/D/3/1991, paras. 9.1-10). The Special Rapporteur believes that any contest of the other above-cited provisions would result in similar authoritative views or opinions.

48. Of similar importance to the conventional obligations in the foundational human rights instruments referred to above are article 16 of the 1951 Convention relating to the Status of Refugees and article 16 of the 1954 Convention relating to the Status of Stateless Persons, which provide as follows:

"Convention relating to the Status of Refugees

"Article 16. - Access to courts

"1. A refugee shall have free access to the courts of law on the territory of all Contracting States.

"2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from cautio judicatum solvi.

"3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence."

"Convention relating to the Status of Stateless Persons

"Article 16. - Access to courts

"1. A stateless person shall have free access to the courts of law on the territory of all Contracting States.

"2. A stateless person shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from cautio judicatum solvi.

"3. A stateless person shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence."

49. The Special Rapporteur observes that the references to "courts" in article 16 of the Convention relating to the Status of Refugees, imply the conditions of independence and impartiality. Indeed, so far as the Special Rapporteur has been able to determine, this implication appears to have been so self-evident as to have never inspired discussion in the drafting process, interpretative notes or circulars of the Division of International Protection of the Office of the United Nations High Commissioner for Refugees (UNHCR), authoritative statements by the Executive Committee of UNHCR or any other similar body, or even analyses in any subsequent academic commentaries on the Convention. The same absence of controversy or even concern appears to have characterized the drafting, analysis, implementation and academic treatment of article 16 of the Convention relating to the Status of Stateless Persons. The apparent absence of doubt most probably is attributable to the logic underlying the provisions - that the person for whom protection is aimed should have recourse to an instance which is not subject to executive or legislative dictates or interests and which is also free from bias, i.e. that the instance be independent and impartial. If this were not so, the Special Rapporteur submits that the provisions would lose their reason for being.

50. Returning to the provisions of the Basic Principles on the Independence of the Judiciary, the Basic Principles on the Role of Lawyers, and the Guidelines on the Role of Prosecutors to which the Special Rapporteur has referred above and to which he attaches special importance as the most precise articulations of the standards relating to judicial independence and impartiality and to the independence of the legal profession, it is to be understood that these instruments will constitute the main references in implementation of the present mandate.

51. While the legal framework of the Special Rapporteur's mandate may be said to be a composite of various obligations arising over the years from the different sources of international law, the Special Rapporteur also attaches considerable importance to Part I, paragraph 27 of the Vienna Declaration and Programme of Action (A/CONF.157/23), unanimously adopted on 25 June 1993 by the World Conference on Human Rights, which brings together the matter in a concise fashion, declaring, in part, as follows:

"Every State should provide an effective framework of remedies to redress human rights grievances or violations. The administration of justice, including law enforcement and prosecutorial agencies and, especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development ..."

52. Despite the quite developed legal content of the notions of judicial independence and impartiality, and also the broader notion of an independent legal profession, some lacunae remain on the margin of these concepts in

international law. This fact explains the existence of the third part of the Special Rapporteur's mandate, which relates to questions of principle requiring clarification, if not further elaboration and possible standard-setting.

D. Some issues of special importance

53. As noted above, the Special Rapporteur is mandated "to study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers" (Commission resolution 1994/41, para. 3 (c)).

54. In studying the work of the Sub-Commission which preceded the creation of his mandate, the Special Rapporteur observes that several questions of principle have already been raised, particularly by Mr. Joinet in his reports. Specifically, Mr. Joinet suggested that the following issues might be given priority status under a monitoring mechanism such as has now been established: justice and the media, justice and reasons of State, justice and emergency situations, justice and anti-terrorism measures (E/CN.4/Sub.2/1993/25, chap. II, para. 11).

55. In fact, as the Special Rapporteur has already indicated, some issues require clarification only. For example, clarification (or perhaps, more accurately, reiteration) may be necessary in relation to the principle of the separation of powers, which is the bedrock upon which the requirements of judicial independence and impartiality are founded. Understanding of, and respect for, the principle of the separation of powers is a sine qua non for a democratic State and is, therefore, of cardinal importance for countries in transition to democracy – which heretofore have been typically characterized by precisely the absence of a separation of powers. Thus, the Special Rapporteur will emphasize the special and urgent necessity for respecting the principle of separation of powers and the requirements of judicial independence and impartiality, especially in countries in transition to democracy. He is confident that, in doing so, the valuable contribution made by independent and impartial justice to national development will also become apparent.

56. Another case where clarification may be necessary is with regard to the function of judicial review, or its equivalent, of the constitutionality or legality of executive decisions, administrative orders and legislative acts. Early in the implementation of his mandate, the Special Rapporteur has already observed a considerable misunderstanding on the part of governmental authorities and even parliamentarians. The misconception seems to be that judicial review is a matter of substituting the opinions of judges for the determinations or acts of the competent authorities within or under the executive or legislative branches of government. The often heard argument is: "How could judges, who are merely appointed, set aside the decisions of the elected representatives of the people and substitute their own decisions?" This misunderstanding tends also to cause the executive or legislative branches to seek to limit, or even suspend, the power of judicial review, i.e. to interfere with judicial independence. Of course, the function of judicial review serves only to ensure that the executive and legislative branches carry out their responsibilities according to law, and that their determinations or

acts do not exceed their accorded powers. The process of judicial review serves to check executive and legislative excesses by upholding the rule of law; it is in no sense a matter of substitution. However, because of the seemingly widespread misunderstanding of the power of judicial review (which is so vital for the protection of the rule of law), the Special Rapporteur will devote some effort to addressing the problem, especially in the context of countries undergoing transition to democracy.

57. Aside from those issues which may require some clarification, it is evident that some standards will have to be further elaborated in terms of the specificities of their application in certain contexts or situations, while other questions of principle will require the elaboration of entirely new standards in order to fill existing gaps. In relation to the former, it is to be observed that the criterion of "independence" is not always assured with respect to military courts, revolutionary tribunals, or similar special courts. In these cases, the extent of the criterion of independence is at issue and requires a clear and sufficient response in terms of application of existing standards.

58. The complexities of the modern State, together with genuine threats which manifest themselves indiscriminately against whole societies, raise questions of principle which may well require additional standards in relation to judicial independence and impartiality and to the independence of the legal profession. However, arguments invoked by the executive to restrict judicial independence on the basis of "reasons of State" (for example, national security) must be carefully scrutinized and clear limits to the restrictions must be established. The Special Rapporteur is confident that creative solutions can be found which would overcome problems of, for example, sensitive documentation which the executive might seek to withhold from the judiciary. In order to avoid what Mr. Joinet has seen to be an "excessive usage of the prerogatives conferred on governmental authorities" (E/CN.4/Sub.2/1993/25, para. 116), examination of the problem will have to be initiated.

59. Another question of considerable concern to the Special Rapporteur arises in relation to states of emergency. One commentator has observed concisely that "the emasculation of the judiciary and the harassment of defence lawyers are not uncommon in a state of emergency" (Chowdhury, Subrata Roy, Rule of Law in a State of Emergency, Pinter Publishers, London, 1989, p. 130). Indeed, decrees instituting states of emergency are often followed by mass dismissals of judges, the creation of special courts and the restriction or suspension of the judicial review function. Concern over such matters has been expressed over the years by many organizations and in many forums, for example, by the International Commission of Jurists and its Centre on the Independence of Judges and Lawyers, the International Law Association and the Sub-Commission on Prevention of Discrimination and Protection of Minorities, and there is no doubt that the matter remains in need of resolution. In this connection, the Special Rapporteur takes note of paragraph 9 of the "Guidelines for the Development of Legislation on States of Emergency" (entitled "Effects of a state of emergency on the judiciary", and which seeks to protect, inter alia, the critical function of judicial review) annexed to the fourth annual report

and list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency, submitted to the Sub-Commission by Mr. Leandro Despouy, Special Rapporteur appointed pursuant to Economic and Social Council resolution 1985/37 (E/CN.4/Sub.2/1991/28).

60. The scourge of terrorism has also given rise to anti-terrorism measures which often present problems for judicial independence or the independence of the legal profession. As in the case of states of emergency, one feature of anti-terrorism measures has been the creation of special courts. In some countries, procedural requirements of the measures constitute clear interferences with the lawyer-client relationship, for example, interferences with confidentiality. Other measures, such as the increasingly broadly applied technique of hooding judges in order to protect them from reprisals, raise larger questions of due process which may have some bearing on the notions of judicial independence and impartiality. Some standard-setting may be required in this area.

61. Another source of increasing concern is the relationship between the media and the judiciary. In this era of rapidly developing communications technologies, it has become difficult at times to balance the equally important freedom of expression (and the corresponding right to information) on the one hand with the requirements of fair trial (featuring an independent and impartial judiciary) on the other hand. Certainly, judges (and/or jurors) must be protected against pressures which would implant or effect bias, or even cause the appearance of such bias, to the detriment of the rule of law in a specific case or in general. At the same time, one must be extremely careful not to restrict unnecessarily the freedom of expression. The question must be examined, a fine balance between these two competing, equally important, rights must be sought, and additional standards of protection may have to be developed in this connection.

62. In referring to the above issues, the Special Rapporteur has sought only to identify some questions of principle to which he attaches special importance. With the cooperation of interested Governments, intergovernmental organizations, non-governmental organizations and individuals, the Special Rapporteur hopes to be able to contribute constructively to the further elaboration of appropriate standards of judicial independence and impartiality and of the independence of the legal profession.

II. METHODS OF WORK

A. Introduction

63. In reviewing the work which has led up to the creation of his mandate, and as a result of his own early experience, the Special Rapporteur wishes to make the preliminary observation that his mandate applies to a wide spectrum of court officers, as its long title indicates. Accordingly, the Special Rapporteur will address issues affecting the officers of the court concerned under his mandate. However, the Special Rapporteur also takes note of the experience of Mr. Joinet which led him to observe that, in relation to the broader legal profession, "it seems that the judiciary and lawyers are the

only professions to run serious risks" (E/CN.4/Sub.2/1992/25/Add.1, para. 6 (2)(e)). As a practical consequence, this means that the Special Rapporteur will address matters affecting principally judges and lawyers, whatever their official role in the judicial branch of government.

64. With regard to definitions, the Special Rapporteur will address himself to all cases, situations and matters involving performance of the functions of judges (whether in the superior or the subordinate courts, or in special tribunals created by statutes), jurors, assessors and lawyers, whether the persons involved are professional or lay, whether their functions or appointments are of regular standing or ad hoc, and irrespective of their formal qualifications or recognition.

65. In devising methods of work for implementing his mandate, the Special Rapporteur is conscious of the fact that his mandate was created in response to concrete and practical problems. In many countries, judges and lawyers suffer reprisals for performing their professional functions. Interferences range from professional sanctions and dismissals through arbitrary arrests and detentions to physical attacks including killings and disappearances. In addition to interferences with individual judges or lawyers, there have been many incidents where the executive or legislative branches have suspended certain functions of the judicial branch, or in some cases legislated them out of existence, i.e. there have been interferences with the structures and institutions which administer justice, including bar associations. The Special Rapporteur finds that the independence and impartiality of the judiciary can be effectively secured if there is in the State a well-entrenched independent mechanism, independent of the executive and legislative arms of government, responsible for the appointment, promotion, transfer, and dismissal of judges (as noted in Human Rights Committee General Comment 13). In addition, financial independence from the executive and legislative arms of government is vital for an independent and impartial system of justice. Consequently, the Special Rapporteur will inquire into the availability of such mechanisms in States Members of the Untied Nations.

66. The purpose of the present chapter is to outline how the Special Rapporteur intends to implement each aspect of his mandate in a practical way. The essential work of the mandate has been articulated in paragraph 3 of Commission resolution 1994/41. Implementation of the mandated tasks requires: (i) fair and reliable methods of investigation into allegations; (ii) reliable methods of assessing progress achieved in protecting and enhancing the independence of the judiciary, together with reliable methods of assessing specific needs in order to make appropriate and concrete recommendations leading to real improvements; and (iii) methods of identifying and examining matters of principle concerning the independence and impartiality of the judiciary and the independence of the legal profession.

67. As a general rule, the Special Rapporteur will make himself available on the widest basis to the greatest extent of his abilities. He will seek to establish, and has already taken steps in this direction, direct contacts with Governments, relevant domestic authorities, intergovernmental organizations, relevant professional organizations and institutions, other interested international and national non-governmental organizations, academic institutions and individuals.

68. As a second general rule, the Special Rapporteur's approach will emphasize the prevention of violations. Hence, the Special Rapporteur will encourage dissemination of the relevant standards and will respond promptly upon being informed of possible threats to judicial independence and the independence of the legal profession.

69. In relation to other thematic mechanisms, the Special Rapporteur wishes to express his intention to cooperate fully, for example through regular consultations, joint studies and joint missions when appropriate, as recommended in the Joint Declaration of the Independent Experts Responsible for the Special Procedures for the Protection of Human Rights (A/CONF.157/9) and in the report on the meeting of independent experts responsible for the special procedures held at Geneva from 30 May to 1 June 1994 (E/CN.4/1995/5).

B. Concerning alleged violations

70. Paragraph 3 (a) of Commission resolution 1994/41 establishes a mandate which is consistent with the other special thematic procedures. Hence, in his methodology the Special Rapporteur will draw upon the experience acquired by the various thematic mechanisms and will largely follow the established common practice. In particular, he takes note of the methods of work used by the Special Rapporteur on extrajudicial, summary or arbitrary executions (E/CN.4/1994/7, paras. 13-67) and the Special Rapporteur on torture (E/CN.4/1994/31, paras. 5-23).

71. The Special Rapporteur's mandate encompasses a broad range of issues relating to the protection of the independence of the judiciary and the legal profession. Since interferences with judicial independence may be directed against both individuals and the institutions or branch as such, the Special Rapporteur will have to consider general situations as well as concrete incidents and individual cases.

72. In relation to the legal profession, the Special Rapporteur is conscious of the fact that the role of lawyers and their respective bar associations in upholding human rights and fundamental freedoms, as referred to in paragraph 14 of the Basic Principles on the Role of Lawyers, is sometimes seen by Governments as lawyers dabbling in politics. The Special Rapporteur will be vigilant in the protection of this important role of lawyers in upholding these rights and freedoms and will seek to bring offending Governments to account; the Special Rapporteur is aware of instances where lawyers have been arbitrarily detained without trial and of some cases in which their law practices have been subjected to economic sanctions. However, the Special Rapporteur will be equally vigilant in scrutinizing situations where lawyers may be using their bar associations to indulge in partisan politics, thus compromising the independence of the legal profession. In this connection, the Special Rapporteur will seek to distinguish between engagement in the protection of those human rights which have political connotations, and engagement in politics *per se*.

73. In all cases, direct contacts with the alleged victims and/or their representatives will be sought. Corroborative or supplementary information will also be sought from sources other than the alleged victims or their representatives.

74. Where the information received by the Special Rapporteur is prima facie credible, the Special Rapporteur will transmit the allegation, usually by letter, to the concerned Government in order to obtain the Government's response.

75. The credibility of the source of the allegations will be established by the Special Rapporteur by reference to: the degree of detail presented by the alleged victim about him or herself and the event or interference alleged; corroborative sources; logic; the laws in force in the concerned State.

76. In rare cases of particularly grave allegations of violations, for example, threats to the life of the alleged victim, the Special Rapporteur will send an urgent appeal to the concerned Government. This method will follow the procedures established for other thematic mechanisms.

77. Whether addressed through a letter or through a cable issued as an urgent appeal, the Government concerned will be expected to respond expeditiously to the Special Rapporteur's request for information or explanation. In this regard, the Special Rapporteur draws attention to Commission resolution 1993/47, in which Governments are encouraged to so respond.

78. Paying due account to the need to have reliable information prior to seeking responses from concerned Governments, the Special Rapporteur will seek to act in the preventive spirit with which he will approach his mandate overall. By doing so, the Special Rapporteur would hope to avoid more serious interferences or attacks. For example, should the Special Rapporteur observe movement in some part of the world directed towards restriction of judicial independence or the independence of the legal profession, for example, consideration of legislation, he will endeavour immediately to inform decision-makers of the relevant international standards. Such endeavours may well require direct intervention at the local level in order to draw the attention of the relevant authorities to the specific standards prior to legislation being adopted or other violations occurring.

79. In such situations as may require, the Special Rapporteur will undertake on-site visits to enhance his understanding of particular situations and to facilitate personal contacts with the relevant parties, especially governmental authorities.

80. Where responses received from Governments are considered unsatisfactory by the Special Rapporteur, he will seek additional information from the source/victim and the Government. Still unsatisfactory governmental responses will be mentioned in the subsequent reports of the Special Rapporteur to the Commission on Human Rights. The cases/situations will also continue to be followed by the Special Rapporteur until such time as a satisfactory response is received. Satisfactory governmental replies will be deemed to have "clarified" allegations and such cases will not normally figure in the Special Rapporteur's reports.

81. Concerning the notion of a "satisfactory" response from a concerned Government, the Special Rapporteur wishes to make clear that responses must demonstrate respect for independence of the judiciary and the legal profession

in practice. The Special Rapporteur will not be satisfied with mere statements of principle extracted from the Constitution of the State concerned, but will seek further information on how in practice those principles are applied to secure judicial independence and impartiality and the independence of the legal profession.

82. In adopting the above-described methods in cases or situations arising under the terms of paragraph 3 (a) of Commission resolution 1994/41, the Special Rapporteur takes note of the fact that Mr. Joinet experienced and described the difficulties of endeavouring to consider allegations and government responses thereto through the normal procedures, in so far as translation and transmission of information and general communication between the sources, the Special Rapporteur, the Centre for Human Rights and the responsible Government are very time-consuming. The Special Rapporteur sincerely hopes that such difficulties can be overcome.

C. Concerning progress achieved and concrete recommendations

83. It is the obvious aim of international human rights law that standards be implemented at the domestic level. However, such implementation requires, in the first place, full knowledge of the existing standards on as wide a scale as possible. In this connection, the Special Rapporteur's initial experience supports Mr. Joinet's earlier finding that "non-governmental organizations, particularly professional organizations of jurists, are insufficiently well informed of the specific system of standards for the protection of the judiciary and lawyers" (E/CN.4/Sub.2/1992/25/Add.1, para. 6 (4) (b)). Consequently, significant promotional activities will be necessary to spur progress in implementation of the standards.

84. The promotion of respect for the independence and impartiality of the judiciary will be served by the Special Rapporteur's reporting on progress achieved throughout the world. Not only will positive steps be brought to light, but specific methods of implementation will no doubt provide the opportunity to learn: progress achieved in one part of the world may be useful in overcoming problems elsewhere in the world.

85. Progress will be evident not so much from the apparent absence of interferences and attacks as from positive measures of protection which engender a healthy and vigorous judiciary and legal profession confidently performing their functions. Legislative progress will be necessary in many parts of the world in order to overcome existing structural deficiencies. However, such legislative progress may be dependent upon success in promotional activities, as mentioned above. For example, before parliamentarians may be prepared to act to secure judicial independence and the independence of the legal profession through statutory measures, unjustified fears that an independent judiciary may usurp executive or legislative powers will have to be overcome.

86. In connection with the above, the Special Rapporteur is especially aware of the importance of encouraging and aiding countries in transition to democracy in order to establish a system that will provide a proper balance between the various authorities concerned with the administration of justice. At this moment of global change, the Special Rapporteur is convinced that the

most immediate and critical need for advisory services and technical assistance in the field of the administration of justice in general, and with regard to judicial independence and the independence of the legal profession in particular, is among countries in transition to democracy. Consequently, the Special Rapporteur will seek dialogue with the authorities of such States with a view to identifying specific needs and encouraging the provision of appropriate services and assistance.

87. The Special Rapporteur will also strongly encourage regional cooperation in order to strengthen the independence of the judiciary. In this connection, the Special Rapporteur welcomes several initiatives around the world. For example, the Special Rapporteur applauds the work being done in the countries of the former Soviet Union by European intergovernmental organizations such as the Council of Europe and the Organization of Security and Cooperation in Europe's Office of Democratic Institutions and Human Rights. Initiatives aimed at regional standard-setting, such as the draft additional protocol to the European Convention on Human Rights prepared by the Association of European Magistrates for Democracy and Freedoms and the Draft General Principles on the Independence of the Judiciary prepared by the association of Asian Chief Justices, are also to be applauded in so far as they are consistent with, or add to, universal standards. Certainly, it is to be acknowledged that initiatives by respected non-governmental organizations, such as the Geneva-based International Commission of Jurists' Centre for the Independence of Judges and Lawyers and the New York-based Lawyers Committee for Human Rights, have contributed greatly through their detailed reporting to the development of specific standards and methods of implementation aimed at securing the independence of judges and lawyers. In relation to such initiatives, the Special Rapporteur will, in addition to reporting upon them, seek to act as a catalyst and facilitator where his involvement may be considered welcome and constructive.

88. Returning to problems of structural deficiency, they will be examined initially through scrutiny of laws. More in-depth examination would require country visits for needs assessment. The Special Rapporteur would be available to undertake such visits at the request of Governments, but he may also approach Governments in that regard where he may think it would be of use. The Special Rapporteur may occasionally issue "country profiles" which would both reveal problem areas and identify governmental efforts which required support and encouragement. Involvement with multilateral institutions such as the World Bank may also be pursued, especially to encourage funding of infrastructural needs associated with the "capital costs" of the administration of justice under an independent and impartial judiciary.

89. Evidently, the effective implementation of paragraph 3 (b) of Commission resolution 1994/41, with special attention to its constructive emphasis, will require close cooperation with the advisory services and technical assistance programme of the Centre for Human Rights. To this end, the Special Rapporteur will pursue the establishment of a regular exchange of information and views with the Centre for Human Rights on matters concerning judicial independence and the independence of the legal profession.

90. Over the long run, increased awareness of the standards is the key to progress. It is partly with this in mind that the Special Rapporteur has

contacted not only the relevant professional associations, whose membership consists of those most immediately interested and affected, but also law schools and faculties, with a view to informing and acculturating future lawyers, judges and, frequently, political leaders. In relation to the latter group, the Special Rapporteur intends to follow up his initial contacts with a recommendation concerning the development of a specific programme for law schools.

D. Concerning questions of principle

91. With regard to that part of the mandate articulated in paragraph 3 (c) of Commission resolution 1994/41, i.e. questions of principle, Messrs. Joinet and Singhvi have already singled out some subjects to be taken up and the Special Rapporteur has already commented briefly upon some of these and others. It may well be that, in the course of his examination of various cases and situations around the world, other questions will arise. The Special Rapporteur will endeavour to analyse systematically such questions in his reports.

92. In addition to his own analyses, the Special Rapporteur may wish to solicit the views of Governments, specialized or interested organizations and independent experts. Wide consultation may take the form of participation in, or even the hosting of, occasional seminars and conferences. In general, the Special Rapporteur will stimulate discussion with a view to distilling consensus on possible standards.

93. In the process of conducting his studies, the Special Rapporteur may very well seek partners from the governmental, intergovernmental and non-governmental communities.

III. RESOURCE REQUIREMENTS

94. It should go without saying that the effective implementation of the Special Rapporteur's mandate depends upon the availability of adequate human and material resources. There is a direct causal link in this regard: adequate funding facilitates effective implementation, while inadequate funding will result in ineffective implementation. It is also to be observed that the availability of resources has a significant bearing on a second causal relationship: the achievement of an independent and impartial judiciary affects significantly the level of respect for human rights in general – as recognized by the Commission in the seventh preambular paragraph of resolution 1994/41. The causal chain continues in so far as the level of respect for human rights has a direct bearing upon the quality of democracy in a State. Taking this logic into account, the "value for money" quotient of support for the independence and impartiality of the judiciary is high; for example, it can contribute greatly to the avoidance of discrimination engendering group disaffections and rivalries giving rise to conflicts.

95. Clearly, the Special Rapporteur will require adequate resources in order to implement his mandate effectively. He hopes that the Member States will, through the relevant United Nations organs, ensure that such resources are made available. In this regard, the Special Rapporteur wishes to acknowledge the welcome intention of the High Commissioner for Human Rights to provide

each special rapporteur with modern means of communication and access to an electronic database of human rights information (see E/CN.4/1995/5/Add.1). It is hoped that Member States will support such concrete and useful initiatives.

96. The practical implication of unmet resource requirements is the inability of the Special Rapporteur to organize and carry out his mandate: he cannot plan missions, make decisions on how (and sometimes whether) to intervene, etc. A clearly identified budget is a necessary precondition to efficient and effective work. This is especially so in the case of emergency situations: the Special Rapporteur must have a clear understanding of the financial resources available to him and/or the permissible expenses he may incur so that he does not enter into undertakings which are unfeasible financially or cause him to expend unrecoverable sums from his personal resources. This is all the more important since the Special Rapporteur is not a United Nations employee, but contributes his work on a pro bono basis.

97. In order to enhance his effectiveness, and taking into account the well-known constraints on the financial resources of the Organization, it may be necessary for the Special Rapporteur to accept voluntary contributions or material assistance from organizations or persons interested in supporting the work of the mandate. However, in principle, the Special Rapporteur will not accept contributions from Governments because of the potential for conflict of interest in possible cases of allegations: the Special Rapporteur will vigorously maintain his independence both in fact and in appearance.

IV. CONCLUSIONS

98. It is worth repeating the observation made by Mr. Singhvi in his report of almost 10 years ago:

> "The contemporary international order is premised on the intrinsic and ultimate indivisibility of freedom, justice and peace. It is clear that in the world in which we live, there can be no peace without justice, there can be no justice without freedom and there can be no freedom without human rights." (E/CN.4/Sub.2/1985/18, para. 74)

99. Commission on Human Rights resolution 1994/41 not only confirms the above-noted general observation of Mr. Singhvi, but, following the end of the cold war, it also gives new meaning and impetus to another more precise observation of Mr. Singhvi:

> "The strength of legal institutions is a form of insurance for the rule of law and for the observance of human rights and fundamental freedoms and for preventing the denial and miscarriage of justice. To strengthen human rights in the legal system and to build up the strength of the legal system and to sustain the rule of law and eliminate any denial of justice should be a major strategy for updating the premises of the new world order." (E/CN.4/Sub.2/1985/18, para. 44)

100. It is the Special Rapporteur's strongly held opinion that the measure of the strength of any legal system is to be found in the degree of independence and impartiality of its judiciary.

101. In order for the principles of judicial independence and the independence of the legal profession to obtain their broadest and deepest effects, it is necessary that the existing standards of judicial independence and the independence of the legal profession enjoy wide dissemination. Emphasis should be placed on achieving such dissemination not only through the efforts of the Special Rapporteur, but also through the publications and promotional activities of the Centre for Human Rights.

102. Implementation of the Special Rapporteur's mandate to monitor progress achieved and to make concrete recommendations, including the provision of advisory services and technical assistance, will require close cooperation with the advisory services and technical assistance programme of the Centre for Human Rights. At a minimum, the Special Rapporteur will have to be kept regularly informed by the Centre.

103. With attention to the practical details of effective implementation of the mandate, it is absolutely clear that the mandate will not be effective without the provision of adequate human and financial resources. There exist some minimum requirements in this regard. Specifically, the Special Rapporteur concludes that he requires the full-time assistance of at least one Professional staff member of the Centre for Human Rights at Geneva, together with the provision of secretarial services at his place of residence (Kuala Lumpur). In addition, the Special Rapporteur requires certainty with regard to the budgetary resources at his disposal, in order to plan his activities and travels.

104. Ultimately, effective implementation of the mandate depends upon the will of Member States with regard to their own domestic jurisdiction. Where problems exist, cooperation of the concerned Governments is fundamental. In seeking to resolve existing problems, constructive dialogue is essential and, therefore, will be the principal method employed by the Special Rapporteur.

V. RECOMMENDATIONS

105. In so far as this report is intended mainly to establish the terms of analysis and subsequent work of the Special Rapporteur in fulfilment of his mandate, he has no recommendations to make of a substantive nature. However, the Commission's adoption of the following recommendations may contribute to the better functioning of the mandate and would facilitate its effective implementation. Specifically, the Special Rapporteur recommends:

(a) That the Special Rapporteur be apprised on a regular basis of requests made for advisory services and technical assistance and of such services and assistance as are being provided through the Centre for Human Rights, or are foreseen, in the area of the administration of justice, in particular with regard to the independence and impartiality of the judiciary;

(b) That, with a view to achieving the widest dissemination of the principles of judicial independence and impartiality and the independence of the legal profession, the Centre for Human Rights publish a "fact sheet" on this subject.

5

UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS

Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers

Commission on Human Rights resolution 1995/36

The Commission on Human Rights,

Guided by articles 7, 8, 10 and 11 of the Universal Declaration of Human Rights and articles 2, 14 and 26 of the International Covenant on Civil and Political Rights,

Convinced that an independent and impartial judiciary and an independent legal profession are essential prerequisites for the protection of human rights and for ensuring that there is no discrimination in the administration of justice,

Bearing in mind the Vienna Declaration and Programme of Action (A/CONF.157/23), in particular paragraph 27 of part I and paragraphs 88, 90 and 95 of part II,

Recalling its resolution 1994/41 of 4 March 1994 in which it requested the Chairman of the Commission to appoint for a period of three years, a special rapporteur on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers,

Recalling also General Assembly resolution 40/32 of 29 November 1985 in which the Assembly endorsed the Basic Principles on the Independence of the Judiciary, and resolution 40/146 of 13 December 1985,

Recalling further General Assembly resolution 45/166 of 18 December 1990, in which the Assembly welcomed the Basic Principles on the Role of Lawyers and the Guidelines on the Role of Prosecutors adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders and invited Governments to respect them and to take them into account within the framework of their national legislation and practice,

Bearing in mind the principles contained in the draft declaration prepared by Mr. L.M. Singhvi (E/CN.4/Sub.2/1988/20/Add.1 and Add.1/Corr.1), which the Commission, in its resolution 1989/32 of 6 March 1989, invited Governments to take into account in implementing the Basic Principles on the Independence of the Judiciary,

Recalling the appointment by the Chairman of the Commission on Human Rights of Mr. Param Cumaraswamy as Special Rapporteur,

Taking note of the first report submitted by the Special Rapporteur on the implementation of his mandate and the recommendation addressed to the Commission on Human Rights contained therein (E/CN.4/1995/39, para. 105),

Noting with concern the increasingly frequent attacks on their independence suffered by judges, lawyers and court officers, and aware of the close link between the weakening of safeguards for judges, lawyers and court officers and the frequency and gravity of violations of human rights,

1. Welcomes the first report submitted by the Special Rapporteur on the activities relating to his mandate entitled "Independence and impartiality of the judiciary, jurors and assessors and the independence of

lawyers" (E/CN.4/1995/39);

2. Endorses the decision of the Special Rapporteur to use, beginning in 1995, the short title of "Special Rapporteur on the independence of judges and lawyers", and requests the Centre for Human Rights to take note of this in its future communications;

3. Takes note of and welcomes the methods of work the Special Rapporteur intends to follow in the implementation of his task, as outlined in chapter II of his report;

4. Notes with appreciation the determination of the Special Rapporteur to achieve as wide a dissemination as possible of information about existing standards relating to the independence and impartiality of the judiciary and the independence of the legal profession in conjunction with the publications and promotional activities of the Centre for Human Rights;

5. Endorses the wish of the Special Rapporteur to be kept regularly informed about the programme of advisory services and technical assistance of the Centre for Human Rights so that he will be in a position to implement his mandate by monitoring progress achieved;

6. Requests the Secretary-General, within the limits of the resources of the United Nations, to provide the Special Rapporteur with any assistance needed for the discharge of his mandate;

7. Requests the Special Rapporteur to submit a report on the activities relating to his mandate to the Commission at its fifty-second session;

8. Decides to consider this question at its fifty-second session.

53rd meeting, 3 March 1995
[Adopted without a vote]

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6

UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS

Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers

Commission on Human Rights resolution 1996/34

The Commission on Human Rights,

Guided by articles 7, 8, 10 and 11 of the Universal Declaration of Human Rights and articles 2, 14 and 26 of the International Covenant on Civil and Political Rights, and bearing in mind the Vienna Declaration and Programme of Action (A/CONF.157/23), in particular, Part I, paragraph 27, and Part II, paragraphs 88, 90 and 95 thereof,

Convinced that an independent and impartial judiciary and an independent legal profession are essential prerequisites for the protection of human rights and for ensuring that there is no discrimination in the administration of justice,

Recalling its resolution 1994/41 of 4 March 1994, in which it requested the Chairman of the Commission to appoint, for a period of three years, a special rapporteur on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers,

Recalling also its resolution 1995/36 of 3 March 1995, in which it endorsed the decision of the Special Rapporteur to use, beginning in 1995, the short title "Special Rapporteur on the independence of judges and lawyers",

Recalling further General Assembly resolution 40/32 of 29 November 1985, in which the Assembly endorsed the Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, and Assembly resolution 40/146 of 13 December 1985,

Recalling General Assembly resolution 45/166 of 18 December 1990, in which the Assembly welcomed the Basic Principles on the Role of Lawyers and the Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, and invited Governments to respect them and to take them into account within the framework of their national legislation and practice,

Recalling also the recommendations adopted by the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Cairo from 29 April to 8 May 1995, regarding, among other things, the invitation addressed to Member States to ensure the independence and impartiality of the judiciary and the proper functioning of prosecutorial and legal services in the field of penal justice and police affairs, taking into account the Basic Principles on the Independence of the Judiciary,

Recalling also the Statement of Principles of the Independence of the Judiciary adopted in Beijing in August 1995 by the Sixth Conference of Chief Justices of Asia and the Pacific, and the Cairo Declaration, adopted in November 1995 by the Third Conference of Francophone Ministers of Justice,

Acknowledging the importance for the Special Rapporteur of being able to cooperate closely, in the framework of his mandate, with the Centre for Human Rights in the field of advisory services and technical cooperation, which could contribute to guaranteeing the independence of judges and lawyers,

Recognizing the importance of the role of non-governmental organizations, bar associations and

professional associations of judges in the defence of the principles of the independence of lawyers and judges,

Noting with concern the increasingly frequent attacks on their independence suffered by judges, lawyers and court officers, and aware of the close link between the weakening of safeguards for judges, lawyers and court officers and the frequency and gravity of violations of human rights,

Taking note of the second report (E/CN.4/1996/37) submitted by the Special Rapporteur on the implementation of his mandate,

1. Takes note of the second report submitted by the Special Rapporteur on the activities relating to his mandate;

2. Also takes note of the cooperative working methods that the Special Rapporteur has adopted to draw up his report and implement his mandate, as described in Commission resolution 1994/41;

3. Welcomes the numerous exchanges the Special Rapporteur has had with several intergovernmental and international organizations and United Nations bodies, and encourages him to continue along this path;

4. Notes with appreciation the determination of the Special Rapporteur to achieve as wide a dissemination as possible of information about existing standards relating to the independence and impartiality of the judiciary and the independence of the legal profession in conjunction with the publications and promotional activities of the Centre for Human Rights;

5. Invites the United Nations High Commissioner for Human Rights to continue to provide technical assistance to train judges and lawyers and to associate the Special Rapporteur in the elaboration of a manual on the training of judges and lawyers in the field of human rights;

6. Urges all Governments to assist the Special Rapporteur in the discharge of his mandate and to transmit to him all the information requested;

7. Encourages Governments that face difficulties in guaranteeing the independence of judges and lawyers, or that are determined to take measures to implement these principles further, to consult and to consider the services of the Special Rapporteur, for instance by inviting him to their country if the Government concerned deems it necessary;

8. Requests the Secretary-General, within the limits of the existing regular budget, to provide the Special Rapporteur with any assistance needed for the discharge of his mandate;

9. Requests the Special Rapporteur to submit a report on the activities relating to his mandate to the Commission at its fifty-third session, and decides to consider this question at that session.

52nd meeting, 19 April 1996
[Adopted without a vote]

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7

UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS

Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers

Commission on Human Rights resolution 1997/23

The Commission on Human Rights,

Guided by articles 7, 8, 10 and 11 of the Universal Declaration of Human Rights and articles 2, 14 and 26 of the International Covenant on Civil and Political Rights, and bearing in mind the Vienna Declaration and Programme of Action (A/CONF.157/23), in particular Part I, paragraph 27, and Part II, paragraphs 88, 90 and 95, thereof,

Convinced that an independent and impartial judiciary and an independent legal profession are essential prerequisites for the protection of human rights and for ensuring that there is no discrimination in the administration of justice,

Recalling its resolution 1994/41 of 4 March 1994, in which it requested the Chairman of the Commission to appoint, for a period of three years, a special rapporteur on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers,

Recalling also its resolution 1995/36 of 3 March 1995, in which it endorsed the decision of the Special Rapporteur to use, beginning in 1995, the short title "Special Rapporteur on the independence of judges and lawyers",

Recalling further General Assembly resolution 40/32 of 29 November 1985, in which the Assembly endorsed the Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, and Assembly resolution 40/146 of 13 December 1985,

Recalling General Assembly resolution 45/166 of 18 December 1990, in which the Assembly welcomed the Basic Principles on the Role of Lawyers and the Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, and invited Governments to respect them and to take them into account within the framework of their national legislation and practice,

Recalling also the recommendations adopted by the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Cairo from 29 April to 8 May 1995, regarding, among other things, the invitation addressed to Member States to ensure the independence and impartiality of the judiciary and the proper functioning of prosecutorial and legal services in the field of penal justice and police affairs, taking into account the Basic Principles on the Independence of the Judiciary,

Recalling further the Statement of Principles on the Independence of the Judiciary adopted in Beijing in August 1995 by the Sixth Conference of Chief Justices of Asia and the Pacific, and the Cairo Declaration, adopted in November 1995 by the Third Conference of Francophone Ministers of Justice,

Acknowledging the importance for the Special Rapporteur of being able to cooperate closely, in the framework of his mandate, with the Centre for Human Rights in the field of advisory services and technical cooperation, which could contribute to guaranteeing the independence of judges and lawyers,

Recognizing the importance of the role of non-governmental organizations, bar associations and professional associations of judges in the defence of the principles of the independence of lawyers and judges,

Noting with concern the increasingly frequent attacks on their independence suffered by judges, lawyers and court officers, and aware of the close link between the weakening of safeguards for judges, lawyers and court officers and the frequency and gravity of violations of human rights,

Taking note of the report submitted by the Special Rapporteur on the implementation of his mandate (E/CN.4/1997/32),

1. Takes note of the report submitted by the Special Rapporteur on the activities relating to his mandate;

2. Also takes note of the cooperative working methods that the Special Rapporteur has adopted to draw up his report and implement his mandate, as described in Commission resolution 1994/41;

3. Welcomes the numerous exchanges the Special Rapporteur has had with several intergovernmental and international organizations and United Nations bodies, and encourages him to continue along this path;

4. Notes with appreciation the determination of the Special Rapporteur to achieve as wide a dissemination as possible of information about existing standards relating to the independence and impartiality of the judiciary and the independence of the legal profession in conjunction with the publications and promotional activities of the Centre for Human Rights;

5. Invites the United Nations High Commissioner for Human Rights to continue to provide technical assistance to train judges and lawyers and to associate the Special Rapporteur in the elaboration of a manual on the training of judges and lawyers in the field of human rights;

6. Urges all Governments to assist the Special Rapporteur in the discharge of his mandate and to transmit to him all the information requested;

7. Encourages Governments that face difficulties in guaranteeing the independence of judges and lawyers, or that are determined to take measures to implement these principles further, to consult and to consider the services of the Special Rapporteur, for instance by inviting him to their country if the Government concerned deems it necessary;

8. Decides to extend the mandate of the Special Rapporteur for a further period of three years, requests him to submit a report on the activities relating to his mandate to the Commission at its fifty-fourth session, and decides to consider this question at that session;

9. Requests the Secretary-General, within the limits of the regular budget, to provide the Special Rapporteur with any assistance needed for the discharge of his mandate;

10. Recommends the following draft decision to the Economic and Social Council for adoption:

[For the text, see chap. I, sect. B, draft decision 6.]

56th meeting
11 April 1997

[Adopted without a vote. See chap. VIII.]

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UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS

[unedited text - not official document]

Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers

Commission on Human Rights resolution 1998/35

The Commission on Human Rights,

Guided by articles 7, 8, 10 and 11 of the Universal Declaration of Human Rights and articles 2, 14 and 26 of the International Covenant on Civil and political Rights, and bearing in mind the Vienna Declaration and Programme of Action (A/CONF.157/23), in particular, Part I, paragraph 27, and Part II, paragraphs 88, 90 and 95 thereof,

Convinced that an independent and impartial judiciary and an independent legal profession are essential prerequisites for the protection of human rights and for ensuring that there is no discrimination in the administration of justice,

Recalling its resolution 1994/41 of 4 March 1994, in which it requested the Chairman of the Commission to appoint, for a period of three years, a special rapporteur on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers,

Recalling also its resolution 1995/36 of 3 March 1995, in which it endorsed the decision of the Special Rapporteur to use, beginning in 1995, the short title "Special Rapporteur on the independence of judges and lawyers",

Recalling further General Assembly resolution 40/32 of 29 November 1985, in which the Assembly endorsed the Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, and Assembly resolution 40/146 of 13 December 1985,

Recalling General Assembly resolution 45/166 of 18 December 1990, in which the Assembly welcomed the Basic Principles on the Role of Lawyers and the Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, and invited Governments to respect them and to take them into account within the framework of their national legislation and practice,

Recalling also the recommendations adopted by the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders regarding, among other things, the invitation addressed to Member States to ensure the independence and impartiality of the judiciary and the proper functioning of prosecutorial and legal services in the field of penal justice and police affairs, taking into account the Basic Principles on the Independence of the Judiciary,

Recalling further the Statement of Principles on the Independence of the Judiciary adopted in Beijing in August 1995 by the Sixth Conference of Chief Justices of Asia and the Pacific, and the Cairo Declaration, adopted in November 1995 by the Third Conference of Francophone Ministers of Justice,

Acknowledging the importance for the Special Rapporteur of being able to cooperate closely, in the framework of his mandate, with the Office of the United Nations High Commissioner for Human Rights

in the field of advisory services and technical cooperation, which could contribute to guaranteeing the independence of judges and lawyers,

Recognizing the importance of the role of non-governmental organizations, bar associations and professional associations of judges in the defence of the principles of the independence of lawyers and judges,

Noting with concern the increasingly frequent attacks on their independence suffered by judges, lawyers and court officers, and aware of the close link between the weakening of safeguards for judges, lawyers and court officers and the frequency and gravity of violations of human rights,

Taking note of the report (E/CN.4/1998/39 and Add.1-5) submitted by the Special Rapporteur on the independence of judges and lawyers on the implementation of his mandate,

1. Takes note of the report submitted by the Special Rapporteur on the activities relating to his mandate;

2. Also takes note of the cooperative working methods that the Special Rapporteur has adopted to draw up his report and implement his mandate, as described in Commission resolution 1994/41;

3. Welcomes the numerous exchanges the Special Rapporteur has had with several intergovernmental and international organizations and United Nations bodies, and encourages him to continue along this path;

4. Notes with appreciation the determination of the Special Rapporteur to achieve as wide a dissemination as possible of information about existing standards relating to the independence and impartiality of the judiciary and the independence of the legal profession in conjunction with the publications and promotional activities of the Office of the United Nations High Commissioner for Human Rights;

5. Invites the United Nations High Commissioner for Human Rights to continue to provide technical assistance to train judges and lawyers and to associate the Special Rapporteur in the elaboration of a manual on the training of judges and lawyers in the field of human rights;

6. Urges all Governments to assist the Special Rapporteur in the discharge of his mandate and to transmit to him all the information requested;

7. Encourages Governments that face difficulties in guaranteeing the independence of judges and lawyers, or that are determined to take measures to implement these principles further, to consult and to consider the services of the Special Rapporteur, for instance by inviting him to their country if the Government concerned deems it necessary;

8. Requests the Special Rapporteur to submit a report on the activities relating to his mandate to the Commission at its fifty-fifth session, and decides to consider this question at that session;

9. Requests the Secretary-General, within the limits of the United Nations regular budget, to provide the Special Rapporteur with any assistance needed for the discharge of his mandate.

51st meeting
17 April 1998

[Adopted without a vote. See chap. VIII.]

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Geneva, Switzerland

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NATIONS UNIES UNITED NATIONS

DATO' PARAM CUMARASWAMY

Special Rapporteur on the Independence of Judges and Lawyers
Rapporteur special sur l'indépendance des judges et des avocats
Relator Especial sobre la independencia de los jueces y abogados

August 29, 1995

BY FAX
4576848

YAB Tan Sri Musa Hitam
Chairman, 51st Session,
U.N. Commission on Human Rights
Geneva

YAB Tan Sri,

Malaysian Judiciary

The negative developments in the Malaysian judicial system are a matter of concern to many. As you will appreciate the problems fall within my mandate for investigations. If I do not investigate and report to the Commission I will be failing on my mandate.

From what I have seen and heard todate the judicial system in the country needs reform before it deteriorates further and described as "corrupt". What happened in the Ayer Molek case is just the tip of the iceberg.

The entire system of appointment to the Bench and promotions within the judicial structure need to be reviewed and positive measures taken to bring the system within international standards. Quality on the Bench has deteriorated to such an extent that basics are often overlooked. For example in the Ayer Molek case even the Chief Justice overlooked the constitutionality of the sitting of his own court. Appointments and promotions today are based not on ones learning, impartiality and integrity but for extraneous reasons unrelated to judicial calibre. In the course the business community will be most affected. They will have no confidence in the judicial system.

It is not going to be pleasant for me to report in detail the shortcomings of the judiciary of my own country to the Commission. Nevertheless, between now and the end of the year I hope positive steps will be taken by the Government to improve the system so that my report can contain the positive measures taken.

Please bring my concerns to the attention of the Prime Minister when you do meet him.

Yours sincerely,

P. Cumaraswamy

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Economic and Social
Council

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1 March 1996

ENGLISH ONLY*

COMMISSION ON HUMAN RIGHTS
Fifty-second session
Item 8 of the provisional agenda

QUESTION OF THE HUMAN RIGHTS OF ALL PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

Report of the Special Rapporteur on the independence of judges and lawyers, Dato' Param Cumaraswamy, submitted pursuant to Commission on Human Rights resolution 1995/36

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* In view of its length, the present document is being issued in the original language only, the Conference Services Division of the United Nations Office at Geneva having insufficient capacity to translate documents that greatly exceed the 32-page limit recommended by the General Assembly (see Commission resolution 1993/94, para. 1).

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INTRODUCTION

1. The present report is submitted pursuant to Commission on Human Rights resolution 1995/31 of 3 March 1995. This report is the second presented to the Commission on Human Rights by Dato'Param Cumaraswamy since the mandate was established by the Commission in its resolution 1994/41 of 4 March 1994 and endorsed by the Economic and Social Council in its decision 1994/251 of 22 July 1994.

2. Chapter I of the present report contains the terms of reference for the discharge of the mandate in conformity with the aforementioned resolution and for requests made to the Special Rapporteur by the Commission on Human Rights in other resolutions. Chapter II briefly refers to the methods of work applied by the Special Rapporteur in the discharge of the mandate. In chapter III, the Special Rapporteur presents an account of activities he has undertaken during the past year. Chapter IV provides a brief discussion on various theoretical issues that the Special Rapporteur considers to be of particular importance for the development of an independent judiciary. Chapter V contains an analysis of information received concerning attacks on the judiciary, a summary of the allegations transmitted to Governments, information received from Governments in response to his initial communication transmitted in October 1994 and in response to the allegations transmitted as well as follow-up with authorities and sources, and, where appropriate, specific comments, conclusions and observations. Chapter VI contains a summary of the Special Rapporteur's communications with other international organizations, particularly the World Bank, and with the Council of Europe. Finally, in chapter VI, the Special Rapporteur sets out future activities that he intends to undertake and his conclusions.

3. The appendix contains a list of the Governments, courts and judges, ombudsmen, universities, Bar Associations, and Association of Lawyers that have replied to the initial communication transmitted by the Special Rapporteur in October and November 1994 requesting information relevant to his mandate.

I. TERMS OF REFERENCE

4. At its fiftieth session, the Commission on Human Rights, in resolution 1994/41, noting both the increasing frequency of attacks on the independence of judges, lawyers and court officials and the link which exists between the weakening of safeguards for the judiciary and lawyers and the gravity and frequency of violations of human rights, requested the Chairman of the Commission to appoint, for a period of three years, a special rapporteur whose mandate would consist of the following tasks: (a) to inquire into any substantial allegations transmitted to him and to report his conclusions thereon; (b) to identify and record not only attacks on the independence of the judiciary, lawyers and court officials but also progress achieved in protecting and enhancing their independence, and make concrete recommendations including the provision of advisory services or technical assistance when they were requested by the State concerned; and (c) to study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers.

5. Several resolutions adopted by the Commission on Human Rights at its fifty-first session are also pertinent to the mandate of the Special Rapporteur and have been taken into consideration in examining and analysing the information brought to his attention with regard to the different countries. These resolutions are, in particular:

(a) Resolution 1995/24, entitled "Rights of persons belonging to national or ethnic, religious and linguistic minorities", in which the Commission urged the special rapporteurs to continue to give due regard, within their respective mandates, to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities;

(b) Resolution 1995/40, on the promotion of the right to freedom of opinion and expression, in which the Commission invited the special rapporteurs to pay attention to the situation of persons detained, subjected to violence, ill-treated or discriminated against for having exercised the right to freedom of opinion and expression;

(c) Resolution 1995/41, entitled "Human rights and the administration of justice, in particular of children and juveniles in detention", in which the Commission called upon the special rapporteurs to continue to provide, wherever appropriate, specific recommendations relating to the effective protection of human rights in the administration of justice;

(d) Resolution 1995/43, entitled "Human rights and terrorism", in which the Commission urged all thematic special rapporteurs to address as appropriate the consequences of the acts, methods and practices of terrorist groups in their reports to the Commission;

(e) Resolution 1995/53, entitled "Advisory services and the Voluntary Fund for Technical Cooperation in the Field of Human Rights", in which the Commission invited the special rapporteurs to continue to include in their recommendations, whenever appropriate, proposals for specific projects to be realized under the programme of advisory services;

(f) Resolution 1995/75, entitled "Cooperation with representatives of United Nations human rights bodies", in which the Commission requested all representatives of human rights bodies to continue to take urgent steps, in conformity with their mandates, to help prevent the hampering of access to United Nations human rights procedures in any way and to help prevent the occurrence of intimidation and reprisals against persons who seek to cooperate or have cooperated with United Nations human rights procedures, as well as relatives of victims of human rights violations, and to continue to include in their reports to the Commission on Human Rights a reference to allegations of intimidation or reprisal and of hampering of access to United Nations human rights procedures, as well as an account of action taken by them in that regard;

(g) Resolution 1995/79, entitled "Rights of the Child", in which the Commission recommended that special rapporteurs pay special attention to particular situations in which children were in danger;

(h) Resolution 1995/80, entitled "Comprehensive implementation of and follow-up to the Vienna Declaration and Programme of Action", in which the Commission called upon all special rapporteurs to take fully into account the recommendations contained in the Vienna Declaration and Programme of Action within their respective mandates;

(i) Resolution 1995/85, entitled "The elimination of violence against women", in which the Commission requested other special rapporteurs to cooperate with and assist the Special Rapporteur on violence against women in the performance of the tasks and duties mandated, and in particular to respond to requests for information on violence against women, its causes and its consequences;

(j) Resolution 1995/86, entitled "Question of integrating the human rights of women into the human rights mechanisms of the United Nations", in which the Commission requested special rapporteurs regularly and systematically to include in their reports information on violations of the human rights of women;

(k) Resolution 1995/87, entitled "Human rights and thematic procedures", in which the Commission requested the thematic special rapporteurs to include in their reports comments on problems of responsiveness and the result of analyses, as appropriate, in order to carry out their mandates even more effectively, and to include also in their reports suggestions as to areas where Governments might request relevant assistance through the programme of advisory services administered by the Centre for Human Rights. The Commission also called on the special rapporteurs to include in their reports gender-disaggregated data and to address the characteristics and practice of human rights violations that were specifically or primarily directed against women, or to which women were particularly vulnerable.

II. METHODS OF WORK

6. The Special Rapporteur has followed the methods of work described in the first report of his tenure (see E/CN.4/1995/39, paras. 63-93) and approved by the Commission on Human Rights in its resolution 1994/41.

7. Seeking to avoid unnecessary duplication of the activities of the thematic mechanisms (see E/CN.4/1995/34, paras. 8 and 9), either among thematic rapporteurs or with country rapporteurs, the Special Rapporteur has been involved in several cooperative initiatives. During the past year the Special Rapporteur has joined with other Special Rapporteurs and Working Groups to transmit urgent appeals on behalf of individuals (see below, appeals to China, para. 133; Nigeria (2), paras. 183, 187; Uzbekistan, para. 241). Further, the Special Rapporteur and the Special Rapporteur on extrajudicial summary or arbitrary executions, the Special Rapporteur on the question of torture and the Chairman of the Working Group on Enforced or Involuntary Disappearances transmitted an urgent appeal to the Government of Peru in which they expressed their concern at the promulgation of amnesty laws.

III. ACTIVITIES OF THE SPECIAL RAPPORTEUR

8. The following sections give an account of the activities carried out by the Special Rapporteur in the implementation of the mandate entrusted to him by the Commission on Human Rights.

A. Consultations

9. The Special Rapporteur visited Geneva for his first round of consultations from 5 to 11 February 1995 in order to present his report to the fifty-first session of the Commission on Human Rights. He also took this occasion to hold an open meeting with all interested non-governmental organizations. The meeting provided an opportunity for the Special Rapporteur to establish a meaningful and useful dialogue with the NGO community and he hopes to continue this dialogue at future sessions of the Commission. During this round of consultations, the Special Rapporteur also held meetings with representatives from the Permanent Missions of the United States of America and Canada to discuss issues relevant to his mandate.

10. Within the framework of related activities of the Commission on Human Rights, the Special Rapporteur participated in the second meeting of special rapporteurs, special representatives and chairpersons of working groups of the special procedures of the Commission on Human Rights and of the advisory services programme, which took place from 29 to 31 May 1995. The Special Rapporteur also held his second round of consultations at this time during which he held a meeting with officials from the Office of the United Nations High Commissioner for Refugees in connection with his proposed mission to the Central Asian Republics.

11. The Special Rapporteur visited Geneva for his third round of consultations from 20 to 24 November 1995 in order to hold consultations with the Secretariat and with the High Commissioner for Human Rights. During this period, the Special Rapporteur also attended a meeting of the Working Group on Arbitrary Detention during which there was an interesting exchange of opinions with the members of the Working Group on various issues of concern to each mandate. The Special Rapporteur took also this occasion to meet with the Chief of the Advisory Services, Technical Cooperation and Information Branch and with the Human Rights Officer responsible for the drafting of a manual to be used to train judges and lawyers, and for coordinating programmes organized by the Centre for Human Rights. In this meeting the Special Rapporteur discussed the need for cooperation between himself and the branch with a view to enhancing training programmes for judges and lawyers. The Special Rapporteur also met with the Chargé d'affaires of the Permanent Mission of Albania to the United Nations Office at Geneva, the Ambassador of Colombia, the Chargé d'affaires of the Permanent Mission of Nigeria (in which Mr. Bacre Ndiaye, the Special Rapporteur on extrajudicial, summary or arbitrary executions also participated) and a representative from the Permanent Mission of Pakistan to discuss issues of concern to the Special Rapporteur in their respective countries and, in the case of Colombia, Nigeria and Pakistan, to discuss the possibility of undertaking a mission to visit those countries.

B. Visits

12. The Special Rapporteur attended an international conference on "The Mason Court and Beyond" in Melbourne, Australia from 8 to 10 September 1995. This conference was to commemorate the retirement of Sir Anthony Mason as Chief Justice of the High Court of Australia. The Special Rapporteur, at the conclusion of the conference, addressed participants on juridical independence/the concerns of the United Nations for the independence of judges and lawyers.

13. On 14 July 1995, the Special Rapporteur, while on a private visit to the United Kingdom, visited Belfast for a preliminary investigation into allegations he had received about executive interference into the administration of justice in Northern Ireland. During the visit he held meetings with representatives of NGOs and, in particular, the Committee on the Administration of Justice.

14. The Special Rapporteur, while on a private visit to Australia, visited Melbourne to meet the Attorney General with regard to allegations of interference into the independence of the legal profession in the State of Victoria by way of reforms under which a new licensing system will be created.

C. Communications with Governments

15. During the period under review, the Special Rapporteur transmitted 20 urgent appeals to the following 12 Governments: Albania; Cambodia; Colombia; China (joint appeal); Egypt; Haiti (joint appeal); Hong Kong; Mexico (2); Namibia; Nigeria (1 urgent appeal and 3 joint appeals); Peru (4 urgent appeals and 1 joint appeal); Uzbekistan. The Special Rapporteur transmitted eight communications to the following seven Governments: Argentina; Egypt (2); Nigeria; Peru; Sudan; Zaire; Yemen. He also transmitted two communications to State governments in Australia.

16. The Special Rapporteur has sought from the Governments of the Central Asian Republics (Kazakstan, Kyrgyzstan, Tajikistan, Turkmenistan, Uzbekistan) permission to undertake missions to those countries. To date, the Government of Kazakstan has replied positively and responses from the other Governments are awaited.

D. Communications with intergovernmental and non-governmental organizations

17. As there are numerous intergovernmental and non-governmental organizations involved in carrying out training programmes for judges and lawyers, the Special Rapporteur has made every effort to establish a dialogue with those organizations and to seek their cooperation. The following section contains a brief summary of the exchanges the Special Rapporteur has had with these organizations.

1. Council of Europe

18. On 18 November 1994, the Special Rapporteur received a letter from the Council of Europe in reply to the Special Rapporteur's communication sent to the Secretary-General of the Council of Europe concerning the

independence of the judiciary. This communication included the text of Recommendation No. R (94) 12 of the Committee of Ministers on independence, efficiency and role of judges, which was adopted by the Committee on 13 October 1994. The Committee of Ministers recommended that States adopt or reinforce all measures necessary to promote the role of individual judges and the judiciary as a whole and strengthen their independence and efficiency by implementing, in particular, six principles.

19. Principle I contains general principles on the independence of judges, which are as follows:

"1. All necessary measures should be taken to respect, protect and promote the independence of judges.

"2. In particular, the following measures should be taken:

"a. The independence of judges should be guaranteed pursuant to the provisions of the Convention and the constitutional principles, for example by inserting specific provisions in the constitutions or other legislation or incorporating the provisions of this recommendation in internal law. Subject to the legal tradition of each State, such rules may provide, for instance, the following:

"i. decisions of judges should not be subject to any revision outside any appeals procedures as provided by law;

"ii. the terms of office of judges and their remuneration should be guaranteed by law;

"iii. no organ other than the courts themselves should decide on its own competence, as defined by law;

"iv. with the exception of decisions on amnesty, pardon or similar, the Government or the administration should not be able to take any decision which invalidates judicial decisions retroactively;

"b. The executive and legislative powers should ensure that judges are independent and that steps are not taken which could endanger the independence of judges.

"c. All decisions concerning the professional careers of judges should be based on objective criteria and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency. The authority taking the decision on the selection and career of judges should be independent of government and administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules.

However, where the constitutional or legal provisions and traditions allow judges to be appointed by government, there should be guarantees to ensure that the procedures to appoint judges are transparent and independent in practice and that the decisions will not be influenced by any reasons other than those related to the objective criteria mentioned above. These guarantees could be, for example, one or more of the following:

"i. a special independent and competent body to give the Government advice which it follows in practice; or

"ii. the right for an individual to appeal against a decision to an independent authority; or

"iii. the authority which makes the decision safeguards against undue or improper influences.

"d. In the decision-making process, judges should be independent and be able to act without any restrictions, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. The law should provide for sanctions against persons seeking to influence judges in any such manner. Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law. Judges should not be obliged to report on the merits of their cases to anyone outside the judiciary.

"e. The distribution of cases should not be influenced by the wishes of any party to a case or any person concerned with the results of the case. Such distribution may, for instance, be made by drawing lots or a system for automatic distribution according to alphabetical order or some similar system.

"f. A case should not be withdrawn from a particular judge without valid reasons, such as cases of serious illness or conflict of interest. Any such reasons and the procedures for such withdrawal should be provided for by law and may not be influenced by any interest of the Government or administration. A decision to withdraw a case from a judge should be taken by an authority which enjoys the same judicial independence as judges.

"3. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists."

20. Principle II, which concerns the authority of judges, reads as follows:

"1. All persons connected with a case, including State bodies or their representatives, should be subject to the authority of the judge.

"2. Judges should have sufficient powers and be able to exercise them in order to carry out their duties and maintain their authority and the dignity of the court."

21. Principle III, which deals with proper working conditions of judges, reads as follows:

"1. Proper conditions should be provided to enable judges to work efficiently and, in particular, by:

"a. recruiting a sufficient number of judges and providing for appropriate training such as practical training in the courts and, where possible, with other authorities and bodies, before appointment and during their career. Such training should be free of charge to the judge and should in particular concern recent legislation and case-law. Where appropriate, the training should include study visits to European and foreign authorities as well as courts;

"b. ensuring that the status and remuneration of judges is commensurate with the dignity of their profession and burden of responsibilities;

"c. providing a clear structure in order to recruit and retain able judges;

"d. providing adequate support staff and equipment, in particular office automation and data-processing facilities, to ensure that judges can act efficiently and without undue delay;

"e. taking appropriate measures to assign non-judicial tasks to other persons, in conformity with Recommendation No. R (86) 12 concerning measures to prevent and reduce the excessive workload in the courts.

"2. All necessary measures should be taken to ensure the safety of judges, such as ensuring the presence of security guards on court premises or providing police protection for judges who may become or are victims of serious threats."

22. Principle IV, which deals with associations of judges, reads as follows:

"Judges should be free to form associations which, either alone or with another body, have the task of safeguarding their independence and protect their interests."

23. Principle V, which deals with judicial responsibilities, reads as follows:

"1. In proceedings, judges have the duty to protect the rights and freedoms of all persons.

"2. Judges have the duty and should be given the power to exercise their judicial responsibilities to ensure that the law is properly applied and cases are dealt with fairly, efficiently and speedily.

"3. Judges should in particular have the following responsibilities:

"a. to act independently in all cases and free from any outside influence;

"b. to conduct cases in an impartial manner in accordance with their assessment of the facts and their understanding of the law, to ensure that a fair hearing is given to all parties and that the procedural rights of the parties are respected pursuant to the provisions of the Convention [for the Protection of Human Rights and Fundamental Freedoms];

"c. to withdraw from a case or decline to act where there are valid reasons, and not otherwise. Such reasons should be defined by law and may, for instance, relate to serious health problems, conflicts of interest or the interests of justice;

"d. where necessary, to explain in an impartial manner procedural matters to parties;

"e. where appropriate, to encourage the parties to reach a friendly settlement;

"f. except where the law or established practice otherwise provides, to give clear and complete reasons for their judgments, using language which is readily understandable;

"g. to undergo any necessary training in order to carry out their duties in an efficient and proper manner."

24. Principle VI, which deals with failure to carry out responsibilities and disciplinary offences, reads as follows:

"1. Where judges fail to carry out their duties in an efficient and proper manner or in the event of disciplinary offences, all necessary measures which do not prejudice judicial independence should be taken. Depending on the constitutional principles and the legal provisions and traditions of each State, such measures may include, for instance:

"a. withdrawal of cases from the judge;

"b. moving the judge to other judicial tasks within the court;

"c. economic sanctions such as a reduction in salary for a temporary period;

"d. suspension.

"2. Appointed judges may not be permanently removed from office without valid reasons until mandatory retirement. Such reasons, which should be defined in precise terms by the law, could apply in countries where the judge is elected for a certain period, or may relate to incapacity to perform judicial functions, commission of criminal offences or serious infringements of disciplinary rules.

"3. Where disciplinary measures under paragraphs 1 and 2 of this article need to be taken, States should consider setting up, by law, a special competent body which has as its task to apply any disciplinary sanctions and measures, where they are not dealt with by a court, and whose decisions shall be controlled by a superior judicial organ, or which is a superior judicial organ itself. The law should provide for appropriate procedures to ensure that judges in question are given at least all the due process requirements of the Convention, for instance that the case should be heard within a reasonable time and that they should have the right to answer any charges."

25. On 5 January 1995 the Special Rapporteur received a communication from the Council of Europe in response to his letter of 12 December 1994 in which he asked the Council of Europe to provide him with information on training programmes for judges undertaken by the Council in different countries of the region, in particular those of the Central Asian Republics. The Council of Europe attached to its communication a copy of its 1993 annual report concerning its cooperation and assistance programmes with Central and Eastern European countries, including some general information concerning the contents of the programme and some information about cooperation with the countries which are of particular interest to the Special Rapporteur. The report notes that the Council of Europe has cooperated actively with other international institutions involved in providing assistance to democratic reforms, in particular the European Union. Also, the Council of Europe and the European Commission have signed agreements for the implementation of joint programmes of cooperation in Albania for the promotion of human rights and the rule of law, and in the Baltic countries for legal reform and democracy. Finally, the Council of Europe and the Commission, in its capacity of coordinator of the Group of 24 Governments providing funds for development assistance (G-24), organized in Strasbourg, on 6 and 7 December 1993, a conference on democratic institution-building.

26. In its communication, the Council stated that the cooperation with the five Central Asian Republics, (Kazakstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan) that the Special Rapporteur mentioned in his letter is less developed than with the 17 countries where the Council of Europe is currently operating on a regular basis and which are either members of the Council of Europe or have applied for membership. It also indicated that if the Council of Europe were to receive a request for technical cooperation and assistance

from other countries, it was likely that the Council would respond to them within the available budgetary means following decisions on a case-by-case basis by the Committee of Ministers.

27. The Special Rapporteur also received information about the Council's "Themis Plan", which offers members of the legal professions a training programme in the relevant fields based on the principles of the rule of law and respect for human rights. The objective of this plan is to ensure that the legislative reforms in the new democracies are genuinely implemented as intended by the legislators.

28. The Council also submitted additional reports for the Special Rapporteur's consideration, including documents relating to the Themis programmes for the development of law, the role of the judicial service commission, the role of the judge in a democratic society, the implementation of activities in 1994, and the Pan-European conference on the transformation of the procuratora into a body compatible with the democratic principles of law.

29. The Special Rapporteur welcomes these developments which provide guidelines for implementing at the domestic level the Basic Principles on the Independence of the Judiciary. As a follow-up, the Special Rapporteur is inquiring into the number of countries in the European Union which have adopted and implemented these guidelines.

30. The communication of 18 November 1994 from the Council of Europe also indicated that since 1990 the Council of Europe has been engaged in a number of projects in Central and Eastern Europe aimed at strengthening the independence and impartiality of the judiciary. This communication also drew the attention of the Special Rapporteur to the jurisprudence of the European Court and Commission on Human Rights under article 6 of the European Convention.

2. Inter-Parliamentary Union

31. On 28 October 1994, the Special Rapporteur received a communication from the Secretary-General of the Inter-Parliamentary Union in reply to his initial request for the cooperation of the Inter-Parliamentary Union with regard to his mandate.

32. The Secretary-General indicated that the IPU, as the world organization of national parliaments, does not pursue a particular cause like many non-governmental organizations but rather endeavours, according to its statutes, to contribute to the defence and the promotion of human rights in general. This is done, first of all, on a political level within the framework of the Inter-Parliamentary Conferences, which in the past years have adopted several resolutions on human rights topics, most recently on strengthening national structures, institutions and organizations of society which play a role in promoting and safeguarding human rights and international cooperation and national action to support social and economic development and efforts to combat poverty (Copenhagen, September 1994). In May 1993, a symposium entitled "Parliament: Guardian of Human Rights" discussed the

specific role of parliamentarians with regard to the protection and promotion of human rights. The question of the independence of the judiciary as such was not addressed on these occasions.

33. However, the Secretary-General did indicate that questions relating to the concept of the independence of the judiciary, its meaning and consequences come up from time to time within the Union's work for the human rights of members of parliament. He informed the Special Rapporteur that the Inter-Parliamentary Council set up in 1976 a Committee on the Human Rights of Parliamentarians which deals with complaints concerning the violation of the human rights of parliamentarians. He also attached a copy of a brochure on the Committee's function. The Committee brings the allegations submitted to it to the attention of the parliamentary authority of the country concerned and requests their observations thereon. All too often, the authorities, referring to the separation of powers and the independence of the judiciary, refuse to comment on the allegations if they relate to an ongoing trial.

34. Thus, in a recent case where allegations of torture and of violations of the right to a fair trial were raised, the Speaker of the relevant national parliament stated, inter alia, that the principle of separation of powers barred the legislature and the judiciary from querying, criticizing and interfering in the affairs, processes and activities of each other and that it was therefore not possible for him to provide any information on the ongoing trial. In the confidential decision adopted by the Committee in this case, it considered that an "MP must be entitled to enquire into reported human rights violations, including those relating to the lack of independence of the Judiciary, wherever they occur and especially in their own countries"; it considered therefore that "the separation of powers cannot be construed as preventing Parliamentarians from concerning themselves with human rights violations in their countries and elsewhere". The Committee continued by stating that "the independence of the Judiciary aims essentially at protecting the Court from interference by the Executive and that MPs' concern for human rights and relevant inquiries may in this regard be essential to safeguarding the independence of the Judiciary and hence the principle of the separation of powers". The Committee considered finally that "in any case there is a distinction to be drawn between a member raising and debating in the House a matter which is sub judice, and the Speaker of the Assembly inquiring, on behalf of the House, into the situation of one of its members or former members who is on trial". Consequently, the Committee failed to understand how the parliament concerned would be violating the principle of separation of powers when raising questions relating to the trial of one of its former members.

35. The Secretary-General expressed his interest in receiving any observations from the Special Rapporteur on the above-mentioned point, which he considered to be of fundamental importance for parliament's role as guardian of human rights.

36. On 9 January 1995 the Special Rapporteur sent a communication to the Secretary-General of the Inter-Parliamentary Union proposing that he participate in a conference of the Inter-Parliamentary Union in order to address the issue of independent and impartial justice. Specifically, the Special Rapporteur welcomed the opportunity of engaging members of the IPU in

discussion on various aspects of the issue. The Secretary-General was receptive to this proposal, and it is possible that the Special Rapporteur may attend one of the meetings of the IPU during the coming year.

37. The Special Rapporteur indicated that the IPU no doubt appreciated that the independent and impartial administration of justice is necessary to achieve respect for human rights and is vital to the rule of law in a democratic society, which, in turn, is the foundation for peace and security and avoidance of conflict between communities within a State. Its members also appreciate the importance of institutional checks to the potential and real excesses of the executive power. An important means of checking executive excesses and interferences is through the judiciary. Similarly, the judiciary plays an important role in checking legislative excesses by means of judicial review - which is often misunderstood.

3. Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe

38. On 25 January 1995 the Special Rapporteur received a communication from the Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe (OSCE/ODIHR) in reply to his initial communication. The OSCE/ODIHR enclosed information concerning the programme of activities of the organization for 1995, which included several seminars on the rule of law, on the changing world of the judge, on the Constitution of Tajikistan etc. In a prior communication dated 1 December 1994, OSCE/ODIHR had informed the Special Rapporteur that it does not monitor allegations of breaches but rather reacts to instructions of investigation given by agreement of the 53 States participating in the OSCE.

4. Inter-American Juridical Committee

39. On 28 November 1994 the Special Rapporteur received a communication from the Vice-Chairman of the Inter-American Juridical Committee (IASC) of the Organization of American States (OAS) and the Committee's Rapporteur on the subject of protection and guarantees for judges and lawyers in the exercise of their functions. He attached for the information of the Special Rapporteur his report to the IAJC on the subject, originally presented in August 1994 and revised in the light of comments by members of the Committee, as well as the text of the most recent resolution of the IACJ, approved unanimously at the August 1994 session of the Committee. The report and resolution are included in the Committee's annual report, which were to be considered by the OAS Committee on Political and Juridical Affairs and ultimately by the OAS General Assembly.

40. In his report, the IACS Rapporteur began by giving some philosophical foundations. These remarks set out the necessity for a legal system to provide for the judicial function, i.e. to provide for a juridical check on the exercise of legislative or executive authority when individual human rights are infringed. There are some factors necessary in order for the judiciary and legal profession to perform these functions on a practical level. The independence of the judiciary is commonly referred to as comprising two basic elements: the collective independence of the judiciary and the independence of individual judges.

41. He considered that central to the concept of institutional independence of the judiciary is the idea that the judiciary not be under the authority of the executive or legislative branches of government and that it continue to be impartial and independent. He also regarded as fundamental for the administration of justice that judges be given administrative independence from the other branches of government. Budgeting and expenditures, appointment and supervision of staff and assignment of caseloads must be within judicial control. This was necessary to prevent the distribution of resources being used to sanction or reward, and to guarantee timely access to the courts. He considered also that the administration of justice required that the jurisdiction of the courts be respected. This included guarantees that judicial authority would not be abrogated.

42. He regarded as an important component of individual independence that a judge should not be considered as a civil servant, but rather as an autonomous officer of the State. The independence of the individual judge comprised two essential elements: substantive independence and personal independence. Substantive independence means that in the making of judicial decisions and exercising other official duties, individual judges are subject to no other authority but the law. Personal independence means that the judicial terms of office and tenure are secure. Personal independence is secured by judicial appointment subject to correct behaviour and terminated only at retirement age, and by safeguarding judicial remuneration. Accordingly, executive control over terms of service of the judges, such as remuneration, pensions or travel allowance, was inconsistent with the concept of judicial independence. Still less acceptable is any executive control over case assignment, court scheduling, or moving judges from one court to another or from one locality to another.

43. Judges thus required security of tenure and guarantees of adequate salary and pensions in order to effectively maintain independence. Similarly, judges require protection against incursion into their personal autonomy, including protection from criticism, civil and criminal immunity, and protection from removal from office.

44. In states of emergencies, ordinary courts should not abdicate their responsibility of testing the legality of a declaration of emergency.

45. He referred also to the independence of the legal profession as essential to the administration of justice. In this regard lawyers should be free to accept any client, and in accordance with the responsibility of the profession should remain free to provide impartial and independent advice, even on matters that are controversial or political in nature.

46. Unfortunately, several countries in the region had recently witnessed a great number of problems and threats to this independence. The most obvious form of executive interference with the judiciary was formal abrogation of judicial authority, often by de facto military regimes. Problems had occurred in Cuba, Uruguay, Ecuador, Argentina, Brazil, El Salvador and Peru.

47. Another problem was maintaining judicial salaries at appropriate levels. The discipline and removal of judges were also great problems. In Chile, Nicaragua and Panama judges had been suspended on political grounds. The

personal security of judges and lawyers had weakened alarmingly in recent years, most seriously in Peru and Colombia, but almost every State in the Americas was facing an increase in threats and harassment of the judiciary.

48. Member States had responded to these threats through constitutional, legal and political measures. Recent constitutional development in, for example, Brazil showed a trend to entrench the separation of powers more firmly. Also, a trend towards ensuring constitutional protection of the judiciary's ability to exercise administrative and constitutional review was noticeable. Another development was the annual meeting of the Consejo Judicial Centroamericano (Supreme Court Justices of Guatemala, El Salvador, Honduras and Nicaragua) to review common functional and institutional problems. The most dramatic response to threats to judges had been in Colombia. In 1984 the President placed the country under a state of siege on the ground that the constitutional system was being disrupted. The measures adopted also provided the judges with anonymity, but the threats and violence have continued.

49. The Rapporteur's conclusion was that despite all international attempts to create an independent judiciary, the judiciary continued to be threatened throughout Latin America.

50. On 24 February 1995, the Special Rapporteur sent a communication to the Inter-American Juridical Committee in reply to its letter dated 28 November 1994. The Special Rapporteur thanked it for its report and acknowledged the fact that the independence of the judiciary was seriously threatened in some countries of the Inter-American system, notwithstanding international attempts to enhance judicial independence in the region. The Special Rapporteur furnished a copy of his first report and explained his intentions for fulfilling the tasks his mandate encompassed. In this regard, the Special Rapporteur indicated his intention to promote and protect the independence and impartiality of the judiciary throughout the world to the maximum extent of his abilities. Within the limited resources of the Special Rapporteur, he promised to develop relations with other organizations, institutions and persons with special interest in and knowledge of the judiciary throughout the world to assist him in this task.

51. The Special Rapporteur requested advice as to how he could contribute to the strengthening of the judiciary in the Americas, including an assessment of the priority needs within the Americas. He also requested an opinion concerning seminars and conferences within the Americas in which he might participate or to which he could contribute with a view to creating better awareness of the requirements of judicial independence, and the rule of law and human rights in general.

52. On 3 April 1995, the Special Rapporteur received a reply from the Principal Counsel of the Trade Law Division of the Inter-American Juridical Committee. He noted that the Special Rapporteur's letter raised important questions regarding his role in strengthening the judiciary in the Americas and regarding the ways in which the OAS and United Nations might enhance their cooperation in that regard. He pointed out that these activities were under

the supervision of the Working Group on Enhancement of the Administration of Justice in the Americas of the Committee on Juridical and Political Affairs of the Permanent Council.

53. The Special Rapporteur welcomes this dialogue on the Americas with this important organization.

5. World Bank

54. On 12 December 1994, the Special Rapporteur sent a communication to the Director of Public Sector Management of the World Bank in reply to the latter's communication dated 15 November 1994 in which the Director sent materials concerning a World Bank conference on judicial review in developing countries. The Special Rapporteur expressed his agreement that securing the independence and impartiality of the judiciary was central to achieving the rule of law. The Special Rapporteur was also pleased that this task had become an important dimension of the Bank's strategies for poverty alleviation and was viewed as a necessary condition for sustainable development. The Special Rapporteur considered that from the perspective of the international community, deficiencies in the administration of justice undermined respect for human rights in general and were an obstacle to both social and economic development. The Special Rapporteur considered that successful legal reforms in countries in transition required not only the full conviction and political commitment of the Governments concerned, but also depended upon simple awareness of applicable international standards. The Special Rapporteur noted that the creation of his mandate by the Commission could be viewed as having raised the level of the international community's concern for the independence and impartiality of the judiciary.

55. The Special Rapporteur expressed the view that he must deal with issues relating to securing the administration of justice in a meaningful and concrete way under an independent and impartial judiciary. In this connection, he drew the attention of the Director to what might be called the "capital costs" for the construction of courts, offices, prisons and other elements of the judicial infrastructure necessary to dispense independent and impartial justice. The Special Rapporteur requested information about the extent to which the World Bank had considered such costs, and encouraged such expenditures, within developing countries.

E. Cooperation with other United Nations procedures and bodies

56. It is to be recalled that the Special Rapporteur has a three-pronged mandate which, inter alia, calls upon him to identify and record not only attacks on the independence of the judiciary, lawyers and court officials, but also progress achieved in protecting and enhancing their independence, and to make concrete recommendations including the provision of advisory services or technical assistance when so requested by the State concerned. To this end, the Special Rapporteur held meetings with the Chief of the Advisory Services, Technical Assistance and Information Branch of the Centre for Human Rights in an attempt to better coordinate the Special Rapporteur's efforts in this area with the programmes of the Branch. The Special Rapporteur has offered his expertise and expressed his wish to be consulted in the planning and

implementation of programmes for the training of judges and lawyers organized by the Branch and to be informed of the results of training programmes and follow-up undertaken by the Branch.

1. Cooperation with special rapporteurs and working groups of the Commission on Human Rights

57. In addition to the Special Rapporteur's participation in the meeting of special rapporteurs and in joint urgent actions transmitted to Governments, referred to above, the Special Rapporteur requested to undertake a joint mission with the Special Rapporteur on the question of torture, Mr. Nigel Rodley, to Pakistan; a joint mission with the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr. Bacre Ndiaye, to Nigeria, and a joint mission with the Working Group on Arbitrary Detention to Peru. The Special Rapporteur must express his disappointment that none of the Governments concerned has responded favourably to these requests. In an oral communication to the Special Rapporteur, a representative of the Permanent Mission of Pakistan to the United Nations Office at Geneva, in rejecting the request for a joint mission, expressed the view that it would be logistically difficult to organize such a mission owing to the fact that the mandates of the respective Special Rapporteurs touched upon distinct and separate issues and therefore would require individual meetings with different government agencies and other organizations. The Governments of Nigeria and Peru had provided no response to the requests by the time the present report was finalized.

58. As noted above, the Special Rapporteur also participated in a meeting of the Working Group on Arbitrary Detention. The Special Rapporteur considers it important to maintain a dialogue with the Working Group, as their respective mandates frequently touch upon the same issues. For example, both the Special Rapporteur and the Working Group have expressed concern about the use of "faceless tribunals" in Peru. Therefore, the Special Rapporteur will maintain and enhance his cooperation with the Working Group on Arbitrary Detention.

2. Cooperation with the Crime Prevention and Criminal Justice Branch

59. As the body that assists the Commission on Crime Prevention and Criminal Justice to oversee the implementation of the Basic Principles on the Independence of the Judiciary and the Basic Principles on the Role of Lawyers, the Special Rapporteur believes it is imperative for him to work in close cooperation with the Crime Prevention and Criminal Justice Branch. To this end, the Special Rapporteur hopes to participate in the forthcoming session of the Commission on Crime Prevention and Criminal Justice to be held in Vienna in May 1996.

3. Cooperation with the Advisory Services, Technical Assistance and Information Branch of the Centre for Human Rights

60. The Special Rapporteur welcomes the fact that the Advisory Services, Technical Assistance and Information Branch of the Centre for Human Rights offered two training courses for lawyers and judges in 1995. These courses

focused on the following topics: international sources, systems and standards for human rights in the administration of justice; human rights during criminal investigations, arrests and pre-trial detention; the independence of judges and lawyers; the elements of a fair trial; juvenile justice; protection of the rights of women in the administration of justice; human rights under states of emergency; standards for the treatment of prisoners; non-custodial measures; and non-discrimination and equal justice. The first training course was for judges, on human rights in the administration of justice. It was held in Ulaanbaatar in February 1995, part of a continuing multi-component project in Mongolia. The second event was a workshop on international standards for judges, lawyers and prosecutors which took place in Sao Tome and Principe in November 1995.

61. The Special Rapporteur also welcomes efforts by the Branch to develop a manual for a human rights training programme for judges and lawyers. As a part of this effort, the Branch is putting together materials that will be published as a volume in the Centre's Professional Training Series. The manual will be used as the basis for training programmes that will be offered to judges and lawyers at the request of countries through the programme of advisory services and technical assistance carried out by the Centre in the area of human rights in the administration of justice. The manual and related materials will be developed in consultation with the Special Rapporteur and the United Nations Crime Prevention and Criminal Justice Branch. Non-governmental organizations which have done valuable work in this field will be contacted and invited to provide suggestions. The contents will be developed through the training courses for judges and lawyers which are held as part of the ongoing technical cooperation projects of the Centre. In addition, according to the information received, a meeting of experts to review an outline of the manual will be held.

4. Cooperation with the United Nations Interregional Crime and Justice Research Institute

62. On 8 November 1994, the Special Rapporteur received a communication from the United Nations Interregional Crime and Justice Research Institute (UNICRI). This communication indicated that the mandate of the Special Rapporteur is an area in which UNICRI took particular interest. It noted that in September 1989 UNICRI and the Centre for Human Rights jointly organized a training course for Colombian judges on human rights and judicial investigation in Castelgandolfo, Italy, and in December 1991 UNICRI worked with the Centre, the Crime Prevention and Criminal Justice Branch and the Foundation for International Studies of the University of Malta on a training course on human rights and crime prevention in Valletta.

63. UNICRI is also currently working on a project of assistance to Albania in the prevention of crime and the administration of justice, in collaboration with the Italian Superior Council of Judges. An important aspect of this endeavour has been the administration of justice, including the Basic Principles on the Independence of the Judiciary and procedures for their effective implementation.

5. Cooperation with the International Labour Office

64. On 15 November 1994, the Special Rapporteur received a letter from the Legal Adviser of the International Labour Office in reply to his initial communication.

65. The Legal Adviser indicated that several international labour standards were pertinent to the need for an independent and impartial judiciary in the member States of the ILO. He referred in particular to ILO instruments guaranteeing freedom of association. The 1994 General Survey of the Reports on the Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention 1949 (No. 98), prepared by the ILO Committee of Experts on the Application of Conventions and Recommendations, illustrates this link. He enclosed copies of paragraphs 32, 77 and 106 of the report. In addition, he indicated that the Termination of Employment Convention, 1982 (No. 158) provides in its article 8, paragraph 1: "A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator." He further indicated that in some countries the labour inspection system included persons who may exercise judicial powers. Where this is the case, the Labour Inspection Convention, 1947 (No. 81) is relevant.

IV. THEORETICAL ISSUES OF SPECIAL IMPORTANCE

A. The use of "faceless" judges in Colombia and Peru

66. In his initial report to the Commission on Human Rights, the Special Rapporteur raised some issues of special importance pursuant to his mandate "to study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers". To this end, the report included a discussion of issues such as separation of powers, the function of judicial review, the media and the judiciary and terrorism and the judiciary. An issue raised in the initial report of the Special Rapporteur was the use of secret witnesses, "faceless" judges and in camera hearing as a measure to combat terrorism. (E/CN.4/1995/39, para. 60). During the past year, the Special Rapporteur continued to receive information on these practices, particularly in Peru and Colombia where there has been extensive use of "faceless" judges and secret witnesses as a means of protecting the judiciary from acts of terrorism. As noted above, this issue is also of particular concern to the Working Group on Arbitrary Detention.

67. Colombia and Peru have in recent times experienced extreme violence resulting from internal disturbances caused by, among other reasons, the confrontation between Government armed forces and irregular armed forces, including terrorist groups and drug traffickers. Targets of this violence have included members of the judiciary. As a response to this situation, both Governments have taken measures to protect the lives and physical integrity of judges and witnesses. Following is a brief description of the measures adopted by the Governments of Colombia and Peru.

1. Colombia

68. On 23 November 1995 the Government of Colombia sent the Special Rapporteur various documents, including materials dealing with what is called "regional justice" or "secret justice".

69. In 1980 the Colombian Government created a system of public order courts, now called courts of regional jurisdiction. The procedures applied by these courts and prosecutors of the regional jurisdiction were established to investigate and prosecute crimes of a certain gravity. The procedures provide judicial officials with certain special powers that other judicial officials lack. One of the principal and special features of the procedures applied by these courts and prosecutors is the use of secret witnesses. For security reasons, testimony presented by a secret witness is admissible before a regional court. Only the judicial official and the agent of the Public Ministry know the identity of the witness and they are obliged to keep it anonymous until the personal security of the witness is guaranteed. One limitation to the reception of this evidence is that it requires corroboration (art. 247, Criminal Procedure Code). Another special power given to regional officials is that the hearings are not open to the public. However, the parties are given a relatively long time to prepare their allegations in written form, instead of orally. Also, regional prosecutors can request preventive detention of a suspect during the investigation.

70. The Government argues that the reason for these special procedures is the prevalence of terrorist activities. Terrorists groups and drug traffickers have created a situation in which it became necessary to protect the lives and personal integrity of the members of the community, in particular judges, magistrates and other people who take part in court proceedings such as witnesses, expert witnesses, informants and victims who testify before the courts. It is alleged that the phenomenon of violence overwhelmed the capacity of the formal judicial system.

71. The Special Rapporteur takes note of the joint report of the Special Rapporteurs on the question of torture and on extrajudicial, summary or arbitrary executions, on their visit to Colombia from 17 to 26 October 1994. The Special Rapporteurs state:

> "Ordinary criminal justice also includes the regional courts, which were formerly called the public order courts and have jurisdiction in proceedings for offences such as terrorism, rebellion and drug trafficking. Non-governmental sources levelled harsh criticism against these courts and their operational procedures, which they considered to undermine due process. In the first place, these categories of offences have been broadly interpreted, resulting in the use of these courts to prosecute not only major criminals, but also activists from peasant, community, labour and similar organizations whose protests, political demonstrations and labour disputes are often characterized as terroristic or supportive of the guerrillas. As far as procedural aspects are concerned, the anonymity of the judges, prosecutors, criminal investigation police officers and even witnesses for the prosecution are still serious obstacles to the exercise of the rights of the defence, despite the reforms introduced in 1993. In this connection, the Fiscal

General de la Nación expressed to the Special Rapporteurs his view that there should be supervision of these courts in order to avoid abuses" (E/CN.4/1995/111, para. 85).

72. The Special Rapporteurs recommended, inter alia, the following:

" ...

"(c) As long as the Regional Justice System exists, the crimes falling under this jurisdiction should be clearly defined so as to avoid acts which constitute a legitimate exercise of political dissent and social protest being considered as 'terrorism' or 'rebellion'. Furthermore, defendants before regional courts must enjoy full respect for their right to a fair trial. The severe restrictions currently in place, including those affecting the right to habeas corpus a procedure essential for protecting people deprived of their liberty from torture, disappearance or summary execution, should be eliminated.

"(d) Effective protection should be provided for all members of the judiciary and the Public Ministry from threats and attempts on their lives and physical integrity, and investigations into such threats and attempts should be carried out with a view to determining their origin and opening criminal and/or disciplinary proceedings, as appropriate.

"(e) Likewise, provision should be made for effective protection of persons providing testimony in proceedings involving human rights violations, as appropriate" (para. 177).

73. The Special Rapporteur also notes that the Inter-American Commission on Human Rights stated in its second report on the human rights situation in Colombia (October 1993) that "faceless" judges and secret evidence are in clear contradiction to the American Convention on Human Rights.

2. Peru

74. During the months of November and December 1995 the Special Rapporteur sent two communications to the Government of Peru concerning cases of defendants who had been formally indicted or tried by tribunals composed of "faceless" judges. The two cases were of deep concern to the Special Rapporteur because the Government had informed him on 21 August 1995 that the anti-terrorist legislation which regulated the functioning of the "faceless" judges was to be abolished on 15 October 1995.

75. In addition, in a communication dated 1 May 1995, the Government submitted information concerning changes made to the internal legislation on terrorism. The Government indicated that it had issued Law No. 26447 as part of the national pacification process. Article 1 of Law No. 26447 provides that the prosecution of crimes of terrorism will be carried out "by the magistrates that correspond according to the procedural and organic norms in effect". This law, which would be put into effect after 15 October 1995, revokes article 15 of Decree Law No. 25475 by which the magistrates who take part in the proceedings of cases of terrorism keep their identity secret. The Government indicated that the use of "faceless" judges was necessary for the

present to protect the physical integrity and the lives of magistrates, who were constantly threatened and attacked by terrorists. The Government concluded that this demonstrated its political commitment to continue adapting its temporary and circumstantial terrorist legislation in accordance with the advances made in the fight against terrorism and the process of national pacification.

76. The Special Rapporteur has learned, however, that terrorism cases will continue to be tried by "faceless" judges until 11 October 1996 (Law No. 26537). Among the reasons given by the Government is that the terrorist organizations have not yet been dismantled.

3. Conclusion

77. United Nations special rapporteurs, the Inter-American Commission on Human Rights and human rights NGOs have condemned the use of "faceless" judges for the following reasons: it violates the principle of the independence of the judiciary; the practice restricts the defendant's right of due process; and it violates the right to a fair trial in a systematic way.

4. Preliminary observations of the Special Rapporteur

78. In a preliminary evaluation of the Governments' reasoning for the use of "faceless" judges, the Special Rapporteur is of the view that such special procedures violate the independence and impartiality of the justice system for a variety of reasons. The Special Rapporteur is, however, mindful of the need to protect the security of individual judges in terrorist-related cases. However, this issue requires further study and analysis. During the course of the coming year, the Special Rapporteur hopes to carry out a mission to Peru and Colombia to investigate these practices in situ, and to do a more exhaustive survey worldwide of similar practices before stating his final conclusions and recommendations.

B. Establishment of an International Criminal Court

79. The Special Rapporteur welcomes the proposed establishment of the International Criminal Court and the progress made towards its establishment.

80. The Special Rapporteur observes that while article 10 of the draft Statute provides for the independence of the judges of the Court, it is imperative that the provisions of the article are strictly implemented once the Court is established because the judges, at least in the initial stages, will not be full-time judges with any fixed remuneration, but will be paid allowances on a daily basis for work actually performed. The onus would be upon the Presidency of the Court to see that the judges do not engage in any employment inimical to their independence including those specifically prohibited under article 10 (2). At the earliest time the judges should be made full-time members of the Court.

C. Johannesburg Principles on National Security, Freedom of Expression and Access to Information

81. In paragraphs 58 and 59 of the Special Rapporteur's first report he raised the problems arising from restrictions imposed on judicial independence by Governments on the grounds of "reasons of State" and during states of emergency. The Special Rapporteur alluded to the need for possible additional standards to safeguard judicial independence even during such crises. In this regard, the Special Rapporteur welcomes the Johannesburg Principles on National Security, Freedom of Expression and Access to Information adopted on 1 October 1995 by a group of experts in international law, national security and human rights. The initiative for this meeting of experts was taken by the NGO article 19: the International Centre Against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of Witwatersrand in South Africa.

82. The Principles are based on international and regional law and standards relating to the protection of human rights, evolving State practice (as reflected, inter alia, in judgements of national courts), and the general principles of law recognized by the community of nations. The Principles also acknowledge the enduring applicability of the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights and the Declaration of Minimum Humanitarian Standards applicable in a state of emergency (the Turku Declaration). The Principles spelled out in this document add to the meagre materials currently available on these subjects. The Special Rapporteur will from time to time refer to these standards to the extent that they are applicable to his mandate.

D. The media and the judiciary

83. In paragraph 61 of the Special Rapporteur's first report he referred to the increasing concerns about the relationship between the media and the judiciary.

84. The role of the media in the O.J. Simpson trial in the United States has raised the important question of how extensive media coverage could affect a fair and impartial trial. No doubt this issue has been addressed in several forums, including by judges. The issue came to the surface again in another criminal case in the United Kingdom in October 1995. In the case of R. v. Geoffrey Knights, the presiding judge, Judge Sanders, after detailing the manner in which the media had covered the pre-trial events, made the following scathing remarks about the media:

> "I have absolutely no doubt that the mass-media publicity in this case was unfair, outrageous and oppressive. I agree with Mr. Plumstead that it can be described as malicious. I also believe that there are grounds for instituting proceedings for contempt of court against the editors concerned and that there is an urgent need to investigate the possibility that certain journalists have colluded with and suborned prosecution witnesses.
>
> "I considered whether I could allow the trial to proceed on its due date by careful vetting of the jury and by giving special

directions to them. The glaring problem is that there can hardly be a potential juror on the panel who has not heard something about this case. The newspapers and articles are widely circulated. They are not of limited or specialist interest only to a few. They are national so I cannot move the venue. Any direction I give to the jury would only draw to their attention that which I wish to conceal. I had thought of delaying the trial for a reasonable period but I have no confidence that the media will leave it alone and in any event to delay the trial is oppressive to the complainant and defendant alike. Counsel would have an impossible task. He would undoubtedly want to question witnesses on what they allegedly told reporters where it is inconsistent with their statements and sworn testimony. It is arguably relevant to ask those witnesses who gave interviews whether they received payment for doing so. Their credibility has been put at issue by the interference of the press in the judicial process. Counsel could be accused of failing in his duty if he didn't refer to the press reports during cross-examination.

"I have not disregarded the serious nature of the case and the concerns of the alleged victim if his complaint is true but the newspapers have denied him the opportunity to put his case just as they have denied the defendant a fair trial. For those reasons I have stayed the proceedings. There has been a grave abuse of process here.

"I direct that the papers in the case be referred to the Attorney General to consider contempt of court proceedings against the editors concerned and I am also asking the Director for Public Prosecutions if she would investigate the possibility that individual journalists have made illegal approaches to prosecution witnesses."

85. It was reported that it was unprecedented in English legal history for a judge to discharge the jury even before the trial proper had commenced. The facts in this case once again reinforced the Special Rapporteur's concerns over the role of the media in the coverage of trials, and in particular pre-trial procedures. As previously stated, a fine balance needs to be struck between the right of the consumers of justice to a fair and impartial trial and the equally important right to freedom of expression and the corresponding right to information. The Special Rapporteur intends to work closely with the Special Rapporteur on freedom of expression and to seek the cooperation of organizations like the International Commission of Jurists and article 19 to formulate some standards to achieve this balance.

E. Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region

86. LAWASIA is the acronym for Law Association of Asia and the Pacific. Founded in 1966, it is the oldest regional association of jurists in the Asian-Pacific region. Its primary objective is "to promote the administration of justice, the protection of human rights and the maintenance of rule of law

in the region". The Association has a Judicial Section which, during the biennial conferences of the Association over the last 12 years, has held a parallel conference of Asian Chief Justices.

87. The Sixth Conference of Asian Chief Justices was held in Beijing in August 1995 in association with the fourteenth biennial conference of the association. Eighteen Chief Justices were present either personally or through their representatives. What emerged was an important document known as the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, which was adopted unanimously.

88. The Beijing Statement had its origin in a statement of principles known as the "Tokyo Principles" formulated by the LAWASIA Human Rights Standing Committee and a number of Chief Justices and other judges following a meeting held in Tokyo in 1982. It also draws heavily upon other international statements of principles including the Basic Principles on the Independence of the Judiciary, and the "Singhvi Declaration".

89. The Beijing Statement, declared to represent "minimum standards necessary to be observed in order to maintain the independence and effective functioning of the judiciary", is most welcome emanating as it does from Asian-Pacific countries including Australia and New Zealand. The Chief Justices of Australia, Bangladesh, China, Hong Kong, India, Indonesia, Mongolia, Myanmar, Nepal, New Zealand, New Caledonia, Pakistan, Papua New Guinea, the Philippines, the Republic of Korea, Singapore, Vanuatu, Viet Nam and Western Samoa signed the Statement, the Chief Justice of Malaysia, although not present in Beijing, had also agreed to sign.

90. The Special Rapporteur commends the Chairman of the Judicial Section of LAWASIA, the Chief Justice of Western Australia, Mr. David Malcom, for his untiring efforts in the preparation of the draft of the Statement.

91. The Special Rapporteur observes that the Statement will be an invaluable supplement to the existing standards. He will, from time to time, refer to the Statement in dealing with Governments and others in the Asian-Pacific region. The Special Rapporteur would welcome information from Bar Associations in the region on the extent to which Governments in the region have implemented the principles set out in the document.

F. Mechanisms for appointment of judges

92. The Special Rapporteur has undertaken a study on appropriate independent appointment mechanisms to ensure that men or women of the right calibre are appointed to the office of judge. In addition to the traditional safeguards necessary to secure judicial independence, in the final analysis it is the character, qualifications and independence of the individual appointee that make the difference. Hence the importance of the selection process.

93. At the request of the Special Rapporteur and with the cooperation of the Chief Justice of the Philippines, a study was undertaken by lecturers and a student of the School of Law of the Ateneo de Manila University on the procedure used for selection of judges in that country. Under the 1987 Constitution of the Philippines the members of the Supreme Court and judges of

High Courts are appointed by the President from a list of at least three nominees prepared by the Judicial and Bar Council for every vacancy. Such appointments need no confirmation. The Judicial and Bar Council is a constitutional creature composed of representatives from the judiciary, the Bar, academics and Government and lay persons. The Chief Justice is the Chairman and the Minister for Justice the Deputy Chairman.

94. The Constitution is also concerned with the quality of judges. It states that "a member of the judiciary must be a person of proven competence, integrity, probity and independence".

95. The Special Rapporteur has received the research material and is currently studying it. The Special Rapporteur would welcome the input of other organizations that have carried out similar studies or that are prepared to assist in similar research on how independent appointment mechanisms function in practice. The object of the exercise is to find suitable mechanisms for standard-setting.

G. Conflicts between the legal profession and the judiciary

96. The judiciary and the legal profession are integral institutions in any system of justice in civilized nations. Harmony, respect for each other's roles and close cooperation will guarantee an independent system of justice based on the highest principles. Conflict or tension between the two will adversely affect the administration of justice. In an adversarial system some conflicts are inevitable. It is left to the maturity of the individuals to put aside personalities and strive for the greater good of the system in general. But when the conflict is institution-based it leads to confrontations which will eventually mar the proper administration of independent justice.

97. The incidence of such conflicts appears to be on the increase and the Special Rapporteur is concerned. The situation needs to be monitored and data collected. A conflict-resolution mechanism may need to be devised within the Centre for Human Rights to be made available to such institutions to restore harmony when requested.

H. Commercialization of the legal profession

98. The organization of legal practices of lawyers needs to keep pace with modern changes, advances and liberalization policies. At the same time, professionals in the practice of the law must be mindful of the need to retain the element of independence needed to discharge their professional duties. Independence is needed not only when the lawyer is on his feet in court; it is needed even when he is in his law office advising clients or drafting a document. People seek him out for his independent advice and skills. It is this independence in the profession which distinguishes it from any other vocation or profession.

99. The Special Rapporteur expresses concern over the increasing trend towards commercialization of the practice of the law. Law firms in some developed and other countries are run more like large corporate institutions.

Rules on professional advertising have become so relaxed in these countries that the media, both print and electronic, are used for the purpose. The Special Rapporteur is considering undertaking a research programme to evaluate how this trend, if left unchecked, would erode not only the independence of lawyers but their professional status as well. The study would include the impact of an over-commercialized legal profession on judicial independence.

I. The Cairo Declaration

100. The Third Conference of Francophone Ministers of Justice took place in Cairo from 30 October to 1 November 1995. The meeting was organized by the Agence de cooperation culturelle et technique (ACCT). The meeting concluded with the Cairo Declaration, in which the participants, inter alia:

(a) Reaffirmed the Francophone community's support of the Basic Principles on the Independence of the Judiciary;

(b) Expressed preoccupation with obstacles to access to justice present in numerous countries, including the long distance to courts, high price of trial, ignorance of the law, lack of judicial assistance, and malfunctioning of certain jurisdictions;

(c) Agreed on the need to eliminate all impediments to the independence of judges, who are the primary guarantors of accessible and efficient justice, by providing them the legal and material means necessary;

(d) Agreed on the need to give greater emphasis on judicial training, particularly initial, continuing and specialized training, of judges and judicial personnel;

(e) Agreed to watch over the adoption and observance of ethical rules, in order to preserve the dignity of the judiciary;

(f) Agreed to participate actively in the work being done towards the convention establishing the International Criminal Court.

101. These are positive developments which the Special Rapporteur welcomes.

V. SITUATIONS

A. General

102. This section contains brief summaries of the urgent appeals and communications transmitted by letter to Governments, and the cases of allegations and urgent appeals to which replies were received from Governments. Observations by the Special Rapporteur have also been included where applicable. This section also contains a summary of substantive information the Special Rapporteur has received from Governments in response to his communications of October 1994.

103. In preparing this report the Special Rapporteur took note of those drawn up by his colleagues, Mr. Paulo Sérgio Pinheiro, Special Rapporteur on the human rights situation in Burundi (E/CN.4/1996/16, paras. 26, 146-147);

Mr. M. Kirby, Special Representative of the Secretary-General on the situation of human rights in Cambodia (A/50/681, paras. 35-38); Mr. J.-C. Groth, Special Rapporteur on the situation of human rights in Cuba (A/50/663, annex, paras. 23-24); Mr. Alejandro Artucio, Special Rapporteur on the human rights situation in the Republic of Equatorial Guinea (E/CN.4/1995/68, paras 23, 50-51 (a)); Mr. Tadeusz Mazowiecki, Special Rapporteur on the situation of human rights in the territory of the former Yugoslavia (A/49/641-S/1994/1252, paras. 97-98, 141), Mrs. Monica Pinto, Independent Expert on the human rights situation in Guatemala (E/CN.4/1996/15, paras. 50, 55-57, 61, 64, 129-130); Mr. Reynaldo Galindo Pohl, Special Rapporteur on the human rights situation in the Islamic Republic of Iran (E/CN.4/1994/50, paras 95-96, 111); Mr. Gáspár Biró, Special Rapporteur on the situation of human rights in the Sudan (E/CN.4/1996/62, para. 24); Mr. Bacre Waly Ndiaye, Special Rapporteur on extrajudicial, summary or arbitrary executions (E/CN.4/1996/4, paras. 69-70, 92, 102, 129, 266, 426, 605-606).

B. Situations in specific countries or territories

Albania

Allegations transmitted to the Government

104. By letter dated 28 September 1995 the Special Rapporteur informed the Government that he had received information concerning allegations of threats to the independence of the judiciary.

105. According to the information received, the High Council of Judges, which has the power to nominate, remove and discipline lower court judges, had removed judges arbitrarily and without due process. This High Council of Judges included officials of the executive, which added to the appearance of impropriety.

106. The Government also proposed an amendment to the Constitution that would have allowed a judge of the Court of Cassation to be removed without cause.

107. The executive had taken some actions which, considered together, appear to constitute an attempt to undermine the authority and independence of the Court of Cassation. For instance, in the winter of 1994, the executive initiated actions in parliament to strip the Chief Judge of the Court of Cassation of his immunity. Later, the executive introduced a motion in parliament to remove two other staff members of the Court of Cassation. The executive continued to threaten the Court's budgetary authority following a decision of the Court to review the case of Fatos Nano, a socialist leader and former member of parliament. The executive petitioned the Court to remove the case from its jurisdiction and to suspend the enforcement of all orders of the Chief Judge. Finally, on 5 September 1995, the Minister of Justice was dismissed and the executive arrested or attempted to arrest the chief administrator of the Court, as well as other staff members. Furthermore, it is alleged that the court building itself was surrounded by police, who placed restraints on free access to the Court, and that some individuals who tried to enter the building were assaulted.

108. In his meeting with the Chargé d'affaires of the Permanent Mission of Albania to the United Nations at Geneva on 21 November 1995, the Special Rapporteur expressed his concerns about the situation of judicial independence. The Albanian representative provided a brief explanation of the current situation and promised to send to the Special Rapporteur a detailed reply from the Government by the end of December.

Response of the Government

109. On 12 January 1996 the Albanian Government submitted an official response to the Special Rapporteur's letter of 28 September 1995.

110. The Government explained that the removal of the immunity of the Chairman of the Court of Cassation and the approval of penal procedures against him were made in accordance with article 6 of Law No. 7561 dated 29 April 1992.

111. With regard to the budget of the Court of Cassation, the Government assured the Special Rapporteur that the Albanian courts have an independent budget that is administered exclusively by the courts.

112. Concerning the suspension of the enforcement of the orders of the Chairman of the Court of Cassation, the Government explained that it was done in accordance with article 25 of Law No. 7561 dated 29 April 1992.

113. With regard to the dismissal of the chief administrator of the Court of Cassation as well as two other employees, the Government explained that it was done in accordance with article 29 of Law No. 7491 dated 29 April 1991.

114. The Special Rapporteur is studying the Government's argument in more detail and expects to issue a response in the near future.

Argentina

Allegations transmitted to the Government

115. On 27 October 1995, the Special Rapporteur transmitted a communication to the Permanent Representative of Argentina to the United Nations Office at Geneva concerning the detention of Dr. León Zimmerman. According to the source, Dr. Zimmerman is the advocate for 200 families who peacefully occupied 27 hectares of land in Quilmes, near Buenos Aires. Subsequently, on 7 October 1995, the judge of the criminal and correctional court No. 4 of Quilmes, Dr. Abel Gonzales Elicabe, ordered the incommunicado detention of Dr. Zimmerman for the crimes of illicit association, usurpation and disobedience.

116. On 24 October 1995, the Special Rapporteur learned that Mr. Zimmerman was freed after the Appellate Chamber ruled that the charges of illicit association were null and void. The Special Rapporteur was also informed that the lower court judge, Dr. Gonzales Elicabe, was removed from the case.

Information transmitted by the Government

117. The Special Rapporteur received a communication from the Government concerning the case of León Zimmerman dated 13 December 1995. In its reply, the Government indicated that Dr. Zimmerman had been freed as a result of an order issued by the Criminal and Correctional Chamber of Appeals of the Jurisdiction of Quilmes which decreed the nullity of all the proceedings that had been carried out. In the same regard, the judge who replaced Dr. Gonzales Elicabe ordered the dismissal of the case against Dr. Zimmerman.

Australia

Victoria

118. In May 1994 the Attorney General of the State of Victoria published a discussion paper entitled "Reform of the Legal Profession - An Agenda for Change". Among the proposals made in the paper was a proposal to have a regulatory body appointed by the executive which would in effect have the ultimate power over licensing of lawyers to practise in the State of Victoria. The Law Institute of Victoria, a statutory body under the Legal Profession Practice Act 1958, which is the professional and regulatory organization for solicitors, while agreeing to some of the Attorney General's proposals took objection to the proposal to set up a regulatory board as such a board would affect the independence of the legal profession in Victoria. The controversy escalated into a confrontation between the Attorney General and the legal profession in Victoria through both the print and electronic media.

119. On being informed of the proposals the Special Rapporteur sought a meeting with the Attorney General. The Special Rapporteur took advantage of his attendance at a meeting in Adelaide on 27 March 1995 to fly to Melbourne on 28 March where he had a brief meeting with the Attorney General. The Attorney General said that the proposals had been misunderstood and assured the Special Rapporteur that it was not the intention of her Government to interfere with the independence of the legal profession in Victoria. It was the intention of her Government rather to permit lawyers to form their own associations. Such associations would be accredited to issue licenses to practise to its members; in the event a lawyer did not wish to belong to any association then the proposed central regulatory board would issue the licence. Her proposal obviously had the effect of taking away the monopoly of the Law Institute and thus fragment the legal profession currently organized under one body into pockets of associations.

120. The Special Rapporteur learned from a subsequent press statement attributed to the Attorney General that her proposal for such a regulatory body had been "endorsed in the Federal Government report on access to justice" released the previous year.

121. In 1994 the Federal Government of Australia did release a report entitled "Access to Justice - An Action Plan - Overview". In the report the following observation, inter alia, was noted:

"The regulation of the legal services market and of the legal profession raises issues that are of central importance to access to justice. Within the framework of ethical responsibilities designed to assist the administration of justice, lawyers protect the rights and advance the interests of the clients they represent. If the legal profession is regulated in a manner that impedes the freedom of lawyers to compete with each other, legal services will not be provided efficiently and consumers of legal services will pay additional costs. Similarly, if the structure of the profession is such that consumers are required to pay for duplication of legal work or unnecessary services, the cost of legal representation will be increased and access to justice thereby diminished. If the exclusive right of lawyers to perform legal services is framed too broadly, consumers are likely to be denied the chance to purchase services from providers (such as conveyancers) who may be prepared to provide them at lower prices than lawyers.

"With this in mind, we propose that the Commonwealth and the States should cooperate in restructuring the legal services market in Australia, by exposing it to competition policy. Of course, we do not suggest that competition principles provide a complete solution to access to justice problems (as is evidenced by all the other areas we have canvassed). None the less, we advocate the extension of the competition principles embodied in the Trade Practices Act 1974 (Cth) to the legal services market throughout Australia. We prefer that this extension take place in the context of the application of the Act to all unincorporated businesses and professions, as a result of a reference of powers by the States to the Commonwealth. Such a reference was suggested by the Hilmer Committee in its report, National Competition Policy, and is presently under consideration by the Council of Australian Governments (COAG).

"We also suggest that the Governments of all States vest the regulatory functions relating to the legal profession in a statutory body, independent of the professional associations, although we think the associations could continue to be involved in the administration of the regulatory system. An alternative, but not our preferred view, is that professional associations should continue to discharge regulatory functions, but that an independent body have the power to disallow rules of the associations on public interest grounds. We consider that those States that maintain formal divisions between solicitors and barristers should remove those divisions, although this would not prevent those who wish to practise as specialist advocates at a separate Bar from continuing to do so."

It is noted that the Federal Government's proposals, as stated above, are in general terms; such is implicit from the word "overview". It was contended that the Attorney General's proposals went beyond and had the effect of threatening the independence of the profession.

122. The Special Rapporteur has been monitoring developments in Victoria on this very issue. He has learned that the Attorney General appointed a working party to examine the proposals contained in her earlier discussion paper. The working party's report was published in September 1995. The recommendation of the working party on the issue of the regulatory board is that it be composed

of three non-lawyer members appointed by the executive and three members elected by the profession. The Chairman should be a serving or retired judge. The question of assuring the independence of the members in terms of their office and conditions for removal is being studied.

123. Subsequent to the release of the working party's report the Attorney General in December 1995 released proposals for a draft Legal Practice Bill to replace the current Legal Profession Practice Act, 1958 for public comment prior to tabling before parliament. The purpose of this exercise is to receive further public comments on the proposals "before a final decision is made by the Victorian Government on the issues covered by those proposals". It has been learned that further changes may be proposed and hence the Bill is not likely to be tabled before Parliament until later this year.

124. The Special Rapporteur is regularly in touch with the Law Institute of Victoria and other interested groups and is monitoring developments. The Special Rapporteur, while commending the Victorian government for constantly seeking the public's views and those of the profession on its proposals and taking them into consideration, nevertheless would urge the government not to formulate any legislation which would undermine or be seen to undermine the independence of the legal profession in Victoria. Any such legislation emanating from Australia, whether at the federal or state level, would send the wrong signal to Governments in some countries in the region where the independence of the profession remains fragile.

Action commenced by the judges of the abolished Accident Compensation Tribunal

125. A brief reference was made in the report to the Sub-Commission on Prevention of Discrimination and Protection of Minorities by Mr. Louis Joinet (E/CN.4/Sub.2/1993/25, para. 131) regarding the removal of the 11 judges of the Accident Compensation Tribunal by the repeal of the legislation which created the Tribunal. The affected judges were offered neither other similar or equivalent judicial posts nor were they compensated. The judges complained that upon appointment they had been assured of security of tenure, like any other independent judge. The Government's contention was that those judges did not enjoy such security of tenure. The State government was alleged to have resorted to removing the judges by legislating the entire Tribunal out of existence, thereby making its judges redundant. Concerns were expressed in many quarters that such action undermined judicial independence. Nine of the 11 judges have since commenced legal action in the Federal Court in Victoria for compensation arising from their removal.

126. The Special Rapporteur has been monitoring developments in this pending action. At the time the present report went to press it was learned that the parties were still at the stage of filing affidavits and the action is likely to be scheduled for hearing later this year. The decision of the federal court in this action would have important implications for the security of tenure of judges of statutory tribunals and thus for their independent status. The Special Rapporteur intends to observe the proceedings personally or to send a representative to the hearing.

Western Australia

127. At the time the present report went to press the Special Rapporteur received information that a report based on a review of Western Australian labour relations legislation had recommended, inter alia, that the office of the President of the Western Australian Industrial Relations Commission who hitherto had the status of judge, be abolished. Fears have been expressed that the present holder of the office may not be appointed to another judicial post if his office is abolished as expected.

128. The Special Rapporteur views this latest development with concern and will be writing to the Attorney General of Western Australia. This once again raises the issue of the security of tenure of judges of statutory tribunals.

New South Wales

129. In an unprecedented move the State government of New South Wales conducted a referendum in the State to seek public approval to entrench judicial independence so that Parliament is prevented from changing the laws affecting judicial independence without a referendum. The referendum was held in conjunction with the State election on 25 March 1995. The results were 65.9 per cent of the electorate in favour of such entrenchment and 34.1 per cent against.

130. Though the Special Rapporteur has yet to see the text of the legislation to entrench, he commends the New South Wales government for this bold, unprecedented and positive step to enhance judicial independence in that State. The Special Rapporteur also commends the legal profession in New South Wales whose members lobbied among the voters for support.

Cambodia

Information transmitted to the Government

131. On 6 January 1995 the Special Rapporteur informed the Government that he had received information alleging that the executive branch of Government was to be entrusted with the power of appointment, promotion and dismissal of judges.

132. On 10 January 1995 the Permanent Mission of Cambodia to the United Nations Office at Geneva sent an acknowledgement of receipt of the communication transmitted by the Special Rapporteur and indicated that it had been forwarded to the Government. To date, no further response has been received from the Government.

China

Information transmitted to the Government

133. On 14 December 1995, the Special Rapporteur sent an urgent joint appeal with the Chairman-Rapporteur of the Working Group on Arbitrary Detention and the Special Rapporteur on the right to freedom of opinion and expression

regarding the case of Wei Jingsheng. The appeal called the attention of the Government to a previous communication transmitted by the Chairman of the Working Group on Arbitrary Detention dated 27 June 1995 regarding the reported incommunicado detention of Mr. Wei, to which the Government had not replied. The Special Rapporteur has yet to receive a response.

134. According to the information received, Mr. Wei was formally arrested on 21 November 1995 by the public security organs on charges of "plotting to overthrow the Government", and that on 13 December 1995 he was sentenced by the Beijing No. 1 intermediate people's court to 14 years' imprisonment. It was reported that his family found out only on 8 December that his trial would start on 13 December, thus leaving no time for him to prepare his defence. It was also alleged that Mr. Wei's lawyer had not been allowed access to him.

Colombia

Information transmitted to the Government

135. On 10 August 1995 the Special Rapporteur submitted an urgent appeal to the Government concerning the murder of human rights lawyer Javier Alberto Barriga Vergel on 16 June 1995. According to the source, Mr. Vergel was acting on behalf of the Committee for Solidarity with Political Prisoners (Comité de Solidaridad con los Presos Políticos), which is very active in investigating numerous cases of human rights violations that implicate members of the police, the army and paramilitary groups.

Information received from the Government

136. On 16 August 1995 the Government replied to the urgent appeal on the case of Mr. Vergel by indicating that the Presidential Advisory Council for Human Rights had met with the Committee for Solidarity with Political Prisoners and that certain agreements had been made. The Government agreed to expedite the investigations. In this regard, an official note was sent to the National Director of Public Prosecutors to ensure that the appropriate measures are taken for a thorough investigation of the case. As a consequence, the National Direction of Public Prosecutors ordered the transfer of the investigations that were undertaken by the prosecutor's office in Cúcuta to the prosecutor's office in Bogotá and a special prosecutor was assigned to the case. The Government noted that this would allow a more efficient investigation in a place other than where the events took place. The Government further stated that it would make arrangements to guarantee the security of the members of the Committee for Solidarity with Political Prisoners in Cúcuta. Finally, the Government stated that it will submit for the consideration of the President of the Republic a proposal consisting of a statement concerning the activity of defence lawyers representing alleged members or real members of insurgent organizations.

137. The Government also indicated that the Special Rapporteur will be informed of the results of the above-mentioned investigations and the implementation of the agreements made. To date, the Special Rapporteur has not received this information.

Observations

138. In light of the mission that is being sought to the country, the Special Rapporteur will address the situation in Colombia in greater detail at a later date.

Egypt

Information transmitted to the Government

139. On 24 June 1994, the Special Rapporteur sent a letter to the Ambassador of Egypt in Kuala Lumpur requesting information on the detention of lawyers.

140. On 27 July 1994, the Special Rapporteur sent a letter to the Ambassador of Egypt in Kuala Lumpur requesting a list of the names of those lawyers arrested and released.

141. On 14 September 1994, the Special Rapporteur sent an urgent appeal to the Government of Egypt concerning the detention of several lawyers following demonstrations protesting the death of a lawyer while in detention. The Special Rapporteur also indicated that it had been brought to his attention that there was fear that the Bar Association would be dissolved by administrative action, as had happened in the past.

Information transmitted by the Government

142. On 18 October 1994, the Government replied to the Special Rapporteur's letters dated 27 July 1994 and 14 September 1994. In its reply, the Government indicated that some members of the Bar Association had exploited their posts by claiming to speak on behalf on their colleagues and adopting positions that did not necessarily represent the views of the majority of members of the Association. The Government did not make any attempt to interfere in the dialogue that was taking place, since it wished to show full respect for the Association's independence and the status of the legal profession.

143. In this regard, some groups within the Association claimed to represent lawyers as a whole and exploited rumours concerning the death of the lawyer Abdel Harith Madani in detention in order to gather together about 600 lawyers at the Association's headquarters on 17 May 1994 when a member of the Association's Council, using a loudspeaker, urged them to immediately hold a public demonstration in the street without giving prior notification to the authorities of their intention to do so.

144. The Government indicated that after several attempts to prevent the lawyers from demonstrating in this way, and after giving the requisite warnings, the security services were forced to use an appropriate degree of force to restrain them in accordance with the regulations in force for the dispersal of demonstrations and gatherings in order to prevent riots and acts of violence.

145. As a result of the intervention of the security forces, 36 lawyers were arrested and were charged with various offences, including participation in a

criminal conspiracy to hold an unlawful gathering and demonstrations, assaulting the public authorities who were carrying out their official duties, throwing stones at vehicles and passers-by and resisting the public authorities. Furthermore, the Government listed the legal norms that were used as a basis to file the charges.

146. All of the lawyers were released unconditionally after being held in custody for various periods of time.

147. With regard to lawyer Madani who allegedly died in detention, the Government stated that Mr. Madani had had serious health problems before he was detained and that the day after being detained he was taken to hospital where he died from an acute asthma attack.

148. With respect to the fears concerning the possible dissolution of the Bar Association, the Government affirmed that there was no real cause for such fears, nor was there any reason to attempt to influence or interfere in the work or activities of the Bar Association as long as the persons running its affairs abided by the provisions of the law.

Observations

149. The Special Rapporteur has not had the benefit of an in situ investigation into the allegations and the Government's contentions. However, the Special Rapporteur had the benefit of reading the report of the Centre for the Independence of Judges and Lawyers (CIJL) which undertook a mission to Egypt from 10 to 16 August 1994. The Special Rapporteur notes the following recommendations of the CIJL:

(a) The Egyptian Government should ensure that the measures taken under the state of emergency are strictly required by the exigencies of the situation in accordance with Egypt's obligations under international law, particularly under the International Covenant on Civil and Political Rights;

(b) The Egyptian legislature should enact laws to prevent the trial of civilians before military courts. The laws allowing for the establishment of special courts should be reviewed in order to respect the right of Egyptian citizens to be tried by ordinary judges in accordance with international law;

(c) The legislature is also encouraged to draft forceful guarantees for the protection of detained persons against torture and other humiliating treatment. State Security personnel should be prevented from interrogating, intimidating and torturing detainees under the protection of the Prisons Service;

(d) Lawyers must be allowed free contact with their clients without intimidation or interference. The confidential contacts with their clients and their families must be respected. All lawyers who were detained for reasons relating to their profession should be set free at once;

(e) Law No. 100 of 1993 concerning professional associations should be reviewed to preserve the independence, the right to free association and the right to self-government of professional associations, including the Bar Association, as required by the Basic Principles on the Role of Lawyers;

(f) Members of the Egyptian Bar are encouraged to adhere to the Basic Principles on the Role of Lawyers in order to enhance their professionalism, independence, freedom of association and freedom of expression;

(g) The Egyptian Government should appoint an independent judicial committee to investigate all cases of deaths of civilians in detention, including the case of lawyer Madani and, if it is found that these deaths resulted from official acts or omissions, should prosecute those responsible.

Hong Kong

150. In January 1995 the Special Rapporteur received a letter from Mr. Philip Y.I. Li, a member of the legal profession in Hong Kong who was also a member of the Law Society Council. Though the background to this complaint was the controversy over the establishment of the Court of Final Appeal in Hong Kong to replace the Privy Council, after reading all the materials received the Special Rapporteur determined that the thrust of the complaint concerned the internal management of the Law Society, specifically the use or abuse of proxy votes at the then-forthcoming extraordinary general meeting of the Law Society in connection with the stand to be taken by the Society on the Court of Final Appeal issue.

151. The Special Rapporteur sought a response from the President of the Law Society on the allegation. After deliberating on the materials received subsequently, the Special Rapporteur came to the opinion that the complaint did not fall within his mandate and sent Mr. Li a letter stating, inter alia:

> "However, my mandate, and interpreting it from the events leading to the creation of the same mandate, is to investigate complaints of actions or inactions resulting in a lawyer's inability to perform his professional functions as a lawyer independently without fear or favour.
>
> "There appears to be no evidence to indicate that the allegation of pressure on certain lawyers over their right to vote at the same meeting, if proven true, may affect, interfere or hinder the alleged pressured lawyers' professional performance of their duties as lawyers.
>
> "The Special Rapporteur should not, and for that matter, should not be seen to be interfering in the internal affairs of law societies or Bar Associations unless the particular society or association seeks his assistance or advice on specific matters."

152. As the issue attracted media attention in Hong Kong, the Special Rapporteur issued a press statement to the same effect.

Japan

Information transmitted to the Government

153. On 6 March 1995, the Special Rapporteur sent a communication to the Government with regard to information he had received concerning the system of appointment of lower court judges. In his letter to the Government he stated that, according to information received from the source, there was discrimination against certain candidates when the Cabinet appointed the judges of the lower court from a list of persons nominated by the Supreme Court. The Supreme Court normally compiles an "Assistant Judge Appointment List" of potential candidates from among graduates of the Legal Training and Research Institute. The Cabinet then makes the appointments based on the list, thus respecting the will of the Supreme Court. However, according to the source, since 1970 there had been 49 cases of graduates being denied appointment. It was alleged that these 49 were rejected because of their "thought or creed".

Information transmitted by the Government

154. On 8 March 1995, the Special Rapporteur received a reply from the Government to his communication in which the Government described the system of selecting judges. In the selection and appointment of an assistant judge from among the legal apprentices who wished to be judges, the Supreme Court of Japan had constantly considered competence, insight and other factors, based on the records of the Legal Training and Research Institute. Furthermore, the Supreme Court had never refused to appoint a person as a judge because of his or her thought or creed.

The daiyo kangoku system

155. The role of the daiyo kangoku ("substitute prison") in the Japanese criminal justice system has been the subject of concern to lawyers and others. The concern is largely over the use of such places for obtaining pre-trial confessions. It is alleged that the usual safeguards for the protection of the human rights of the accused are absent and that judges tend to accept without question confessions obtained in this manner. Since 1958 the Japanese Federation of Bar Associations has publicly called for the abolition of the system. At the request of the Association the International Bar Association sent a mission to Tokyo with the support of the International Commission of Jurists and the Law Association of Asia and the Pacific in 1994/95.

156. The Special Rapporteur was sent a copy of the report of the mission. Of concern to the Special Rapporteur is the finding that the daiyo kangoku raises problems for "the rule of law and the independence of the judiciary in Japan". The mission found that the ready acceptance by judges of confessions obtained under the system leads to the perception of the judiciary as being an extension of the prosecution, and called for the judges to be educated "in the true import of the concept of the independence of the judiciary".

157. The Special Rapporteur views the findings of the mission with regard to the independence of the judiciary in Japan with some concern and will pursue the matter further with the relevant government authorities in Japan.

Malaysia

158. A few recent decisions handed down by the courts have placed the Malaysian judiciary in the spotlight with allegations of impropriety. The catalyst was a questionable decision of a High Court judge on an ex parte application in a commercial case. Both the High Court judge and the conduct of the lawyer who acted for the applicants were criticized by the Court of Appeal in rather strong terms. The Federal Court (the highest appellate court) in a lightning appeal set aside the judgement of the Court of Appeal and severely, in even stronger language, reprimanded the three appeal judges and directed that certain parts of the Court of Appeal judgement be expunged.

159. This commercial case involved a struggle by businessmen to take control of a publicly listed company called Ayer Molek; millions of ringgit were at stake. The facts of the case and the manner in which the court procedures were used for the attempted take-over of the company and the language of the judgements of the Court of Appeal and the Federal Court presided over by the Chief Justice led the Bar Council of Malaysia to issue the following press statement on 21 August 1995:

> "The Bar Council is deeply shocked at the extraordinary events in the Ayer Molek Rubber Company case. These events are a matter of very great concern to the commercial and corporate community and to the general public. The totally differing views and comments of the Court of Appeal and the Federal Court raise very serious questions as to the administration of justice in Malaysia. These questions demand an answer. Something is very seriously wrong."

160. The events aroused considerable public anxiety over the integrity, independence and impartiality of the judiciary. This was compounded by subsequent revelations that the judgement of the Federal Court could be a nullity because one of the three judges who sat at that Federal Court sitting was not qualified to do so under the provisions of the Malaysian Constitution. On 23 August 1995 the Special Rapporteur issued the following press statement:

> "Complaints are rife that certain highly placed personalities in Malaysia including those in the business and corporate sectors are manipulating the Malaysian system of justice and thereby undermining the due administration of independent and impartial justice by the courts.
>
> "Under the mandate entrusted to me by the United Nations Commission on Human Rights, I am duty bound to investigate these complaints and report to the same Commission, if possible, at its fifty-second session next year. To facilitate my inquiries I will seek the cooperation of all those involved in the administration of justice, including the Government which, under my mandate, is requested to extend its cooperation and assistance."

161. In a speech delivered at the opening of an international conference in Kuala Lumpur on 9 December 1995, the Deputy Prime Minister of Malaysia, Dato Anuar Ibrahim, alluded to the events and the public anxiety over the state of the judiciary. He said, inter alia:

"The growing concern of the public as regards the increasing incidence of judicial indiscretions is not a matter to be taken lightly, nor viewed negatively. In tandem with the growing maturity of our society, the people's consciousness and expectations of the moral dimension of justice is greater. Not only must judges display the requisite level of competence and expertise; like Caesar's wife [they must] be above suspicion."

162. The Special Rapporteur has since gathered information and is continuing to do so. Following the terms of his mandate, the Special Rapporteur will not only inquire into allegations of erosion of judicial independence but will inquire into and identify causes leading to such erosion and provide specific recommendations.

163. The causes which have led to the present state of the judiciary could be traced to 1987/88 beginning with the amendment to the Malaysian Constitution to remove judicial power from the High Court and the subsequent judicial crisis when six independent senior judges of the then Supreme Court, including its Lord President, were subjected to disciplinary tribunal proceedings. Three were dismissed, including the Lord President.

164. The then Chief Justice, Tan Sri Hamid Omar, who presided over the tribunal which recommended the removal of the Lord President, succeeded to the office of the Lord President of the Supreme Court. And this same Lord President retired from office in 1994 amidst several police reports lodged against him for corruption. The Attorney General in a public statement said that there was no evidence for any prosecution.

165. Due to space constraints in the present report coupled with the investigations still in progress, the Special Rapporteur will submit a separate detailed report on the state of the Malaysian judiciary to the Commission at a later date.

Mexico

Information transmitted to the Government

166. On 6 July 1995 the Special Rapporteur sent a communication to the Government expressing his outrage at the assassination of Judge Polo Uscanga on 19 June 1995. In his communication, the Special Rapporteur referred to his previous urgent appeal sent to the Government on 19 June 1995. On that occasion, the Special Rapporteur advised the Government of the information he had received concerning the resignation under pressure of Judge Abraham Polo Uscanga on 1 April 1995 because he refused to issue a warrant for the arrest of the leaders of the Union Ruta 100. Following his resignation, Judge Polo Uscanga issued a statement explaining that he had refused to issue the warrant because he considered that it did not satisfy the minimum evidentiary requirements. Soon afterwards, he began receiving threatening phone calls. According to the information received, Judge Polo Uscanga was kidnapped at gunpoint, blindfolded and taken to an unknown destination, severely tortured, and then released. He was subsequently found shot to death.

167. The Special Rapporteur considers that the death of Judge Polo Uscanga puts at grave risk the independence and the impartiality of the judiciary in Mexico. The Special Rapporteur considered that if a thorough investigation is not carried out and the responsible parties punished, a climate of distrust and impunity and a grave precedent will be established for the magistrates of the United States of Mexico.

Information transmitted by the Government

168. On 14 December 1995, the Government replied to the communications of the Special Rapporteur concerning Judge Polo Uscanga. In its reply, the Government attached a copy of a report submitted by the Commission of Human Rights of the Federal District and of a report submitted jointly by the Federal Prosecutor and an ad hoc commission created by the National Assembly.

169. The report of the Commission of Human Rights dated 18 July 1995 stated that the Superior Tribunal of Justice of the Federal District authorized a leave of absence requested by Judge Polo Uscanga on 1 April 1995. The reason for the request, according to the judge, was that another member of the Tribunal, Mr. Saturnino Agüero Aguirre, had tried to intimidate him. On 5 June 1995, Mr. Polo Uscanga filed a complaint that he had received death threats and that he had been kidnapped and tortured. The report contained extensive details of the torture allegedly suffered by Mr. Polo Uscanga. On 20 June 1995, his body was found in circumstances that led the police to think that he had been murdered.

170. According to the joint report, Judge Polo Uscanga was shot in the back of the head by two or three people. The gun found at the scene of the crime was the murder weapon. Nothing had been stolen from his apartment.

Observations

171. The Special Rapporteur thanks the Government for providing him with the preliminary results of the investigation on the assassination of Judge Polo Uscanga. However, the Special Rapporteur wishes to express his view that it is still necessary to identify and bring to justice those responsible for this outrageous crime, which will continue to be a threat to the independence of judges and lawyers in Mexico.

Namibia

Information transmitted to the Government

172. On 29 May 1995, the Special Rapporteur sent a message to the Attorney General, Advocate R.V. Rukoro, concerning the information he had received concerning the Legal Practitioner's Bill 1995 which had been tabled in Parliament. According to the information received, it appeared that certain provisions of the Bill would have the effect of directly undermining the independence of the legal profession in Namibia and, subsequently and inevitably, the independence of the judiciary.

Information transmitted by the Government

173. On 16 June 1995, the Ministry of Justice of Namibia replied to the Special Rapporteur's communication concerning the Bill. He indicated that nothing in the Legal Practitioner's Bill 1995 could objectively be said to violate the universally accepted norms for the protection of an independent legal profession. The Minister of Justice indicated that what was really at issue was simply self-interest. The members of the Law Society and the Society of Advocates were all white but for a handful of indigenous black lawyers. After independence, the status quo continued whereby their law firms were entrusted with the training and admission of new advocates and attorneys through articles of clerkship. Their firms were under no obligation to take any law graduate but could do so at their discretion.

174. The Minister further stated that there were well in excess of 25 young black law school graduates at the time of independence who had acquired their academic qualifications in exile during the struggle, most of them from reputable universities like Warwick in the United Kingdom. Most of these young men and women could not get articles from the white law firms. According to the law firms, any legal education acquired outside South Africa, which was their bastion, was suspect.

175. The result of this had been that since independence 5½ years ago the "so-called independent legal profession" had not admitted a single advocate and only a handful of attorneys, certainly less than five. This was a poor record and it could be said that there was a deliberate attempt to keep the number of legal practitioners as low as possible.

176. Private legal practitioners are at present found only in Windhoek and a few of the larger centres which were previously, under the apartheid law, designated as police zones where blacks were not allowed to live. Well over 70 per cent of the population lived and still lives outside these zones and not a single one of those towns has even a single private legal practitioner. They have to travel 500-900 kilometres to obtain the services of a lawyer.

177. With such an imbalance of legal services, it had become a matter of necessity for the Government to look at other ways of training lawyers at a pace that would be acceptable to address the imbalance. The Law Faculty was therefore established at the University as well as a Justice Training Centre to train graduates in practical skills. This method of training is not particular to Namibia; it exists in many other countries.

178. The definition of legal practitioner contained in the Bill and complained of by the law societies is also a definition found in most legal systems. Lawyers are lawyers in whichever sector they work. The Bill's only "mischief" is to bring about changes that would afford Namibians equal opportunities both to study law and to obtain the services of lawyers by ensuring the training of more lawyers to join the legal profession.

179. The Minister of Justice considered that in view of the above-mentioned reasons he did not consider it necessary for the legislative programme of the National Assembly to be deferred owing to the Special Rapporteur's involvement.

180. The Government raised a question regarding the intervention of the Special Rapporteur at the present stage of the situation. It is indicated that both the Optional Protocol to the International Covenant on Civil and Political Rights and resolution 1503 (XLVIII) of the Economic and Social Council, which recognized the right of individuals or groups of individuals to communicate complaints about violations of their human rights to bodies such as the mandate of the Special Rapporteur, provide that all possible domestic remedies must be exhausted before the complaint can be entertained. In Namibia, citizens have a right to test the constitutionality of any Act of Parliament in a competent court of law. This condition has not been fulfilled by the two societies. The Minister questioned whether the Special Rapporteur was not obliged to ensure that this procedure is adhered to.

181. The Special Rapporteur thanks the Minister of Justice for his detailed reply, which raises important issues on the structure of the legal profession and for equal opportunities for all citizens without any discrimination.

Observations

182. While the Special Rapporteur is of the opinion that it is unnecessary for special rapporteurs and working groups of the Commission on Human Rights to delay consideration of an issue brought to their attention until domestic remedies have been exhausted, he nevertheless intends to raise this issue at the forthcoming meeting of special rapporteurs scheduled for 28 to 31 May 1996.

Nigeria

Information transmitted to the Government

183. On 2 November 1995, the Special Rapporteur and the Special Rapporteur on extrajudicial, summary or arbitrary executions sent a joint urgent appeal to the Government of Nigeria drawing the Government's attention to the information they had received containing the following grave allegations.

184. On 30 and 31 October 1995, Ken Saro-Wiwa, writer, environmentalist and President of the Movement for the Survival of the Ogoni People (MOSOP), as well as Dr. Barinem Kiobel, Saturday Dobee, Paul Levura, Nordu Eawo, Felix Nuate, Danial Gbakoo, John Kpuinem and Baribor Bera, were reportedly sentenced to death by hanging by the Civil Disturbances Tribunal in Port Harcout, Rivers State. They were allegedly convicted in relation to the murder of four Ogoni leaders in May 1994. After their arrest in May 1994, the nine were reportedly held incommunicado for eight months, without any charges brought against them. They were allegedly ill-treated during their detention in overcrowded and unhygienic cells, and they were allegedly denied medical treatment. The trial of the nine had been reported to be unfair, and the defendants allegedly had no right to appeal against the sentence.

185. The denial of medical treatment might have resulted in the death of another accused, Clement Tusina, who reportedly died from diabetes on 15 August 1995 during detention.

186. Disturbing reports had been received concerning the lack of independence and impartiality of the Civil Disturbances Special Tribunal, which was allegedly established by the Government especially to try the case in two separate trials. The Government was reported to have appointed the members of the Tribunal, among whom was a serving armed forces officer. It was alleged that the verdicts and sentences of the Special Tribunal would have no legal status until confirmed by the Government, which could accept or reject the Tribunal's findings in secrecy without any legal argument and without giving any reasons. Moreover, it was alleged that the military had wielded an improper influence over the Tribunal's proceedings. It was furthermore alleged that two key prosecution witnesses had been bribed and threatened to give false evidence, and the defence lawyers of Ken Saro-Wiwa were reported to have withdrawn from the trials in June and July 1995, as a protest against alleged bias of the Tribunal in favour of the prosecution.

187. On 9 November 1995, the Special Rapporteurs reiterated their urgent appeal of 2 November to the Government of Nigeria. They expressed deep concern to have learned that the Provisional Ruling Council on 9 November 1995 had unanimously confirmed death sentences for the nine persons, including Ken Saro-Wiwa. The Special Rapporteurs strongly urged the Government of Nigeria to refrain from carrying out the death sentences and urgently to provide the Special Rapporteurs with information concerning the way the trial was conducted.

188. The Special Rapporteurs, on 2 November and 9 November 1995, jointly issued press releases in which concern was expressed about the human rights situation in Nigeria and the confirmation of death sentences on the nine Ogoni activists respectively.

189. On 21 November 1995, the Special Rapporteur wrote to the Chargé d'affaires of the Permanent Mission of the Federal Republic of Nigeria to the United Nations Office at Geneva stating that in the light of recent events and the concern expressed by the international community over the state of the rule of law and human rights, including the independence of judges and lawyers, in Nigeria, he would like to undertake a joint mission with the Special Rapporteur on extrajudicial, summary or arbitrary executions to investigate and to report on the state of the independence of judges and lawyers pursuant to the mandate given him by the Commission on Human Rights. The Special Rapporteur requested the Government of Nigeria to extend all facilities and access to all materials and personalities so that he might be able to carry out his mission meaningfully and constructively. The Special Rapporteur sought an immediate response to his proposal to enable him to carry out his mission within three months from 21 November 1995. Although consultations have been held with the Chargé d'affaires and Ambassador of Nigeria, to date the Special Rapporteur has not received a response from the Government concerning such a mission.

190. On 4 December 1995, the Special Rapporteur wrote to the Chargé d'affaires of the Permanent Mission of the Federal Republic of Nigeria to the United Nations Office at Geneva, drawing his attention to information received by the Special Rapporteurs concerning the case of 17 Ogoni activists who were arrested in mid-1994 following the alleged murder of four Ogoni leaders in May 1994. It was alleged that the 17 individuals were detained incommunicado

and without charge from mid-1994 until June 1995. It was alleged that they were brought before a magistrate's court in Port Harcourt on a "holding charge", believed to be for murder. It was further alleged that four other Ogoni activists - whose identities are not known - were reportedly arrested on 24 October 1995 and charged with murder, also in connection with the May 1994 murders. Following the execution of the nine Ogoni activists on 10 November 1995, concern had been expressed that the 21 Ogoni activists referred to above could be unfairly tried and sentenced to death by the Civil Disturbances Tribunal, which was considered not to be independent. Further, it was a fact that there was no right of appeal from the decisions of that Tribunal and it was left to the discretion of the executive to either confirm or not to confirm the conviction and death sentence.

191. If these allegations are correct, the 21 Ogoni activists would be tried by a tribunal devoid of the universally accepted basic norms for independent and impartial justice. To date, the Special Rapporteur has received no response to this communication.

192. On 8 February 1996 the Special Rapporteur and the Working Group on Arbitrary Detention transmitted an urgent appeal to the Ministry of Foreign Affairs on behalf of Gani Fawehimni, a human rights lawyer who allegedly had been detained by the security forces and was being held incommunicado without any criminal charges having been brought against him.

193. On 22 November 1995, the Permanent Mission of the Federal Republic of Nigeria to the United Nations Office at Geneva forwarded to the Centre for Human Rights a press release issued by the Attorney General of the Federation of Nigeria and Minister of Justice, as well as information on the carrying out of the death sentences passed on Ken Saro-Wiwa and the eight other Ogoni activists. In the press release, the Attorney General "maintains that Nigeria as a sovereign nation will not accept dictations from members of the Western World who apply double standards where it suits their purposes". The Attorney General claimed that the Ogoni trial was "fair, open and in accordance with acceptable standards" and that "there is no way this case could have been tried by the ordinary court since our law recognizes that offences arising from civil disturbances can only be tried by a Tribunal."

194. On 11 December 1995, the Permanent Mission of the Federal Republic of Nigeria to the United Nations Office at Geneva informed the Centre for Human Rights that it had transmitted to the relevant Nigerian authorities for necessary action the letter dated 4 December 1995 of the Special Rapporteur on the independence of judges and lawyers concerning the allegations with regard to the 21 Ogoni activists.

Observations

195. The Special Rapporteur is concerned that under the law establishing the Civil Disturbances Special Tribunal, there is no right of appeal. Nor is there provision for review by a body independent both of the Tribunal and of the State. The decisions of the Tribunal are effective only upon confirmation by the executive and cannot be challenged by the courts. This appears to be an attack on justice, which could facilitate other and broader human rights violations. The Special Rapporteur consequently calls on the Government of

Nigeria to ensure that the Special Disturbances Tribunal conforms to the standards of proceedings for fair trial as contained in the relevant international instruments or to abolish the Tribunal altogether.

196. Furthermore, the Special Rapporteur is deeply concerned about the long delay by the Government of Nigeria in responding to a letter of the Special Rapporteur dated 21 November 1995 seeking permission from the Government to undertake a joint mission with the Special Rapporteur on extrajudicial, summary or arbitrary executions during which they can investigate and report on the state of the independence of judges and lawyers in the light of recent events and in view of the concern expressed by the international community over the rule of law and human rights situation in Nigeria. In this regard, the Special Rapporteur urges Nigeria to respond promptly and positively to his request to undertake an investigatory mission to Nigeria.

Pakistan

197. The Special Rapporteur has been receiving information by way of memoranda and clippings of media reports alleging erosion of judicial independence in Pakistan and threats to the independence of its lawyers.

198. The thrust of the allegations are over supersession in the appointment of the Chief Justice and the appointment of ad hoc judges in place of permanent judges to the Supreme Court. Under article 182 of the Constitution of Pakistan ad hoc judges are appointed in specific circumstances, primarily as a temporary measure. These appointments caused considerable controversy in the independent media and the Bar Associations were vocal in their protests.

199. In a related development a senior advocate of the Supreme Court Bar Association, Mr. Mohammed Akram Sheik, a vocal critic of these appointments, was charged with contempt of court in June 1995 over public statements he made regarding a judgement of the Supreme Court where four of the seven judges who decided that case were ad hoc judges. He questioned, inter alia, whether the Supreme Court was properly constituted with respect to the provisions of the Constitution.

200. Concern was also expressed that the contempt charge would be heard before a panel of ad hoc judges in the Supreme Court. No hearing date has been fixed.

201. At the time of writing it was learned that the constitutionality of the appointment of ad hoc judges is currently being heard by a full bench of five Supreme Court judges.

202. In another development the Special Rapporteur received the alarming information on the attempted assassination of Asma Jahangir and Hina Gilani on 19 October 1995 at their respective homes. It was suspected that the attackers were religious fanatics and that their actions were reprisals for the two courageous human rights lawyers having successfully defended two persons accused of blasphemy, a case which aroused considerable public interest and unrest. The Special Rapporteur communicated directly and personally with Asma Jahangir who assured him that she and her family,

together with Hina Gilani and family, were given adequate protection by the Government. The attempted assassinations were condemned by all quarters, Government, opposition and the media.

203. The Special Rapporteur has also been receiving information of lack of unity within Bar Associations in Pakistan. It appears to the Special Rapporteur that this lack of unity could have resulted from politicization within the Bar Associations which, if true, could seriously undermine the independence of the profession.

204. The Special Rapporteur has sought to lead a mission to Pakistan and to this end has had discussions with the representative of the Permanent Mission of Pakistan in Geneva. The Special Rapporteur is awaiting a positive response from the Government of Pakistan.

Peru

Information transmitted to the Government

205. On 25 July 1995 the Special Rapporteur transmitted to the Government two urgent appeals concerning information he had received on the cases of Judge Antonia Saquicuray Sánchez and human rights lawyer Tito Guido Gallegos. According to the information received, on 16 June 1995 Judge Saquicuray began receiving death threats by phone after she made a statement concerning the promulgation on 15 June 1995 of the Amnesty Law by the executive. Mrs. Saquicuray had stated that the Law was not applicable to the investigations being carried out into the massacre at Barrios Altos which had occurred in November 1991. In the case of Mr. Guido Gallegos, the source reported that he began receiving death threats on 23 June 1995 in relation to his legal activities in opposition to the Amnesty Law.

206. On 1 August 1995 the Special Rapporteur sent a joint urgent appeal with the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special Rapporteur on the question of torture, and the Chairman of the Working Group on Enforced or Involuntary Disappearances concerning the promulgation of Amnesty Laws 26479 of 15 June 1995 and 26492 of 2 July 1995. The first of these laws grants general amnesty to military, police or civilian officials for acts derived from or committed in connection with or as a result of the fight against terrorism since May 1980. According to the information received, and in application of the amnesty laws, members of the armed forces who were on trial for violations of human rights might have been released. The second of the laws declares that the amnesty granted is non-justiciable and would not constitute a violation of the Constitution nor of the country's international obligations.

207. On 24 November 1995, the Special Rapporteur sent an urgent appeal to the Government concerning the case of Dr. Margarita Chuquiuru Silva, a lawyer who was allegedly detained on 28 February 1994 on charges of terrorism. She was tried according to the procedure established in articles 13 to 18 of Decree 2475 of 1992. In accordance with this decree, the trial was private (art. 13 f); there was no procedure for challenging the judges (art. 13 h); the identity of the judges was secret; the judicial decisions did not carry a signature or a seal and the judges were not able to be identified visually or

orally by the defence lawyer or by the defendant (arts. 15 and 16). She was found guilty and sentenced to 20 years' imprisonment. According to the source, there was no evidence to prove her guilt except for the testimony of an informer who was unable to explain where he had met Dr. Chuquiuru or his relationship with her. According to the source, this case was part of a systematic and general policy in Peru of persecution and harassment of defence lawyers who represent individuals accused of terrorism.

208. On 11 December 1995, the Special Rapporteur sent an urgent appeal to the Government concerning an allegation dealing with the death threats received by human rights lawyers of the Association for Human Rights, which is a member of the National Coordination for Human Rights. According to the information received, a woman delivered by hand a funeral floral arrangement in the shape of a cross to the offices of the Association for Human Rights. Attached to this floral arrangement was a funeral note that listed the names of people still alive. Several of the listed people were human rights lawyers. This funeral note was signed by a group called COLINA which, according to the information received, was a paramilitary group involved in various human rights violations in Peru, including the massacres in Barrios Altos and La Cantuta.

209. On 3 January 1996 the Special Rapporteur sent an urgent appeal to the Government concerning information he had received on the case of an American citizen, Ms. Lori Berenson, who was arrested by the Peruvian police on 30 November 1995 for alleged participation in acts of terrorism. The source indicated that she was to be formally accused by a tribunal composed of "faceless" judges. On 12 January 1996 the Special Rapporteur learned that Ms. Berenson had been tried by a "faceless" military tribunal, found guilty of treason and sentenced to life imprisonment.

Information transmitted by the Government

210. On 1 May 1995, the Government submitted to the Special Rapporteur information concerning changes made to the internal legislation on terrorism. The Government had issued Law No. 26447 which revoked article 15 of Decree Law No. 25475 which established the use of "faceless" judges: part of the national pacification process. The Government emphasized that article 2 of Law No. 26447 provides for the presence of the defence attorney from the beginning of the intervention by the police.

211. On 21 August 1995, the Government replied to the joint urgent appeal concerning the amnesty laws. The laws were enacted by Congress on the basis of article 102, paragraph 6, and article 139, paragraph 13, of the Peruvian Constitution, which give Congress the power to grant amnesty. Article 55 of the Constitution stipulates that international treaties concluded by Peru are part of national law and are therefore subject to the constitutional regime, as are all the country's laws. Thus, not only did the constitutional power of Congress to grant amnesty not contradict the relevant treaties, but those treaties do not expressly prohibit the implementation of articles 102 and 139 of the Constitution.

212. On 8 December 1995, the Special Rapporteur received a reply from the Peruvian Government to his communication of 25 July 1995 concerning the cases

of Antonia Saquicuray Sánchez and Tito Guido Gallegos. With regard to Ms. Saquicuray, the investigations had not yet yielded any results. With regard to Mr. Guido Gallegos, the letter stated that the prosecutor's office in Puno had arranged for the investigations concerning the death threats he had received from paramilitary groups and that the police headquarters of the region had provided protection for Mr. Guido Gallegos.

213. In the light of the mission being sought to the country, the Special Rapporteur will address the situation in Peru in greater detail at a later date.

Singapore

214. Allegations of lack of independence and impartiality of the judiciary were vehemently denied by the executive branch of the Government. During a special debate in Parliament in early November 1995, the Singapore Government, and in particular senior minister Lee Kwan Yew, came out in strong defence of the independence of the judiciary as an institution and the integrity of its individual judges and, in particular, the Chief Justice.

215. Singapore's judges today receive the highest salaries in the world. This island republic prides itself on an efficient judicial administration where cases, both criminal and civil, are disposed of speedily under strict case management control.

216. In another development the Attorney General of Singapore, in a speech delivered at a seminar on professional practice and responsibility in November 1995, inquired of the Law Society of Singapore why it failed to defend Singapore's legal system and judiciary when it was attacked by the foreign press.

217. The Special Rapporteur has not had a response from the Law Society. Neither has the Special Rapporteur received the Hansard record of the earlier parliamentary proceedings.

218. The Special Rapporteur observes that the allegations concerning the independence and impartiality of the judiciary could have stemmed from the very high number of cases won by the Government or members of the ruling party in either contempt of court proceedings or defamation suits brought against critics of the Government, be they individuals or the media. In the recent contempt of court charges brought against the International Herald Tribune and others, the Attorney General adduced evidence to show that over a period of time defamation suits brought against 11 opposition politicians by members of the ruling party all succeeded before the courts.

Sudan

Information transmitted to the Government

219. On 28 September 1995, the Special Rapporteur sent an urgent appeal to the Government citing information he had received concerning the arrest of three prominent lawyers in Khartoum. According to the information, Mustapha Abdel Gadir and Mohamed Ali al-Saydi were arrested in Khartoum on

12 September 1995. The source alleged that the men had been detained without charge or trial by the security forces in Kober prison in Khartoum. The source also reported that Bushra Abdel Karim is believed to have been arrested at the same time. The source claims that the men had been arrested because of the leading role they played in defending opponents of the Government who had been brought before the courts on criminal charges. To date there has been no response from the Government of the Sudan.

Tunisia

Information transmitted to the Government

220. On 23 December 1994 the Special Rapporteur sent a communication to the Government concerning information he had received on a seminar on the independent judiciary and its functions in Tunisia held in Tunisia from 14 to 24 of November 1994. According to this information, the publication of the minutes of the seminar allegedly were modified following pressure on the participants exerted by the Ministry of Justice. It was further alleged that the participants were individually summoned to the Centre for Legal and Juridical Studies of the Ministry of Justice where they were asked to sign a letter to withdraw the original document.

Information transmitted by the Government

221. On 6 October 1995 the Special Rapporteur received a reply from the Government to his communication, in which it acknowledged that the seminar had been held, for 23 Tunisian judges, within the framework of a programme organized jointly by the Centre for Legal and Juridical Studies of the Ministry of Justice and the Centre for the Independence of Judges and Lawyers of the International Commission of Jurists, in cooperation with the Arab Institute for Human Rights, the High Institute of Judges, the Tunisian Association for Penal Law and the Tunisian Organization for Education and the Family. The Government stated that the independence of the judiciary is enshrined in the Tunisian Constitution which, in article 65, stipulates that "in the exercise of their functions, judges are subjected only to the authority of the law". In addition, the Government pointed out that judges have an association which ensures that they are independent and defends their moral and material interests.

222. The Government stated that contrary to the allegation received by the Special Rapporteur, the participants were not summoned to the Centre for Legal and Juridical Studies and that the summary records of the seminar were not modified following pressure which was reportedly exercised. In fact, after the conclusion of the seminar, the participants realized that the document entitled "Summary of the Activities of the Courses", which had been distributed during the hours just before the closing of the training session without them having had time to examine its contents, did not fully reflect the contents of the debate. Therefore, they decided to hold a meeting at the Centre, the venue where they usually met, in order to discuss the matter and to adopt a common position regarding the document. At the end of their meeting, they issued a document reflecting the totality of the views expressed.

223. Furthermore, the Government indicated that it would appear that contacts subsequent to the holding of the seminar had been undertaken between the organizers of the seminar and the secretariat of the International Commission of Jurists, which would be in a position to clarify the situation.

224. Pursuant to the recommendation from the Government to seek clarification from the International Commission of Jurists, the Special Rapporteur takes note of a press release issued by the ICJ on 9 December 1994, in which the ICJ and its Centre for the Independence of Judges and Lawyers stated that the Ministry of Justice had pressured participating judges to sign a new document significantly different in content from the document entitled "Summary of the Activities of the Course", which was a collection of reports drafted by participants during the seminar. Accordingly, the Special Rapporteur calls upon the Government of Tunisia to take the necessary measures to remedy this situation.

United Kingdom of Great Britain and Northern Ireland

England and Wales

225. In paragraph 56 of his first report to this Commission, the Special Rapporteur alluded to the need for clarification with regard to the function of judicial review, or its equivalent, of the constitutionality or legality of executive decisions, administrative orders and legislative acts. The Special Rapporteur observed that there were considerable misunderstandings on the part of governmental authorities and even parliamentarians over this power of the courts.

226. The Special Rapporteur notes with grave concern recent media reports in the United Kingdom of comments by ministers and/or highly placed government personalities on recent decisions of the courts on judicial review of administrative decisions of the Home Secretary. The Chairman of the House of Commons Home Affairs Select Committee was reported to have warned that if the judges did not exercise self-restraint, "it is inevitable that we shall statutorily have to restrict judicial review". The controversy continued and reportedly prompted the former Master of the Rolls, Lord Donaldson, who was said to have accused the Government of launching a concerted attack on the independence of judiciary, to have said, "any government which seeks to make itself immune to an independent review of whether its actions are lawful or unlawful is potentially despotic".

227. The Special Rapporteur will be monitoring developments in the United Kingdom concerning this controversy. That such a controversy could arise over this very issue in a country which cradled the common law and judicial independence is hard to believe.

Northern Ireland

228. According to the information received on the situation in Northern Ireland, visits between lawyers and their clients in prison were normally conducted under "open" conditions, i.e. in a room with the door

closed but which was open to the view of the prison officers who could see everything that occurred but were unable to hear what transpired between the lawyers and their clients. Reportedly, the Government has initiated a new policy whereby certain prisoners who have been designated as being "exceptional high risks" have had special arrangements imposed upon visits by their lawyers and their families. There were about 15 prisoners, 8 of them Irish, affected by the policy.

229. Under the new policy, all persons visiting "exceptional high risk" prisoners, including defence lawyers, are subjected to stringent searches. In one reported incident, a prisoner was strip-searched both before and after the lawyer's visit, even though no physical contact between the prisoner and the lawyer had been possible. It is also alleged that the authorities fail to respect lawyer-client confidentiality where such prisoners are concerned.

230. It is alleged that the implementation of the new policy hampers the unfettered access by prisoners to legal advice.

231. It was further alleged that with the cessation of political violence in Northern Ireland, there was no justification for the United Kingdom Government's continuing derogation from article 14 of the International Covenant on Civil and Political Rights.

232. It was also alleged that the present situation in Northern Ireland did not justify the adoption of emergency laws.

233. With regard to the right to private legal consultation for detainees, it was alleged that the present practice in Northern Ireland contravened article 14.3 (b) of the ICCPR and the United Nations Basic Principles on the Role of Lawyers.

234. During his visit to Northern Ireland, which is referred to above in paragraph 13, the Special Rapporteur was informed that the number of arrests under emergency laws in Northern Ireland had decreased dramatically since the ceasefire of 1994. The source also reported that the abuse of solicitors by certain police officers in Castlereagh Holding Centre had also diminished, but only because fewer arrests had provided fewer opportunities to be abusive.

235. When people were detained at Castlereagh, it was reported that some police officers of the Criminal Investigation Division (CID) continued to question the professional integrity of their solicitors and to assume that the solicitors were in sympathy with their client's affiliations and causes. Death threats were still made against solicitors on occasion, and reference in very derogatory terms was still made to the murdered lawyer Patrick Finucane.

236. On 11 January 1996, the United Kingdom Government extended the Northern Ireland (Emergency Provisions) Act for a further two years. Under this legislation suspects could be denied access to their lawyers for periods up to 48 hours and could always be interviewed in the absence of their lawyers. In such conditions, it was alleged that police abuse of solicitors could continue completely unchecked.

237. The Government did announce one minor reform, which was that silent video recordings would be made of police interrogations. While this might help to safeguard against actual physical abuse, the absence of sound recording could not inhibit verbal abuse of both suspects and their lawyers.

238. In August 1995, as a result of reports made available to him, the Special Rapporteur requested a leading British lawyer to observe the proceedings in an application for judicial review of certain prison rules introduced by the Home Secretary. These rules were in connection with meetings in prison with the prisoners designated as high risk. These rules also applied to lawyers interviewing remand prisoners in such prisons. The allegation made to the Special Rapporteur was that implementation of these rules would affect confidentiality of communication between solicitor and client in violation of paragraph 8 of the Basic Principles on the Role of Lawyers.

239. The High Court composed of two judges heard the application and on the facts dismissed the same application. The Special Rapporteur has been told that the applicants have appealed to the Court of Appeal.

240. The Special Rapporteur is continuing to monitor developments in Northern Ireland and in that connection appreciates the cooperation extended to him by the British Irish Rights Watch and the Lawyers Committee for Human Rights in New York.

Uzbekistan

Information transmitted to the Government

241. On 29 December 1995 the Special Rapporteur sent a joint appeal with the Special Rapporteurs on extrajudicial, summary or arbitrary executions, and on the question of torture on behalf of a group of citizens of the Republic of Korea, Un Dmitry, Lee Vladimir, Arutyunov Vitaly, and Tsoi Valery, who were convicted of the crime of murder by the Samakand Regional Court. According to the source, Mr. Un Dmitry had been sentenced to death, while the other three defendants had been sentenced to 12 years' imprisonment.

242. According to the source, it was alleged that all four defendants were kept in cells without sanction of the prosecutor for more than 10 days, in violation of Uzbek law, and that all were badly beaten to force a confession. It was further alleged that the criminal case against the defendants contained false documents, including forged signatures of witnesses and lawyers, and faked protocols of interrogations. Further, it was alleged that the investigator had denied the defendants the minimum guarantees of a fair trial, including the right to have legal counsel of one's own choosing and the right to examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him, leading to the suspicion that the Court was not independent. It was also alleged that there was collusion between the procurator and the trial court. To date the there has been no response from the Government.

Yemen

Information transmitted to the Government

243. On 20 October 1995 the Special Rapporteur advised the Government that he had received information concerning advocate Abdel Aziz Ahmed El-Samawi, the Secretary-General of the Yemen Bar Association. According to the source, Mr. El-Samawi was attacked and beaten while in court defending a case in the city of Sana'a. The source also reported that he was subsequently accused of apostasy. To date there has been no response from the Government of Yemen.

Zaire

Information transmitted to the Government

244. The Special Rapporteur transmitted a communication to the Government on 27 October 1995 concerning information he had received of an incident which had occurred in Haut-Zaire on 20 July 1995. According to the source, Mr. Lombeya Bosongo, Governor of Haut-Zaire, had made numerous verbal attacks against the magistrates of the Baluba tribe, which culminated in a violent demonstration on 20 July 1995. During the course of this demonstration, organized by Governor Lombeya, the building of the tribunal de paix of Makiso and the Court of Appeal were destroyed. Many judicial documents were also destroyed and the robes of the judges were burned. Also, the home of Judge Kabamba Mbikayi of the Court of Appeal was ransacked during the demonstrations. The source reported that no action had been taken against the demonstrators. A commission of inquiry has been established, but its composition had not been made public nor had it commenced its work. To date there has been no response from the Government.

VI. CONCLUSIONS AND RECOMMENDATIONS

245. The attacks on the independence of judges and lawyers remain a serious concern; none the less, the Special Rapporteur is pleased to observe that there is today a greater awareness of the importance of judicial independence for the maintenance of the rule of law and the protection of human rights, not just civil and political rights but economic, social and cultural rights as well. The Special Rapporteur views this as a positive development which should be encouraged. In that regard, a report from Morocco states that, "reflecting a growing emphasis on economic development ... experts say the focus of debates has shifted from looking at ways to ensure the independence of the judiciary to examining how the rule of law can be used as a tool to provide a stable environment for investment."

246. The threat to judicial independence comes not just from the executive arm of the Government nor from the legislature, but from organized crime, powerful businessmen, corporate giants and multinationals. The conduct of some within the judiciary and the legal profession can threaten their own or each other's independence. Hence the need for constant vigilance both within and without.

247. The newly emerging democracies need particular attention. With meagre resources, both financial and human, it would be wrong to impose the high standards expected of the more developed nations. They need to be advised and

made aware of those standards and the need to achieve them, yet as an immediate measure they need the basics. In some of these democracies unqualified people are appointed to high judicial posts because of the lack of trained human resources. Training programmes must therefore be structured to meet these needs.

248. Without duplicating efforts by other NGOs involved in trial observation programmes, the Special Rapporteur intends to observe certain specific trials of particular interest to his mandate, either personally or through a representative appointed by him. From his personal experience the Special Rapporteur appreciates the importance of such a presence at trials, especially when there are suspicions that such trials may not be fair for the reason that the tribunal may not be independent and impartial and/or that the independence of the defence lawyers may be undermined.

249. The Special Rapporteur is conscious of the monumental tasks ahead in the realization of his mandate. He seeks the cooperation of NGOs and other organizations to provide him with timely information on any attacks on the independence of judges and lawyers in their respective countries or neighbouring countries due to the fact that the Special Rapporteur has no monitoring mechanism to gather such information.

250. In his first report the Special Rapporteur made particular reference to resource requirements. Resources still remain inadequate and with the increased financial crisis faced by the United Nations in general and the Centre for Human Rights in particular any such further requests may be inappropriate.

251. The Special Rapporteur calls upon all Governments to respond to his interventions promptly and in cases where missions are sought, the Special Rapporteur again calls on the Governments concerned to respond without delay so as to enable him to organize his schedule in advance for the year.

Appendix

1. The Special Rapporteur wishes to thank the replies submitted by the following Governments to his initial communication dated 16 December 1994: Armenia; Austria; Belarus; Cameroon; Canada; Colombia; Cuba; Cyprus; Chile; Egypt; Estonia; Ethiopia; Georgia; Germany; Iraq; Japan; Jordan; Kuwait; Libyan Arab Jamahiriya; Liechtenstein; Luxembourg; Malta; Mauritius; Mexico; Morocco; Namibia; New Zealand; Poland; Saudi Arabia; Senegal; Slovakia; Syrian Arab Republic; Sweden; Sri Lanka; Tunisia; Turkey.

2. The Special Rapporteur wishes to thank the following courts and judges for their replies to his initial communication dated 16 December 1994: The Honourable Justice Robin Millhouse of the Australian Section of International Association of Judges; The Honourable Justice Michael Kirby AC CMG, President of the Court of Appeal, Supreme Court of Sydney; the Chief Justice of the High Court of Australia, Sir A.F. Mason; the Chief Justice of the Supreme Court of the Bahamas, Honourable Mr. Justice J.C. Gonsalves-Sabola; the Union internationale des magistrates, Section belge; the Chief Justice of Grand Cayman Islands, Honourable G.E. Harre; the Superior Court of Québec, the Honourable Lawrence A. Poitras, Chief Justice; the Tax Court of Canada, Office of the Chief Justice; Federal Court of Canada, the Rt. Hon. Antonio Lamer, Chief Justice of Canada; Canadian Judicial Council, Ms. Jeannie Thomas, Executive Director; the Danish Association of Judges, Mr. Bjarne Pederson; the Supreme Court of Finland; Bundesverfassungsgericht (Constitutional Court of Germany), Der Direktor, Dr. Karl-Georg; the Supreme Court of Ghana; the Chief Justice of Hong Kong, Director of Administration, Mr. R.J.F. Hoare; Chief Justice of the Supreme Court of Hong Kong, the Honorable Sir Ti Liang Yang; Justice M.K.N. Goyal of India; Constitutional Court of Italy, Secretary General, Mr. Cesare Bronzini; Bailiff's Chambers, Royal Court House, Sir Graham Dorey, Bailiff of Guernsey; Constitutional Court of Lithuania, Chairman, Mr. Jouzas ilys; Supreme Court of Mongolia, Chief Justice D. Dembereltseren; Supreme Court of Netherlands, Chief Justice Sjoerd Royer; Netherlands Association for the Judiciary; Chief Justice of New Zealand, Sir Thomas Eichelbaum; Conseil constitutionnel du Sénégal, President Youssoupha Ndiaye; le Médiateur de la République du Sénégal, M. Ousmane Camara; Supreme Court of Singapore; Constitutional Court of Slovenia; the Association of Slovak Judges, Judge and Executive Manager, Dr. Annamária Katarína Brunovská; High Court of Solomon Islands, Chief Justice John Muria; Supreme Court of Sweden, Chief Justice Anders Knutsson; Supreme Administrative Court of Sweden, President G. Wahlgren; Supreme Court of Uruguay, President Dr. Raúl Alonso de Marco; the Royal Court of Justice of the United Kingdom, The Honourable Mr. Justice Phillips; the Bailiff's Chambers Royal Court House, Jersey, Sir Peter Crill, C.B.E.; the Commonwealth Secretariat, Legal and Consultation Affairs Division, Director R.H.F. Austin; The Lord President, Parliament House, Edinburgh; the Chief Justice of Zambia; the Chief Justice of Zimbabwe, The Honourable Mr. Justice A.R. Gubbay; the Lord Chief Justice of England and Wales, Lord Taylor.

3. The Special Rapporteur wishes to thank the following Ombudsmen who replied to his initial communication dated 16 December 1994: the Acting Ombudsman of Victoria, Australia, B.W. Perry; the Ombudsman for the Northern Territory of Australia, Acting Ombudsman, T.J. Galloway; Ombudsman for the Legislative Assembly, Province of British Columbia, Canada, Dulcie McCallum;

the Danish Ombudsman, Hans Gammeltoft-Hansen; the Parliamentary Ombudsman of Finland, Mr. Jacob Söderman; Office of the Ombudsman of Guyana, S.Y.Mohamed; the National Ombudsman of the Netherlands, Marten Oosting; the Parliamentary Ombudsman of Norway, Mr. Arne Fliflet; the Investigator General (the Ombudsman Institution of Zambia), Justice F.N. Mumba; the Secretary for Justice, Legal and Parliamentary Affairs, Ombudsman of Zimbabwe, Mrs. B. Chanetsa.

4. The Special Rapporteur wishes to thank the following universities for replying to his initial communication dated 16 December 1994: Faculty of Law, University of Chittagong, Bangladesh, Dr. M. Shah Alam, Dean; Faculty of Law, University of the West Indies, Barbados, Dr. Albert K. Fiadjoe, Dean; Faculty of Law, University of Botswana, Bojosi Otlhogile, Dean; Department of Law, Carleton University, Professor T. Brettel Dawson, Chair; Faculty of Law, University of Ottawa, Sanda Rodgers, Dean; Institute of Legal Science, University of Copenhagen, Eva Smith, Professor of Law; University of Hong Kong, Department of Law; Faculty of Law, Kurukshetra University, India, Mr. S.K. Singh, Dean; Faculty of Law, University of Delhi, Mr. M.P. Singh; Faculty of Law, University of Auckland, New Zealand, Professor Julie Maxton, Deputy Dean; Faculty of Advocates of Scotland, Andrew R. Hardie, Q.C., Dean; Faculty of Law, University of Dar es Salaam, Z.S. Gondwe, Dean; Council of Legal Education of Trinidad, Hugh Wooding Law School, Austin L. Davis, Principal; Faculty of Law, University of Birmingham, Mr. Jeremy McBride; Cambridge University, on behalf of the Chairman of the Faculty Board of Law, Sir Derek Oulton, O.C., Ph. D.

5. The Special Rapporteur wishes to thank the following Bar Associations that have replied to his initial communication dated 16 December 1994: Finnish Bar Association, Pirkko Kivikari, Deputy Secretary; the Bar Association of India, Lalit Bhasin, General Secretary; American Bar Association, Virginia M. Russel, Director.

6. The Special Rapporteur wishes to thank the following associations of lawyers that have replied to his initial communication dated 16 December 1994: International Association of Young Lawyers, Stefano Dindo-Cinti, National Vice-President for Italy; New Zealand Law Society, Austin Forbes, President; National Lawyers Association of Tunisia, Abdelwaheb El Behi, Bâtonnier; Law Society of Zimbabwe, W. Mapombere, Executive Director; Law Council of Australia, National Council of Lawyers, B.S. Virtue, Deputy Secretary-General.

7. The Special Rapporteur wishes to thank the following NGOs which have been assisting with his mandate: Amnesty International; Arab Lawyers Union; Arab Organization for Human Rights; Article XIX: International Centre Against Censorship; Asociación para la Promoción Social Alternativa; Asociación Pro Derechos Humanos; Asociación Pro Derechos Humanos España; Bar Human Rights Committee of England and Wales; British Irish Rights Watch; Canadian Human Rights Commission; Centre for the Independence of Judges and Lawyers; Citizens' Network; Commonwealth Secretariat; Comisión Andina de Juristas; Comisión Andina de Juristas, Seccional Colombiana; Comisión para la Defensa de los Derechos Humanos en Centroamérica; Coordinadora Nacional de Derechos Humanos; Egyptian Organization for Human Rights; Fondation pour le respect des lois et des libertes; Human Rights Watch Helsinki; Human Rights Watch/Asia; Human Rights in China; Inter-Church Committee on Human Rights in Latin America; International Association Against Torture; International

Commission of Jurists; International Federation of Human Rights; International Law Group; Kashimir American Council; Lawyers Committee for Human Rights; Minority Rights Group International; National Society for Human Rights, Republic of Namibia; Pat Finucane Centre - Towards Human Rights and Social Change; Peace Brigades International; Physicians for Human Rights; Tibet Bureau, Human Rights Desk, Department of Information and International Relations.

8. The Special Rapporteur also wishes to thank the Carter Center, Atlanta, Georgia, and the Center for Civil and Human Rights of Notre Dame University, Indiana, United States of America, for having provided law clerks to assist him.

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QUESTION OF THE HUMAN RIGHTS OF ALL PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

Report of the Special Rapporteur on the independence of judges and lawyers, Mr. Param Cumaraswamy

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Introduction

1. The present report is submitted pursuant to Commission on Human Rights resolution 1996/34 of 19 April 1996. This report is the third annual report to the Commission on Human Rights by Mr. Param Cumaraswamy, since the mandate was established by the Commission in its resolution 1994/41 of 4 March 1994 and endorsed by the Economic and Social Council in its decision 1994/251 of 22 July 1994. (See also E/CN.4/1995/39 and E/CN.4/1996/37.)

2. Chapter I of the present report contains the terms of reference for the discharge of the mandate. Chapter II refers to the methods of work applied by the Special Rapporteur in the discharge of the mandate. In chapter III, the Special Rapporteur presents an account of the activities undertaken within the framework of his mandate in the past year. Chapter IV provides a brief discussion on a number of theoretical issues which the Special Rapporteur considers to be important for the development of an independent and impartial judiciary. Chapter V contains brief summaries of urgent appeals and communications to and from Governments, along with observations of the Special Rapporteur. Lastly, chapter VI contains the conclusions and recommendations of the Special Rapporteur.

I. TERMS OF REFERENCE

3. At its fiftieth session, the Commission on Human Rights, in resolution 1994/41, noting both the increasing frequency of attacks on the independence of judges, lawyers and court officials and the link which exists between the weakening of safeguards for the judiciary and lawyers and the gravity and frequency of violations of human rights, requested the Chairman of the Commission to appoint, for a period of three years, a special rapporteur whose mandate would consist of the following tasks:

(a) To inquire into any substantial allegations transmitted to him or her and report his or her conclusions thereon;

(b) To identify and record not only attacks on the independence of the judiciary, lawyers and court officials but also progress achieved in protecting and enhancing their independence, and make concrete recommendations including the provision of advisory services or technical assistance when they were requested by the State concerned;

(c) To study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers.

4. In its resolution 1995/36 the Commission endorsed the decision of the Special Rapporteur to use, beginning in 1995, the short title "Special Rapporteur on the independence of judges and lawyers".

5. In resolutions 1995/36 and 1996/34, respectively, the Commission on Human Rights took note of the first and second reports of the Special Rapporteur, expressing appreciation of his working methods, and requested him to submit another report on the activities relating to his mandate to the Commission on Human Rights.

6. Several resolutions adopted by the Commission on Human Rights at its fifty-second session are also pertinent to the mandate of the Special Rapporteur and have been taken into consideration by him in examining and analysing the information brought to his attention with regard to various countries, in particular:

(a) Resolution 1996/20 on the rights of persons belonging to national or ethnic, religious and linguistic minorities, in which the Commission urged special rapporteurs to continue to give due regard, within their respective mandates, to the promotion and protection of the rights of persons belonging to minorities, and invited them to continue to submit contributions as to how they promoted and gave effect to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities;

(b) Resolution 1996/32 on human rights in the administration of justice, in particular of children and juveniles in detention, in which the Commission called upon special rapporteurs to continue to give special attention to questions relating to the effective protection of human rights in the administration of justice and to provide specific recommendations in that regard;

(c) Resolution 1996/43 on the protection of human rights in the context of HIV and AIDS, in which the Commission urged the special rapporteurs to keep under review the protection of HIV-related human rights in relation to their respective mandates;

(d) Resolution 1996/46 on human rights and thematic procedures, in which the Commission invited the thematic special rapporteurs to include in their reports information provided by Governments on follow-up action; encouraged those special rapporteurs to make recommendations for the avoidance of human rights violations; also encouraged them to follow closely the progress made by Governments; further encouraged them to continue close cooperation with relevant treaty monitoring bodies and country rapporteurs; requested the thematic special rapporteurs to include in their reports comments on the problems of responsiveness and the result of analyses; called on them to include in their reports gender-disaggregated data and to address the violations under their mandates that are directed against women; and suggested that the special rapporteurs consider how they could make available information on the situation of individuals working for human rights and how their protection could be enhanced;

(e) Resolution 1996/47 on human rights and terrorism, in which the Commission urged all thematic special rapporteurs to address as appropriate the consequences of the acts, methods and practices of terrorist groups in their forthcoming reports to the Commission;

(f) Resolution 1996/48 on the question of integrating the human rights of women throughout the United Nations system, in which the Commission requested that the special rapporteurs regularly take a gender perspective into account in the implementation of their mandates;

(g) Resolution 1996/49, on the elimination of violence against women, in which the Commission requested other special rapporteurs to cooperate with and assist the Special Rapporteur on violence against women;

(h) Resolution 1996/51 on human rights and mass exoduses, in which the Commission invited the special rapporteurs, acting within their mandates, to seek information, where appropriate, on problems resulting in mass exoduses of populations or impeding their voluntary return home and, where appropriate, to include such information, together with recommendations thereon, in their reports, and to bring such information to the attention of the High Commissioner for Human Rights for appropriate action;

(i) Resolution 1996/53 on the right to freedom and expression, in which the Commission invited the special rapporteurs to pay attention, within the framework of their mandates, to the situation of persons detained, subjected to violence, ill-treated or discriminated against for having exercised the right to freedom of opinion and expression;

(j) Resolution 1996/55 on advisory services, technical cooperation and the Voluntary Fund for Technical Cooperation in the Field of Human Rights, in which the Commission invited the special rapporteurs to continue to include in their recommendations, whenever appropriate, proposals for specific projects to be realized under the programme of advisory services and technical cooperation in the field of human rights;

(k) Resolution 1996/62 on hostage-taking, in which the Commission urged all thematic special rapporteurs to address, as appropriate, the consequences of hostage-taking in their forthcoming reports to the Commission;

(l) Resolution 1996/69 on human rights in Cuba, in which the Commission invited the thematic mechanisms to cooperate fully and exchange information and findings on the situation of human rights in Cuba;

(m) Resolution 1996/78 on comprehensive implementation of and follow-up to the Vienna Declaration and Programme of Action, in which the Commission called upon all special rapporteurs to take fully into account the recommendations contained in the Vienna Declaration and Programme of Action within their respective mandates;

(n) Resolution 1996/79 on the situation of human rights in Nigeria, in which the Commission requested the two special rapporteurs who had requested a joint investigative visit to the country (the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on extrajudicial, summary or arbitrary executions) to submit to the Commission at its fifty-third session a joint report on their findings, along with any observations of other relevant mechanisms, and requested them to submit an interim report to the General Assembly;

(o) Resolution 1996/85 on the rights of the child, in which the Commission recommended that special rapporteurs pay special attention to particular situations in which children were in danger;

II. METHODS OF WORK

7. The Special Rapporteur, in the third year of his mandate, continued following the methods of work described in the first report of his tenure (E/CN.4/1995/39, paras. 63-93).

8. Seeking to avoid unnecessary duplication of the activities of other thematic rapporteurs, the Special Rapporteur has been involved in several cooperative initiatives. During the past year, he has joined with other Special Rapporteurs and working groups to transmit urgent appeals on behalf of individuals to the Governments of the following countries: Bolivia, together with the Working Group on Arbitrary Detention on 25 March 1996; Mexico, together with the Special Rapporteur on extrajudicial, summary or arbitrary executions on 14 August 1996; Pakistan, jointly with the Special Rapporteurs on extrajudicial, summary or arbitrary executions and on the question of torture on 16 July 1996.

III. ACTIVITIES OF THE SPECIAL RAPPORTEUR

9. The following sections give an account of the activities carried out by the Special Rapporteur in the implementation of the mandate entrusted to him by the Commission on Human Rights.

A. Consultations

10. The Special Rapporteur visited Geneva for his first round of consultations from 1 to 5 April 1996 and in order to present his report to the Commission at its fifty-second session. During this period the Special Rapporteur met with representatives of the Latin American, Asian, Eastern Europe and Western European and Other regional groups to brief them on his work as Special Rapporteur and to answer any questions they might have. He also held consultations with representatives of the Governments of Albania, Belgium, China and Peru and met with a representative of the Mexican Commission for Human Rights. In addition he held a briefing for interested non-governmental organizations.

11. The Special Rapporteur visited Geneva for his second round of consultations from 27 to 31 May 1996 for the third meeting of special rapporteurs/representatives/experts and chairmen of working groups of the special procedures of the Commission on Human Rights and of the advisory services programme, which was held from 28 to 30 May. During this period, the Special Rapporteur held consultations with representatives of the Government of Belgium, China, Colombia, India and Nigeria.

B. Missions/visits

12. During 1996, the Special Rapporteur undertook a mission to Peru and Colombia, as a follow-up to concerns expressed in his 1996 report with regard to the situation of the judiciary in those two countries. He visited Peru from 9 to 15 September 1996 and Colombia immediately after, from 15 to 17 September 1996.

13. In its resolution 1996/79, the Commission requested the Special Rapporteur and the Special Rapporteur on extrajudicial, summary or arbitrary executions who had requested a joint investigative mission to Nigeria to submit to it at its fifty-third session a joint report on their findings and to submit an interim report to the General Assembly.

14. Accordingly, the two Special Rapporteurs submitted an interim report (A/51/538) to the General Assembly on 18 November 1996 and a final report to the Commission at its fifty-third session (E/CN.4/1997/62), although the submissions of both reports were without the benefit of a joint investigative mission. In the event that the Special Rapporteurs are able to carry out a fact-finding mission to Nigeria prior to the fifty-third session of the Commission, it is their intention to issue a mission report.

15. During the period under review, the Special Rapporteur informed the Governments of the following countries of his wish to carry out an in situ investigation: Cuba, Kazakstan, Pakistan, Turkey and Uzbekistan.

16. During his visit to New York for the presentation of the interim report to the General Assembly on the situation of human rights in Nigeria, the Special Rapporteur also held consultations with officials of the United Nations Development Programme (UNDP) in New York and travelled to Washington, D.C. to meet with representatives of the World Bank, USAID, the Inter-American Juridical Committee, the International Human Rights Law Group and the American Society of International Law. While in Washington, D.C. the Special Rapporteur also visited Chief Justice William Rehnquist of the Supreme Court of the United States of America.

C. Communications with Governments

17. During the period under review, the Special Rapporteur transmitted 21 urgent appeals to the Governments of the following 16 countries: Algeria, Bahrain (2), Belarus, Belgium, Botswana, Colombia (2), India, Indonesia, Malaysia, Mexico, Pakistan, Peru (2), Tunisia, Turkey (2), the United States of America (2) and Uzbekistan. The Special Rapporteur transmitted three joint urgent appeals to the Governments of the following three countries: Bolivia (jointly with the Working Group on Arbitrary Detention), Djibouti (jointly with the Special Rapporteur on extrajudicial, summary or arbitrary executions) and Mexico (jointly with the Special Rapporteur on extrajudicial, summary or arbitrary executions).

18. The Special Rapporteur transmitted 17 communications to the Governments of the following 14 countries: Argentina, Australia, Bahrain (2), Bolivia, Botswana, Brazil, Côte d'Ivoire, Cuba (2), India (2), Malaysia, Mexico, Pakistan, Peru and Tunisia.

19. The Special Rapporteur transmitted one communication jointly with the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Special Rapporteur on the question of torture to the Government of Pakistan.

20. The Special Rapporteur received replies to urgent appeals from the Governments of the following 11 countries: Algeria, Bahrain, Belgium, Botswana, Indonesia, Mexico, Pakistan, Tunisia, Turkey (2), United States of America and Uzbekistan.

21. Replies to joint urgent appeals were received from the Governments of the People's Republic of China and Mexico. Replies to communications were received from the Governments of Australia, Bahrain (2), Brazil, Cuba, India (2), Malaysia, Peru and Tunisia. Other communications were received from the Governments of the following eight countries: Bahrain, Burkina Faso, India, Kazakstan, Mexico, Peru (2), Tunisia (2) and Uzbekistan.

D. Cooperation with intergovernmental and non-governmental organizations

1. World Bank

22. The Special Rapporteur undertook a visit to Washington to discuss in detail the programmes relating to judicial reform funded by the World Bank. In this regard, the Special Rapporteur raised the question of possible funding for the preparation of a training manual for judges and lawyers, and submitted a budget for this project. The representatives of the World Bank with whom the Special Rapporteur met, while appreciating the importance of this project, indicated possible constraints on the World Bank funding projects of international organizations, such as the United Nations.

23. The Special Rapporteur also discussed ways and means of enhancing cooperation on projects financed by the World Bank for the administration of justice in Member States, in particular relating to judicial reform.

E. Other United Nations procedures and bodies

1. Cooperation with special rapporteurs and working groups of the Commission on Human Rights

24. In addition to the Special Rapporteur's participation in the special rapporteurs' meeting and in joint urgent actions transmitted to Governments, in 1996 the Special Rapporteur requested to undertake a joint mission to Nigeria with the Special Rapporteur on extrajudicial, summary or arbitrary executions. As referred to above, pursuant to resolution 1996/79 of the Commission on Human Rights, the Special Rapporteurs jointly followed up on their request, originally made in November 1995, to visit Nigeria.

25. With regard to the Special Rapporteur's request, dating from 1995 (see E/CN.4/1996/37) to visit Peru jointly with the Working Group on Arbitrary Detention, the Special Rapporteur wishes to inform the Commission that in view of the fact that the Working Group on Arbitrary Detention decided to undertake a mission at a later stage, he preferred to undertake the mission in combination with his mission to Colombia.

2. Cooperation with the Crime Prevention and Criminal Justice Branch

26. In his second report (E/CN.4/1996/37, para. 59), the Special Rapporteur referred to the important work of the Crime Prevention and Criminal Justice Division of the Secretariat in overseeing the implementation of the Basic Principles on the Independence of the Judiciary and the need for the Special Rapporteur to work closely with that Division.

27. The Special Rapporteur attended the fifth session of the Commission on Crime Prevention and Criminal Justice, held from 21 to 31 May 1996 in Vienna. Of particular interest to the Special Rapporteur was item 7 of the agenda in reference to the discussion on the status of implementation of the Basic Principles. Also of interest to the Special Rapporteur was the work of the Division in ascertaining the extent of the use and application of the Basic Principles on the Independence of the Judiciary by Member States pursuant to Economic and Social Council resolution 1993/34, section III, of 27 July 1993. For that purpose a questionnaire, duly endorsed by the Council in its resolution 1994/18 of 25 July 1994, was sent to all Member States and non-governmental organizations through the International Bar Association.

28. The Special Rapporteur notes with regret that only 65 Member States replied to the questionnaire, as well as 4 non-governmental organizations. The findings of the Division from these replies are of special importance to the Special Rapporteur. He repeats hereunder the five paragraphs from the conclusions of the report submitted by the Division (E/CN.15/1996/16/Add.4).

> "73. According to the information received, the Basic Principles enjoy respect in most countries. There appear to be only a few countries still needing to improve fundamental guarantees which would ensure the independence of the judiciary in all its aspects.
>
> "74. Further, as illustrated by the breadth and depth of the responses received, the principle of the independence of the judiciary is of central concern to many States. Judging from the responses, a large number of States were undertaking significant efforts to ensure the use and application of the Basic Principles in their national law and practice. Differences in legal tradition, however, particularly between common law and civil law countries, seem to suggest different approaches to the subject of judicial independence. That should be kept in mind when providing technical assistance.
>
> "75. As has been pointed out, the promotion and protection of judicial independence requires an ongoing commitment on the part of all States. No matter how well established the independence of the judiciary may be, constant vigilance and international cooperation are necessary to ensure continuing respect for judicial independence.
>
> "76. The Commission may wish to discuss further ways and means of assisting States, upon request, in the enhanced use and application of the Basic Principles. The suggestions made by the Special Rapporteur, as well as the proposals agreed upon by the Meeting of Experts for the Evaluation of Implementation of United Nations Norms and Guidelines

in Crime Prevention and Criminal Justice, held at Vienna from 14 to 16 October 1991 (E/CN.15/1992/4/Add.4), could provide useful indications to the Commission.

"77. Further, the Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary, as adopted by the Council in its resolution 1989/60 of 24 May 1989, offer additional guidance. The Procedures specify, inter alia, that States shall ensure that the Basic Principles are widely publicized in at least the main or official language or languages of each State. In particular, States shall make the text of the Basic Principles available to all members of the judiciary (Procedure 4). In addition, States shall encourage seminars and courses at the national and regional levels on the role of the judiciary in society and the necessity for its implementation (Procedure 6), which shall also be promoted by the United Nations (Procedure 11 d). According to Procedure 14, the Commission shall identify existing obstacles to, or shortcomings in, the implementation of the Basic Principles and the reasons for those obstacles or shortcomings, making specific recommendations, as appropriate, to the General Assembly and the Council, and to any other relevant United Nations human rights bodies."

29. The Special Rapporteur will continue liaising with the Crime Prevention and Criminal Justice Division and work closely with it towards greater dissemination of the Basic Principles on the Independence of the Judiciary, and their application by Member States. The Special Rapporteur notes that the Division anticipates undertaking a similar survey on the implementation of the Basic Principles on the Role of Lawyers and of the Guidelines on the Role of Prosecutors.

3. UNDP

30. As mentioned above, the Special Rapporteur met with officials of UNDP in New York on 19 November 1996 to establish a mode of cooperation with respect to the work of UNDP in assisting in the reform and development of institutions relating to the administration of justice. The Special Rapporteur learned that UNDP is very much decentralized and that its office in New York does not control projects undertaken by field offices in the 134 countries in which UNDP is located. However, the officials assured the Special Rapporteur that they would inform him of general UNDP policy matters affecting the administration of justice.

4. Cooperation with the Activities and Programmes Branch of the Centre for Human Rights

31. In his second report, the Special Rapporteur welcomed the efforts by the Advisory Services, Technical Assistance and Information Branch of the Centre for Human Rights to develop a training manual for judges and lawyers (E/CN.4/1996/37, para. 61). The Special Rapporteur is currently collaborating with the Activities and Programmes Branch of the Centre in the drafting of this manual, which is being developed in the context of the United Nations Decade for Human Rights Programme. Following the completion of the draft manual, a meeting of experts will be convened sometime in May 1997 to consider

the draft and it is expected that the manual will be ready for use by the end of the year. The Special Rapporteur expects this manual, which will contain relevant international standards, to be invaluable in training programmes for judges and lawyers throughout the world.

F. Promotional activities

32. As part of his mandate to promote the importance of the independence of the judiciary and the legal profession for respect for the rule of law in a democratic society, in the spirit of the Vienna Declaration and Programme of Action, the Special Rapporteur accepted several invitations to address legal forums, seminars and conferences including the following:

(a) On 22 March 1996, at the invitation of the International Commission of Jurists, he addressed the Tenth International Commission of Jurists Workshop on NGO participation in the African Commission on Human and Peoples' Rights in Ouagadougou, Burkina Faso;

(b) In Lima on 9 September in conjunction with his mission to Peru, the Special Rapporteur addressed the opening session of the Andean Regional Conference of Judges and Lawyers. The theme of the Special Rapporteur's address was "Securing judicial independence";

(c) In Bangkok, on 27 August, at the invitation of the Asian Institute for Development Communication, the Special Rapporteur addressed participants from the Asian region at a seminar on "the media and the role of an independent judiciary in a democracy" on the subject of "Securing an independent judiciary - regional and international norms";

(d) In Berlin, in conjunction with the Biennial Conference of the International Bar Association (IBA), on 19 October, he addressed participants on the subject of "Independence of the judiciary and the role of the Special Rapporteur". The seminar was organized by the newly formed IBA Human Rights Institute;

(e) In conjunction with the same Biennial Conference, at the invitation of the Judges Forum of the IBA, on 22 October, the Special Rapporteur addressed judges from all over the world on "The dimensions of judicial independence and the role of the Special Rapporteur";

(f) In Colombo, Sri Lanka, on 14 December, at the invitation of the Sri Lanka Bar Association, the Special Rapporteur delivered a keynote address at the opening session of a seminar entitled "Towards realization of human rights through a just rule of law", organized by the Bar Association jointly with the IBA Human Rights Institute. This seminar was opened with an address by the Chief Justice of Sri Lanka. Following his address, the Special Rapporteur was interviewed by journalists on the issue of judicial independence and, in particular, on judicial appointments. The interviews were given wide coverage by the Sri Lankan newspapers.

33. It is learnt that the speeches made by the Special Rapporteur on these occasions will be published by the organizers of these conferences in newsletters and periodicals for wider dissemination.

34. The Special Rapporteur expresses his regret that, owing to time constraints, he could not accept various other invitations from the legal community.

IV. THEORETICAL ISSUES OF SPECIAL IMPORTANCE

A. The use of "faceless" tribunals

35. In his second report to the Commission on Human Rights, the Special Rapporteur considered the information he had received on the extensive use of "faceless" judges and secret witnesses as a means of protecting the judiciary from acts of terrorism (see E/CN.4/1996/37, paras. 66-78). The issue is of particular concern to the Working Group on Arbitrary Detention. It was also a subject of concern reported on in the joint report of the Special Rapporteurs on the question of torture and on extrajudicial, summary or arbitrary executions on their mission to Colombia from 17 to 26 October 1994 (E/CN.4/1995/111, paras. 14 and 85).

36. On making his preliminary observations on this issue, the Special Rapporteur said, inter alia:

> "The Special Rapporteur is of the view that such special procedures violate the independence and impartiality of the justice system for a variety of reasons. The Special Rapporteur is, however, mindful of the need to protect the security of individual judges in terrorist-related cases. However, this issue requires further study and analysis. During the course of the coming year the Special Rapporteur hopes to carry out a mission to Peru and Colombia to investigate these practices in situ and to do a more exhaustive survey worldwide of similar practices before stating his final conclusions and recommendations." (E/CN.4/1996/37, para. 78.)

37. It was in that context that the Special Rapporteur undertook a mission to Peru from 9 to 15 September 1996, and a mission to Colombia from 16 to 27 September 1996 at the invitation of the respective Governments. The information and materials the Special Rapporteur received in the course of the missions went beyond the issue of the use of "faceless" judges in the two countries. But such information and materials were most pertinent to the mandate of the Special Rapporteur.

38. The Special Rapporteur noted the constitutional changes in the two countries and the related complexities of the transitional process. In Peru this transitional process included the institutional reform of the administration of justice, which was in progress. He has learnt that progress on these reforms has been suspended following the hostage taking by the Revolutionary Movement of Tupac Amaru in the residence of the Ambassador of Japan in Lima 17 December 1996, and at the time of finalizing of the present report 72 hostages are still confined in the residence.

39. At the conclusion of his mission to Peru, the Special Rapporteur met the media and issued a statement on his preliminary observations, among them a call for the abolition of the "faceless" tribunals. In that regard, he said:

"There is no doubt that the 'faceless' tribunals tried many cases without observing the rules of due process. Owing to this serious flaw, several innocent people were wrongly convicted and sentenced. The very purpose of the due process procedure enshrined in the Constitution of Peru and international instruments is to see that only the guilty are convicted and punished.

These tribunals should no longer be continued. They should be abolished forthwith. All pending cases should be transferred to be tried by the ordinary courts.

In any event, in the light of the considerable improvement in the security situation, there is no longer any justification to continue with these tribunals.

Further, amidst bold measures to reform the administration of justice and enhance respect for human rights, the continuation of these tribunals makes a mockery of the reforms."

40. From the materials given to him during the mission on this issue, it was also clear that these tribunals no longer protected the security of judges, prosecutors and witnesses. Further, there had already been an admission from the Government that several innocent people had been convicted by these tribunals, as a result of which the Government of Peru set up the Ad Hoc Commission on Pardons to evaluate those cases of miscarriage of justice and to advise the President to pardon those wrongly convicted and sentenced. For all these reasons, the Special Rapporteur is convinced at this stage that these tribunals should be abolished forthwith.

41. While in Colombia, the Special Rapporteur sought extensive information from the Ministry of Justice, among others. This information was received by the Special Rapporteur on 14 January 1997. The Special Rapporteur also had discussions with representatives of the Ministry of Foreign Affairs over the then ongoing discussions between the Government of Colombia and the High Commissioner for Human Rights to set up a United Nations mechanism in Colombia to monitor human rights violations in the country. The Special Rapporteur is pleased to note that agreement has been reached between the Government and the High Commissioner. Currently, the structure of the mechanism is being worked out. The Special Rapporteur considers that this mechanism would be a useful means of receiving and disseminating information in Colombia on matters pertaining to his mandate.

42. In the light of the complexities and developments in the two countries, outlined above, the Special Rapporteur considers that he would need more time to evaluate and analyse the materials he received before he finalizes separate reports on each of the countries.

43. On the particular issue of the use of "faceless" judges in dealing with terrorist related offences, and as indicated in his second report, the Special Rapporteur is seeking resources, both human and financial, to make an

exhaustive survey worldwide of similar practices in procedures dealing with terrorist related offences. Such a study could provide information which would be of use in determining whether the prevailing standards are sufficient to deal with such crimes.

B. Conflicts between the legal profession and the judiciary

44. In presenting his second report to the Commission on Human Rights at its fifty-second session, the Special Rapporteur spoke of the interest of the International Bar Association in working closely with him to develop a mechanism to resolve disputes between the judiciary and bar associations Member States. The Special Rapporteur is still in the process of negotiating with IBA on the structure of such a mechanism, bearing in mind that IBA is a non-governmental organization.

C. Establishment of an international criminal court

45. The Special Rapporteur appreciates the continuing work being undertaken by all concerned for the establishment of an international criminal court. In his second report, the Special Rapporteur referred to article 10 of the draft statute, which provided for the independence of the court and called for strict implementation of that article when the statute was adopted and the court established (E/CN.4/1996/37, para. 80). The Special Rapporteur referred to the possibility that, in the beginning after the court is established, judges may not be full-time with fixed remuneration. He expressed the importance of ensuring that judges are full-time members of the court with fixed remuneration as soon as possible, in order to secure the individual independence of its members.

46. The Special Rapporteur's attention has been drawn to the current draft statute which provides that only States parties to the statute or the Security Council may initiate investigations of a crime under the court's jurisdiction. It is felt that the denial of the right of the prosecutor to initiate investigations could seriously impede the independence of the court. The Special Rapporteur is considering intervening with his views on this matter.

D. The media and the judiciary

47. Since raising the matter of the media and the judiciary in his second report (E/CN.4/1996/37, paras. 83-85), the Special Rapporteur had discussions with the International Commission of Jurists and the Special Rapporteur on the question of freedom of opinion and expression. No programme has yet been formalized, but the Special Rapporteur will pursue this matter in the coming months, subject to the availability of resources.

E. Trial observation

48. The Special Rapporteur has been investigating the possibility of himself or a representative observing important trials. During conversations with a representative of one State (the People's Republic of China), he was informed that there were express prohibitions in that State's national legislation that

might be an obstacle to the undertaking of such activities. The Special Rapporteur is, however, pursuing the feasibility of trial observations.

F. Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA region

49. The Special Rapporteur in his promotional activities, particularly in the LAWASIA (Law Association of Asia and the Pacific) region, has been making reference to these principles to develop greater awareness (see E/CN.4/1996/37, paras. 86-91). In his letters of intervention in the LAWASIA region he draws the attention of Governments to specific principles contained in this Statement.

V. COUNTRY SITUATIONS

50. This chapter contains brief summaries of the urgent appeals and communications transmitted to Governments, as well as replies received from the Governments to allegations. In addition, the Special Rapporteur takes note in this chapter of the activities of other mechanisms which are related to his mandate. Where he has deemed it necessary, the Special Rapporteur has included his own observations. He wishes to emphasize that appeals and communications reflected in this chapter are based exclusively upon information that has been transmitted to him directly. Further, he deeply regrets that lack of sufficient human resources has prevented him from acting upon all of the information transmitted to him during the past year, and he apologizes to the organizations which have provided him with well documented and researched reports on particular situations. The Special Rapporteur also recognizes that problems concerning the independence and impartiality of the judiciary are not confined to countries mentioned in this chapter. In this regard, he wishes to emphasize that the omission of a particular country from this chapter should not be interpreted as indicating that the Special Rapporteur considers that there are no problems with the judiciary in that country.

51. In preparing the present report, the Special Rapporteur took note of those drawn up by his colleagues, Mr. Paulo Sérgio Pinheiro, Special Rapporteur on the situation of human rights in Burundi (A/51/459, paras. 51-54 and E/CN.4/1997/12, paras. 27-32); Mr. Thomas Hammarberg, Special Representative of the Secretary-General on the situation of human rights in Cambodia (E/CN.4/1997/85, paras. 61-80); Mrs. Elisabeth Rehn, Special Rapporteur on the situation of human rights in the Former Yugoslavia (E/CN.4/1997/56, paras. 32-36, para. 56 (Bosnia and Herzegovina), paras. 88-90 (Croatia)); Mrs. Monica Pinto, independent expert on the situation of human rights in Guatemala (E/CN.4/1997/90, paras. 17-36); Mr. Adama Dieng, independent expert on the human rights situation in Haiti (E/CN.4/1997/89, paras. 33-78); Mr. Rajsmoor Lallah, Special Rapporteur on the situation of human rights in Myanmar (E/CN.4/1997/64, paras. 28-30); and Mr. René Degni-Ségui, Special Rapporteur on the situation of human rights in Rwanda (E/CN.4/1997/61, paras. 95-98).

Albania

52. In his 1996 report to the Commission on Human Rights, the Special Rapporteur reported on allegations that he had transmitted to the Government and the response to those allegations provided by the Government (E/CN.4/1996/37, paras. 104-114). Of particular concern was the allegation that the executive had initiated action in Parliament to strip the Chairman of the Court of Cassation of his immunity. The Government had responded that the removal of the immunity of the Chairman and the approval of penal proceedings against him had been made in accordance with article 6 of Law No. 7561 dated 29 April 1992.

53. The Special Rapporteur has subsequently learned that the Chairman has in fact been dismissed from the Court of Cassation and that the Constitutional Court ruled on 14 February 1996 that the dismissal was legal because the Chairman had committed a serious criminal offence. The Constitutional Court held that the unconstitutionality of the Chairman's actions, specifically, suspending the execution of certain decisions, was sufficient to constitute a serious criminal offence.

54. The Special Rapporteur notes that no criminal charges were brought against the Chairman. Further, suspending the execution of certain decisions would appear to fall within the normal duties of an appellate court and certainly cannot be considered a criminal offense. Non-governmental sources claim that the Chairman was removed in order to subordinate the Court to the executive, and that the Government falsified the parliamentary vote to do so.

55. The Special Rapporteur welcomes reports that the Parliament passed a law in July 1996 to establish a government subsidized magistrate's school, to assure the professional training of judges and prosecutors. It will reportedly include in its programme mandatory initial training of candidates for magistrate positions, as well as the continuing education of magistrates.

Algeria

56. On 7 August 1996, the Special Rapporteur transmitted an urgent appeal to the Government of Algeria regarding Rachid Mesli, a lawyer and human rights defender, who was reportedly abducted by four unknown individuals on 31 July 1996. It was feared that he had been abducted by members of the security forces for reasons related to his active involvement as a lawyer in human rights issues.

57. The Government informed the Special Rapporteur on 28 August 1996, that Rachid Mesli had not been abducted, but that he had been interrogated on 31 July 1996 by security forces in the context of cases relating to terrorism and subversion. In addition, he had been officially accused, jointly with a group of persons suspected of having been involved in terrorist activities, and had been put in preventive detention by the competent authorities. The preliminary investigation had been carried out in accordance with the law.

Argentina

58. On 10 June 1996, the Special Rapporteur sent a communication to the Government of Argentina, acknowledging receipt of the Government's communication of 13 December 1995 with regard to the case of a lawyer, Leon Zimmerman, which he had transmitted to the Government in 1995 (see E/CN.4/1996/37 paras. 115-116). The Special Rapporteur welcomed the release of Mr. Zimmerman, but requested additional information with regard to the status of Judge Elicabe Gonzales, who had reportedly been removed from the case.

59. At the time the present report was finalized, no reply had been received from the Government of Argentina.

60. In addition, the Special Rapporteur would like to refer to the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions in relation to the case of a lawyer, Frederico Alberto Hubert, who reportedly has continuously been threatened and intimidated while working on the case of Diego Rodriguez Laguenz, who died while in police detention in 1994 (see E/CN.4/1997/60/Add.1, paras. 22-23).

Australia

State of Victoria

61. In his second report, the Special Rapporteur drew the attention of the Commission on Human Rights to proposals by the State Government of Victoria in Australia for the reform of the legal profession in that state (E/CN.4/1996/37, paras. 118-124). Proposals for a draft legal practice bill to replace the Legal Practice Act of 1958 had been released by the Attorney General in December 1995 for public comment. Of concern to the Law Institute of Victoria, a statutory body and the professional and regulatory organization for solicitors, was the proposal to set up a separate regulatory body to license lawyers to practice. The Institute felt that such a separate body would affect the independence of the profession in the state.

62. The Special Rapporteur expressed the opinion that the proposals had the effect of doing away with a single organization for lawyers, such as the Law Institute was, and thus, fragment the legal profession, resulting in the formation of pockets of associations.

63. The Special Rapporteur has since received information from the Law Institute of Victoria. The draft bill, after much analysis, debate and negotiation, was enacted into law and came into effect on 1 January 1997. The Act provides for a separate Legal Practice Board. The Board consists of a retired judge of the Supreme Court of Victoria, three lawyers chosen by the Law Institute and the Victoria Bar Council, and three lay persons chosen by the Government. Although the Law Institute and the Victoria Bar Council are at present accredited by the Legal Practice Board as recognized "professional associations", other legal professional associations may seek accreditation. Thus, it is now possible for the legal profession in the State of Victoria to be fragmented and its unity may be adversely affected.

64. In his second report, the Special Rapporteur referred to action initiated by 9 of the 11 judges of the Accident Compensation Tribunal who alleged that they had been dismissed without alternative appointments or compensation by the State Government following the repeal of the legislation that had created the Tribunal. The Special Rapporteur expressed his interest in observing the proceedings personally or to send a representative, (E/CN.4/1996/37, paras. 125-126). Of interest to the Special Rapporteur in this particular action was the issue of security of tenure of judges of the subordinate courts and statutory tribunals.

65. The Special Rapporteur received information that the hearing was to take place for two weeks from 2 December 1996 before the Federal Court in Victoria. However, on 2 December 1996, the nine judges settled the claim with the State Government for an undisclosed sum.

Bahrain

Communication to the Government

66. On 25 March 1996, the Special Rapporteur transmitted an urgent appeal to the Government of the State of Bahrain, concerning the alleged detention of a lawyer, Ahmad al-Shamlan. He was reportedly arrested by members of the Bahraini State Intelligence Service under the 1974 Decree Law on State Security Measures, which permits detention without charge or trial for up to three years of any person suspected of being a threat to state security. The source furthermore alleged that Mr. al-Shamlan had been detained because of his prominent role in the pro-democracy movement in Bahrain and because he had acted as defence lawyer for many prisoners who were reportedly prosecuted in connection with political protests. It was therefore feared that Mr. al-Shamlan was being harassed for carrying out his professional duties and exercising his right to freedom of opinion and expression.

67. On 17 May 1996, the Special Rapporteur sent a letter to the Government in which he referred to the Government's communication of 17 April 1996 (see para. 70 below), concerning the arrest and detention of Mr. al-Shamlan. The Special Rapporteur urged the Government to inform the lawyer promptly of the criminal charges brought against him and to bring him before a judge or other officer authorized by law and, if no such charges were brought against him to release him immediately.

68. On 16 October 1996, the Special Rapporteur transmitted a letter to the Government concerning the trials of persons charged with criminal offences against the State of Bahrain. According to the source, Amiri Decree No. 7 of 1976, which established the State Security Court, sets forth exceptional provisions governing its proceedings. The source reported that these provisions deny defendants the right to a fair trial. In particular, the Special Rapporteur was informed that defendants are not allowed access to legal counsel until they are brought to the State Security Court. As a result, defendants can only appoint lawyers of their own choosing on the first day of their trial, just before the opening session of the court. The State Security Court reportedly appoints lawyers for defendants who fail to secure legal representation on their own. Furthermore, defence lawyers allegedly do not have access to court documents, nor do they have adequate time to prepare

a defence for their clients. The source also claimed that the lawyers are given limited access to their clients during the trials. Despite the fact that article 5 (4) of Amiri Decree No. 7 of 1976 states that sentencing shall be pronounced in public sessions, and that the sessions of the State Security Court shall be held in public unless it is deemed necessary to hold them in camera, sessions allegedly are always held in camera, attended only by members of the Bench, the defendants, defence lawyers and representatives of the Public Prosecution. Sentencing is also reported to take place in closed sessions.

69. On 18 November 1996, the Special Rapporteur transmitted an urgent appeal to the Government concerning the death sentences issued against 'Ali Ahmad Abed al-Usfur, Yousef Hussein 'Abdelbaki and Ahmad Ibrahim al-Kattan. A previous urgent appeal had been sent by the Special Rapporteur on extrajudicial, summary or arbitrary executions on 3 July 1996 (see E/CN.4/1997/60/Add.1, para. 44). According to the source, these three individuals were sentenced to death following an unfair trial before the Security Court. The men were reportedly incriminated by the Minister of Interior before they were brought to court, thus violating the principle of the presumption of innocence. The source also claimed that this could also be considered an inappropriate and unwarranted interference with the judicial process. In addition, the Special Rapporteur was informed that the three were amongst eight persons who were to be brought to trial under the Penal Procedures Law of 1996, which was not in effect at the time of the incident of which they were accused. Allegedly, the authorities brought the defendants before the State Security Court under Decree No. 10, which was issued six days after the incident. The Special Rapporteur was informed that the defence lawyers had protested and issued a joint note against the retroactive application of that Decree. It was also alleged that the defendants were detained incommunicado, and that they were denied access to legal counsel until immediately prior to the opening session of the trial, which was held in secret. The Supreme Court was reported to have ruled on 27 October 1996 that it did not have jurisdiction over the State Security Court's verdict. As a consequence, the three men were at risk of being executed without having had the right to appeal their sentences to a higher jurisdiction.

Communications from the Government

70. On 17 April 1996, the Government provided the Special Rapporteur with a reply regarding the case of Ahmed al-Shamlan. According to the Government, the information received by the Special Rapporteur was incorrect. Mr. al-Shamlan had not been arrested for any of the alleged reasons but for criminal activities unrelated to the conduct of his professional duties. Furthermore, he was in lawful custody and his right to due process was guaranteed. The Government also referred to the recent situation of unrest in Bahrain and stated that the information should be viewed against that background.

71. On 23 May 1996, the Government informed the Special Rapporteur that Mr. Ahmad al-Shamlan had been released on bail on 15 April 1996. On 5 May 1996, he was acquitted in court of the charges brought against him.

72. On 18 June 1996, the Government provided the Special Rapporteur with a copy of a communiqué issued by the Ministry of the Interior of the State of Bahrain relating to an alleged plot to seek to overthrow the Government of the State of Bahrain and to destabilize peace in the region.

73. On 25 November 1996, the Government provided a reply to the Special Rapporteur's communication concerning Amiri Decree No. 7 of 1976. The communication contained a reply which had been sent to the Working Group on Arbitrary Detention of the Commission on Human Rights in 1992 with regard to the same issue. According to this information, the State Security Legislation is composed of the Administrative Emergency Measures (1974 State Security Law) as well as ordinary criminal law (1976 Penal Code). Both laws are subject to judicial review procedures as laid down in law. It is the policy of the Government of the State of Bahrain that security cases are dealt with under criminal law, and not under administrative procedures of the 1974 State Security Law. At the same time, it was acknowledged that "the 1974 State Security Law is an exceedingly valuable counter-terrorist measure". Under this legislation, proceedings before the State Security Appeal court are mandatorily "in camera". Article 1 of the 1974 State Security Law provides that persons arrested by order of the Minister of the Interior for committing any of the acts set out in the law may (subject to judicial review) be detained for a period not exceeding three years. Anyone arrested under this provision has the right to appeal to the High Court after three months and thereafter periodically, every six months. If this right is not exercised, the prosecuting authority shall exercise this right for purposes of validating the Minister's arrest order (art. 4).

74. In addition to this procedure, which is related to "highly sensitive information", the criminal acts set out in the ordinary 1976 Penal Code are subject to the 1966 Code of Criminal Procedure, article 5 of which provides that sessions are public unless the Court decides otherwise. The Code furthermore provides, with regard to appeals, that, since criminal proceedings are of an inquisitorial nature, the verdict of the court is not subject to appeal. However, such a verdict must be viewed in the light of prior judicial findings in proceedings before the remand (review) investigatory courts. The criminal Security Court, moreover, is in fact the High Court of Appeal. Clemency following conviction may always be petitioned to the Amir. In the event of acquittal, there is no remedy available to the prosecution.

75. The Court of Cassation, formed under Law No. 8 of 1989 has not yet exercised any appellate jurisdiction over criminal security cases, in spite of its technically supreme appellate status, on points of law only.

Observations

76. The Special Rapporteur remains concerned that the trials before the State Security Court violate article 14 of the International Covenant on Civil and Political Rights owing to the apparent lack of due process in the Court. The Special Rapporteur will continue to monitor further developments concerning the use of the State Security Court by the State of Bahrain.

Belarus

77. On 12 November 1996, the Special Rapporteur sent an urgent appeal to the Government of Belarus concerning information he had received that President Alyaksandr Lukashenka was reportedly in the process of suspending the Constitutional Court, following its decision regarding the referendum on two draft constitutions, one prepared by the President and one prepared by the Parliament. It was also reported that the President had stated that he would ignore the Court's decision. In addition, it had been brought to the Special Rapporteur's attention that earlier in 1995 the President had already threatened to take decisive action if the court did not change a specific ruling. At that time, the President had allegedly threatened to dismiss the Court's chairman, following five decisions of the Court ruling that certain presidential decrees were unconstitutional. The Special Rapporteur expressed his concern over these allegations and requested the Government to provide him with information.

78. A reply was received from the Government on 10 January 1997, in reaction to the Rapporteur's appeal of 12 November 1996; the reply had not yet been translated at the time the present report was finalized.

Belgium

Communication to the Government

79. On 28 October 1996, the Special Rapporteur sent an urgent appeal to the Government of Belgium concerning information he had received pertaining to the ongoing demonstrations in Belgium following the dismissal of a magistrate investigating a case of child prostitution, kidnapping and murder. The Special Rapporteur stated that while the dismissal of the magistrate may have been appropriate under Belgian law as his actions called into question his impartiality in the matter, it had underscored a perception that the system by which magistrates and judges were appointed, promoted and dismissed was motivated by political and/or partisan interests. The Special Rapporteur had been informed that that had resulted in a lack of public confidence in the judicial system in Belgium. In addition, the Special Rapporteur expressed his deep concern about the media reports alleging that the judicial system in Belgium was perceived by the public as being corrupt. The Special Rapporteur further noted his appreciation of the Prime Minister's assurance that his Government would press for constitutional reforms, inter alia, to stop the appointment of magistrates on the basis of political considerations. The Special Rapporteur requested that he be kept informed of such proposals. Lastly, the Special Rapporteur suggested meeting with the Prime Minister, the Minister of Justice and the President of the Cour de Cassation during his next visit to Europe, in order to discuss the proposed reforms.

Communication from the Government

80. The Government acknowledged receipt of the Special Rapporteur's letter on 4 November 1996 and a substantive reply was received on 11 December 1996. The information transmitted by the Government included a copy of the Belgian Constitution and a copy of the Government's proposal to revise Article 151 of the Constitution.

81. The Government of Belgium acceded to the request of the Special Rapporteur for a meeting in Brussels to discuss the proposal to reform the procedure for the appointment of magistrates and judges. The Special Rapporteur has informed the Government that he will notify it of the dates on which he will next be in Europe.

Bolivia

82. On 25 March 1996, the Special Rapporteur sent an urgent appeal, jointly with the Chairman of the Working Group on Arbitrary Detention, concerning the case of a lawyer, Mr. Morales Dávila, who had reportedly been detained since 7 March 1996. According to the information received, he had been accused of sedition and contempt of presidential authority following his public declarations against government economic policies regarding plans for "capitalizing" a state-owned oil and gas company. Mr. Morales Dávila was allegedly held incommunicado since 16 March 1996 and had been denied access to lawyers and family. In addition, the penal judge was reported to have failed to rule on the habeas corpus petition which had been presented by the Bolivian Bar Association on his behalf.

Follow-up

83. On 24 June 1996, the Special Rapporteur sent a follow-up communication to the Government of Bolivia, regarding the case of Mr. Manuel Morales Dávila, reminding the Government of his communication of 25 March 1996.

84. At the time the present report was finalized, no reply had been received from the Government.

Botswana

85. On 7 May 1996, the Special Rapporteur sent an urgent appeal to the Government of Botswana concerning the case of Mr. A.C.N. Nchunga, a senior magistrate in Botswana. According to the source, Mr. Nchunga had been removed from the Office of Senior Magistrates with immediate effect, and it was alleged that no reasons had been given for that removal.

86. On 23 May 1996, the Government provided the Special Rapporteur with a reply to his letter of 7 May. It contained detailed information regarding the constitutional provisions concerning removal proceedings and criteria. The Special Rapporteur was informed that the recommendation for removal of Mr. Nchunga from office for reasons of inadequate behaviour had been made by an independent body, the Judicial Service Commission. In addition, the removal was carried out in accordance with the provisions of the Constitution, following a fair hearing. The Special Rapporteur was furthermore informed that Mr. Nchunga was transferred to a post with the same level of remuneration and rank, but of a less sensitive nature.

87. On 30 May 1996, the Special Rapporteur sent a letter to the Government in which he thanked it and expressed appreciation for the information provided.

Brazil

88. On 12 December 1996, the Special Rapporteur sent a communication to the Government of Brazil concerning the murder of Francisco Gilson Nogueira de Carvalho, a lawyer and human rights activist. It was alleged that his assassination might be linked to his work as a lawyer and his investigations concerning the participation of members of the civilian police of Rio Grande do Norte in death squads. The Special Rapporteur requested information about the investigation into this killing. He was informed about a previous urgent appeal sent on 23 October 1996 by the Special Rapporteur on extrajudicial, summary or arbitrary executions in which reference had been made to this case (see E/CN.4/1997/60/Add.1, para. 62 (d)).

89. On 18 December 1996, the Special Rapporteur received a reply from the Government of Brazil indicating that the Federal Police were in charge of the investigation. In addition, the Governor of Rio Grande do Norte had dismissed the Deputy Secretary of State for Public Security, suspected of being involved with the group known as "meninos de ouro". Lastly, the Council for the Defence of the Rights of the Human Person of the Ministry of Justice had set up a special commission to investigate the allegations of human rights violations by the police of Rio Grande do Norte, in particular the activities of the above-mentioned group.

90. The Special Rapporteur would like to thank the Government of Brazil for its prompt response to his appeal and welcomes the positive steps taken in the case. However, he would request the Government to keep him informed on the progress of the investigation.

Burkina Faso

91. Following a meeting that the Special Rapporteur had with the Minister of Justice in Ouagadougou on 23 March 1996, on 12 July 1996, the Minister provided the Special Rapporteur with information about the guarantees with regard to the independence of judges and lawyers, provided for in article 129 of the 1991 Constitution as well as about recent legislation in that respect. In addition, the Special Rapporteur was informed how the recent modifications to legal provisions had increased the independence and impartiality of the judiciary and improved the implementation of human rights.

92. Ordinance 91-0052 relates to the establishment, organization and operation of the Supreme Council of Justice, which is the organ charged with disciplinary matters. The Chief of State, who is the President of the Council, and the Minister of Justice, who is Vice-President, do not participate in sessions relating to such measures. Another ordinance of special interest to the Special Rapporteur's mandate is Ordinance No. 91-979/PRES of 25 November 1991 on special provisions concerning procedures for the revision of sentences handed down by the People's Revolutionary Courts and the courts of special jurisdiction under the previous regime. The Special Rapporteur was informed that the conditions for review of sentences handed down by the courts mentioned had been extended and, as a

consequence, numerous applications for review had been addressed to the Minister of Justice. Furthermore, the State had been made to pay hundreds of millions of francs compensation to persons who had been prosecuted and punished by the People's Revolutionary Courts.

Chile

93. The Special Rapporteur was informed that on 31 October 1996, the Supreme Court of Justice had rejected the petition made by the military prosecutor to instruct all appeal courts to close legal proceedings relating to human rights violations committed before March 1978, under the military Government. By a majority vote of 14 of the 15 Supreme Court members, the ruling re-established the independence of the judiciary. The Court held that "judges are independent to decide ... on cases within their jurisdiction: in this regard, any external influences, from sources other than the judiciary, and internal influences from higher authorities ... are inadmissible".

People's Republic of China

Communications from the Government

94. On 18 March 1996, the Government of the People's Republic of China provided a reply to a joint urgent appeal sent by the Working Group on Arbitrary Detention, the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on freedom of opinion and expression on 14 December 1995 (see E/CN.4/1996/37, paras. 133-134). The Government replied that Wei Jingsheng had been involved in activities related to plotting to overthrow the Government while he was on parole and deprived of his political rights. The Special Rapporteur was informed that on 13 December 1995, the Beijing No. 1 People's Court held an open hearing of the case of Mr. Wei and, in accordance with the law, sentenced him to 14 years' imprisonment and 3 years' deprivation of political rights at first instance, for the crime of conspiring to overthrow the Government. The Government stated that the right to defence had been effectively guaranteed during the trial. In accordance with the law, in addition to the exercise of the right to defend himself during the proceedings, an accused person may engage lawyers or close relatives or other citizens to defend him. In addition, the accused person is informed about charges no later than seven days before the opening of the court session, so that he will be informed of the charges, and will have sufficient time to prepare his defence and contact his counsels. Lastly, the Special Rapporteur was informed that the proceedings had been carried out in accordance with national law and with international instruments, including provisions of the International Covenant of Civil and Political Rights, to which China has not yet acceded.

Colombia

Communications to the Government

95. On 18 March 1996, the Rapporteur transmitted an urgent appeal to the Government of Colombia, concerning death threats against Mrs. Margarita Arregoces and a human rights lawyer Mr. Reinaldo Villalba Vargas of the Lawyers' Collective (Corporación Colectivo de Abogados). The

message containing the threats was reportedly signed by a paramilitary group called COLSINGUE, and was also considered to be an indirect threat against Mr. Villalba Vargas who is defending Mrs. Arregoces in a trial which was initiated against her by the regional public prosecutor's office of Santafé de Bogotá.

96. On 12 December 1996, the Special Rapporteur sent an urgent appeal to the Government of Colombia concerning Pedro Julio Mahecha Avila, a lawyer and member of the lawyers' collective "Alvear Restrepo", who was reportedly being followed and watched by unknown individuals. In this context, the Special Rapporteur also referred to an urgent appeal sent previously to the Government by the Special Rapporteur on extrajudicial, summary or arbitrary executions. According to the source, in anonymous phonecalls various persons had allegedly tried to find out the whereabouts of Mr. Mahecha Avila, his wife and his son. It has been reported that those acts of intimidation might be linked to his work as the lawyer of persons who are detained for political reasons, including members of a guerrilla-group. The Special Rapporteur was informed that since the establishment of the lawyers' collective several of its members had been receiving death threats related to their work as human rights lawyers.

97. On 16 December 1996, the Special Rapporteur sent a joint urgent appeal, together with the Special Rapporteur on extrajudicial, summary or arbitrary executions, concerning the reported assassination of Mr. Helí Gómez Osorio, a municipal ombudsman in the Department of Antioquia. Mr. Osorio was reportedly shot dead on 26 November 1996 by three men who allegedly belong to a paramilitary group when he was leaving the office of the mayor in El Carmen de Viboral. The Special Rapporteurs were informed that in recent years Mr. Osorio, in his professional capacity had publicly denounced violations of human rights, including assassinations carried out as "social cleansing". His name was reportedly included on a list of 33 persons who were accused of collaborating with the guerrilla. In addition, the Special Rapporteurs were informed about the killing of José Loaiza Correa, a municipal employee of Cañasgordas, whose dead body was reportedly found on 2 December 1996. It was alleged that he had also been killed by paramilitary. Further, 8 of the 15 municipal employees are reported to have resigned out of fear for their security. The Association of Municipal Employees was reported to have requested protection from the Ministry of Defence and Justice, which had reportedly not been provided. On the basis of this information, the Special Rapporteurs requested the Government to carry out a prompt investigation into the killings, and to provide the other municipal employees in the Department of Antioquía with protection.

Communications from the Government

98. At the time the present report was finalized, no reply had been received from the Government.

Côte d'Ivoire

99. On 19 June 1996, the Special Rapporteur addressed a communication to the Government of Côte d'Ivoire regarding a number of draft bills which were being prepared by the Minister of Justice and Public Liberties. One of these bills

might affect the status of the judiciary in Côte d'Ivoire. It had been brought to the Special Rapporteur's attention that certain provisions of that bill, in particular articles 6 and 50, might infringe the principle of the separation of powers, as well as the irremovability of judges. Furthermore, articles 10 and 16 of that reportedly might infringe upon the right of judges and lawyers to form associations. The Special Rapporteur requested information regarding the dates of the debate in Parliament of the draft bill and requested the Government to forward him a copy of it.

100. At the time the present report was finalized, no reply from the Government to this communication had been received by the Special Rapporteur.

Cuba

Communication to the Government

101. On 26 June 1996, the Special Rapporteur sent a letter to the Government of Cuba, reminding the Government of previous consultations with the High Commissioner for Human Rights in which the Government had expressed its willingness to consider inviting thematic mechanisms to undertake a mission to Cuba. The Special Rapporteur informed the Government of his wish to carry out an *in situ* investigation of the independence of the judiciary in Cuba, and to establish a dialogue with the relevant authorities with a view to identifying areas where technical or other assistance might be required, in order to strengthen the existing system of justice.

102. On 8 July 1996, the Special Rapporteur transmitted to the Government of Cuba a letter containing allegations regarding the cases of three lawyers, Leonel Morejón Almagro, René Gomez Manzano and Jorge Bacallao. Leonel Morejon Almagro, then executive secretary of the provisional organizing group for the "Concilio Cubano", a coalition of unofficial groups, including political parties and organizations of lawyers, journalists, women and trade unionists, was alleged to have been detained for nine hours on 14 November 1996. According to the information received, he was dismissed from his post at the Marianao Lawyers Collective by the National Directorate of Lawyers' Collectives, for alleged "technical deficiencies". He was reportedly arrested once more, for organizing a meeting for the national committee of the Concilio Cubano on 12 January 1996. On 22 February 1996, he was tried for "resistance" and condemned to six months' imprisonment, apparently for asking members of the State Security Police to identify themselves upon his arrest. The Special Rapporteur was also informed that his lawyer, Mr. José Angel Izquierdo Gonzalez, who only had last-minute access to his client and details of the case, was fined after the trial for stating publicly that the trial was a "sham". It was feared that he might be facing disciplinary measures.

103. René Gomez Manzano, one of the founders of the "Concilio Cubano", was reportedly dismissed from the lawyers' collective in October 1995 after criticizing the leadership of the National Assembly of Lawyers' Collectives. The information received by the Special Rapporteur indicated that the reason given for the dismissal of Mr. Gomez Manzano was that his behaviour "did not concord with official policy" and was alleged to be "incompatible with his participation in the lawyers' collective". It was also alleged that the dismissal was linked to his work as the defence lawyer for Mr. Abel del Valle,

about whose case he had publicly stated that the defence lawyers had been prevented from presenting their own witnesses and were not permitted to see so-called "secret documents" which reportedly were the mainstay of the prosecution's case. Furthermore, Mr. Gomez Manzano was reported to have spoken out on issues relating to the justice system in Cuba, in his capacity as president of an unofficial group called "Corriente Agramontista". Jorge Bacallao, a member of the same group, was reported to have been subjected to harassment and intimidation by members of the State Security Police to make him stop his activities on behalf of the "Concilio Cubano".

104. The Special Rapporteur was also informed that under Cuban law lawyers, all of whom are employed by the State, are obliged to observe and contribute to the strengthening of socialist legality. According to the information received, all legal services to the population are provided through bufetes colectivos, collective law offices, organized and supervised by the Ministry of Justice. The role of defence lawyers in cases of a political nature was reported to be severely limited, and the information received indicated that, for example, in cases of crimes against State security, defence lawyers were not permitted to have any direct contact with their clients during the first weeks or even months of pre-trial detention. Furthermore, a number of defence lawyers who had been outspoken in recent years were penalized in professional terms, and sometimes dismissed or threatened with physical violence.

105. At the time the present report was finalized, no substantive reply had been received from the Government to the allegations contained in his communication of 8 July 1996. However, in response to the request to visit Cuba, the Government recalled its discussions with the High Commissioner for Human Rights in 1994 concerning the question of invitations to thematic rapporteurs of the Commission. The Government noted that, on that occasion, it had reiterated its political position on cooperation with the human rights mechanisms of the United Nations that the same conditions should be applied to all Member States, based on the principles of objectivity, impartiality and non-selectivity. In that context, the Cuban authorities had stated that they would consider the possibility of inviting thematic mechanisms of the Commission on Human Rights when it was of interest and convenience for the country.

Djibouti

106. On 8 February 1996, the Special Rapporteur sent a joint urgent appeal to the Government of Djibouti with the Special Rapporteur on extrajudicial, summary or arbitrary executions, concerning allegations of threats and harassment against human rights lawyer Aref Mohammed Aref who, on 16 January 1996, was reportedly informed that certain police officers had received instructions to execute him. This information was subsequently reported to the Attorney General's office, whereon which Mr. Aref was informed that the threats would not be investigated, nor would he be provided with protection. In addition, Mr. Aref was reportedly followed constantly without his consent by two members of the Political Police. The allegations indicate that the threats might be linked to his professional activities, which included representation of victims of human rights violations.

107. At the time the present report was finalized, no reply had been received from the Government.

Ecuador

108. The Special Rapporteur was informed about the establishment of the Truth and Justice Commission, charged with investigating complaints of unresolved human rights violations in the past 17 years. The commission, which is mandated to publish its report and to file its findings and recommendations before the relevant judicial authorities, could serve as a measure to end impunity and ensure that victims and their relatives are adequately compensated for violations of their human rights.

Guatemala

109. The Special Rapporteur refers to the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions in relation to the case of the death of an ex-member of the judiciary, José Vicente Gonzalez, a former judge, who reportedly died by the hands of the military in December 1995 after having received death threats on various occasions (E/CN.4/1997/60/Add.1, para. 188).

India

Communication to the Government

110. On 28 March 1996, the Special Rapporteur transmitted an urgent appeal to the Government of India concerning the alleged abduction of Jalil Andrabi, a lawyer, human rights activist and Chairman of the Kashmir Commission of Jurists, by government soldiers of the "Rashtriya Rifles". According to the information received, a habeas corpus petition was filed in the Srinigar High Court, but the "Rashtriya Rifles" reportedly denied that Mr. Andrabi was in their custody.

111. On 29 March 1996, the Special Rapporteur transmitted another communication to the Government of India, after receiving information that Mr. Andrabi's dead body had been found in a river on the morning of 27 March 1996. The Special Rapporteur requested the Government of India promptly to order an independent and impartial investigation, to make public the findings of such investigation and to bring to justice those responsible.

112. On 17 May 1996, the Special Rapporteur transmitted another communication to the Government in which he welcomed the prompt action taken by the Government in ordering an investigation into the murder of Jalil Andrabi. He requested additional information on the investigations.

Communication from the Government

113. On 2 April 1996, the Government provided the Special Rapporteur with a press statement by the spokesman of the Government of India. According to this press statement, a special team had been set up to investigate the case of the killing of Mr. Jalil Andrabi.

114. On 12 April 1996, the Government provided the Special Rapporteur with information regarding the investigation into the killing of Mr. Jalil Andrabi. According to the Government, the Jammu and Kashmir High Court was monitoring the investigations and the Advocate General of Jammu and Kashmir and the investigating team would be reporting directly to the Court. In addition, the National Human Rights Commission of India had launched an independent investigation into the matter.

115. On 2 May 1996, the Government provided the Special Rapporteur with updated information on the case of Jalil Andrabi, which had also been provided to the Special Rapporteur on extrajudicial, summary or arbitrary executions. In order to avoid unnecessary duplication, the Special Rapporteur refers to the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (E/CN.4/1997/60/Add.1, para. 223).

Indonesia

Communications to the Government

116. On 23 October 1996, the Special Rapporteur transmitted an urgent appeal to the Government of Indonesia concerning the case of two lawyers, Bambang Widjojanto and Muchtar Pakpahan. According to the source, Mr. Bambang Widjojanto was reportedly facing the threat of arrest and criminal prosecution as a result of his refusal to answer a number of summonses arising from his legal representation of clients. The source also alleged that the summonses were an effort to undermine his professional obligations towards his clients and that they interfered with his representation of Muchtar Pakpahan and others. The authorities reportedly were attempting to intimidate other lawyers from undertaking and mounting a vigorous defence in controversial cases. In addition, Muchtar Pakpahan, who, according to the information received was a trade union lawyer, was reportedly arrested on 30 July 1996, on charges of being an accomplice in subversive activities. The Special Rapporteur was also informed that Mr. Pakpahan had been questioned about his involvement with "Mjelis Rakyat Indonesia", an alliance of 32 pro-democracy non-governmental organizations. It was alleged that his arrest and detention could be related to his work as a legal representative of workers and their concerns, and thus might interfere with his right to freedom of opinion and expression.

Communication from the Government

117. The Government provided the Special Rapporteur with a reply on 1 November 1996, in which it stated that Mr. Widjojanto had been summoned because of past activities related to his clients. When he had refused to respond to the summons because it did not necessarily reflect the difference between his client-attorney privileges and his past relationships with those persons, the summons had been corrected to meet his demands. The Government informed the Special Rapporteur, furthermore, that after the questioning session, Mr. Widjojanto had stated to the press that the Government's questions had not been related to client-attorney privileges. With regard to Muchtar Pakpahan, the Government informed the Special Rapporteur that he was not a lawyer and he had never worked as a representative of workers, nor was he a member of the organization mentioned. His arrest was related to his

participation in an illegal organization and his participation in activities which resulted in rioting on 27 July 1996, during which some people had been killed or injured.

Kazakstan

Mission

118. On 21 February 1996, the Special Rapporteur received a positive reply from the Government of Kazakstan to his request to be invited to that country. The Government requested the Special Rapporteur to indicate suitable dates for such a visit. Owing to other commitments, the Special Rapporteur was compelled to postpone the proposed mission.

Kuwait

119. The Special Rapporteur was informed about the needs-assessment mission to Kuwait carried out from 4 to 14 March 1996 by two staff members of the Centre for Human Rights under the programme of technical cooperation in the field of human rights. The Special Rapporteur took particular note of the part of their mission report relating to the administration of justice. The Constitution of Kuwait guarantees the independence of justice in article 163, and interference with the course of justice is prohibited. Civilian judges are granted life tenure.

120. The recommendations on the administration of justice contained in the report are of special interest to the mandate of the Special Rapporteur. He welcomes the fact that Kuwait is proceeding to ratify the International Covenant on Civil and Political Rights.

121. The mission recommended that the Government should review current laws and procedures relating to fair trial, regulations and standing orders relating to the administration of justice, penalties, the police, prisons and courts, with a view to ensuring their conformity with international human rights standards. Such a review should include emergency legislation, as protection of the right to a fair trial should be maintained after the declaration of martial law or other exceptional measures. In addition, it was recommended that the Government should provide human rights training to all personnel working within the administration of justice. The mission also recommended that there should be a judicial review of expulsion orders, and that an independent judiciary should be guaranteed in a strong Constitution, which would also limit emergency powers. In addition, the mission recommended the elaboration of a national training regime for lawyers and judges regarding human rights and democracy. Specific recommendations were made with regard to emergency legislation: a review of the current legal regime for states of emergency was needed and they should only be declared in conformity with the law. Even during a state of emergency, nobody should be held guilty of a criminal offence on account of any act or omission which did not constitute a criminal offence at the time it was committed. An independent and fully functioning judiciary must be protected. Nothing done pursuant to the state of emergency should diminish the jurisdiction of the courts to review the legality of the state of emergency or their jurisdiction over legal actions to protect any rights not affected by the declaration of the state of emergency.

Malaysia

Communication to the Government

122. In his second report to the Commission the Special Rapporteur expressed concern over allegations of impropriety in the Malaysian judiciary with regard to a few decisions of the courts. He also made reference to events that had aroused considerable public anxiety as to the integrity, independence and impartiality of the judiciary, and to the fact that he had issued a press statement indicating his intention to investigate the complaints (E/CN.4/1996/37, paras. 158-165).

123. Arising from those decisions and the concerns expressed, an article entitled "Malaysian Justice on Trial" was published in the November 1995 issue of International Commercial Litigation. Within a year from December 1995, those personalities and corporations that had received favourable rulings in the decisions and/or attempted to obtain such rulings in the judicial process, which had given rise to the Special Rapporteur's concern, as well as the lawyer who had appeared for them, served 13 writs, issued in the Malaysian court, alleging defamation against the author of the article in question, the publisher, a correspondent of the Asian Wall Street Journal, two lawyers, one of them the Secretary of the Bar Council, the partners in the latter individual's law firm, and lastly, on 12 December 1996, against the Special Rapporteur. The total amount claimed in these lawsuits is approximately MR 800 (US$ 320 million). The claimants allege that the article was defamatory of themselves and was based upon interviews the author had had with the defendants, including the Special Rapporteur.

124. In the article in question, wherever quotes were attributed to the Special Rapporteur, it was indicated that the statements had been made in his capacity as Special Rapporteur and that he was still investigating the complaints, and therefore that he had not reached any conclusions.

125. In December 1995 and March 1996, the Special Rapporteur received letters from the claimants' solicitors threatening legal proceedings for defamation. The Special Rapporteur immediately referred the matter to the Centre for Human Rights in Geneva and the Office of the United Nations Legal Counsel in New York. The Centre for Human Rights notified the solicitors for the claimants, by letter dated 22 December 1995, of the Special Rapporteur's immunity from legal process under the Convention on Privileges and Immunities of the United Nations (1946). On 28 December 1995, the Centre transmitted a note verbale to the Permanent Mission of Malaysia to the United Nations Office in Geneva requesting that the competent Malaysian authorities be advised of the Special Rapporteur's privileges and immunities and that they, in turn, advise the Malaysian courts of his immunity from legal process. On 29 March 1996, the Office of the Legal Counsel of the United Nations notified the Permanent Representative of Malaysia to the United Nations of the Special Rapporteur's immunity from legal process.

126. Despite these communications from the Secretariat, on 6 January 1997, the Special Rapporteur was served with the writ issued by the Malaysian High Court (referred to in para. 234 above) wherein the two corporations involved in the controversial decisions which had given rise to the concern of the

Special Rapporteur are claiming MR 60 million (US$ 24 million) in damages against him. Upon consultation and advice from the United Nations Legal Counsel, the Special Rapporteur entered conditional appearance and has applied to the court to set aside the writ on the grounds of his United Nations immunity from legal process. The Special Rapporteur's application is fixed for hearing before a judge on 12 March 1997. The application has been served on the solicitors for the claimants.

127. The Special Rapporteur has been informed by the Office of the Legal Counsel that it is liaising with the Government of Malaysia, through the Permanent Mission in New York, to assert his United Nations immunity in court.

128. In this regard, the Special Rapporteur wishes to place on record his appreciation to the Legal Counsel and the staff of his Office, in particular his Deputy, for their prompt attention to his matter and for all of their advice and assistance to date.

129. In another development, on 23 August 1996 the Special Rapporteur wrote to the Minister for Foreign Affairs of Malaysia inquiring into allegations that the Attorney General of Malaysia was proposing to amend the Legal Profession Act 1976 to provide inter alia:

(i) For non-private practitioners, including lawyers in full-time service in the Government, who are not advocates or solicitors admitted to practice, to become members of the Malaysian Bar;

(ii) That the Attorney General be statutorily appointed the President of the Malaysian Bar or, at least, exercise a controlling influence over the affairs of the Malaysian Bar;

(iii) That the Attorney General would appoint members to the Bar Council.

130. The Special Rapporteur also indicated to the Minister for Foreign Affairs that he had learnt that the proposed amendments were in retaliation to public statements issued by the Malaysian Bar Council in connection with events affecting the administration of justice in Malaysia.

131. The Special Rapporteur considers that, while there may be no objection to the enlarging of the Malaysian Bar to include those in full-time employment in government, in the universities and in commercial corporations, the motive of the Attorney General for such enlargement gives rise to concern. In a speech delivered at the annual dinner of the Medico-Legal Society of Malaysia on 19 July 1996, the Attorney General said, inter alia:

> "Because the Bar Council comprises only private practitioners, the Bar Council often forgets that it is a body corporate created by statute ... It frequently speaks as if it is a private law association, or an NGO or an opposition political party. It does not understand, nor seek to understand the various sensitive issues facing the Government. I have always reminded the leaders of the Bar Council that it can seek and have meaningful dialogues with the Attorney General's Chambers and the judiciary, to better understand and discuss the issues at hand, away

from the glare of media attention. If the leaders of the Bar Council can bring themselves to talk with genuine respect for judges and officers of the Crown, instead of taking positions by public statements and open criticisms of the judiciary and the Government, then and only then can there be a truly useful forum for us to discuss the various problems that beset our profession. Our profession is comprised of members of the judiciary, Government legal officers, law lecturers, as well as private practitioners ... not just private practitioners alone! We need a body, a Bar Council, that truly represents all branches of the legal profession ... so that our profession will truly be united. It is in this context that I look with admiration and respect to the medical profession. There is a lot that we can learn from the medical profession and how to organize and manage our profession. I have in my previous meetings with the President and leaders cf the Bar Council stated that if the Bar Council does not take medication to cure itself, then it may have to undergo surgery to cure itself of its malignant illness ... They have not listened to my advice ... maybe surgery is not imminent or inevitable. My Chambers are presently preparing a paper with recommendations to the Government to reform the legal profession and, hopefully, with proper medication, a few minor surgeries, implantations and transplantations here and there, the legal body will be cured of its many ills and live a long and healthy life, contributing to the well-being of our Nation!"

The remarks reproduced above tend to indicate that the paramount motive for the proposed enlargement is to curtail the independence of the Malaysian Bar.

132. At an extraordinary general meeting of the Malaysian Bar convened on 21 September 1996 to consider the above-mentioned speech of the Attorney General, a record number of members of the Bar attended and adopted the following resolution:

"(i) The independence of the Malaysian Bar is vital to the democratic society of Malaysia, the Rule of Law and the independence of the judiciary, and is also essential to the growth of Malaysia as a leading commercial and economic entity in the region;

(ii) We therefore strongly oppose any measures to amend the Legal Profession Act 1976 that would have the effect of diluting or impairing the independence of the Malaysian Bar and/or the Bar Council."

133. The Special Rapporteur has not yet received a response from the Government of Malaysia to his letter, apart from an acknowledgment contained in a letter dated 8 October 1996.

134. In the light of these developments and in particular the current civil suit pending in the Malaysian courts, the Special Rapporteur has decided to postpone reporting to the Commission on Human Rights on his findings to date on the initial complaints referred to in his second report (E/CN.4/1996/37, paras. 158-165).

Mexico

Communications to the Government

135. On 7 May 1996, the Special Rapporteur sent an urgent appeal to the Government of Mexico concerning alleged death threats and acts of harassment against human rights lawyer Maria Teresa Jardí of the National Commission of Human Rights, her son, Julian Andrade Jardí and her assistant, Hector Gutierrez Ugalde. The threats reportedly are related to the work of Mrs. Jardí as a human rights lawyer, and to the work of her son, who was carrying out investigations into human rights violations committed by the security forces. In addition, the National Human Rights Commission has investigated several cases concerning human rights violations by individual members of the security forces, and had issued recommendations that individual members be sanctioned for criminal acts. (See also E/CN.4/1997/60/Add.1, para. 314.)

136. On 14 August 1996, the Special Rapporteur sent a joint urgent appeal with the Special Rapporteur on extrajudicial, summary or arbitrary executions to the Government of Mexico concerning allegations that two lawyers, Pilar Noriega and Digna Ochoa, had received anonymous death threats. According to the information received, the threats might be related to their work as lawyers, since they had been involved in the defence of alleged members of the Zapatista Army for National Liberation. Both lawyers are members of the human rights centre "Centro de Derechos Humanos-Miguel Agustín Juárez" (PRODH). Other members of this organization have been threatened on previous occasions, on the allegation that it is involved in guerrilla activities. The Special Rapporteur on extrajudicial, summary or arbitrary executions has on several occasions intervened in such cases (see E/CN.4/1997/60/Add.1, para. 314).

Follow-up

137. On 10 June 1996, the Special Rapporteur sent a follow-up letter to the Government of Mexico, requesting updated information regarding the investigations into the assassination of Judge Polo Uscanga (see E/CN.4/1996/37, paras. 168-171).

Communication from the Government

138. On 21 May 1996, the Government provided the Special Rapporteur with a reply to the above-mentioned allegations. The kidnapping and ill-treatment of Mr. Gutierrez was under investigation and protection had been provided to Mrs. Jardí and her son, despite the fact that none of the victims had officially denounced the acts of intimidation and the threats.

139. On 1 October 1996, the Government provided the Special Rapporteur with a reply to his communication of 14 August 1996 concerning alleged death threats against Pilar Noriega and Digna Ochoa, lawyers with PRODH and members of the National Front of Democratic Lawyers. Despite the fact that the Human Rights

Commission of the Federal District had not received a complaint regarding the threats, the General Procurator of the Federal District and the Secretariat of Public Security had been requested to take protection measures for the two persons in question.

140. On 12 November 1996, the Government provided additional information with regard to the above-mentioned case. The Government informed the Special Rapporteur about the security measures taken in order to protect the PRODH office. In addition, the Government informed the Special Rapporteur that the two lawyers had informed the Office of the General Procurator that for the moment they did not require any protection.

141. The Rapporteur would like to refer to the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, in relation to the case of Conception Hernandez Mendez, a lawyer, who allegedly received death threats because of her work as a defender of the rights of indigenous peoples (see E/CN.4/1997/60/Add.1, para. 314).

Nigeria

142. For a detailed analysis of the situation of human rights in Nigeria, the Special Rapporteur wishes to refer to the interim report on the situation of human rights in Nigeria, which was submitted to the General Assembly (A/51/538) and the final report, which the Commission on Human Rights has before it (E/CN.4/1997/62). Both of these reports were submitted jointly with the Special Rapporteur on extrajudicial, summary or arbitrary executions, pursuant to Commission on Human Rights resolution 1996/79. Following their forthcoming visit to Nigeria, the Special Rapporteurs will submit a report to the Commission on the findings of their mission.

Pakistan

Communication to the Government

143. On 10 June 1996, the Special Rapporteur transmitted to the Government of Pakistan an urgent appeal regarding alleged threats and acts of harassment against a lawyer, Asthma Jahangir, and her family, owing to her defence of a 21-year-old woman in a habeas corpus petition filed by the young woman's father. The Special Rapporteur requested the Government to provide Mrs. Jahangir and her family with adequate protection and to investigate the allegations.

144. On 26 July 1996, the Special Rapporteur addressed a letter to the Government of Pakistan in response to the Government's communication of 21 June 1996 (see paragraph below), regarding the case of Ms. Asthma Jahangir. The Special Rapporteur stated that the incidents referred to in the Government's response seemed to refer to incidents which had occurred in 1995. He therefore requested the Government to provide him with information regarding the threats that had occurred in 1996 referred to in his earlier communication.

145. On 16 July 1996, the Special Rapporteur sent a joint letter with the Special Rapporteurs on extrajudicial, summary or arbitrary executions and on

the question of torture to the Government of Pakistan concerning the murder of Mr. Nizam Ahmed, a former justice of the Sindh High Court and member of the Pakistan Bar Council, and his son Nadeem Ahmed. It was brought to the attention of the Special Rapporteurs that Mr. Ahmed had received anonymous death threats, prior to his murder, in which demands were made that he withdraw a case that he had filed with the Sindh High Court in Karachi. The source indicated that although these threats were reported to the authorities, no steps were taken to investigate the allegations or to provide Justice Ahmed with protection.

Communication from the Government

146. On 21 June 1996, the Government provided the Special Rapporteur with a reply to his letter of 10 June 1996 concerning the case of Ms. Asthma Jahangir. The information provided by the Government referred to an incident that had occurred in 1995, in reaction to which the authorities had provided Ms. Asthma Jahangir with protection. The Special Rapporteur was informed that additional information regarding the case had been requested from the authorities in Pakistan.

Observation

147. In his second report, the Special Rapporteur referred to a challenge before the Supreme Court to the constitutionality of the appointment of ad hoc judges to the Supreme Court (E/CN.4/1996/37, para. 201). The Supreme Court, after hearing lengthy arguments, issued what it considered a landmark decision on 20 March 1996. The Special Rapporteur welcomes this decision which, inter alia, asserted the independence of the judiciary with regard to the appointment of judges. In effect, the judiciary by this decision asserted the power of appointment of the judiciary rather than of the executive, which was the position previously.

Peru

Communications to the Government

148. On 19 November 1996, the Special Rapporteur transmitted an urgent appeal to the Government of Peru, regarding the attempt against the life of the President of the Constitutional Tribunal, Mr. Nugent, on 8 November 1996. The Special Rapporteur expressed his concern about this information and requested the Government to carry out exhaustive investigations, reminding the Government of its obligation to guarantee protection to judges who are put under such pressure.

149. On 12 December 1996, the Special Rapporteur sent an urgent appeal to the Government of Peru, concerning disciplinary measures taken by the Supreme Council of Military Justice against a lawyer, Heriberto Benítez. Mr. Benítez, had reportedly been suspended from office for five months, during which time he would not be allowed to represent his clients. The measure was related to his public statements concerning the composition of the Supreme Council of Military Justice and, in particular, concerning the fact that some members of the Council were not lawyers and thus would not be familiar with the content of the law. Mr. Benítez was reported to have made these statements in

connection with the detention and prosecution of his client, retired General Robles, who was reported to have publicly stated that a paramilitary group was responsible for an attack against a television station in November 1996. The Special Rapporteur was also informed that Mr. Benítez had been notified of the opening of criminal investigations against him for his statement regarding the members of the Supreme Council of Military Justice. According to the information received, Mr. Benítez had previously been detained for 24 hours on similar charges while working on the case of the La Cantuta massacre. The source expressed fear that a similar situation would occur again.

Communications from the Government

150. On 15 April 1996, the Government informed the Special Rapporteur about the appointment of the first Ombudsman in Peru.

151. In communications dated 3 October 1996 and 7 November 1996, the Special Rapporteur was informed about the release of a number of innocent prisoners who had been held in detention under anti-terrorism legislation. Their release was based upon recommendations of the Ad Hoc Commission on Pardons, which had been established to make recommendations to the President on pardoning innocent detainees.

152. On 7 November 1996, in response his communication of 25 July 1995 concerning lawyer Tito Guido Gallegos (see E/CN.4/1996/37, para. 205), the Government informed the Special Rapporteur that Mr. Tito Gallegos had been appointed as a judge of the High Court of the judicial district of Puno by a resolution of the National Council of the Judiciary.

Follow-up

153. On 10 June 1996, the Special Rapporteur sent a follow-up letter thanking the Government of Peru for providing him with information regarding the protection measures taken with regard to the threats against Judge Antonia Saquicuray Sánchez and the human rights lawyer, Tito Guido Gallegos (see E/CN.4/1996/37, paras. 205-207). He requested the Government to provide him with information on the results of the investigations. In addition, the Special Rapporteur reminded the Government of his communications to which he had not yet received a reply, regarding the cases of Margarita Chuquiuru Silva, of human rights lawyers of the Pro Human Rights Organization (APRODEH) and of Lori Berenson (see E/CN.4/1996/37, paras. 207-209).

154. At the time the present report was finalized, no reply had been received to that letter.

155. The Special Rapporteur would also like to refer to the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions in relation to the case of a lawyer, Gloria Cano Legua, who has reportedly been threatened and harassed (E/CN.4/1997/60/Add.1, para. 384).

Philippines

156. The Special Rapporteur would like to refer to the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions in relation to the case of a lawyer, Ferdinand Reyes, who was reportedly killed on 12 February 1996, supposedly for his criticism of government policy (E/CN.4/1997/60/Add.1, para. 393 (f)).

Rwanda

157. The Special Rapporteur has continued to receive reports from the United Nations Human Rights Field Operation in Rwanda (HRFOR) on justice, legal reform and institution-building in Rwanda. In its report of October 1996, HRFOR reported that while there had been positive developments in the past year (for example, the "National awareness campaign on the judicial system" was successfully launched in October), there remained concerns that there were serious shortcomings in the administration of justice. Not only was there a serious shortage of judges, clerks and material resources for the courts, and a shortage of defence lawyers, but there had also been serious allegations that the military of Rwanda had acted in contravention of judicial orders.

158. On 23 January 1997, the Special Rapporteur sent an urgent appeal, jointly with the Special Rapporteur on the situation of human rights in Rwanda and the Special Rapporteur on extrajudicial, summary or arbitrary executions, on behalf of Deogratias Bizimana and Mr. Egide Gatanazi, both of whom had been sentenced to death after the High Court in Kibungo found them guilty of genocide and crimes. The source alleged that the defendants had no access to legal counsel either before or during trial and that they were not given adequate time to prepare their defence. The source also reported that the defendants were booed and prosecutors applauded during the trial, without intervention by the presiding judge. Further, most of the judicial officials have received only up to four months' training and there were serious questions as to the independence and impartiality of the judicial officials following statements by some judicial and government officials that the defendants should not request legal counsel.

Tunisia

Communication to the Government

159. On 22 May 1996, the Special Rapporteur transmitted an urgent appeal to the Government of Tunisia regarding the case of lawyer and human rights defender Najib Hosni, who on 22 May 1996 had reportedly been convicted to eight years' imprisonment. According to the information received, he had been convicted by the Appeal Court of el-Kef, without having the right of defence, since the 30 lawyers who were assisting him had left the hearing room in order to protest the refusal of the court to postpone the proceedings. The postponement had been requested on 25 December 1995 to allow the lawyers adequate time to prepare the defence. It was also reported that Mr. Hosni had

stated that he had not been fully informed about the details of the charges against him. In addition, the source stated that he did not have the right to appeal. It has been alleged that the trial might be linked to his work as a human rights defender.

160. On 22 October 1996, the Special Rapporteur transmitted a letter to the Government of Tunisia concerning the case of human rights defender and parliamentarian Khémais Chammari, who had reportedly received a five-year prison sentence on charges of leaking secret information to foreign powers in a case bearing on national security. According to the information received, Mr. Chammari had passed documents to a European international lawyer concerning the case of Mr. Mouadda, leader of the opposition Social Democratic Party (MDS) who, in October 1995 was convicted to 11 years' imprisonment on charges of having relations with a foreign power. In addition, the Special Rapporteur was informed that Mr. Chammari and Mrs. Alya Chammari, his wife and a lawyer, were suffering acts of intimidation and threats from the police and security forces, related to his activities on behalf of Mr. Mouadda. Further, it was alleged that Mr. Chammari's imprisonment was the result of his non-violent activities in defence of human rights and civil liberties in Tunisia.

Communication from the Government

161. On 21 June 1996, the Government provided the Special Rapporteur with a reply in the case of Najib Hosni. The Government informed the Special Rapporteur that Mr. Najib Hosni had in fact had access to defence counsel, and stated that the withdrawal of the lawyers during the proceedings had been an attempt to influence the court's decision. The Government further stated that the allegation that Mr. Hosni did not have the right to appeal was unfounded, since under the Tunisian judicial criminal system decisions were subject to an application for review by the Court of Cassation. In addition, the Government stated that his detention was not linked to his activities as a human rights lawyer, but based on specific acts punishable under ordinary law.

162. On 29 November 1996, the Government provided the Special Rapporteur with a reply concerning the case of Mr. Khémais Chammari. The Government informed the Special Rapporteur that Mr. Chammari's conviction was not related to his work as a defender of human rights and that no official complaints about the alleged threats and acts of intimidation and harassment had been received by the authorities. The Government also stated that the files had been fully at the disposal of the lawyers. The composition of the court had been changed at the request of Mr. Chammari, and his right to be tried by an independent and impartial tribunal had been fully respected. Lastly, the Special Rapporteur was informed that the Supreme Court, which has the competence to decide whether it is necessary to postpone a case, which rarely occurs, had decided that in this case it was not necessary to do so. The Government stated that the allegation that the defence lawyers had not had sufficient time to prepare the case was unfounded.

163. On 20 December 1996, the Government of Tunisia informed the Special Rapporteur that lawyer Najib Hosni, for whom an urgent appeal had been sent on

22 May 1996 and who had been convicted to eight years' imprisonment for the falsification of documents and their possession, had been liberated on 14 December 1996.

164. On 3 January 1996, the Special Rapporteur was informed by the Government of Tunisia that Mr. Khémais Chammari had been conditionally released from prison, for humanitarian reasons.

Turkey

Communication to the Government

165. On 16 February 1996, the Special Rapporteur transmitted to the Government of Turkey an urgent appeal concerning the reported trial of Turgat Inal, the former Chairman of the Balikesir Bar Association. According to the information received, he had been brought to trial on charges relating to an article he had written which was included in a book published in June 1995 by the Human Rights Foundation of Turkey (HRFT). Mr. Inal, together with the nine members of the executive board of HRFT, were reportedly charged with "insulting the laws of the Republic". The Special Rapporteur expressed concern that the prosecution of Mr. Inal for publishing his criticism of Turkish law might interfere with his freedom of opinion and expression. The Special Rapporteur's view is that this would appear to be an unwarranted restriction on the duty of lawyers to take part in public discussions of matters concerning the law.

166. On 7 May 1996, the Special Rapporteur transmitted an urgent appeal to the Government of Turkey concerning Mr. Huseyin Umit, a lawyer and board member of the Hakkari branch of the Turkish Human Rights Association (HRA). According to the information received, Mr. Umit was detained without an arrest warrant on 29 March 1996, and released after several hours. During his detention his house and offices of the HRA were searched. The source claimed that those steps were taken against Mr. Umit solely because of his activities as a human rights lawyer. In addition, since his release, Mr. Umit was reported to have received death threats.

Communication from the Government

167. On 4 June 1996, the Government provided the Special Rapporteur with a reply to his communication of 16 February 1996 concerning the case of Mr. Turgut Inal. The Government informed the Special Rapporteur that the case was "under way". The Government expressed its view that excerpts of articles published by Mr. Imut showed that the article openly attempted to degrade and insult Turkish law and the Constitution. Thus, in accordance with article 159/3 of the Turkish Penal Code, "those who vilify the laws of the Turkish Republic or the decisions of the Turkish Grand National Assembly shall be punished". The trial was, in the Government's view, not aiming at the exercise of the freedom of expression concerning the law, the administration of justice or the promotion and protection of human rights. Furthermore, the Government stated that the lawyer had not complied with Principle 23 of the Basic Principles on the Role of Lawyers: "in exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession".

168. On 8 July 1996, the Government provided a reply to the Special Rapporteur's communication of 7 May 1996 concerning the case of Mr. Huseyin Umit. Grounds for the detention of Mr. Umit were found in documentary evidence, gathered during operations conducted by the security forces in the neighbouring mountains on 27 March 1996, which indicated that he had provided financial assistance to the terrorist organization PKK. The searches, however, had provided no evidence pointing to the alleged crime. The Government further stated that Mr. Umit had never been arrested, and that he had been released after interrogation.

Request for a mission

169. On 28 June 1996, in a letter to the Government of Turkey, the Special Rapporteur reiterated his interest in undertaking a mission to Turkey, as previously expressed in his letter of 16 February 1996. At the time the present report was finalized, no reply to this request had been received from the Government.

United Kingdom of Great Britain and Northern Ireland

England and Wales

170. In his second report, the Special Rapporteur expressed concern over comments by ministers and/or highly placed government personalities on decisions of the courts made on judicial review of administrative decisions of the Home Secretary (E/CN.4/1996/37, para. 226).

171. Arising from this controversy, the relationship between the judiciary, the legislature and the executive was the subject of a lively six-hour debate in the House of Lords on 5 June 1996 on a motion moved by the Shadow Lord Chancellor (Lord Irvine of Lairg). The Special Rapporteur was present in the House of Lords to listen to the debate. The thrust of the debate was the role of judges in the development of the law, their independence and the extent to which judges should participate in public discussion of developments in the law.

172. In the course of the debate, the Lord Chancellor (Lord Mackay of Clasfern) said, on the issue of the independence of the judiciary:

> "We also have a judiciary whose independence, as individual judges, from one another and from any improper influence, is also superb and complete. I certainly do not know of anyone who has successfully attempted - or indeed has attempted without success - to influence the decisions of the judges in the cases committed to them. The essence of judicial independence is that the judge trying the case is free to decide according to his judgement in the light of the existing law. That applies to the individual case and that is the essence of judicial independence.
>
> The independence of the judiciary - in agreement for example, with my noble and learned friend, Lord Simon of Glassdale - is an important part of the checks and balances of our constitution. The jurisdiction which the judges exercise right across the board is fundamental to the rule of

law. I agree with the view that the rule of law is a deeper concept than just that of law and order." (Hansard 1996, vol. 572, No. 100, p. 1308)

173. There was consensus among the Lords that it was quite proper, and some like Lord Woolf, the Master of the Rolls, said that it was fundamental, that judges and lawyers should be able to participate in public discussion of developments in the law. The Lord Chancellor said: "Public lectures have been a well authenticated way of doing that over many years".

174. The Shadow Lord Chancellor expressed his personal hostility to any legislative attempt to restrict judicial review, which he believed directly promoted the rule of law. He assured the House that "The role and independence of the judiciary will be vigorously upheld by the next Labour government". (Hansard 1996, vol. 572, No. 100, p. 1314).

175. On 6 June 1996, the Special Rapporteur called on the then newly appointed Lord Chief Justice, Lord Thomas Bingham, at his Chambers in London. The Lord Chief Justice assured the Special Rapporteur that he regarded judicial independence as firmly entrenched in the United Kingdom. He further assured him that judges did not feel themselves under any pressure in relation to judicial decisions.

176. The Special Rapporteur welcomes the expressions of commitment by the Lord Chancellor and the Shadow Lord Chancellor and the assurance of the Lord Chief Justice. In this regard, the Special Rapporteur has not received any specific allegations that the independence of any particular judge was threatened. His concern was more with regard to the threat to the institutional independence of the judiciary. From the tone of the House of Lords debate, the Special Rapporteur is confident that any legislative attempt to restrict judicial review will be strongly resisted, at least in that House.

Northern Ireland

177. In his second report, the Special Rapporteur made reference to information received with regard to difficulties experienced by "high risk" prisoners in obtaining access to legal advice/representation (E/CN.4/1996/37, para. 229). The Special Rapporteur continued to receive information in this regard. In the latest submission of information to the Special Rapporteur in December 1996 by British-Irish Rights Watch, it was alleged, inter alia, that there were attempts to restrict lawyers' access to their clients in Northern Ireland police stations and English prisons; to failure of the judiciary and of government appointed functionaries to uphold lawyers' rights; to proposals that would allow clandestine surveillance of lawyers' offices.

178. In response to the above-mentioned report from British-Irish Rights Watch, the Independent Commissioner for the Holding Centre for Northern Ireland submitted a memorandum dated 17 January 1997 to the Special Rapporteur. The Independent Commissioner expressed the view, inter alia, that he might favour "an independent investigation into the nature and extent of any intimidation of defence solicitors". The Special Rapporteur also received

a letter, dated 31 January 1997, from the Chairman of the General Council of the Bar of Northern Ireland in response to the allegations submitted to the Special Rapporteur by the British-Irish Rights Watch.

179. In the light of the latest submission from British-Irish Rights Watch and the response from the Independent Commissioner and the Chairman of the Northern Ireland Bar Council the Special Rapporteur is considering, subject to the availability of resources, seeking the permission of the Government of the United Kingdom to visit Northern Ireland for an in situ investigation into the allegations he has received on the situation in Northern Ireland

United States of America

180. On 2 April 1996, the Special Rapporteur sent an urgent appeal to the Government of the United States of America concerning Judge Harold Baer Jr. of the Federal District Court of Manhattan. According to the source, President Clinton and Senator Bob Dole had called for the resignation and impeachment of Judge Baer as a result of his ruling in a drugs-related case. The Special Rapporteur expressed his concern that, if true, the allegation would amount to executive intimidation of the independence of the judiciary.

181. On 17 June 1996, the Special Rapporteur transmitted an urgent appeal to the Government concerning statements made and actions taken by Governor George E. Pataki of the State of New York. According to the information received, Governor Pataki had pressured District-Attorney Robert T. Johnson to seek the death penalty in a murder case in which the victim was a police officer. It was furthermore alleged that Governor Pataki removed Mr. Johnson from the case pursuant to a State law that grants the Governor the power to remove district attorneys in specific cases, a law which was only used in cases where a prosecutor or his office asked to be excused from a case, or had been suspended for misconduct.

Communication from the Government

182. On 21 May 1996, the Permanent Representative of the United States of America provided a reply to the Special Rapporteur's communication of 4 April 1996. The Special Rapporteur was informed that the President had at no time called for the resignation of Judge Baer. According to the Permanent Representative, the matter was addressed in a letter from the Counsel to the President to several members of Congress who had expressed their disapproval of the decision by Judge Baer to suppress evidence in a drug trafficking case and had demanded that the President seek his resignation. The letter states:

> "The President has made clear that he believes Judge Baer's decision is grievously wrong, not only in its results but also in its totally unjustified criticism of the New York City Police and its suggestion that it is acceptable behavior for anyone to run from the police. The President's views on this matter are represented by the U.S. Attorney for the Southern District, his chief law enforcement officer in Manhattan, who brought the prosecution in the first place and against whom Judge Baer ruled. Immediately after the decision, the President instructed me to ascertain that the U.S. Attorney was prepared to challenge the judge's decision vigorously. The U.S. Attorney is in fact

vigorously challenging the Judge's order. And, it is only because of the U.S. Attorney's pursuit of this case that Judge Baer eventually agreed to rehear the motion and consider additional police testimony. The President hopes that Judge Baer will reverse his earlier decision. If he does not, the President will direct the Justice Department to appeal the decision.

The proper way for the Executive Branch to contest judicial decisions with which it disagrees is to challenge them in the courts, exactly as the Clinton Administration is doing in this case. The President supports the independence of the federal judiciary, which is established by the Constitution. Although comments in recent press reports may have led some to conclude otherwise, the President believes that the issue now before Judge Baer should be resolved in the Courts."

Observations

183. The Special Rapporteur welcomes the statements made by the President in support of the independence of the judiciary and is in full agreement with the assertion that the proper way for the Executive Branch to contest judicial decisions with which it disagrees is to challenge them in the appellate courts. Nevertheless, the Special Rapporteur is of the view that harsh, public criticism of a judicial decision by the Executive Branch, particularly in a politically charged environment in which prominent legislators and politicians are calling for the resignation of the particular judge who has rendered a controversial decision, can have a chilling effect on the independence and impartiality of the judiciary. In this regard, the Special Rapporteur notes that subsequently Judge Baer did in fact reverse his earlier decision, thus causing concern among legal circles that the same judge may have done a disservice to judicial independence by reversing his own decision under external pressure.

Uzbekistan

Communication to the Government

184. On 23 April 1996, the Special Rapporteur transmitted an urgent appeal to the Government of Uzbekistan concerning the reported harassment by State security organs against Mrs. Paulina Braunerg, an attorney and board member of the Human Rights Society of Uzbekistan. On 14 March 1996, Mrs. Braunerg's house was reportedly searched by security agents, who confiscated newspapers which reportedly published outside Uzbekistan. On the same day, she was reportedly interrogated about these newspapers, as well as about her participation in a human rights conference in 1995 in Kazakstan. According to the information received, she was again interrogated, on 15 March 1996, about her contacts with human rights activists and organizations abroad, but no official charges were brought against her.

Communication from the Government

185. On 15 May 1996, the Government provided the Special Rapporteur with a reply to his communication of 23 April 1996 concerning the interrogation of Mrs. Paulina Braunerg. The Government informed the Special Rapporteur that

during an authorized search of Mrs. Braunerg's house in connection with the investigation of an ordinary crime, the authorities found literature distorting the situation in Uzbekistan. As a result, on 16 March 1996, Mrs. Braunerg was invited to the National Security Service (SNB) for an interview, during which she was reported to have expressed her regret about the incident. She was also said to have left the literature in the office of the SNB. The Government reported to the Special Rapporteur that the criminal investigation of the ordinary crime was continuing.

VI. CONCLUSIONS AND RECOMMENDATIONS

186. This is the third year of the Special Rapporteur's mandate. Recalling the historical background to this mandate and the circumstances leading to its creation by the Commission on Human Rights, the Special Rapporteur is convinced that, though attacks on the independence of judges and lawyers have not diminished, there is, today, greater awareness of the importance of the independence and impartiality of the judiciary and the independence of lawyers for constitutional government under a democracy based on the rule of law. This is evidenced by the large amount of correspondence that the Special Rapporteur has received pertaining to his mandate in the past year, much of which, owing to inadequate resources, it has not been possible to process, analyse and follow up. It is further evidenced by the various invitations the Special Rapporteur received to participate in legal workshops, seminars and conferences.

187. The Special Rapporteur's participation and involvement in these meetings and the dissemination of his addresses and interviews by the media in the different regions have contributed to a better understanding of his mandate and its significance in the global human rights agenda.

188. The extent of implementation of the Basic Principles on the Independence of the Judiciary and the Basic Principles on the Role of Lawyers, the two leading United Nations instruments spelling out minimum standards to be applied by Member States for the realization of an independent justice system, is a matter of paramount consideration under this mandate. To this end, the Special Rapporteur appreciates the survey undertaken by the Crime Prevention and Criminal Justice Division in Vienna on the implementation of the Basic Principles on the Independence of the Judiciary. The information collated from the responses of Member States and bar associations is of relevance for gauging the state of judicial independence in countries and addressing problems associated with the implementation and the adequacy of the Basic Principles. The Special Rapporteur appeals to Member States and bar associations which have not responded, to do so without delay. The Special Rapporteur intends to work closely with the Division in Vienna in this exercise.

189. The Special Rapporteur has learnt that the Economic and Social Council, in its resolution 1996/16, decided that the Commission on Crime Prevention and Criminal Justice should to consider the report of the Secretary-General on the desirability of establishing an inter-sessional working group at its sixth session to examine the reports on the use and application of standards and norms in crime prevention and criminal justice in more detail. He has also learnt that a similar survey on the implementation of the Basic Principles on

the Role of Lawyers and the Guidelines on the Role of Prosecutors is anticipated. Pending the survey on the latter two standards, the Special Rapporteur will discuss with the Division the feasibility of the establishment of a working group especially to review the results of the survey on the Basic Principles on the Independence of the Judiciary.

190. From the information gathered in the past three years, it is clear that attacks on the independence of judges and lawyers are not confined to the underdeveloped and developing countries. The Special Rapporteur has noted in his previous report and in the present report, that developed countries too are not spared these problems. Hence, the threat to the independence of judges and lawyers is universal and needs constant international vigilance.

191. This thematic mandate is wide in scope. To date, not all its parameters have been examined. With greater awareness there will be greater expectations, among them those of the emerging new democracies, which may seek advice on specific issues for the structuring of independent justice systems. Further, the mandate covers different legal systems. And materials submitted, all of which need to be analysed and responded to, may be in different languages. Disappointing those who approach the Special Rapporteur, on grounds of want of resources, would be a negation of the aspirations inherent in the terms of this mandate.

192. The Special Rapporteur views the project currently being undertaken by the Activities and Programmes Branch of the High Commissioner/Centre for Human Rights for the preparation of a manual for the training of judges and lawyers as important. Such a manual would complement significantly the work of the Special Rapporteur. As a standard global training manual, it would have to be acceptable in all regions of the world. The project may require additional funding to organize a meeting of experts, drawn from all the regions, of sufficient duration to enable them to study the draft in a meaningful way and to approve it. The Special Rapporteur trusts that such funding would be forthcoming.

193. In the two previous reports, the Special Rapporteur referred to several theoretical issues of special importance which he strongly felt should be studied and analysed. However, owing to lack of resources - both human and financial - the Special Rapporteur has not been able to pursue those research programmes.

194. Although some Governments have been slow in responding to his communications and some have completely ignored them, the Special Rapporteur has found that a majority of Governments do respond to his interventions and urgent appeals. In some cases, the Special Rapporteur's intervention and involvement had a salutary effect. This is significant for the mandate. The cooperation extended by non-governmental organizations, particularly the international organizations, has been significant.

195. The Special Rapporteur is convinced that there is a very real need for the continuation of the monitoring mechanism envisaged under the mandate. With adequate resources, there is considerable potential for this mandate to contribute in a positive and meaningful way towards the realization of the Vienna Declaration and Programme of Action. An independent judicial system is

the constitutional guarantee of all human rights. The right to such a system is the right that protects all other human rights. Realization of this right is a sine qua non for the realization of all other rights. This mandate, therefore, should be accorded its rightful place in the human rights agenda of this Commission.

196. The Special Rapporteur concludes this third report by emphasizing and reiterating again that there can only be meaningful and constructive realization of what is expected of this mandate if the Special Rapporteur is provided with adequate resources, both human and financial. Human resources, at least some, must be permanent for purposes of continuity, and not temporary and transient.

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QUESTION OF THE HUMAN RIGHTS OF ALL PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

Report of the Special Rapporteur on the independence of judges and lawyers, Mr. Param Cumaraswamy

GE.98-10499 (E)

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I. THE MANDATE

Introduction

1. The present report is submitted pursuant to Commission on Human Rights resolution 1997/23 of 11 April 1997. This report is the fourth annual report to the Commission on Human Rights by Mr. Param Cumaraswamy since the mandate was established by the Commission in its resolution 1994/41 of 4 March 1994, renewed by resolution 1997/23 and endorsed by the Economic and Social Council in its decision 1997/246 of 22 July 1997 (see also E/CN.4/1995/39, E/CN.4/1996/57 and E/CN.4/1997/32).

2. Chapter I of the present report contains the terms of reference for the discharge of the mandate. Chapter II refers to the methods of work applied by the Special Rapporteur in the discharge of the mandate. In chapter III, the Special Rapporteur presents an account of the activities undertaken within the framework of his mandate in the past year. Chapter IV deals with the establishment of an international criminal court. Chapter V contains brief summaries of urgent appeals and communications to and from the Governments, along with the observations of the Special Rapporteur.

Terms of reference

3. At its fiftieth session, the Commission on Human Rights, in resolution 1994/41, noting both the increasing frequency of attacks on the independence of judges, lawyers and court officials and the link which exists between the weakening of safeguards for the judiciary and lawyers and the gravity and frequency of violations of human rights, requested the Chairman of the Commission to appoint, for a period of three years, a special rapporteur whose mandate would consist of the following tasks:

(a) To inquire into any substantial allegations transmitted to him (...) and report his or her conclusions thereon;

(b) To identify and record not only attacks on the independence of the judiciary, lawyers and court officials but also progress achieved in protecting and enhancing their independence, and make recommendations including the provision of advisory services or technical assistance when they are requested by the State concerned;

(c) To study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers.

4. Without substantially changing the mandate, the Commission endorsed in resolution 1995/36 the decision of the Special Rapporteur to use, beginning in 1995, the short title "Special Rapporteur on the independence of judges and lawyers".

5. In resolutions 1995/36, 1996/34 and 1997/23, the Commission on Human Rights took note of the annual report of the Special Rapporteur, expressing

appreciation for his working methods, and requested him to submit another annual report on the activities relating to his mandate to the Commission on Human Rights.

6. Several resolutions adopted by the Commission on Human Rights at its fifty-third session are also pertinent to the mandate of the Special Rapporteur and have been taken into consideration in examining and analysing the information brought to his attention with regard to the different countries. These resolutions are:

(a) Resolution 1997/16 on the rights of persons belonging to national or ethnic, religious and linguistic minorities, in which the Commission called upon all special representatives, special rapporteurs and working groups of the Commission to continue to give attention, within their respective mandates, to situations involving minorities;

(b) Resolution 1997/27 on the promotion of the right to freedom of opinion and expression, in which the Commission invited once again the working groups, representatives and special rapporteurs of the Commission on Human Rights to pay attention, within the framework of their mandates, to the situation of persons detained, subjected to violence, ill-treated or discriminated against for having exercised the right to freedom of opinion and expression as affirmed in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and other relevant human rights instruments; and invited the working groups, representatives and special rapporteurs of the Commission, within their mandates, to take note of any deterioration in the right to freedom of expression;

(c) Resolution 1997/28 on hostage-taking, in which the Commission urged all thematic special rapporteurs and working groups to address, as appropriate, the consequences of hostage-taking in their forthcoming reports to the Commission;

(d) Resolution 1997/37 on human rights and thematic procedures, in which the Commission invited the thematic special rapporteurs and working groups to: (i) make recommendations for the avoidance of human rights violations; (ii) follow closely the progress made by Governments in their investigations carried out within their respective mandates; (iii) continue close cooperation with relevant treaty bodies and country rapporteurs; (iv) include in their reports information provided by Governments on follow-up action, as well as their own observations thereon, including in regard to both problems and improvements, as appropriate; (v) include regularly in their reports gender-disaggregated data and to address the characteristics and practice of human rights violations under their mandates that are specifically or primarily directed against women, or to which women are particularly vulnerable, in order to ensure the effective protection of their human rights; requested the thematic special rapporteurs and working groups to include in their reports comments on problems of responsiveness and the result of analyses, as appropriate, in order to carry out their mandates even more effectively, and to include also in their reports suggestions as to areas where Governments might request relevant assistance through the programme of advisory services administered by the Office of the High Commissioner for Human Rights; and suggested that the special rapporteurs, representatives,

experts and chairpersons of working groups of the special procedures of the Commission on Human Rights consider how those mechanisms could make available information on the particular situation of individuals working for the promotion and protection of all human rights and fundamental freedoms and how their protection could be enhanced, taking into account the ongoing deliberations of the relevant working group of the Commission;

(e) Resolution 1997/42 on human rights and terrorism, in which the Commission urged all thematic special rapporteurs and working groups to address, as appropriate, the consequences of the acts, methods and practices of terrorist groups, in their forthcoming reports to the Commission;

(f) Resolution 1997/43 on integrating human rights of women throughout the United Nations system, in which the Commission encouraged the strengthening of cooperation and coordination among all human rights treaty bodies, special rapporteurs, special procedures and other human rights mechanisms of the Commission and the Sub-Commission on Prevention of Discrimination and Protection of Minorities, and requested that they regularly and systematically take a gender perspective into account in the implementation of their mandates, including information and qualitative analysis in their reports on violations of the human rights of women;

(g) Resolution 1997/46 on advisory services, technical cooperation and the Voluntary Fund for Technical Cooperation in the Field of Human Rights, in which the Commission invited relevant United Nations treaty bodies, special rapporteurs and representatives, as well as working groups, to continue to include in their recommendations, whenever appropriate, proposals for specific projects to be realized under the programme of advisory services and technical cooperation in the field of human rights;

(h) Resolution 1997/62 on human rights in Cuba, in which the Commission invited the Special Rapporteur on the situation of human rights in Cuba and the existing thematic mechanisms of the Commission to cooperate fully and exchange information and findings on that situation;

(i) Resolution 1997/69 on comprehensive implementation of and follow-up to the Vienna Declaration and Programme of Action, in which the Commission called upon all special representatives, special rapporteurs, independent experts and thematic working groups of the Commission to take fully into account the recommendations contained in the Vienna Declaration and Programme of Action within their respective mandates;

(j) Resolution 1997/75 on human rights and mass exoduses, in which the Commission invited the special rapporteurs, special representatives and working groups of the Commission and the United Nations human rights treaty bodies, acting within their mandates, to seek information, where appropriate, on problems resulting in mass exoduses of populations or impeding their voluntary return home and, where appropriate, to include such information, together with recommendations thereon, in their reports, and to bring such information to the attention of the High Commissioner for Human Rights for appropriate action in fulfilment of her mandate, in consultation with the United Nations High Commissioner for Refugees;

(k) Resolution 1997/78 on the rights of the child, in which the Commission, recommending that, within their mandates, all relevant human rights mechanisms and all other relevant organs and mechanisms of the United Nations system and the supervisory bodies of the specialized agencies pay attention to particular situations in which children are in danger and where their rights are violated and that they take into account the work of the Committee on the Rights of the Child, took various decisions with respect to the situation of children in various circumstances of difficulty.

II. METHODS OF WORK

7. The Special Rapporteur, in the fourth year of his mandate, continued following the methods of work described in the first report of his tenure (E/CN.4/1995/39, paras. 63-93).

III. ACTIVITIES OF THE SPECIAL RAPPORTEUR

8. The following sections give an account of the activities carried out by the Special Rapporteur in the implementation of the mandate entrusted to him by the Commission on Human Rights.

A. Consultations

9. The Special Rapporteur visited Geneva for his first round of consultations from 1 to 8 February 1997 in order to finalize his reports to the Commission. He held consultations with representatives of the Permanent Missions of Belgium, China, India and Nigeria.

10. He visited Geneva for his second round of consultations from 24 March to 8 April 1997 in order to present his report to the Commission at its fifty-third session. During this period the Special Rapporteur met with representatives of the Latin American Group, the Western Group and the Asian Group and other regional groups to brief them on his work as Special Rapporteur and to answer any questions they might have. He also held consultations with representatives of the Government of Nigeria. In addition, he held a briefing for interested non-governmental organizations and also met individually with several non-governmental organizations.

11. The Special Rapporteur visited Geneva for his third round of consultations from 20 to 23 May 1997 and to attend the fourth meeting of special rapporteurs/representatives, experts and chairmen of working groups of the special procedures of the Commission on Human Rights and of the advisory services programme, which was held from 20 to 23 May.

12. In conjunction with his missions to Belgium and the United Kingdom, the Special Rapporteur stopped over in Geneva from 31 October to 7 November 1997 for consultations. Again, in conjunction with his visit to New York, the Special Rapporteur stopped in Geneva from 22 to 29 November 1997 for further consultations.

B. Missions/visits

13. During 1997, the Special Rapporteur undertook a field mission to Belgium (14 to 18 October 1997) followed by a mission to the United Kingdom (20 to 30 October 1997). The Special Rapporteur's reports on these missions containing his findings, conclusions and recommendations can be found in addenda to the present report.

14. During the period under review the Special Rapporteur informed the Governments of Indonesia and Tunisia of his wish to carry out an in situ investigation. He reminded the Governments of Pakistan and Turkey of his previous requests to undertake a mission to those countries.

C. Communications with Governments

15. During the period under review, the Special Rapporteur transmitted 18 urgent appeals to the following 12 States: Bangladesh, Colombia, Egypt, India, Mexico, Pakistan (4), Peru, Philippines (2), Tunisia, Turkey (3), Venezuela and Yugoslavia.

16. Seeking to avoid unnecessary duplication of the activities of other thematic rapporteurs and country-specific rapporteurs, the Special Rapporteur has joined during the past year with other special rapporteurs and working groups to transmit seven urgent appeals on behalf of individuals to the Governments of the seven following countries: Bolivia, together with the Special Rapporteur on extrajudicial, summary or arbitrary executions on 6 March 1997; Brazil, jointly with the Special Rapporteur on extrajudicial, summary or arbitrary executions on 20 June 1997; Colombia, together with the Special Rapporteur on extrajudicial, summary or arbitrary executions on 17 July 1997; India, jointly with the Special Rapporteur on extrajudicial, summary or arbitrary executions on 13 June 1997; the Islamic Republic of Iran, together with the Special Representative on the situation of human rights in Iran, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on extrajudicial, summary or arbitrary executions on 2 July 1997; the Philippines, together with the Working Group on Enforced or Involuntary Disappearances; and Rwanda, jointly with the Special Rapporteur on torture, the Special Rapporteur on the situation of human rights in Rwanda and the Special Rapporteur on extrajudicial, summary or arbitrary executions on 23 January 1997.

17. The Special Rapporteur transmitted 26 communications to the following 18 Governments: Bahrain, Brazil, Colombia, Croatia, France, Georgia, India (4), Indonesia (2), Kenya (2), Lebanon, Malaysia (2), Mexico, Pakistan, Papua New Guinea, Philippines (2), Rwanda, Spain and United Kingdom (2).

18. The Special Rapporteur has also joined with other special rapporteurs to transmit three communications to the Governments of the following three countries: Switzerland, together with the Special Rapporteur on torture on 13 June 1996; Tunisia, together with the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

on 4 December 1997; Turkey, together with the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on 7 October 1997.

19. The Special Rapporteur received replies to urgent appeals from the Governments of the following eight countries: Bangladesh, Belarus, Egypt, India, Pakistan, Peru (6), Tunisia and Turkey. Replies to joint urgent appeals were received from the Governments of India and the Islamic Republic of Iran. Replies to communications were received from the Governments of the following 12 countries: Colombia (4), Croatia, Cuba, Georgia (1), India (5), Indonesia, Kenya, Malaysia, Mexico, Philippines, Spain and United Kingdom (2). Replies to joint communications were received from the Governments of Switzerland (2) and Turkey. Other communications were received from the Governments of Bahrain and Peru (2).

D. Cooperation with intergovernmental and non-governmental organizations

20. The Special Rapporteur continued his dialogue with intergovernmental and non-governmental organizations in the implementation of his mandate. The Special Rapporteur thanks these organizations for their cooperation and assistance during the year.

21. In its previous correspondence with the Special Rapporteur, the World Bank addressed its concern at the incidence of corruption in the judiciary, particularly in developing countries. Of late, the Special Rapporteur has been receiving information of a general nature of such corruption in some countries. The Special Rapporteur will liaise with the World Bank on this issue to consider the feasibility of drawing up a programme of cooperation in this area.

E. Other United Nations procedures and bodies

1. Cooperation with special rapporteurs and working groups of the Commission on Human Rights

22. The Special Rapporteur continued to work closely with the mandate of other special rapporteurs and working groups. As previously indicated, the Special Rapporteur, in order to avoid duplications, where appropriate has joined in interventions with other special rapporteurs and working groups. The Special Rapporteur has also sought a joint mission to Tunisia with the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. The Special Rapporteur continued to make reference to reports of other special rapporteurs and working groups on issues relevant to his mandate.

2. Cooperation with the Crime Prevention and Criminal Justice Division

23. In his third report (E/CN.4/1997/32, paras. 26-29), the Special Rapporteur referred to the importance of the work done by the Crime Prevention

and Criminal Justice Division in overseeing the implementation of the Basic Principles on the Independence of the Judiciary and the need for the Special Rapporteur to work closely with that Division.

24. The Special Rapporteur could not attend the Sixth Session of the Commission on Crime Prevention and Criminal Justice in Vienna, which was held from 28 April to 9 May 1997. However, he was informed by the Centre for International Crime Prevention of the Office for Drug Control and Crime Prevention in Vienna that replies to the questionnaire regarding the use and application of the Basic Principles on the Independence of the Judiciary had been received from 77 countries as of 16 December 1997. The Special Rapporteur was also informed that the Crime Prevention and Criminal Justice Division is still in the process of undertaking a similar survey on the implementation of the Basic Principles on the Role of Lawyers and the Guidelines on the Role of Prosecutors. The Special Rapporteur will continue liaising with the same Division and will work closely with it for greater dissemination of the Basic Principles on the Independence of the Judiciary and its application in Member States.

3. Cooperation with UNDP

25. The Special Rapporteur thanks UNDP for the assistance and cooperation extended to him by UNDP offices in various countries.

4. Cooperation with the Activities and Programmes Branch of the Office of the High Commissioner for Human Rights (OHCHR)

26. As mentioned in his third report, the Special Rapporteur is collaborating with the Activities and Programmes Branch of the Office of the High Commissioner for Human Rights to develop a training manual for judges and lawyers (E/CN.4/1997/32, para. 31), as part of the United Nations Decade for Human Rights Education. The Special Rapporteur attended an expert meeting from 5 to 8 May 1997 to review the draft manual. The draft will be revised on the basis of substantive comments made by the participants at the expert meeting and will be further piloted through forthcoming courses to be offered to judges and lawyers by the OHCHR programme of technical cooperation, before its final publication. The Special Rapporteur expects this manual to constitute a comprehensive curriculum for the training of judges and lawyers on international human rights standards, to be adapted case by case to particular national needs and legal systems.

F. Promotional activities

27. As stated in his third report, the Special Rapporteur considers the promotion of the importance of the independence of the judiciary and the legal profession for respect for the rule of law in a democratic society, in the spirit of the Vienna Declaration and Programme of Action, to be an integral part of his mandate. In this regard, the Special Rapporteur continued to receive invitations to address legal forums, seminars, conferences and training programmes. Due to other commitments during the year, the Special Rapporteur could not accept all the invitations. Nevertheless, the Special Rapporteur accepted the following invitations:

(a) In Cambodia, from 23 to 25 June 1997, the Special Rapporteur addressed the opening of the judicial training programme organized by the Cambodian Law Training Project. He held consultations with the Minister for Justice, the local OHCHR office and other donor organizations.

(b) From 25 to 30 August 1997 the Special Rapporteur attended the fifteenth LAWASIA Conference in Manila where he delivered several addresses and participated in panel discussions with several Chief Justices of the Asian-Pacific region.

IV. ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT

28. The Special Rapporteur wishes to express his appreciation for the efforts of the Preparatory Committee on the Establishment of an International Criminal Court (created by General Assembly resolution 50/46 of 11 December 1995) which has been meeting periodically to create a draft treaty on the establishment of a permanent international criminal court to be put before a conference of plenipotentiaries in Rome in June-July 1998. The Special Rapporteur supports a strong permanent international criminal court with jurisdiction over serious violations of international human rights and humanitarian law.

29. With regard to the independence and impartiality of such a court, the Special Rapporteur is firmly of the opinion that the permanent international criminal court must have a strong independent prosecutor who can initiate investigations on his own motion without any political or other considerations. A prosecutor with the requisite independence and impartiality will add considerably to the integrity and independence of the court.

30. As the Special Rapporteur discussed in his earlier report to the Commission (E/CN.4/1997/32, paras. 45 and 46), it is important that the method of remuneration of judges of the court from its inception be seen to be compatible with their security of tenure so as to maintain their independence. It is equally important for the court's decisions, either interlocutory or final, to be complied with by States. If States are permitted to ignore its decisions, the very object of the establishment of the court will be defeated and public confidence in the integrity of the court lost. The statute therefore must provide for a procedure to secure compliance when there is a failure to do so. The Special Rapporteur hopes that these issues will be adequately addressed at the next Preparatory Committee meeting before the final draft statute is presented in Rome.

V. COUNTRY SITUATIONS

A. Introduction

31. This chapter contains brief summaries of the urgent appeals and communications transmitted to Governments between 1 January and 10 December 1997, as well as replies to the allegations received from the Governments between 1 January 1997 and 28 January 1998, including meetings the Special Rapporteur had with government representatives. In addition, the Special Rapporteur takes note in this chapter of the activities of other mechanisms which are related to his mandate. Where he has deemed it

necessary, the Special Rapporteur has included his own observations. He wishes to emphasize that appeals and communications reflected in this chapter are based exclusively upon information that has been transmitted to him directly. Where information was insufficient, the Special Rapporteur was not in a position to act. Further, he deeply regrets that lack of sufficient human resources has prevented him from acting upon all the information transmitted to him during the past year, and he apologizes to the organizations who have provided him with well-documented and well-researched reports on particular situations. The Special Rapporteur also recognizes that problems concerning the independence and impartiality of the judiciary are not confined to the countries mentioned in this chapter. In this regard, he wishes to emphasize that readers of the present report should not interpret the omission of a particular country from this chapter as indicative that the Special Rapporteur considers that there are no problems with the judiciary in that country.

32. In preparing this report, the Special Rapporteur took note of reports of his colleagues, Mr. Thomas Hammarberg, Special Representative of the Secretary-General on the situation of human rights in Cambodia; Ms. Elisabeth Rehn, Special Rapporteur on the situation of human rights in the territory of the former Yugoslavia, and Mr. Michel Moussalli, Special Representative on the situation of human rights in Rwanda.

B. Situations in specific countries or territories

Bahrain

Communication from the Government

33. On 7 May 1997, the Government of Bahrain transmitted a letter to the Special Rapporteur requesting clarification on the passage in his report to the fifty-third session of the Commission on Human Rights which expressed concern that "the trials before the State Security Court violate article 14 of the International Covenant on Civil and Political Rights owing to the apparent lack of due process in the Court" (E/CN.4/1997/32, para. 76).

Communication to the Government

34. On 12 November 1997, the Special Rapporteur replied to the letter of 7 May 1997, explaining that he had received serious allegations concerning the alleged lack of due process within the State Security Court. According to the source, defendants are not allowed access to legal counsel until they are brought to the State Security Court; defence lawyers allegedly do not have access to court documents, nor do they have adequate time to prepare a defence for their clients; defence lawyers are given limited access to their clients during the trials before the State Security Court; and the sessions before the Court are allegedly held in camera. Further, article 7 of the Criminal Security Court Law provides that "the verdict passed by the court shall be final and shall not, in any manner, be appealed against, unless the said verdict has been passed in the absence of the accused, in which event, the procedure stated in the foregoing article shall apply". It was also brought to the Special Rapporteur's attention that of three State Security Courts, two are presided by members of the Al-Khalifa family which governs the State of

Bahrain. The Special Rapporteur took note of the fact that the State Security Court Law does in fact provide for procedural guarantees that address the allegations contained in the communications sent by the Special Rapporteur to the Government. However, the source presented allegations concerning specific cases in which these procedural guarantees were not followed by the State Security Court, allegations that were summarized in the communications sent to the Government on 16 October 1996 and 18 November 1996.

Bangladesh

Communication from the Special Rapporteur

35. On 14 February 1997, the Special Rapporteur sent an urgent appeal to the Government of Bangladesh to express his concern over the legal situation of Mrs. Zobaïda Rashid, wife of Colonel Rashid. According to the source, Mrs. Rashid was arrested on 3 November 1996 in her Dhaka residence on a remand order and held for five days, during which time she was reportedly tortured to make her confess. It has been reported that she was brought before the Chief Metropolitan Magistrate on 12 November 1996 without the presence of her attorney and that the charges against her were unclear. Attempts to manipulate the legal proceedings were also reported; in particular, her defence attorney was misinformed of the dates of Mrs. Rashid's appearances in court and he did not have access to documents relating to the case.

Communication from the Government

36. In February 1997, the Government provided the Special Rapporteur with a reply to the urgent appeal sent on behalf of Mrs. Zobaïda Rashid. The Government stated that Mrs. Rashid was arrested on 3 November 1996 in the presence of her attorney, Mr. Forman Ali, and was prosecuted for possession of illegal arms. She was held at a police remand centre for five days and on 9 November 1996, she was produced before the Chief Metropolitan Magistrate, who granted further remand for four days. The allegation that she was tortured during her detention is false and unfounded. The Government added that the investigation has established the involvement of Mrs. Rashid in a criminal conspiracy to kill the then President of Bangladesh, Bangabandhu Shelkh Mujibur Rahman, and 32 others, including pregnant women and children, but she was never charged with any subversive act against the Government and she was never detained under the Special Powers Act 1974. The Government also asserted that she has been very well treated in jail and that she was allowed to receive visitors and lawyers. The Government also listed the names of relatives and advocates who visited her in detention between 1996 and February 1997.

Observations

37. The Special Rapporteur thanks the Government for its prompt response to his intervention. The Special Rapporteur has not heard further from the Government.

Belarus

Communication from the Government

38. On 10 January 1997, the Government provided the Special Rapporteur with a reply to his letter dated 12 November 1996 regarding the alleged process of suspending the Constitutional Court by the head of State following its decision concerning the referendum on two draft constitutions. The response of the Government contained information with regard to provisions embodied in the Constitution concerning the administration of justice and the appointment and independence of judges. It also gave detailed information regarding the organization of the judicial system and the status of judges as contained in the Republic of Belarus Act of 13 January 1995. The Special Rapporteur was also informed of the appointment proceedings, the activities and the competence of the Constitutional Court judges. The Government stated that the above-mentioned general information related to the period covered by the inquiry from the Special Rapporteur concerning the situation of judicial organs in Belarus. Finally, the Government added that on 24 November 1996, the Republic of Belarus adopted a new Constitution by referendum which amended the procedure for the appointment of judges. The President of the Constitutional Court, the President of the Supreme Court and the President of the Supreme Economic Court are now appointed by the President with the consent of the Council of the Republic, whereas these persons were all elected by the Supreme Council under the previous Constitution. The new Constitution has also increased the membership and age limit of the Constitutional Court.

Observations

39. The Special Rapporteur would like to thank the Government for its response. However, he notes that the Government did not provide him with information regarding the specific allegation he sent. He remains concerned that the judiciary may not be independent from the executive branch.

Bolivia

Communication to the Government

40. On 6 February 1997, the Special Rapporteur transmitted an urgent appeal jointly with the Special Rapporteur on extrajudicial, summary or arbitrary executions concerning the case of lawyer and President of the non-governmental Permanent Human Rights Assembly of Bolivia, Mr. Waldo Albarracín, who had reportedly been detained by eight policemen. According to the information received, he was severely beaten and threatened with death. He was recently transferred to the headquarters of the Technical Judicial Police in La Paz and then taken to a hospital. It is reported that the incident may be related to a statement made by Waldo Albarracín to the press about a violent encounter between miners and the police which took place in the Amayapampa region of Bolivia and in which nine people were killed.

Observations

41. At the time the present report was finalized, no reply had been received from the Government.

Brazil

Communications to the Government

42. On 20 June 1997, the Special Rapporteur sent an urgent appeal jointly with the Special Rapporteur on extrajudicial, summary or arbitrary executions concerning the State prosecutor, Luis Renato Azevedo da Silveira, and his assistant, lawyer Marcelo Denaday. It was reported that on 12 June 1997, Marcelo Denaday suffered an attempt on his life while he was driving with his wife and children. According to the information received, Marcelo Denaday and Luis Renato Azevedo da Silveira were investigating the murder of Carlos Batista de Freitas, a case in which members of the police organization Scuderie Detective le Cocq (SDLC) were allegedly involved. It was also reported that Luis Renato Azevedo da Silveira had been investigating the activities of SDLC for some time. Members of the police and of the judiciary may reportedly be involved in this organization. Furthermore, Luis Renato Azevedo da Silveira had requested police protection, which was denied due to lack of resources.

43. On 24 September 1997, the Special Rapporteur sent a communication to the Government concerning Pedro Montenegro, a lawyer, member of the Permanent Forum Against Violence of Alagoas (FPCV-Al) and member of Amnesty International Brazil Section, and Marcelo Nascimento, lawyer and President of the Grupo Gay de Alagoas and member of the FPCV-Al. It was alleged that both of them had received anonymous telephone calls warning them that unless they dropped their investigations into the murders of two homosexuals and a transvestite on 6 June 1996, they would be killed.

Observations

44. The Special Rapporteur regrets that no reply from the Government has been received to date.

Cambodia

45. Between 23 and 25 June 1997, the Special Rapporteur visited Cambodia at the invitation of the International Human Rights Group to address the opening of the training programme for the judges of Cambodia organized by the Cambodian Law Training Project.

46. On 24 June, the Special Rapporteur called on the Minister of Justice of Cambodia and expressed his concern over the state of judicial independence in that country. Of particular concern to the Special Rapporteur was the failure on the part of the Government to convene the Supreme Council of Magistracy, which is the constitutional mechanism for the appointment of judges. The Special Rapporteur learnt that there have been a few appointments of judges by the Government, which may be unconstitutional. Such appointments could have very serious implications on the judgements and decisions of those judges.

47. The Minister of Justice expressed his difficulties in convening the Council because of political differences between the two parties then sharing governmental power.

48. The Special Rapporteur associates himself with the concerns expressed by the Special Representative of the Secretary-General for Cambodia over the independence of the judiciary in Cambodia, as expressed in his recent report to the General Assembly (A/52/489).

Colombia

Communications to the Government

49. On 17 July 1997, the Special Rapporteur sent an urgent appeal jointly with the Special Rapporteur on extrajudicial, summary or arbitrary executions concerning lawyer and City Ombudsman of San Calixto José Estanislao Amaya Páez. It has been reported that Mr. Amaya Paéz had received a death threat from a paramilitary group called "Autodefensas del Catatumbo" which ordered him to leave the region within eight days. According to the information received, this paramilitary group is linked with the Colombian security forces.

50. On 1 August 1997, the Special Rapporteur transmitted a communication to the Government concerning lawyers José Luis Marulanda Acosta and Augusto Zapata Rojas. It was alleged that members of the Colombian military had submitted a report stating that both men were active members of the National Liberation Army (ENL). Reportedly, this was based on Mr. Marulanda Acosta's defence of Jhon Jairo Ocampo Franco, who was arrested and charged with being a member of the ENL. The source further alleged that Mr. Maralunda Acosta and Mr. Zapata Rojas, who merely shares an office with Mr. Marulanda Acosta, began having problems following the former's refusal to allow his client to be photographed with allegedly confiscated material. The photographs were to be sent to the national press.

51. On 17 November 1997, the Special Rapporteur sent an urgent appeal concerning lawyers Alirio Uribe Muñoz, Rafael Barrios Mendivil and Miguel Puerto Barrera, members of the "José Alvear Restrepo" lawyers' collective. Allegedly, the lawyers had suffered threats and harassment for several months. It was reported that Alirio Uribe Muñoz, President of the collective, was accused of supporting a wing of the ENL. The accusations were reportedly made in a report submitted by the army to the Bogotá regional prosecutor's office. It was also reported that Miguel Puerto Barrera, legal representative of the victims, was declared a military objective by the army. Finally, Rafael Barrios Mendivil, legal representative of the families and survivors of the Caloto massacre, had been reportedly subjected to constant tailing, harassment and threats.

Communications from the Government

52. On 1 October 1997, the Government sent a reply to the communication transmitted by the Special Rapporteur concerning lawyers Luis Marulanda Acosta and Augusto Zapata Rojas. According to the Government, the Fiscalía Regional Delegada of the city of Armenia is investigating Jhon Jairo Ocampo for charges of rebellion. The investigation started on 7 February 1997 and on 22 April the Prosecutor ordered the arrest of Jhon Jairo Ocampo. On 9 May the Prosecutor decided to release him. The investigation is currently in the examination proceedings, collecting evidence, in order to clarify the facts.

53. On 3 December 1997, the Government provided additional information with regard to the above-mentioned case. The Government informed the Special Rapporteur that according to a report submitted by the judicial attorney (Procurador Judicial en lo penal) in the city of Armenia, there were no irregularities in the investigation of the case of Jhon Jairo Ocampo that justify the appointment of a Special Agent; however, the judicial attorney ordered special surveillance to the process. Furthermore, the Government informed that the complaint made by lawyer José Luis Marulanda Acosta was at that moment under investigation. On 16 December 1997, the Government of Colombia provided the Special Rapporteur with a reply to his communication dated 16 November 1997 regarding the case of the members of the "José Alvear Restrepo" lawyers' collective. According to the Government, the case had been studied by the competent authorities of the Government. In particular, the Committee on the Regulation and Evaluation of Risks of the Programme of Special Protection for Witnesses and Threatened Persons of the Human Rights Administrative Special Unit of the Ministry of Interior had ordered the adoption of the measures for protecting the office and the integrity of the members of the collective. These security measures, located in the "Edificio de Avancia" in the city of Santa Fe in Bogotá, included the installation of a reinforced security door at the entry level, a closed-circuit security system and an entry system for staff involving an electronic keyboard and magnetic cards. Moreover, a seminar on self-protection was organized for the members of the collective. Rafael Maria Barrios, Reynaldo Villalba and Pedro Julio Mahecha had been given bulletproof vests and cellular telephones in which the telephone numbers of the security branch of the Ministry of Interior had been programmed in the event that an emergency arose. The Direction of Protection of the Administrative Department of Security was requested to undertake a study of threats issued against Mr. Alirio Uribe, Mr. Rafael Barrios, Mr. Barrios Mendivil and Mr. Puerto Barrera and to evaluate the risks. The Government said that notwithstanding the previous communication, it had not been possible to obtain within the given time detailed information relating to the investigations concerning the mentioned allegations. The Government requested an extension of two months in order to present its observations concerning the allegations made by the members of the "José Alvear Restrepo" lawyers' collective.

54. On 23 January 1998, the Government provided the Special Rapporteur with the requested additional information. According to the Government, the Public Prosecutor's Department had stated in a recent communication that the Terrorism Unit of the Bogotá Regional Prosecutor's Office confirmed that the Unit was not undertaking any proceedings against Mr. Uribe Muñoz, Mr. Puerto Barrera or Mr. Barrios Mendivil on the contrary, the Unit was investigating the threats against them. In addition, the Special Rapporteur was informed that the Protection Department had undertaken the study of the level of risk and intimidation of the three men. The study was being considered by the Committee on the Regulation and Evaluation of Risks, and the Special Rapporteur would be provided with the Committee's conclusions.

Observations

55. The Special Rapporteur thanks the Government of Colombia for the responses provided. However, he notes that the replies dated 1 October 1997, 3 and 16 December 1997 and 23 January 1998 do not address the Special

Rapporteur's concerns about lawyers Dr. Marulanda Acosta and Dr. Zapata Rojas. The Special Rapporteur will continue to monitor developments in the three complaints.

Croatia

Communication to the Government

56. On 4 November 1997, the Special Rapporteur sent a communication to the Government containing general allegations concerning the judiciary in Croatia. According to the information received, several judges were reportedly relieved from their posts following decisions by the State Judicial Council which were alleged to have been motivated more by the national origin or political views of the judges than by their professional competence. The President of the Supreme Court, Dr. Krunislav Olujic, was reportedly dismissed following a decision of the High Judiciary Council on 4 January 1997 which was alleged to be connected to his determination to work independently of the ruling HDZ political party. Some dysfunctions of the judiciary were also brought to the Special Rapporteur's attention, in particular the pre-selection of judicial candidates by the Minister of Justice. Further, security of tenure is not guaranteed for judges. The Croatian courts have also reportedly experienced difficulties with implementing their decisions, particularly with respect to cases against members of the Croatian army and the police, or where rulings were in favour of non-Croats. It was also reported that the accused's right to have an attorney present during the investigative phase and during an appeal against investigative detention was not always respected.

Communication from the Government

57. On 14 January 1998, the Special Rapporteur received a communication from the Government of Croatia in response to his letter of 4 November 1997. Save for setting out generally the constitutional provisions governing the judiciary in Croatia and stating that the removal of the former President of the Supreme Court was not motivated by political considerations, the issues raised in the Special Rapporteur's letter were not addressed. The Special Rapporteur therefore intends to follow up on the matter.

Cuba

Communications from the Government

58. On 25 February 1997, the Government sent a response to a letter transmitted by the Special Rapporteur on 8 July 1996 concerning the Cuban legislation on the independence of judges and lawyers and the cases of Cuban lawyers Leonel Morejón Almagro and René Gómez Manzano.

59. The Government of Cuba provided information on the reforms of the judiciary since the ending of the previous regime, particularly the law that abolished the Emergency Tribunals and the Criminal Division of the High Court. Both institutions then had the power to impose severe punishments summarily without complying with fundamental guarantees for the accused and without right of appeal to a higher tribunal. The Government further explained that the principle of the independence of the judiciary is enshrined in the

Constitution and in the 1990 Law on the Tribunales Populares. Decree-Law 81 of 1984 provides, inter alia, that "the exercise of the legal profession is free" and that lawyers are independent and accountable only to the law. Article 5 of Decree-Law 81 defines the Organización Nacional de Bufetes Colectivos (National Organization Of Collective Law Offices) as a public interest professional legal entity, autonomous and national, whose membership is voluntary and which is regulated by the law and its own agreements and provisions.

60. The Criminal Procedure Law of Cuba contains provisions with regard to the functions of lawyers, including members of the Organización Nacional de Bufetes Colectivos. Regarding the latter, the law states, inter alia, that disciplinary measures against the members of the organization may be appealed to the highest levels and that disciplinary sanctions may be applied by the courts against legal professionals for professional misconduct in the performance of their functions.

61. In addition, the Government informed the Special Rapporteur that the freedom of association and of speech of lawyers is recognized in articles 53 and 54 of the Constitution and, for the members of the Organización Nacional de Bufetes Colectivos, in article 34 of its Regulations. Moreover, Decree-Law 81 states that lawyers may organize and conduct legal literacy programmes for the public.

62. The Government questioned the motives of the source who complained to the Special Rapporteur and suggested that he establish clear rules of admissibility for allegations. As an example, concerning the case of lawyer Leonel Morejón Almagro, the Government explained that he had been expelled by the Organización Nacional de Bufetes Colectivos because of repeated and serious failures to carry out his professional duties, thereby harming both his clients and the prestige of the organization. As provided for by law, Mr. Morejón had appealed to the Minister of Justice, alleging that although he had made mistakes, those were due to the number of cases with which he had to deal and to his weakness with respect to certain details. The Minister upheld the expulsion.

63. Regarding the case of Mr. Gómez Manzano, the Government explained that his request to create a lawyers' association was rejected because it would have had similar objectives to those of the existing Unión Nacional de Juristas de Cuba, which would be contrary to Cuban law.

Observations

64. The Special Rapporteur thanks the Government for its detailed response. From its response, it does appear that the Government, through the Minister of Justice, has some control over disciplinary sanctions on lawyers. Principle 28 of the United Nations Basic Principles on the Role of Lawyers provides: "Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review" (emphasis added). The fact that

Mr. Leonel Morejón Almagro appealed to the Minister of Justice and the Minister dismissed the appeal, indicates that there may not be a provision in the legislation for an independent judicial review as provided in principle.

Egypt

Communication to the Government

65. On 23 September 1997, the Special Rapporteur sent an urgent appeal concerning lawyers Mohammad Sulayman Fayyad and Hamdi Haykal, arrested on 17 June 1997 in the town of Banha for criticizing, in a public gathering, Law 96 of 1992. They were reportedly charged with possession of printed material critical of Law 96, which allows landowners to evict farmers, and with inciting farmers to oppose the Law, although by peaceful means. According to the information received, they were tortured in Tora penitentiary by security officers. They were then transferred to the High Security Prison in Tora. The authorities did not inform their lawyers or families of their whereabouts until 19 June and, even then, they were unable to receive visits due to a ban forbidding visits by lawyers and relatives to detainees. The Special Rapporteur was also informed that on 9 August 1997, Sayyed Ahmad al-Tokhi, a lawyer from the Egyptian Organization of Human Rights (EOHR), was arrested at Cairo airport allegedly in connection with his peaceful activities in opposition to Law 96. For two days he was held in three different detention centres without charges being brought against him. According to the source, he was finally interrogated on 11 August in the presence of defence lawyers at the State Security Prosecution Office. Before being transferred to Mazra'at Tora prison, where he was reportedly detained at the time of the intervention, he was held in al-Mahkoum prison in Tora where he was said to have been ill-treated. He has been charged with verbally promoting ideas which contradict the fundamental principles of the ruling regime.

Communication from the Government

66. On 15 October 1997, the Government provided the Special Rapporteur with a reply to his urgent appeal, in which it confirmed that all the rights of the persons in question were respected and that their cases were being dealt with in an orderly manner according to the law. Regarding the cases of Mr. Mohamed Soliman Fayed and Mr. Hamdy Heikal, the Government informed the Special Rapporteur that both persons had conducted premeditated and organized agitation instigating farmers to oppose by force the implementation of the new Law 96 of 1992 on tenancy agreements in regard to agricultural land. According to the Government, both persons have been arrested by order of the Public Prosecutor following a search of their residence where printed material calling for opposition by force to the Law was found. The Government mentioned that while the two persons were imprisoned in the Tora penitentiary, they attacked some military police working in the prison. Those incidents were investigated. Regarding the case of Mr. Ahmed Altouhky, the Government informed the Special Rapporteur that he was arrested on 9 August 1997 at Cairo airport trying to escape an arrest warrant issued by the Public Prosecutor for the same reasons mentioned in the case of Mr. Fayed and Mr. Heikal. The Public Prosecutor had begun an investigation, but had not then reached a final decision. According to the Government, nothing in the facts related to the

three cases was connected to their profession as lawyers and all of their rights during investigation and detention were fully respected.

Observations

67. The Special Rapporteur thanks the Government for its response.

France

Communication to the Government

68. On 7 November 1997, the Special Rapporteur sent a communication to the Government of France regarding the strike on 6 November 1997 in which most of the 33,000 French lawyers participated in order to draw the attention of the Government to the lack of human and financial resources of the French justice system, resulting in a large backlog of cases in the courts. In addition, the Special Rapporteur requested the Government to provide him with the latest developments relating to the draft reform of the judicial system in France.

Observations

69. To date, the Government has not responded.

Georgia

Communication to the Government

70. On 23 September 1997, the Special Rapporteur sent a communication to the Government expressing concern about allegations of interference of the executive in political and criminal trials and politically sensitive trials. It was also reported that judges practise self-restraint in order to retain their jobs and that sentences in politically sensitive cases are handed down by the Supreme Court of Georgia acting as a court of first instance. According to the source, the sentences of this Court are considered to be final and the right of appeal to a higher court is denied. The Special Rapporteur was also informed that the April 1995 amendments to the Criminal Code substantially restrict the rights of lawyers in defending their clients. According to the source, certain amendments have the effect of limiting a defence lawyer's access to important documents.

Communications from the Government

71. On 19 January 1998 the Government responded by sending a copy of a letter dated 16 January 1998 addressed to the High Commissioner for Human Rights. The Government indicated that Georgia had adopted a new democratic Constitution on 24 August 1995 and, pursuant to this Constitution, on 13 July 1997 the Parliament of Georgia adopted the Basic Law on courts of general jurisdiction. The Government stated that the Basic Law completely transformed the status of courts in the country as regards their relations with other bodies of authority. The Government had sought the comments of the High Commissioner on the Basic Law.

Observations

72. Georgia obviously is going through a period of transformation from the previous Soviet system to democracy. The Government admits that under the previous system there were many ways to influence the courts.

73. The Special Rapporteur thanks the Government for its response and will study the materials on the new Basic Law and express his comments in due course.

India

Communications to the Government

74. On 21 February 1997, the Special Rapporteur sent a communication to the Government of India in which he requested to be advised of the status of the investigations concerning the kidnapping and killing of Mr. Jalil Andrabi, lawyer and human rights activist. This case was the subject of an exchange of correspondence between the Special Rapporteur and the Government in 1996 and was mentioned in his 1997 report (E/CN.4/1997/32, paras. 110-115).

75. On 29 May 1997, the Special Rapporteur transmitted a communication to the Government concerning Jasved Singh, a human rights lawyer who had allegedly been threatened and harassed by the police. He was reportedly accused of harbouring terrorists and his home had been raided more than 100 times. According to the source, Jasved Singh received such treatment because of his defence of suspected terrorists and his human rights work. In the same communication, the Special Rapporteur recalled his previous letters concerning the kidnapping and murder of Jalil Andrabi and requested the Government to provide him with information on the current status of the investigations.

76. On 13 June 1997, the Special Rapporteur sent an urgent appeal jointly with the Special Rapporteur on extrajudicial, summary or arbitrary executions concerning T. Puroshotham, lawyer and joint secretary of the Andhra Pradesh Civil Liberties Committee, who was reportedly attacked on 27 May 1997 by police in plain clothes and sustained serious head injuries. According to the source, the "Green Tigers", a group allegedly established by the Andhra Pradesh Government in concert with the police to counter the activities of human rights defenders, claimed responsibility for the attack.

77. On 1 August 1997, the Special Rapporteur sent a communication to the Government in which he provided additional information on the harassment and intimidation of Jasved Singh. According to the information received by the Special Rapporteur, Jasved Singh resides in the State of Punjab and practises in the subregional courts. He is also a member of a local civil liberties organization. He allegedly began to have difficulties in 1987 when he was charged with terrorist and disruptive activities. He was released after 33 days of detention and acquitted of all charges. The source also alleged that in 1990 Mr. Singh was arrested for murder, jailed for 20 days and subsequently acquitted. According to the source, Jasved Singh was also aggressively questioned for his defence of two Sikh men charged with the murder of Pisham Prakesh, the President of the Congress in Khanna district.

78. On 23 September 1997, the Special Rapporteur transmitted a communication to the Government concerning the harassment of three lawyers and a judge. According to the information received, a team of armed personnel of the 30th Assam Rifles, along with one Manipur police constable, searched the home of lawyer Thokchom Ibohal Singh on 4 April 1997. It was further alleged that he was accused of being a sympathizer of an underground organization and of giving financial assistance to it, although no evidence was found. The Special Rapporteur was also informed that lawyer Khaidem Mani Singh, Vice-President of the Manipur Bar Association, was arrested with his wife on the evening of 31 March 1997 and charged with harbouring armed opposition leaders. It was also reported that lawyer Chongtham Cha Surjeet's house was raided on 4 July 1997 by a team of the Indian Army and the Rapid Action police Force of the Manipur Police. Finally, the Special Rapporteur expressed his concern about allegations received concerning Judge W.A. Shishak, a judge of the Gauhati High Court, whose house was raided on 10 December 1996. According to the source, the assault was related to his activities in defence of human rights in Manipur.

79. On 24 September 1997, the Special Rapporteur sent an urgent appeal to the Government of India concerning the lawyer Ravi Nair, Executive Director of the South Asian Documentation Centre, based in New Delhi. According to the source, Ravi Nair received two phone calls from a policeman, who identified himself as Deputy Commissioner of Police of the Delhi police, threatening him with arrest and physical injury.

Communications from the Government

80. On 4 July 1997, the Government provided a reply to the Special Rapporteur containing additional information on the case of the human rights lawyer Jasved Singh. In the same letter, the Government enclosed information regarding the death of Jalil Andrabi. According to the Government, the Division Bench of the Jammu and Kashmir High Court of Srinagar took into consideration the investigation report of the Special Investigation Team and issued an order on 10 April 1997 requesting efforts to secure the presence for questioning of a Territorial Army officer, Avtar Singh. The authorities concerned were also requested to collaborate with the Special Investigation Team.

81. The Special Rapporteur received a reply from the Government of India on 29 September 1997 with respect to the case of Ravi Nair. The Special Rapporteur was informed that the Permanent Mission of India to the United Nations Office at Geneva had gotten in touch with Mr. Nair regarding his alleged harassment and that the National Human Rights Commission was currently seized of the matter. According to the Government, inquiries were being conducted into the incident.

82. On 9 October 1997, the Government provided a reply to the urgent appeal sent jointly with the Special Rapporteur on extrajudicial, summary or arbitrary executions regarding lawyer T. Purushottam. According to the Government, T. Purushottam was attacked by some unknown individuals on Station Road, Mahbubnagar. The Station House Officer of the nearest police station took T. Purushottam to the government hospital immediately for treatment and also recorded his statement. The Government informed the Special Rapporteur

that the Additional Superintendent and the Superintendent of Police of the area also visited T. Purushottam at the hospital to ascertain the facts of the case. Efforts were currently being made to identify the persons responsible for the assault.

83. On 23 October 1997, the Government responded to the Special Rapporteur regarding a raid allegedly conducted by security forces on the house of the Judge W.A. Shishak of the Giwahati High Court. According to the Government, the incident was brought to the attention of the Chief Justice of the Guwahati High Court who immediately issued orders for a formal petition impleading the Union of India and the State Government of Nagaland to be registered. The army officers concerned were directed to file their reply within a week and, in the meantime, the Superintendent of Police of Dimapur gave instructions to visit the spot and inquire into the matter. The hearing of the case took place on 7 April 1997 and affidavits were filed by army and police authorities. The Guwahati High Court concluded that the incident was a result of confusion caused by the fact that the building was not the official residence of Justice Shishak and that one of the members of his staff looked like a suspect for whom the security forces were searching. The Government informed the Special Rapporteur that the information regarding other allegations raised in the communication would be provided to him as soon as it was received from the concerned officials.

Observations

84. The Special Rapporteur would like to thank the Government of India for its replies and welcomes the positive steps taken in the cases. However, he remains concerned about the frequent allegations he has received of harassment and intimidation of lawyers by the police and security forces. He requests the Government to investigate systematically, thoroughly and impartially these allegations, to identify those responsible and bring them to justice.

85. Regarding the case of Jalil Andrabi, the Special Rapporteur, while expressing his appreciation for the investigations into the death of Jalil Andrabi, yet remains concerned over the delay in concluding the investigation.

Indonesia

86. On 12 June 1997, the Special Rapporteur sent a letter to the Government of Indonesia with regard to previous allegations transmitted on 23 October 1996 concerning Mochtar Pakpahan and Banbang Widjojanto. The Special Rapporteur was informed that on 25 October 1996, a Supreme Court panel presided by Chief Justice Soajono overturned the acquittal of Mr. Pakpahan ordered previously by another Supreme Court panel presided by Justice Adi Andojo on 29 September 1995. The process by which this reversal took place was by means of "judicial review" pursuant to article 263 of the Indonesian Criminal Procedural Code which states, inter alia, "regarding a judicial decision that has been made, except one that exonerates an accused of all his liability, the person convicted or his beneficiaries may apply for a review of the decision to the Supreme Court." It was alleged that it was the first time

in the legal history of Indonesia that that provision of the Code was invoked by the prosecutor to apply for review of an acquittal ordered by the Supreme Court.

87. It was further alleged that when the Supreme Court handed down its decision, on 25 October 1996 (about five days before the retirement of the Chief Justice), overturning its previous decision, Mr. Pakpahan was not present in court. He was not notified of the matter. He was notified of the decision about a month after it was made. There were allegations of rivalries within the judiciary, particularly involving the Chief Justice and Justice Adi Andajo, who had presided over the earlier court.

88. In the same letter, the Special Rapporteur also sought a response from the Government regarding allegations that Banbang Widjojanto, a lawyer and defence counsel for Mr. Pakpahan, had been threatened by the prosecution to be called as a witness to testify against his own client.

89. The Special Rapporteur further sought the Government's response to allegations that he had received regarding lawsuits initiated by Mrs. Megawati Soekarnoputri against the Government after her purported removal as the democratically elected leader of Partai Demokratik Indonesia (PDI). It was alleged that judges had received direction from government officials on how the lawsuits should be dismissed on technical grounds, etc.

90. Finally, in the same letter the Special Rapporteur sought the Government's response to his request to carry out an in situ mission to inquire into the state of judicial independence in Indonesia.

91. The Permanent Mission of Indonesia to the United Nations Office at Geneva responded to the Special Rapporteur in a communication dated September 1997. The Government requested that its communication be submitted in toto to the fifty-fourth session of the Commission on Human Rights. Although it is not the practice of the Special Rapporteur to incorporate in his reports the full text of communications he receives, owing to space constraints, in this particular case, as the allegations were serious, the Special Rapporteur has decided to accede to the request of the Government.

92. Following is the text of the Government's reply:

"I. Mochtar Pakpahan

Regarding the case of Mr. Pakahan, the Indonesian Courts have supplied the following clarifications:

A. During the trial at the Central Jakarta District Court, he was found guilty of publicly inciting the people, both verbally and in writing, to infringe the law or to defy the public authority, or to commit punishable acts sanctioned by article 160 of the Indonesian Penal Code.

B. Chronology of the legal proceedings against Mr. Pakpahan:

1. On 7 November 1994, the Central Jakarta Court of First Instance sentenced Mr. Pakpahan to three years imprisonment for violating Articles 160 and 64 (1);

2. On 16 January 1995, the Jakarta Court of Second Instance increased his sentence to four years for the same offence;

3. On 29 October 1995 the Supreme Court of appeals cleared him of all charges;

4. On 6 January 1997, following a request by the Attorney-General for a review of the case, the Supreme Court reinstated the four-year sentence with immediate effect.

C. The Attorney-General decided to submit a request for a review based on the dispositions of Articles 263 (1), 263 (2)(c) and 263 (3) of the Code of Criminal Procedure (KUHAP) as follows:

Article 263 (1):

> 'A defendant or his heir, are entitled to appeal to the Supreme Court against a verdict which has acquired permanent legal force, unless he has been acquitted and the charges against him have been dropped. This article is to the benefit of the defendant or his heir. It goes without saying that the defendant of his heir are not going to appeal for review if there has been an acquittal. However, this article does not expressly preclude the Attorney-General from requesting for a review after an acquittal has been pronounced.'

Article 262 (2):

> 'The request for a review shall be made on the basis of the following: ...
>
> ... (c) If a decision clearly shows a mistake on the part of the judge or is clearly wrong.'

Article 263 (3):

> 'For the same reasons as intended in section (2), a request for a review can be submitted with regard to a court's decision which has acquired permanent legal force, if in the decision an allegation which has been proved is not subject to criminal proceedings.'

This last article is clearly intended for no party other than the Attorney-General.

In this connection, the Supreme Court judge made several mistakes in his review of Mr. Pakpahan's case, as follows:

1. The panel of judges only considered the case in the context of the prevalent social transformations in Indonesia while overlooking the existing law, which should be upheld;

2. The panel of judges interpreted the law in the context of the social transformations in the country to justify the wrongdoings of the defendant and cleared him of all the legal charges against him, rather than considering the social factor as one of many dimensions of the law;

3. The panel of judges focused their decision on the prevalent social problems rather than the legal system;

4. The judges did not consider the law as the basis of their verdict, but instead considered it only as a reference in drawing their conclusion;

5. In their considerations, the judges stated that legal Acts were not the only legal source of the law and that there were other sources which were more important. However, they failed to specify what more important sources there were on which they based their verdict;

6. The panel of judges stated that the defendant, Mr. Pakpahan, was not responsible for the loss of life and material as a result of his actions;

7. Clearing Mr. Pakpahan of his criminal conduct would be bound to encourage workers around the country to organize unlawful strikes;

8. The verdict was not in line with another decision of the Supreme Court which convicted Mr. Amosi Telaumbanua, one of the men who acted under the direct instruction of Mr. Pakpahan in the related case, and the fact that the judge chairing the panel in the Pakpahan case also sat on the same panel which tried Mr. Amosi Telaumbanua.

D. The Attorney-General based his request for a review on the following additional considerations:

1. Principle of balance: The right to review a case should not only be accorded to a defendant or to his/her heir, but should also be accorded to the Attorney-General;

2. Principle of public interest: According to Article 49 of Act of Parliament No. 5/1986 on the State Administration Court, by public interest one should understand the interest of the nation or the state, or the communal interest, or the interest of the state development programme according to the law. According to the Act of Parliament No. 5/1991 on the Attorney-General, public interest should be understood to mean the interest of the nation, the state and the community.

3. Principle of Common Law: Tap MPR (decision of the People's Consultative Assembly) II/MPR/1994 on the GBHN (broad guidelines of state policies) stipulates that a new law is not only created through enactment by the legislative, but also through jurisprudence. In addition, Presidential Decree No. 17/1994 on Repelita VI (five-year development plan), under the subheading 'Law' gives inter alia 'a greater role to the judiciary to develop new laws for the realization of social justice for the people through jurisprudence'.

4. Former Law: The 'Reglement op de Strafvordering' and Supreme Court regulations No. 1/1969 and No. 1/1980 state that the Attorney-General may submit for a review of a court's verdict which has acquired permanent legal force.

E. In conclusion, the decision of the Supreme Court to overturn its former decision which cleared Mr. Pakpahan of all legal charges and to reimpose the four-year sentence previously handed down by the High Court, does not violate Article 263 of the Indonesian Code of Criminal Procedure, as wrongly suggested in your communication, but instead finds its legal basis in the said article.

F. It is not true that either Mr. Pakpahan or his legal representative were not notified of the decision promptly enough to enable them to challenge the ruling, despite their request for a review of the Supreme Court decision, which is still being examined to date.

G. The judiciary concerned has confirmed that throughout the entire trial of Mr. Pakpahan, the relevant provisions of the Indonesian Code of Penal Procedure were fully observed by the panel of judges. Contrary to the allegations, the defendant and his legal counsel, as well as all the witnesses were given a fair hearing, and the rights of all parties were respected. The panel of judges carried out their task with all the independence guaranteed by the Indonesian law and throughout the trial, were entirely free to act according to their own convictions and sense of justice. At no time and under no circumstances was there any interference from the executive in the proceedings.

II. Bambang Widjojanto

The allegation to the effect that Mr. Bambang Widjojanto, defence counsel for Mochtar Pakpahan, was threatened with being forced to testify against his own client is totally without foundation. The investigation confirmed the absence of any corroborative evidence to support the allegation and Mr. Pakpahan's counsel was fully able to discharge his duties on behalf of his client. In fact, Mr. Widjojanto continues to represent Mr. Pakpahan, who has appealed for another review of his case against the decision of the Supreme Court, which rejected the conclusions of the first review after the Attorney-General ordered a re-examination of the case.

III. Megawatu Soekarnoputri

Regarding the lawsuits initiated by Megawati Soerkarnoputri against the Government after her purported removal as the elected leader of Parai Demokratik Indonesia (PDI) by decision of the PDI Congress in Medan in June 1996, the clarifications from the judicial authority concerned are as follows:

A. In the case No. 229/1996, Mrs. Megawati Soekarnoputri and Mr. Alexander Litaay, in their capacity as Chairperson and General Secretary of the PDI Central Board of the National Congress of 1993 respectively, represented by their legal proxy from the Defending Team for Indonesian Democracy (TPDI), filed against:

1. Fatimah Achmad as the representative of the Congress Committee;

2. Fatimah Achmad as the representative of the Congress Leadership;

3. Soerjadi and Buttu R. Hutapea - in their capacity as General Chairman and Secretary-General of DPP PDI of the Medan Congress;

4. the Minister of Home Affairs;

5. the Commander of the Indonesian Armed Forces;

6. the Chief of the State Police,

all of whom are directly involved in the organization and implementation of the Medan Congress.

B. The charges brought by Mrs. Megawati Soekarnoputri against Soerjadi and some of his colleagues, the Commander of the Indonesian Armed Forces, the Minister of Home Affairs and the Chief of the State Police were rejected by the Central Jakarta District Court on 10 November 1996.

C. The council of judges ruled that the organizing of the PDI Congress was an internal matter of the party which had to be resolved internally without involving the Court. As defendants 1, 2 and 3 were PDI officials, the court was not competent to handle their case. While for defendants 4, 5 and 6 as they were government officials, the court considered that their case should be brought before the Court of State Administration.

D. The Court of Second Instance of Jakarta, in its decision No. 726/PDT/1997/PT.DKI of July 1997, accepted the appeal submitted by Megawati Soerkarnoputri and Alexander Litaay and annulled the decision of the Central Jakarta District Court of

10 November 1996 which had refused to try Megawati Soekarnoputri and Alexander Litaay on the grounds that it had no competence to try the case.

E. In its ruling, the court stated that, in organizing the Medan Congress, defendants 1, 2 and 3 had infringed the Party Statutes of 1994, and that defendants 4, 5 and 6 had broken the law (article 1365 of the Indonesian Private Code) by permitting, supporting, funding and facilitating the Congress which had resulted in the losses and damage caused by the accusers. In this connection, pursuant to Article 2 (1) of Act No. 14/1997 on the Judiciary and Article 50 of the Act No. 2/1986, the Court instructed the Central Jakarta District Court to proceed with the trial of the case.

F. All the accused have appealed for a review of this decision of the Court of First Instance, which is still being examined.

G. In conclusion, the allegation that the judges in charge of the case acted under the direction of a non-judicial element, namely the Government, is totally unfounded since the decision of the Court favoured the accusers against government officials. This fact confirms that there was no inappropriate or unwarranted interference in the judicial process concerning the case of Megawati Soekarnoputri.

Regarding your request for the Government's permission to lead a mission to Indonesia to investigate and report on the state of the independence of judges and lawyers, I very much regret to have to inform you that in view of the Government of Indonesia's present engagement in the preparations for the forthcoming five-yearly session of the highest State body, the People's General Assembly, ahead of the presidential elections of March 1998, the Government would prefer to defer such a visit until a more opportune time. However, may I draw your attention to the fact that the Indonesian Government will, as always, continue to be at your disposal to provide you with any information you may request. As you may be aware, the Government of Indonesia puts high value on the work of all the United Nations human rights mechanisms, including the work of the thematic rapporteurs. In this respect, Indonesia received the visit of the Special Rapporteur on Torture in 1991, the Special Rapporteur on Summary or Arbitrary Executions in 1994 and, in 1995, the highest authority in the field of human rights, the High Commissioner. By the same token, I would also like to reiterate my Government's duty and commitment to ensuring that the independence of judges and lawyers is protected from any unwarranted interference.

I can assure you, Sir, that the independence of the judiciary, guaranteed by the State and enshrined in the 1945 Constitution, as well as all other laws are respected and observed by the Government. Similarly, the Indonesian Act on the Basic Principles of the Judiciary stipulates the principles of a fair and impartial trial and of the presumption of innocence.

Finally, I should like to reiterate the commitment of the Government of the Republic of Indonesia to cooperate fully with all the United Nations human rights mechanisms, including the Special Rapporteur, on the independence of judges and lawyers. It is my Government's sincere hope that this clarification will be submitted in toto to the fifty-fourth session of the Commission on Human Rights."

Observations

93. The Special Rapporteur thanks the Government for its responses. It is not within the mandate of the Special Rapporteur to question the correctness of domestic court decisions. But when such decisions are made by courts or tribunals alleged to be wanting in independence and impartiality, then it falls within the mandate of the Special Rapporteur to inquire into the allegations.

94. The information received by the Special Rapporteur from various sources, whose credibility he has no reason to doubt, and the contents of the Government's communication leave several issues relating to the independence of the courts unanswered. An application by Mr. Pakpahan for a further review before the Supreme Court is pending. It is of concern, however, that he is currently in custody serving his term of imprisonment, despite being in hospital receiving medical treatment.

95. The Special Rapporteur trusts that the Government will facilitate the carrying out by the Special Rapporteur of an in situ mission.

Iran (Islamic Republic of)

Communication to the Government

96. On 2 July 1997, the Special Rapporteur transmitted an urgent appeal, jointly with the Special Rapporteurs on the promotion and protection of freedom of opinion and expression, and on extrajudicial, summary or arbitrary executions, and the Special Representative on the situation of human rights in the Islamic Republic of Iran concerning the writer and editor-in-chief of the monthly Adineh, Faraj Sarkouhi. Mr. Sarkouhi was reportedly a signatory of the 1994 declaration of 134 writers appealing for an end to censorship in Iran. According to the information received, Faraj Sarkouhi was arrested on 27 January 1997 after having been held incommunicado for several weeks in November 1996. Allegedly, he was tried in a closed trial on a variety of charges including espionage, which reportedly carries a mandatory death penalty. It was also alleged that he had not been permitted to appoint a lawyer and that the trial was closed to the public and international observers. According to some sources, a death sentence had been pronounced.

Communication from the Government

97. On 16 July 1997, the Government of the Islamic Republic of Iran provided the Special Rapporteur with a reply to the joint urgent appeal sent on 2 July 1997. According to the Government, Faraj Sarkouhi had left Tehran for Germany in November 1996 and any allegation about his detention during this period was therefore baseless. He was arrested on 2 February 1997 on

charges of espionage and attempting to leave the country illegally. The Government drew attention to the fact that Mr. Sarkouhi had never been tried or convicted and that he will enjoy all legal rights in conformity with due process of law, including the right to a fair trial and the right to a defence lawyer.

Observations

98. The Special Rapporteur thanks the Government for its prompt response.

Kenya

Communications to the Government

99. On 1 August 1997, the Special Rapporteur transmitted to the Government of Kenya a communication concerning the murder of lawyer S.K. Ndungi on 22 April 1997. According to the source, Mr. Ndungi frequently undertook criminal defence work for clients charged in significant armed robbery cases like those implicated in the February 1997 robbery of the Standard Chartered Bank on Moi Avenue in Nairobi in which 96 million Kenya shillings were stolen. In this connection, Mr. Ndungi had reportedly accused members of the police force of taking some of the recovered stolen money. Furthermore, it was alleged that Mr. Ndungi discovered evidence incriminating either his own clients, the police, or both. Mr. Ndungi was reportedly followed by unidentified persons in an unmarked car for some time before his death. The source expressed concern that Mr. Ndungi could have been murdered because of his professional activities.

100. On 19 August 1997, the Special Rapporteur transmitted to the Government of Kenya a communication concerning the independence of the judiciary in Kenya. He drew the Government's attention to the fact that the judicial system was under-funded and that the President of Kenya made "presidential comments" publicly predicting the outcome of pending cases. Pursuant to one such comment, former Chief Justice Hancox reportedly issued a circular to all magistrates ordering them to follow the President's directive. Further, it was alleged that sensitive political cases were not allocated to judges who are regarded as being either pro-human rights or completely independent. In addition, the Special Rapporteur received allegations that lawyers supporting human rights or opposition parties were harassed and economically sanctioned. In this regard, lawyers suffered excessive tax demands and they often received threats, were summoned to the police station for questioning and were asked to surrender clients' files. The Special Rapporteur also mentioned the following specific cases:

(a) Regarding the trial of Koigi Wa Wamwere, presiding Chief Magistrate Tuiyot was reportedly biased in favour of the Government because he made, inter alia, numerous unwarranted interventions in the defence's case and denied defence counsel's request for a trial record;

(b) Concerning the case of lawyer Mbuthi Gathenji, it was reported that he had been arrested, detained and harassed due to his activities as a lawyer. Mr. Gathenji was retained to act on behalf of victims of violence which had occurred in 1993 in the Western and Rift Valley provinces and in

pursuit of a civil action against those believed to be responsible. Mr. Gathenji took a number of statements by members of the armed forces which allegedly implicated certain government officials;

(c) Concerning lawyer Wang'ondu Kariuki, it was alleged that Mr. Kariuki was arrested and charged with belonging to an illegal guerilla organization referred to as the February the Eighteenth Movement. According to the source, Mr. Kariuki signed a confession under torture, which he later withdrew;

(d) It has also been reported that the office of Kituo Cha Sheria, a legal advice centre, was firebombed on one occasion and threatened with burning;

(e) The Law Society of Kenya was reportedly facing lawsuits challenging the constitutionality of its existence. The Society has stood up for judicial independence and human rights in Kenya.

Communication from the Government

101. On 8 October 1997, the Government of Kenya provided the Special Rapporteur with a reply to the urgent appeal sent on 1 August 1997 with regard to the killing of lawyer S.K. Ndungi. The Government transmitted a copy of a press statement issued by the Attorney-General of the Republic of Kenya on the investigation into the case according to which a first investigation report failed to identify the killer(s). Following further investigations on 11 September 1997 a second report was issued which again did not identify the culprit. The Attorney-General then requested the Director of Public Prosecutions to place the investigation file before the Chief Magistrate in Nairobi, who would appoint a senior member of staff to lead a public inquest.

Observations

102. The Special Rapporteur would like to thank the Government of Kenya for its prompt response and welcomes the positive steps taken in the case of S.K. Ndungi. In this regard, he wishes to be kept informed of the latest developments in and the result of the investigation.

103. The Special rapporteur remains concerned over the number of allegations received with regard to the harassment of lawyers and the lack of independence of the judiciary in Kenya.

Lebanon

Communication to the Government

104. On 19 August 1997, the Special Rapporteur sent a communication to the Government of Lebanon regarding lawyer Dr. Mohammed Mugraby. According to the source, Dr. Mugraby had been threatened and intimidated in connection with his activities in defence of human rights. On 23 September 1994, Dr. Mugraby had reportedly received a summons from the Assistant Military Prosecutor, Mr. Mouyasser Shuker, to explain his defence in a military court of George Haddad, a social activist and an alleged victim of torture. It was

furthermore reported that the Beirut Bar Association had rejected a case submitted to it by the Ministry of Defence wherein Dr. Mugraby had been charged with defaming the Government of Lebanon. In that case, it was alleged that the Government had intercepted a fax sent by Mr. Mugraby which discussed the human rights violations suffered by his clients, and that three appeals had been brought by the Public Prosecutor to reverse the decisions of the Beirut Bar. It was also reported that the hearings on the appeal were not in accordance with the Lebanese Code of Civil Procedure, and that Dr. Mugraby was neither informed of the appeal hearing nor was he served with a summons or any legal papers, including the decisions being appealed and the petition of appeal. Moreover, it was reported that the presiding judge did not want to listen to the requests of Dr. Mugraby and had directed the record to state that Dr. Mugraby had not answered the appeal.

Observations

105. To date the Government of Lebanon has not responded.

Malaysia

106. In his third report to the Commission, the Special Rapporteur drew attention to a number of lawsuits commenced in the Malaysian courts for defamation arising from an article entitled "Malaysian Justice on Trial" (E/CN.4/1997/32, paras. 123 ff). Among the 14 lawsuits claiming in total MR9 40 million, 4 are against the Special Rapporteur for a total of MR 280 million.

107. In the first of the lawsuits against the Special Rapporteur undertaken by two corporations, the High Court of Malaysia in Kuala Lumpur, on 28 June 1997, dismissed with costs the Special Rapporteur's application to strike out the action on the grounds of the immunity from legal process enjoyed by the United Nations. The Court directed him to file his defence to the action within two weeks, refusing a stay of execution pending appeal. An application to the Court of Appeal for stay of execution was turned down by the President of the Court of Appeal sitting as a single judge.

108. The Special Rapporteur filed his defence to the action on 11 July 1997. On 20 and 21 August 1997, the Special Rapporteur's appeal to the Court of Appeal was heard by three judges. On 20 October, the Court of Appeal, in a written judgement, dismissed the appeal with costs.

109. The Special Rapporteur has since applied to the Federal Court, which is the final appellate court, for leave to appeal to that Court. The hearing on that application has been fixed for 16 February 1998.

110. The Special Rapporteur's applications to strike out the second and third suits have been stayed pending the outcome of the decision of the Federal Court on the leave of application in the first suit. His application to strike out the fourth suit is set for hearing on 3 March 1998.

111. The remaining 11 suits against others quoted or referred to in the impugned article are pending with interlocutory applications filed in court.

112. In his third report, the Special Rapporteur also referred to the allegations that the Attorney-General of Malaysia was proposing to amend the Legal Profession Act 1976 and expressed concern that if such a proposal was acted upon, the independence of the legal profession would be adversely affected (paras. 130 ff). The Government, in a communication dated 3 March 1997, assured the Special Rapporteur, inter alia, that the Legal Profession Act would not be amended without consulting the Malaysian Bar.

113. In another development, on 4 November 1997, the Special Rapporteur wrote to the Permanent Representative of Malaysia to the United Nations Office at Geneva inquiring into disturbing information received by the Special Rapporteur. He was informed that a circular letter dated 16 June 1997 was addressed to about 14 governmental departments directing them not to send any legal work to the three named law firms on grounds that they were "anti-government". These three law firms happen to be the largest in Malaysia. The circular letter emanated from the Ministry of Finance and referred to a Cabinet decision of 19 February 1997.

Communication from the Government

114. On 28 January, 1998 the Special Rapporteur received a letter dated 23 January, 1998 in response to the allegations contained in his letter dated 4 November, 1997. The Government contends, inter alia, that the relationship between the Government and the legal firms to which it gives its legal work is essentially the same as the one between a client and a service provider. As with other clients, the Government has the right to give work to whomever it wishes. The Government acknowledged that it takes full cognizance of principle 16 of the United Nations Basic Principles on the Role of Lawyers and that the three legal firms were free to conduct their business with other clients.

Observations

115. The Special Rapporteur thanks the Government for its response. While the Special Rapporteur appreciates that the Government is free to choose its lawyers, it has not answered why in the circular letter dated 16 June, 1997 the three law firms were characterized as "anti-Government".

116. In his second report to the Commission (E/CN.4/1996/37, para. 162), the Special Rapporteur indicated that he was investigating allegations of manipulation of the judicial system and had gathered information and was continuing to do so. The Special Rapporteur has received serious allegations calling into question the independence and impartiality of the judiciary in certain cases involving certain lawyers representing commercial interests. Owing to the events described in paragraphs 106 through 111 of this report, the Special Rapporteur has not been in a position to effectively follow-up his investigations into these allegations.

Mexico

Communications to the Government

117. On 19 February 1997, the Special Rapporteur transmitted an urgent appeal to the Government of Mexico concerning lawyer Barbara Zamora, a member of the National Association of Democratic Lawyers (ANAD). According to the source, Ms. Zamora was the object of harassment and death threats. It was reported that since December 1996 some members of this association have been the object of harassment. The office of lawyers Jesús Campos Linas, Maria Luisa Campos Aragón and José Luis Contreras, members of ANAD, was broken into. According to the source, ANAD is a group of independent lawyers that undertakes cases involving labour and indigenous rights. It was also reported that in response to the recent wave of harassment, ANAD registered formal complaints with the Office of the Attorney-General, asking for the appropriate investigation and protection. However, as of the date of the appeal, no protection had been provided and no investigation had been initiated.

118. On 19 August 1997, the Special Rapporteur sent a communication to the Mexican Government concerning Judge Julio César Sánchez Narváez. It was alleged that the judge had received death threats from the President of the Upper Tribunal of the State of Tabasco, Javier López y Conde. Reportedly, Javier López y Conde had removed Judge Sánchez from his judicial functions for failing to sign a judicial order of imprisonment against René Brando Bulnes, former local deputy of the Revolutionary Democratic Party (RDP), who was being tried for fraud and who had already been detained. According to the source, during the trial of René Brando Bulnes, when Judge Sánchez ordered his release. Subsequently, the President of the Upper Tribunal requested him to change that decision. The source expressed concern that the threats made against Judge Sánchez might be carried out.

Communication from the Government

119. On 20 October 1997, the Government of Mexico provided the Special Rapporteur with a reply concerning the alleged removal of Judge Julio César Sánchez Narváez from judicial office. According to the Government, the judge was not removed from office, but resigned. According to the Government, Judge Sánchez was seeking to avoid penal responsibility for an alleged crime of fraud for which he is being tried. He appealed at different levels of the courts, but even the amparo appeal was refused on 19 May 1997. The Government stated that Judge Sánchez's complaint before different human rights organizations for alleged violation of his rights is unfounded and that he is seeking impunity for a crime that he committed.

Nigeria

120. The Special Rapporteur notes that he did not receive any response from the Government with regard to the conclusions and recommendations contained in the report on the situation of human rights in Nigeria submitted to the fifty-third session of the Commission on Human Rights (E/CN.4/1997/62 and Add.1). The Special Rapporteur remains concerned about the rule of law

and, in particular, the independence of judges and lawyers. The Special Rapporteur looks forward to reading the report of the Special Rapporteur on the situation of human rights in Nigeria (E/CN.4/1998/62).

Pakistan

Communications to the Government

121. On 23 September 1997, the Special Rapporteur sent a communication to the Government of Pakistan referring to his previous communications dated 17 January 1996 and 28 September 1995 in which he requested to lead a mission to investigate the state of independence of the judiciary and the legal profession.

122. On 16 October 1997, the Special Rapporteur sent an urgent appeal concerning retired Judge Arif Iqbal Hussain Bhatti, who was killed in his Lahore office on 19 October 1997; he had acquitted two Christian brothers accused of blasphemy in a highly publicized case in 1995. According to the source, the judge had received a series of threats from Muslim extremists during the campaign to impose the death penalty on persons convicted of blasphemy. At least seven judges and lawyers who had provided legal aid to people accused of blasphemy were reported to have been targeted in drive-by shootings and assassinations. Among those was Asthma Jahangir, a lawyer and founding member of Pakistan's Human Rights Commission, who had reportedly received regular threats from Muslim extremist groups since the 1995 trial in which she provided legal assistance to the two Christian brothers.

123. On 24 November 1997, the Special Rapporteur transmitted a second urgent appeal to the Government of Pakistan on behalf of Mohammad Akram Sheikh, Senior Advocate of the Supreme Court of Pakistan and outgoing President of the Supreme Court Bar Association, who was allegedly intimidated, threatened with death and physically assaulted by two members of workers for the ruling party, the Pakistan Muslim League (PML). According to the source, the assault was because of Mr. Akram Sheikh's opposition to policy of the PML on the judiciary and the independence of the Bar.

124. In addition, the Special Rapporteur sent an urgent appeal on 28 November 1997 to express his concerns over media reports of the tension between the executive and the judiciary in Pakistan. It was reported that a regional court in Quetta in Baluchistan province had suspended the Chief Justice of Pakistan while the following day, the Supreme Court set aside that decision. The Special Rapporteur also reminded the Government of Pakistan that he had not received any response to his previous letters in which he expressed his wish to undertake a mission to Pakistan.

125. On 11 December 1997, the Special Rapporteur transmitted another urgent appeal on behalf of Mohammad Akram Sheikh, Senior Advocate of the Supreme Court of Pakistan and outgoing President of the Supreme Court Bar Association. Further information was brought to the attention of the Special Rapporteur regarding death threats that Mr. Akram Sheikh had received from three PML workers when he was leaving the Supreme Court building on 18 November 1997 and when he was entering the Supreme Court as an amicus curiae on 19 November 1997. At his request, the police had provided Mr. Akram Sheikh

with a security guard for 3½ days, but no protection was provided thereafter despite repeated death threats. The source also mentioned that the PML Lawyers Forum has demanded, through the press, that Mr. Akram Sheikh be tried for high treason and sedition.

126. The Special Rapporteur remains very concerned at the high level of tension between the executive and the judiciary. In that regard, he issued on 1 December 1997 a press statement to express his grave concern at the constitutional crisis developing in Pakistan. He made reference to the storming of the Supreme Court building by a mob on 28 November, following which the Chief Justice wrote to the head of State concerning the security of the court and of individual judges. The Special Rapporteur expressed his concern that the situation could lead to a possible breakdown of the rule of law in Pakistan.

127. In another development, the Special Rapporteur received information that the Supreme Court had listed for hearing between 19 and 22 January 1998 the contempt of court applications against Mr. Akram Sheikh and some journalists referred to the Special Rapporteur's second report (E/CN.4/1996/37, para. 199), together with the application for contempt against the Prime Minister, which was alleged to have led to the storming of the Supreme Court on 28 November 1997. In view of the implications of these cases for judicial independence, the Special Rapporteur wrote to the Government on 8 January 1998 indicating his interest in observing the hearings before the Supreme Court in Islamabad.

Communications from the Government

128. In letters dated 4 December 1997 and 7 January 1998, the Government responded to the allegations mentioned in the Special Rapporteur's letters dated 16 October and 21 November 1997. With regard to the murder of retired judge Mr. Arif Iqbal Bhatti, the Government reported that it was under investigation and retaliation for the verdict acquitting the two Christian brothers is not ruled out. As for Asthma Jahangir, she is provided with police protection.

129. With regard to Mr. Akram Sheikh, the Government sent, on 25 November 1997, a reply to the urgent appeal transmitted by the Special Rapporteur on 21 November 1997. The Government of Pakistan informed the Special Rapporteur that the version of events described in his urgent appeal did not correspond to the one presented by Mr. Akram Sheikh, which was itself controversial. The Government confirmed that Mr. Akram Sheikh was assisting the Supreme Court as amicus curiae. It indicated that an incident took place during the tea interval and that a complaint was made to the Supreme Court about the conduct of Mr. Akram Sheikh by a lawyer, who claimed to have been mistreated and abused by Akram Sheikh. At the end of that day's hearing, Akram Sheikh made a statement before the Court in which he explained that he had had a harsh exchange of words with one Kh. Muhammad Asif, who had hit him. According to the Government, Akram Sheikh emphasized that he had freely forgiven Mr. Asif and he had never filed a complaint. Furthermore, the Government added that no allegation was made by Akram Sheikh against Senator Pervaiz Rashid and that special security had been provided to Akram Sheikh.

Observations

130. The Special Rapporteur thanks the Government for its response thus far. However, to date, the Government has not responded to the other communications of the Special Rapporteur. The Special Rapporteur remains very concerned over the recent events in Pakistan which bring into question the state of judicial independence in that country.

131. The Special Rapporteur reiterates his interest in carrying out a mission to Pakistan.

Papua New Guinea

Communication to the Government

132. On 19 August 1997, the Special Rapporteur sent a communication to the Government of Papua New Guinea regarding the case of Mr. Powes Parkop, lawyer and Executive Director of the Individual and Community Rights Advocacy Forum. According to the source, Mr. Parkop had reportedly been arrested on 12 May 1997 and charged under article 64 of Papua New Guinea's Criminal Code on two counts of unlawful assembly on 25 and 26 March 1997 at the Papua New Guinea Parliament. The source furthermore alleged that Mr. Parkop had been arrested because of his role in organizing a peaceful demonstration to protest the Government's contract with Sandlines International to provide foreign military personnel in Bougainville.

Observations

133. To date the Government has not responded.

Peru

Communication to the Government

134. On 4 September 1997, the Special Rapporteur sent an urgent appeal to the Government of Peru concerning Judge Elba Greta Minaya Calle. According to the information received, a resolution published on 13 August 1997 authorized the Public Prosecutor to lodge a penal complaint against Elba Greta Minaya Calle for alleged crimes of violence and resistance to the authorities, abuse of authority against officials of the juridical system and terrorism. It was reported that she could be detained at any time and held in detention for 15 days. However, it was reported that due to public outcry, the Government published another resolution which revoked the first resolution and ordered an internal investigation into allegations of professional misconduct by Judge Elba Greta Minaya Calle. The actions taken against her were allegedly related to a habeas corpus writ that she issued ordering the release of Carmen Cáceres Hinostroza, who was said to be in detention.

Communications from the Government

135. The Government of Peru sent two communications relating to the state of emergency. On 8 January 1997, the Government informed the Office of the High Commissioner for Human Rights that on 18 December 1996 a state of emergency

was declared for a 60-day period in the Department of Lima and the Province of Callao and extended for a 60-day period to the Provinces of Coronel Portillo and Padre Abad, in Uyacali Department, and the Province of Puerto Inca, in Huánaco Department. As a consequence of the state of emergency, the exercise of the following rights enshrined in article 2 of the Constitution were suspended in those jurisdictions: right to inviolability of the home (para. 9), right to secrecy and to the inviolability of communications and private documents (para. 11), right to assemble peacefully (para. 12), right not to be arrested without a written warrant giving particulars issued by a judge, or the police in case of a perpetrator caught in the act, and the right to be brought before an appropriate magistrate within 24 hours or upon arrival at destination (para. 24F).

136. On 6 June 1997, the Government informed the Special Rapporteur that on 23 May 1997, the state of emergency was extended for a 60-day period in the following provinces: Oxapampa, in Pasco Department; Satipo and Chanchamayo, in Junín Department; Huancavelica, Castrovirreyna and Huaytara, in Huancavélica Department; Huamanga, Cangallo and La Mar, in Ayacucho Department; Quimbiri and Pichari districts, in the Province of La Convención and Cusco Department; Chincheros, in Apurímac Department; in Huánaco Department (except in the Provinces of Puerto Inca, Yarowilca, Dos de Mayo and in Huacrachuco district, in Marañon Province), San Martín Department, Yurimaguas district in Alto Amazonas Province. The state of emergency in these territories suspended the exercise of the rights enshrined in article 2, paragraph F (9), (11), (12) and (24), of the Peruvian Constitution.

137. The Government provided three replies concerning the case of lawyer Heriberto Benítez who was the subject of a letter transmitted by the Special Rapporteur on 12 December 1996 (see E/CN.4/1997/32, para. 148). In its reply of 13 January 1997, the Government informed the Special Rapporteur that Heriberto Benítez had all the necessary facilities to carry out his functions as a defence attorney on behalf of his clients before all instances of the Supreme Council of Military Justice. The communication indicated that Mr. Benítez had been suspended by the military prosecutor for a three-month period pursuant to a provision of the Military Code of Justice. Mr. Benítez appealed this decision; however, his appeal was dismissed by the Superior Military Tribunal and subsequently he was sanctioned for a five-month period during which he would not be able to represent his clients before military instances.

138. On 28 January 1997, the Government of Peru provided the Special Rapporteur with further information about the situation of Heriberto Benítez, stating that on 20 December 1996, Heriberto Benítez was granted amnesty under Law No. 26700.

139. On 6 February 1997, the Government sent a letter to the Special Rapporteur confirming the amnesty granted to Heriberto Benítez under law No. 26700.

140. The Government provided two replies concerning the attack on the President of the Constitutional Tribunal, Dr. Ricardo Nugent, who was the subject of a communication sent by the Special Rapporteur on 19 November 1996. On 25 January 1997, the Government sent a reply explaining that the attack

which took place was directed not against the President of the Constitutional Tribunal but against an unidentified person whom, according to the police report, criminals were trying to attack and/or kidnap when they saw the police who were present to protect the President of the Constitutional Tribunal. They shot at the policemen, killing two of them and injuring another. The Directorate against Terrorism (DINCOTE) indicated that there was no evidence of a terrorist attack against the President of the Constitutional Court. Information was also provided concerning the protection provided for Dr. Nugent and his family.

141. On 30 April 1997 the Government of Peru sent further information about the attack. According to the police report, a terrorist attack was considered implausible owing to the way and circumstances in which the incident took place, the fact that terrorists use different methods, and that other characteristics are typical of terrorists actions.

142. On 10 September 1997, the Government provided the Special Rapporteur with a reply to his urgent appeal of 4 September 1996 concerning Judge Elba Greta Minaya Calle. The Government explained that the personal liberty of Judge Minaya Calle is not in jeopardy as there is no criminal complaint pending against her. However, an administrative complaint is being investigated by the supervisory authorities of the judiciary relating to an unlawful habeas corpus writ that the judge had issued in favour of Carmen Caceres Hinostroza. The writ was unlawful, according to the Government, because Judge Minaya Calle had issued it without a request by the person concerned or another acting on his/her behalf and without the intervention of the prosecutor, as required by law. Moreover, she had ordered the release of Carmen Caceres Hinostroza, who was under investigation for crimes of terrorism and/or treason, before issuing a judicial decision, which constitutes the crime of abuse of authority, or violence against and resistance to the authorities. On 9 June 1997, the DINCOTE communicated these facts to the Public Prosecutor for cases of terrorism who filed an administrative complaint of professional misconduct against Judge Minaya Calle with the supervisory authorities of the judiciary. At the same time, the Public Prosecutor conveyed these facts to the Ministry of the Interior, requesting that a ministerial resolution be issued authorizing a penal complaint to be lodged against Judge Minaya Calle. On 7 July 1997, the Ministry of the Interior issued a ministerial resolution authorizing the Prosecutor to lodge, on behalf and in defence of the State, a penal complaint against Judge Minaya Calle for the crimes of violence against and resistance to the authorities, abuse of authority, actions against the juridical system, and terrorism. However, the Ministry of Justice, after learning about this resolution, notified the Ministry of the Interior of the existence of the administrative complaint against Judge Minaya Calle; it was necessary to wait until a verdict was reached on that complaint before a penal complaint could be lodged against the judge. Consequently, on 14 August, the Ministry of the Interior issued a ministerial resolution revoking its resolution of 7 July and authorized the Public Procurator to continue with the complaint before the supervisory authorities. Therefore, according to the Government, the personal liberty of Judge Elba Greta Minaya Calle is not in danger, as the resolution of 7 July had been revoked.

Philippines

Communications to the Government

143. On 13 February 1997, the Special Rapporteur sent an urgent action to the Government of the Philippines with respect to allegations of harassment and death threats made against the following judges, human rights lawyers and lawyers working for the Free Legal Assistance Group (FLAG) in the Philippines: Senator Paul Roco, Justice Francis Garchitorena, Justice Jose Balajadia, and attorneys Jose Manuel I. Diokno, Efren C. Moncupa, Lorenzo R. Tanada III, Wigverto R. Tanada Jr., Arno V. Sanidad, Alexander A. Padilla, Theodore O. Te, and Francis P.N. Pangilina. The two judges and the above-mentioned lawyers were reportedly threatened throughout 1996 and subjected to unauthorized surveillance and break-ins of their offices. The ongoing threats and the more recent death threats that they received between 31 January and 5 February 1997 are reportedly connected to their involvement in the Kuratong Baleleng case in which 26 members of the Philippine National Police have been charged in connection with the May 1995 murder of 11 suspected bank robbers. The source believed that it is likely that the threats came from members of the Philippine National Police.

144. The Special Rapporteur transmitted an urgent action on 3 March 1997 concerning death threats made against Senator Paul Roco, Chairman of the Senate Committee on Human Rights and Social Justice. These threats are part of the same series of threatening actions directed at judges and lawyers which were the subject of the previous urgent appeal sent by the Special Rapporteur.

145. On 28 May 1997, the Special Rapporteur sent a follow-up letter to remind the Government that he had not received any response to the two previous urgent actions he transmitted on 13 February and 3 March 1997.

146. The Special Rapporteur sent an urgent action on 4 August 1997, jointly with the Working Group on Enforced or Involuntary Disappearances, on behalf of a lawyer, Nicolas Ruiz, who was abducted with his driver, Jevee Patalita, on 12 July 1997 by armed men dressed in black from a restaurant in San Juan, Metro Manila. Attorney Ruiz's family filed a petition for habeas corpus before the Supreme Court, but the competent authorities are said to have denied having the two men in their custody. It has also been reported that attorney Ruiz had acted as counsel for a person whom the Government allegedly suspects of being involved in illegal activity.

147. On 11 December 1997, the Special Rapporteur sent a follow-up letter to remind the Government to respond to the urgent appeal sent on 4 August 1997 concerning the abduction of Mr. Ruiz and Mr. Patalita.

Communications from the Government

148. On 3 June 1997, the Government provided the Special Rapporteur with a reply regarding the alleged death threats made against the FLAG members and human rights lawyers in connection with their involvement in the prosecution of police officers in the Kuratong Baleleng case (urgent actions dated 13 February and 3 March 1997). The Government informed the Special Rapporteur that the Criminal Investigation and Detective Management of the Philippine

National Police are in the process of conducting the necessary investigation. The Secretary of Justice had also requested the National Bureau of Investigation to conduct a parallel investigation of the case. According to the Government, there were no significant signs of threats against the members of FLAG and the other human rights lawyers owing to the fact that some lawyers did not see the necessity for the protection being offered by the security officers. The Government provided the Special Rapporteur with a copy of a letter dated 30 April 1997 sent to Mr. Ralph Zacklin, Officer-in-Charge of the Office of the High Commissioner for Human Rights, in which it assured him that steps had been taken to protect the physical well-being of the lawyers so that they could perform their duties without fear.

Rwanda

Communication to the Government

149. On 23 January 1997, the Special Rapporteur sent to the Government an urgent appeal jointly with the Special Rapporteur on torture and the Special Rapporteur on extrajudicial, summary or arbitrary executions with regard to the trials for genocide and crimes against humanity which are in process in Rwanda. According to the source, provisions embodied in international instruments relating to a fair trial had not been fully taken into account. It was furthermore reported that some of the accused had had no access to a lawyer and that due process was restricted. Some of those accused had been sentenced to death. It was also reported that there had been cases in which the accused were subjected to uncivil treatment before the hearing. Some prosecutors and judges had reportedly received only up to four months' training, and impartiality and the independence of the judiciary in general had reportedly not been guaranteed.

150. On 30 September 1997, the Special Rapporteur sent an urgent communication to the Government of Rwanda with regard to alleged violations of the independence of judges and lawyers in relation to the genocide trials. According to the source, judicial officers had been dismissed or forced to leave the country in fear of their lives because of military and government interference in their duties. Some officials had reportedly been arrested, detained and charged with having participated in the genocide. Others had allegedly been threatened, disappeared or even killed. It was also reported that defendants in the genocide trials had been denied access to files and cross-examination of prosecution witnesses. It was further alleged that judicial and government officials had turned down the right to legal representation and courts had failed to notify defendants of their right to have a lawyer during interrogation and before trial. It was also reported that prosecutors, assistant prosecutors and defence lawyers had been threatened, arrested, disappeared or killed. More specifically, lawyer Murengezi, accused of having participated in the genocide, had disappeared on 30 January 1997 whereas lawyer Munyagishali, also accused of having taken part in the genocide and charged with crimes against humanity, had been arrested in February 1996. It was furthermore reported that there had been no objectivity in the commission de triage, the screening committee set up to recommend the release of detainees in cases of insufficient evidence.

Observations

151. To date the Government has not responded. The Special Rapporteur has had the benefit of reading the status report on the genocide trials to 31 October 1997 issued by the United Nations High Commissioner for Human Rights Field Operation in Rwanda (HRFOR). The Special Rapporteur also had the advantage of reading the report of the Special Representative of the Commission on the situation of human rights in Rwanda submitted to the fifty-second session of the General Assembly (A/52/522, annex).

152. The prevailing political situation in Rwanda has made it difficult for an independent and impartial justice system to function effectively. The lack of adequate resources, both financial and human, is a matter of serious concern. The Special Rapporteur supports the recommendations of both the HRFOR and the Special Representative insofar as they relate to the improvement of the justice system.

South Africa

153. The Truth and Reconciliation Commission is entrusted with the task of gathering evidence from various institutions, organizations, agencies, corporations and individuals in order to understand the role played by them in contributing to the violation and/or protection of human rights during the apartheid era, i.e. from 1 March 1960 to 10 May 1994, and to identify what changes are required to prevent those abuses from happening again.

154. The Special Rapporteur learned that the judges of the South African judiciary were invited to appear before the Commission which was inquiring into a wide range of issues pertaining to the legal system during that period and how the legal system, including individual judges, had contributed to the violations and abuses of human rights. The Special Rapporteur later learned that several judges, including the Chief Justice, the former Chief Justice and the President of the Constitutional Court, refrained from appearing before the Commission. However, many judges submitted written representations. The Chief Justice, the President of the Constitutional Court, the Deputy President and the Deputy Chief Justice, together with the former Chief Justice, submitted a joint written submission. The former Chief Justice, who was the Chief Justice during the relevant period, submitted a separate written submission. He too did not appear before the Commission.

155. In the face of this failure to appear in person before the Commission, a representative of the Commission consulted the Special Rapporteur on the propriety of issuing subpoenas to the judges to compel them to appear before the Commission.

156. The Special Rapporteur advised that it would not be proper to compel the judges to appear before the Commission, however noble its objectives. Subpoenaing the judges for examination by the Commission as to their conduct during the relevant period would amount to reopening cases decided by them, examining the evidence, and generally reviewing the correctness of the decisions. Though judges are accountable, their accountability does not extend to their having to account to another institution for their judgements. That would seriously erode not only the independence of the judges concerned

but also the institutional independence of the judiciary. Further, such compulsion could violate the immunity conferred on judges. Finally, if they are subjected to public examination in the glare of the media, public confidence in the judiciary could be undermined, bearing in mind that prior to 1994 there was no written constitution in South Africa with an entrenched bill of rights for judges to apply and on the basis of which to rule on the legality of legislation. For these reasons, the Special Rapporteur advised that the Commission, having the benefit of written submissions from many judges, could make its findings without having to compel them to appear personally.

Spain

Communication to the Government

157. On 10 November 1997, the Special Rapporteur transmitted to the Government of Spain a communication concerning the trial of the Executive Board of the political party Herri Batasuna. According to the source, some members of the Spanish Government made statements to the press that could affect the independence of the court. Allegedly, the Ministry of the Interior stated to the press on 9 May 1997 that in his opinion the members of the Executive Board of Herri Batasuna should receive prison sentences of more than eight years. Furthermore, the newspaper El Mundo published on 15 September 1997 an article reporting that, according to a source from the Ministry of the Interior, it was expected that two of the three magistrates composing the court would be in favour of the conviction while the other one had not shown a clear position.

Communication from the Government

158. On 4 December 1997, the Government of Spain provided the Special Rapporteur with a reply to the above allegations. The Government stated that the information received by the Special Rapporteur was not correct. Firstly, with respect to a statement allegedly made to the press by the Minister of the Interior, that statement was in fact taken from a radio interview the Minister gave on a variety of subjects. On the issue of the trial of the Executive Board of Herri Batasuna, the Minister said "we are all morally certain that they should be sent to prison not for eight years but for many more. The crux of the issue is that moral certainty is not sufficient; what is needed is legal certainty". Secondly, the Government noted that the information published in El Mundo referred to "some sources", which did not include the Ministry or the Executive. Moreover, the text was "guarded and cautious" as it stated that "everything depended on what happens during the actual trial".

Observations

159. The Special Rapporteur thanks the Government for its response. He notes, however, that the Minister's admitted statement on the radio could be construed as the Executive attempting to influence the court on what it expects the sentence to be.

Switzerland

Communications to the Government

160. On 13 June 1997, the Special Rapporteur sent a joint communication to the Government of Switzerland with the Special Rapporteur on torture concerning the case of Mr. Clement Nwankwo, a Nigerian lawyer and human rights activist and Executive Director of the Lagos-based Constitutional Rights Project, who was arrested in Geneva on 5 April 1997 and detained for five days incommunicado. He was in Geneva to attend the fifty-third session of the Commission on Human Rights and was arrested on suspicion of shoplifting. It was alleged that during and after his arrest, Mr. Nwankwo was severely beaten and kicked by the Geneva police. The Special Rapporteur was also informed that Mr. Nwankwo was denied the right to obtain counsel of his choice and was made to sign the record of the proceedings before the examining magistrate without the presence of his counsel. He was also compelled to sign this document despite the fact that he was unable to read it because it was in French. Finally, he was reportedly tried, convicted and sentenced without a lawyer to defend him in what appeared to be a trial not open to the public, raising questions as to independence and impartiality of the tribunal. Mr. Nwankwo was convicted of theft and sentenced to 20 days' imprisonment and ordered to be expelled from the country. The sentence was suspended.

Communications from the Government

161. On 27 June 1997, the Government sent a response to the Special Rapporteurs to inform them that the Deputy Permanent Representative of Switzerland to the international organizations in Geneva conveyed to Mr. Clement Nwankwo the regrets of the Swiss authorities, including those of the police. According to the Government, the minister in charge of Geneva's Department of Justice, Police and Transports immediately set up an administrative inquiry into treatment Mr. Nwankwo received while in police custody. After receiving the conclusions of the inquiry, he sent a letter to Mr. Nwankwo requesting him to accept the apologies of the Government and informing him that appropriate measures would be taken against the members of the police concerned. The Government also indicated that Mr. Nwankwo could commence civil proceedings against the State for damages.

162. On 28 July 1997, the Government sent additional information regarding the case of Mr. Nwankwo. Copies of judicial decisions along with a response to a questionnaire from the Association for the Prevention of Torture were provided to the Special Rapporteur. The Government informed the Special Rapporteur that an appeal court on 20 June 1997 had acquitted Mr. Nwankwo of the charge of theft but convicted him of the charge of resisting arrest in a public place. However, the administrative inquiry concluded that the treatment that Mr. Nwankwo received was not in conformity with acceptable principles of police behaviour. The Government drew attention to the fact that disciplinary actions would be taken against the four police officers involved in the case.

Observations

163. The Special Rapporteur thanks the Government of Switzerland for its prompt response and welcomes the positive steps taken in the case. However, he noticed that no information was provided with regard to the alleged lack of independence of the tribunal which convicted Mr. Nwankwo in defiance of the principles of due process. Further, the Special Rapporteur views with a certain concern that despite the fact that the appeal court had set aside the conviction of theft imposed on Mr. Nwankwo, the same court found it fit to convict him on the charge of resisting arrest for an offence which he never in law committed. The conviction is particularly disturbing in the light of the apologies extended to Mr. Nwankwo by the Government of Switzerland. The Special Rapporteur has been notified that a further appeal by Mr. Nwankwo to the Court of Cassation is contemplated and therefore refrains from drawing any conclusions from the facts he has thus far received. However, in the light of the Government's apologies to Mr. Nwankwo and its suggestion that he could file a civil suit against the State for compensation, the Special Rapporteur recommends that the Government offer Mr. Nwankwo adequate compensation, thereby avoiding protracted civil litigation and the resultant costs and expense.

Tunisia

Communications to the Government

164. On 1 August 1997, the Special Rapporteur sent an urgent appeal to the Government of Tunisia regarding lawyer Radhia Nasraoui who had reportedly been intimidated and harassed on the night of 29 April 1997 for reasons relating to her work in defence of victims of torture and other human rights violations. According to the source, Ms. Nasraoui's office was broken into, her computer stolen, her phone disconnected and her files interfered with. It was further reported that she had been the victim of similar acts of intimidation in 1994 and in 1995.

165. On 4 December 1997, the Special Rapporteur sent a letter to the Government to request a joint mission to Tunisia with the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression in order to assess the human rights situation regarding freedom of opinion as well as the independence of judges and lawyers. In this regard, the Special Rapporteur referred to the report of the High Commissioner for Human Rights of July 1996 to the Economic and Social Council (see E/1996/87) following his visit to Tunisia.

Communication from the Government

166. On 30 September 1997, the Government provided the Special Rapporteur with a reply to his letter dated 1 August 1997 concerning the case of Ms. Nasraoui. In its response, the Government informed the Special Rapporteur that the robbery of the office of Ms. Nasraoui was the subject of a judicial investigation based upon a complaint made before the competent authorities on 30 April 1997 by a colleague of Ms. Nasraoui's. Furthermore, the Government stated that the two thieves had been arrested and had admitted to their crimes. They had been sentenced, one to eight months' imprisonment by the

First Instance Court of Tunis, and the other to four months by the juvenile magistrate. However, the Government denied the allegations that Ms. Nasraoui had suffered intimidation and harassment.

Observations

167. The Special Rapporteur would like to thank the Government of Tunisia for its prompt response. In addition, the Special Rapporteur reiterates his interest in visiting Tunisia, jointly with the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, and hopes to receive a positive response to this request.

Turkey

Communication to the Government

168. On 21 May 1997, the Special Rapporteur sent an urgent appeal to the Government of Turkey concerning the following lawyers: Gazanfer Abbasioglu, Sebabattin Acar, Arif Altinkalem, Meral Bestas, Mesut Bestas, Niyazi Cem, Fuat Hayri Demir, Baki Demirhan, Tahir Elçi, Vedat Erten, Nevzat Kaya, Mehmet Selim Kurbanoglu, Hüsniye Ölmez, Arzu Sahin, Imam Sahin, Sinasi Tur, Ferudun Celik, Zafer Gür, Mehmet Biçen, Sinan Tanrikulu, Edip Yildiz, Abdullah Akin, Fevzi Veznedaroglu, Sedat Aslantas and Hasan Dogan. It was alleged that these lawyers had been brought to trial on charges relating to one or more of the following situations:

(a) Lawyers who repeatedly conduct defences before the State Security Court, in which case they are equated with the defendants' cause and, as such, are termed "terrorist lawyers" by the police, the public prosecutors and by the courts;

(b) Lawyers appearing in trials before the State Security Courts in cases of torture and extrajudicial killings and who have been qualified as "public enemies";

(c) Lawyers who publicly comment on the human rights practices of Turkey; and

(d) Lawyers who comment on the Kurdish situation.

It was further alleged that these lawyers were tried under emergency legislation which allows for incommunicado detention for a period of up to 30 days. It was also said that the lawyers have suffered economic sanctions and/or have been pressured, harassed, tortured, or become the target of "unknown perpetrator" killings. In addition, the Special Rapporteur referred to his letter to the Government of 16 February 1996 in which he expressed his wish to undertake a mission to Turkey.

169. On 27 May 1997, the Special Rapporteur transmitted an urgent appeal to the Government of Turkey concerning lawyer Mahmut Sakar, Vice-President of the Turkish Human Rights Association (IHD) and President of its Diyarbakir branch. According to the source, Mahmut Sakar was being detained and interrogated under the threat of torture. The Diyarbakir IHD office had reportedly been

searched and magazines, books and correspondence were confiscated. It was alleged that Mahmut Sakar had been detained solely on account of his work as a human rights advocate.

170. On 7 October 1997, the Special Rapporteur sent a joint communication with the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression concerning the lawyer, writer and doctor of philosophy Esber Yagmurdereli. According to the information received, Dr. Yagmurdereli was tried and sentenced to death in 1978 for "trying to change the constitutional order by force", under article 146 of the Turkish Penal Code. The sentence was commuted to life imprisonment on account of a physical disability. In 1991, Esber Yagmurdereli benefited from a conditional amnesty which suspended sentences for offences such as the ones contained in article 146 of the Turkish Penal Code. As a result of a speech made after his liberation, the Istanbul Security Court convicted him of "separatism", and sentenced him to 10 months' imprisonment. The sentence was confirmed by the High Court of Appeals. Consequently, the Samsun Criminal Court decided that Esber Yagmurdereli will be obliged to serve the remainder of his previous sentence. An appeal was reportedly turned down in mid-September.

171. On 7 November 1997, the Special Rapporteur transmitted an urgent appeal to the Government of Turkey concerning Judge Kamil Sherif, who resigned from a case on 6 November 1997 because of alleged intense pressure to influence the case from some foreign and Turkish institutions and politicians. The judge was presiding over the trial in the town of Afyon of nine police officers charged with the death of the leftist journalist Metih Goktepe in January 1996. The Special Rapporteur also referred to his letters to the Government of 16 February 1996 and 21 May 1997 in which he expressed his wish to undertake a mission to Turkey in order to investigate, in situ, allegations concerning the independence of judges and lawyers.

Communication from the Government

172. On 27 November 1997, the Government provided the Special Rapporteur with a reply to the joint urgent appeal sent on behalf of Esber Yagmurdereli. According to the Government, Mr. Yagmurdereli is a member of an illegal terrorist organization called THKPC (Revolutionary Pioneers of the People) and was sentenced to life imprisonment for having violated several articles of the Turkish Penal Code, including incitement to robbery by use of force and incitement to looting. He was released under a conditional amnesty on 1 August 1991, but committed another crime by contravening article 8 of the Anti-Terrorist Law (incitement to violence against the State through propaganda) only a month after his release. The Turkish Penal Code stipulates that if a person to whom a conditional amnesty is granted commits another crime, he or she would be required to serve the whole remainder of the previous sentence along with the new sentence. Mr. Yagmurdereli was then sentenced to 10 months' imprisonment on 28 May 1997 by the Istanbul Security Court and as he was required by law to serve the remainder of his previous sentence, he was consequently sentenced to a total of 23 years of imprisonment. His appeal was rejected on 20 October 1997. However, Mr. Yagmurdereli was released on 9 November 1997, on the grounds of his poor health, in compliance with article 339/2 of the Turkish Code of Criminal Procedure. The Government emphasized that the release does not constitute an

amnesty but a release on health grounds, and his sentence has been suspended for one year. The duration of this suspension is subject to the discretion of the Chief Public Prosecutor.

173. On 5 January 1998, the Government of Turkey provided the Special Rapporteur with a reply to his letter dated 7 November 1997 regarding the case of Judge Kamil Serif. According to the Government, Mr. Serif asked to resign as he claimed to be under pressure from public opinion, the media, the press and other circles, including some political parties. He claimed, furthermore, that he had been receiving letters and telephone calls from Istanbul, Ankara and Australia, and that he had been hurt and disturbed by local and foreign reports that he had been bribed. The Government added that Mr. Serif had declared his unwillingness to continue to preside over the trial as he had not been in a position to maintain his impartiality. The Special Rapporteur was also informed that in conformity with article 29 of the Turkish Code of Criminal Procedure a judge may request to be excused from a case on legal grounds and the approval or refusal of the judge's request is decided by the Superior Court. In this regard, the request of Judge Kamil Serif to be excused from the case of Mr. Metin Göktepe is being considered by the Sandikli High Criminal Court.

Observations

174. The Special Rapporteur thanks the Government of Turkey for its responses and welcomes the release of Esber Yagmurdereli, albeit on a suspended sentence for health reasons. With regard to the case of Judge Kamil Serif, it is not clear what steps the Government had taken to protect him from inappropriate and unwarranted interference with the judicial process as provided in principle 4 of the United Nations Basic Principles on the Independence of the Judiciary. The Special Rapporteur has not received a response to his earlier interventions dated 21 and 27 May 1997. In addition, the Special Rapporteur reiterates his interest in carrying out a mission to Turkey and hopes to receive a positive response to this request.

Venezuela

Communication to the Government

175. On 19 February 1997, the Special Rapporteur transmitted an urgent appeal to the Government of Venezuela concerning the case of lawyers Adrian Gelves Osorio and Joe Castillo, members of the Human Rights Office of the Apostolic Vicariate. According to the source, the Public Ministry brought charges of "usurpation of functions" against the Office of the Apostolic Vicariate. The charges were alleged to have arisen from two complaints sent in November 1996 to the General Commander of the State Police, concerning the death of a civilian at the hands of police agents. These complaints contained detailed information on the incident, including the names of witnesses, and requested an investigation. The Venezuelan Penal Code defines the felony charge of "usurpation of functions" as the "unauthorized assumption or exercise of public, civil or military functions". According to the source, there was no basis for such charge. It was reported that one of the main tasks of this organization is to monitor arbitrary acts of violence committed by police forces, especially against indigenous people. Registration of

formal complaints is part of its functions and is supported by the constitutional right of petition (article 67 of the Venezuelan Constitution).

Observations

176. To date the Government has not responded.

Yugoslavia

Communication to the Government

177. On 19 August 1997, the Special Rapporteur sent an urgent appeal to the Government of the Federal Republic of Yugoslavia in which he expressed his concern about Mr. Nikola Barovic, a lawyer and human rights advocate who, during a live television debate, was reportedly assaulted and seriously injured by a bodyguard of Mr. Vojislav Seselj, leader and presidential candidate for the Radical Party and Mayor of the Belgrade municipality of Zemun. According to the source, Mr. Barovic defends many politically unpopular clients in the former Yugoslavia, including both ethnic Croats and Serbs as well as Albanians. He was reported to have defended a family of ethnic Croats evicted from their homes following an eviction order issued by the Zemun municipality which was reportedly overturned by the Belgrade District Court on 10 July 1997. It was also reported that Mr. Barovic has spoken out publicly against the authorities' policy of ethnically motivated evictions.

Observations

178. So far, no response had been received from the Government of the Federal Republic of Yugoslavia.

V. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

179. The Special Rapporteur views with some concern the increased number of complaints concerning Governments' identification of lawyers with their clients' causes. Lawyers representing accused persons in politically sensitive cases are often subjected to such accusations. Generally only a few lawyers undertake such cases in any jurisdiction; hence, they are usually quite visible. Identifying lawyers with their clients' causes, unless there is evidence to that effect, could be construed as intimidating and harassing the lawyers concerned. The Governments have an obligation to protect such lawyers from intimidation and harassment.

180. The United Nations Basic Principles on the Role of Lawyers expressly call upon Governments to guarantee, inter alia, the following:

> "16. Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and shall not suffer, or be threatened with, prosecution or

administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

"17. Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities."

Principle 18 expressly provides that "Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions."

181. Hence, the Special Rapporteur considers that where there is evidence of lawyers identifying with their clients' causes, it is incumbent on the Government to refer the complaints to the appropriate disciplinary body of the legal profession.

182. There has also been an increase in complaints of Governments' non-compliance with internationally accepted standards of due process, particularly in terrorist-related crimes, raising questions concerning the integrity, independence and impartiality of the courts. The Special Rapporteur is continuing to gather information on this issue in order to better understand the difficulties faced by Governments in complying with the standards of due process in such cases and the extent of miscarriages of justice committed by the courts.

183. The Special Rapporteur also expresses concern over the number of countries where judges are appointed on a provisional basis without security of tenure in breach of principles 11 and 12 of the United Nations Basic Principles on the Independence of the Judiciary. Such appointments become a serious threat to the independence of the judiciary, particularly where the provisional judges are conferred with the same powers as permanent judges and remain on the bench for a prolonged period of time. Such provisional judges are vulnerable to executive interference and even tensions within the judiciary.

184. The problems faced by countries in transition in providing an independent and impartial justice system are a matter of concern. It is acknowledged that in addition to the lack of financial resources, the lack of human resources and of infrastructure are serious contributing factors. The prevailing situations in Rwanda, Cambodia and some countries in the Eastern European region are some examples. The Special Rapporteur continues to liaise with the Activities and Programmes Branch of the Office of the High Commissioner for Human Rights in this regard.

B. Recommendations

185. Arising from some of the observations made earlier on the country situations and on his activities, the Special Rapporteur wishes to make some specific recommendations.

186. In the case of Switzerland, the Special Rapporteur recommends that the Swiss Government offer adequate compensation to Mr. Clement Nwankwo and thereby avoid any protracted civil suit before the Swiss courts and the resultant cost and expense.

187. In paragraph 4 of resolution 1994/41 creating this mandate the Commission urged all Governments to assist the Special Rapporteur in the discharge of his mandate and to transmit to him all the information requested. In the spirit of this paragraph the Special Rapporteur urges Governments that have not responded to his interventions and requests to undertake missions to do so.

188. The Special Rapporteur requests all Member States to respond promptly to the questionnaire on the implementation of the Basic Principles on the Role of Lawyers which is expected to be sent to Governments before the end of 1998 by the Centre for International Crime Prevention in Vienna. In this regard, the Special Rapporteur also requests Governments that have not responded to the earlier questionnaire on the implementation of the Basic Principles on the Independence of the Judiciary to do so as soon as possible.

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COMMISSION ON HUMAN RIGHTS
Fifty-fourth session
Item 8 of the provisional agenda

QUESTION OF THE HUMAN RIGHTS OF ALL PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

Report of the Special Rapporteur on the independence of judges and lawyers, Mr. Param Cumaraswamy, submitted pursuant to Commission on Human Rights resolution 1997/23

Addendum

Recent developments in Malaysia

1. In paragraph 109 of his report (E/CN.4/1998/39), the Special Rapporteur stated that his application for leave to appeal to the Federal Court (the apex appellate court of Malaysia) from the decision of the Court of Appeal dismissing his appeal to that court had been fixed for hearing on 16 February 1998. In the present document, the Special Rapporteur wishes to report on the outcome of the hearing of that application.

2. His application was heard on 18 and 19 February 1998 by a panel of three judges presided over by the President of the Court of Appeal. The President was the same judge who had earlier refused the Special Rapporteur's application to the Court of Appeal for a stay of execution on the judgement of the High Court referred to in paragraph 107 of the report. He also sat on the Court of Appeal which affirmed the award of RM 10 million (US$ 2.5 million) which decision was referred to and commented upon in the impugned article. The businessman who was awarded that sum is currently the plaintiff in one of the four suits against the Special Rapporteur for defamation arising from the impugned article. Another judge who heard the appeal on 18 February was one of the three judges in the controversial Ayer Molek case (see E/CN.4/1996/37, paras. 158-160) which was extensively commented on in the impugned article.

3. At the conclusion of the hearing, the Federal court, by a unanimous oral decision, dismissed the application with costs. In dismissing the application, the Presiding Judge made a statement to the effect that the Special Rapporteur was neither a sovereign nor a diplomat but, in layman's terms, an "unpaid, part-time provider of information".

4. The immunity determined and asserted by the United Nations Secretary-General was from "legal process of every kind" in respect of words spoken or written by the Special Rapporteur in the course of the performance of his mission. Despite cogent authorities cited to the Court to the effect that the issue goes to jurisdiction and therefore should be decided in limine, the Court agreed with the lower courts that the issue of immunity from legal process would be decided at the end of the process.

5. The application was for leave to admit the appeal as one with merit for appeal. Yet it was summarily disposed of. There were many admitted previously with far less merit than the present one.

6. The Special Rapporteur has exhausted all his legal remedies on the issue of immunity before the domestic courts of Malaysia. He is now exposed to legal process of full trials on the four defamation suits for a total sum of RM 280 million (US $70 million).

Observations

7. The decisions of the Federal Court and of the lower courts were against the weight of authorities and do not accord with international law. The courts failed and/or refused to recognize the United Nations jurisprudence on the issue. They defied the authority of the Secretary-General of the United Nations and, moreover, both the Court of Appeal and the Federal Court ignored the 1989 Advisory Opinion of the International Court of Justice in the Mazilu case. There was a virtually total disregard for the United Nations and its procedures.

THE STAR THURSDAY August 24 1995

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UN to probe legal grouses

KUALA LUMPUR: The United Nations Special Rapporteur on the Independence of Judges and Lawyers will be investigating recent complaints of manipulation of the Malaysian system of justice.

Special Rapporteur Datuk Param Cumaraswamy, when contacted, said the circumstances leading to the recent decision of the Federal Court involving Ayer Molek Rubber Company Bhd, Insas Bhd and Megapolitan Nominees had raised several issues which needed to be investigated.

"Complaints are rife that some highly placed personalities in Malaysia including those in the business and corporate sectors are manipulating the Malaysian system of justice and thereby undermining the due administration of independent and impartial justice by the courts," he said in a statement.

He is expected to report his findings to the commission next year.

Cumaraswamy said anyone with information which could help in the investigation should contact him here at ☎ (03)-2011788 or in Geneva at ☎ (4122)-917 9290.

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INTERNATIONAL

COMMERCIAL LITIGATION

Malaysian justice on trial

Sullivan & Cromwell owns up

McDonald's trade mark blow

Estonia relatives to take action

German TV battle

Exelon insurers try again

The advocate's art

The Barry Minkow story

Disputes as business decisions

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Malaysia's reputation for judicial integrity is being questioned. David Samuels reports that a string of controversial court decisions is the cause of mounting concern among the country's lawyers and foreign investors

Malaysian justice on trial

On April 10 1995, a Malaysian lawyer was granted an *ex parte* order by the country's High Court, compelling a company to register a block of shares owned by his client. The kind of thing that happens all the time.

But this was no routine case. This was different. It ended with Malaysia's supreme court criticizing the country's appeal court in terms which were far from judicial, and the president of the Malaysian Bar Council talking of "very serious questions over the administration of justice in Malaysia".

The case in question was the *Ayer Molek* case. And it was the culmination of a series of court decisions in commercial cases which has caused many of Malaysia's leading lawyers to raise doubts about Malaysia's legal system.

"The ultimate fear about Ayer Molek and all of these cases is that they mean Malaysia is going the way of other Asian countries, such as Indonesia, Thailand and the Philippines," says Raphael Pura, the Malaysia correspondent to the *Asian Wall Street Journal*. "The implication is that, just like those other countries, Malaysia is becoming a place where justice is now 'up for bid'."

Until now, Malaysia, which enjoyed economic growth of 9.5% in the first half of 1995, has been able to portray itself as a country largely free from corruption. As a result, the government has succeeded in attracting some of the biggest foreign names in manufacturing. Apple Computers, Citroen, Motorola, General Electric

The court cases to which Pura refers, and which could seriously affect Malaysia's reputation as a major financial centre, have all occurred within the last year. They came to a head in August, when the *Ayer Molek* case provoked a row between the Federal Court and the Court of Appeal, Malaysia's two highest courts. Because of the cases, Malaysians from all walks of life have openly started to question the independence of their judiciary.

On August 28, Puan Hendon, the president of the Malaysian Bar Council, issued a press statement saying the "differing views and comments" of the two courts raised "very serious questions over the administration of justice in Malaysia". In response, Eusoff Chin, Malaysia's most senior judge and the author of the Federal Court judgment which criticized the Court of Appeal, issued a statement saying the Bar Council should have discussed the matter with him privately before they went "to yell in the press".

Politicians also became involved. Lim Kit Siang, secretary general to the DAP, Malaysia's largest opposition party, said that there was "a new crisis of confidence over the judiciary in Malaysia". Prime Minister Mahathir Mohamad told the Bar Council and Chin on September 7 that their squabble was "destabilizing" the Malaysian legal system.

The Ayer Molek case

The case of *Insas and Megapolitan Nominees v Ayer Molek Rubber*

M$157 million ($63 million) purchase by Insas and Megapolitan, two related investment houses, of 30% of Ayer Molek's shares in 1994. It produced very sharp criticisms from the Court of Appeal about the conduct of one plaintiff lawyer, VK Lingham of VK Lingham & Co, accusing him of illicit manoeuvring to put the case before a High Court judge of his choice.

Even though they had not asked Ayer Molek to register their shares, Insas and Megapolitan went to the High Court on April 10 1995. They informed the judge that they knew from "reliable sources" that Ayer Molek, if asked, would refuse to register their shares. This was because the company had not registered a separate, 12% block bought by a nominee company, PFA Nominees.

Later affidavits show that Haji Mohd Halmi, the chairman of Ayer Molek, had, by the time of the court hearing, become convinced that Insas, Megapolitan, PFA Nominees and Vincent Tan, one of Malaysia's most prominent businessmen, were "aligned to each other to ensure that both the Insas shares ... [and the PFA shares] were registered". He believed that, by jointly buying 42% of Ayer Molek stock in secret, Insas and PFA had breached Malaysia's takeover code. Consequently, Ayer Molek's board had decided that registration requests from either Insas and Megapolitan, or PFA Nominees, would be refused.

The affidavits show that Haji's belief resulted from meetings to which he was invited on March 31

to both, were present at each. On both occasions, Haji was requested to "speed up the registration of the PFA-held Ayer Molek shares".

In the High Court on April 10, Lingham was granted an *ex parte* order designed to compel Ayer Molek to register the 30% block of shares bought by Insas and Megapolitan. Judge Azmel Mamoor, who sits in the Special Appellate Division of the High Court (which deals with administrative cases), and is the Chief Judge of the High Court, made the order. The order, which was served on April 11, directed Ayer Molek's officers to register the shares within 48 hours or face imprisonment.

Ayer Molek applied to have the order revoked on April 13. Azmel agreed to hear their request on April 27 but refused a request to stay the injunction pending that hearing. Ayer Molek reluctantly registered Insas's and Megapolitan's shares on April 14 and took the matter to the Court of Appeal four days later. Ayer Molek was seeking a declaration that the High Court had been unjust and asked the Court of Appeal to reverse the effects of a registration that had been made under duress. The hearing was set for July 26.

At the hearing, the Court of Appeal, saying that it was "using its inherent power to stop further injustice from occurring", gave Ayer Molek an order to stop Insas and Megapolitan exercising any rights over their shares. Five days later, it delivered its written judgment on Ayer Molek's appeal. It called the situation produced by the High Court's treatment of the case "an injustice perpetrated by a court of law".

The Court of Appeal also strongly criticized Lingham for taking a commercial matter, the registration of shares, to a division of the High Court which should only deal with administrative law cases. It called him an "unethical lawyer" and said that his conduct would give "right-minded people the impression that some litigants are able to choose the judge before whom they wish to appear". Insas and Megapolitan appealed to the Federal Court, Malaysia's highest court, which held a hearing on August 1.

censured the lower court for its comments. In an August 12 judgment, it accused the Court of Appeal of itself "bringing the administration of justice into disrepute" by "departing from sobriety" and "going off on a frolic of its own". The Federal Court said that, by discontinuing the High Court action, Ayer Molek could "be deemed to have conceded the *ex parte* order". It expunged the sections of the Court of Appeal's judgment which criticized Lingham.

On September 8, the share sales to Insas and Megapolitan, and PFA Nominees, were finally cancelled and police investigations into the whole affair ceased. All law suits were withdrawn a week later.

Something rotten

Although the Federal Court overturned the lower court's decision, the Court of Appeal's comments brought the *Ayer Molek* case to the attention of the rest of Malaysia's legal profession. One lawyer notes: "The Court of Appeal made it clear that it thought something funny had been going on in the High Court in that case. That was why they put in a Shakespeare quote about there being 'something rotten in the State of Denmark'. It was a reference to the building the High Court is in, which is called Denmark House."

Tommy Thomas of Skrine and Co would like to know how Lingham managed to "overcome two hurdles that are supposed to make it impossible for this misfiling to happen. First, you have to get the registry to admit the case in the wrong division. Then you have to persuade the judge himself to let it stay. The fact that the judge agreed to entertain this case really is a surprise".

Another lawyer says: "Lingham's action was like filing a commercial matter in the family court. It should have made him look incredibly stupid. But, of course, it turned out that it went super well."

Yet another lawyer found the terms of the *ex parte* order that Lingham obtained highly irregular: "First, it is literally unheard of to be given a compulsion order which forces a company to register your shares except where you have tried [illegible] and it is your last

the two shareholders, who had not done anything at all about their shares for six months, suddenly were able to go to court and use this last resort compulsion procedure. What I do not understand is how they could get a judge to threaten Ayer Molek with contempt of court before Ayer Molek had actually refused to do anything."

Another says: "At Lingham's request, this judge even added mandatory imprisonment to the *ex parte* order. And then he refused to hear Ayer Molek's case for two weeks or to suspend the order, although such orders only have a life-span of two weeks."

Privileged scheduling

There are various aspects of the way that the Federal Court dealt with Ayer Molek that also concern Malaysia's lawyers. "The case made it into the Federal Court at a startling speed," says one. "I am appealing the same sort of order at the moment. I expect that to get it into the Federal Court will take at least six months. In *Ayer Molek*, it only took Lingham four days."

That sort of privileged scheduling, says Tommy Thomas, is usually preserved for emergency situations: "In the textbooks, the example of an emergency situation they give is where a bulldozer is already outside your home ready to start knocking it down. You should not be able to get an expedited appeal in a case about shares."

Other lawyers feel the tone of the Federal Court judgment, which was delivered on August 12 by Chief Justice Eusoff, and especially its criticisms of the Court of Appeal, ar too personal. One says that, in the *Ayer Molek* judgment, Eusoff makes several departures from his established style of writing: "Eusoff certainly has an identifiable style to his judgments, which, after all, we have been reading now since 1982, when he first became a judge. Normally, and unlike here, he writ in a very staccato form, using shor sentences and without making ma references to other cases as authorities. He certainly doesn't quote big chunks of text from oth cases in the way that he did in this case. At least a quarter of this

from other cases. Normally it would be at most a couple of carefully chosen, very brief quotes, if a point needs to be made clear."

The lawyer also points out that the judgment was written in the 11 days between August 12, when the judgment was delivered, and the hearing on August 1. "My own experience," he says, "is that it takes the Federal Court at least 21 to 30 days to produce a judgment".

K Anantham of Skrine & Co says the Federal Court's decision to expunge parts of the Court of Appeal's judgment was fortuitous for Lingham: "The Bar Council was going to order Lingham to account for his behaviour in *Ayer Molek*, using the Court of Appeal's comments about him as the basis, if necessary, on which to discipline him. But then, on the basis of an Indian authority which Lingham had found, the Federal Court expunged the important sections of the Court of Appeal's judgment, cutting the ground from under the Bar Council's feet."

More concerns

In the aftermath of *Ayer Molek*, concerns about Lingham's tactics have arisen again. This time in the dispute between the Malaysia Borneo finance Holdings (MBfH) and the East Asiatic Company (EAC). Again, there were a number of procedural peculiarities which lead Param Cumuraswamy, United Nations Special Rapporteur on the Independence of Judges and Lawyers, to say that the case looks like "a very obvious, perhaps even glaring, example of judge-choosing", although he stresses that he has not finished his investigations.

This case concerned a claim for breach of contract for the sale of land. The land was bought from EAC on March 8 1995 by MBfH. The cost was M$115 million ($46 million), paid for by 72,424,058 MBfH shares. A second agreement prevented EAC from selling the shares before August 31, and gave three MBfH subsidiaries the right to arrange any sale once one was allowed.

On May 6, MBfH started an action in the Civil Division of the High Court, alleging EAC had broken its contract by not providing vacant possession of the land. Delays in the could not be heard for at least six months, and so MBfH applied for a pre-trial injunction to stop EAC from selling the shares after August 31.

A hearing on MBfH's application took place in front of Judge Vohrah on June 21 and he later said that he would announce his decision on August 23.

But, on August 11, the subsidiaries, represented by Lingham, also started court proceedings against EAC, aimed at stopping EAC from selling the shares after August 31. They issued an Originating Summons in Court No 5 of the Commercial Division of the High Court (Judge Malek), seeking a declaration that EAC's shares were "encumbered by the dispute between MBfH and EAC". The following day, the subsidiaries started a second, identical, set of proceedings against EAC in Court No 2 of the Commercial Division (Judge Low Hop Bing).

On August 14, the Court No 2 proceedings were served on EAC. On the same day, the subsidiaries filed an *ex parte* notice of discontinuance of their Court No 5 proceedings.

EAC responded by filing two identical consolidation applications in Vohrah's and Low Hop's courts, requesting that the subsidiaries' action be added to the first action before Vohrah. At this point, Cheang and Ariff stepped down as MBfH's lawyers, to be replaced by T H Su & Co.

Low Hop Bing held a hearing on the consolidation application on August 18. He granted EAC's request to adjourn the matter until after Vohrah's August 23 decision. Vohrah also held a hearing on the consolidation request and asked Lingham why the first proceedings he had started (in Court No 5) had been discontinued. This was the first EAC knew of the discontinued proceedings. Lingham replied that the Court No 5 summons was withdrawn "because it had typing mistakes".

On August 23, Vohrah rejected MBfH's injunction application and, the following day, asked if any party objected to his hearing both cases. Only Lingham did, insisting that the subsidiaries' case should remain before Low Hop Bing. Vohrah then discharged himself from the main trial and instructed the parties to Judge of the High Court, on how they should proceed. Azmel said that they should talk to Chief Justice Eusoff. An hour after Vorhah's hearing, Low Hop Bing threw out EAC's consolidation request, announcing that the subsidiaries' case would remain before him.

After Eusoff informed the parties on August 25 that he could not see them until September 6, the dispute was settled. The shares were sold on August 30 for M$115 million.

Procedural gymnastics

Tommy Thomas, who acted for EAC, says that the "procedural gymnastics" in which the subsidiaries engaged during that dispute "raise questions that cry out for answers". A lawyer close to Cheang & Ariff says that the firm stepped down because "it disagreed with what was being done by the legal team working for the subsidiaries".

Thomas points to the sequence of the two identical legal actions started in two different courts, one of which was then discontinued, as proof that the subsidiaries were trying to get their case before one particular judge, namely Judge Low Hop Bing: "Lingham told Judge Vohrah on August 19 that the action they had started in Court No 5, on August 11, had to be withdrawn on August 14 because of typing errors. That simply cannot be right. If you compare the main document from Court No 5, which is supposed to have contained so many typing errors that it had to be withdrawn, with the main document put into Court No 2 [Low Hop Bing's court], you will see that there are absolutely no differences between them. And there are only two inconsequential differences between the supporting affidavits."

"The irresistible inference," Thomas says, "has to be that they wanted Low Hop Bing, and only Low Hop Bing, to hear their case. When everyone else involved agreed that all the actions should be brought together in Judge Vohrah's court, it was Lingham who insisted the subsidiaries' case should stay with Low Hop Bing".

VK Lingham

The Malaysian Bar Council's record shows that Lingham qualified in

Thomas, Lingham has built up "a small portfolio" of clients, all of whom "are incredibly rich and very loyal to him, mainly Malaysian entrepreneurs".

So is it possible that the speculation surrounding these and others of Lingham's most recent cases could be a case of sour grapes? A few defeated opponents saving face by using their seniority to make mischief for him?

One member of the Bar Council rules this out: "The people Lingham has been up against recently are all very senior counsel and have no need to indulge in such sour grapes. People like Tommy Thomas and Loh Siew Cheang of Cheang & Ariff have been around for many years and are from locally renowned firms. Their reputations are already absolutely assured. They are hardly people who would feel that they had somehow lost their credibility as advocates because of these cases."

"Besides," he adds, "I do not think these cases were ever really allowed to get to the meat of the dispute. So they never became about Lingham bettering any of his opponents in open argument before the court. The cases have all tended to finish immediately after the pre-trial stage. They were all about procedure and manoeuvring".

VK Lingham declined to comment on the questions raised by these two decisions and those described below.

Terrible situation

The people who are most concerned about the implications of these recent cases are Malaysia's 5,500 lawyers. "The present situation is terrible," says Thomas, "one hears all sorts of gossip".

Another senior lawyer, who prefers not to be named, agrees there is a new feeling around the profession. "People are very disheartened and disillusioned," he says. "There is a general feeling that *Ayer Molek* should not have happened the way that it did. In particular, people felt that, for some reason, in that case the Federal Court was choosing deliberately to be very unfair."

And, according to this lawyer, Malaysian lawyers, bewildered by the many unusual aspects to these decisions, have found that they are understands these decisions, people have really had to start questioning both the intellectual capacity of our courts and the integrity of our judges." Tommy Thomas says that many Malaysian lawyers have already decided which of those explanations they believe.

Economic consequences

The danger is that, if these perceptions continue and become more widely held, they could damage Malaysia's good standing in the eyes of foreign investors. An economist from one of the international banks which has offices in Malaysia is not sure if the affair has started to alter perceptions of the country. It is, he says, "one of those intangible issues. It depends on the groundswell of opinion. At the moment I don't think any general opinion about Malaysia being corrupt has started to crystallize".

According to the economist, those crucial foreign manufacturers like Malaysia for a number of reasons: "Land has been well priced and the Malaysian government has always been very pro-foreigners. So it has allowed them to own the bulk of their own plants. Partly it is also because the English language is widely spoken, and there is a surplus of skilled labour in the market."

But, and this is more important in the light of the new mood of gloom around Malaysia's courts, the economist thinks that company faith in Malaysia has "a lot to do with Malaysia's UK-derived tradition of a good legal framework". Especially as, he points out, setting up operations in a new country is a process often fraught with "disputes and teething problems".

So it would be cause for concern to those in the higher levels of Malaysian public life if the country's justice system had indeed started to go the way of its Asian neighbours. And there is evidence that, in the wake of these legal problems, Malaysian-based companies are beginning to lose faith in the Malaysian courts.

Param Cumuraswamy, who has a global mandate from the United Nations to investigate complaints such as those circulating in Malaysia at present, reports that he has a counsel at the Malaysian law firm of Shook Lin & Bok, he says: "It would be unfair to name any names, but there is some concern about all this among foreign businessmen based in Malaysia, particularly among those who have litigation pending."

Another senior Malaysian attorney has also witnessed this growing concern. "There is a general concern among foreign clients about the civil justice system," he says. "The first question that those clients ask me now is 'how safe are the Malaysian courts?' I know several people whose multinational clients have been asking them questions specifically about the *Ayer Molek* case."

There was no sign of these concerns at the beginning of 1995, when the World Economic Forum, a Geneva-based business consultancy, researched its World Competitiveness Report. It was published in September. As part of the research, major companies were asked what level of confidence they had in the justice system of the country in which they were located. On the basis of the 59 Malaysian replies it received between January and April, the World Economic Forum ranked Malaysia as one of the top 25 systems in the world, and placed it above both the US and United Kingdom.

Cumuraswamy thinks Malaysia would not be able to repeat that result at present. "Complaints are rife that certain highly placed personalities in the business and corporate sectors are able to manipulate the Malaysian system of justice," he says. "But I do not want any of the people involved to think I have yet made up my mind."

The Tan libel case

Cumuraswamy says that, although these complaints "only really came to prominence because of the judge-choosing allegations in the *Ayer Molek* affair, people first started to question the integrity of the judiciary after the M$10 million ($4 million) libel award which Vincent Tan received on October 22 last year."

Tan is the head of the Berjaya Group, one of Malaysia's largest companies, which has diverse business interests ranging from gaming venues, to shopping malls,

at one of the international banks based in Malaysia describes Tan as "the archetypal business autocrat, completely inseparable from his company. Tan is the major stockholder in, and the driving force behind, the company. He goes out and gets the contracts, and hires and fires the staff".

Tan sued over four articles published in the August and October 1993 issues of *Malaysian Industry*, a business magazine. The M$10 million damages he received was the highest ever awarded by a Malaysian court. "The Tan libel case struck people as unusual," says Raphael Pura, "because of the speed with which the case went from start to finish. Suddenly, a case which would typically take about four years to get a court date, was heard within six months. The trial itself, which normally would take about 12 months to get to court, was in and out in three days."

A Malaysian lawyer agrees that the speed of the case raised eyebrows. "People instantly wondered what was so special about the Tan libel case that the courts wanted to deal with it so speedily," he says.

But others say it was the size of the award which made them curious. "MS10 million dollars is a big award for a libel case by any country's standards. But, by Malaysian standards, it is a hell of a lot," says Pura. "No one in Malaysia had won anything like it before. The most previously had been about half a million Malaysian dollars." He adds that, at the outset, few had thought Tan's case looked strong: "The core of the article was not a particularly outrageous reference to money-politics. Tan leapt on it and tried to put the worst possible meaning on it, one that perhaps wasn't justified." VK Lingham acted for Tan in the case.

Defying the odds

According to one economist, one of Tan's companies, Berjaya Industrial, has also recently "appeared to defy the odds" in a Malaysian court. On May 13, Berjaya Industrial won an injunction in the High Court of Malaysia that prevented a M$500 million dispute over derivatives from being relocated to the United Kingdom. Berjaya Industrial was suing CS First Boston for negligent misrepresentation after the Malaysian company lost heavily in an interest rates swap deal.

The economist at the Malaysian branch of an international bank says: "From what I heard about the case, it should have been quite cut and dried. Berjaya basically ducked out. Tan later sacked the guy who signed Berjaya up for it. Locally the view was that that was a bit strange too. He seemed to be too junior a person to have committed the company to such a huge position. The Malaysian judge, Chief Judge Malek, said that it was a Malaysian deal so the dispute should be heard by a Malaysian courts."

Tommy Thomas of Skrine & Co believes that the decision looks incorrect: "It was an offshore deal done under UK law, so the UK seemed like it was the proper forum for the dispute." CS First Boston and Berjaya settled the dispute on October 12. Both agreed not to apply for any costs. VK Lingham acted for Berjaya Industrial.

Behind closed doors

Cumuraswamy stresses that the public feud that erupted between Chief Justice Eusoff Chin and the Bar Council over *Ayer Molek* appears to have been resolved: "The Bar Council and the Chief Justice have met and I have heard that some positive steps are being taken to improve the system."

But some of Malaysia's disheartened lawyers already think they know how it will feel if the system does not improve. One says: "At the end of the day we all just want the system to be fair. You want it to be one where you are able to walk out of a case and say lightheartedly 'The judge was a fool!', without being worried that it could actually be true."

He concludes: "What people are really worried about is that one day it might be them who has to leave court without having any real idea what just happened. Whether it was they who never understood the law; whether it was the judge who misunderstood the law; or whether something terrible had been arranged in advance behind closed doors."

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V. SIVA AND PARTNERS

28

15

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ADVOCATES & SOLICITORS

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Please quote our reference when replying

Your Ref :
Our Ref : VSP/109/95
Date : 18th December 1995

RECEIVED BY
SHOOK LIN & BOK (Jennifer)
ON 18/12/95
AT 2.57 ~~a.m~~/p.m

DATO' PARAM CUMARASWAMY
Messrs Shook Lin & Bok
Advocates & Solicitors
20th Floor, Bangunan Arab Malaysian
Jalan Raja Chulan
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Malaysia

Dear Sir,

We act on behalf of Insas Berhad and Megapolitan Nominees Sdn Bhd who have clearly been seriously defamed in the issue of the International Commercial Litigation for November 1995 published by Euromoney Publications PLC, in the feature article headed **"Malaysian justice on trial"**. A copy of the article is enclosed herewith. It is clear that they are being accused of corruption, in collaboration with their leading Legal Counsel Dato' V K Lingam, in relation to litigation brought earlier this year against the Ayer Molek Rubber Co. Bhd and its directors and secretaries.

The article seems to be based to a significant extent upon allegations made by you. You are extensively quoted (we are sure quite accurately) in the article. Despite the disingenuous comments "... that he has not finished the investigations" and that you "... do not want any of the people involved to think I have yet made up my mind", you have made what are clearly intended to be damning comments to the staff of the magazine, which manifestly accuse Dato' V K Lingam and his various clients of corruption. In particular, you have referred to our clients' litigation as having brought to prominence the allegations about the integrity of the judiciary.

You must surely have known of the ruling of the Federal Court in the case of Insas Berhad v Ayer Molek Rubber Bhd [1995] 2 MLJ 833, 844, 846, where it was clearly stated that there was "no evidence or cause" to warrant the criticisms of the Court of Appeal, and their remarks were described as "totally unwarranted and unjustified". In any event, your allegations are obviously defamatory and, on your own admission, based on incomplete investigations and/or rumour.

In the circumstances, our clients are left with no choice but to issue defamation proceedings against you in respect of your comments and their subsequent republication in the International Commercial Litigation. It is important that all steps are taken, for the purpose of mitigating the continuing damage being done to their business and commercial reputations which is worldwide, as quickly and effectively as possible.

We therefore write to ask that you will agree:

(1) to join in the making of a Statement in Open Court in agreed terms;

(2) to associate yourself with the publication of a full and unqualified retraction in the International Commercial Litigation magazine, with corresponding prominence to that of the offending article, in terms to be agreed by us on behalf of our clients;

(3) to make suitable proposals for the payment of damages to vindicate, so far as is now possible, the companies' reputations;

(4) to undertake to refrain from publishing any similar libels in the future.

Naturally, our clients will also expect to be indemnified in respect of all the legal costs which they have had to incur. Will you please reply to this letter as a matter of urgency. In the meantime all rights are reserved.

Yours faithfully,

c..c Clients

V. SIVA AND PARTNERS

PEGUAMBELA DAN PEGUAMCARA
ADVOCATES & SOLICITORS

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LL.B. (Hons) U.K., Barrister-At-Law, Inner Temple

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DATO' PARAM CUMARASWAMY
Messrs Shook Lin & Bok
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20th Floor, Bangunan Arab Malaysian
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Malaysia

Dear Sir,

We act on behalf of Dato' V K Lingam, who has clearly been seriously defamed in the issue of the International Commercial Litigation for November 1995 published by Euromoney Publications PLC, in the feature article headed "**Malaysian justice on trial**". A copy of the article is enclosed herewith. He is mentioned (including in one cross-head) in connection with each of the cases cited in support of the proposition that "Malaysia is becoming a place where justice is now 'up for bid'", whereas it has until now "... been able to portray itself as a country largely free from corruption".

The article seems to be based to a significant extent upon allegations made by you. You are extensively quoted (we are sure quite accurately) in the article. Despite the disingenuous comments "... that he has not finished the investigations" and that you "... do not want any of the people involved to think I have yet made up my mind", you have made what are clearly intended to be damning comments to the staff of the magazine which manifestly accuse Dato' V K Lingam and his various clients of corruption (including "a very obvious, perhaps even glaring, example of judge-choosing"). These are obviously defamatory and, on your own admission, based on incomplete investigations and/or rumour. Quite apart from the serious defamation you have thereby perpetrated, you have clearly disqualified yourself, on grounds of bias, from carrying out further investigations into these matters on any credible basis.

In any event, Dato' V K Lingam is left with no choice but to issue defamation proceedings against you in respect of your defamatory comments and their subsequent republication in the International Commercial Litigation.

It is important that all necessary steps are taken, in order to mitigate the continuing damage being done to his reputation which is worldwide and to his livelihood, as quickly and effectively as possible. We therefore write to ask that you will agree:

(1) to join in the making of a Statement in Open Court in agreed terms;

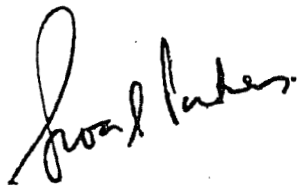
(2) to associate yourself with the publication of a full and unqualified retraction, in the International Commercial Litigation magazine, with corresponding prominence to that of the offending article, in terms to be agreed by us on behalf of Dato' V K Lingam;

(3) to make suitable proposals for the payment of damages to compensate for the outrage to his feelings and to vindicate, so far as is now possible, his reputation;

(4) to undertake to refrain from the publication of any similar libels in the future.

Naturally, our client will also expect to be indemnified in respect of all the legal costs which he has had to incur. Will you please reply to this letter as a matter of urgency. Meanwhile all rights are reserved.

Yours faithfully,



c.c. Client

V. SIVA AND PARTNERS

(1)

PEGUAMBELA DAN PEGUAMCARA
ADVOCATES & SOLICITORS

V SIVAPARANJOTHI
LL.B. (Hons) U.K., Barrister-At-Law, Inner Temple

SHANTINI SELVARAJAH
LL.B. (Hons) U.K., C.L.P. (MAL)

Suite No 307, 3rd Floor,
Bangunan Loke Yew,
No. 4, Jalan Mahkamah Persekutuan,
50050 Kuala Lumpur

Please quote our reference when replying

Tel : 03-2931663, 2931727 & 2938157
Fax : 03-2931741

Your Ref :
Our Ref : VSP/108/95
Date : 18th December 1995

RECEIVED BY
SHOOK LIN & BOK (jennifer)
ON 18/12/95
AT 10.50 a.m/~~p.m~~

DATO' PARAM CUMARASWAMY
Messrs Shook Lin & Bok
Advocates & Solicitors
20th Floor, Bangunan Arab Malaysian
Jalan Raja Chulan
50200 Kuala Lumpur
Malaysia

Dear Sir,

We act on behalf of Yang Berbahagia Tan Sri Dato' Vincent Tan Chee Yioun, Berjaya Industrial Berhad and Berjaya Corporation (Cayman) Limited, who have clearly been seriously defamed in the issue of the International Commercial Litigation for November 1995 published by Euromoney Publications PLC, in the feature article headed "**Malaysian justice on trial**". A copy of the article is enclosed herewith. It is clear that they are being accused of corruption, together with their leading Legal Counsel Dato' V K Lingam, in relation to an allegation of obtaining special favours in litigation in which they have been involved.

(2)

The article seems to be based to a significant extent upon allegations made by you. You are extensively quoted (we are sure quite accurately) in the article. Despite the disingenuous comments "... that he has not finished the investigations" and that you "... do not want any of the people involved to think I have yet made up my mind", you have made what are clearly intended to be damning comments to the staff of the magazine, which manifestly accuse Dato' V K Lingam and his various clients of corruption. In particular, you have chosen to pinpoint Tan Sri Vincent Tan's libel case as being the one in relation to which "people first started to question the integrity of the judiciary". These remarks are obviously defamatory and, on your own admission, based on uncompleted investigations and/or rumour.

In these circumstances, our clients are left with no choice but to issue defamation proceedings against you in respect of your defamatory comments and their subsequent republication in the International Commercial Litigation magazine. It is important that all steps are taken, for the purpose of mitigating the continuing damage being done to their personal and commercial reputations which is worldwide, as quickly and effectively as possible.

We therefore write to ask that you will agree:

(1) to join in the making of a Statement in Open Court in agreed terms;

(2) to associate yourself with the publication of a full and unqualified retraction, in the International Commercial Litigation magazine, with corresponding prominence to that of the offending article, in terms to be agreed by us on behalf of our clients;

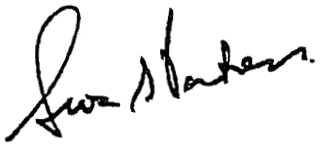
3

(3) to make suitable proposals for the payment of damages to compensate for the outrage to Tan Sri Dato' Vincent Tan's feelings and to vindicate, so far as is now possible, his reputation and that of the two companies;

(4) to undertake to refrain from the publication of any similar libels in the future.

Our clients will also expect to be indemnified in respect of all the legal costs which they have had to incur. Will you please reply to this letter as a matter of urgency. Meanwhile all rights are reserved.

Yours faithfully,



c.c. Clients

SHOOK LIN & BOK

PEGUAMBELA & PEGUAMCARA
ADVOCATES & SOLICITORS

EJEN PATEN DERDAFTAR & EJEN CAP DAGANGAN
REGISTERED PATENT AGENTS & TRADE-MARK AGENTS

NOTARI AWAM
NOTARY PUBLIC

TELEFON-TELEPHONE (03) 2011783 (25 LINES) FAX (603) 2011775/8/9 TELEX MA 30052 KAWAT-CABLE SHOBOK

116

PARTNERS
DATO' P. CUMARASWAMY
MUSHIR MAJID
TOO HENG YEW
DR. GYANI Y. DAS
FORREST P. HOYAN
LAI YING TONG
KATHERINE LIM SUK HONG
PATRICIA DAVID SAHI
NAGARAJAN NATTAN
ROMESH KERAMAN
YOONG SIN MIN
YUAN KIT LEE
DR. ARUNAN SUBRAMANIAM
MICHAEL C. H. SOO
JOHN MATHEW
HO YUK CHUN
S. MANITHA RALAN

CONSULTANT
MICHAEL K. L. KONG

ASSOCIATE
HON KIAT CHUNG
KHONG MEI LIN
LIM TIAM FOK
CHONG SU-SAN
KARIN KAUR
DAVINDER KAUR
LEE POOI MEN
MOHAMADAIS KANAGASABAI
LAU MAY UNG
GEETA SWAPATHUNDRAM
KOH ST. JAMES
STEVEN THURUSELAMUDAN
JALALULLAH OTHMAN
KONG PIK FOONG
KHOTON TOTO KUM LOONG
LEONG TIEK HONG
SURINDER A. DHEDHARAN
MICHELE K. LIM
HO THANT THEANG LAURA
LIM CHEE KHANG
MANITHAYATHY S. KANDIAH
TAN CHEE LING
GEETA GHANAKAJAN
SHANTHI G. SOMASKANTHAN
YAP JUN YEE
AZLINDA EZRINA AMIN
TENG CHONG WOI
ENG TONG MH
WONG CH KIT
RAMANDRAN THAMBA
CAROLYN TAN SHEW LIAN
SABRINA AMIR
TREVOR GEORGE DE SILVA
PONGO KUALA
ADRIAN HE SUO TECK
GOH SU TAN
NG FOONG WONG
MOHAMED SUFIAN MOHOTAR
CLARIE ONG FU KI
LEE TONG JOO
TAU YEE MING
S.P. MUTHUKELOO
AZLAN SHAMSI
LEE KHAN LEONG

SEMBAH TUAN
YOUR REFERENCE

RUJUKAN KAMI
OUR REFERENCE

VSP/102/95
CD/Misc.

旭齡及拷律師樓

December 22, 1995

BY HAND

M/s Siva & Partners
Advocates & Solicitors
Suite No. 307, 3rd Floor,
Bangunan Loke Yew
No. 4 Jalan Mahkamah Persekutuan
50050 Kuala Lumpur

9048

Dear Sirs,

Re: Your Three Letters of December 18, 1995

We are the Solicitors for Dato' Param Cumaraswamy and refer to your three letters as above. It suffices for the present for us to say that no legal liability could arise on the part of our client for the matters alleged, and further our client puts in issue all the said matters alleged and/or their legal consequences as averred.

2. In this regard, we draw your attention to S.22(b) of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly of the United Nations on February 13, 1946 and acceded to by Malaysia on October 28, 1957.

3. If your clients wish to proceed nevertheless to litigation, we have instructions to accept service and please be notified that we wish to be informed and served in respect of every legal process or application you make in connection with this matter.

Yours faithfully,

SHOOK LIN & BOK

c.c. (1) Client

(2) U.N. Office at Geneva
Centre for Human Rights

rc

OFFICE DES NATIONS UNIES A GENÈVE

UNITED NATIONS OFFICE AT GENEVA

CENTRE POUR LES DROITS DE L'HOMME

CENTRE FOR HUMAN RIGHTS

Télégrammes: UNATIONS, GENÈVE
Télex : 41 29 62
Téléphone : 917 1234 - 917 3402
Téléfax : (22) 917 0123

Palais des Nations
CH-1211 Genève 10

Réf. N° : G/SO 214 (3-3-7)
(à rappeler dans la réponse)

The Secretariat of the United Nations present its compliments to the Permanent Mission of Malaysia to the United Nations Office at Geneva and has the honour to draw its attention to the following:

On 18 December 1995 Dato' Param Cumaraswamy, the Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers, received three letters from the law firm of Siva & Partners of Kuala Lumpur indicating their intent to initiate defamation proceedings against him on behalf of their clients: Tan Sri Dato' Vincent Tan Chee Yioun; Berjaya Industrial Berhad; Berjaya Corportation (Cayman) Limited; Insas Berhad; Megapolitan Nominees Sdn. Bhd.; and Dato' V.K. Lingam.

In this regard, the Secretariat would like to draw the attention of the Permanent Mission to the fact that all actions taken and words spoken or written by Mr. Cumaraswamy in the matters referred to in these letters have been done in his capacity as Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers. Special Rapporteurs of the Commission on Human Rights are deemed to be experts on mission of the United Nations. In accordance with Section 22 of Article VI of the Convention on the Privileges and Immunities of the United Nations of which Malaysia is a party, " Experts ... performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions ..." Section 22 (B) of the Convention provides that "they shall be accorded in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind."

Accordingly, pursuant to Article VI of the Convention on the Privileges and Immunities of the United Nations, Dato' Param Cumaraswamy is immune from legal process of every kind in respect of words spoken or written and acts done by him in the course of the performance of his mission.

Under Section 34 of the Convention on the Privileges and Immunities of the United Nations, the Government of Malaysia has an obligation to be "in a position under its own laws to give effect to the terms of this Convention." As such, the Secretariat would respectfully request that the competent Malaysian authorities be advised of the Special Rapporteur's privileges and immunities, and that they, in turn, advise the Malaysian courts of his immunity from legal process.

28 December 1995

OFFICE DES NATIONS UNIES A GENÈVE

UNITED NATIONS OFFICE AT GENEVA

CENTRE POUR LES DROITS DE L'HOMME

CENTRE FOR HUMAN RIGHTS

Télégrammes: UNATIONS, GENÈVE
Télex : 41 29 62
Téléphone : 917 1234 -907 1234
Téléfax : (22) 917 0123

Réf. N° : G/SO 214 (3-3-7)
(à rappeler dans la réponse)

Palais des Nations
CH-1211 Genève 10

D

1 March 1996

Dear Sir,

I refer to your letter of 26 February 1996 to Dato' Param Cumaraswamy in which you indicated your intent to initiate defamation proceedings against Mr Cumaraswamy on behalf of your clients: MBf Northern Securities Sdn Bhd; MBf Capital Berhad; and Dato' V.K. Lingam.

In this regard, I remind you to my previous letter dated 22 December 1995 sent to your offices in which I advised you that all actions taken and words spoken or written by Mr. Cumaraswamy in the matters referred to in your letters have been done in his capacity as Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers. Special Rapporteurs of the Commission on Human Rights are deemed to be experts on mission of the United Nations. In accordance with Section 22 of Article VI of the Convention on the Privileges and Immunities of the United Nations, of which Malaysia is a party, "Experts.....performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions....." Section 22 (B) of the Convention provides that "they shall be accorded in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind"

Accordingly, pursuant to Article VI of the Convention on the Privileges and Immunities of the United Nations, Dato' Param Cumaraswamy, the Special Rapporteur on the Independence of Judges and Lawyers, is immune from legal process of every kind in respect of words spoken or written and acts done by him in the course of the performance of his mission.

Yours sincerely,

Georg Mautner-Markhof
Chief, Special Procedures

c.c: Dato' Param Cumaraswamy

Siva &Partners
Advocates & Solicitors
Suite No. 307,3rd Floor
Bangunan Loke Yew
No. 4 Jalan Mahkamah Persekutuan
50050 Kuala Lumpur
Malaysia

By telefax: 00603-2931741

UNITED NATIONS NATIONS UNIES

19

POSTAL ADDRESS—ADRESSE POSTALE UNITED NATIONS, N.Y. 10017
CABLE ADDRESS—ADRESSE TELEGRAPHIQUE UNATIONS NEWYORK

REFERENCE.

The Legal Counsel of the United Nations presents his compliments to the Permanent Representative of Malaysia to the United Nations and has the honour to inform him that he had been advised by the United Nations Centre for Human Rights in Geneva that the Malaysian law firm of Siva & Partners of Kuala Lumpur has indicated their clients' intent to initiate defamation proceedings against Dato' Param Cumaraswamy, the Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers.

Special Rapporteurs of the Commission on Human Rights are deemed to be experts on mission of the United Nations. In accordance with section 22 of Article VI of the Convention on the Privileges and Immunities of the United Nations (the Convention) of which Malaysia is a party, "experts... performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions...." Section 22(b) of the Convention provides that "they shall be accorded, in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind."

Accordingly, the Special Rapporteur on the Independence of Judges and Lawyers, is immune from legal process of every kind in respect of words spoken or written and acts done by him in the course of the performance of his mission.

Under section 34 of the Convention, the Government of Malaysia has an obligation to be "in a position under its own law to give effect to the terms of this Convention." As such, it is for the competent Malaysian authorities to advise the Malaysian courts of the Special Rapporteur's immunity from legal process.

The Legal Counsel would be grateful if the competent Malaysian authorities could be requested to advise the Malaysian courts of the Special Rapporteur's immunity from legal process.

The Legal Counsel avails himself of this opportunity to assure the Permanent Representative of the Malaysia to the United Nations of his highest consideration.

29 March 1996

DOSSIER NO. 20

SUMMARY OF THE WRIT OF SUMMONS AND STATEMENT OF CLAIM

In the High Court of Malaya
at Kuala Lumpur

Suit No. S3-23-68

registered/issued : 12 December 1996

The Writ

Two Plaintiffs claim MR60,000,000 for damages, including exemplary damages for slander and for libel, as well as interest at 8% per annum accruable from the date of judgment until the date of payment, costs of the action and an injunction to restrain Defendant from further defaming Plaintiffs.

The Statement of Claim

At all material times, Defendant was an Advocate and Solicitor of the High Court of Malaya and the Chief Executive Partner of a Malaysian law firm (Shook Lin & Bok).

Defendant spoke and thereby published defamatory words of and concerning the Plaintiffs, their business and their conduct therein.

His words were calculated to disparage Plaintiffs in their business and to cause them pecuniary damage.

The publication of the words, seriously damaged Plaintiffs' trading reputations and brought them into public scandal, odium and contempt.

UNITED NATIONS NATIONS UNIES

POSTAL ADDRESS—ADRESSE POSTALE: UNITED NATIONS, N.Y. 10017
CABLE ADDRESS—ADRESSE TELEGRAPHIQUE: UNATIONS NEWYORK

REFERENCE:

3 January 1997

To Whom It May Concern

The United Nations hereby notifies the competent authorities of Malaysia that Dato' Param Cumaraswamy, national of Malaysia, is the Special Rapporteur on the Independence of Judges and Lawyers of the United Nations Commission on Human Rights. In this capacity, Dato' Cumaraswamy is entitled to the privileges and immunities accorded to experts performing missions for the United Nations under Articles VI and VII of the Convention on the Privileges and Immunities of the United Nations to which Malaysia has been a party since 28 October 1957 without any reservation..

In accordance with Section 22(b) of the Convention Dato' Cumaraswamy, in particular, shall be accorded by the competent authorities "in respect of words spoken or written and acts done by [the experts] in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on mission for the United Nations" (emphasis added).

It should also be noted that under Section 34 of the Convention a State acceding thereto should "be in a position under its own law to give effect to the terms of this Convention".

The United Nations hereby notifies the competent authorities of Malaysia by the present document that it maintains the immunity from legal process of its Special Rapporteur, Dato' Param Cumaraswamy.

The United Nations requests all those whom it may concern to extend to Dato' Param Cumaraswamy the privileges and immunities, courtesies and facilities to which he is entitled under the Convention on the Privileges and Immunited of the United Nations.

Ralph Zacklin
Director and Deputy to the
Under-Secretary-General
Office of the Legal Counsel

22

UNITED NATIONS NATIONS UNIES

POSTAL ADDRESS—ADRESSE POSTALE UNITED NATIONS, N.Y. 10017
CABLE ADDRESS—ADRESSE TELEGRAPHIQUE UNATIONS NEWYORK

REFERENCE:

6 January 1997

To Whom It May Concern

Re: Kuala Lumpur High Court
Civil Suit No. S3-23-68 in the year 1996
1. MBF Capital Berhad
2. MBF Northern Securities Sdn. Bhd.
vs.
Dato' Param Cumaraswamy

In connection with the Civil Suit No. S3-23-68 of 1996 by MBF Capital Berhad and MBF Northern Securities Sdn. Bhd. against Dato' Param Cumaraswamy, the United Nations hereby notifies the competent authorities of Malaysia that Dato' Param Cumaraswamy, national of Malaysia, is the Special Rapporteur on the Independence of Judges and Lawyers of the United Nations Commission on Human Rights. In this capacity, Dato' Cumaraswamy is entitled to the privileges and immunities accorded to experts performing missions for the United Nations under Articles VI and VII of the Convention on the Privileges and Immunities of the United Nations to which Malaysia has been a party since 28 October 1957 without any reservation.

In accordance with Section 22(b) of the Convention Dato' Cumaraswamy, in particular, shall be accorded by the competent authorities "in respect of words spoken or written and acts done by [the experts] in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on mission for the United Nations" (emphasis added).

It should also be noted that under Section 34 of the Convention a State acceding thereto should "be in a position under its own law to give effect to the terms of this Convention".

The United Nations hereby notifies the competent authorities of Malaysia by the present document that it maintains the immunity from legal process of its Special Rapporteur, Dato' Param Cumaraswamy.

The United Nations requests all those whom it may concern to extend to Dato' Param Cumaraswamy the privileges and immunities, courtesies and facilities to which he is entitled under the Convention on the Privileges and Immunited of the United Nations.

R Zacklin
Ralph Zacklin
Director and Deputy to the
Under-Secretary-General
Office of the Legal Counsel

ENGLISH TRANSLATION

23

IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR

(CIVIL DIVISION)

SUIT NO. S3 - 23 - 68 OF 1996

Between

1. MBf CAPITAL BERHAD
2. MBf NORTHERN SECURITIES SDN BHD — Plaintiffs

And

DATO' PARAM CUMARASWAMY — Defendant

A F F I D A V I T

I, DATO' PARAM CUMARASWAMY (K.P No. 4475178) of full age and a Malaysian citizen of care of Tingkat 20, Bangunan Arab-Malaysia, 55 Jalan Raja Chulan, 50200 Kuala Lumpur, do solemnly make oath and affirm as follows:-

1. I am the Defendant abovenamed.

2. Save where otherwise stated to the contrary, the facts deposed herein are within my personal knowledge.

3. I crave leave of this Honourable Court to refer to the Writ of Summons dated 12.12.1996 and filed herein. On 6.1.1997, my solicitors Messrs Shook Lin & Bok accepted service of the Writ on my behalf on a "without prejudice" basis.

4. I verily believe that I have to enter an appearance to the Writ within eight days of service of the Writ,

inclusive of the date of service. I wish to state that I intend to enter a Conditional Appearance to the said Writ and thereafter apply to stay proceedings or to set aside the Writ. Accordingly, I now make the instant application for leave of this Honourable Court for the purposes of entering Conditional Appearance to the Plaintiffs' purported action.

5. I wish to state that the Plaintiffs' action against me for purported defamation arises out of an article which appeared in the November 1995 issue of the International Commercial Litigation Magazine under the caption "Malaysian Justice on Trial".

I am now shown a copy of the said article which is annexed hereto and marked as Exhibit **"A"**.

6. I wish to state that the statements which were attributed to me and as reproduced in the said article, were made in my capacity as the United Nations Special Rapporteur on the Independence of Judges and Lawyers and in the course of my mission which required me to carry out an examination or inquiry into the independence of the Malaysian Judiciary in respect of the events relating to important aspects of certain controversial Court cases. It was expressly stated in the said article that I was investigating such cases.

7. The said Writ makes no reference whatsoever to the fact that the statements which were attributed to me were made in my capacity as United Nations Special Rapporteur on the Independence of Judges and Lawyers. I verily believe that it is not open to the Plaintiffs to deliberately avoid making any reference to my official capacity which is so clearly mentioned in the very article on which they base their claims. I verily believe that the Plaintiffs have to take the article as a whole.

8. In this regard, I wish to state that after the publication of the said article, I received a letter dated 26.2.1996 from Messrs V. Siva & Partners on behalf of the Plaintiffs. A copy of the said letter is now shown to me and annexed hereto and marked as Exhibit **"B"**.

9. On my instructions, my Solicitors Messrs Shook Lin & Bok, replied by letter dated 1.3.1996 and duly notified the Plaintiffs' solicitors that since the statements attributed to me were made in my official capacity as United Nations Special Rapporteur on the Independence of Judges and Lawyers and in the course of my mission in carrying out an investigation, I was therefore immune from legal process of every kind. A copy of the letter dated 1.3.1996 from Messrs Shook Lin & Bok to the Plaintiffs solicitors is now shown to me and annexed hereto and marked as Exhibit **"C"**.

10. Further, by letter dated 1.3.1996, the Centre for Human Rights of the United Nations Office at Geneva had written to the Plaintiffs' solicitors and had asserted that by virtue of Section 22(b) of the Convention on the Privileges and Immunities of the United Nations adopted by the General Assembly of the United Nations on 18.2.1946 and acceded to by Malaysia on 28.10.1957, I was immune from legal process of every kind in respect of words spoken or written and acts done in the course of performing my mission. A copy of the said letter dated 1.3.1996 from the United Nations office is now shown to me and annexed hereto and marked as Exhibit **"D"**.

11. Further, I wish to state that upon being served with the said Writ, I duly notified the United Nations office in New York and in response thereto, I received a letter dated 6.1.1997 from the Under-Secretary General Office of the Legal Counsel of the United Nationss which confirms that the United Nations maintains my immunity from legal process of every kind and that I am to be accorded immunity from any legal process in respect of the statements attributed to me in the article, which are now the subject matter of the Plaintiffs' purported action herein. A copy of the said letter from the United Nations office is now shown to me and annexed hereto and marked as Exhibit **"E"**.

12. Accordingly, I am advised in law by my Solicitors and verily believe that the statements attributed to me and

which were published in the said article are not actionable in law by the Plaintiffs or any other party, as there was at all material times and still is a complete legal immunity which I am entitled to under Section 22(b) of the Convention on the Privileges and Immunities of the United Nations. In the circumstances, the present Affidavit is explicitly made without prejudice to my privileges and immunities as United Nations Special Rapporteur on the Independence of Judges and Lawyers from legal process of every kind in respect of words spoken or written or acts done by me in the course of the performance of my mission.

13. In all the circumstances as aforestated, I verily believe that there is no legal basis for the issuance of the said Writ and the Writ ought to be set aside or further proceedings be stayed. I respectfully pray for an order granting me leave to enter Conditional Appearance so as to enable me to thereafter apply to set aside the Writ.

AFFIRMED at Kuala Lumpur by the)
said DATO' PARAM CUMARASWAMY this)
day of 09 JAN 1997 1997)

P. Cumaraswamy

Before me

PESURUHJAYA SUMPAH
No. W 147
TEONG KIAN MENG
MALAYSIA

Commissioner for Oaths
Kuala Lumpur

Commissioner For Oaths
Lot 138, Tingkat Satu
Wisma HLA, Jalan Raja Chulan
50200 Kuala Lumpur

This Affidavit is filed by Messrs Shook Lin & Bok, solicitors for the Defendant abovenamed and whose address for service is at 20th Floor, Arab-Malaysian Building, 55, Jalan Raja Chulan, 50200 Kuala Lumpur.

CD/10100/95/PC/L(08) (NB/S)

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

(BAHAGIAN SIVIL)

GUAMAN NO. S3 - 23 - 68 DALAM TAHUN 1996

Di Antara

1. MBf CAPITAL BERHAD
2. MBf NORTHERN SECURITIES SDN BHD — Plaintif-Plaintif

Dan

DATO' PARAM CUMARASWAMY — Defendan

DI HADAPAN PENOLONG KANAN PENDAFTAR
PUAN REIHANA BT. ABD. RAZAK

PADA 10 HARIBULAN JANUARI, 1997 — DALAM KAMAR

P E R I N T A H

ATAS PERMOHONAN Defendan yang dinamakan di atas dalam tindakan ini DAN SETELAH MEMBACA Ex-Parte Saman Dalam Kamar bertarikh 9 haribulan Januari, 1996 dan Afidavit Dato' Param Cumaraswamy yang diikrarkan pada 9 haribulan Januari, 1996 dan difailkan di sini DAN SETELAH MENDENGAR Encik S. Nantha Balan peguam bagi pihak Defendan ADALAH DIPERINTAHKAN bahawa Defendan diberi kebenaran untuk memasukkan Kehadiran Bersyarat terhadap tuntutan Plaintif-Plaintif di sini.

Bertarikh pada 10 haribulan Januari, 1997.

REIHANA BT. ABD. RAZAK
Penolong Kanan Pendaftar,
Mahkamah Tinggi, Kuala Lumpur.

Perintah ini adalah difailkan oleh Tetuan Shook Lin & Bok, Peguamcara bagi pihak Defendan yang dinamakan di atas dan alamat untuk penyampaian ke atasnya adalah Tingkat 20, Bangunan Arab-Malaysian, 55, Jalan Raja Chulan, 50200 Kuala Lumpur.

CD/10100/95/PC/L(08) (NB/S)

ENGLISH TRANSLATION

IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR

(CIVIL DIVISION)

SUIT NO. S3 - 23 - 68 OF 1996

Between

1. MBf CAPITAL BERHAD
2. MBf NORTHERN SECURITIES SDN BHD — Plaintiffs

And

DATO' PARAM CUMARASWAMY — Defendant

BEFORE THE SENIOR ASSISTANT REGISTRAR
PUAN REIHANA BT. ABD. RAZAK

DATED 10TH DAY OF JANUARY, 1997 — IN CHAMBERS

O R D E R

UPON THE APPLICATION of the Defendant abovenamed in this action AND UPON READING Ex-Parte Summons In Chambers dated 9th day of January, 1996 and the Affidavit of Dato' Param Cumaraswamy affirmed on the 9th day of January, 1996 and filed herein AND UPON HEARING Mr. S. Nantha Balan of Counsel for the Defendant IT IS ORDERED that the Defendant be given leave to enter Conditional Appearance in respect of the Plaintiffs' action herein.

Dated this 10th day of January, 1997.

Senior Assistant Registrar,
High Court, Kuala Lumpur.

This Order is filed by Messrs. Shook Lin & Bok, solicitors for the Defendant herein and whose address for service is at 20th Floor, Arab-Malaysian Building, 55, Jalan Raja Chulan, 50200 Kuala Lumpur.

CD/10100/95/PC/L(08) (NB/S)

ENGLISH TRANSLATION

25

IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR

(CIVIL DIVISION)

SUIT NO. S3 - 23 - 68 OF 1996

Between

1. MBf CAPITAL BERHAD
2. MBf NORTHERN SECURITIES SDN BHD — Plaintiffs

And

DATO' PARAM CUMARASWAMY — Defendant

MEMORANDUM OF CONDITIONAL APPEARANCE

Enter Conditional Appearance for the Defendant abovenamed without prejudice to an application to set aside the Writ.

Dated this 10th day of January, 1997

Solicitors for the Defendant

This Memorandum Of Conditional Appearance is filed by Messrs Shook Lin & Bok, solicitors for the Defendant abovenamed and whose address for service is at 20th Floor, Arab-Malaysian Building, 55, Jalan Raja Chulan, 50200 Kuala Lumpur.

This Appearance is to stand as unconditional unless the Defendant applies within 14 days to set aside the Writ, and obtains an Order to that effect.

Senior Assistant Registrar,
High Court, Kuala Lumpur.

CD/10100/95/PC/L(08) (NB/S)

EK 10/97

The Permanent Representative of Malaysia to the United Nations presents his compliments to the Legal Counsel of the United Nations and has the honour to refer to the latter's Note dated 29 March 1996 in regard to the matter of intended defamation proceedings against Dato' Param Cumaraswamy, the Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers.

The Permanent Representative of Malaysia wishes to inform the Legal Counsel of the United Nations that the Government of Malaysia has fulfilled its obligation under Section 34 of the Convention on the Privileges and Immunities of the United Nations in that there has already been enacted legislation to give effect to the terms of the Convention. The legislation in question is the "Diplomatic Privileges (United Nations and International Court of Justice) Order 1949", a copy of which is attached herewith. In particular, paragraph 12(b) of the Order is relevant. The Malaysian Evidence Act 1950, the relevant portion of which is also attached herewith, obligates courts to take judicial notice of all laws or regulations having the force of law in Malaysia, which would therefore include the Diplomatic Privileges (United Nations and International Court of Justice) Order 1949.

The Permanent Representative of Malaysia to the United Nations avails himself of this opportunity to assure the Legal Counsel of the United Nations of his highest consideration.

New York
14 January 1997.

UNITED NATIONS NATIONS UNIES

POSTAL ADDRESS—ADRESSE POSTALE UNITED NATIONS, N.Y. 10017
CABLE ADDRESS—ADRESSE TELEGRAPHIQUE: UNATIONS NEWYORK

REFERENCE:

The Legal Counsel of the United Nations presents his compliments to the Permanent Representative of Malaysia and has the honour to refer to the latter's Note Verbale dated 14 January 1997 concerning the defamation proceedings which have been initiated against the United Nations Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers in the Civil Division of the High Court of Malaya at Kuala Lumpur. The Legal Counsel had previously addressed a Note Verbale dated 29 March 1996 to the Permanent Representative of Malaysia informing the latter that the Malaysian law firm of Siva & Partners of Kuala Lumpur had indicated their clients' intent to initiate defamation proceedings against the Special Rapporteur. The aforementioned clients included MBf Northern Securities Sdn Bhd and MBf Capital Berhad, the plaintiffs on whose behalf Siva & Partners filed a complaint against the Special Rapporteur in the Civil Division of the High Court of Malaya at Kuala Lumpur on 12 December 1996.

The Legal Counsel reaffirms that Special Rapporteurs of the Commission on Human Rights are deemed to be experts on mission of the United Nations. In accordance with Section 22 of Article VI of the Convention on the Privileges and Immunities of the United Nations (the Convention) of which Malaysia is a party since 28 October 1957 without reservation, "experts ... performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions ..." Section 22(b) of the Convention provides that "they shall be accorded, in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind." The latter has been confirmed by the International Court of Justice in its Advisory Opinion of 15 December 1989 on the Applicability of Article VI, section 22 of the Convention on the Privileges and Immunities of the United Nations. Under section 34 of the Convention, the Government of Malaysia has an obligation to be "in a position under its own law to give effect to the terms of this Convention."

Please be further advised that pursuant to Malaysian law, in particular paragraph 12(b) of the Diplomatic Privileges (United Nations and International Court of Justice) Order of 1949, "except in so far as in any particular case any privilege or immunity is waived by the Secretary-General of the United Nations, persons employed on missions on behalf of the United Nations shall enjoy immunity

from legal process of every kind in respect of words spoken or written and all acts done by them in the exercise of these functions." More importantly, in accordance with paragraph 57(1)(a) of the Malaysian Evidence Act of 1950, the court shall take judicial notice of "all laws or regulations having the force of law now or heretofore in force or hereafter to be in force in Malaysia or any part thereof." Paragraph 56 of the Act provides that "no fact of which the court will take judicial notice need be proved."

To the extent that the privileges and immunities enjoyed by the Special Rapporteur on the Independence of Judges and Lawyers have not been waived by the Secretary-General of the United Nations in this particular case, the Special Rapporteur is immune from legal process of every kind in respect of words spoken or written and acts done by him in the course of the performance of his mission. Pursuant to section 34 of the Convention, the Government of Malaysia therefore has a legal obligation to give effect to the terms of section 22(b) of the Convention and paragraph 12(b) of the Malaysian Diplomatic Privileges Order of 1949 and to advise the Malaysian courts of the Special Rapporteur's immunity from legal process in this case. Furthermore, the competent Malaysian court has an obligation, under paragraphs 56 and 57 of the Malaysian Evidence Act of 1950, to take judicial notice of the Special Rapporteur's immunity which pursuant thereto need not be proved.

The United Nations attaches great importance to this matter as it affects not only the status of the Special Rapporteur on the Independence of Judges and Lawyers but also the status of all Special Rapporteurs of the United Nations system.

The Legal Counsel therefore requests the competent Malaysian authorities to promptly advise the Malaysian courts of the Special Rapporteur's immunity from legal process.

The Legal Counsel avails himself of this opportunity to assure the Permanent Representative of Malaysia to the United Nations of his highest consideration.

15 January 1997

Note to The File

On Wednesday, 5 March 1997, Mr. Zacklin met with the Acting Permanent Representative of Malaysia to discuss the information conveyed by Mr. Cumaraswamy in his facsimile of 5 March 1997 concerning the certificate to be presented by the Minister for Affairs of Malaysia to the competent court asserting the Special Rapporteur's immunity from legal process.

Mr. Zacklin informed the Acting Permanent Representative that in a letter to the President of the Law Society of England and Wales, the Attorney General of Malaysia had indicated that the Minister for Foreign Affairs would certify that the Special Rapporteur "shall be accorded immunity from legal process of every kind in respect of words spoken and acts done by him in the course of the performance of his mission as clearly stated in his mandate. Whether the words were spoken in line with the performance of his mission was for him to prove in court." (emphasis added)

Mr. Zacklin advised the Permanent Representative that the latter part of the certificate clearly violates the Special Rapporteur's immunity from legal process and the Secretary-General's exclusive authority to determine the applicability and scope of such immunity in contravention of the Government of Malaysia's obligations under the Convention on the Privileges and Immunities of the United Nations as well as the provisions of the Malaysian Evidence Act of 1950 pursuant to which the court must take judicial notice of all matters pertaining to the Special Rapporteur's immunity and which therefore need not be proved.

Mr. Zacklin notified the Permanent Representative that, if such language is indeed currently part of the Minister for Foreign Affairs' certificate, the United Nations formally requests that such certificate be immediately withdrawn and revised in accordance with the Government of Malaysia's international legal obligations. Mr. Zacklin concluded the meeting by stating that the Government's failure to assert the Special Rapporteur's immunity accurately and completely would give rise to a dispute between the United Nations and the Government of Malaysia. In the light of the upcoming session of the Commission on Human Rights, he was confident that the Government of Malaysia would seek to avoid such an outcome.

The Permanent Representative assured Mr. Zacklin that he would immediately convey the foregoing to the Ministry for Foreign Affairs.

5 March 1997

Mona Khalil

THE SECRETARY-GENERAL

7 March 1997

To Whom It May Concern

In connection with the Civil Suit No. S3-23-68 of 1996 by MBF Capital Berhad and MBF Northern Securities Sdn. Bhd. against Dato' Param Cumaraswamy, the Secretary-General of the United Nations hereby notifies the competent authorities of Malaysia that Dato' Param Cumaraswamy, national of Malaysia, is the Special Rapporteur on the Independence of Judges and Lawyers of the United Nations Commission on Human Rights. In this capacity, Dato' Cumaraswamy is entitled to the privileges and immunities accorded to experts performing missions for the United Nations under Articles VI and VII of the Convention on the Privileges and Immunities of the United Nations to which Malaysia has been a party since 28 October 1957 without any reservation.

In accordance with section 22 of Article VI of the Convention, "experts... performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions...". Section 22(b) of the Convention further provides that "they shall be accorded, in respect of words spoken or written and acts done by them in the course of the performance of

their mission, immunity from legal process of every kind". As such, the Special Rapporteur on the Independence of Judges and Lawyers, is immune from legal process of every kind in respect of words spoken or written and acts done by him in the course of the performance of his mission.

The Secretary-General has determined that the words which constitute the basis of plaintiffs' complaint in this case were spoken by the Special Rapporteur in the course of his mission. The Secretary-General therefore maintains that Dato' Param Cumaraswamy is immune from legal process with respect thereto.

Under Section 34 of the Convention, the Government of Malaysia has a legal obligation to "be in a position under its own law to give effect to the terms of this Convention". The Secretary-General of the United Nations therefore requests the competent Malaysian authorities to extend to Dato' Param Cumaraswamy the privileges and immunities, courtesies and facilities to which he is entitled under the Convention on the Privileges and Immunities of the United Nations.

Kofi A. Annan

ENGLISH TRANSLATION

30

IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR

(CIVIL DIVISION)

SUIT NO. S3 - 23 - 68 OF 1996

Between

1. MBf CAPITAL BERHAD
2. MBf NORTHERN SECURITIES SDN BHD — Plaintiffs

And

DATO' PARAM CUMARASWAMY — Defendant

FURTHER AFFIDAVIT

I, DATO' PARAM CUMARASWAMY (K.P No. 4675178) of full age and a Malaysian citizen of care of Tingkat 20, Bangunan Arab-Malaysia, 55 Jalan Raja Chulan, 50200 Kuala Lumpur, do hereby solemnly affirm and state as follows:-

1. I am the United Nations Special Rapporteur on the Independence of Judges and Lawyers.

2. Save where otherwise stated to the contrary, the facts deposed herein are within my personal knowledge in my aforesaid capacity.

3. I crave leave to refer to, repeat and adopt all the averments in my previous Affidavits affirmed on 20.1.1997 and 18.2.1997 filed herein.

4. I refer in particular to paragraphs 7, 10, 11, 12, 13 and 14 of my Affidavit affirmed on 20.1.1997 and paragraph 9 of my Affidavit affirmed on 18.2.1997. In this regard I have today received a copy of a certificate from the Secretary General of the United Nations dated 7.3.1997 duly confirming in writing that the words which constitute the basis of Plaintiffs' complaint in this case were spoken by me in the course of my mission and therefore he maintains my immunity from legal process with respect thereto. I am now shown a copy of the letter dated 7.3.1997 from the Secretary General of the United Nations which is annexed hereto and marked as exhibit "A".

5. Further, I informed by the office of the Legal Counsel of the United Nations and verily believe that the original of the letter dated 7.3.1997 from the Secretary General of the United Nations as stated above, will shortly be or has been handed over by the Legal Counsel of the United Nations to the Acting Permanent Representative of Malaysia to the United Nations.

6. I respectfully pray for an order in terms of this Application.

AFFIRMED at Kuala Lumpur by the)
said DATO' PARAM CUMARASWAMY this)
day of 11 MAR 1997 1997)

Before me

PESURUHJAYA SUMPAH
No. W 147
TEONG KIAN MENG
MALAYSIA

Commissioner for Oaths
Kuala Lumpur

Commissioner For Oaths
No. 138, Tingkat Satu
No. 11LA, Jalan Raja Chulan
Kuala Lumpur

This Further Affidavit is filed by Messrs Shook Lin & Bok, solicitors for the Defendant abovenamed and whose address for service is at 20th Floor, Arab-Malaysian Building, 55, Jalan Raja Chulan, 50200 Kuala Lumpur.

CD/10100/95/PC/L(08) (NB/S)

THE SECRETARY-GENERAL

7 March 1997

To Whom It May Concern

In connection with the Civil Suit No. S3-23-68 of 1996 by MBF Capital Berhad and MBF Northern Securities Sdn. Bhd. against Dato' Param Cumaraswamy, the Secretary-General of the United Nations hereby notifies the competent authorities of Malaysia that Dato' Param Cumaraswamy, national of Malaysia, is the Special Rapporteur on the Independence of Judges and Lawyers of the United Nations Commission on Human Rights. In this capacity, Dato' Cumaraswamy is entitled to the privileges and immunities accorded to experts performing missions for the United Nations under Articles VI and VII of the Convention on the Privileges and Immunities of the United Nations to which Malaysia has been a party since 28 October 1957 without any reservation.

In accordance with section 22 of Article VI of the Convention, "experts... performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions...". Section 22(b) of the Convention further provides that "they shall be accorded, in respect of words spoken or written and acts done by them in the course of the performance of

their mission, immunity from legal process of every kind". As such, the Special Rapporteur on the Independence of Judges and Lawyers, is immune from legal process of every kind in respect of words spoken or written and acts done by him in the course of the performance of his mission.

The Secretary-General has determined that the words which constitute the basis of plaintiffs' complaint in this case were spoken by the Special Rapporteur in the course of his mission. The Secretary-General therefore maintains that Dato' Param Cumaraswamy is immune from legal process with respect thereto.

Under Section 34 of the Convention, the Government of Malaysia has a legal obligation to "be in a position under its own law to give effect to the terms of this Convention". The Secretary-General of the United Nations therefore requests the competent Malaysian authorities to extend to Dato' Param Cumaraswamy the privileges and immunities, courtesies and facilities to which he is entitled under the Convention on the Privileges and Immunities of the United Nations.

Kofi A. Annan

Miss MONA KHAUL

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31

INTERNATIONAL ORGANIZATIONS (PRIVILEGES AND IMMUNITIES) ACT 1992 (ACT 485)

CERTIFICATE UNDER SECTION 7(1)

I, DATUK ABDULLAH BIN HJ. AHMAD BADAWI, Minister of Foreign Affairs, Malaysia by virtue of the power granted to me under section 7(1) of the International Organizations (Privileges and Immunities) Act 1992 (Act 485) hereby certify that Dato' Param Cumaraswamy was appointed by the United Nations in 1994 for a period of three years as Special Rapporteur on the Independence of Judges and Lawyers, whose mandate is as follows:

a) **to inquire into any substantial allegations transmitted to him and report his conclusions;**

b) **to identify and record not only attacks on the independence of the judiciary, lawyers and court officials but also progress achieved in protecting and enhancing their independence, and make concrete recommendations including the provision of advisory services or technical assistance when they are requested by the State concerned;**

c) **to study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers.**

2. Under the Convention on the Privileges and Immunities of the United Nations 1946 and under the Diplomatic Privileges (United Nations and International Court of Justice) Order 1949 Dato' Param Cumaraswamy shall enjoy the privileges and immunities as are necessary for the independent exercise of his functions. He shall be accorded immunity from legal process of every kind only in respect of words spoken or written and acts done by him in the course of the performance of his mission.

Dated 12th day of March 1997

(DATUK ABDULLAH BIN HJ. AHMAD BADAWI)
Minister of Foreign Affairs

UNITED NATIONS NATIONS UNIES

POSTAL ADDRESS—ADRESSE POSTALE UNITED NATIONS, N.Y. 10017
CABLE ADDRESS—ADRESSE TELEGRAPHIQUE UNATIONS NEWYORK

32

REFERENCE:

14 April 1997

Dear Mr. Ambassador,

I have the honour to refer to Civil Suit No. S3-23-68 of 1996 by MBF Capital Barhad and MBF Northern Securities Sdn. Bhd. against Dato Param Cumaraswamy. As you know, on 7 March 1997 the Secretary-General signed a note, addressed "To Whom It May Concern" in respect to this proceeding (copy attached) in which he determined that the words which constitute the basis of plaintiff's complaint in this case were spoken by Mr. Cumaraswamy in his capacity as Special Rapporteur on the Independence of Judges and Lawyers of the United Nations Commission on Human Rights, and were spoken in the course of his mission for the Commission.

In addition, as you know, the Minister of Foreign Affairs of your Government on 12 March 1997 signed a "Certificate Under Section 7(1)" of the International Organizations (Privileges and Immunities) Act 1992 (Act 485), in which he certified that Mr. Cumaraswamy does enjoy privileges and immunities as are necessary for the independent exercise of his functions, and therefore is to be accorded immunity from legal process of any kind but "only in respect of word spoken or written and acts done by him in the course of the performance of his mission".

The United Nations has just been informed that the court in which the above-mentioned proceedings are being conducted is in the course of hearing arguments on the question whether, in spite of the conclusive certification of the Secretary-General, Mr. Cumaraswamy was indeed acting within the course of his official functions. It is the position of the United Nations that if the Secretary-General's decision on this point is not considered as

H.E. Mr. Ismail Razali
Permanent Representative of Malaysia
to the United Nations
New York

conclusive, this may constitute a difference arising out of the interpretation or application of the Convention on the Privileges and Immunities of the United Nations, to which Malaysia is a party without any reservation. According to Section 30 of that Convention, any such differences that arise between the United Nations on the one hand and a Member State on the other, are to be submitted to the International Court of Justice for an advisory opinion, rather than being litigated in any national court.

The United Nations, therefore, considers that the Government need make arrangements to ensure that no court of Malaysia would undertake to consider whether or not the Secretary-General's determination is conclusive as to the official functions of an expert on mission.

Yours sincerely,

Hans Corell
Under-Secretary-General for Legal Affairs
The Legal Counsel

33

UNITED NATIONS NATIONS UNIES

POSTAL ADDRESS—ADRESSE POSTALE UNITED NATIONS, N.Y. 10017
CABLE ADDRESS—ADRESSE TELEGRAPHIQUE UNATIONS NEWYORK

REFERENCE.

The Legal Counsel of the United Nations presents his compliments to the Alternate Permanent Representative of Malaysia and has the honour to refer to the ongoing proceedings in connection with the defamation complaint brought against the United Nations Special Rapporteur on the Independence of Judges and Lawyers in the Malaysian civil courts. Notwithstanding the presentation to the court of the "Certificate Under Section 7(1)" of the International Organizations (Privileges and Immunities) Act 1992 (Act 485) signed by the Minister for Foreign Affairs of Malaysia on 12 March 1997 and the Secretary-General's note of 7 March 1997, the court has held extensive hearings, now adjourned until 19 May to hear further plaintiff's arguments, to examine the Special Rapporteur's immunity from legal process. It is therefore clear that the Minister's certificate has not adequately asserted, or that the court has not taken adequate notice of, the Special Rapporteur's immunity from legal process in respect of words or acts related to his official mission or the Secretary-General's exclusive authority to determine whether particular words or acts did relate to such a mission.

In this connection and further to his letter of 14 April 1997, the Legal Counsel has the honour to refer to the latter part of the Minister for Foreign Affairs' Certificate which provides that the Special Rapporteur "shall be accorded immunity from legal process of every kind <u>only</u> in respect of words spoken or written and acts done by him in the course of the performance of his mission" (emphasis added), which may have misled the court into believing that it is its task to determine whether the words here in question were spoken by the Special Rapporteur in his official capacity. The Legal Counsel therefore requests the competent Malaysian authorities to amend or supplement the afore-mentioned Certificate to certify that, by his note of 7 March 1997, the Secretary-General has exercised his exclusive authority and determined that the words which constitute the basis of plaintiff's complaint in Civil Suit S3-23-68 were spoken by the Special Rapporteur in the course of the performance of his mission and that the Special Rapporteur is therefore immune from legal process with respect thereto.

The Legal Counsel avails himself of this opportunity to assure the Alternate Permanent Representative of Malaysia to the United Nations of his highest consideration.

2 May 1997

OFFICE DES NATIONS UNIES À GENÈVE
HAUT COMMISSAIRE AUX DROITS DE L'HOMME
CENTRE POUR LES DROITS DE L'HOMME

UNITED NATIONS OFFICE AT GENEVA
HIGH COMMISSIONER FOR HUMAN RIGHTS
CENTRE FOR HUMAN RIGHTS

Téléfax: (41-22) 9170092
Télégrammes: UNATIONS, GENEVE
Téléx: 41 29 62
Téléphone: (41-22) 9173356

Reference:

Palais des Nations

CH 1211 Geneva 10

Mr. Connell

94

9712857
JUN 17 1997

Geneva, 30 May 1997

Your Excellency,

The special rapporteurs/representatives/experts and chairpersons of working groups of the Special Procedures and the Advisory Services Programme of the United Nations Commission on Human Rights, meeting in Geneva from 21 to 23 May 1997, are alarmed by the litigation pursued against Mr. Param Cumaraswamy, United Nations Special Rapporteur on the Independence of Judges and Lawyers. Our understanding is that a civil action has commenced against the Special Rapporteur in the Kuala Lumpur High Court by two public corporations. The alleged defamation refers to an article that appeared in a London-based legal magazine in which Mr. Cumaraswamy was interviewed in his capacity as the United Nations Special Rapporteur on the Independence of Judges and Lawyers.

As Experts performing missions for the United Nations, we are immune from legal process under the 1946 Convention on the Privileges and Immunities of the United Nations, to which Malaysia is also a party. This immunity is accorded "in respect of words spoken or written and acts done in the course of the performance of their mission...". Our immunity has been confirmed by the International Court of Justice (ICJ) *inter alia* in the 1989 *Mazilu* case. In that case, the ICJ also determined that experts enjoy such privileges and immunities throughout their mandate, whether they are traveling or not.

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JUN 1 0 1997
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OFFICE OF LEGAL AFFAIRS
USG LOG NO.

MK

H. E. Mr. Kofi Annan
Secretary-General
United Nations Organization
UN Headquarters
New York, N.Y.

cc: H.E. Mr. Miroslav Somol
Chairman of the 53rd session
of the Commission on Human Rights

We greatly appreciate the prompt action taken by Your Excellency in issuing a certificate asserting Mr. Cumaraswamy's immunity. We also understand that the Malaysian Government has issued a certificate. We are concerned that this latter certificate was drafted in terms which would appear to leave jurisdiction to the Court to determine whether Mr. Cumaraswamy was or was not acting within his mandate; a fact which it was for the Secretary-General to determine. We are concerned in this regard that, several court sessions have already been held to hear the case. The mere holding of such court sessions and the fact that the Special Rapporteur, or his legal representative, has to appear before and defend himself in court in itself undermines the immunity granted to us under international law.

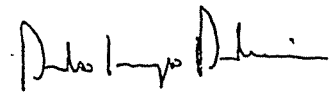
The United Nations Experts view such a situation with great concern. Undermining the immunity accorded to one expert constitutes an attack on the entire system and institution of United Nations human rights special procedures and mechanisms.

All differences arising out of the interpretation or application of the Convention should be referred to the International Court of Justice, as is specified by the 1946 Convention on the Privileges and Immunities of the United Nations. They are not to be decided by national courts with the possibility of varying rulings, interpretations and jurisprudence.

In light of the present circumstances, we are of the view that differences on the interpretation on the application of the convention have already risen.

We therefore, respectfully request Your Excellency, to immediately invoke the procedures outlined in Section 30 of the 1946 Convention on the Privileges and Immunities of the United Nations for a request to be made to seek an advisory opinion from the International Court of Justice. The Convention states that the opinion of the Court must be accepted as decisive by the parties.

Please accept the assurance of our highest consideration.



Mr. Paulo Sergio Pinheiro
Chairman
Fourth Meeting of special rapporteurs/representatives/experts
and chairpersons of working groups of the Special Procedures
and the Advisory Services Programme
of the United Nations Commission on Human Rights

DOSSIER NO. 35

SUMMARY OF THE JUDGEMENT OF HIGH COURT OF KUALA LUMPUR DELIVERED ON 28 JUNE 1997

The Court dismissed an Application by Mr. Cumaraswamy to set aside Plaintiffs' writ on the basis of his immunity from suit pursuant to the Convention on the Privileges and Immunities of the United Nations.

The Court concluded that the Secretary-General's certificate of immunity is to be viewed as an opinion that has no more probative value than a document which appears wanting in material particulars. It also indicated that the question whether Mr. Cumaraswamy's actions were within the scope of his mandate must be determined when the evidence is before the Court. The Court also noted that its jurisdiction was not ousted by the Mazilu Case since decisions of the International Court of Justice on a point of public international law are not binding on the Court.

The Court held that it had jurisdiction to hear the case on the merits, including making a determination whether Mr. Cumaraswamy was entitled to any immunity. The Court also ordered that Mr. Cumaraswamy's Application be dismissed with costs and that those costs be taxed and paid forthwith and that Mr. Cumaraswamy was to file and serve his defence within 14 days from the date of the Order.

United Nations

Press Release

Information Service | United Nations Office at Geneva

HR/97/43
30 June 1997

HEAD OF OFFICE OF HIGH COMMISSIONER FOR HUMAN RIGHTS EXPRESSES CONCERN OVER MALAYSIAN COURT'S DECISION ON IMMUNITY OF UN HUMAN RIGHTS RAPPORTEUR

Ruling "Establishes a Dangerous Precedent" Says Ralph Zacklin

The Officer-in-Charge of the Office of the High Commissioner for Human Rights, Ralph Zacklin, is deeply concerned over a decision issued by a High Court of Malaysia that it has a jurisdiction to hear an application brought by plaintiffs claiming that statements made by the Special Rapporteur on the Independence of Judges and Lawyers, Param Cumaraswamy, were defamatory. In its decision, the Court held that the certificate given by the Secretary-General of the United Nations confirming the Special Rapporteur's immunity from legal process was merely an opinion which is not binding upon the Court.

This decision establishes a dangerous precedent by undermining the immunity accorded to an expert who is on mission for the United Nations. In deciding that a national court has the jurisdiction to determine whether a Special Rapporteur is acting in the course of the performance of his mission, the court is usurping the exclusive authority of the Secretary-General to determine whether the words spoken or written or acts done by experts on mission are performed in the course of their missions, and therefore, entitled to immunity from legal process of every kind.

This decision, if allowed to stand, presents a serious threat to the entire system and institution of the special procedure mechanisms of the Commission on Human Rights, which is a pillar of the United Nations human rights programme. If independent experts and special rapporteurs are denied such immunity and subjected to legal process in domestic courts, this would have a negative effect on their ability to carry out their mandates and to report on violations of human rights, thus undermining their independence.

* *** *

United Nations Information Service in Geneva Press Releases are available on the Internet at the following address:
http://www.unog.ch

For use of information media; not an official record

UNITED NATIONS NATIONS UNIES

37

POSTAL ADDRESS—ADRESSE POSTALE UNITED NATIONS, N.Y. 10017
CABLE ADDRESS—ADRESSE TELEGRAPHIQUE UNATIONS NEWYORK

REFERENCE:

The Legal Counsel of the United Nations presents his compliments to the Permanent Representative of Malaysia and, further to previous correspondence and discussions concerning the defamation proceedings against the Special Rapporteur on the Independence of Judges and Lawyers in the Malaysian civil courts, has the honour to refer to the judge's decision of 28 June 1997. As the Permanent Representative may know, the judge has decided that she has jurisdiction to hear an application brought by plaintiffs claiming that statements made by the Special Rapporteur were defamatory. Her decision is based, in part, on her determination that the Secretary-General of the United Nations' note of 7 March 1997 confirming the Special Rapporteur's immunity from legal process was merely "an opinion" with scant probative value and no binding force upon the court and that the Minister for Foreign Affairs' "Certificate Under Section 7(1)" of the International Organizations (Privileges and Immunities) Act 1992 (Act 485) signed on 12 March 1997 "would appear to be no more than a bland statement as to a state of fact pertaining to the Defendant's status and mandate as a Special Rapporteur and appears to have room for interpretation."

The judge's decision disregards the Secretary-General's exclusive authority to determine whether the words which constitute the basis of plaintiff's complaint in Civil Suit S3-23-68 were spoken by Dato' Param Cumaraswamy in his capacity as Special Rapporteur on the Independence of Judges and Lawyers in the course of the performance of his mission and that the Special Rapporteur is therefore immune from legal process with respect thereto.

The Legal Counsel's concern, as previously expressed in his notes to the Permanent Representative of 2 May 1997 and 14 April 1997, that the Minister for Foreign Affairs' Certificate might mislead the court into believing that it is its task to determine whether the words here in question were

spoken by the Special Rapporteur in his official capacity, has been borne out by the judge's determination that the Minister's Certificate is not conclusive.

In the light of the foregoing, the Legal Counsel is of the view that the present situation is that the Government of Malaysia has not adequately fulfilled its obligation, under section 34 of the Convention, to give effect to the terms of section 22(b) thereof. If the judge's decision is not reversed on appeal and the trial is allowed to proceed against the Special Rapporteur, a dispute between the United Nations and Malaysia would arise under Section 30 of the Convention. It would therefore seem essential for the Government to remind the appellate courts of Malaysia's obligation to fulfil its obligations under the Convention.

Furthermore, as the judge has ordered the Special Rapporteur to submit a defense within two weeks, it is necessary that that order be stayed immediately lest the Special Rapporteur be forced into a position of having to defend his official actions before a domestic Malaysian court. Should that occur, the Secretary-General might consider it essential to invoke Article 30 of the Convention immediately.

The Legal Counsel avails himself of this opportunity to assure the Permanent Representative of Malaysia to the United Nations of his highest consideration.

30 June 1997

UNITED NATIONS NATIONS UNIES

38

POSTAL ADDRESS—ADRESSE POSTALE UNITED NATIONS, N.Y. 10017
CABLE ADDRESS—ADRESSE TELEGRAPHIQUE: UNATIONS NEWYORK

REFERENCE:

The Legal Counsel of the United Nations presents his compliments to the Permanent Representative of Malaysia and, further to previous correspondence and notes concerning the defamation proceedings against the Special Rapporteur on the Independence of Judges and Lawyers in the Malaysian civil courts, and especially his note verbale of 1 July 1997 and his conversation on that day with the Deputy Permanent Representative of your Mission, has the honour to specify with greater precision what actions he considers that the Government of Malaysia need take to ensure that Malaysia's obligations under the Convention on the Privileges and Immunities of the United Nations are fulfilled in connection with the above-referenced litigation.

Section 22(b) of the Convention on the Privileges and Immunities of the United Nations, to which Malaysia has been a party since 28 October 1957, without any reservation, provides in pertinent part that: "Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular they shall be accorded: ... (b) in respect of words spoken or written and acts done by them in the course of the performance of their mission, <u>immunity from legal process of every kind</u>." This immunity is designed to shield experts performing tasks for the United Nations from having to answer in national courts for any of the protected words or acts, and must be understood as including protection from not only the consequences of any adverse decisions of a domestic court in relation to such words and acts but also from the burden of having to defend a civil or criminal suit relating to such acts.

As your Government is aware, Mr. Data' Param Cumaraswamy was originally served with writs in the current suits in December 1996, and the Government was informed by early January 1997 that the United Nations considered that the Convention provided immunity from those suits. Indeed, by 12 March 1997 the Minister for Foreign Affairs submitted a Certificate in relation to these proceedings. Nevertheless, the proceedings were allowed to continue, in spite of the repeated objections of the United Nations and without any further intervention by your Government, with personal expense for the Special Rapporteur, until the High Court on 28 June 1997 handed down its negative decision on his application to set aside the writ because of his immunity from legal process in respect of the subject matter of the writ; the Court ordered that the Special Rapporteur's summons be dismissed with costs, that costs be taxed and paid forthwith by him and that he file and serve his defense within 14 days of the date of the order. Although the amount of the costs to be taxed have not yet been determined, they are likely to involve many hundreds of thousands of Malaysian Ringgit, quite aside from the expenses that the Special Rapporteur has himself incurred. Moreover, he will immediately have to incur further expenses in preparing his defense on short notice, and may potentially be exposed to further costs taxed to him should he loose the proceedings in the High Court. Any appeal of the High Court's order to the Court of Appeals will involve further expenses, as well as the risk of further taxed costs.

It is the position of the United Nations that to expose one of its special rapporteurs to such burdensome proceedings and potentially ruinous expenses and taxed costs, quite aside from any substantive judgment that might be awarded against him, in respect of words uttered in the performance of the Rapporteur's official functions as determined by the United Nations, is

calculated to interfere with his independence in performing these functions and is likely to have a negative effect on the autonomy of other such rapporteurs and similar experts on mission, who may fear that the performance of their functions could result in comparable destructive legal attacks against them.

Consequently the United Nations considers that it is the responsibility of your Government to intervene in the current proceeding so that the burden of any further defense, including any expenses and taxed costs resulting therefrom, be assumed by the Government. Furthermore, Mr. Cumaraswamy should be held harmless in respect of the expenses he has already incurred or that are being taxed to him from the proceedings so far. Finally, to prevent the accumulation of further expenses and costs and further need for submitting a defense until the matter of his immunity is definitively resolved between the United Nations and your Government, it appears necessary for your Government to support the motion that we understand Mr. Cumaraswamy has made to have the High Court proceedings stayed until such resolution.

Should your Government decide that it cannot or does not wish to protect and hold harmless the Special Rapporteur in the manner indicated above, then the United Nations is likely to conclude that a difference has arisen between itself and your Government within the meaning of the second sentence of Section 30 of the Convention on the Privileges and Immunities of the United Nations. In that event the Secretary-General would have to approach the General Assembly to seek, in accordance with that Section, an advisory opinion on any legal questions involved in that difference, which must, as also provided in that Section, be accepted as decisive by the parties.

The Legal Counsel avails himself of this opportunity to assure the Permanent Representative of Malaysia to the United Nations of his highest consideration.

7 July 1997

UNITED NATIONS NATIONS UNIES

POSTAL ADDRESS—ADRESSE POSTALE UNITED NATIONS, N.Y. 10017
CABLE ADDRESS—ADRESSE TELEGRAPHIQUE UNATIONS NEWYORK

8 July 1997

REFERENCE.

Dear Ambassador Razali,

Further to our conversation yesterday and to the note verbale that I handed to you on that occasion, I must now inform you of the latest developments in the respect of the defamation suit that has been brought in the Malaysian courts against the Human Rights Commission's Special Rapporteur on the Independence of Judges and Lawyers, Mr. Dato' Param Cumaraswamy.

Earlier today, the President of the Court of Appeal, sitting as a single judge, dismissed, with costs, Mr. Cumaraswamy's application for stay of execution. He will therefore now have to file his substantive defense, by Friday, 11 July, and may almost immediately have to pay both the costs associated with his failed motion for immunity in the trial court and of his failed application to the Court of Appeal for a stay of execution of the orders of the trial court.

This development adds considerable urgency to the matters we discussed yesterday afternoon. In particular, unless your Government can now intervene with the competent courts to effect an immediate stay of execution, the Secretary-General will have no choice but to raise this matter in the General Assembly, pointing out that unless the Malaysian Government assumes the defense of the current proceedings and the costs associated therewith, the United Nations will most likely be considered liable for these.

Sincerely yours,

Hans Corell
Under-Secretary-General for Legal Affairs
The Legal Counsel

H.E. Mr. Ismail Razali
Permanent Representative of Malaysia
to the United Nations
New York

OFFICE DES NATIONS UNIES À GENÈVE
HAUT COMMISSAIRE AUX DROITS DE L'HOMME
CENTRE POUR LES DROITS DE L'HOMME

UNITED NATIONS OFFICE AT GENEVA
HIGH COMMISSIONER FOR HUMAN RIGHTS
CENTRE FOR HUMAN RIGHTS

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Palais des Nations
CH 1211 Geneva 10

OLC/92

40

Mr. Covell (EP)

RECEIVED JUL - 8 1997 9714103 OF THE SECRETARY

RECEIVED JUL 8 1997 OFFICE OF LEGAL AFFAIRS USG LOG NO. 3001

Reference:

Geneva, 8 July 1997

Your Excellency,

I am writing again to Your Excellency on behalf of the Special Rapporteurs/ Representatives/ Experts and Chairpersons of Working Groups of the Special Procedures and the Advisory Service Programme of the United Nations Commission on Human Rights. The matter is particularly urgent in light of today's decision where the Special Rapporteur's application to stay the order made on 28 June 1997 pending his appeal, was refused. The 28 June 1997 decision of the High Court in Kuala Lumpur allowed the continuation of the defamation action brought against Dato' Param Cumaraswamy by two public corporations. Hence, the substantive appeal, when heard, will become redundant because Dato' Cumaraswamy will now have to file his defence and proceeded to trial.

The immunity from legal process granted to UN experts under the 1946 Convention on the Privileges and Immunities of the United Nations is now completely undermined. We cannot emphasise enough our alarm of this situation. Threatening the immunity of one expert constitutes an attack on the entire system and institution of the United Nations special procedures and mechanisms.

It was already our opinion that a difference had risen out of the interpretation of the 1946 Convention on the Privileges and Immunities of the United Nations. We respectfully believe that any further delay in invoking Section 30 of the 1946 Convention on the Privileges and Immunities of the United Nations, will subject Dato' Cumaraswamy to further harm, and will send an open invitation to others to challenge our immunity.

We respectfully request Your Excellency to publicly affirm the immunity of the Special Rapporteurs and indicate the seriousness of this precedent.

Please accept the assurance of our highest consideration.

Mr. Paulo Sergio Pinheiro
Chairman

Please prepare a reply. Maybe we should also prepare a statement for the public on the day when the note to the GA is forwarded.

8/7/97

H.E. Mr. Kofi Annan
Secretary-General
United Nations Organisation
UN Headquarters
New York, N.Y.
USA
FAX (001) 212.963.3511

DOSSIER NO. 41

SUMMARY OF THE WRIT OF SUMMONS AND STATEMENT OF CLAIM

in the High Court of Malaya
at Kuala Lumpur

Suit No. S4-23-66

registered 9 December 1996
served 9 July 1997

The Writ

One Plaintiff claims MR60,000,000 for damages, including aggravated and/or exemplary damages, for slander and for libel as well as interest at 8% per annum accruable from date of judgement until the date of payment, costs of the action and an injunction to restrain Defendant from further defaming Plaintiff.

The Statement of Claim

At all material times, Defendant was an Advocate and Solicitor of the High Court of Malaya and the Chief Executive Partner of a Malaysian law firm (Shook Lin & Bok).

Defendant spoke and thereby published defamatory words of and concerning the Plaintiff, his profession and his conduct therein.

His words were calculated to disparage Plaintiff in his profession

The publication of the words, injured Plaintiff's feelings and seriously damaged his personal and professional reputation and brought him into public scandal, odium and contempt.

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UNITED NATIONS NATIONS UNIES

POSTAL ADDRESS—ADRESSE POSTALE UNITED NATIONS, N.Y. 10017
CABLE ADDRESS—ADRESSE TELEGRAPHIQUE UNATIONS NEWYORK

REFERENCE.

10 July 1997

Dear Ambassador Razali,

Once more with reference to my letter of 8 June, I now have to report to you a further development in respect of the law suits being brought against the Human Right Commission's Special Rapporteur on the Independence of Judges and Lawyers, Mr. Dato' Param Cumaraswamy. This morning he was served in respect of yet another suit, by another plaintiff but based on the same interview, claiming RM60 million; though the case had apparently been filed on 9 December 1996, the writ was only served on Mr. Cumaraswamy today. I am attaching a copy of that filing, which requires a response within 8 days.

In this connection I would also like to remind that the deadline for Mr. Cumaraswamy to present his defense, as specified in the order of 28 June by the High Court of Kuala Lumpur, expires tomorrow. By that time he must decide whether to default on his defense or to submit the extensive documentation required to resist the two suits that had been filed previously.

Should your Government allow matters to advance to that stage, the Secretary-General may feel constrained to inform the General Assembly immediately of the dispute between Malaysia and the United Nations, in order to seek the approval of certain questions to be put to the International Court of Justice pursuant to section 30 of the Convention on the Privileges and Immunities of the United Nations and to propose that it appeal formally to your Government to arrange for a stay of the pending proceedings in the Malaysian courts until the International Court of Justice has rendered its binding advisory opinion.

Sincerely yours,

Hans Corell
Under-Secretary-General for Legal Affairs
The Legal Counsel

H.E. Mr. Ismail Razali
Permanent Representative of Malaysia
to the United Nations
New York

THE SECRETARY-GENERAL

43

11 July 1997

To Whom It May Concern

In connection with the Civil Suit No. S4-23-66-1996 by Dato'V Kanagalingam against Dato' Param Cumaraswamy, the Secretary-General of the United Nations hereby notifies the competent authorities of Malaysia that Dato' Param Cumaraswamy, national of Malaysia, is the Special Rapporteur on the Independence of Judges and Lawyers of the United Nations Commission on Human Rights. In this capacity, Dato' Cumaraswamy is entitled to the privileges and immunities accorded to experts performing missions for the United Nations under Article VI and VII of the Convention on the Privileges and Immunities of the United Nations to which Malaysia has been a party since 28 October 1957 without any reservation.

In accordance with section 22 of Article VI of the Convention, "experts... performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions...". Section 22(b) of the Convention further provides that "they shall be accorded, in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind". As such, the Special Rapporteur on the Independence of Judges and Lawyers, is immune

from legal process of every kind in respect of words spoken or written and acts done by him in the course of the performance of his mission.

The Secretary-General has determined that the words which constitute the basis of plaintiff's complaint in this case were spoken by the Special Rapporteur in the course of his mission. The Secretary-General therefore maintains that Dato' Param Cumaraswamy is immune from legal process with respect thereto.

Under Section 34 of the Convention, the Government of Malaysia has a legal obligation to "be in a position under its own law to give effect to the terms of this Convention". The Secretary-General of the United Nations therefore requests the competent Malaysian authorities to extend to Dato' Param Cumaraswamy the privileges and immunities, courtesies and facilities to which he is entitled under the Convention on the Privileges and Immunities of the United Nations.

Kofi A. Annan

THE SECRETARY-GENERAL

11 July 1997

Dear Ambassador Razali,

Further to our conversation this morning about the civil law suits that have been filed against the Special Rapporteur on the Independence of Judges and Lawyers of the Human Rights Commission, Dato' Param Cumaraswamy, I would now like to request you to transmit urgently to your Government the enclosed note verbale, by which I certify the immunity of Mr. Cumaraswamy in respect of the latest law suit that was filed against him on 10 July: Civil Suit No. S4-23-66-1996 by Dato' V Kanagalingam.

We understand that Mr. Cumaraswamy is applying on Monday to have that suit suppressed on account of his immunity, and in this connection we deem it essential that the appropriate representative of your Government support that motion and ~~to~~ submit the attached note verbale to the competent court.

Accept, Sir, the assurances of my highest consideration.

Kofi A. Annan

H.E. Mr. Ismail Razali
Permanent Representative of Malaysia
to the United Nations
New York

UNITED NATIONS NATIONS UNIES

POSTAL ADDRESS—ADRESSE POSTALE UNITED NATIONS, N.Y. 10017
CABLE ADDRESS—ADRESSE TELEGRAPHIQUE UNATIONS NEWYORK

REFERENCE:

The Secretary-General of the United Nations has the honour to present his compliments to the Permanent Representative of Malaysia and to inform him, in connection with the Civil Suit No. S4-23-66-1996 by Dato'V Kanagalingam against Dato' Param Cumaraswamy, that Dato' Param Cumaraswamy, a national of Malaysia, is the Special Rapporteur on the Independence of Judges and Lawyers of the United Nations Commission on Human Rights. In this capacity, Dato' Cumaraswamy is entitled to the privileges and immunities accorded to experts performing missions for the United Nations under Article VI and VII of the Convention on the Privileges and Immunities of the United Nations to which Malaysia has been a party since 28 October 1957 without any reservation.

In accordance with section 22 of Article VI of the Convention, "experts... performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions...". Section 22(b) of the Convention further provides that "they shall be accorded, in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind". As such, the Special Rapporteur on the Independence of Judges and Lawyers, is immune

from legal process of every kind in respect of words spoken or written and acts done by him in the course of the performance of his mission.

The Secretary-General has determined that the words which constitute the basis of plaintiff's complaint in this case were spoken by the Special Rapporteur in the course of his mission. The Secretary-General therefore maintains that Dato' Param Cumaraswamy is immune from legal process with respect thereto.

Under Section 34 of the Convention, the Government of Malaysia has a legal obligation to "be in a position under its own law to give effect to the terms of this Convention". The Secretary-General of the United Nations therefore requests the competent Malaysian authorities to extend to Dato' Param Cumaraswamy the privileges and immunities, courtesies and facilities to which he is entitled under the Convention on the Privileges and Immunities of the United Nations.

The Secretary-General avails himself of this opportunity to assure the Permanent Representative of Malaysia to the United Nations of his highest consideration.

11 July 1997

DOSSIER NO. 45

SUMMARY OF THE JUDGEMENT OF COURT OF APPEAL OF MALAYSIA DELIVERED ON 20 OCTOBER 1997

The Court of Appeal stated that the High Court Judge was entitled, as a matter of law, to defer determination on Mr. Cumaraswamy's plea of immunity until after she had the benefit of evidence on that issue. The Court indicated that the Convention does not confer any power or authority upon the Secretary-General to declare that the words complained of were spoken by Mr. Cumaraswamy in his capacity as Special Rapporteur and that the Convention merely confirms the power of the Secretary-General to waive immunity. The Court thus concluded that it was for the trial judge to determine whether the words were spoken in his capacity as Special Rapporteur and whether it was within his mandate to do so.

The Court of Appeal therefore dismissed the appeal of Mr. Cumaraswamy against the Judgement of the High Court of Kuala Lumpur (Dossier No. 35) holding that it was for the Court to determine whether the actions complained of were performed in the course of Mr. Cumaraswamy's mission. The Court, however, overturned the ruling of the High Court that the costs of the High Court case were to be paid forthwith; rather they shall be part of the costs of the main action. However the Court held that the costs of the appeal to the Court of Appeal were to be taxed and paid by Mr. Cumaraswamy.

DOSSIER NO. 46

SUMMARY OF THE WRIT OF SUMMONS AND STATEMENT OF CLAIM

in the High Court of Malaya
at Kuala Lumpur

Suit No. S5-23-65

registered 9 December 1996
served 23 October 1997

The Writ:

Three Plaintiffs claim MR95,000,000 for damages, including aggravated and/or exemplary damages, for slander and for libel as well as interest at 8% per annum accruable from date of judgement until the date of payment, costs of acts and injunction to restrain Defendant from further defaming Plaintiffs.

The Statement of Claim

At all material times, Defendant was an Advocate and Solicitor of the High Court of Malaya and the Chief Executive Partner of a Malaysian law firm (Shook Lin & Bok).

Defendant spoke and thereby published defamatory words of and concerning the Plaintiffs, their business and their conduct therein.

His words were calculated to disparage Plaintiffs in their business and to cause them pecuniary damage.

The publication of the words, injured the first Plaintiff's feelings and seriously damaged his personal and business reputations, and seriously damaged the second and third Plaintiffs' trading reputations and brought all three Plaintiffs into public scandal, odium and contempt.

THE SECRETARY-GENERAL

47

27 October 1997

To Whom It May Concern

In connection with the Civil Suit by Tan Sri Dato' Vincent Tan Chee Yioun, Berjaya Industrial Berhad and Berjaya Corporation (Cayman) Limited against Dato' Param Cumaraswamy, the Secretary-General of the United Nations hereby notifies the competent authorities of Malaysia that Dato' Param Cumaraswamy, national of Malaysia, is the Special Rapporteur on the Independence of Judges and Lawyers of the United Nations Commission on Human Rights. In this capacity, Dato' Cumaraswamy is entitled to the privileges and immunities accorded to experts performing missions for the United Nations under Articles VI and VII of the Convention on the Privileges and Immunities of the United Nations to which Malaysia has been a party since 28 October 1957 without any reservation.

In accordance with section 22 of Article VI of the Convention, "experts... performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions...". Section 22(b) of the Convention further provides that "they shall be accorded, in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind". As such, the Special Rapporteur on the

Independence of Judges and Lawyers, is immune from legal process of every kind in respect of words spoken or written and acts done by him in the course of the performance of his mission.

The Secretary-General has determined that the words which constitute the basis of plaintiffs' complaint in this case were spoken by the Special Rapporteur in the course of his mission. The Secretary-General therefore maintains that Dato' Param Cumaraswamy is immune from legal process with respect thereto.

Under Section 34 of the Convention, the Government of Malaysia has a legal obligation to "be in a position under its own law to give effect to the terms of this Convention". The Secretary-General of the United Nations therefore requests the competent Malaysian authorities to extend to Dato' Param Cumaraswamy the privileges and immunities, courtesies and facilities to which he is entitled under the Convention on the Privileges and Immunities of the United Nations.

Kofi A. Annan

UNITED NATIONS NATIONS UNIES

POSTAL ADDRESS—ADRESSE POSTALE UNITED NATIONS, N.Y. 10017
CABLE ADDRESS—ADRESSE TELEGRAPHIQUE: UNATIONS NEWYORK

REFERENCE:

The Legal Counsel of the United Nations presents his compliments to the Permanent Representative of Malaysia and, further to previous correspondence and notes concerning the defamation proceedings against the Special Rapporteur on the Independence of Judges and Lawyers in the Malaysian civil courts, now is compelled to invite the attention of the Permanent Representative to the Judgment of the Court of Appeal of 20 October 1997 (copy attached), rejecting the appeal of the Special Rapporteur from the judgment of the High Court of 28 June 1997.

The Court of Appeal held that the Secretary-General's certificate of 7 March 1997, which determined that the "words which constitute the basis of plaintiffs' complaint in this case were spoken by the Special Rapporteur in the course of his mission", was not conclusive as to this issue. This determination is based in part on Malaysian domestic law and in part on the conclusion that the 1946 Convention on the Privileges and Immunities of the United Nations (the General Convention), to which Malaysia has been a party since 28 June 1957 without any reservation, only establishes the Secretary-General's power to waive immunity but not to make a determination as to whether immunity may be asserted; indeed, the Court held that that is a matter for the Malaysian courts to decide.

As it is the view of the United Nations that it is exclusively for the Secretary-General to determine -- subject to possible review by the International Court of Justice under Section 30 of the General Convention -- when the immunity of an expert on mission is to be asserted, it considers that the judgment is therefore based on an incorrect interpretation of the General Convention. Therefore, if the Government supports the view of the Court of Appeal, then a difference has arisen concerning the interpretation of the Convention, within the meaning of Section 30 thereof; this Section calls for resolution of such differences not by the domestic courts of any State but exclusively by means of a binding advisory opinion of the International Court of Justice.

The Court of Appeal's judgment further suggests that if the certificate that the Minister of Foreign Affairs of Malaysia signed on 12 March 1997 had actually specified, as the Secretary-General had, that the words in question had been spoken by the Special Rapporteur in the course of his official mission, such a determination would have been considered, under section 7(2) of the Malaysian International Organisations (Privileges and Immunities) Act of 1992 (Act 485), as "evidence of the facts certified". The fact that the Foreign Minister's certificate did not so specify and that it would therefore not be properly taken into account by the Malaysian courts, was a concern that had been brought to the attention of the Permanent Representative and of the Mission on several occasions both before and after that certificate was issued. The United Nations considers that in failing to confirm the Secretary-General's determination, the certificate of the Minister of Foreign Affairs allowed the Court of Appeal to reach an incorrect conclusion as to the immunity of the Special Rapporteur. Moreover, the failure of the Minister to give a certificate that directly addressed the applicability of the General Convention to the Special Rapporteur under the relevant circumstances, meant that the Government had not adequately fulfilled its obligation to give effect to Section 22(b) of the General Convention.

If the Government does not agree that the words that constitute the basis of plaintiffs' suit were spoken by the Special Rapporteur in the course of the performance of his mission, then a difference arising out of the application of the General Convention exists in this regard between the United Nations and Malaysia, which too should be referred to the International Court of Justice pursuant to Section 30 of the Convention. The availability of that method of settling differences as to whether or not the Secretary-General has properly asserted the immunity of a particular official or expert on mission, makes it clear that such an assertion by the Secretary-General is indeed subject to judicial review and thus does not constitute -- as your Government has sometimes asserted and the Court of Appeal appears to believe -- an unreviewable determination of a type that the parties to the General Convention cannot be considered to have agreed to.

As the Legal Counsel had indicated in his note of 7 July 1997, the United Nations considers that it is the responsibility of your Government to intervene in the current proceedings so that the burden of any further defense, including any expenses and taxed costs resulting therefrom, be assumed by the Government. Furthermore, the Special Rapporteur should be held harmless in respect of the expenses he has already incurred or that are being taxed to him from the proceedings so far. In this connection the Legal Counsel also wishes to call the attention of the Government to the fact that a third Writ has just been served on the Special Rapporteur by three plaintiffs claiming aggregate damages of RM100 million; the Special Rapporteur has until 30 October to assert this immunity in that proceeding, and the Secretary-General has already provided him with a certificate for that purpose. Once more, it is expected that the Government will effectively support the Special Rapporteur's application, taking into account the deficiencies in its previous certificates as appears from the opinion of the Court of Appeal.

As the Permanent Representative knows, the Secretary-General has requested Maitre Yves Fortier to assist him in resolving the impasse that appears to have arisen between the United Nations and your Government. Mr. Fortier has indicated that he would be prepared to travel to Malaysia at the end of November, provided that he can be assured of seeing the Prime Minister at that time. We therefore trust that arrangements will be made to facilitate such a visit, and that to this end you will inform us at an early date.

The Legal Counsel avails himself of this opportunity to assure the Permanent Representative of Malaysia to the United Nations of his highest consideration and of his readiness to consult with the Permanent Representative or with members of his Mission concerning these matters.

30 October 1997

YC

THE SECRETARY-GENERAL

49

7 November 1997

Excellency,

Though with considerable reluctance, I feel constrained to address you personally on a matter that has for sometime clouded the otherwise excellent relations between Malaysia and the United Nations: the numerous massive suits that have been filed in Malaysian courts against the Special Rapporteur for the Independence of Judges and Lawyers of the United Nations Commission for Human Rights, Dato' Param Cumaraswamy.

You are aware that the Court of Appeal of Malaysia has just ruled that the question of the Special Rapporteur's immunity from suit, which I had asserted in a certificate filed with the High Court, is not determined by that certificate, but is a matter to be adjudged in due course by Malaysian courts. This is a position that the United Nations cannot accept, and if your Government shares the view of the Court of Appeal, a difference appears to have arisen between your Government and this Organization with respect to the interpretation of the 1946 Convention on the Privileges and Immunities of the United Nations.

Excellency
Dato' Seri Dr. Mahathir Mohamed
Prime Minister
Malaysia

It should be understood that although the Secretary-General's determination, as to whether an expert on mission or an official of the United Nations is acting within his or her official functions, may not be reviewed by any national court, that determination is, however, subject to judicial examination by the International Court of Justice pursuant to Section 30 of the 1946 Convention (to which I refer at greater length below).

As indicated in my several certificates relating to the three law suits that have been filed against Mr. Cumaraswamy, he was acting within the scope of his official functions as Special Rapporteur. He is therefore entitled to seek recompense from the United Nations for any costs he himself has incurred in conducting his defense, for any costs that are taxed to him by the Malaysian courts and, should he lose, for the amounts of the consequent judgments, which might amount to well over a hundred million Ringgit. In the event Mr. Cumaraswamy does so, the United Nations would have no choice but to seek compensation from your Government for any expenses it thus incurs.

It is the position of the United Nations that it is the clear responsibility of your Government to accord the Special Rapporteur full immunity from the current litigation in the Malaysian courts. Although it is not for this Organization to specify how that immunity is in practice to be arranged, your Government might consider filing with the competent courts certificates issued by the Foreign Minister pursuant to section 7 of the Malaysian International Organisations (Privileges and Immunities) Act of 1992 (Act 485), which would take into account the reason why the certificate earlier filed by the Minister in respect of the first law suit was not accepted as determinative by the Court of Appeal.

Should your Government fail, for whatever reason, to afford full and effective protection to the Special Rapporteur from the current law suits or from future similar ones, it will be necessary for me to inform the General Assembly that differences have arisen between Malaysia and the United Nations with respect this matter, and that consequently it will become necessary to invoke Section 30 of the 1946 Convention. As you know, this would require the Assembly to address one or more legal questions to the International Court of Justice for an advisory opinion, and the replies given by the Court to such questions would then be binding on the Organization and on your Government.

It is, however, my earnest hope that such resort to the General Assembly and the International Court of Justice can be avoided by having your Government arrange for the necessary immunities to be effectively accorded to the Special Rapporteur. Should your Government wish to explore such possibilities, it might do so either with the Legal Counsel or with Maitre Yves Fortier of Canada, whom I have requested to assist me in this respect. If necessary, Maitre Fortier is prepared to visit you as my Special Envoy later this month. I sincerely hope that this matter can be resolved before my visit to Malaysia in December.

Please accept, Excellency, the assurances of my highest consideration.

Kofi A. Annan

DOSSIER NO. 50

SUMMARY OF THE WRIT OF SUMMONS AND STATEMENT OF CLAIMS

in the High Court of Malaya
at Kuala Lumpur

Suit No. S1-23-67

registered 9 December 1996
served 21 November 1997

The Writ:

Two Plaintiffs claim MR60,000,000 for damages, including exemplary damages, for slander and for libel and interest at 8% per annum accruable from date of judgement until the date of payment, costs of the action and for an injunction to restrain Defendant from further defaming Plaintiffs.

The Statement of Claim

At all material times, Defendant was an Advocate and Solicitor of the High Court of Malaya and the Chief Executive Partner of a Malaysian law firm (Shook Lin & Bok).

Defendant spoke and thereby published defamatory words of and concerning the Plaintiffs, their business and their conduct therein.

His words were calculated to disparage Plaintiffs in their business and to cause them pecuniary damage.

The publication of the words, seriously damaged Plaintiffs' personal, business and trading reputations and brought them into public scandal, odium and contempt.

THE SECRETARY-GENERAL

51

21 November 1997

To Whom It May Concern

In connection with the Civil Suit (KL High Court Suit No S1-23-67 of 1996) by Insas Berhad and Megapolitan Nominees SDN BHD against Dato' Param Cumaraswamy, the Secretary-General of the United Nations hereby notifies the competent authorities of Malaysia that Dato' Param Cumaraswamy, national of Malaysia, is the Special Rapporteur on the Independence of Judges and Lawyers of the United Nations Commission on Human Rights. In this capacity, Dato' Cumaraswamy is entitled to the privileges and immunities accorded to experts performing missions for the United Nations under Articles VI and VII of the Convention on the Privileges and Immunities of the United Nations to which Malaysia has been a party since 28 October 1957 without any reservation.

In accordance with section 22 of Article VI of the Convention, "experts... performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions...". Section 22(b) of the Convention further provides that "they shall be accorded, in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind". As such, the Special Rapporteur on the

Independence of Judges and Lawyers, is immune from legal process of every kind in respect of words spoken or written and acts done by him in the course of the performance of his mission.

The Secretary-General has determined that the words which constitute the basis of plaintiffs' complaint in this case were spoken by the Special Rapporteur in the course of his mission. The Secretary-General therefore maintains that Dato' Param Cumaraswamy is immune from legal process with respect thereto.

Under Section 34 of the Convention, the Government of Malaysia has a legal obligation to "be in a position under its own law to give effect to the terms of this Convention". The Secretary-General of the United Nations therefore requests the competent Malaysian authorities to extend to Dato' Param Cumaraswamy the privileges and immunities, courtesies and facilities to which he is entitled under the Convention on the Privileges and Immunities of the United Nations.

Kofi A. Annan

52

UNITED NATIONS NATIONS UNIES

POSTAL ADDRESS—ADRESSE POSTALE UNITED NATIONS, N.Y. 10017
CABLE ADDRESS—ADRESSE TELEGRAPHIQUE: UNATIONS NEWYORK

REFERENCE:

The Legal Counsel of the United Nations presents his compliments to the Permanent Representative of Malaysia and, further to previous correspondence concerning the defamation proceedings in the Malaysian civil courts against the Special Rapporteur on the Independence of Judges and Lawyers, has the honour to present the attached certificate of immunity signed by the Secretary-General in connection with a fourth suit (Suit No. S1-23-67) which has been filed by Insas Berhad and Megapolitan Nominees SDN BHD against Dato' Param Cumaraswamy in the High Court of Kuala Lumpur.

The Legal Counsel avails himself of this opportunity to assure the Permanent Representative of Malaysia to the United Nations of his highest consideration.

25 November 1997

Y.C.

THE SECRETARY-GENERAL

21 November 1997

To Whom It May Concern

In connection with the Civil Suit (KL High Court Suit No S1-23-67 of 1996) by Insas Berhad and Megapolitan Nominees SDN BHD against Dato' Param Cumaraswamy, the Secretary-General of the United Nations hereby notifies the competent authorities of Malaysia that Dato' Param Cumaraswamy, national of Malaysia, is the Special Rapporteur on the Independence of Judges and Lawyers of the United Nations Commission on Human Rights. In this capacity, Dato' Cumaraswamy is entitled to the privileges and immunities accorded to experts performing missions for the United Nations under Articles VI and VII of the Convention on the Privileges and Immunities of the United Nations to which Malaysia has been a party since 28 October 1957 without any reservation.

In accordance with section 22 of Article VI of the Convention, "experts... performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions...". Section 22(b) of the Convention further provides that "they shall be accorded, in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind". As such, the Special Rapporteur on the

Independence of Judges and Lawyers, is immune from legal process of every kind in respect of words spoken or written and acts done by him in the course of the performance of his mission.

The Secretary-General has determined that the words which constitute the basis of plaintiffs' complaint in this case were spoken by the Special Rapporteur in the course of his mission. The Secretary-General therefore maintains that Dato' Param Cumaraswamy is immune from legal process with respect thereto.

Under Section 34 of the Convention, the Government of Malaysia has a legal obligation to "be in a position under its own law to give effect to the terms of this Convention". The Secretary-General of the United Nations therefore requests the competent Malaysian authorities to extend to Dato' Param Cumaraswamy the privileges and immunities, courtesies and facilities to which he is entitled under the Convention on the Privileges and Immunities of the United Nations.

Kofi A. Annan

SHOOK LIN & BOK

PEGUAMBELA & PEGUAMCARA
ADVOCATES & SOLICITORS

EJEN PATEN BERDAFTAR & EJEN CAP DAGANGAN
REGISTERED PATENT AGENTS & TRADE MARK AGENTS

NOTARI AWAM
NOTARY PUBLIC

TELEFON -TELEPHONE (03) 2011788 (25 LINES) FAX (603) 2011775/8/9 EMAIL : shooklin@tm.net.my KAWAT- CABLE SHOBOK

ENGLISH TRANSLATION 5

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NARAYAN NAIR
TOO HING YEAP
SA. SYRUS V. DAS
PERAKA P. ADYAN
LIM WING YONG
KATHERINE LIM NYI HONG
PATRICIA DAVID SAINI
NADARAJAN MUTTAN
ROMEEN ABRAHAM
YOOHI BIN MIN
YIP NYT LEE
DR. ARUNAN SUBRAMANIAM
MICHAEL C. M. KOO
JOHN MATHEW
HO YUE CHAN
S. RANI NA BALAN
KHONG MEI LIN

CONSULTANT
MICHAEL K. L. WONG

ASSISTANTS
HOW KIAT CHING
NAMEN KAUR
LEE WOOI MIEN DAHLIA
MOHANARASE KANAGASABAI
LAU MAY LING
GEETHA SHAFATHADURAI
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MICHELLE K. LIM
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YAP LER YEE
TONG CHENG MOI
PHO TONG MOI
CAROLYN TAN SIEW LIAN
TREVON GEORGE DE SILVA
ADRIAN HO KUO TECK
DOH SU LIN
NG FOONG MENG
ELAINE CHO SU PEI
LEE TENG JOO
LEE KWAN LEONG
LAM SWEE THEAM
CHITRAKALA D. MUNUSAMY
LAI FUI SIM
KENNETH CHOW KOK WEE
CHONG WHYE MUN
TEO I WEE TEA
HOW MENG WEI
JANET TONG HWAY MING
THARMY RAMALINGAM
LEELA BASKARAN
LAM KO LUEN
SHAY AI LIN
THYE WAN MEE
TAN CHEE HANG JERAM
SUGHARGANAN THILLAINATHAN
GAZLIN SUHAILA SAUD
CHUAH YEAN PING
FATIN HANUM KHAIRUDDIN
SUTHANANELLION NADARAJAH
LIM HUGH HIN EDWIN
JASWANT SINGH
ANGELINA TAN CHIANG
TEO CHANG CHTE

BY HAND OUR REFERENCE
YOUR REFERENCE
NB/CD/10100/95/PC/L/08 November 27, 1997
(WHEN REPLYING, PLEASE QUOTE OUR REFERENCE NUMBER)

旭齡及穆律師樓

Yang Amat Arif Ketua Hakim Negara
(The Honourable Chief Justice
of Malaysia)
Tun Haji Mohd Eusoff bin Chin
Mahkamah Persekutuan
Bahagian Rayuan
Bangunan Sultan Abdul Samad
Jalan Raja
50506 Kuala Lumpur

U R G E N T

BY HAND

Yang Amat Arif,

Federal Court Malaysia
Civil Application No.08-86-1997(W)
(Court of Appeal Malaysia
Civil Appeal No.W-02-323-1997)
Dato' Param Cumaraswamy .. Applicant
And
MBf Capital Berhad & Anor .. Respondents

We are the solicitors for the Applicant in the above matter.

2. We wish to apply for an early hearing of our client's application for leave on the grounds that there are pending three (3) other suits based on the same facts, which would be dependent on the outcome of this case. The suits are:-

(a) Kuala Lumpur High Court
Civil Suit No.S5-23-65-96
Tan Sri Dato' Vincent Tan Chee Yioun
& 2 ors v. Dato' Param Cumaraswamy

(b) Kuala Lumpur High Court
Civil Suit No.S4-23-66-96
Dato' V. Kanagalingam v.
Dato' Param Cumaraswamy

(c) Kuala Lumpur High Court
Civil Suit No.S1-23-67-96
Insas Berhad and Anor v.
Dato' Param Cumaraswamy

...2/-

3. Similar applications to strike out, dismiss or permanently stay the actions are pending in suits (a) and (b) whereas we are in the process of obtaining leave to enter conditional appearance and thereafter will apply to file a similar application for suit (c).

4. All the above suits arise out of the same article which was published in the November, 1995 issue of the International Commercial Litigation magazine, which said article is also the subject matter of the instant application for leave to appeal to the Federal Court. The three (3) other suits mentioned above also involve the issue of our client's entitlement to immunity under Section 22(b) of the Convention on the Privileges and Immunities of the United Nations ("UN Convention") and the same domestic legislation and Malaysia's obligations under the UN Convention.

5. By reason of the circumstances as aforestated, we are of the view that it is desirable that an early date should be fixed for the application for leave. Moreover, the issues involved in the proposed appeal are of great importance as they involve domestic legislation as well as international convention and Malaysia's international obligations under the UN Convention.

6. For all the reasons as stated above, we respectfully urge that an early date be fixed for our client's application.

Thanking you.

Yours faithfully,

SHOOK LIN & BOK

c.c. Client

c.c. Messrs V. Siva & Partners
(Ref: VSP/L/108/96)
(BY HAND)

js

Statement by the United Nations High Commissioner for Human Rights, Mrs. Mary Robinson, on the importance of the independence of Special Rapporteurs and similar mechanisms of the Commission on Human Rights

"We have just marked the beginning of Human Rights Year leading up to the commemoration on 10 December 1998 of the 50th anniversary of the adoption of the Universal Declaration of Human Rights. An important focus of this year will be defending and protecting the achievements of the United Nations human rights programme.

A key mechanism developed by the United Nations over the years for the promotion and protection of human rights is the system of fact-finding through independent experts designated either as special rapporteurs or members of working groups. These experts are charged with carefully analysing allegations of human rights violations and Government information and informing the international community of their findings and making pertinent recommendations.

Over the years the crucial value of these procedures to saving human lives and helping resolve serious situations of violations has been fully acknowledged. The World Conference on Human Rights recognized the importance of these procedures and called for their preservation and strengthening. During the coming year, I will be giving special attention to this objective.

In order to provide the international community with the independent and impartially analysed information which is essential in human rights policy making, the experts of the special procedures system must be secure in enjoying the privileges and immunities due to them as experts on mission for the United Nations. Member States have agreed to this by ratifying the 1946 Convention on the Privileges and Immunities of the United Nations. The International Court of Justice reaffirmed these principles in its 1989 Advisory Opinion relating to a Member State's obligation under the Convention to ensure freedom of movement to a United Nations Special Rapporteur, Mr. Dumitru Mazilu.

The scrupulous respect for these rights by Member States is essential and I wish to call on all States to do so fully. The Secretary-General is now discussing with the Government of Malaysia application of the Convention in relation to Mr. Param Cumaraswamy, Special Rapporteur on the Independence of Judges and Lawyers. I wish to urge the Government to implement fully the provisions of the Convention as a key component of international law."

HR/97/88 16
December 1997

54 bis

NATIONS UNIES
HAUT COMMISSARIAT AUX DROITS DE L'HOMME

UNITED NATIONS
HIGH COMMISSIONER FOR HUMAN RIGHTS

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Palais des Nations
CH-1211 GENEVE 10

REFERENCE:cc

Geneva, 2 October 1998

Dear Secretary-General,

Further to our discussion on 22 September 1998, I would like to highlight the following human rights issues which, I believe, may be of relevance insofar as the Cumaraswamy case now before the International Court of Justice is concerned.

In March 1994, the Commission on Human Rights, in resolution 1994/41, noted both the increasing frequency of attacks on the independence of judges, lawyers and court officials and the link that exists between the weakening of safeguards for the judiciary and lawyers and the gravity and frequency of violations of human rights. The Commission requested the Chairman of the Commission to appoint, for a period of three years, a special rapporteur whose mandate would consist of inquiring into any substantial allegations transmitted to him or her and report his or her conclusions thereon; identifying and recording not only attacks on the independence of the judiciary, lawyers and court officials but also progress achieved in protecting and enhancing their independence, and make concrete recommendations including the provision of advisory services or technical assistance when they were requested by the State concerned; and studying, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers.

The Chairman of the Commission on Human Rights appointed Mr. Param Cumaraswamy as Special Rapporteur on the Independence of Judges and Lawyers in a letter dated 2 April 1994.

Mr. Cumaraswamy is one of some 40 Special Rapporteurs who are appointed by the Commission on Human Rights. Their mandates are either country specific or thematic. Special Rapporteurs are not paid salaries, although they receive expenses when they travel, together with research and administrative support from the Office of the United Nations High Commissioner for Human Rights in Geneva. It is of importance to recall that members of other UN committees such as the Human Rights Committee, the Committee on the Elimination of Racial Discrimination and the Committee on the Elimination of All Forms of Discrimination Against Women, to name only a few, also serve in a personal capacity, not as representatives of States, and are experts on mission within the meaning of the Convention. Mr. Cumaraswamy's mandate is clearly a fundamental one which encompasses studying and monitoring the implementation of some of the non-derogable provisions in United Nations human rights instruments.

.../

The Secretary-General
United Nations
New York

The Commission has routinely expressed appreciation at the determination of the Special Rapporteur to achieve as wide dissemination as possible of information about pertinent standards. Additionally, it should be pointed out that, it is more common than not for Special Rapporteurs to speak to the press about matters pertaining to their investigations, thereby keeping the general public informed of their work. This includes promotional activities such as acceptance of invitations to speak about their mandate at conferences, seminars and forums all over the world. In connection with such appearances, Special Rapporteurs have at times been interviewed by the media.

In the report of the fourth annual meeting of Special Rapporteurs/Representatives/Experts and Chairmen of Working Groups of the Commission on Human Rights and the Advisory Services Programme, the participants reaffirmed the general principles and criteria that guide their work (E/CN. 4/1998/45, para.71). According to these principles the "Special Rapporteurs are agents not of confidential but of public procedures. Their reports are public. Hence their relations with the press are governed by the basic principle of transparency." In practice, Special Rapporteurs frequently speak to the press throughout the course of the year to answer queries concerning their mandates and activities. Press coverage is, indeed, an effective way of raising awareness of an expert's concerns. However, if these experts were to be subjected to legal proceedings in domestic courts, there would be a chilling effect on their ability to speak out and report on violations which would necessarily impede their ability to carry out the mandates to which they have been entrusted by the Commission on Human Rights. Subjecting one independent expert to legal proceedings in a domestic court would seriously hinder all experts of the Commission on Human Rights from carrying out independent and impartial investigations for fear of being subjected to frivolous suits in domestic courts.

The Special Rapporteur on Independence of Judges and Lawyers has carried out several country missions, which so far have included Peru, Colombia, Belgium, and the United Kingdom and Northern Ireland, with a view to enquiring into alleged attacks on the independence of judges and lawyers. The Special Rapporteur has submitted four general reports and four additional reports on his country visits to the Commission on Human Rights since his appointment in 1994.

It is of importance to underline that the Commission on Human Rights renewed the Special Rapporteur's mandate for an additional three years at its fifty-fourth session held in Geneva in April 1997. At the time of the renewal of the Special Rapporteur's mandate, the Commission was aware of the lawsuits against the Special Rapporteur before the Malaysian courts. Hence, his reappointment could be considered an endorsement by the Commission of the Special Rapporteur's working methods and interpretation of his mandate, including making public statements in the form of interviews.

I would also like to point out that, in the *Mazilu* case, the Court explicitly rejected Romania's argument that "in the country of which he is a national and in countries other than the country to which he is sent on mission, an expert enjoys privileges and immunities only in respect of actual activities spoken or written which he performs in connection with his mission." The Court confirmed that "experts on missions enjoy the privileges and immunities provided for under the Convention in their relations with the States of which they are nationals or on the territory of which they reside," unless a reservation has been validly made in this respect by the state concerned. Consequently, the Special Rapporteur, who is a citizen of Malaysia and resides in Kuala Lumpur, is entitled to immunity from legal process of every kind in the courts of Malaysia in his capacity as an expert on mission for the United Nations. Malaysia has not made any reservation in this respect.

The unacceptable consequence of the Malaysian courts' rulings is that the Special Rapporteur is ordered to defend himself on the merits of the suits filed against him before the courts of Malaysia and that the Malaysian courts have arrogated to themselves the power to determine the Special Rapporteur's capacity and the scope of his mission or mandate. It has to be further underlined that since the mandate has been formulated and established by the Commission on Human Rights, it is for the Secretary-General to determine whether a person seeking the protection of the immunities provided for in the General Convention fits within the class of persons that the Convention seeks to protect in light of the mandate given by the Commission on Human Rights and whether such person spoke words in the course of his mission for the United Nations. By having been ordered by the Malaysian courts to defend his case at a full trial, the Special Rapporteur has effectively been denied the "immunity from legal process of every kind" to which he is entitled as an expert on mission under Section 22(b) of the General Convention.

It is essential to ensure that all Special Rapporteurs, as experts on mission for the United Nations, enjoy certain privileges and immunities, especially immunity from legal process of every kind, in order to promote the independent exercise of the functions entrusted to them. Moreover, in view of their independence, it is important that there be consistent protection of experts on mission regardless of nationality. The pending lawsuits in Malaysian courts have a direct and negative effect on the independence of experts, in this case of the Special Rapporteur on the Independence of Judges and Lawyers, who, while still being in office, has been called to account for his statements in his national courts for his words spoken as expert on mission. The protection, by way of immunity, of the Special Rapporteur's freedom of official speech is, therefore, at issue.

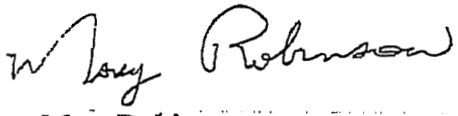
The actions against the Special Rapporteur on the Independence of Judges and Lawyers raise serious concerns about a wider pattern of interference with the work of all Special Rapporteurs, Representatives, independent experts and working groups of the Commission on Human Rights as well as other United Nations human rights mechanisms. The special procedures of the Commission on Human Rights play a crucial role in monitoring human rights situations around the world, calling public attention to human rights violations and preventing their further occurrence. The Commission on Human Rights has a responsibility to ensure that the special procedures guarantee experts full freedom and independence in giving effect to their respective mandates, guided by relevant resolutions and established practices among Special Rapporteurs and independent experts. In order to carry out their work independently and effectively, their immunity, as United Nations experts must be fully protected.

What is at stake in this case is not just the Special Rapporteur's interest and independence but that of the entire UN human rights system. Over the past decades, the United Nations has carefully developed a mechanism for the promotion and protection of human rights, which is essentially a system of fact-finding through independent experts designated either as special rapporteurs or members of working groups. These experts are given a mandate by important bodies such as the General Assembly, the Commission on Human Rights, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, or the Special Commission investigating Iraq, and are entrusted with preparing reports, conducting investigations or finding and establishing facts. They play an important role in informing the international community of their findings and make pertinent recommendations. The special rapporteurs appointed by the Commission on Human Rights have a special responsibility to analyze, and report on, allegations of human rights violations and government information relevant thereto. This mechanism, which, together with the increased UN field presence in human rights, has grown exponentially and has served to save human lives and resolve serious situations of violations.

In order to guarantee the independence and impartiality of the information and analysis provided by experts on mission that is essential to human rights policy making, the experts must be able to count on the privileges and immunities due to them as experts on mission for the United Nations.

Finally, threatening the immunity of one expert constitutes an attack on the entire United Nations system of experts on mission employed in the organization's human rights mechanism. What is more, the decisions of the Malaysian courts not only affect the immunities of experts on mission but also of the United Nations, UN officials and other persons working for the organization. Indeed, if these decisions are not corrected, they could have a chilling effect on the ability of independent experts to speak out, in complete independence and impartiality, against violations of international human rights standards.

Yours sincerely,



Mary Robinson

DECISION OF FEDERAL COURT ON 19.2.98

YAA TAN SRI LAMIN
YAA TAN SRI WAN ADNAN
YA DATO' DR. ZAKARIA

We thank both counsel for having assisted this Court for 1½ days.

We are unanimous in our finding that there is no fault in the grounds of Judgment of Court of Appeal and High Court. We are not dealing with a sovereign, or a full fledged diplomat ..... he is someone called a Rapporteur who has to act, in the present case, within mandate of, in laymen's terms, an unpaid, part-time provider of information, as against those cases cited to by counsel. Those cases are not relevant because they are cases with sovereign, diplomats. He is not anywhere near that - he has a mandate.

In the circumstances of this case, the application must be dismissed and dismissed with costs.

Y012

56

WISMA PUTRA,
KEMENTERIAN LUAR NEGERI MALAYSIA,
(MINISTRY OF FOREIGN AFFAIRS MALAYSIA).
50602 KUALA LUMPUR
Telegram: "WISMA PUTRA KUALA LUMPUR"
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KUALA LUMPUR 98

BY FAX

Ruj. Tuan:

Ruj. Kami: SR(600)826/6/10-41 Vol II

Tarikh: 13 March 1998

Mr L.Yves Fortier, C,C., Q.C.
Ogilvy Renault
1981 Mcgill College Avenue
Suite 1100
Montreal,
Quebec
Canada

Fax No: (514) 286 - 5474

TERIMA
13 MAR 1998
UNIT KAWAL
KEM. LUAR NEGERI

Dear Yves

I wish to acknowledge with thanks receipt of your fax dated 11 March 1998 on the Param Cumaraswamy Case.

2. Let me also say that it was a pleasure meeting you in Kuala Lumpur recently. We are indeed appreciative of the efforts of the Secretary General of the United Nations in sending you as his Special Envoy to discuss with us on the Param Cumaraswamy Case. We are grateful for the views that you had conveyed to us and we have also taken note of the modality that you had proposed for the resolution of the Case. In fact, your visit has contributed much to our better understanding of the various issues involved. I hope that, likewise, it has also enlightened you of the Malaysian perception on this subject.

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3. I am pleased to inform you we are now giving very serious consideration to the views and recommendations that you had conveyed to us in our mutual search for an amicable solution. At the same time, we are exploring the possibility of whether we might yet be able to find an out-of-court settlement to

this Case. Efforts in this regard are presently underway and the UN is also aware of this.

4. We are also aware that when the 54th Session of UN Commission on Human Rights begins next week in Geneva it is likely that questions may be raised on the PC Case. Our delegation has been briefed to respond to these appropriately.

5. We would like to thank you again for your kind efforts on this matter.

Best regards

Yours sincerely,

(Dato' N. Parameswaran)
Deputy Secretary General II
Ministry of Foreign Affairs

Judicial Harassment of a Special Rapporteur

The fifth meeting of Special Rapporteurs/Representatives/Experts and Chairpersons of Working Groups of the Commission on Human Rights and of the Advisory Services Programmes, held in Geneva from 26 to 29 May 1998, expresses serious concern about the judicial harassment meted out to Mr. Param Cumaraswamy, the Special Rapporteur on the independence of judges and lawyers.

The participants were disappointed that, despite the continuous appeals during the course of the last year, the legal proceedings involving a civil action in the Malaysian courts against Mr. Cumaraswamy, had not been terminated. Indeed, the Malaysian High Court had ignored the assertion by the Secretary-General of the United Nations of immunity attaching to the acts that are the subject of the proceedings. Article VI, section 22 of the Convention on Privileges and Immunities of the United Nations lays down that experts on mission enjoy immunity from legal process of every kind in "respect of words spoken or written ... in the course of the performance of their mission." The meeting welcomes the determination of the Secretary-General, as already urged by the participants at last year's meeting, that a dispute now exists between the United Nations and Malaysia, within the meaning of Article VIII, section 30 of the Convention

The participants consider that the Malaysian court decision to permit continuation of the proceedings represents not only a legally indefensible and oppressive attack against Mr. Cumaraswamy, but a challenge to the status of the United Nations as a whole, its officials and its experts on mission, including the mechanisms established by the Commission on Human Rights, as approved by the Economic and Social Council.

They therefore respectfully request the Secretary-General to take immediate and necessary measures to have the dispute promptly referred, pursuant to Article VIII, section 30, to the International Court of Justice for conclusive disposition.

They request the Chairperson of the Meeting to bring this statement to the attention of the Secretary-General, the High Commissioner for Human Rights, the Legal Counsel and the Chairman of the Commission on Human Rights, and to make it public.

58

UNITED NATIONS NATIONS UNIES

POSTAL ADDRESS—ADRESSE POSTALE UNITED NATIONS, N.Y. 10017
CABLE ADDRESS—ADRESSE TELEGRAPHIQUE UNATIONS NEWYORK

REFERENCE.

18 June 1998

Dear Ambassador Hasmy,

We are informed that, by his letter of 12 June 1998, Dato' Parameswaran, Deputy Secretary General II of the Malaysian Ministry for Foreign Affairs advised Maitre Yves Fortier that while the Cumaraswamy case is still under active consideration by the relevant Malaysian authorities, it is expected that a decision on the matter would be made very shortly. The Deputy Secretary General adds that the Government of Malaysia remains committed in its desire to find an amicable solution to this issue. The Secretary-General is equally committed to finding such a solution.

However, the Secretary-General is under considerable pressure from the international human rights and legal community to have this matter resolved. It is clear that the Secretary-General cannot avoid the issue, should it remain without a negotiated settlement, during the upcoming session of the Economic and Social Council which commences on 6 July 1998. Accordingly, unless the Government of Malaysia formally responds to the draft settlement agreement, we will have to resort to the International Court of Justice and will thus proceed to submit to you the questions we intend to present to the Economic and Social Council to request an advisory opinion.

Yours sincerely,

Ralph Zacklin
Assistant Secretary-General
for Legal Affairs

H.E. Mr. Hasmy Agam
Permanent Representative of Malaysia
to the United Nations
New York

United Nations E/1998/94 59

Economic and Social Council

Distr.: General
28 July 1998

Original: English

Substantive session of 1998
New York, 6–31 July 1998
Agenda item 14 (g)
Social and human rights questions: human rights

Privileges and immunities of the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers

Note by the Secretary-General

1. In its resolution 22 A (I) of 13 February 1946, the General Assembly adopted, pursuant to Article 105 (3) of the Charter of the United Nations, the Convention on the Privileges and Immunities of the United Nations (the Convention). Since then, 137 Member States have become parties to the Convention, and its provisions have been incorporated by reference into many hundreds of agreements relating to the headquarters or seats of the United Nations and its organs, and to activities carried out by the Organization in nearly every country of the world.

2. That Convention is, *inter alia*, designed to protect various categories of persons, including "Experts on Mission for the United Nations", from all types of interference by national authorities. In particular, Section 22 (b) of Article VI of the Convention provides:

> *Section 22*: "Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including time spent on journeys in connection with their missions. In particular they shall be accorded:
>
> "...
>
> "(b) in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of any kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations."

3. In its Advisory Opinion of 14 December 1989, on the "Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations" (the so-called "Mazilou case"), the International Court of Justice held that a Special Rapporteur of the Subcommission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights was an "expert on mission" within the meaning of Article VI of the Convention.

4. The Commission on Human Rights, by its resolution 1994/41 of 4 March 1994, endorsed by the Economic and Social Council in its decision 1994/251 of 22 July 1994, appointed Dato' Param Cumaraswamy, a Malaysian jurist, as the Commission's Special Rapporteur on the Independence of Judges and Lawyers. His mandate consists of tasks including, *inter alia*, to inquire into substantial allegations concerning, and to identify and record attacks on, the independence of the judiciary, lawyers and court officials. Mr.

98-21975 (E) 290798

Certified true copy

New York, NY, 6 August 1998

Cumaraswamy has submitted four reports to the Commission on the execution of his mandate: E/CN.4/1995/39, E/CN.4/1996/37, E/CN.4/1997/32 and E/CN.4/1998/39. After the third report containing a section on the litigation pending against him in the Malaysian civil courts, the Commission at its fifty-fourth session, in April 1997, renewed his mandate for an additional three years.

5. In November 1995 the Special Rapporteur gave an interview to *International Commercial Litigation*, a magazine published in the United Kingdom of Great Britain and Northern Ireland but circulated also in Malaysia, in which he commented on certain litigations that had been carried out in Malaysian courts. As a result of an article published on the basis of that interview, two commercial companies in Malaysia asserted that the said article contained defamatory words that had "brought them into public scandal, odium and contempt". Each company filed a suit against him for damages amounting to M$ 30 million (approximately US$ 12 million each), "including exemplary damages for slander".

6. Acting on behalf of the Secretary-General, the Legal Counsel considered the circumstances of the interview and of the controverted passages of the article and determined that Dato' Param Cumaraswamy was interviewed in his official capacity as Special Rapporteur on the Independence of Judges and Lawyers, that the article clearly referred to his United Nations capacity and to the Special Rapporteur's United Nations global mandate to investigate allegations concerning the independence of the judiciary, and that the quoted passages related to such allegations. On 15 January 1997, the Legal Counsel, in a note verbale addressed to the Permanent Representative of Malaysia to the United Nations, therefore "requested the competent Malaysian authorities to promptly advise the Malaysian courts of the Special Rapporteur's immunity from legal process" with respect to that particular complaint. On 20 January 1997, the Special Rapporteur filed an application in the High Court of Kuala Lumpur (the trial court in which the said suit had been filed) to set aside and/or strike out the Plaintiffs' writ, on the ground that the words that were the subject of the suits had been spoken by him in the course of performing his mission for the United Nations as Special Rapporteur on the Independence of Judges and Lawyers. The Secretary-General issued a note on 7 March 1997 confirming that "the words which constitute the basis of plaintiffs' complaint in this case were spoken by the Special Rapporteur in the course of his mission" and that the Secretary-General "therefore maintains that Dato' Param Cumaraswamy is immune from legal process with respect thereto". The Special Rapporteur filed this note in support of his above-mentioned application.

7. After a draft of a certificate that the Minister for Foreign Affairs proposed to file with the trial court had been discussed with representatives of the Office of Legal Affairs, who had indicated that the draft set out the immunities of the Special Rapporteur incompletely and inadequately, the Minister nevertheless on 12 March 1997 filed the certificate in the form originally proposed; in particular the final sentence of that certificate in effect invited the trial court to determine at its own discretion whether the immunity applied, by stating that this was the case "*only* in respect of words spoken or written and acts done by him in the course of the performance of his mission" (emphasis added). In spite of the representations that had been made by the Office of Legal Affairs, the certificate failed to refer in any way to the note that the Secretary-General had issued a few days earlier and that had in the meantime been filed with the court, nor did it indicate that in this respect, i.e. in deciding whether particular words or acts of an expert fell within the scope of his mission, the determination could exclusively be made by the Secretary-General, and that such determination had conclusive effect and therefore had to be accepted as such by the court. In spite of repeated requests by the Legal Counsel, the Minister for Foreign Affairs refused to amend his certificate or to supplement it in the manner urged by the United Nations.

8. On 28 June 1997, the competent judge of the Malaysian High Court for Kuala Lumpur concluded that she was "unable to hold that the Defendant is absolutely protected by the immunity he claims", in part because she considered that the Secretary-General's note was merely "an opinion" with scant probative value and no binding force upon the court and that the Minister for Foreign Affairs' certificate "would appear to be no more than a bland statement as to a state of fact pertaining to the Defendant's status and mandate as a Special Rapporteur and appears to have room for interpretation". The Court ordered that the Special Rapporteur's motion be dismissed with costs, that costs be taxed and paid forthwith by him and that he file and serve his defence within 14 days. On 8 July, the Court of Appeal dismissed Mr. Cumaraswamy's motion for a stay of execution.

9. On 30 June and 7 July 1997, the Legal Counsel thereupon sent notes verbales to the Permanent Representative of Malaysia, and also held meetings with him and his Deputy. In the latter note, the Legal Counsel, *inter alia*, called on the Malaysian Government to intervene in the current proceedings so that the burden of any further defence, including any expenses and taxed costs resulting therefrom, be assumed by the Government; to hold Mr. Cumaraswamy harmless in respect of the expenses he had already incurred or that were being taxed to him in respect of the proceedings so far; and, so as to prevent the accumulation

of additional expenses and costs and the further need to submit a defence until the matter of his immunity was definitively resolved between the United Nations and the Government, to support a motion to have the High Court proceedings stayed until such resolution. The Legal Counsel referred to the provisions for the settlement of differences arising out of the interpretation and application of the 1946 Convention that might arise between the Organization and a Member State, which are set out in Section 30 of the Convention, and indicated that if the Government decided that it cannot or does not wish to protect and to hold harmless the Special Rapporteur in the indicated manner, a difference within the meaning of those provisions might be considered have arisen between the Organization and the Government of Malaysia.

10. Section 30 of the Convention provides as follows:

> *Section 30*: "All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties."

11. On 10 July yet another lawsuit was filed against the Special Rapporteur by one the lawyers mentioned in the magazine article referred to in paragraph 5 above, based on precisely the same passages of the interview and claiming mages in an amount of M$ 60 million (US$ 24 million). On 11 July, the Secretary-General issued a note corresponding to the one of 7 March 1997 (see para. 6 above) and also communicated a note verbale with essentially the same text to the Permanent Representative of Malaysia with the request that it be presented formally to the competent Malaysian court by the Government.

12. On 23 October and 21 November 1997, new plaintiffs filed a third and fourth lawsuit against the Special Rapporteur for M$ 100 million (US$ 40 million) and M$ 60 million (US$ 24 million) respectively. On 27 October and 22 November 1997, the Secretary-General issued identical certificates of the Special Rapporteur's immunity.

13. On 7 November 1997, the Secretary-General advised the Prime Minister of Malaysia that a difference might have arisen between the United Nations and the Government of Malaysia and about the possibility of resorting to the International Court of Justice pursuant to Section 30 of the Convention. Nonetheless on 19 February 1998, the Federal Court of Malaysia denied Mr. Cumaraswamy's application for leave to appeal stating that he is neither a sovereign nor a full-fledged diplomat but merely "an unpaid, part-time provider of information".

14. The Secretary-General then appointed a Special Envoy, Maître Yves Fortier of Canada, who, on 26 and 27 February 1998, undertook an official visit to Kuala Lumpur to reach an agreement with the Government of Malaysia on a joint submission to the International Court of Justice. Following that visit, on 13 March 1998 the Minister for Foreign Affairs of Malaysia informed the Secretary-General's Special Envoy of his Government's desire to reach an out-of-court settlement. In an effort to reach such a settlement, the Office of Legal Affairs proposed the terms of such a settlement on 23 March 1998 and a draft settlement agreement on 26 May 1998. Although the Government of Malaysia succeeded in staying proceedings in the four lawsuits until September 1998, no final settlement agreement was concluded. During this period, the Government of Malaysia insisted that, in order to negotiate a settlement, Maître Fortier must return to Kuala Lumpur. While Maître Fortier preferred to undertake the trip only once a preliminary agreement between the Parties had been reached, nonetheless, based on the Prime Minister of Malaysia's request that Maître Fortier return as soon as possible, the Secretary-General requested his Special Envoy to do so.

15. Maître Fortier undertook a second official visit to Kuala Lumpur, from 25 to 28 July 1998, during which he concluded that the Government of Malaysia was not going to participate either in settling this matter or in preparing a joint submission to the current session of the Economic and Social Council. The Secretary-General's Special Envoy therefore advised that the matter should be referred to the Council to request an advisory opinion from the International Court of Justice. The United Nations had exhausted all efforts to reach either a negotiated settlement or a joint submission through the Council to the International Court of Justice. In this connection, the Government of Malaysia has acknowledged the Organization's right to refer the matter to the Council to request an advisory opinion in accordance with Section 30 of the Convention, advised the Secretary-General's Special Envoy that the United Nations should proceed to do so, and indicated that, while it will make its own presentations to the International Court of Justice, it does not oppose the submission of the matter to that Court through the Council.

16. The Secretary-General considers it most important that the principle be accepted that it is for himself alone to determine, with conclusive effect (except as indicated in para. 17 below), whether a member of the staff of the

Organization or an expert on mission has spoken or written words or performed an act "in their official capacity" (in the case of officials) or "in the performance of their mission" (in the case of experts on mission). Unless such conclusive effect is accorded to his determinations in this respect, it will be for national courts to determine – and in respect of a given word or act there may be several national courts – whether an official or an expert, or a former official or expert, enjoys immunity in respect of his words or acts. The adjudication of United Nations privileges and immunities in the national courts would be certain to have a negative effect on the independence of officials and experts, who would then have to fear that at any time, whether they were still in office or later they had left it, they could be called to account in national courts, not necessarily their own, civilly or criminally, for their words spoken or written or acts performed as officials or experts.

17. Although the decision of the Secretary-General must thus be considered as not subject to challenge in national courts, it can, of course, be challenged by a Government concerned pursuant to Section 30 of the 1946 Convention (quoted in para. 10 above), in which case the matter would be decided with binding effect by the International Court of Justice.

18. It should be pointed out that Section 23 of the 1946 Convention provides in respect of experts (and similarly Section 20 in respect of officials) that:

> *Section 23*: "Privileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations."

Thus any abuse of the immunities of an expert (or an official) would be prevented by the right and duty of the Secretary-General to waive such immunity under the circumstances specified in those sections.

19. In connection with this case, it should also be noted that the Secretary-General received a communication from the Special Rapporteurs/Representatives/Experts and Chairpersons of Working Groups of the Commission on Human Rights and the Advisory Services Programme of the United Nations Commission on Human Rights which indicated that "undermining the immunity accorded to one expert constitutes an attack on the entire system and institution of United Nations human rights special procedures and mechanisms". Moreover, on 29 May 1998, the Fifth Meeting of Special Rapporteurs/Representatives/ Experts and Chairpersons of Working Groups of the Commission on Human Rights and of the Advisory Services Programmes adopted a statement entitled the "Judicial Harassment of a Special Rapporteur" urging the Secretary-General to refer the matter to the International Court of Justice pursuant to Section 30 of the Convention. The Secretary-General received innumerable interventions from representatives of the international human rights and legal community reflecting the overwhelming consensus in favour of referring the matter to the International Court of Justice.

20. Finally, it is necessary to point out that unless the Government of Malaysia accepts the responsibility, costs and expenses of ensuring respect for the Special Rapporteur's immunity through appropriate interventions in the Malaysian courts, then these considerable expenses might have to be assumed by the Organization itself as it considers that the words that constitute the basis of the plaintiffs' complaint were spoken by the Rapporteur in the course of his mission.

21. As the Organization and the Government of Malaysia agree that a difference has arisen between them out of the interpretation or application of the Convention and as they have been unable to agree on another mode of settlement, the difference should be referred to the International Court of Justice in accordance with Section 30 of the Convention and the following request for an advisory opinion should be made in accordance with Article 96 of the Charter of the United Nations and Article 65 of the Statute of the Court:

> "Considering the difference that has arisen between the United Nations and the Government of Malaysia with respect to the immunity from legal process of Mr. Dato' Param Cumaraswamy, the United Nations Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers, in respect of certain words spoken by him:
>
> "1. Subject only to Section 30 of the Convention on the Privileges and Immunities of the United Nations, does the Secretary-General of the United Nations have the exclusive authority to determine whether words were spoken in the course of the performance of a mission for the United Nations within the meaning of Section 22 (b) of the Convention?
>
> "2. In accordance with Section 34 of the Convention, once the Secretary-General has determined that such words were spoken in the course of the performance of a mission and has decided to maintain, or not to waive, the immunity from legal process, does the Government of a Member

State party to the Convention have an obligation to give effect to that immunity in its national courts and, if failing to do so, to assume responsibility for, and any costs, expenses and damages arising from, any legal proceedings brought in respect of such words?

"Pending receipt of the advisory opinion of the International Court of Justice, which shall be accepted as decisive by the parties, the Government of Malaysia is called upon to ensure that all judgements and proceedings in this matter in the Malaysian courts are stayed."

United Nations E/1998/94/Add.1 60

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Social and human rights questions: human rights

Privileges and immunities of the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers

Addendum

Note by the Secretary-General

In paragraph 14 of the note by the Secretary-General on the privileges and immunities of the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers (E/1998/94), it is reported that the "Government of Malaysia succeeded in staying proceedings in the four lawsuits until September 1998". In this connection, the Secretary-General has been informed that on 1 August 1998, Dato' Param Cumaraswamy was served with a Notice of Taxation and Bill of Costs dated 28 July 1998 and signed by the Deputy Registrar of the Federal Court notifying him that the bill of costs of the Federal Court application would be assessed on 18 September 1998. The amount claimed is M$ 310,000 (US$ 77,500). On the same day, Dato' Param Cumaraswamy was also served with a Notice dated 29 July 1998 and signed by the Registrar of the Court of Appeal notifying him that the Plaintiff's bill of costs would be assessed on 4 September 1998. The amount claimed in that bill is M$ 550,000 (US$ 137,500).

Certified true copy

New York, NY, 6 August 1998

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SOCIAL AND HUMAN RIGHTS QUESTIONS: HUMAN RIGHTS

Draft decision submitted by the Vice-President of the Council, Mr. Anwarul Chowdhury (Bangladesh), on the basis of informal consultations

The Economic and Social Council,

Having considered the note by the Secretary-General on the privileges and immunities of the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers,[1]

Considering that a difference has arisen between the United Nations and the Government of Malaysia, within the meaning of section 30 of the Convention on the Privileges and Immunities of the United Nations, with respect to the immunity from legal process of Dato' Param Cumaraswamy, the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers,

Recalling General Assembly resolution 89 (I) of 11 December 1946,

1. Requests on a priority basis, pursuant to Article 96, paragraph 2, of the Charter of the United Nations and in accordance with General Assembly resolution 89 (I), an advisory opinion from the International Court of Justice on the legal question of the applicability of article VI, section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, taking into account the circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General,[1] and on the legal obligations of Malaysia in this case;

[1] E/1998/94.

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2. Calls upon the Government of Malaysia to ensure that all judgements and proceedings in this matter in the Malaysian courts are stayed pending receipt of the advisory opinion of the International Court of Justice, which shall be accepted as decisive by the parties.

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REPORT

OF THE

PREPARATORY COMMISSION OF THE UNITED NATIONS

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CHAPTER VII

PRIVILEGES, IMMUNITIES AND FACILITIES OF THE UNITED NATIONS

Section 1: Recommendations Concerning Privileges and Immunities

1. THE PREPARATORY COMMISSION REPORTS to the General Assembly that it has instructed the Executive Secretary to invite the attention of the Members of the United Nations to the fact that, under Article 105 of the Charter, the obligation of all members to accord to the United Nations, its officials and the representatives of its members all privileges and immunities necessary for the accomplishment of its purposes, operates from the coming into force of the Charter and is therefore applicable even before the General Assembly has made the recommendations or proposed the conventions referred to in paragraph 3 of Article 105.

2. THE PREPARATORY COMMISSION RECOMMENDS that the General Assembly, at its First Session, should make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of Article 105 of the Charter, or propose conventions to the Members of the United Nations for this purpose.

3. THE PREPARATORY COMMISSION TRANSMITS for the consideration of the General Assembly the attached study on privileges and immunities and the attached draft convention on privileges and immunities.

4. THE PREPARATORY COMMISSION CONSIDERS that the details of diplomatic privileges and immunities to be accorded to members of the International Court of Justice when engaged upon the business of the Court, and the privileges and immunities of agents, counsel, and advocates of parties before the Court, necessary to the independent exercise of their duties, at the seat of the Court and elsewhere, should be determined after the Court has been consulted, and that until further action has been taken the rules applicable to the members of the Permanent Court of International Justice should be followed.

5. THE PREPARATORY COMMISSION RECOMMENDS to the General Assembly that the privileges and immunities of specialized agencies contained in their respective constitutions should be reconsidered. If necessary, negotiations should be opened for their co-ordination in the light of any convention ultimately adopted by the United Nations with regard to the considerations set forth in the following extract from the appendix to Section 5 of Chapter V of the Report by the Executive Committee, to which a few words in italics have been added:

> "5. There are many advantages in the unification, as far as possible of the privileges and immunities enjoyed by the United Nations and the various specialized agencies. On the other hand, it must be recognized that not all specialized agencies require all the privileges and immunities which may be needed by others. No specialized agency would, however, require greater privileges than the United Nations itself. *Certain of the specialized agencies may, by reason of their particular functions, require privileges of a special nature which are not required by the United Nations.* The privileges and immunities, therefore, of the United Nations might be regarded as a maximum within which the various specialized agencies should enjoy just such privileges and immunities as the proper fulfilment of their respective functions may require. It should be a principle that no immunities and privileges, which are not really necessary, should be asked for."

Appendix A: Study on Privileges and Immunities

Provisions of the Charter

1. Chapter XVI of the Charter contains the following provisions:

" *Article* 104

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

" *Article* 105

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

2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs *1* and *2* of this Article or may propose conventions to the Members of the United Nations for this purpose."

Privileges and Immunities at the seat of the Organization and elsewhere

2. The question of privileges and immunities for the United Nations is of the greatest importance in connection with the country in which the United Nations has its seat. In the case of the League of Nations, including the International Labour Organization, the Covenant of the League contains only the following short provision in Article 7:

" Representatives of the Members of the League and officials of the League, when engaged on the business of the League, shall enjoy diplomatic privileges and immunities."

As a result, all the detailed arrangements for the privileges and immunities of the League of Nations and the I.L.O. were worked out in agreements concluded between the Secretary-General of the League and the Swiss Government. It would seem desirable that the working out of the detailed privileges and immunities of the United Nations should be deferred until the question of its seat has been decided.

3. However, although the question of privileges and immunities arises in the greatest degree as between the United Nations and the country in which it has its seat, the same question arises as between the Organization and all its Members. The difference is one of degree rather than one of kind. The United Nations may have offices elsewhere than at its seat. The officials of the Organization may be travelling on its business in any part of the world. The United Nations may wish to conclude contracts and hold funds or property elsewhere than at its seat. For these and similar reasons, therefore, the Organization will require, in the territories of all Members, the same kind of privileges and immunities as it has in the country of its seat.

Precedents afforded by the Constitutions of Specialized Agencies

4. A number of specialized agencies is already in existence. Their constitutions, or the agreements under which they are set up, have for the most part detailed provisions with regard to privileges and immunities based to a large extent on the arrangements made between the League of Nations and the Swiss Government. These specialized agencies include the following: The International Monetary Fund (Article IX), the International Bank for Reconstruction and Development (Article VII), United Nations Relief and Rehabilitation Administration (Resolutions Nos. 32, 34 and 36 of the first session of the Council), Food and Agriculture Organization (Articles VIII and XV), European Central Inland Transport Organization (Article VIII, paragraphs 13, 14, 15, 16, 17). These provisions are on the same lines in each case, though in some instances they have been worked out in more detail than in others.

Co-ordination of the Privileges and Immunities of the United Nations with those of Specialized Agencies

5. There are many advantages in the unification, as far as possible, of the privileges and immunities enjoyed by the United Nations and the various specialized agencies. On the other hand, it must be recognized that not all specialized agencies require all the privileges and immunities which may be needed by others. No specialized agency would, however, require greater privileges than the United Nations itself. The privileges and immunities

therefore, of the United Nations might be regarded as a maximum within which the various specialized agencies should enjoy just such privileges and immunities as the proper fulfilment of their respective functions may require. It should be a principle that no immunities and privileges, which are not really necessary, should be asked for. An example of a case where a differentiation has been made between immunities, for practical reasons, may be seen by comparing Section 3 of Article IX of the Articles of Agreement of the International Monetary Fund, and Section 3 of Article VII of the Articles of Agreement of the International Bank for Reconstruction and Development. There are certain privileges and immunities which probably every specialized agency would require as well as the United Nations itself, such as recognition that it possesses legal capacity to contract and to hold property, and to be a party to legal proceedings, the immunity of its premises and papers, and the granting of travelling facilities to its officials. When the privileges and immunities of the United Nations have been determined in detail, and the specialized agencies are being brought into relationship with the United Nations, reconsideration of the privileges and immunities accorded to such specialized agencies may be desirable if it is found that they enjoy privileges and immunities in excess of those to be given to the United Nations or of what is really required.

Creation of an International Passport

6. In order to facilitate the travelling of officials it may be found desirable to institute an international passport issued by the Organization, describing the holder as its official. The United Nations might issue such passports also to the senior officials of specialized agencies. The creation of this passport would not, of course, impair the sovereign rights of members of the United Nations in respect of the granting of visas. It might, however, be hoped that any necessary visas would be granted speedily. Member governments are already required to grant visas speedily under the constitutions of some specialized agencies. It may be desirable to confine the holding of these special passports to superior officials.

Privileges and Immunities

7. In this report the expression "diplomatic privileges and immunities" is used for convenience to describe the whole complex of privileges and immunities which are in fact accorded to diplomatic envoys. While it will clearly be necessary that all officials, whatever their rank, should be granted immunity from legal process in respect of acts done in the course of their official duties, whether in the country of which they are nationals or elsewhere, it is by no means necessary that all officials should have diplomatic immunity. On the contrary, there is every reason for confining full diplomatic immunity to the cases where it is really justified. Any excess or abuse of immunity and privilege is as detrimental to the interests of the international organization itself as it is to the countries who are asked to grant such immunities. In the case of existing specialized agencies, the practice has up to now been to confine diplomatic immunity to the senior official of the agency concerned and those of his assistants, whose rank is equivalent to that of Assistant Secretary-General. (In the case of the I.L.O. the range of officials to whom diplomatic immunity has been accorded is somewhat wider.) It is also a principle that no official can have, in the country of which he is a national, immunity from being sued in respect of his non-official acts and from criminal prosecution. It is further most desirable that both the United Nations and all specialized agencies should adopt the principle that privileges and immunities are only given to their officials in the interests of the Organization in whose service they are, and in no way for the benefit of the individual concerned, and that, in consequence, the Secretary-General both can waive immunity and will in fact do so in every case where such a course is consistent with the interests of the United Nations. This rule has long been in force in the International Labour Organization. It has been accepted by most of the new specialized agencies which have come into being. Similarly, it is desirable that where the United Nations or a specialized agency concludes contracts with private individuals or corporations, it should include in the contract an undertaking to submit to arbitration disputes arising out of the contract, if it is not prepared to go before the Courts. Most of the existing specialized agencies have already agreed to do this.

Taxation of Officials in the State of which they are nationals

8. The provisions in the agreements or constitutions of the new specialized agencies, while providing in general that no taxation should be levied on the salaries of officials, leave complete latitude to governments to tax the salaries of officials who are their own nationals or persons resident in their territory. As a result, the Act of Parliament of the United Kingdom which was passed to enable the United Kingdom to give effect to its obligations as regards privileges and immunities for international organizations (the Diplomatic Privileges Extension Act, 1944) excepts from the immunity from income tax the salaries of those international officials who are both British subjects and whose usual place of abode is in the United Kingdom. A similar practice has been followed

in certain other countries. It is, however, a matter for consideration whether this latitude or this exception are really sound. One of its effects is that some of the members of the staff have salaries which are tax free, because being resident outside their own states they do not fall under the income tax provisions of their own state, while other officials doing the same work for the same nominal salary are subject to income tax. This has led to certain administrative difficulties and has indeed raised the question whether the United Nations should not pay some special allowance to those of its employees who are paying income tax, in order to produce equality.

The International Court of Justice

9. The above paragraphs do not apply to the International Court of Justice. The Statute of the Court provides:

Article 19

"The members of the Court, when engaged upon the business of the Court, shall enjoy diplomatic privileges and immunities."

Article 32—Paragraph 8

"The above salaries, allowances and compensation shall be free of all taxation."

Article 42—Paragraph 3

"The agents, counsel, and advocates of parties before the Court shall enjoy the privileges and immunities necessary to the independent exercise of their duties."

When the first and second of these paragraphs (which correspond to the provisions of the Statute of the Permanent Court, whereas the third is new) are compared with paragraph 2 of the above quoted Article 105 of the Charter of the United Nations, it seems clear that the members of the Court, when engaged in the business of the Court, are to enjoy diplomatic privileges and immunities in the fullest sense. This has been the case with the members of the Permanent Court. For that institution the details of the privileges and immunities to be accorded at the seat of the Court were settled by negotiations between the Court itself and the Netherlands Government. It would seem desirable to postpone consideration of the subject until the Court can be consulted. It is therefore suggested that, for the first session of the Court, the rules applicable to the members of the Permanent Court should be observed, and that the new Court should then be invited to state whether changes are in their opinion required and, if this be the case, whether they wish the General Assembly to act on their behalf.

It would also appear expedient to consult the Court upon the privileges and immunities necessary for its members when engaged on the Court's business outside the country of its seat.

Finally, the question of the privileges and immunities of agents, counsel and advocates of parties before the Court would seem to be a matter which should only be taken up after it has been possible to consult the Court. It is not likely to arise at the first session.

Annex to Study on Privileges and Immunities

IMMUNITIES AND PRIVILEGES GRANTED TO THE ORGANIZATION, REPRESENTATIVES OF THE MEMBERS, AND OFFICIALS IN ACCORDANCE WITH THE CONSTITUTIONS OF THE INTERNATIONAL MONETARY FUND—THE INTERNATIONAL BANK OF RECONSTRUCTION AND DEVELOPMENT — UNITED NATIONS RELIEF AND REHABILITATION ADMINISTRATION — FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS— AND EUROPEAN CENTRAL INLAND TRANSPORT ORGANIZATION

Status of the Organization

Purposes of the Immunities and Privileges

1. International Monetary Fund (Article IX—Section 1) and International Bank for Reconstruction and Development (Article VII—Section 1):

"To enable the Fund/Bank to fulfil the functions with which it is entrusted the status, immunities and privileges set forth in this Article shall be accorded to the Fund in the territories of each member."

2. United Nations Relief and Rehabilitation Administration (Resolution 32):

"WHEREAS the Council is desirous of insuring to the Administration and its agents the independence necessary for the efficient performance of the duties entrusted to them, and of avoiding the imposition of financial burdens upon the funds contributed by member governments to the Administration;"

Appendix B: Draft Convention on Privileges and Immunities

WHEREAS 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 fulfilment of its purposes and

WHEREAS Article 105 of the Charter of the United Nations provides that the Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes and that representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization and

WHEREAS by a resolution of the General Assembly adopted on.....
.....it was decided to propose a convention with a view to determining the details of the application of the aforesaid Articles and

WHEREAS the present convention was drawn up and approved by a resolution of the General Assembly adopted on.....

Introductory Article

1. The present convention is open to accession on behalf of every Member of the United Nations.

2. Accession shall be effected by a deposit of an instrument with the Secretary-General of the United Nations and the convention shall take effect as regards each Member as from the date of deposit of its instrument of accession.

3. The Secretary-General shall inform all Members of the United Nations of the deposit of each accession.

4. It is understood that, when an instrument of accession is deposited on behalf of any Member, this Member will have taken such action as is necessary in its own territories for the purpose of giving effect under its own laws to the terms of the present convention.

5. The present convention shall continue in force as between the Organization and every Member which has deposited an instrument of accession for so long as that Member remains a Member of the Organization unless, by agreement, other provisions are substituted for the provisions of the present Convention. The Secretary-General may conclude with any Member or Members supplementary agreements, approved in each case by the General Assembly, amending, so far as that Member or those Members are concerned, the provisions of the present Convention.

Article 1

The Organization shall possess full juridical personality and in particular, the capacity:

(*a*) to contract;

(*b*) to acquire and dispose of immovable and movable property; and

(*c*) to institute legal proceedings.

Article 2

1. The Organization, its property and its assets, wherever located and by whomsoever held, shall enjoy immunity from every form of judicial process except to the extent that in any case it expressly waives its immunity for the purpose of any proceedings or by the terms of any contract.

2. The premises of the Organization shall be inviolable. The property and assets of the Organization wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and from any other form of seizure, whether by executive, administrative or legislative action or otherwise.

3. The archives of the Organization and in general all documents, belonging to it or held by it, shall be inviolable wherever located.

4. (*a*) Without being restricted by financial controls, regulations or moratoria of any kind:

(i) the Organization may hold funds or currency of any kind and operate accounts in any currency; and

(ii) the Organization shall be free to transfer its funds from one country to another or within any country and to convert any currency held by it into any other currency.

(*b*) In exercising its rights under (*a*) above, the Organization shall pay due regard to any representations by the national authorities of any Member insofar as effect can be given to such representations without detriment to the financial interests of the Organization.

Article 3

1. The Organization, its assets, income and other property shall be :

(*a*) exempt from all direct taxes* ; it is understood, however, that the Organization cannot claim exemption from taxes which are, in fact, no more than charges for services rendered ; and

(*b*) exempt from customs duties in respect of articles imported by the Organization for its official use and in respect of publications issued by it. It is, however, understood that articles imported free of customs duty will not be sold in the country into which they were imported except under conditions agreed with the authorities of that country.

2. While the Organization cannot in principle claim exemption from sales taxes and excise duties, which form part of the price of goods sold, nevertheless in cases where the Organization is making large purchases for official use of goods on which such taxes and duties have been charged or are chargeable, Members will, whenever possible, make appropriate administrative arrangements for the remission or return of the amount of tax or duty.

Article 4

Provisions regarding communication facilities and facilities for purchases. (*See* Annex to Appendix C of this chapter).

Article 5

1. Representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the Organization shall be accorded, while exercising their functions and during their journey to and from the place of meeting, the following privileges and immunities :

(*a*) immunity from legal process of any kind ;

(*b*) immunity from immigration restrictions, alien registration and national service obligations ;

(*c*) the same facilities as regards exchange restrictions as are accorded to representatives of the Governments of Members visiting the country ; and

(*d*) the same immunities and facilities as regards their personal baggage as are accorded to diplomatic envoys.

2. As a means of securing complete freedom of speech and independence in the discharge of their duties, the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the Organization shall be accorded immunity from legal process in respect of all acts done and words spoken or written by them in the discharge of their duties as such.

3. The provisions of paragraphs 1 (*a*) and (*b*) and of paragraph 2 of this Article cannot be invoked by any persons against the authorities of the country of which he is a national or of which he is or has been the representative, nor when the Member which he represented has waived the immunity in question.

4. In this Article the expression representatives shall be deemed to include all Delegates and Deputy Delegates, advisers, technical experts, and secretaries.

Article 6

1. All officials† of the Organization shall :

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

(*b*) be exempt from taxation on the salaries and emoluments paid to them by the Organization ;

(*c*) be immune from national service obligations ;

(*d*) be immune, together with their spouses and minor children, from immigration restrictions and alien registration ;

(*e*) be accorded the same privileges as regards exchange facilities as are accorded to the officials of comparable ranks forming part of the diplomatic missions to the government of x ; and

(*f*) be given together with their spouses and minor children the same repatriation facilities as diplomatic agents in time of international crisis.

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

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* The sub-committee considered that it may be desirable to define the expression "direct taxes," but did not feel able to perform this task, which requires the assistance of revenue experts.

† By this word it is intended to cover all ranks of the Secretariat and all those who have to make the declaration of loyalty to the Organization (Chapter VIII, Section 3, Regulation 2), but not to include local employees, such as office cleaners, motor car drivers, etc.

Article 7

1. The Organization may issue United Nations passports to its officials.* All United Nations passports shall be recognized and accepted as passports.

2. Applications for visas from the holders of such passports when accompanied by a certificate that they are travelling on the business of the Organization, shall be dealt with with the minimum of delay. In addition the holders of United Nations passports shall be granted facilities for speedy travel.

3. Similar facilities to those specified in paragraph 2 above shall be accorded to experts and other persons who, though not officials of the United Nations, have a certificate that they are travelling on the business of the Organization.

4. The Secretary-General, Assistant Secretaries-General, and Directors travelling on United Nations passports on the business of the Organization shall be granted the same facilities as are accorded diplomatic envoys.

Article 8

1. It is understood that privileges and immunities are granted to officials in the interests of the Organization and not for the benefit of the officials themselves. The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, such immunity can be waived without prejudice to the interests of the Organization.

2. The Organization shall co-operate at all times with the appropriate authorities to facilitate the proper administration of justice, secure the execution of police regulations and prevent the occurrence of any abuse in connection with the privileges, immunities and facilities mentioned in this convention. In particular the Secretary-General will ensure that the drivers of all official motor cars of the Organization and all officials who own or drive motor cars shall be properly insured against third party risks.†

3. The Organization shall make provision for appropriate modes of settlement of :

(*a*) disputes arising out of contracts or other disputes of a private law character to which the Organization is a party ; and

(*b*) disputes involving any official of the Organization, who by reason of his official position enjoys immunity, if such immunity has not been waived by the Secretary-General.

Article 9

Freedom of travel to the seat of the Organization for the press, representatives of non-governmental Organizations and private individuals. (*See* Annex to Appendix C of this chapter).

Article 10

The provisions of Article 7 may be applied to the comparable officials of specialized agencies if the agreements for relationship made under Article 63 of the Charter so provide.

Article 11

All differences arising out of the interpretation or application of the present Convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If the dispute is between the Organization on the one hand and a Member on the other hand, a request shall be made for an advisory opinion in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The advisory opinion of the Court shall be accepted by the parties to the dispute as a binding decision in the same manner as a judgment.

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* *See* footnote to Article 6.

† If it is decided that the internal regulations of the Organization shall contain provisions to this effect this sentence could be omitted.

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DOCUMENTS OFFICIELS DE LA PREMIERE PARTIE DE LA PREMIERE SESSION DE L'ASSEMBLEE GENERALE

SIXIEME COMMISSION
QUESTIONS JURIDIQUES

Procès-verbaux des séances
11 janvier - 8 février 1946

CHURCH HOUSE, WESTMINSTER

SIXTH MEETING

Held on Thursday, 24 January 1946 at 5 p.m.

Chairman: Mr. Roberto JIMÉNEZ (Panama).

9. Privileges and Immunities: General Discussion

The SECRETARY, on the invitation of the Chairman, made a statement on the documentation relating to the question of privileges and immunities, drawing the attention of the Committee to Chapter VII of the Report of the Preparatory Commission, and pointing out that the Committee had to choose whether it should make a series of recommendations or draft a convention. The Committee would also have to adopt a draft treaty with the host State. The Secretary also stated that the documents contained in the Report of the Commission were now out of date since the juridical Sub-Committee of the Interim Committee on Headquarters had elaborated new drafts.

The CHAIRMAN proposed that a Sub-Committee on privileges and immunities be appointed.

A brief discussion took place on the terms of reference of the Sub-Committee.

Decision: *The Committee agreed, by a vote, that the terms of reference of the Sub-Committee were first of all to recommend which was preferable, a draft convention on privileges and immunities, or a series of recommendations, and to report its recommendations to the Committee.*

SIXIEME SEANCE

Tenue le jeudi 24 janvier 1946 à 17 heures.

Président: M. Roberto JIMÉNEZ (Panama).

9. Privilèges et immunités: Discussion générale

Sur l'invitation du Président, le SECRÉTAIRE fait un exposé sur la documentation relative aux privilèges et immunités, en attirant l'attention sur le chapitre VII du Rapport de la Commission préparatoire et en signalant que la Sixième Commission a le choix entre la présentation d'une série de recommandations et l'établissement d'un projet de convention. La Commission devra aussi approuver un projet de traité avec l'Etat hôte. Le Secrétaire ajoute que les documents contenus dans le Rapport de la Commission préparatoire sont en ce moment périmés, du fait que la Sous-Commission juridique du Comité temporaire du siège permanent a élaboré de nouveaux textes.

Le PRÉSIDENT propose de constituer une Sous-Commission des privilèges et immunités.

Une brève discussion a lieu sur le mandat de cette Sous-Commission.

Décision: *La Commission décide par un vote que la Sous-Commission aura pour mandat, en tout premier lieu, de recommander la solution qui lui paraît préférable, à savoir un projet de convention sur les privilèges et immunités ou une série de recommandations, et de faire rapport à ce sujet à la Commission.*

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The CHAIRMAN proposed the following Members to serve on the Sub-Committee: Australia, Belgium, Bolivia, Canada, China, Cuba, Denmark, Egypt, El Salvador, France, Poland, Union of Soviet Socialist Republics, United Kingdom, United States of America and Yugoslavia.

The representative of the UKRAINIAN SOVIET SOCIALIST REPUBLIC requested that the representative of Czechoslovakia should be included among the members of the Sub-Committee.

Mr. READ (Canada) asked that the representative of Czechoslovakia should take his place on the Sub-Committee, since, in his role of Rapporteur, he would be attending its meetings.

The representative of CZECHOSLOVAKIA expressed his thanks to the representatives of the Ukrainian Soviet Socialist Republic and Canada and agreed to take part in the meetings of the Sub-Committee.

10. Committee Structure of the General Assembly

The CHAIRMAN announced that, under the terms of reference of the Sixth Committee, the question of committee structure of the General Assembly had also to be studied, and he referred the Committee to page 21 of the Report of the Preparatory Commission, together with appendix II of the Report.

He proposed that this question should be studied by the Sub-Committee on rules of procedure.

The Chairman also proposed that the Sub-Committee on rules of procedure should be enlarged by the inclusion of the representatives of the United States and the USSR.

Decision: *The Committee adopted unanimously the Chairman's proposal.*

The meeting rose at 6.15 p.m.

Le PRÉSIDENT propose que la Sous-Commission comprenne des représentants des Membres suivants: Australie, Belgique, Bolivie, Canada, Chine, Cuba, Danemark, Egypte, Salvador, France, Pologne, Union des Républiques socialistes soviétiques, Royaume-Uni, Etats-Unis d'Amérique, Yougoslavie.

Le représentant de la RÉPUBLIQUE SOCIALISTE SOVIÉTIQUE D'UKRAINE demande que le représentant de la Tchécoslovaquie soit compris parmi les membres de la Sous-Commission.

M. READ (Canada) propose que le représentant de la Tchécoslovaquie occupe sa propre place à la Sous-Commission puisque, en sa qualité de Rapporteur, il assistera de toute façon à ses séances.

Le représentant de la TCHÉCOSLOVAQUIE remercie les représentants de la République socialiste soviétique d'Ukraine et du Canada et accepte de participer aux discussions de la Sous-Commission.

10. Commissions de l'Assemblée générale

Le PRÉSIDENT annonce que, selon le mandat assigné à la Sixième Commission, celle-ci aura aussi à étudier la question des commissions que doit comporter l'Assemblée générale, et il invite la Commission à se référer à la page 21 du Rapport de la Commission préparatoire ainsi qu'à l'annexe II de ce Rapport.

Il propose de confier l'examen de la question au Sous-Comité du règlement intérieur.

Il propose également d'adjoindre, au Sous-Comité du règlement intérieur, des représentants des Etats-Unis et de l'URSS.

Décision: *La Commission approuve à l'unanimité les propositions du Président.*

La séance est levée à 18 h. 15.

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ANNEX 3

[A/C. 6/17]
Original text: English

Privileges and Immunities

First Report of the Sub-Committee on Privileges and Immunities

Rapporteur: Mr. W. E. Beckett (United Kingdom)

1. On 24 January 1946, the Sixth Committee appointed a Sub-Committee[1] to consider chapter VII of the Report of the Preparatory Commission. The Sub-Committee was invited to present a preliminary report on the most appropriate methods of implementing the provisions of Article 105 of the Charter. The Sub-Committee met on 25 January, and after having elected a Chairman: H. E. M. Guerrero (El Salvador); a Vice-Chairman, Professor Krylov (Union of Soviet Socialist Republics) and Rapporteur, Mr. Beckett (United Kingdom), examined the respective advantages of:

(*a*) The Assembly making recommendations; and

(*b*) The Assembly proposing conventions to the Members of the United Nations.

Both these courses are mentioned in Article 105 of the Charter as possible alternatives.

2. The Sub-Committee agreed, without reservation, to request the Sixth Committee to recommend that the General Assembly should propose to the Members of the United Nations a general Convention which would determine the details of application of paragraphs 1 and 2 of Article 105 of the Charter. This suggestion does not prejudice the separate question of the conclusion of a special Convention with the State on the territory of which the seat of the United Nations will be situated.

3. There were three main reasons for the conclusion of the Sub-Committee. In the first place, it was thought that the immunities necessary for the fulfilment of the purposes of the Organization and the independent exercise of their functions by its officials and by the representatives of Members should be laid down in a manner which was as precise as possible. Secondly, that the method should be adopted which would be likely to lead to the greatest uniformity in application; and, thirdly, that the procedure should be such as best to facilitate the passing by Members of the necessary domestic legislation. All these three reasons pointed to the adoption of a Convention as the

[1] The Sub-Committee consists of the representatives of the following Members: Australia, Belgium, Bolivia, China, Cuba, Czechoslovakia, Denmark, Egypt, El Salvador, France, Poland, United Kingdom, United States of America, Union of Soviet Socialist Republics, Yugoslavia.

ANNEXE 3

[A/C. 6/17]
Texte original en anglais

Privilèges et immunités

Premier rapport de la Sous-Commission des privilèges et immunités

Rapporteur: M. W. E. Beckett (Royaume-Uni)

1. Le 24 janvier 1946, la Sixième Commission a chargé une Sous-Commission[1] d'étudier le chapitre VII du Rapport de la Commission préparatoire. La Sous-Commission a été invitée à présenter un rapport préliminaire sur les meilleures méthodes à suivre pour mettre en application les dispositions de l'Article 105 de la Charte. La Sous-Commission s'est réunie le 25 janvier, et après avoir élu Président, S. E. M. Guerrero (Salvador); Vice-Président, le Professeur Krylov (Union des Républiques socialistes soviétiques), et Rapporteur, M. Beckett (Royaume-Uni), a examiné les avantages respectifs qu'il y aurait pour l'Assemblée:

a) Soit à faire des recommandations;

b) Soit à proposer des conventions aux Membres des Nations Unies.

La possibilité de recourir à l'un ou l'autre de ces deux procédés est mentionnée à l'Article 105 de la Charte.

2. La Sous-Commission a décidé, sans réserve, d'inviter la Sixième Commission à recommander que l'Assemblée générale propose aux Membres des Nations Unies une Convention générale tendant à préciser les détails d'application des paragraphes 1 et 2 de l'Article 105 de la Charte. Cette suggestion ne préjuge pas la question tout à fait distincte de la conclusion d'une Convention spéciale avec l'Etat sur le territoire duquel sera établi le siège des Nations Unies.

3. Trois raisons principales ont motivé la conclusion de la Sous-Commission. Tout d'abord on a estimé que les immunités nécessaires pour permettre à l'Organisation d'atteindre ses buts, et à ses fonctionnaires et aux représentants des Membres d'exercer leurs fonctions en toute indépendance, devraient être formulées de façon aussi précise que possible. En second lieu on a pensé que l'on devrait adopter la méthode qui permettra d'apporter dans l'application le maximum d'uniformité. Enfin, la procédure devrait être de faciliter le plus possible l'adoption par les Etats Membres de la législation intérieure indispensable. Ces trois raisons ont amené à considérer l'adoption d'une Convention

[1] Le sous-comité est composé des représentants des Etats Membres ci-après: Australie, Belgique, Bolivie, Chine, Cuba, Tchécoslovaquie, Danemark, Egypte, Salvador, France, Pologne, Royaume-Uni, Etats-Unis d'Amérique, Union des Républiques socialistes soviétiques, Yougoslavie.

/...

best course. The procedure of recommendations in itself suggests some indefinity of content as well as latitude in application. Further, a Convention is more usual, as well as in general a more satisfactory basis upon which Governments can approach their respective legislatures in order to obtain any legislative action which may be necessary. Certain members of the Sub-Committee, and amongst them some representing Federal States, stressed their view that a Convention adopted by the General Assembly would be the method best calculated to facilitate legislation.

comme la meilleure méthode. La procédure des recommandations comporte, par sa nature même, une certaine imprécision dans son objet et quelque latitude dans son application. De plus, une Convention constitue le plus souvent la base sur laquelle les gouvernements peuvent, généralement dans les conditions les plus satisfaisantes, inviter leurs parlements respectifs à voter les mesures législatives éventuellement nécessaires. Certains membres de la Sous-Commission, et parmi eux des représentants d'Etats fédéraux, ont été d'avis que l'adoption d'une Convention par l'Assemblée générale constituerait la meilleure méthode pour faciliter le vote de mesures législatives.

4. The adoption of a Convention would not exclude the possibility of the adoption, in addition, of recommendations upon particular points which were not fully dealt with in the Convention. This possibility is merely alluded to, in case in the course of later discussion it is thought desirable to deal with particular points in this way. It should not be supposed that the Sub-Committee has yet come to the conclusion that it would be necessary or desirable to have such additional recommendations.

4. L'adoption d'une Convention n'exclurait pas la possibilité d'adopter en outre des recommandations sur des points particuliers qui ne seraient pas traités de manière complète dans la Convention. Cette possibilité n'est ici envisagée que pour le cas où, au cours de discussions ultérieures, il paraîtrait souhaitable de régler ainsi des points particuliers. Il ne faudrait pas en déduire que la Sous-Commission soit d'ores et déjà arrivée à la conclusion que des recommandations additionnelles de ce genre seraient nécessaires et souhaitables.

5. The general Convention on immunities and privileges of the United Nations is, in a sense, a Convention between the United Nations as an Organization, on the one part, and each of its Members individually on the other part. The adoption of a Convention by the General Assembly would therefore at one and the same time fix the text of the Convention and also imply the acceptance of that text by the United Nations as a body. On the other hand, each of the Members individually would only accept and become bound by the Convention when it had deposited its formal instrument of accession or ratification, a step which the Member would only take after it had fulfilled such requirements as its constitution prescribed.

5. La Convention générale sur les privilèges et immunités des Nations Unies constitue, en un certain sens, une Convention entre les Nations Unies considérées en tant qu'Organisation, d'une part, et les Etats Membres de cette Organisation pris individuellement, d'autre part. L'adoption d'une Convention par l'Assemblée générale établirait donc le texte de la Convention, en même temps qu'elle impliquerait l'acceptation de ce texte par les Nations Unies, de leur côté. D'autre part, chacun des Etats Membres pris individuellement n'accepterait la Convention et ne serait lié par elle que lorsqu'il aurait déposé l'instrument officiel de son adhésion ou de sa ratification, mesure que le Membre ne prendrait qu'après avoir satisfait aux exigences de sa constitution.

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CHURCH HOUSE, WESTMINSTER
LONDON

SEVENTH MEETING

[A/C.6/19]

Held on Monday, 28 January 1946 at 5 p.m.

Chairman: Mr. Roberto JIMÉNEZ (Panama).

11. Privileges and Immunities: First Report of the Sub-Committee (document A/C.6/17)

Mr. BECKETT (United Kingdom), speaking as Rapporteur of the Sub-Committee, stated that the Sub-Committee had reached agreement regarding the best method of implementing the provisions of Article 105 of the Charter (annex 3, page 44). It considered that the Committee should recommend the conclusion of a general convention concerning immunities and privileges.

Mr. Beckett further explained that the juridical Sub-Committee of the interim Committee on Headquarters had prepared a draft treaty (document A/C.6/21) with the host State, and to this had been attached an annex which was based on the provisions of the draft general convention on immunities and privileges contained in the Report of the Preparatory Commission.

Decision: *The Committee adopted unanimously the recommendation of the Sub-Committee that the General Assembly should propose a convention to the Members in respect of privileges and immunities, and that the Sub-Committee should draft such a convention.*

12. Provisional Rules of Procedure of the General Assembly: Amendment proposed by the delegation of Egypt to Rule 78 and Supplementary Rule S (document A/C.6/14)

The CHAIRMAN was of the opinion that the amendment proposed by the delegation of Egypt to rule 78 and supplementary rule S of the provisional rules of procedure (annex 2 c, page 40) should be referred for study to the Sub-Committee on rules of procedure.

Decision: *The Committee adopted the Chairman's proposal unanimously. It also agreed that the representative of Egypt, who was not a member of the Sub-Committee, should be invited to attend its meetings.*

13. Committee Structure of the General Assembly: Submission of Amendments

The CHAIRMAN stated that any delegation wishing to propose amendments to the rules of procedure relating to the committee structure of the General Assembly, notably rules 91 to 103, should submit them in writing to the Secretariat.

14. Steps necessary for convening the International Court of Justice (document A/C.6/16)

The CHAIRMAN announced that the Committee should now consider document A/C.6/16

SEPTIEME SEANCE

[A/C.6/19]

Tenue le lundi 28 janvier 1946 à 17 heures.

Président: M. Roberto JIMÉNEZ (Panama).

11. Privilèges et immunités: Premier rapport de la Sous-Commission (document A/C.6/17)

M. BECKETT (Royaume-Uni), Rapporteur de la Sous-Commission des privilèges et immunités, annonce que celle-ci est parvenue à un accord concernant les meilleures méthodes à suivre pour mettre en application les dispositions de l'Article 105 de la Charte (annexe 3, page 44). La Sous-Commission est d'avis que la Commission recommande l'établissement d'une convention générale relative aux privilèges et immunités.

M. Beckett informe en outre la Commission que le Sous-Comité juridique du Comité temporaire du siège permanent a élaboré un projet de traité à conclure avec l'Etat hôte (document A/C.6/21). A ce projet se trouve jointe une annexe qui s'inspire des dispositions du projet de convention sur les privilèges et immunités contenu dans le Rapport de la Commission préparatoire.

Décision: *La Commission adopte à l'unanimité la proposition de la Sous-Commission tendant à ce que l'Assemblée générale recommande aux Membres l'établissement d'une convention relative aux privilèges et immunités et que la Sous-Commission soit chargée d'en élaborer le projet.*

12. Règlement intérieur provisoire de l'Assemblée générale: Proposition d'amendement à l'article 78 et à l'article additionnel S, soumise par la délégation égyptienne (document A/C.6/14)

Le PRÉSIDENT propose que l'amendement soumis par la délégation égyptienne relativement à l'article 78 et à l'article additionnel S du règlement intérieur (annexe 2 c, page 40) soit renvoyé pour étude au Sous-Comité du règlement intérieur.

Décision: *La proposition du Président est adoptée à l'unanimité. En outre, la Commission décide que le représentant de l'Egypte, qui ne fait pas partie du Sous-Comité, sera invité à assister aux séances de celui-ci.*

13. Commissions de l'Assemblée générale: Proposition d'amendements

Le PRÉSIDENT prie les délégations désireuses de proposer des amendements au règlement intérieur, relativement aux Commissions de l'Assemblée générale, et notamment aux articles 91 à 103, de les présenter par écrit au Secrétariat.

14. Mesures à prendre en vue de la convocation de la Cour internationale de Justice (document A/C.6/16)

Le PRÉSIDENT invite la Commission à examiner le document A/C.6/16 (annexe 4,

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publics, United Kingdom, United States of America, Uruguay, Venezuela and Yugoslavia.

Absent: Bolivia, Costa Rica, Ethiopia, Greece, Guatemala, Haiti, Liberia, Luxembourg, Paraguay.

The meeting rose at 4.30 p.m.

ELEVENTH MEETING

[A/C.6/37]

Held on Thursday, 7 February 1946 at 2.30 p.m.

Chairman: Mr. Per FEDERSPIEL (Denmark), Vice-Chairman.

21. Election of a new Rapporteur

The CHAIRMAN congratulated the Rapporteur of the Committee, Mr. Read (Canada), on his election as a judge of the International Court of Justice, and announced that Mr. Read had resigned his office as Rapporteur in consequence of his election.

On the proposal of the Chairman, seconded by the representative of BELGIUM, Mr. BECKETT (United Kingdom) *was elected Rapporteur in the place of Mr. Read.*

22. Privileges and Immunities: Report of the Sub-Committee (document A/C.6/31): Draft Recommendation and Convention on the Privileges and Immunities of the United Nations (document A/C.6/28)

Mr. BECKETT (United Kingdom), Rapporteur, introducing the report of the Sub-Committee (annex 3a, page 45), pointed out that the general Convention on privileges and immunities of the United Nations was based closely on the text in the Report of the Preparatory Commission (page 72).

The CHAIRMAN called for comments on the draft general Convention on the privileges and immunities of the United Nations, submitted by the Sub-Committee.

Mr. WALKER (United States of America) reserved the position of his delegation with regard to paragraphs (*b*) and (*c*) of article V, section 18, concerning exemption from taxation on salaries and emoluments and immunity from national service obligations of officials as far as United States nationals were concerned. His reason was that the right to exempt from taxation and exempt from national service obligations was a prerogative of Congress in the United States of America.

The representative of FRANCE, while he admitted the practical difficulty for certain Members in adopting these two provisions, held that it was essential that equality should be maintained between all the officials of the United Nations independently of nationality.

Mr. KORETSKY (Ukrainian Soviet Socialist Republic) wished to reserve the position of his

bliques socialistes soviétiques, Royaume-Uni, Etats-Unis d'Amérique, Uruguay, Venezuela, Yougoslavie.

Absents: Bolivie, Costa-Rica, Ethiopie, Grèce, Guatemala, Haïti, Libéria, Luxembourg, Paraguay.

La séance est levée à 16 h. 30.

ONZIEME SEANCE

[A/C.6/37]

Tenue le jeudi 7 février 1946 à 14 h. 30.

Président: M. Per FEDERSPIEL (Danemark), Vice-Président.

21. Election d'un nouveau Rapporteur

Le PRÉSIDENT félicite le Rapporteur de la Commission, M. Read (Canada), de son élection comme juge à la Cour internationale de Justice, et fait connaître qu'en raison de cette élection, M. Read s'est démis de ses fonctions de Rapporteur.

Sur la proposition du Président, appuyée par le représentant de la BELGIQUE, M. BECKETT (Royaume-Uni) *est élu Rapporteur en remplacement de M. Read.*

22. Privilèges et immunités: Rapport de la Sous-Commission (document A/C.6/31): Projet de recommandation et Convention sur les privilèges et immunités des Nations Unies (document A/C.6/28)

M. BECKETT (Royaume-Uni), Rapporteur, en présentant le rapport de la Sous-Commission (annexe 3a, page 45), fait ressortir que la Convention générale relative aux privilèges et immunités des Nations Unies suit de très près le texte du Rapport de la Commission préparatoire (page 72).

Le PRÉSIDENT demande qu'on présente des observations sur le projet de Convention générale relative aux privilèges et immunités des Nations Unies soumis par la Sous-Commission.

M. WALKER (Etats-Unis d'Amérique) réserve la position de sa délégation en ce qui concerne les paragraphes *b*) et *c*) de l'article V, section 18, concernant les exonérations d'impôts sur les traitements et allocations et l'exemption du service national obligatoire pour les fonctionnaires, au moins pour ce qui est des ressortissants des Etats-Unis. Il a donné comme raison que le droit d'exempter d'impôts ou de service national est une prérogative du Congrès des Etats-Unis.

Le représentant de la FRANCE, tout en admettant la difficulté pratique que présente pour certains Membres l'adoption de ces deux clauses, maintient qu'il est essentiel que l'égalité soit sauvegardée entre les fonctionnaires des Nations Unies, sans distinction de nationalité.

M. KORETSKY (République socialiste soviétique d'Ukraine) réserve la position de sa délé-

delegation regarding the provisions of section 18 (*c*): immunity from national service obligations, and also regarding the provisions of section 30: settlement of disputes by the International Court of Justice. These items raised constitutional problems and it was not possible to adopt the provisions in question without first consulting the most authoritative bodies in his country. He stated that he understood that, during the meetings of the Sub-Committee, the representatives of the Soviet Union and Byelorussian Soviet Socialist Republic had also reserved their positions on these items.

Mr. BAILEY (Australia) wished to place on record the reservation of his Government regarding the question of exemption of officials from taxation (section 18*b*) on the ground that it was unwise to create a tax-free class. The delegation for Australia had reserved its position on this question in the Fifth Committee and would have accepted the principle of exemption from taxation if the proposal to impose a United Nations tax on all the officials had been approved.

Mr. SANTOS MUÑOZ (Argentina) said that his Government might have to make reservations regarding the immunity from national service obligations, and the provisions of section 30, but he had not been able to receive instructions on those questions.

Sir Hartley SHAWCROSS (United Kingdom) stated that he understood the difficulties of the representatives who had reserved their positions with regard to the provisions of section 18 (*b*) and (*c*) and section 30, since they were unable to consult their Governments fully at the present time. But he hoped that they would be successful in persuading their Governments to adhere to the present convention.

With regard to paragraph (*c*) of section 18, immunity from national service obligations, he maintained that members of the international civil service should not feel themselves under a kind of divided loyalty or divided allegiance. Their allegiance should be to the United Nations alone. In the Sub-Committee it had been proposed that officials of the United Nations should be relieved of all national obligations and service to their own States after the age of twenty-five. The adoption of this rule would enable them to perform their initial period of military service in their own States, and after that, they would no longer have any obligations as reservists in the armies of their countries.

The acceptance of the provision to exempt from national service obligations would involve no serious loss of manpower to the armies of the Members.

Some delegations raised questions on the text which were answered by the Rapporteur.

At the request of the representative of IRAQ, *the Committee agreed to amend section 14 by the inclusion of the words* "in the opinion of the Member" *after the words* ". . . course of justice, and . . ." *in order to clarify the text.*

gation au sujet des clauses de la section 18 *c*): exemption du service national et aussi au sujet des clauses de la section 30: règlement des différends à la Cour internationale de Justice. Ces points posent des problèmes d'ordre constitutionnel et il lui est impossible d'adopter de telles clauses sans consulter au préalable les organes les plus qualifiés de son pays. Il fait remarquer qu'autant qu'il s'en souvient, au cours des séances de la Sous-Commission les représentants de l'Union soviétique et de la République socialiste soviétique de Biélorussie ont également réservé leurs positions sur ces points.

M. BAILEY (Australie) désire qu'on prenne acte des réserves que formule son Gouvernement sur la question de l'exonération d'impôts des fonctionnaires (section 18 *b*) en arguant qu'il est dangereux de créer une classe non soumise aux contributions. La délégation de l'Australie a réservé sa position sur cette question à la Cinquième Commission; elle aurait accepté le principe d'exemption d'impôt si l'on avait approuvé la proposition tendant à frapper tous les fonctionnaires d'un impôt perçu par les Nations Unies.

M. SANTOS MUÑOZ (Argentine) déclare que son Gouvernement est susceptible de faire des réserves en ce qui concerne l'exemption du service national et les clauses de la section 30, mais qu'il n'a pas été en mesure de se faire envoyer des instructions sur ces points.

Sir Hartley SHAWCROSS (Royaume-Uni) déclare qu'il comprend l'embarras des représentants qui ont réservé leur position au sujet des clauses de la section 18 *b*) et *c*) et de la section 30, puisque ces représentants n'ont pas encore pu, au moment présent, consulter leurs gouvernements. Mais il exprime l'espoir qu'ils réussiront à décider leurs gouvernements à adhérer à la présente convention.

Pour ce qui a trait au paragraphe *c*) de la section 18, exemption du service national, il maintient que les membres de l'administration internationale ne doivent pas se sentir pris entre deux devoirs. Ils ne doivent avoir de devoirs qu'envers les seules Nations Unies. En Sous-Commission, on a proposé que les fonctionnaires des Nations Unies âgés de plus de vingt-cinq ans fussent dégagés de toutes obligations et de tout service d'ordre national. L'adoption de cette règle leur permettrait d'accomplir la première période du service militaire dans leurs pays respectifs et ensuite ils n'auraient plus aucune obligation en tant que réservistes.

L'acceptation de la clause exemptant du service national ces fonctionnaires ne représenterait pas une sérieuse diminution d'effectifs pour les armées des Membres.

Plusieurs délégations posent des questions sur le texte et le Rapporteur y répond.

A la demande du représentant de l'IRAK, *la Commission se met d'accord pour modifier la section 14 par l'insertion des mots* "à son avis" *après les mots* "chaque fois que" *afin de rendre le texte plus clair.*

Mr. AIKMAN (New Zealand) proposed the inclusion in the draft Convention of a reference to the application to comparable officials in the specialized agencies of the provisions of this Convention. At the request of the Chairman, Mr. Aikman agreed not to press his proposal on the understanding that he would raise the subject again when the Committee was discussing the recommendation on the co-ordination of the privileges and immunities of the United Nations and the specialized agencies (document A/C.6/34).

Mr. SALAMANCA (Bolivia) congratulated the Sub-Committee on its work in producing the text of the Convention, and proposed that it should be adopted unanimously.

He also proposed, and Mr. EGELAND (Union of South Africa) seconded the proposal, that the Committee should offer a unanimous vote of thanks to Mr. Beckett for his brilliant work in the Sub-Committee.

The Committee applauded this proposal.

Decision: *The Committee adopted by a unanimous vote the draft recommendation concerning the general Convention on immunities and privileges* (document A/C.6/28).[1]

The meeting rose at 5 p.m.

TWELFTH MEETING

[A/C.6/38]

Held on Friday, 8 February 1946 at 10.30 a.m.
Chairman: Mr. Roberto JIMÉNEZ (Panama).

23. Appointment of certain Members of the Committee as Judges of the International Court of Justice

The CHAIRMAN made the following statement:

"I want to express my heartfelt congratulations to the eminent jurists, Doctors Guerrero, Krylov, Hackworth, Read, Winiarski and Zoricic, members of this Committee, who have received the signal honour of being elected by the General Assembly and by the Security Council to the first Bench of the world, the International Court of Justice.

In no better hands could the disputes of this troubled world be placed.

Their learning and their exceptional moral qualifications will be a safeguard of the principle of peace with justice for which this Organization stands.

Unfortunately, other members of this Committee as highly qualified morally and intellectually, did not attain the necessary votes in both organs of the United Nations Organization as we all would have wished.

[1] For the final text of the recommendation and Convention, see the Official Record of the plenary meetings of the first part of the first session of the General Assembly.

M. AIKMAN (Nouvelle-Zélande) propose d'insérer dans le projet de Convention une phrase tendant à rendre les clauses de cette Convention applicables aux fonctionnaires des institutions spécialisées qui sont dans une situation comparable. A la demande du Président, M. Aikman consent à ne pas maintenir sa proposition, étant entendu qu'il soulèvera à nouveau la question lorsque la Commission discutera la recommandation sur la coordination des privilèges et immunités des Nations Unies et des institutions spécialisées (document A/C.6/34).

M. SALAMANCA (Bolivie) félicite la Sous-Commission du travail qu'elle a fourni pour mettre sur pied le texte de cette Convention et exprime le vœu que celle-ci soit adoptée à l'unanimité.

Il propose aussi, et M. EGELAND (Union Sud-Africaine) appuie cette proposition, que la Commission adresse un vote unanime de remerciement à M. Beckett pour son travail magnifique dans cette Sous-Commission.

La Commission applaudit à cette proposition.

Décision: *La Commission adopte à l'unanimité le projet de recommandation relatif à une Convention générale sur les privilèges et immunités* (document A/C.6/28).[1]

La séance est levée à 17 heures.

DOUZIEME SEANCE

[A/C.6/38]

Tenue le vendredi 8 février 1946 à 10 h. 30.
Président: M. Roberto JIMÉNEZ (Panama).

23. Nomination de plusieurs membres de la Commission à la Cour internationale de Justice

Le PRÉSIDENT fait la déclaration suivante:

"Je tiens à présenter mes félicitations sincères à MM. Guerrero, Krylov, Hackworth, Read, Winiarski et Zoricic, éminents juristes et membres de notre Commission, qui ont eu l'honneur insigne d'être désignés par l'Assemblée générale et par le Conseil de sécurité pour siéger à ce Tribunal mondial suprême qu'est la Cour internationale de Justice.

Le règlement des conflits qui pourront surgir dans notre monde troublé ne saurait être confié à de meilleures mains.

Leur science et leurs exceptionnelles qualités morales seront la sauvegarde du principe de paix et de justice que défend notre Organisation.

Certains autres membres de notre Commission, qui possédaient des qualifications morales et intellectuelles également élevées, n'ont malheureusement pas obtenu, ainsi que nous l'aurions tous souhaité, le nombre de voix nécessaire à leur élection au sein des deux organes des Nations Unies.

[1] Pour le texte définitif de la recommandation et de la Convention, voir les documents officiels des séances plénières de la première partie de la première session de l'Assemblée générale.

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U N I T E D N A T I O N S

OFFICIAL RECORDS OF THE FIRST PART OF THE FIRST SESSION OF THE GENERAL ASSEMBLY

PLENARY MEETINGS
OF
THE GENERAL ASSEMBLY

Verbatim Record

10 January — 14 February 1946

N A T I O N S U N I E S

DOCUMENTS OFFICIELS DE LA PREMIERE PARTIE DE LA PREMIERE SESSION DE L'ASSEMBLEE GENERALE

SEANCES PLENIERES
DE
L'ASSEMBLEE GENERALE

Comptes rendus in extenso

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A/43/Rev.1/Corr.2
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[*Original text: English*]

ANNEX 22

Privileges and Immunities of the United Nations

Report of the Sixth Committee to the General Assembly

Rapporteur: Mr. W. E. Beckett
(United Kingdom)

The General Assembly, at its sixteenth plenary meeting held on 19 January 1946, referred to the Sixth Committee for consideration and report, chapter VII of the Report of the Preparatory Commission, (Privileges, Immunities and Facilities of the United Nations). In fulfilment of this task, the Sixth Committee has the honour to submit to the General Assembly the following documents concerning the privileges and immunities of the United Nations:—

1. A resolution relating to the adoption of the General Convention on Privileges and Immunities of the United Nations, to which the text of the Convention is annexed (Appendix I).
2. A resolution relating to negotiations with the competent authorities of the United States of America concerning the arrangements required as a result of the establishment of the seat of the United Nations in the United States, together with a draft Convention to be transmitted as a basis of discussion for these negotiations (Appendix II).
3. A resolution on the privileges and immunities of the International Court of Justice (Appendix III).
4. A resolution on the co-ordination of the privileges and immunities of the United Nations and the specialized agencies (Appendix IV).
5. A resolution relating to the insurance against third party risks of motor-cars of the Organization and of members of the staff (Appendix V).
6. A resolution relating to arrangements to be made so that officials of Members who are transferred or seconded for service with the United Nations should not lose their accrued pension rights by reason of such transfer or secondment (Appendix VI).

All these documents, before being submitted to the Sixth Committee, have been dealt with very carefully by a Sub-Committee, presided over by H.E. J. G. Guerrero (El Salvador)

They call only for certain short comments.

The discussion of the general Convention on privileges and immunities was particularly exhaustive and thorough. The text now submitted to the General Assembly was approved unanimously, but on paragraphs (*b*) and (*c*) of section 18 the United States delegate made reservations on the grounds that the right to exempt United States nationals from taxation and from national service obligations was a prerogative of the Congress of the United States of America.

The delegations of the Byelorussian Soviet Socialist Republic, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics

A/43/Rev.1/Corr.1
A/43/Rev.1/Corr.2
et A/43/Corr.1

[*Texte original en anglais*]

ANNEXE 22

Privilèges et immunité des Nations Unies

Rapport de la Sixième Commission à l'Assemblée générale

Rapporteur: M. W. E. Beckett
(Royaume-Uni)

L'Assemblée générale, au cours de sa seizième séance plénière tenue le 19 janvier 1946, a chargé la Sixième Commission d'examiner le chapitre VII du rapport de la Commission préparatoire (privilèges, immunités et facilités à accorder à l'Organisation des Nations Unies) et de lui faire rapport sur ce chapitre. La Sixième Commission, s'acquittant de cette tâche, a l'honneur de soumettre à l'Assemblée générale les documents suivants qui concernent les privilèges et immunités à accorder à l'Organisation:

1. Résolution relative à l'adoption de la Convention générale sur les privilèges et immunités à accorder à l'Organisation, à laquelle est annexé le texte de la Convention (appendice I).
2. Résolution relative aux négociations à entamer avec les autorités compétentes des Etats-Unis d'Amérique sur les dispositions à prendre à la suite de l'établissement aux Etats-Unis d'Amérique du siège de l'Organisation, ainsi qu'un projet de Convention destiné à servir de base de discussion pour ces négociations (appendice II).
3. Résolution sur les privilèges et immunités de la Cour internationale de Justice (appendice III).
4. Résolution sur la coordination des privilèges et immunités de l'Organisation des Nations Unies avec ceux des institutions spécialisées (appendice IV).
5. Résolution relative à l'assurance contre les accidents aux tiers des automobiles de l'Organisation et des membres du personnel (appendice V).
6. Résolution relative aux dispositions à prévoir pour que les fonctionnaires d'Etats Membres qui sont mis à la disposition de l'Organisation ou détachés dans ses services, ne perdent point du fait de ce détachement, leurs droits acquis à pension (appendice VI).

Avant d'avoir été soumis à la Sixième Commission, ces documents ont fait l'objet d'un examen détaillé à la sous-commission présidée par Son Excellence M. J. G. Guerrero (Salvador).

Ils n'appellent que quelques brefs commentaires.

La Convention générale sur les privilèges et immunités a fait l'objet d'une discussion particulièrement approfondie et minutieuse. La Commission a approuvé à l'unanimité le texte soumis à l'Assemblée générale; le délégué des Etats-Unis cependant a fait quelques réserves sur les paragraphes *b*) et *c*) de la section 18, en faisant valoir que le pouvoir d'accorder aux ressortissants des Etats-Unis l'exemption d'impôts et de toute obligation de service national est une prérogative du Congrès des Etats-Unis.

Les délégations de la RSS de Biélorussie, de la RSS d'Ukraine et de l'URSS ont fait des réserves sur la section 18 *c*) et la section 30 en faisant

made reservations with regard to section 18 (*c*) and section 30 on the grounds that these items raised constitutional problems on which the most representative bodies in their countries had to be consulted.

The delegate for Argentina stated that his Government might have to make reservations regarding section 18 (*c*) and section 30, but he had not been able to receive instructions on this matter.

The delegate for Australia stated that his Government was opposed to the making of officials of the United Nations a tax free class. The Australian delegation could only agree to the exemption of such officials from taxation on condition that some such scheme as that suggested by the Advisory Group of Experts on financial matters for a United Nations staff contribution plan, should be adopted.

Other delegates stressed the importance of these provisions and urged those delegations which had made them, to do their utmost to secure that their Governments should ultimately be able to fall in with the view of the majority on these questions.

Further, in connection with section 9, the Committee desired to place on record that the words "*rates* and taxes *on mails*" did not cover free postage.

In the case of the resolution referred to above under paragraph 2, namely, the special Convention with the United States of America, the United States delegation stated that, in view of the fact that the draft Convention was being adopted as a basis of discussion for the purpose of negotiations with the competent authorities of the United States, they considered that the United States delegation should take no part in the discussion and the vote on this matter.

Sub-Appendix II of the special Convention with the United States is the same as the general Convention, except that it has been put in a bilateral form, and therefore reservations to the general Convention naturally apply to the corresponding provisions of this Sub-Appendix.

In connection with the resolution referred to above under paragraph 6, it should be explained that the Committee considered that, in principle, this resolution dealt with a matter which was rather within the scope of the Fifth Committee (Administrative and Budgetary) than of the Sixth Committee. The matter had originally been brought before the Committee with a view to its being included in the draft general Convention, and at the time when the Committee came to the conclusion that it could only become the subject of a recommendation, it was pointed out by the representatives of the Advisory Group of Experts on administrative and budgetary matters, who brought the matter before the Sub-Committee of the Sixth Committee, which was then dealing with the matter, that it would no longer be possible for the Fifth Committee to propose such a recommendation. Consequently, the Committee approved the view of the Sub-Committee that the recommendation might, in the circumstances, be forwarded to the General Assembly by the Sixth Committee.

The Sub-Committee on privileges and immunities examined another proposal submitted by the Advisory Group of Experts on administrative and budgetary matters, made with a view to exempting all members of the staff of the Organization from taxation on retirement benefits and exempting their beneficiaries from taxation on death benefits,

valoir que ces points soulèvent des problèmes d'ordre constitutionnel sur lesquels les organes les plus représentatifs de leur pays devront être consultés.

Le délégué de l'Argentine a déclaré que son Gouvernement aurait peut-être à formuler des réserves sur la section 18 *c*) et la section 30, mais il n'a pas encore pu recevoir d'instructions à ce sujet.

Le délégué de l'Australie déclare que son Gouvernement est opposé à ce que l'on fasse des fonctionnaires de l'Organisation une classe exempte d'impôts. La délégation australienne ne pourrait accepter que ces fonctionnaires soient exempts d'impôts que si l'on adoptait un plan tel que celui qui a été proposé par le Groupe consultatif d'experts en matière financière, relativement à un système de contribution du personnel de l'Organisation.

D'autres délégués ont souligné l'importance de ces dispositions et ont demandé avec insistance aux délégations qui les ont élaborées de faire tout ce qui est en leur pouvoir pour que leurs Gouvernements puissent se rallier finalement à l'opinion de la majorité sur ces questions.

De plus, en ce qui concerne la section 9, la Commission désire que l'on prenne acte du fait que les mots "*tarifs* et taxes sur *le courrier*" n'impliquent point la franchise postale.

Au sujet de la résolution qui fait l'objet du paragraphe 2 ci-dessus, à savoir la convention spéciale à passer avec les Etats-Unis d'Amérique, la délégation des Etats-Unis déclare qu'étant donné que le projet est adopté comme base de discussion en vue des négociations avec les autorités compétentes des Etats-Unis, elle estime ne pas devoir prendre part à la discussion et au vote sur cette question.

Le sous-appendice II de la Convention spéciale à passer avec les Etats-Unis est identique à la convention générale si ce n'est qu'il a été rédigé sous la forme bilatérale, et en conséquence, les réserves formulées à l'égard de la convention générale s'appliquent naturellement aux dispositions correspondantes de ce sous-appendice.

En ce qui concerne la résolution qui fait l'objet du paragraphe 6 ci-dessus, la Commission désire préciser qu'à son avis cette résolution a trait à des questions qui, en principe, relèveraient plutôt du domaine de la Cinquième Commission (questions administratives et budgétaires) que de celui de la Commission juridique. Si, à l'origine, on a saisi la Commission de ces questions, c'était en vue de les inclure dans le projet de convention générale. Quand la Commission est arrivée à la conclusion que ces questions ne pourraient faire l'objet que d'une recommandation, les représentants du Groupe consultatif d'experts sur les questions administratives et budgétaires, qui en avaient saisi la sous-commission de la Sixième Commission—cette dernière traitait à ce moment de ces questions—ont souligné qu'il serait plus possible à la Cinquième Commission de proposer une recommandation de cette nature. En conséquence, la Commission a approuvé le point de vue de la sous-commission selon lequel la recommandation pourrait, dans ces conditions, être transmise par la Cinquième Commission à l'Assemblée générale.

La sous-commission des privilèges et immunités a examiné une autre proposition du Groupe consultatif d'experts sur les questions administratives et budgétaires tendant à faire exempter tous les membres du personnel de l'Organisation d'impôts sur les pensions de retraite et à exempter leurs ayants droit des impôts frappant les allocations

either in the form of a lump sum or benefits paid by the Organizations to widows and orphans. The Sub-Committee decided, without prejudice to this question being taken up and considered separately at a later stage, that a provision to this effect should not be included in the general Convention.

octroyées en cas de décès, qu'il s'agisse d'une somme globale ou de versements effectués par l'Organisation aux veuves ou aux orphelins. La sous-commission a décidé qu'il serait inopportun de faire figurer dans la Convention générale une disposition à cet effet, sans exclure toutefois la possibilité de reprendre cette question par la suite et de l'examiner séparément.

The Rapporteur of the Sixth Committee places himself at the disposal of the General Assembly to give any explanations, with regard to particular provisions of the text submitted to the General Assembly, that the Assembly may desire.

Le Rapporteur de la Sixième Commission se tient à la disposition de l'Assemblée générale pour lui donner toutes explications qu'elle demanderait en ce qui concerne certaines dispositions particulières du texte qui lui a été soumis.

Appendix I

The Sixth Committee after having examined the respective advantages, as methods of implementing the provisions of Article 105 of the Charter, of the General Assembly (*a*) making recommendations or (*b*) proposing conventions to the Members of the United Nations, recommends to the General Assembly to propose to the Members of the United Nations a general Convention on the privileges and immunities of the United Nations of which the text is annexed hereto. The Sixth Committee recommends that the General Assembly adopt the following resolution:

> "*The General Assembly* approves the annexed Convention on the privileges and immunities of the United Nations and proposes it for accession by each Member of the United Nations."

Convention on the Privileges and Immunities of the United Nations

Whereas 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 fulfilment of its purposes; and

Whereas Article 105 of the Charter of the United Nation provides that the Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes and that representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of the functions in connection with the Organization;

Consequently the General Assembly, by a resolution adopted on 13 February 1946, approved the following convention and proposes it for accession by each Member of the United Nations.

Article I

Juridical Personality

Section 1. The United Nations shall possess juridical personality. It shall have the capacity:

(*a*) To contract;

(*b*) To acquire and dispose of immovable and movable property;

(*c*) To institute legal proceedings.

Article II

Property, Funds and Assets

Section 2. The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.

Appendice I

La Sixième Commission, ayant examiné les avantages respectifs des deux méthodes proposées pour mettre à effet les dispositions de l'Article 105 de la Charte, soit celle de recommandations formulées par l'Assemblée générale, soit celle de conventions proposées aux Membres des Nations Unies, recommande à l'Assemblée générale de proposer aux Membres des Nations Unies une convention générale sur les privilèges et immunités des Nations Unies, dont le texte figure en annexe au présent document. La Sixième Commission recommande à l'Assemblée générale d'adopter la résolution suivante:

> "*L'Assemblée générale* approuve le texte ci-annexé de la convention sur les privilèges et immunités des Nations Unies, et soumet cette convention à chacun de leurs Membres aux fins d'adhésion."

Convention sur les privilèges et les immunités des Nations Unies

Considérant que l'Article 104 de la Charte des Nations Unies stipule que l'Organisation jouit, sur le territoire de chacun de ses Membres, de la capacité juridique qui lui est nécessaire pour exercer ses fonctions et atteindre ses buts;

Considérant que l'Article 105 de la Charte des Nations Unies stipule que l'Organisation jouit, sur le territoire de chacun de ses Membres, des privilèges et immunités qui lui sont nécessaires pour atteindre ses buts et que les représentants des Membres des Nations Unies et les fonctionnaires de l'Organisation jouissent également des privilèges et immunités qui leur sont nécessaires pour exercer en toute indépendance leurs fonctions en rapport avec l'Organisation;

En conséquence, par une résolution adoptée le 13 février 1946, l'Assemblée générale a approuvé la convention suivante et la propose à l'adhésion de chacun des Membres des Nations Unies.

Article I

Personnalité juridique

Section 1. L'Organisation des Nations Unies possède la personnalité juridique. Elle a la capacité:

a) De contracter;

b) D'acquérir et de vendre des biens immobiliers et mobiliers;

c) D'ester en justice.

Article II

Biens, fonds et avoirs

Section 2. L'Organisation des Nations Unies, ses biens et avoirs, quels que soient leur siège et leur détenteur, jouissent de l'immunité de juridiction, sauf dans la mesure où l'Organisation y a expressément renoncé dans un cas particulier. Il est toutefois entendu que la renonciation ne peut s'étendre à des mesures d'exécution.

Section 3. The premises of the United Nations be inviolable. The property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

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

Section 5. Without being restricted by financial controls, regulations or moratoria of any kind:

a) The United Nations may hold funds, gold or currency of any kind and operate accounts in any currency;

b) The United Nations shall be free to transfer its funds, gold or currency from one country to another or within any country and to convert any currency held by it into any other currency.

Section 6. In exercising its rights under section 5 above, the United Nations shall pay due regard to any representations made by the Government of any Member in so far as it is considered that effect can be given to such representations without prejudice to the interests of the United Nations.

Section 7. The United Nations, its assets, income and other property shall be:

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

b) Exempt from customs duties and prohibitions and restrictions on imports and exports in respect of articles imported or exported by the United Nations for its official use. It is understood, however, that articles imported under such exemption will not be sold in the country into which they were imported except under conditions agreed with the Government of that country;

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

Section 8. While the United Nations will not, as a general rule, claim exemption from excise duties and from taxes on the sale of movable and immovable property which form part of the price to be paid, nevertheless, when the United Nations is making important purchases for official use of property on which such duties and taxes have been imposed or are chargeable, Members will, whenever possible, make appropriate administrative arrangements for the remission or return of the amount of duty or tax.

Article III

Facilities in respect of Communications

Section 9. The United Nations shall enjoy in the territory of each Member, for its official communications, treatment not less favourable than that accorded by the Government of that Member to any other Government, including its diplomatic missions, in the matter of priorities, rates and taxes on mails, cables, telegrams, radiograms, telephotos, telephones and other communications; and press rates for information to the press and radio. No censorship shall be applied to the official correspondence and other official communications of the United Nations.

Section 3. Les locaux de l'Organisation sont inviolables. Ses biens et avoirs, où qu'ils se trouvent et quel que soit leur détenteur, sont exempts de perquisition, réquisition, confiscation, expropriation ou de toute autre forme de contrainte exécutive, administrative, judiciaire ou législative.

Section 4. Les archives de l'Organisation et, d'une manière générale, tous les documents lui appartenant ou détenus par elle, sont inviolables, où qu'ils se trouvent.

Section 5. Sans être astreinte à aucun contrôle, réglementation ou moratoire financiers:

a) L'Organisation peut détenir des fonds, de l'or ou des devises quelconques et avoir des comptes en n'importe quelle monnaie;

b) L'Organisation peut transférer librement ses fonds, son or ou ses devises d'un pays dans un autre ou à l'intérieur d'un pays quelconque et convertir toutes devises détenues par elle en toute autre monnaie.

Section 6. Dans l'exercice des droits qui lui sont accordés en vertu de la section 5 ci-dessus, l'Organisation des Nations Unies tiendra compte de toutes représentations du Gouvernement d'un Etat Membre, dans la mesure où elle estimera pouvoir y donner suite sans porter préjudice à ses propres intérêts.

Section 7. L'Organisation des Nations Unies, ses avoirs, revenus et autres biens sont:

a) Exonérés de tout impôt direct. Il demeure entendu, toutefois, que l'Organisation ne peut demander l'exonération d'impôts qui ne seraient pas en excès de la simple rémunération de services d'utilité publique;

b) Exonérés de tous droits de douane et prohibitions et restrictions d'importation ou d'exportation à l'égard d'objets importés ou exportés par l'Organisation des Nations Unies pour son usage officiel. Il est entendu, toutefois, que les articles ainsi importés en franchise ne seront pas vendus sur le territoire du pays dans lequel ils auront été introduits, à moins que ce ne soit à des conditions acceptées par le Gouvernement de ce pays;

c) Exonérés de tout droit de douane et de toutes prohibitions et restrictions d'importation et d'exportation à l'égard de ses publications.

Section 8. Bien que l'Organisation des Nations Unies ne revendique pas, en principe, l'exonération des droits d'accise et des taxes à la vente entrant dans le prix des biens mobiliers ou immobiliers, cependant, quand elle effectue pour son usage officiel des achats importants dont le prix comprend des droits et taxes de cette nature, les Membres prendront, chaque fois qu'il leur sera possible, les dispositions administratives appropriées en vue de la remise ou du remboursement du montant de ces droits et taxes.

Article III

Facilités de communications

Section 9. L'Organisation des Nations Unies bénéficiera, sur le territoire de chaque Membre, pour ses communications officielles, d'un traitement au moins aussi favorable que le traitement accordé par lui à tout autre gouvernement, y compris sa mission diplomatique, en ce qui concerne les priorités, tarifs et taxes sur le courrier, les câblogrammes, télégrammes, radiotélégrammes, téléphotos, communications téléphoniques et autres communications, ainsi que sur les tarifs de presse pour les informations à la presse et la radio. La correspondance officielle et les autres communications officielles de l'Organisation ne pourront être censurées.

Section 10. The United Nations shall have the right to use codes and to dispatch and receive its correspondence by courier or in bags, which shall have the same immunities and privileges as diplomatic couriers and bags.

Article IV

The Representatives of Members

Section 11. Representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, shall, while exercising their functions and during their journey to and from the place of meeting, enjoy the following privileges and immunities:

(*a*) Immunity from personal arrest or detention and from seizure of their personal baggage, and, in respect of words spoken or written and all acts done by them in their capacity as representatives, immunity from legal process of every kind;

(*b*) Inviolability for all papers and documents;

(*c*) The right to use codes and to receive papers or correspondence by courier or in sealed bags;

(*d*) Exemption in respect of themselves and their spouses from immigration restrictions, aliens registration or national service obligations in the State they are visting or through which they are passing in the exercise of their functions;

(*e*) The same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;

(*f*) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys, and also;

(*g*) Such other privileges, immunities and facilities, not inconsistent with the foregoing, as diplomatic envoys enjoy, except that they shall have no right to claim exemption from customs duties on goods imported (otherwise than as part of their personal baggage) or from excise duties or sales taxes.

Section 12. In order to secure for the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, complete freedom of speech and independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer the representatives of Members.

Section 13. Where the incidence of any form of taxation depends upon residence, periods during which the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations are present in a State for the discharge of their duties, shall not be considered as periods of residence.

Section 14. Privileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connection with the United

Section 10. L'Organisation des Nations Unies aura le droit d'employer des codes ainsi que d'expédier et de recevoir sa correspondance par des courriers ou valises qui jouiront des mêmes privilèges et immunités que les courriers et valises diplomatiques.

Article IV

Représentants des Membres

Section 11. Les représentants des Membres auprès des organes principaux et subsidiaires des Nations Unies et aux conférences convoquées par les Nations Unies jouissent, durant l'exercice de leurs fonctions et au cours des voyages à destination ou en provenance du lieu de la réunion, des privilèges et immunités suivants:

a) Immunité d'arrestation personnelle ou de détention et de saisie de leurs bagages personnels et, en ce qui concerne les actes accomplis par eux en leur qualité de représentants, y compris leurs paroles et écrits, immunité de toute juridiction;

b) Inviolabilité de tous papiers et documents;

c) Droit de faire usage de codes et de recevoir des documents ou de la correspondance par courrier ou par valises scellées;

d) Exemption pour eux-mêmes et pour leurs conjoints à l'égard de toutes mesures restrictives relatives à l'immigration, de toutes formalités d'enregistrement des étrangers et de toutes obligations de service national dans les pays visités ou traversés par eux dans l'exercice de leurs fonctions;

e) Les mêmes facilités en ce qui concerne les réglementations monétaires ou de change que celles accordées aux représentants de gouvernements étrangers en mission officielle temporaire;

f) Les mêmes immunités et facilités en ce qui concerne leurs bagages personnels que celles accordées aux agents diplomatiques, et également:

g) Tels autres privilèges, immunités et facilités non incompatibles avec ce qui précède, dont jouissent les agents diplomatiques, sauf le droit de réclamer l'exemption des droits de douane sur des objets importés (autres que ceux qui font partie de leurs bagages personnels) ou de droits d'accise ou de taxes à la vente.

Section 12. En vue d'assurer aux représentants des Membres aux organes principaux et subsidiaires des Nations Unies et aux conférences convoquées par l'Organisation une complète liberté de parole et une complète indépendance dans l'accomplissement de leurs fonctions, l'immunité de juridiction en ce qui concerne les paroles ou les écrits ou les actes émanant d'eux dans l'accomplissement de leurs fonctions continuera à leur être accordée, même après que ces personnes auront cessé d'être les représentants des Membres.

Section 13. Dans le cas où l'incidence d'un impôt quelconque est subordonnée à la résidence de l'assujetti, les périodes pendant lesquelles les représentants des Membres auprès des organes principaux et subsidiaires des Nations Unies et aux conférences convoquées par l'Organisation des Nations Unies se trouveront sur le territoire d'un Etat Membre pour l'exercice de leurs fonctions, ne seront pas considérées comme des périodes de résidence.

Section 14. Les privilèges et immunités sont accordés aux représentants des Membres non à leur avantage personnel, mais dans le but d'assurer en toute indépendance l'exercice de leurs fonctions en rapport avec l'Organisation. Par conséquent:

...ions. Consequently a Member not only has the ... but is under a duty to waive the immunity of ... representative in any case where in the opinion of the Member the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded.

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

Section 16. In this article the expression "representatives" shall be deemed to include all delegates, deputy delegates, advisers, technical experts and secretaries of delegations.

Article V

Officials

Section 17. The Secretary-General will specify the categories of officials to which the provisions of this article and article VII shall apply. He shall submit these categories to the General Assembly. Thereafter these categories shall be communicated to the Governments of all Members. The names of the officials included in these categories shall from time to time be made known to the Governments of Members.

Section 18. Officials of the United Nations shall:

(*a*) Be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity;

(*b*) Be exempt from taxation of the salaries and emoluments paid to them by the United Nations;

(*c*) Be immune from national service obligations;

(*d*) Be immune, together with their spouses and relatives dependent on them, from immigration restrictions and alien registration;

(*e*) Be accorded the same privileges in respect of exchange facilities as are accorded to the officials of comparable ranks forming part of diplomatic missions to the Government concerned;

(*f*) Be given, together with their spouses and relatives dependent on them, the same repatriation facilities in time of international crisis as diplomatic envoys;

(*g*) Have the right to import free of duty their furniture and effects at the time of first taking up their post in the country in question.

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

Section 20. Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of

un Membre a non seulement le droit, mais le devoir, de lever l'immunité de son représentant dans tous les cas où, à son avis, l'immunité empêcherait que justice soit faite et où elle peut être levée sans nuire au but pour lequel l'immunité est accordée.

Section 15. Les dispositions des sections 11, 12 et 13 ne sont pas applicables dans le cas d'un représentant vis-à-vis des autorités de l'Etat dont il est ressortissant ou dont il est ou a été le représentant.

Section 16. Aux fins du présent article, le terme "représentants" est considéré comme comprenant tous les délégués, délégués adjoints, conseillers, experts techniques et secrétaires de délégation.

Article V

Fonctionnaires

Section 17. Le Secrétaire général déterminera les catégories des fonctionnaires auxquels s'appliquent les dispositions du présent article ainsi que de l'article VII. Il en soumettra la liste à l'Assemblée générale et en donnera ensuite communication aux Gouvernements de tous les Membres. Les noms des fonctionnaires compris dans ces catégories seront communiqués périodiquement aux Gouvernements des Membres.

Section 18. Les fonctionnaires de l'Organisation des Nations Unies:

a) Jouiront de l'immunité de juridiction pour les actes accomplis par eux en leur qualité officielle (y compris leurs paroles et écrits);

b) Seront exonérés de tout impôt sur les traitements et émoluments versés par l'Organisation des Nations Unies;

c) Seront exempts de toute obligation relative au service national;

d) Ne seront pas soumis, non plus que leurs conjoints et les membres de leur famille vivant à leur charge, aux dispositions limitant l'immigration et aux formalités d'enregistrement des étrangers;

e) Jouiront, en ce qui concerne les facilités de change, des mêmes privilèges que les fonctionnaires d'un rang comparable appartenant aux missions diplomatiques accréditées auprès du Gouvernement intéressé;

f) Jouiront, ainsi que leurs conjoints et les membres de leur famille vivant à leur charge, des mêmes facilités de rapatriement que les envoyés diplomatiques en période de crise internationale;

g) Jouiront du droit d'importer en franchise leur mobilier et leurs effets à l'occasion de leur première prise de fonctions dans le pays intéressé.

Section 19. Outre les privilèges et immunités prévus à la section 18, le Secrétaire général et tous les Sous-Secrétaires généraux, tant en ce qui les concerne qu'en ce qui concerne leurs conjoints et enfants mineurs, jouiront des privilèges, immunités, exemptions et facilités, accordés, conformément au droit international, aux envoyés diplomatiques.

Section 20. Les privilèges et immunités sont accordés aux fonctionnaires uniquement dans l'intérêt des Nations Unies et non à leur avantage personnel. Le Secrétaire général pourra et devra lever l'immunité accordée à un fonctionnaire dans tous les cas où, à son avis, cette immunité empêcherait que justice soit faite et pourra être levée sans porter préjudice aux intérêts de l'Organisation. A

the United Nations. In the case of the Secretary-General, the Security Council shall have the right to waive immunity.

Section 21. The United Nations shall co-operate at all times with the appropriate authorities of Members to facilitate the proper administration of justice, secure the observance of police regulations, and prevent the occurrence of any abuse in connection with the privileges, immunities and facilities mentioned in this article.

Article VI
Experts on Missions for the United Nations

Section 22. Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular they shall be accorded:

(*a*) Immunity from personal arrest or detention and from seizure of their personal baggage;

(*b*) In respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations;

(*c*) Inviolability for all papers and documents;

(*d*) For the purpose of their communications with the United Nations, the right to use codes and to receive papers or correspondence by courier or in sealed bags;

(*e*) The same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;

(*f*) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys.

Section 23. Privileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations.

Article VII
United Nations Laissez-Passer

Section 24. The United Nations may issue United Nations *laissez-passer* to its officials. These *laissez-passer* shall be recognized and accepted as valid travel documents, by the authorities of Members, taking into account the provisions of section 25.

Section 25. Applications for visas (where required) from the holders of United Nations *laissez-passer*, when accompanied by a certificate that they are travelling on the business of the United Nations, shall be dealt with as speedily as possible. In addition, such persons shall be granted facilities for speedy travel.

l'égard du Secrétaire général, le Conseil de sécurité a qualité pour prononcer la levée des immunités.

Section 21. L'Organisation des Nations Unies collaborera, en tous temps, avec les autorités compétentes des Etats Membres en vue de faciliter la bonne administration de la justice, d'assurer l'observation des règlements de police et d'éviter tout abus auquel pourraient donner lieu les privilèges, immunités et facilités énumérés dans le présent article.

Article VI
Experts en missions pour l'Organisation des Nations Unies

Section 22. Les experts (autres que les fonctionnaires visés à l'article V) lorsqu'ils accomplissent des missions pour l'Organisation des Nations Unies, jouissent, pendant la durée de leur mission, y compris le temps du voyage, des privilèges et immunités nécessaires pour exercer leurs fonctions en toute indépendance. Ils jouissent en particulier des privilèges et immunités suivants:

a) Immunité d'arrestation personnelle ou de détention et de saisie de leurs bagages personnels;

b) Immunité de toute juridiction en ce qui concerne les actes accomplis par eux au cours de leurs missions, y compris leurs paroles et écrits. Cette immunité continuera à leur être accordée même après que ces personnes auront cessé de remplir des missions pour l'Organisation des Nations Unies;

c) Inviolabilité de tous papiers et documents;

d) Droit de faire usage de codes et de recevoir des documents et de la correspondance par courrier ou par valises scellées, pour leurs communications avec l'Organisation des Nations Unies;

e) Les mêmes facilités, en ce qui concerne les réglementations monétaires ou de change, que celles qui sont accordées aux représentants des gouvernements étrangers en mission officielle temporaire;

f) Les mêmes immunités et facilités en ce qui concerne leurs bagages personnels que celles qui sont accordées aux agents diplomatiques.

Section 23. Les privilèges et immunités sont accordés aux experts dans l'intérêt de l'Organisation des Nations Unies et non à leur avantage personnel. Le Secrétaire général pourra et devra lever l'immunité accordée à un expert, dans tous les cas où, à son avis, cette immunité empêcherait que justice soit faite et où elle peut être levée sans porter préjudice aux intérêts de l'Organisation.

Article VII
Laissez-passer des Nations Unies

Section 24. L'Organisation des Nations Unies pourra délivrer des laissez-passer à ses fonctionnaires. Ces laissez-passer seront reconnus et acceptés, par les autorités des Etats Membres, comme titre valable de voyage en tenant compte des dispositions de la section 25.

Section 25. Les demandes de visas (lorsque des visas sont nécessaires) émanant des titulaires de ces laissez-passer et accompagnées d'un certificat attestant que ces fonctionnaires voyagent pour le compte de l'Organisation, devront être examinées dans le plus bref délai possible. En outre, des facilités de voyage rapide seront accordées aux titulaires de ces laissez-passer.

Section 26. Similiar facilities to those specified in section 25 shall be accorded to experts and other persons who, though not the holders of United Nations *laissez-passer*, have a certificate that they are travelling on the business of the United Nations.

Section 27. The Secretary-General, Assistant Secretaries-General and Directors travelling on United Nations *laissez-passer* on the business of the United Nations shall be granted the same facilities as are accorded to diplomatic envoys.

Section 28. The provisions of this article may be applied to the comparable officials of specialized agencies if the agreements for relationship made under Article 63 of the Charter so provide.

Article VIII
Settlement of Disputes

Section 29. The United Nations shall make provision for appropriate modes of settlement of:

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

(*b*) Disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.

Section 30. All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless, in any case, it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.

Final Article

Section 31. This convention is submitted to every Member of the United Nations for accession.

Section 32. Accession shall be effected by deposit of an instrument with the Secretary-General of the United Nations and the convention shall come into force as regards each Member on the date of deposit of each instrument of accession.

Section 33. The Secretary-General shall inform all Members of the United Nations of the deposit of each accession.

Section 34. It is understood that, when an instrument of accession is deposited on behalf of any Member, the Member will be in a position under its own law to give effect to the terms of this convention.

Section 35. This convention shall continue in force as between the United Nations and every Member which has deposited an instrument of accession for so long as that Member remains a Member of the United Nations, or until a revised general convention has been approved by the General Assembly and that Member has become a party to this revised convention.

Section 36. The Secretary-General may conclude with any Member or Members, supplementary agreements, adjusting the provisions of this

Section 26. Des facilités analogues à celles qui sont mentionnées à la section 25 seront accordées aux experts et autres personnes qui, sans être munis d'un laissez-passer des Nations Unies, seront porteurs d'un certificat attestant qu'ils voyagent pour le compte de l'Organisation.

Section 27. Le Secrétaire général, les Sous-Secrétaires généraux et les directeurs, voyageant pour le compte de l'Organisation et munis d'un laissez-passer délivré par celle-ci, jouiront des mêmes facilités que les envoyés diplomatiques.

Section 28. Les dispositions du présent article peuvent être appliquées aux fonctionnaires, de rang analogue, appartenant à des institutions spécialisées, si les accords fixant les relations desdites institutions avec l'Organisation, aux termes de l'Article 63 de la Charte, comportent une disposition à cet effet.

Article VIII
Règlement des différends

Section 29. L'Organisation des Nations Unies devra prévoir des modes de règlement appropriés pour:

a) Les différends en matière de contrats ou autres différends de droit privé dans lesquels l'Organisation serait partie;

b) Les différends dans lesquels serait impliqué un fonctionnaire de l'Organisation qui, du fait de sa situation officielle, jouit de l'immunité, si cette immunité n'a pas été levée par le Secrétaire général.

Section 30. Toute contestation portant sur l'interprétation ou l'application de la présente convention sera portée devant la Cour internationale de justice, à moins que, dans un cas donné, les parties ne conviennent d'avoir recours à un autre mode de règlement. Si un différend surgit entre l'Organisation des Nations Unies, d'une part, et un Membre, d'autre part, un avis consultatif sur tout point de droit soulevé sera demandé en conformité de l'Article 96 de la Charte et de l'Article 65 du statut de la Cour. L'avis de la Cour sera accepté par les parties comme décisif.

Article final

Section 31. La présente convention est soumise pour adhésion à tous les Membres de l'Organisation des Nations Unies.

Section 32. L'adhésion s'effectuera par le dépôt d'un instrument auprès du Secrétaire général de l'Organisation des Nations Unies et la convention entrera en vigueur, à l'égard de chaque Membre, à la date du dépôt par ce Membre de son instrument d'adhésion.

Section 33. Le Secrétaire général informera tous les Membres de l'Organisation des Nations Unies du dépôt de chaque adhésion.

Section 34. Il est entendu que lorsqu'un instrument d'adhésion est déposé par un Membre quelconque, celui-ci doit être en mesure d'appliquer, en vertu de son propre droit, les dispositions de la présente convention.

Section 35. La présente convention restera en vigueur entre l'Organisation des Nations Unies et tout Membre qui aura déposé son instrument d'adhésion, tant que ce Membre sera Membre de l'Organisation ou jusqu'à ce qu'une convention générale revisée ait été approuvée par l'Assemblée générale et que ledit Membre soit devenu partie à cette dernière convention.

Section 36. Le Secrétaire général pourra conclure, avec un ou plusieurs Membres, des accords additionnels, aménageant, en ce qui concerne ce

convention so far as that Member or those Members are concerned. These supplementary agreements shall in each case be subject to the approval of the General Assembly.

Appendix II

The Sixth Committee recommends that the General Assembly adopt the following resolution:

1. *The General Assembly* authorizes the Secretary-General (with the assistance of a committee composed of persons appointed by the Governments of Australia, Belgium, Bolivia, China, Cuba, Egypt, France, Poland, United Kingdom, Union of Soviet Socialist Republics) to negotiate with the competent authorities of the United States of America the arrangements required as a result of the establishment of the seat of the United Nations in the United States of America.

2. The following draft convention is transmitted by the General Assembly to the Secretary-General for use in these negotiations as a basis of discussion.

3. The Secretary-General shall report to the General Assembly the results of these negotiations.

4. Any agreement, apart from purely temporary agreements with the competent authorities of the United States of America, resulting from these negotiations shall be subject to approval by the General Assembly before being signed on behalf of the United Nations.

Convention between the United Nations and the Government of the United States of America

(This draft has been prepared on the assumption that there will be no private persons living within the zone containing the seat of the United Nations.)

The United Nations and the Government of the United States of America:

Desiring to conclude a convention for the purpose of carrying out the resolution adopted by the General Assembly....., to establish the seat of the United Nations in..... and to regulate questions arising as a result thereof:

Have appointed as their plenipotentiaries for this purpose:

The United Nations.....
Secretary-General

The Government of the
United States of America.....
who have agreed as follows:

Article I

Definitions

Section 1. In this convention:

(*a*) The expression "zone" means the area referred to in section 2, including any additions to it;

(*b*) The expression "law of the United States of America" includes federal, state, and local laws, however designated;

(*c*) The expression "Government of the United States of America" includes a state or a competent state authority wherever the context so requires;

(*d*) The expression "courts of the United States of America" includes federal and state courts;

Membre ou ces Membres, les dispositions de la présente convention. Ces accords additionnels seront dans chaque cas soumis à l'approbation de l'Assemblée générale.

Appendice II

La Sixième Commission recommande à l'Assemblée générale d'adopter la résolution suivante:

1. *L'Assemblée générale* autorise le Secrétaire général (assisté d'un comité composé de personnes désignées par les Gouvernements des pays suivants: Australie, Belgique, Bolivie, Chine, Cuba, Egypte, France, Pologne, Royaume-Uni, Union des Républiques socialistes soviétique) à négocier avec les autorités compétentes des Etats-Unis d'Amérique tous arrangements rendus nécessaires par l'établissement du siège permanent de l'Organisation des Nations Unies aux Etats-Unis d'Amérique.

2. Le projet de convention ci-joint est transmis par l'Assemblée générale au Secrétaire général afin de servir de base de discussion au cours des négociations.

3. Le Secrétaire général fera rapport, à la deuxième partie de la première session de l'Assemblée générale, sur les résultats de ces négociations.

4. Tout accord conclu à la suite de ces négociations, à l'exception d'accords purement temporaires, avec les autorités compétentes des Etats-Unis d'Amérique sera subordonné à l'approbation de l'Assemblée générale avant d'être signé au nom des Nations Unies.

Convention entre les Nations Unies et le Gouvernement des Etats-Unis d'Amérique

(Ce projet a été conçu dans l'hypothèse qu'aucune personne privée ne résiderait dans la zone où sera établi le siège de l'Organisation des Nations Unies.)

L'Organisation des Nations Unies et le Gouvernement des Etats-Unis d'Amérique:

Désireux de conclure une convention en vue d'assurer l'exécution de la résolution adoptée par l'Assemblée générale ..... d'établir le siège des Nations Unies à ..... et de régler les questions soulevées par cette décision:

Ont signé, à cet effet, comme plénipotentiaires:

L'Organisation des Nations Unies .....
Secrétaire général

Le Gouvernement des
Etats-Unis d'Amérique .....
qui sont convenus de ce qui suit:

Article I

Définitions

Section 1. Aux termes de cette convention:

a) L'expression "zone" désigne l'étendue de territoire mentionnée à la section 2 ainsi que toutes les adjonctions qui pourront lui être faites;

b) L'expression "législation des Etats-Unis d'Amérique" s'applique aux lois fédérales, aux lois des états, aux lois locales quelle que soit leur dénomination;

c) L'expression "Gouvernement des Etats-Unis d'Amérique" s'applique à un état, ou à l'autorité compétente d'un état selon le contexte;

d) L'expression "tribunaux des Etats-Unis d'Amérique" s'applique aux tribunaux fédéraux et d'états;

(*e*) The expression "United Nations" means the International Organization established by the Charter of the United Nations.

ARTICLE II

The United Nations Zone

Section 2. The seat of the United Nations shall be the area situated..... and marked pink on the map which forms annex I. Additions may be made later to this area in accordance with the provisions of section 8.

Section 3. The Government of the United States of America undertakes, on the entry into force of this convention, to cause to be vested in the United Nations, possession immediately and full ownership as soon as possible of all land in the zone as shown in annex I and of all buildings situated thereon at the time of transfer.

Section 4 The Government of the United States of America shall be responsible for expropriating and compensating so far as necessary and as soon as possible all interests in land and buildings conveyed to the United Nations.

Section 5. Having regard to section 4, the United Nations shall pay to the United States of America a fair price for any land and buildings conveyed to the United Nations. The amount so payable shall be credited to the United States of America in the accounts of the United Nations and shall be set off, during such period as may be fixed, against contributions due from the United States of America. In default of agreement, this price and this period shall be determined by an expert selected by the President of the International Court of Justice.

Section 6. The United Nations shall have exclusive rights over the subsoil of land conveyed to it and in particular the right to make construction underground and to obtain therefrom supplies of water. It shall not, however, have the right to exploit minerals.

Section 7. The United Nations may establish in the zone any type of installation which it deems necessary for the purpose of its work, and in particular may establish its own radio telegraph sending and receiving stations, including broadcasting, teletype, and telephoto services. The United Nations shall make arrangements with the International Telecommunications Union with regard to wavelengths and other similar matters.

Section 8. The Government of the United States of America shall, at the request of the Secretary-General acting in pursuance of a resolution of the General Assembly, cause to be vested in the United Nations, possession immediately and full ownership as soon as possible over such further land as may be required for the purpose of constructing an airport, railway station, or radio telegraphic station or for such other purposes as may be required by the United Nations. The provisions of sections 4, 5 and 6 shall apply to land so conveyed.

Section 9. In the event of the land conveyed in accordance with section 8 not being contiguous to the remainder of the zone, the Government of the United States of America shall guarantee

(*e*) L'expression "Nations Unies" désigne l'Organisation internationale créée par la Charte des Nations Unies.

ARTICLE II

Zone des Nations Unies

Section 2. Le siège des Nations Unies sera l'étendue de territoire située ..... et marquée en rose sur la carte qui constitue l'annexe I. Des adjonctions pourront être faites ultérieurement à ce territoire, conformément aux dispositions de la section 8.

Section 3. Le Gouvernement des Etats-Unis d'Amérique s'engage à mettre l'Organisation des Nations Unies (au moment de l'entrée en vigueur de la présente convention) immédiatement en possession de tout le terrain de la zone indiqué à l'annexe I, ainsi que de tous les bâtiments qui s'y trouveront au moment du transfert, et de lui faire remettre la pleine et entière propriété de ceux-ci aussitôt que possible.

Section 4. Le Gouvernement des Etats-Unis d'Amérique assumera le plus tôt possible la responsabilité des mesures d'expropriation et de compensation qu'il pourra y avoir lieu de prendre à l'égard de tous les intérêts liés au terrain et aux bâtiments cédés à l'Organisation des Nations Unies.

Section 5. En accord avec la section 4, l'Organisation versera aux Etats-Unis d'Amérique un prix équitable pour le terrain et les bâtiments ainsi cédés. Cette somme sera portée au crédit des Etats-Unis dans les comptes des Nations Unies et sera défalquée, au cours d'une période déterminée, des contributions dues par les Etats-Unis d'Amérique. A défaut d'accord, ce prix et cette période seront déterminés par un expert désigné par le Président de la Cour internationale de Justice.

Section 6. L'Organisation des Nations Unies aura un droit exclusif sur le sous-sol du terrain ainsi cédé et, en particulier, le droit d'y faire toute construction souterraine et d'en tirer son approvisionnement en eau. Toutefois, elle n'aura pas le droit d'en exploiter les ressources minérales.

Section 7. L'Organisation des Nations Unies pourra construire dans la zone tout genre d'installations qu'elle estimera nécessaire à l'accomplissement de sa tâche. En particulier, elle pourra installer ses propres stations émettrices et réceptrices de radiotélégraphie, y compris les services de radiodiffusion, de télétypie et de téléphotographie. L'Organisation se mettra d'accord avec l'Union internationale des télécommunications en ce qui concerne les longueurs d'ondes et toutes autres questions analogues.

Section 8. Le Gouvernement des Etats-Unis d'Amérique, à la requête du Secrétaire général agissant en exécution d'une résolution de l'Assemblée générale, mettra l'Organisation immédiatement en possession de tous terrains supplémentaires qui seraient nécessaires pour la construction d'un aérodrome, d'une gare de chemin de fer ou d'une station de télégraphie sans fil, ou pour toutes autres fins utiles à l'Organisation et lui fera remettre la pleine et entière propriété de ceux-ci aussitôt que possible. Les dispositions 4, 5 et 6 s'appliqueront également aux terrains ainsi transférés.

Section 9. Au cas où le terrain transféré en application des dispositions de la section 8 ne serait pas contigu au reste de la zone, le Gouvernement des Etats-Unis d'Amérique garantira la liberté des

unimpeded communication and transit between parts of the zone.

Article III

Law and Authority in the Zone

Section 10. The zone, including the air space above it and the subsoil below it, shall be inviolable.

Section 11. Save as otherwise provided in this convention, the zone shall be under the control and authority of the United Nations.

Section 12. Without prejudice to the generality of section 11, the Government of the United States of America renounces jurisdiction over any matter relating to entry into the zone and to the conditions under which persons may remain or reside there, and over any matters relating to the construction or removal of buildings in the zone.

Section 13. Officers or officials of any authority in the territory of the United States of America, whether administrative, judicial, military, or police, shall not enter the zone to perform any official duties therein except with the permission of and under conditions agreed by the Secretary-General. The service of legal process, including the seizure of private property, shall take place within the zone under conditions approved by the Secretary-General.

Section 14. Without prejudice to the provisions which are contained in annex II and subsequently in the General Convention referred to in section 32, and which relate to the immunities of officials of the United Nations and of the representatives of Members, the United Nations shall not permit the zone to become a refuge either for persons who are avoiding arrest under the law of the United States of America or are required by the Government of the United States of America for extradition to another country, or for persons who are endeavouring to avoid service of legal process.

Section 15. Subject to section 16, the law of the United States of America shall apply within the zone, and in particular the ordinary civil and criminal law.

Section 16. The United Nations may enact regulations making provision of an administrative character for the zone. Any such regulation shall prevail over any provisions in the law of the United States of America which are inconsistent with it. It is agreed that within the zone the protection afforded by the Constitution of the United States to personal liberty and to the basic human freedoms of expression and worship shall not be lessened, and no form of racial discrimination shall be permitted.

Section 17. The courts of the United States of America shall, without prejudice to any provisions of annex II and subsequently of the General Convention referred to in section 32, have jurisdiction over acts done and transactions taking place in the zone, in the same manner as they have over similar acts and transactions taking place outside the zone.

Section 18. The courts of the United States of America, when dealing with cases arising out of or relating to acts done or transactions taking place in the zone, shall take cognizance of the regulations enacted by the United Nations under section 16, though they shall not be obliged to inflict penalties for infraction of such regulations unless the Government of the United States of America has

communications et de la circulation entre les diverses parties de la zone.

Article III

Zone: Droit en vigueur et autorité compétente

Section 10. La zone, y compris son espace aérien et son sous-sol, sera inviolable.

Section 11. Sauf dispositions contraires de la présente Convention, la zone sera placée sous le contrôle et l'autorité de l'Organisation.

Section 12. Sans porter atteinte au caractère général de la section 11, le Gouvernement des Etats-Unis d'Amérique renonce à sa juridiction pour tout ce qui concerne l'entrée et les conditions de séjour ou de résidence dans la zone ainsi qu'à la construction ou la démolition de bâtiments à l'intérieur de la zone.

Section 13. Les officiers ou fonctionnaires des autorités administratives, judiciaires, militaires ou de police du territoire des Etats-Unis d'Amérique ne pourront entrer dans la zone pour y exercer leurs fonctions qu'avec l'autorisation du Secrétaire général et dans des conditions approuvées par celui-ci. L'exécution des actes de procédure, y compris la saisie de biens privés, ne pourra avoir lieu à l'intérieur de la zone que dans des conditions approuvées par le Secrétaire général.

Section 14. Sans préjudice des dispositions qui figurent à l'annexe II et qui seront inscrites par la suite dans la convention générale visée à la section 32, concernant les immunités des fonctionnaires de l'Organisation et des représentants des Etats Membres, l'Organisation ne permettra pas que la zone serve de refuge à une personne contre laquelle un mandat d'arrêt aura été lancé en vertu de la législation des Etats-Unis d'Amérique, qui est réclamée par le Gouvernement des Etats-Unis d'Amérique pour être extradée dans un autre pays, ou à une personne cherchant à se soustraire à l'action de la justice.

Section 15. Sous réserve des dispositions prévues à la section 16, la législation des Etats-Unis d'Amérique sera applicable à l'intérieur de la zone, notamment en ce qui concerne le droit civil et le droit pénal.

Section 16. L'Organisation des Nations Unies pourra édicter des règlements prévoyant des mesures de caractère administratif, applicables à la zone. Ces règlements prévaudront contre toutes dispositions contraires de la législation des Etats-Unis d'Amérique. Il est entendu qu'à l'intérieur de la zone, rien ne viendra restreindre la liberté individuelle et les libertés fondamentales de parole et de culte garantis par la Constitution des Etats-Unis et aucune discrimination raciale ne sera permise.

Section 17. Sans préjudice des dispositions de l'annexe II et par la suite de la Convention générale visée à la section 32, les tribunaux des Etats-Unis d'Amérique seront compétents pour connaître des actes accomplis ou des transactions effectuées à l'intérieur de la zone, dans la mesure où ils seraient compétents pour connaître d'actes ou de transactions analogues, à l'extérieur de la zone.

Section 18. Les tribunaux des Etats-Unis d'Amérique lorsqu'ils auront à connaître d'affaires nées à l'occasion d'actes accomplis, ou de transactions effectuées à l'intérieur de la zone, ou se rapportant à celles-ci, tiendront compte des règlements édictés par l'Organisation conformément à la section 16, bien qu'ils ne soient pas tenus d'infliger des peines pour infraction commise à l'en-

agreed to these regulations before the infraction was committed.

Article IV

Communications and Transit to and from the Zone

Section 19. The Government of the United States of America shall guarantee at all times adequate means of communication to and from the zone through the territory of the United States of America, for the passage of persons, the transmission of postal correspondence and telegrams, and the transport of goods required for use and consumption in the zone.

Section 20. Representatives of Members, irrespective of the relations existing between their Government and the Government of the United States of America, officials both of the United Nations and of the specialized agencies, and the families of these representatives and officials, shall at all times enjoy the right of unimpeded and safe transit through the territory of the United States of America to and from the zone.

Section 21. The accredited representatives of news agencies, whether press, radio, or films, and of non-governmental organizations recognized by the United Nations for the purpose of consultation, shall also enjoy the rights referred to in section 20.

Section 22. Immigration and other regulations in force in the United States of America, regarding the entry and residence of foreigners, shall not be applied in such a manner as to interfere with the rights referred to in sections 20 and 21. Visas required by the persons referred to in those sections shall be granted without charge, without delay and without requirement of personal attendance for the issue of the visa.

Section 23. The Government of the United States of America shall give or cause to be given facilities for the issue of visas to, and for the use of the available means of transport by, persons coming from abroad (other than those referred to in sections 20 and 21) who desire to visit the zone. The Secretary-General of the United Nations and the Government of the United States of America shall, at the request of either of them, enter into discussion with regard to the application of this section.

Section 24. The provisions of this article shall not prevent the Government of the United States of America from taking precautions in the interests of national security, provided that such precautions shall not have the effect of interfering with the rights referred to in sections 19, 20 and 21.

Article V

Resident Representatives to the United Nations

Section 25. Persons accredited to the United Nations by Members as resident representatives and their staffs, whether residing inside or outside the zone, shall be recognized by the Government of the United States of America as entitled on its territory to the same privileges and immunities as that Government accords to the diplomatic envoys accredited to it, and the staffs of these envoys.

contre de ces règlements à moins que le Gouvernement des Etats-Unis d'Amérique n'ait reconnu lesdits règlements avant que l'infraction n'ait été commise.

Article IV

Communication et circulation à destination et en provenance de la zone

Section 19. Le Gouvernement des Etats-Unis d'Amérique garantira à tout moment des moyens de communication suffisants pour se rendre dans la zone, et pour en sortir, à travers le territoire des Etats-Unis d'Amérique pour les personnes, la correspondance postale, les télégrammes et le transport des marchandises destinées à être utilisées ou consommées dans la zone.

Section 20. Les représentants des Etats Membres, quel que soit l'état des relations existant entre leur Gouvernement et le Gouvernement des Etats-Unis d'Amérique, les fonctionnaires de l'Organisation et des institutions spécialisées, ainsi que les familles de ces représentants et de ces fonctionnaires, auront en tout temps le droit de traverser librement et en sécurité le territoire des Etats-Unis d'Amérique lorsqu'ils se rendent dans la zone ou en reviennent.

Section 21. Les représentants accrédités des agences d'informations, qu'il s'agisse de la presse, de la radio ou du cinéma, ainsi que les représentants des organisations non gouvernementales, reconnues par l'Organisations des Nations Unies aux fins de consultation jouiront également des droits définis à la section 20.

Section 22. L'application des règlements concernant l'immigration et de tous autres règlements relatifs aux conditions d'entrée et de résidence des étrangers, en vigueur aux Etats-Unis d'Amérique, ne devra en aucun cas porter atteinte aux droits définis aux sections 20 et 21. Les visas nécessaires aux personnes énumérées dans ces sections seront accordés gratuitement, sans retard et sans obligation pour l'intéressé de se présenter personellement lors de la délivrance dudit visa.

Section 23. Le Gouvernement des Etats-Unis d'Amérique accordera ou fera accorder des facilités pour l'octroi de visas et l'usage de moyens de transport aux personnes (autres que celles qui sont mentionnées aux sections 20 et 21) venant de l'étranger et désirant se rendre dans la zone. Le Secrétaire général de l'Organisation et le Gouvernement des Etats-Unis d'Amérique, si l'un ou l'autre en exprime le désir, devront procéder à un échange de vues au sujet de l'application de la présente section.

Section 24. Les dispositions du présent article ne pourront empêcher le Gouvernement des Etats-Unis de prendre des précautions nécessaires à la sécurité nationale, sous réserve que ces précautions ne puissent avoir pour effet de porter atteinte aux droits définis aux sections 19, 20 et 21.

Article V

Représentants permanents auprès de l'Organisation

Section 25. Les personnes accréditées auprès de l'Organisation, par les Etats Membres, comme représentants permanents et leur personnel, qu'ils résident à l'intérieur ou à l'extérieur de la zone, seront reconnus par le Gouvernement des Etats-Unis d'Amérique comme ayant droit, sur le territoire de ce pays, aux privilèges et immunités que ce gouvernement accorde aux diplomates accrédités auprès de lui et à leur personnel.

ARTICLE VI

Police Protection of the Zone

Section 26. The Government of the United States of America shall cause to be provided on the boundaries of the zone such police protection for the zone as is required, and shall be responsible for ensuring that the tranquillity of the zone is not disturbed by the unauthorized entry of bodies of persons from outside or by disturbances in its immediate vicinity.

Section 27. If so requested by the Secretary-General, the Government of the United States of America shall cause to be provided a sufficient number of police to perform duties inside the zone for the preservation of law and order therein, and for the removal of persons who have committed or are suspected of having committed or of being about to commit offences, including infractions to the administrative regulations of the United Nations.

ARTICLE VII

Public Services for and the Amenities of the Zone

Section 28. The Government of the United States of America will exercise all the powers which it possesses to ensure that the zone shall be supplied on equitable terms with the necessary public services (including electricity, water, gas, post, telephone, telegraph, drainage, collection of refuse) and that these services shall not be interrupted. In case of any interruption or threatened interruption of any of these services, the Government of the United States of America will consider the needs of the zone as being of equal importance with the essential services of the United States Government itself. Consequently, in that event it will take all those steps which it would take in case of interruption or threatened interruption of these services to the essential Departments of the United States Government to ensure that the work of the United Nations is not prejudiced.

Section 29. The Government of the United States of America shall be responsible for ensuring that the amenities of the zone are not prejudiced and the purposes for which the zone is required are not obstructed by any use made of the land in its vicinity.

ARTICLE VIII

Matters relating to the operation of this Convention

Section 30. The Secretary-General and the Government of the United States of America shall settle by agreement the channel or channels through which shall be conducted correspondence relating to the application of the provisions of this convention and to other questions affecting the zone. If the Secretary-General so requests, the Government of the United States of America shall appoint a special representative for the purpose of liaison with the Secretary-General.

Section 31. In so far as the fulfilment of this convention requires co-operation and action by any state or other non-federal authority of the United States of America, the Government of the United States will conclude with that state or authority such agreements as are necessary for this purpose. The conclusion of these agreements, together with the enactment of any necessary legislation by the United States and by the state, shall be completed before the notice is given which is required under section 35 to be given by the Government of the

ARTICLE VI

Mesures de police destinées à assurer la protection de la zone

Section 26. Le Gouvernement des Etats-Unis d'Amérique fera prendre, aux limites de la zone, des mesures de police nécessaires à la protection de celle-ci et aura la responsabilité de veiller à ce que la tranquillité de la zone ne soit pas troublée par l'entrée, sans autorisation, de groupes venant de l'extérieur, ou par des désordres dans le voisinage immédiat de la zone.

Section 27. Sur la demande du Secrétaire général, le Gouvernement des Etats-Unis veillera à fournir les forces de police, qui pourraient être nécessaires pour assurer, à l'intérieur de la zone, le respect de la loi et le maintien de l'ordre et expulser les personnes qui auront commis, seront soupçonnées d'avoir commis ou seront sur le point de commettre des infractions, y compris celles aux règlements administratifs de l'Organisation.

ARTICLE VII

Services publics et agréments de la zone

Section 28. Le Gouvernement des Etats-Unis d'Amérique fera usage de tous les pouvoirs dont il dispose, pour faire en sorte que la zone soit dotée, dans des conditions équitables, des services publics nécessaires (entre autres l'électricité, l'eau, le gaz, les services postaux, téléphoniques et télégraphiques, l'évacuation des eaux et l'enlèvement des ordures) et que ces services fonctionnent sans interruption. En cas d'interruption ou de menace d'interruption de l'un quelconque de ces services, le Gouvernement des Etats-Unis d'Amérique considérera que les besoins de la zone sont d'une importance égale à celle des services essentiels du Gouvernement des Etats-Unis lui-même. En conséquence, il prendra, dans cette éventualité, toutes les mesures qu'il adopterait en cas d'interruption ou de menace d'interruption de ces services pour les administrations essentielles du Gouvernement des Etats-Unis, afin de veiller à ce que les travaux des Nations Unies ne soient pas entravés.

Section 29. Le Gouvernement des Etats-Unis d'Amérique veillera à ce que l'usage qui pourrait être fait des terrains avoisinant la zone, ne puisse en aucun cas porter atteinte aux agréments que comporte la zone et aux fins auxquelles elle est destinée.

ARTICLE VIII

Questions relatives à l'application de la convention

Section 30. Le Secrétaire général et le Gouvernement des Etats-Unis d'Amérique se mettront d'accord sur les voies par lesquelles se fera la correspondance relative à l'application des dispositions de la présente convention et aux autres questions intéressant la zone. Le Gouvernement des Etats-Unis désignera auprès du Secrétaire général, si celui-ci en fait la demande, un représentant spécial chargé d'assurer la liaison.

Section 31. Dans la mesure où l'exécution de la présente convention nécessite la coopération et l'intervention d'un état ou d'une autre autorité non fédérale des Etats-Unis d'Amérique, le Gouvernement des Etats-Unis conclura avec cet état ou cette autorité les accords nécessaires à cet effet. La conclusion de ces accords, de même que l'adoption de toutes mesures législatives nécessaires par les Etats-Unis ou par l'état, devront intervenir avant la notification que le Gouvernement des Etats-Unis d'Amérique est tenu de faire, conforme-

United States of America before this convention enters into force.

Article IX

Relation between this Convention and the General Convention

Section 32. Until the Government of the United States of America becomes a party to the General Convention relating to the privileges and immunities of the United Nations, the provisions of annex II shall apply between the United Nations and the Government of the United States of America. Thereafter, these provisions shall be replaced by the provisions of the General Convention, which shall continue in force so long as the present convention remains in operation.

Section 33. The provisions of this convention shall be complementary to the provisions of the General Convention and, until the Government of the United States of America becomes a party to the General Convention, to the provisions of annex II.

Section 34. In so far as any provision of this convention and any provision of the General Convention (or of annex II as the case may be) relate to the same subject matter, the two provisions shall, wherever possible, be treated as complementary, so that both provisions shall be applicable and neither shall narrow the effect of the other; but in any case of absolute conflict, the provisions of this convention shall prevail.

Article X

Final Provisions

Section 35. This convention, having already been approved by a resolution of the General Assembly, shall enter into force as soon as the Government of the United States of America notifies the Secretary-General that it has all the powers necessary to fulfil the provisions of the convention. The Government of the United States of America shall take every possible step to enable it to give this notification as soon as possible, and in any case not later than.....

Section 36. This convention shall remain in force so long as the seat of the United Nations is maintained in the territory of the United States of America.

Section 37. The seat of the United Nations shall only be removed from the territory of the United States of America if the United Nations should so decide.

Section 38. If the seat of the United Nations is removed from the territory of the United States of America, the Government of the United States of America shall pay to the United Nations an equitable sum for the land in the zone and for all buildings and installations thereon. An expert, nominated by the President of the International Court of Justice, shall decide, in default of agreement between the parties, what sum is equitable, having regard to:

(*a*) The then value to the United States of America of the land, buildings and installations; and

(*b*) The cost incurred by the United Nations in acquiring the land and in erecting the buildings and installations.

Section 39. Any difference between the United Nations and the Government of the United States of America concerning the interpretation or application of this convention or of any supplementary agreement or agreement which is not settled by

ment à la section 35, avant que la présente convention entre en vigueur.

Article IX

Rapports entre la présente convention et la convention générale

Section 32. Les dispositions de l'annexe II seront applicables entre l'Organisation des Nations Unies et le Gouvernement des Etats-Unis d'Amérique jusqu'à ce que celui-ci devienne partie à la convention générale concernant les privilèges et immunités de l'Organisation. Ces dispositions seront alors remplacées par celles de la convention générale qui demeurera en vigueur aussi longtemps que la présente convention restera applicable.

Section 33. Les dispositions de la présente convention seront complémentaires des dispositions de la convention générale et, jusqu'à ce que le Gouvernement des Etats-Unis devienne partie à celle-ci, des dispositions de l'annexe II.

Section 34. Lorsqu'une disposition de la présente convention et une disposition de la convention générale (ou de l'annexe II, selon le cas) auront trait au même sujet, les deux dispositions seront considérées, autant que possible, comme complémentaires et applicables toutes les deux; aucune d'entre elles ne limitera les effets de l'autre, mais en cas d'opposition irréductible, les dispositions de la présente convention prévaudront.

Article X

Dispositions finales

Section 35. La présente convention, déjà approuvée par une résolution de l'Assemblée générale, entrera en vigueur aussitôt que le Gouvernement des Etats-Unis d'Amérique aura notifié au Secrétaire général qu'il dispose de tous les pouvoirs nécessaires pour exécuter les stipulations de la convention. Le Gouvernement des Etats-Unis d'Amérique prendre toutes les mesures utiles pour pouvoir faire cette notification dans le plus bref délai possible, et, en tout cas, le ..... au plus tard.

Section 36. La présente convention demeurera en vigueur aussi longtemps que le siège de l'Organisation des Nations Unies restera sur le territoire des Etats-Unis d'Amérique.

Section 37. Le siège de l'Organisation des Nations Unies ne sera transféré hors du territoire des Etats-Unis d'Amérique que si l'Organisation en décide ainsi.

Section 38. Si le siège de l'Organisation est transféré hors du territoire des Etats-Unis d'Amérique, le Gouvernement des Etats-Unis d'Amérique offrira aux Nations Unies une somme équitable pour les terrains de la zone et tous les bâtiments et installations qui s'y trouvent. En cas de désaccord entre les parties, un expert désigné par le Président de la Cour internationale de Justice fixera cette somme, en tenant compte:

a) De la valeur que présenteront alors pour les Etats-Unis d'Amérique les terrains, bâtiments et installations; et

b) Des dépenses encourues par les Nations Unies pour l'acquisition des terrains et la construction des bâtiments et installations.

Section 39. Tout différend entre l'Organisation et le Gouvernement des Etats-Unis d'Amérique au sujet de l'interprétation ou de l'application de la présente convention, ou encore de tout accord ou arrangement complémentaire, s'il n'est

negotiation shall be referred to the arbitration of an umpire appointed for the purpose by the President of the International Court of Justice.

Section 40. Either party may ask the General Assembly to request of the International Court of Justice an advisory opinion on any legal question arising in the course of the proceedings referred to in section 39. Pending the receipt of the opinion of the Court, an interim decision of the umpire shall be observed by both parties. Thereafter the umpire shall render a final decision, having regard to the opinion of the Court.

IN WITNESS THEREOF THE ABOVE-MENTIONED PLENIPOTENTIARIES HAVE SIGNED THIS CONVENTION:

DONE THIS ..... DAY OF ..... AT ..... IN DUPLICATE.

ANNEX I

MAP

(Not reproduced)

ANNEX II

ARTICLE I

Juridical Personality

Section 1. The United Nations shall possess juridical personality. It shall have the capacity:

(*a*) To contract;

(*b*) To acquire and dispose of immovable and movable property;

(*c*) To institute legal proceedings.

ARTICLE II

Property, Funds and Assets

Section 2. The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as, in any particular case, it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.

Section 3. The premises of the United Nations shall be inviolable. The property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation, and any other form of interference, whether by executive, administrative, judicial or legislative action.

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

Section 5. Without being restricted by financial controls, regulations or moratoria of any kind,

(*a*) The United Nations may hold funds, gold or currency of any kind and operate accounts in any currency;

(*b*) The United Nations shall be free to transfer its funds, gold or currency between the United States of America and any other State, and from one place to another within the United States of America, and to convert any currency held by it into any other currency.

Section 6. In exercising its right under section 5 above, the United Nations shall pay due regard to any representations made by the Government of the United States, in so far as it is considered that effect can be given to such representations without detriment to the interests of the United Nations.

pas réglé par voie de négociation, sera soumis à la décision d'un arbitre désigné à cet effet par le Président de la Cour internationale de justice.

Section 40. Chaque partie pourra prier l'Assemblée générale de demander à la Cour internationale de Justice un avis consultatif sur toute question juridique surgissant au cours de la procédure prévue à la section 39. Aussi longtemps que cet avis de la Cour n'aura pas été reçu, les deux parties se conformeront à toute décision provisoire de l'arbitre. Ensuite, celui-ci rendra une décision définitive en tenant compte de l'avis de la Cour.

EN FOI DE QUOI LES PLÉNIPOTENTIAIRES SUSMENTIONNÉS ONT SIGNÉ LA PRÉSENTE CONVENTION:

FAIT À ..... LE ..... EN DOUBLE EXPÉDITION.

ANNEXE I

CARTE

(Non reproduite)

ANNEXE II

ARTICLE I

Personnalité juridique

Section 1. L'Organisation des Nations Unies possède la personnalité juridique. Elle a la capacité:

a) De contracter;

b) D'acquérir et de vendre des biens immobiliers et mobiliers;

c) D'ester en justice.

ARTICLE II

Biens, fonds et avoirs

Section 2. L'Organisation des Nations Unies, ses biens et avoirs, quels que soient leur siège ou leur détenteur, jouissent de l'immunité de juridiction, sauf dans la mesure où l'Organisation y a expressément renoncé dans un cas particulier. Il est toutefois entendu que la renonciation ne peut s'étendre à des mesures d'exécution.

Section 3. Les locaux de l'Organisation sont inviolables. Ses biens et avoirs, où qu'ils se trouvent et quel que soit leur détenteur, sont exempts de perquisition, réquisition, confiscation, expropriation, ou de toute autre forme de contrainte exécutive, administrative, judiciaire, législative.

Section 4. Les archives de l'Organisation et, d'une manière générale, tous les documents lui appartenant ou détenus par elle, sont inviolables où qu'ils se trouvent.

Section 5. Sans être astreinte à aucun contrôle, réglementation ou moratoire financiers,

a) L'Organisation des Nations Unies peut détenir des fonds, de l'or ou des devises quelconques et avoir des comptes en n'importe quelle monnaie;

b) L'Organisation peut transférer librement ses fonds, son or ou ses devises des Etats-Unis d'Amérique dans un autre Etat ou d'un lieu à un autre dans les limites des Etats-Unis d'Amérique et de convertir toutes devises détenues par elle en toute autre monnaie.

Section 6. Dans l'exercice des droits qui lui sont accordés en vertu de la section 5 ci-dessus, l'Organisation des Nations Unies devra tenir compte de toutes représentations que lui seront faites par le Gouvernement des Etats-Unis d'Amérique, dans la mesure où elle estimera pouvoir y donner suite sans porter préjudice à ses propres intérêts.

Section 7. The United Nations, its assets, income and other property shall be:

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

(*b*) Exempt from customs duties and prohibitions and restrictions on imports and exports in respect of articles imported or exported by the United Nations for its official use. It is understood, however, that articles imported under such exemption will not be sold in the United States of America except under conditions agreed with the Government of the United States of America;

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

Section 8. While the United Nations will not, as a general rule, claim exemption from excise duties and from taxes on the sale of movable and immovable property which form part of the price to be paid, nevertheless, when the United Nations is making important purchases for official use of property on which such duties and taxes have been charged or are chargeable, the Government of the United States of America will, whenever possible, make appropriate administrative arrangements for the remission or return of the amount of duty or tax.

Article III

Facilities in respect of Communications

Section 9. The United Nations shall enjoy in the territory of the United States of America for its official communications treatment not less favourable than that accorded by the Government of the United States of America to any other government, including its diplomatic mission, in the matter of priorities, rates and taxes on mails, cables, telegrams, radiograms, telephotos, telephone and other communications; and press rates for information to the press and radio. No censorship shall be applied to the official correspondence and other official communications of the United Nations.

Section 10. The United Nations shall have the right to use codes and to despatch and receive its correspondence by courier or in bags, which shall have the same immunities and privileges as diplomatic couriers and bags.

Article IV

The Representatives of Members

Section 11. Representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, shall, while exercising their functions and during their journey to and from the place of meeting, be accorded by the Government of the United States of America the following privileges and immunities:

(*a*) Immunity from personal arrest or detention and from seizure of their personal baggage, and, in respect of words spoken or written and all acts done by them in their capacity as representatives, immunity from legal process of every kind;

(*b*) Inviolability for all papers and documents;

Section 7. L'Organisation, ses avoirs, revenus et autres biens seront:

a) Exonérés de tout impôt direct. Il demeure entendu toutefois que l'Organisation ne peut demander l'exonération d'impôts qui ne seraient pas en excès de simple rémunération de services d'utilité publique;

b) Exonérés de tous droits de douane et prohibitions et restrictions d'importation et d'exportation à l'égard d'objets importés et exportés par l'Organisation pour son usage officiel. Il est entendu toutefois que les articles ainsi importés en franchise ne seront pas vendus sur le territoire du pays dans lequel ils auront été introduits, à moins que ce ne soit à des conditions acceptées par le Gouvernement des Etats-Unis d'Amérique.

c) Exonérés de tout droit de douane et de toutes prohibitions et restrictions d'importation et d'exportation à l'égard de ses publications.

Section 8. Bien que l'Organisation ne revendique pas, en principe, l'exonération des droits d'accise et des taxes à la vente, entrant dans le prix des biens mobiliers ou immobiliers, cependant, quand elle effectue pour son usage officiel des achats importants dont le prix comprend des droits et taxes de cette nature, les Etats-Unis d'Amérique, prendront, chaque fois qu'il leur sera possible, les dispositions administratives appropriées en vue de la remise ou du remboursement du montant de ces droits et taxes.

Article III

Facilités de communications

Section 9. L'Organisation des Nations Unies bénéficiera, sur le territoire des Etats-Unis, pour ses communications officielles, d'un traitement au moins aussi favorable que le traitement accordé par le Gouvernement des Etats-Unis d'Amérique à tout autre gouvernement y compris sa mission diplomatique, en ce qui concerne les priorités, tarifs et taxes sur le courrier, les câblogrammes, télégrammes, radiotélégrammes, téléphotos, communications téléphoniques et autres communications ainsi que sur les tarifs de presse pour les informations à la presse et la radio. La correspondance officielle et les autres communications officielles de l'Organisation ne pourront être censurées.

Section 10. L'Organisation des Nations Unies aura le droit d'employer des codes ainsi que d'expédier et de recevoir sa correspondance par des courriers ou valises qui jouiront des mêmes privilèges et immunités que les courriers et valises diplomatiques.

Article IV

Représentants des Membres

Section 11. Les représentants des Membres auprès des organes principaux et subsidiaires des Nations Unies et aux conférences convoquées par les Nations Unies jouissent durant l'exercice de leurs fonctions et au cours de voyages à destination ou en provenance du lieu de la réunion, des privilèges et immunités suivants:

a) Immunité d'arrestation personnelle ou de détention et de saisie de leurs bagages personnels et, en ce qui concerne les actes accomplis par eux en leur qualité de représentants, y compris leurs paroles et écrits, immunité de toute juridiction;

b) Inviolabilité de tous papiers et documents;

(*c*) The right to use codes and to receive papers or correspondence by courier or in sealed bags;

(*d*) Exemption in respect of themselves and their spouses from immigration restrictions, aliens registration or national service obligations in the State they are visiting or through which they are passing in the exercise of their functions;

(*e*) The same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions to the Government of the United States;

(*f*) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys; and also

(*g*) Such other privileges, immunities and facilities, not inconsistent with the foregoing, as diplomatic envoys enjoy, except that they shall have no right to claim exemption from customs duties on goods imported (otherwise than as part of their personal baggage) or from excise duties or sales taxes.

Section 12. In order to secure for the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, complete freedom of speech and independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer the representatives of Members.

Section 13. Where the incidence of any form of taxation depends upon residence, periods during which the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations are present in the United States of America for the discharge of their duties shall not be considered as periods of residence.

Section 14. Privileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connection with the United Nations. Consequently a Member not only has the right but is under a duty to waive the immunity of its representative in any case where the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded.

Section 15. The provisions of sections 11, 12 and 13 may not be invoked against the authorities of the United States of America:

(*a*) By a national of the United States of America;

(*b*) By a representative of the United States of America;

(*c*) By a representative of another Member, when that Member has waived the immunity in question.

Section 16. In this article the expression "representatives" shall be deemed to include all delegates, deputy delegates, advisers, technical experts and secretaries of delegations.

c) Droit de faire usage de codes et de recevoir des documents ou de la correspondance par courrier ou par valises scellées;

d) Exemption pour eux-mêmes et pour leurs conjoints à l'égard de toutes mesures restrictives d'immigration, de toute formalité d'enregistrement des étrangers et de toutes obligations de service national dans les pays visités ou traversés par eux dans l'exercice de leurs fonctions;

e) Les mêmes facilités en ce qui concerne les réglementations monétaires ou de change que celles accordées aux représentants de gouvernements étrangers en mission officielle temporaire auprès du Gouvernement des Etats-Unis d'Amérique;

f) Les mêmes immunités et facilités en ce qui concerne leurs bagages personnels que celles accordées aux agents diplomatiques; et également

g) Tels autres privilèges, immunités et facilités, non incompatibles avec ce qui précède, dont jouissent les agents diplomatiques, sauf le droit de réclamer l'exemption des droits de douane sur des objets importés (autres que ceux qui font partie de leurs bagages personnels) ou de droits d'accise ou de taxes à la vente.

Section 12. En vue d'assurer aux représentants des Membres aux organes principaux et subsidiaires des Nations Unies et aux conférences convoquées par l'Organisation une complète liberté de parole et une complète indépendance dans l'accomplissement de leurs fonctions, l'immunité de juridiction en ce qui concerne les paroles ou les écrits ou les actes émanant d'eux dans l'accomplissement de leurs fonctions continuera à leur être accordée même après que ces personnes auront cessé d'être les représentants de Membres.

Section 13. Dans le cas où l'incidence d'un impôt quelconque est subordonnée à la résidence de l'assujetti, les périodes pendant lesquelles les représentants des Membres auprès des organes principaux et subsidiaires des Nations Unies et aux conférences convoquées par l'Organisation des Nations Unies se trouveront sur le territoire des Etats-Unis d'Amérique pour l'exercice de leurs fonctions, ne seront pas considérées comme des périodes de résidence.

Section 14. Les privilèges et immunités sont accordés aux représentants des Membres, non à leur avantage personnel, mais dans le but d'assurer en toute indépendance l'exercice de leurs fonctions en rapport avec l'Organisation. Par conséquent un Membre a non seulement le droit mais le devoir de lever l'immunité de son représentant dans tous les cas où à son avis l'immunité empêcherait que justice soit faite et où elle peut-être levée sans nuire au but pour lequel l'immunité est accordée.

Section 15. Les dispositions des sections 11, 12 et 13 ne pourront être invoquées à l'encontre des autorités des Etats-Unis d'Amérique:

a) Par un ressortissant des Etats-Unis d'Amérique;

b) Par le représentant des Etats-Unis d'Amérique;

c) Par le représentant d'un autre Membre, si celui-ci a levé l'immunité en question.

Section 16. Aux fins du présent article, le terme "représentants" est considéré comme comprenant tous les délégués, délégués adjoints, conseillers, experts techniques et secrétaires de délégation.

Article V

Officials

Section 17. The Secretary-General will specify the categories of officials to which the provisions of this article and article VII shall apply. He shall submit these categories to the General Assembly. Thereafter these categories shall be communicated to the Governments of all Members. The names of the officials included in these categories shall from time to time be made known to the Government of the United States of America.

Section 18. Officials of the United Nations shall:

(*a*) Be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity;

(*b*) Be exempt from taxation on the salaries and emoluments paid to them by the United Nations;

(*c*) Be immune from national service obligations;

(*d*) Be immune, together with their spouses and relatives dependent on them, from immigration restrictions and alien registration;

(*e*) Be accorded the same privileges in respect of exchange facilities as are accorded to the officials of comparable ranks forming part of diplomatic missions to the Government of the United States of America;

(*f*) Be given, together with their spouses and relatives dependent on them, the same repatriation facilities in time of international crisis as diplomatic envoys;

(*g*) Have the right to import free of duty their furniture and effects at the time of first taking up their post in the country in question.

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

Section 20. Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. In the case of the Secretary-General the Security Council shall have the right to waive immunity.

Section 21. The United Nations shall co-operate at all times with the appropriate authorities of the United States of America to facilitate the proper administration of justice, secure the observance of police regulations, and prevent the occurrence of any abuse in connection with the privileges, immunities and facilities mentioned in this article.

Article VI

Experts on Missions for the United Nations

Section 22. Experts (other than officials coming within the scope of article V) performing

Article V

Fonctionnaires

Section 17. Le Secrétaire général déterminera les catégories des fonctionnaires auxquels s'appliquent les dispositions du présent article ainsi que de l'article VII. Il en soumettra la liste à l'Assemblée générale et en donnera ensuite communication aux Gouvernements de tous les Membres. Les noms des fonctionnaires compris dans ces catégories seront communiqués périodiquement au Gouvernement des Etats-Unis d'Amérique.

Section 18. Les fonctionnaires de l'Organisation des Nations Unies:

a) Jouiront de l'immunité de juridiction pour les actes accomplis par eux en leur qualité de représentants, y compris leurs paroles et écrits;

b) Seront exonérés de tout impôt sur les traitements et émoluments versées par l'Organisation des Nations Unies;

c) Seront exempts de toute obligation relative au service national;

d) Ne seront pas soumis, non plus que leurs conjoints et les membres de leur famille vivant à leur charge, aux dispositions limitant l'immigration et aux formalités d'enregistrement des étrangers;

e) Jouiront, en ce qui concerne les facilités de change, des mêmes privilèges que les fonctionnaires d'un rang comparable appartenant aux missions diplomatiques accréditées auprès du Gouvernement des Etats-Unis d'Amérique;

f) Jouiront, ainsi que leurs conjoints et les membres de leur famille vivant à leur charge, des mêmes facilités de rapatriement que les envoyés diplomatiques en période de crise internationale;

g) Jouiront du droit d'importer en franchise leur mobilier et leurs effets à l'occasion de leur première prise de fonctions dans le pays intéressé.

Section 19. Outre les privilèges et immunités prévus à la section 18, le Secrétaire général et tous les Sous-Secrétaires généraux, tant en ce qui les concerne qu'en ce qui concerne leurs conjoints et leurs enfants mineurs, jouiront des privilèges, immunités, exemptions et facilités accordées, conformément au droit international, aux envoyés diplomatiques.

Section 20. Les privilèges et immunités sont accordés aux fonctionnaires uniquement dans l'intérêt des Nations Unies, et non à leur avantage personnel. Le Secrétaire général pourra et devra lever l'immunité accordée à un fonctionnaire dans tous les cas, où, à son avis, cette immunité empêcherait que justice soit faite et pourra être levée sans porter préjudice aux intérêts de l'Organisation. A l'égard du Secrétaire général, le Conseil de sécurité a qualité pour prononcer la levée des immunités.

Section 21. L'Organisation des Nations Unies collaborera en tous temps avec les autorités compétentes des Etats-Unis en vue de faciliter la bonne administration de la justice, d'assurer l'observation des règlements de police et d'éviter tout abus auquel pourraient donner lieu les privilèges, immunités et facilités visés dans le présent article.

Article VI

Experts en missions pour l'Organisation des Nations Unies

Section 22. Les experts (autres que les fonctionnaires visés à l'article V), lorsqu'ils accomplis-

missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular they shall be accorded:

(*a*) Immunity from personal arrest or detention and from seizure of their personal baggage;

(*b*) In respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations;

(*c*) Inviolability for all papers and documents;

(*d*) For the purpose of their communications with the United Nations, the right to use codes and to receive papers or correspondence by courier or in sealed bags;

(*e*) The same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions to the Government of the United States of America;

(*f*) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys.

Section 23. Privileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations.

Article VII

United Nations Laissez-Passer

Section 24. The United Nations may issue United Nations *laissez-passer* to its officials. These *laissez-passer* shall be recognized and accepted as valid travel documents by the authorities of the United States of America, taking into account the provisons of section 25.

Section 25. Applications for visas (where required) from the holders of United Nations *laissez-passer,* when accompanied by a certificate that they are travelling on the business of the United Nations, shall be dealt with as speedily as possible. In addition, such persons shall be granted facilities for speedy travel.

Section 26. Similar facilities to those specified in section 25 shall be accorded to experts and other persons who, though not the holders of United Nations *laissez-passer,* have a certificate that they are travelling on the business of the United Nations.

Section 27. The Secretary-General, Assistant Secretaries-General and Directors travelling on United Nations *laissez-passer* on the business of the United Nations shall be granted the same facilities as are accorded to diplomatic envoys.

Section 28. The provisions of this article may be applied to the comparable officials of specialized

sent une mission pour l'Organisation des Nations Unies, jouissent, pendant la durée de cette mission, y compris le temps du voyage, des privilèges et immunités nécessaires pour pouvoir exercer leurs fonctions en toute indépendance. Ils jouissent en particulier des privilèges et immunités suivants:

a) Immunité d'arrestation personnelle ou de détention et de saisie de leurs bagages personnels;

b) Immunité de toute juridiction en ce qui concerne les actes accomplis par eux au cours de leur mission, y compris leurs paroles et écrits. Cette immunité continuera à leur être accordée même après que ces personnes auront cessé de remplir des missions pour l'Organisation des Nations Unies;

c) Inviolabilité de tous papiers et documents;

d) Le droit de faire usage de codes et de recevoir des documents et de la correspondance par courrier ou par valises scellées pour leurs communications avec l'Organisation des Nations Unies;

e) Les mêmes facilités en ce qui concerne les réglementations monétaires de change que celles qui sont accordées aux représentants des gouvernements étrangers en mission officielle temporaire auprès du Gouvernement des Etats-Unis d'Amérique;

f) Les mêmes immunités et facilités en ce qui concerne leurs bagages personnels que celles qui sont accordées aux agents diplomatiques.

Section 23. Les privilèges et immunités sont accordés aux experts dans l'intérêt de l'Organisation des Nations Unies et non à leur avantage personnel. Le Secrétaire général pourra et devra lever l'immunité accordée à un expert dans tous les cas où, à son avis, cette immunité empêcherait que justice soit faite, et où elle peut être levée sans porter préjudice aux intérêts de l'Organisation.

Article VII

Laissez-passer des Nations Unies

Section 24. L'Organisation des Nations Unies pourra délivrer des laissez-passer à ses fonctionnaires. Ces laissez-passer seront reconnus et acceptés par les autorités des Etats-Unis d'Amérique comme titre valable de voyage, en tenant compte des dispositions de la section 25.

Section 25. Les demandes de visas (lorsque des visas sont nécessaires) émanant des titulaires de ces laissez-passer et accompagnées d'un certificat attestant que ces fonctionnaires voyagent pour le compte de l'Organisation devront être examinées dans le plus bref délai possible. En outre, des facilités de voyage rapide seront accordées aux titulaires de ces laissez-passer.

Section 26. Des facilités analogues à celles qui sont mentionnées à la section 25 seront accordées aux experts et autres personnes qui, sans être munis de laissez-passer des Nations Unies, seront porteurs d'un certificat attestant qu'ils voyagent pour le compte de l'Organisation.

Section 27. Le Secrétaire général, les Sous-Secrétaires généraux et les directeurs voyageant pour le compte de l'Organisation et munis de laissez-passer délivrés par celle-ci jouiront des mêmes facilités que les envoyés diplomatiques.

Section 28. Les dispositions du présent article peuvent être appliquées aux fonctionnaires de rang

agencies if the agreements for relationship made under Article 63 of the Charter so provide.

Article VIII

Settlement of Disputes

Section 29. The United Nations shall make provision for appropriate modes of settlement of:

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

(*b*) Disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.

Appendix III

The Sixth Committee has examined the question of the privileges and immunities to be accorded to the members of the International Court of Justice, the agents, counsel and advocates of parties before the Court in accordance with the provisions of Articles 19, 32 (paragraph 8) and 42 (paragraph 3) of the Statute, as well as the privileges and immunities to be accorded to the registrar and other officers of the Court, and recommends that the General Assembly adopt the following resolution:

"1. *The General Assembly,* with a view to ensuring that the International Court of Justice shall enjoy the privileges, immunities and facilities necessary for the exercise of its functions and the fulfilment of its purposes, in the country of its seat and elsewhere, invites the members of the Court at their first session to consider this question and to inform the Secretary-General of their recommendations.

"2. *The General Assembly* decides that the question of the privileges and immunities of the Court shall be considered as soon as possible after the receipt of the recommendations of the Court.

"3. *The General Assembly* recommends that, until further action has been taken, the rules which have been applied to the Permanent Court of International Justice should be observed by Members in relation to the International Court of Justice."

Appendix IV

The Sixth Committee records its agreement with the recommendations of the Preparatory Commission of the United Nations concerning the desirability of a unification, as far as possible, of the privileges and immunities enjoyed by the United Nations and the various specialized agencies, and recommends that the General Assembly adopt the following resolution:

"*The General Assembly* considers that there are many advantages in the unification as far as possible of the privileges and immunities enjoyed by the United Nations and the various specialized agencies.

"While recognizing that not all specialized agencies require all the privileges and immunities which may be needed by others, and that certain of these may, by reason of their particular functions, require privileges of a special

analogue appartenant à des institutions spécialisées, si les accords fixant les relations desdites institutions avec l'Organisation aux termes de l'Article 63 de la Charte comportent une disposition à cet effet.

Article VIII

Règlement des différends

Section 29. L'Organisation des Nations Unies devra prévoir des modes de règlement appropriés pour:

a) Des différends en matière de contrats ou autres différends de droit privé dans lesquels l'Organisation serait partie;

b) Des différends dans lesquels serait impliqué un fonctionnaire de l'Organisation qui, du fait de sa situation officielle, jouit de l'immunité, si cette immunité n'a pas été levée par le Secrétaire général.

Appendice III

La Sixième Commission a étudié la question des privilèges et immunités qui devront être accordés aux membres de la Cour internationale de Justice et aux représentants, conseils et avocats des parties à un litige soumis à la Cour, conformément aux dispositions des articles 19, 32 (paragraphe 8) et 42 (paragraphe 3) du Statut. Elle a également examiné la question des privilèges et immunités qui devront être accordés au Greffier et aux autres fonctionnaires de la Cour. Elle recommande à l'Assemblée générale d'adopter la résolution suivante:

"1. *L'Assemblée générale,* en vue d'assurer à la Cour internationale de justice le bénéfice des privilèges, immunités et facilités nécessaires à l'exercice de ses fonctions et à l'accomplissement de sa tâche, soit dans le pays où le siège de la Cour sera établi, soit dans tout autre pays, invite les membres de la Cour, au cours de la première session de celle-ci, à examiner la question et à communiquer leurs recommandations au Secrétaire général.

"2. *L'Assemblée générale* décide que la question des privilèges et immunités de la Cour sera examinée aussitôt que possible après le dépôt de ces recommandations.

"3. *L'Assemblée générale* recommande que les Membres observent, en ce qui concerne la Cour internationale de Justice et jusqu'à ce que de nouvelles dispositions soient intervenues, la réglementation appliquée en la matière pour la Cour permanente de Justice internationale."

Appendice IV

La Sixième Commission a approuvé les recommandations de la Commission préparatoire des Nations Unies concernant l'intérêt qu'il y aurait à unifier, dans la mesure du possible, les privilèges et immunités dont jouissent l'Organisation et les diverses institutions spécialisées, et elle recommande à l'Assemblée générale d'adopter la résolution suivante:

"*L'Assemblée générale* estime que l'unification, dans la mesure du possible, des privilèges et immunités dont jouissent l'Organisation et les diverses institutions spécialisées, présente de nombreux avantages.

"Tout en reconnaissant que les institutions spécialisées n'ont pas toutes besoin des mêmes privilèges et immunités et que certaines d'entre elles, en raison du caractère particulier de leurs fonctions, ont besoin de privilèges d'une nature

nature which are not required by the United Nations itself, the General Assembly considers that the privileges and immunities of the United Nations should be regarded, as a general rule, as a maximum within which the various specialized agencies should enjoy such privileges and immunities as the appropriate fulfilment of their respective functions may require, and that no privileges and immunities which are not really necessary should be asked for.

"Therefore the General Assembly instructs the Secretary-General to open negotiations with a view to the re-consideration, in the light both of the General Convention adopted by the United Nations and of the considerations above, of the provisions under which the specialized agencies at present enjoy privileges and immunities."

Appendix V

The Sixth Committee recommends that the General Assembly adopt the following resolution:

"It has been found that a frequent source of difficulty is road accidents in which motor cars, owned or driven by persons possessing immunity from legal process, are involved.

"It is the intention of the United Nations to prevent the occurrence of any abuse in connection with privileges, immunities and facilities granted to it under Articles 104 and 105 of the Charter and the General Convention on privileges and immunities, which determines the details of the application of these articles.

"Therefore the General Assembly instructs the Secretary-General to ensure that the drivers of all official motor cars of the United Nations and all members of the staff who own or drive motor cars, shall be properly insured against third party risks."

Appendix VI

The Sixth Committee considered a proposal from the Advisory Group of Experts on Administrative and Budgetary Matters, to the effect that an article should be included in the General Convention providing for the preservation of the accrued pension rights of persons who, at the time that they enter the service of the United Nations, have held official positions in the territories of Members. The Sixth Committee did not consider that a provision on these lines could be included in the Convention. The Committee was, however, of the opinion that the substance of the proposal was of great importance for the purpose of facilitating the recruitment of suitable personnel for the staff of the United Nations, especially in the earlier years. Consequently, the Sixth Committee proposes that the matter should be the subject of a recommendation, which this Committee felt competent to make, seeing that the matter had been referred to it, although in principle it might be maintained that the subject fell more properly within the scope of the Committee on Administrative and Budgetary questions (Fifth Committee).

Accordingly, the Sixth Committee recommends that the General Assembly adopt the following resolution:

"In order to facilitate the engagement, as members of the staff of the United Nations, of persons who have accrued pension rights as officials, either of the central government of Members, or of subordinate governmental or other administrative authorities within the

spéciale, qui ne sont pas nécessaires à l'Organisation, l'Assemblée estime que les privilèges et immunités de celle-ci devraient être considérés, en règle générale, comme un maximum, dans les limites duquel les diverses institutions spécialisées ne jouiraient que des privilèges et immunités nécessaires à l'accomplissement de leurs fonctions respectives, et qu'on ne devrait réclamer aucune immunité et aucun privilège qui ne soient vraiment nécessaires.

"En conséquence, l'Assemblée générale charge le Secrétaire général d'entamer des négociations en vue de réexaminer, à la lumière de la convention générale adoptée par les Nations Unies et des considérations mentionnées ci-dessus, les dispositions conférant aux institutions spécialisées les privilèges et immunités dont elles jouissent actuellement."

Appendice V

La Sixième Commission recommande à l'Assemblée générale d'adopter la résolution suivante:

"Il se produit fréquemment des difficultes à la suite d'accidents de la circulation lorsque le conducteur ou le propriétaire de la voiture en cause ne peut-être traduit en justice en raison de l'immunité qui le protège.

"L'Organisation des Nations Unies entend prévenir tout abus auquel pourraient donner lieu les privilèges, immunités et facilités dont elle jouit en vertu des Articles 104 et 105 de la Charte et de la convention générale relative aux privilèges et immunités, qui détermine les modalités d'application de ces articles.

"En conséquence, l'Assemblée générale charge le Secrétaire général de prendre les mesures nécessaires pour que les conducteurs de toutes les voitures officielles de l'Organisation, ainsi que tous les membres du personnel qui possèdent ou conduisent des voitures, soient dûment assurés contre les accidents aux tiers."

Appendice VI

La Sixième Commission a étudié une proposition du Groupe consultatif d'experts en matière administrative et budgétaire tendant à ajouter à la convention générale un article prévoyant le maintien des droits à pension acquis par les personnes qui, au moment de leur entrée au service de l'Organisation, occupaient un emploi officiel sur le territoire d'un Etat Membre. La Sixième Commission n'a pas jugé qu'une telle disposition pût figurer dans la convention. Cependant, elle a estimé que l'idée contenue dans la proposition était de nature à faciliter considérablement le recrutement d'un personnel qualifié, particulièrement dans les débuts. En conséquence, la Sixième Commission propose que la question fasse l'objet d'une recommandation et elle a estimé qu'il lui appartenait de présenter cette recommandation, puisqu'elle avait été saisie de la question, bien que, en principe, on puisse soutenir que cette question soit plutôt du ressort de la Commission des questions administratives et budgétaires (Cinquième Commission).

La Sixième Commission recommande donc à l'Assemblée générale d'adopter la résolution ci-après:

"En vue de faciliter l'engagement, parmi le personnel de l'Organisation, de personnes ayant acquis des droits à pension en qualité de fonctionnaires, soit du gouvernement central d'un Etat Membre, soit d'autres organes subsidiaires ou services administratifs gouvernementaux sur

territory of Members, it is desirable that arrangements should be made to secure that accrued pension rights are not lost when such persons accept posts on the staff of the United Nations, by way either of transfer or of secondment.

"Therefore, the General Assembly recommends that:

"After such discussion with the Secretary-General as may be necessary to settle details the Governments of Members adopt such legislative or administrative measures as may be required to preserve such pension rights."

A/36
[*Original text: English*]

ANNEX 23

Committee Structure of the General Assembly

Report of the Sixth Committee to the General Assembly

Rapporteur: Mr. W. E. Beckett (United Kingdom)

1. The General Assembly, at its sixteenth plenary meeting held on 19 January 1946, referred the consideration of section 4 of chapter I of the Report of the Preparatory Commission dealing with the committee structure of the General Assembly to the Sixth Committee.

2. It will be recalled that independently from this and in connection with an amendment proposed by the delegation of Cuba to the rules of procedure of the General Assembly (document A/C.6/8) which the General Assembly referred to the Sixth Committee, the General Assembly, upon the consideration of the report of the Sixth Committee on this amendment at its eighteenth plenary meeting of 26 January 1946, adopted an amendment to rule 33 and a new rule 33A of the provisional rules of procedure. These two rules deal with the functions and procedure of the General Committee. Their subject matter is partly covered by section 4 of chapter I of the Report of the Preparatory Commission.

3. The Sixth Committee considered section 4 of chapter I of the Report of the Preparatory Commission at its ninth meeting on 5 February 1946, after it had been previously referred to its Subcommittee on rules of procedure.

4. No further amendments to the provisional rules of procedure dealing with the committee structure of the General Assembly were submitted to its members to the Sixth Committee. There is, therefore, no need for further action by the General Assembly in this respect.

A/50
[*Original text: English*]

ANNEX 24

Draft Resolution on the Extradition and Punishment of War Criminals

Report of the First Committee to the General Assembly

Rapporteur: Mr. Viteri Lafronte (Ecuador)

1. The General Assembly, at its twenty-second plenary meeting held on Saturday, 2 February

le territoire d'Etats Membres, il convient de prendre des dispositions pour assurer le maintien des droits à pension déjà acquis lorsque ces personnes acceptent un emploi dans l'Organisation, soit par transfert, soit par détachement.

"En conséquence, l'Assemblée générale recommande que:

"Après avoir réglé avec le Secrétaire général les questions de détail indispensables, les gouvernements des Etats Membres prennent les mesures législatives ou administratives nécessaires au maintien desdits droits à pension."

A/36
[*Texte original en anglais*]

ANNEXE 23

Commissions de l'Assemblée générale

Rapport de la Sixième Commission à l'Assemblée générale

Rapporteur: M. W. E. Beckett (Royaume-Uni)

1. L'Assemblée générale, au cours de sa seizième séance plénière tenue le 19 janvier 1946, a renvoyé à la Sixième Commission l'examen de la section 4 du chapitre I du rapport de la Commission préparatoire concernant les Commissions de l'Assemblée générale.

2. On se rappellera que, outre cette décision et à propos d'un amendement de la délégation de Cuba au règlement intérieur de l'Assemblée générale (document A/C.6/8), renvoyé par celle-ci à la Sixième Commission, l'Assemblée générale, à la suite de l'examen du rapport que lui a soumis la Sixième Commission au sujet de cet amendement à sa dix-huitième séance plénière tenue le 26 janvier 1946 a adopté un amendement à l'article 33 du règlement intérieur provisoire et un nouvel article 33A. Ces deux articles ont trait aux fonctions et à la procédure du Bureau, questions traitées en partie dans la section 4 du chapitre I du rapport de la Commission préparatoire.

3. La Sixième Commission, au cours de sa neuvième séance tenue le 5 février 1946, a examiné la section 4 du chapitre I du rapport de la Commission préparatoire, qui avait été préalablement renvoyée à son sous-comité du règlement intérieur.

4. Les membres de la Sixième Commission n'ont pas présenté d'autres amendements aux articles du règlement intérieur relatifs aux Commissions de l'Assemblée générale. Celle-ci n'a donc pas à prendre d'autres décisions à cet égard.

A/50
[*Texte original en anglais*]

ANNEXE 24

Projet de résolution sur l'extradition et le châtiment des criminels de guerre

Rapport de la Première Commission à l'Assemblée générale

Rapporteur: M. Viteri Lafronte (Equateur)

1. L'Assemblée générale, au cours de sa vingt-deuxième séance plénière, tenue le samedi 2 février

U N I T E D N A T I O N S

OFFICIAL RECORDS OF THE FIRST PART OF THE FIRST SESSION OF THE GENERAL ASSEMBLY

PLENARY MEETINGS OF THE GENERAL ASSEMBLY

Verbatim Record

10 January — 14 February 1946

N A T I O N S U N I E S

DOCUMENTS OFFICIELS DE LA PREMIERE PARTIE DE LA PREMIERE SESSION DE L'ASSEMBLEE GENERALE

SEANCES PLENIERES DE L'ASSEMBLEE GENERALE

Comptes rendus in extenso

10 janvier — 14 février 1946

CENTRAL HALL, WESTMINSTER
LONDON

large part of the success of this Committee is due to his work and his experience.

I move the adoption of all the reports and resolutions of the Fifth Committee.

The PRESIDENT (*Translation from the French*): As there are no more speakers on the list, we shall now proceed to vote. I propose to take each of the four reports separately.

I call for a vote on the first, which is document A/41: Organization of the Secretariat.

(*A vote was taken by a show of hands.*)

Decision: *The report and resolutions were adopted by thirty-seven votes. No delegation voted against, and there were no abstentions.*

The PRESIDENT (*Translation from the French*): The second report is document A/47: Amendments to the provisional rules of procedure.

If there is no objection, I shall take it that the report is adopted.

Decision: *The report and resolution were adopted.*

The PRESIDENT (*Translation from the French*): The third report is document A/44: Budgetary and financial arrangements.

If there is no objection, the report is adopted.

Decision: *The report and resolutions were adopted.*

The PRESIDENT (*Translation from the French*): The last report is document A/48: Composition of the Committee on Contributions.

If there are no objections, the report is adopted.

Decision: *The report and resolutions were adopted.*

68. PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS: REPORT OF THE SIXTH COMMITTEE: RESOLUTIONS (DOCUMENT A/43)

The PRESIDENT (*Translation from the French*): The next item on the agenda is the report of the Sixth Committee on the privileges and immunities of the United Nations (Annex 22, page 642).

I call upon the Rapporteur of the Sixth Committee, Mr. Beckett, representative of the United Kingdom.

Mr. BECKETT (United Kingdom): I have the honour to bring before the General Assembly a further report from your Legal Committee. The document which you have to consider now is in the English version A/43, but in the French version I would ask delegates to take document A/43/Rev.1. Further, I would mention that there are two small corrigenda to both documents correcting typographical errors which appeared in the first typing.

This report, though it is in one document, covers a large amount of ground. As delegates will see, it is a report consisting of forty-one pages. I have no intention of reading those forty-one pages, or indeed any of them. I do feel, how-

par cette Commission est due à son activité et à son expérience.

Je propose d'adopter tous les rapports et projets de résolution soumis par la Cinquième Commission.

Le PRÉSIDENT: Aucun orateur n'étant plus inscrit, nous allons procéder au vote. Je vous propose de voter séparément sur les quatre rapports.

Je mets aux voix le premier rapport sur l'organisation du Secrétariat (document A/41).

(*Il est procédé au vote à main levée.*)

Décision: *Le rapport et les résolutions sont adoptés par trente-sept voix contre zéro et sans abstention.*

Le PRÉSIDENT: Le deuxième rapport concerne les amendements au règlement intérieur (document A/47).

Si aucune opposition n'est formulée, je le considère comme adopté.

Décision: *Le rapport et les résolutions sont adoptés.*

Le PRÉSIDENT: Le troisième rapport est relatif aux dispositions budgétaires et financières (document A/44).

En l'absence de toute observation, je le considère comme adopté.

Décision: *Le rapport et les résolutions sont adoptés.*

Le PRÉSIDENT: Le dernier rapport a trait à la composition du Comité des contributions (document A/48).

Si aucune observation n'est formulée, je le considère comme adopté.

Décision: *Le rapport et les résolutions sont adoptés.*

68. PRIVILÈGES ET IMMUNITÉS DES NATIONS UNIES: RAPPORT DE LA SIXIÈME COMMISSION: RÉSOLUTIONS (DOCUMENT A/43 REV.1)

Le PRÉSIDENT: L'ordre du jour appelle la discussion du rapport de la Sixième Commission sur les privilèges et immunités des Nations Unies (annexe 22, page 642).

La parole est à M. Beckett, représentant du Royaume-Uni, Rapporteur de la Sixième Commission.

M. BECKETT (Royaume-Uni) (*Traduction de l'anglais*): J'ai l'honneur de soumettre à l'Assemblée générale un nouveau rapport de la Commission des questions juridiques. Le document qui vous est présenté porte la référence A/43 dans la version anglaise, mais pour la version française, vous voudrez bien vous reporter au document A/43/Rev.1. En outre, je vous signale qu'il y a lieu d'apporter deux légères corrections au texte de ces deux documents qui contiennent des erreurs typographiques dans la première épreuve.

Ce rapport, tout en ne formant qu'un seul document, couvre un domaine très vaste. Comme vous le constaterez, le rapport comporte 41 pages. Je n'ai nullement l'intention de vous lire ce document en entier ni même en partie. Néan-

ever, that I should call attention to the fact that this report covers six separate items.

Of these items I think that the first is probably the most important. You have here a resolution covering a general Convention on the privileges and immunities of the United Nations, a Convention which the General Assembly is invited to adopt now in final form so that Members can immediately begin to take the necessary steps to enable them to accede to it, and so that the privileges and immunities of the United Nations may be defined by a precise instrument. This general Convention is the result of long and very detailed work. If one counts the time given to it in the Preparatory Commission as well as the work given to it in the Sixth Committee of this Assembly, this document has been under close, constant and detailed discussion for a period of not less than two months.

I now turn to the second item in the report. That second item is a resolution covering another draft Convention, but this is the draft of a special Convention between the United Nations and the United States of America as the country in which the seat of our Organization is to be situated. Whereas the general Convention is applicable to all Members of the United Nations and the difference, if any, between them is one of degree and not of kind, this special Convention deals with special problems which arise from the presence of the seat in the United States. But in this case the document which is presented to you is presented only as a basis of discussion for the purposes of negotiations which it is planned should take place between the Secretary-General, on the one hand, and the proper authorities in the United States, on the other. It is also suggested that the Secretary-General should be assisted by a committee of ten, and the names of the countries from which the members of that committee are to be chosen are set out in the second draft resolution.

Then there follow four further resolutions. The first of these, which is the third item in the report, concerns the privileges and immunities of the International Court of Justice. The effect of this, shortly, is that the judges are asked first to consider the question themselves and to express their views and recommendations, and then that this matter should be considered by the General Assembly after the views of the Court itself have been received.

The next resolution, which is the fourth item, deals with the important and possibly somewhat complicated question of the co-ordination of the privileges and immunities of the United Nations and the specialized agencies. The object of this resolution is to start the machinery in motion which will be necessary to produce this co-ordination, and therefore it proposes that the Secretary-General should open negotiations with a view to reconsideration, in the light both of the general Convention and of certain considerations which are mentioned above, of the provisions

moins, je tiens à appeler votre attention sur le fait que ce rapport traite de six questions différentes.

La première est probablement la plus importante. Il y est question d'une résolution s'appliquant à l'ensemble de la Convention générale relative aux privilèges et immunités de l'Organisation des Nations Unies, Convention que l'Assemblée générale est invitée à adopter dès maintenant sous sa forme définitive afin que les Membres de l'Organisation puissent prendre les premières mesures nécessaires pour pouvoir y adhérer et que les privilèges et immunités des Nations Unies soient fixés dans un document précis. Cette Convention générale est le résultat de travaux prolongés et très approfondis. Si l'on fait le compte du temps que lui a consacré la Commission préparatoire, ainsi que de la somme de travail qu'il a demandée à la Sixième Commission de la présente Assemblée, on voit que ce document a été soumis à une discussion serrée, constante et détaillée qui n'a pas pris moins de deux mois.

Je passe au second point du rapport. Il vise une résolution s'appliquant à un autre projet de Convention, un projet de Convention spéciale entre l'Organisation des Nations Unies et les Etats-Unis d'Amérique, en tant que pays dans lequel sera établi le siège de notre Organisation. Attendu que la Convention générale est applicable à tous les Etats Membres des Nations Unies et que la différence entre eux, s'il en existe une, est une différence de degré et non pas de nature, cette Convention spéciale traite des problèmes particuliers que soulève l'installation du siège aux Etats-Unis. Mais dans le cas d'espèce, le document qui vous est soumis n'est présenté que comme base de discussion en vue des négociations qu'on envisage entre le Secrétaire général, d'une part, et les autorités compétentes des Etats-Unis, d'autre part. Il y est proposé également que le Secrétaire général soit assisté d'un comité de dix membres; la liste des pays dans lesquels devront être choisis les membres de ce comité figure dans le second projet de résolution.

Viennent ensuite quatre autres résolutions. La première, qui fait l'objet du troisième point du rapport, a trait aux privilèges et immunités de la Cour internationale de Justice. En résumé, elle propose que les juges soient invités d'abord à étudier eux-mêmes la question et à faire connaître leur manière de voir et leurs recommandations, et que la question soit soumise ensuite à l'Assemblée générale lorsque l'opinion de la Cour elle-même sera connue.

La résolution suivante qui fait l'objet du quatrième point du rapport concerne la question importante et peut-être assez complexe de la coordination des privilèges et immunités de l'Organisation des Nations Unies avec ceux des institutions spécialisées. Cette résolution a pour objet de mettre en mouvement le mécanisme permettant d'assurer cette coordination et, à cet effet, elle suggère que le Secrétaire général entreprenne des négociations en vue de réexaminer, à la lumière de la Convention générale et de certaines considérations mentionnées ci-dessus, les

under which the specialized agencies at present enjoy privileges and immunities.

The fifth item is a small, simple, but possibly quite important matter from a practical point of view. It requires that the official cars of the Organization should be insured against third party risks and thereby prevent a possible source of grievance arising from the immunities of our Organization.

Lastly, there is a resolution regarding arrangements that may be made so that officials, persons who are now in the service of the Governments of Members and who are transferred to the service of the United Nations or seconded for service with the United Nations, should be able to preserve those pensions rights which have accrued to them while they were in the service of their own Governments.

All these six items are presented to the Assembly in one report which, in fact, covers about half the whole work of the Legal Committee. Though there are one or two reservations which are set out in the report, together with the reasons therefor, all the items were approved in Committee unanimously, and we hope therefore that the same unanimity may prevail in the General Assembly.

The PRESIDENT (*Translation from the French*): I call upon Sir Hartley Shawcross, representative of the United Kingdom.

Sir Hartley SHAWCROSS (United Kingdom): I want just to say a few words to commend the two draft Conventions which have been submitted to the General Assembly by the Sixth Committee, and may I say just a word first about the special draft Convention which has been submitted by the Committee for the purposes of negotiation with the United States of America.[1]

That Convention, as the Assembly will appreciate, has been put forward as a basis for negotiations with the United States, and it is fair to say that the United States themselves, considering that this was a matter in which the Organization was on one side and they were on the other, took no actual part in the discussions in the Committee about it, stood aside and are not committed by it. None the less, we attempted to take into account, as far as we could, all the legitimate considerations by which the United States might reasonably take exception.

I mention those points just to emphasize that, although, of course, this document is merely put forward as a basis of negotiation, it is not put forward as a kind of list of maximum demands which we do not expect to see accepted, and which we are content to have whittled down and whittled away by a process of bargaining. It is put forward as a solid basis of negotiation in order

[1] See page 650.

dispositions en [illegible] desquelles les institutions spécialisées jouissent des privilèges et immunités dont elles bénéficient actuellement.

Le cinquième point a trait à une question simple et plus limitée mais qui peut, du point de vue pratique, avoir une grande importance. La résolution prévoit l'assurance des voitures officielles de l'Organisation contre les accidents causés à des tiers; cette assurance est destinée à éviter une source de griefs possibles provenant des immunités accordées à notre Organisation.

Enfin vient une résolution relative aux dispositions à prendre pour permettre aux fonctionnaires et aux personnes actuellement au service des Gouvernements des Etats Membres qui passent au service des Nations Unies ou sont détachés auprès de cette Organisation de conserver les droits aux retraites ou pensions qu'ils ont acquis pendant leurs années de service auprès de leur Gouvernement.

L'ensemble de ces six points est exposé à l'Assemblée dans un rapport unique qui en fait représente la moitié environ de l'ensemble des travaux de la Commission des questions juridiques. Bien que le rapport formule une ou deux réserves en indiquant les raisons qui les motivent, tous les points exposés ont reçu l'approbation unanime de la Commission et nous espérons que la même unanimité sera obtenue à l'Assemblée générale.

Le PRÉSIDENT: La parole est à Sir Hartley Shawcross, représentant du Royaume-Uni.

Sir Hartley SHAWCROSS (Royaume-Uni) (*Traduction de l'anglais*): Je n'ai que quelques mots à dire. Je désire vous recommander les deux projets de Convention qui ont été soumis à l'Assemblée générale par la Sixième Commission et je vous parlerai d'abord brièvement du projet de Convention spéciale qui a été présenté par la Commission en vue des négociations avec les Etats-Unis d'Amérique[1].

Ainsi que l'Assemblée pourra s'en rendre compte, cette Convention a été présentée comme base de négociations avec les Etats-Unis. Il convient de remarquer que les Etats-Unis eux-mêmes, considérant qu'il s'agissait en l'espèce d'une question dans laquelle l'Organisation des Nations Unies se trouve d'un côté et les Etats-Unis de l'autre, n'ont pris aucune part aux débats soulevés au sein du Comité à ce sujet, mais se sont abstenus et n'ont donc contracté aucun engagement. Nous ne nous en sommes pas moins efforcés de tenir compte, dans toute la mesure du possible, de toutes les considérations légitimes susceptibles d'intéresser les Etats-Unis, et il nous est arrivé parfois de modifier les propositions présentées, afin de parer aux objections que nous paraissaient devoir raisonnablement soulever certains points de la part des Etats-Unis.

Ces remarques ont uniquement pour but de souligner que ce document, bien qu'il n'ait évidemment été présenté qu'à titre de base de négociations, ne constitue pas une sorte de liste des demandes maxima que nous ne nous attendons pas à voir adoptées et que nous accepterions de voir réduites par des marchandages. Ce projet de Convention est présenté en vue de constituer une

[1] Voir page 650.

to indicate the lines which we think, in principle, the Convention ought to take. Adjustments, of course, there must be, adjustments up and adjustments down, but we hope that the United States will feel able, in principle, to accept the draft in the terms in which it is put forward.

I want to refer in particular to section 7 of that draft. Section 7 of the draft special Convention with the United States permits the establishment of broadcasting stations on behalf of the United Nations Organization. I suppose that one of the greatest obstacles to understanding and to unity in this world, which is racked by so many vital and difficult problems, is the lack of any source from which the peoples of the world may ascertain in an authoritative form information about each other's difficulties and about each other's special points of view. The national press and the national broadcasting organizations of different countries, whether they are under some measure of Government control or whether, as in this country, they are completely free to express whatever view they like, naturally and inevitably tend to discuss and to report matters from a national point of view and to stress national aspects. If great debates take place, debates in which the statesmen of different countries participate, the national press of each particular country naturally tends to report and tends to emphasize the speeches of its own statesmen to the neglect, sometimes, of the answers which may be put forward in the speeches of other statesmen, and sometimes to the complete exclusion of the views which may be expressed by statesmen of other countries. And so, in the result, the opinion of each country is sometimes in danger of being formed on a biased national basis and of being arrived at in ignorance of both sides of the question.

We believe that in the long run that does not make for strength in national government, and that it certainly does not make for unity in international affairs. It is not enough that nation should speak unto nation. We think that the United Nations Organization, as an organization of United Nations, must be able to speak, and to speak fearlessly and impartially, to the peace-loving peoples of the whole world; and so we venture to express the hope now, at the very beginning of this matter, that section 7 of this draft Convention with the United States shall not prove to be a dead letter. The matter will have to be worked out in detail. Arrangements will have to be made both in the United States, and no doubt in other countries, for relaying broadcasts that may be made; but we hope it will be possible to take early steps to implement the provisions of section 7 of this Convention and to establish radio stations from which the United Nations Organization may give the world the truth, the courage to face it and the knowledge to solve the problems which the truth involves.

Now I want to say a word or two about, and to commend to the Assembly, the draft Conven-

base solide pour les négociations et il a pour objet de marquer, dans ses grandes lignes, l'aspect que la Convention devrait revêtir en principe. Il y aura lieu évidemment de procéder à certains ajustements dans l'un et l'autre sens, mais nous espérons que les Etats-Unis seront disposés en principe à accepter les termes du projet établi.

Je tiens à faire une allusion particulière à la section 7 de ce projet de Convention spéciale avec les Etats-Unis qui permet l'installation de stations radiophoniques pour le compte de l'Organisation des Nations Unies. Je crois que l'un des plus grands obstacles à la compréhension internationale et à l'unité d'un monde qui se heurte à tant de problèmes d'une difficulté et d'une importance extrêmes est l'absence d'une source autorisée qui permettrait aux peuples du monde d'être informés de leurs difficultés respectives et de leurs points de vue particuliers. La presse et les organisations de radiodiffusion nationales des différents pays, qu'elles soient placés sous le contrôle plus ou moins étendu de leur Gouvernement, ou bien, comme c'est le cas pour notre pays, qu'elles soient entièrement libres d'exprimer leur point de vue, ont inévitablement et tout naturellement tendance à discuter et à exposer certaines questions d'un point de vue national et à mettre l'accent sur l'aspect national qu'elles présentent. Lorsque de grands débats internationaux ont lieu, débats auxquels prennent part les hommes d'Etat de divers pays, la presse de chacun des pays intéressés a naturellement tendance à publier et à mettre en relief les discours prononcés par ses propres hommes d'Etat, en négligeant parfois les réponses des autres hommes d'Etat et en omettant totalement les vues exprimées par les membres des gouvernements d'autres pays. Il en résulte que, dans chaque pays, l'opinion risque parfois de se former sur la base d'informations partiales et d'ignorer que la question a deux côtés.

Nous estimons qu'à la longue cela ne contribue pas à renforcer l'autorité d'un gouvernement national ni certes à établir l'unité dans le domaine international. Il ne suffit pas qu'une nation s'adresse à une autre nation. Nous pensons que l'Organisation des Nations Unies en tant qu'organisation internationale doit pouvoir s'adresser sans crainte et en toute impartialité aux peuples pacifiques du monde entier. Nous espérons donc, au moment où nous nous engageons dans cette voie, que la section 7 du projet de Conventions avec les Etats-Unis ne restera pas lettre morte. La question devra être mise au point dans le détail. Il conviendra de prendre, aussi bien aux Etats-Unis que dans d'autres pays, des mesures pour relayer les émissions qui pourront être faites. Mais nous espérons qu'il sera possible de prendre, sans tarder, des mesures pour donner effet aux dispositions de la section 7 de ladite Convention et pour installer des stations radiophoniques d'où l'Organisation des Nations Unies pourra dire la vérité à l'univers et lui donner, avec le courage de la regarder en face, les informations nécessaires pour lui permettre de résoudre les problèmes qu'elle comporte.

Je désire maintenant dire quelques mots pour recommander à l'Assemblée le projet de Conven-

tion on privileges and immunities,[1] and I want to refer to certain particular aspects of that Convention. But at the very outset I want to tell the Assembly this: that it is the intention of His Majesty's Government to accede to this Convention with the least possible delay, and to ask the Parliament of this country for any necessary statutory powers which may be required to enable us to implement to the full the provisions of this Convention. We hope to be, and I expect we may be, the first of the Powers to accede to this most important document. It is an important document and an historic document.

It is important that in setting up this great new international Organization we should not ask for it to possess privileges and immunities which are greater than those required for its efficient organization. That would lead to unnecessary conflicts with the national sovereignty of particular Member States. On the other hand, equally important is it to ensure that it has adequate privileges and immunities. To give too few would fetter the United Nations Organization in the discharge of its tasks. The Charter provides that the immunities and privileges to be granted should be such as are necessary for the fulfilment of its purposes, and that is exactly what this important and historic document does. Within the scope and the ambit of the Charter this Convention will give the United Nations Organization, in every Member State, a sufficient degree of sovereignty in regard to its own affairs to enable it to carry out its functions independently, impartially and efficiently.

I do not want to refer, however, to this matter in general terms. As you will have seen from the report, certain States, I think only four in number, have felt it necessary to make reservations on particular points which are dealt with in the Convention. I do not for a moment complain about that. We understand completely the position which these different States have had to take up. There are important matters involved here, one of them, perhaps, a constitutional matter, and it is not so easy for some delegations as it is for that of the United Kingdom here, right at the seat of its own Government, to obtain instructions and to obtain authority in regard to particular matters. But we do venture to express the hope that the delegates of those States which have found it necessary to make reservations now will be able to persuade their Governments to withdraw those reservations and to accede to this Convention unconditionally.

May I just remind the Assembly about the three matters in regard to which reservations have been made? They arise under section 18 and under section 30 of the draft Convention. Under section 18, I think it is clause 18 (*b*), some States have found it necessary to make a reservation for the moment in regard to the ques-

[1] See page 644.

tion relatif aux privilèges et immunités[1] dont je tiens à souligner certains aspects particuliers. Dès l'abord, je désire faire connaître à l'Assemblée qu'il entre dans les intentions du Gouvernement de Sa Majesté d'adhérer à cette Convention dans le plus bref délai possible et de demander au Parlement de notre pays les pouvoirs nécessaires pour que nous puissions mettre en œuvre les dispositions de cette Convention. Nous espérons être, et je pense que nous serons la première Puissance qui donnera son adhésion à ce document d'une importance capitale et historique.

Il est important qu'en établissant cette grande Organisation internationale nouvelle, nous ne demandons pas de privilèges et immunités dépassant ceux qui sont nécessaires au bon fonctionnement de l'Organisation; toute politique différente ne manquerait pas de porter inutilement atteinte à la souveraineté nationale des Etats Membres. D'autre part, il importe également d'assurer à l'Organisation la jouissance des privilèges et des immunités nécessaires. En accorder trop peu aurait pour effet d'entraver l'Organisation des Nations Unies dans l'accomplissement de ses fonctions. La Charte stipule que les immunités et privilèges à accorder aux Nations Unies doivent être suffisants pour permettre à l'Organisation d'atteindre ses fins et tel est exactement le résultat qu'obtint ce document historique important. Dans les limites et dans le cadre de la Charte, cette Convention assurera à l'Organisation des Nations Unies, sur le territoire de chacun des Etats Membres, le degré de souveraineté qui lui est indispensable pour ses propres affaires, en lui permettant ainsi de s'acquitter de sa tâche avec impartialité et compétence ainsi qu'en toute indépendance.

Cependant je ne veux pas vous entretenir de cette question en termes généraux. Comme vous le verrez d'après le rapport, certains Etats—quatre je crois—ont estimé nécessaire de formuler des réserves sur certains points particuliers traités dans la Convention. Je ne songe pas un seul instant à m'élever contre cela. Nous comprenons très bien la situation dans laquelle se trouvent les différents Etats intéressés. D'importantes questions sont en jeu dans cette Convention; l'une d'entre elles relève peut-être du domaine constitutionnel, et il n'est pas aussi facile pour certaines délégations de recevoir des instructions de leurs gouvernements respectifs et d'obtenir les pouvoirs nécessaires dans des cas donnés que pour la délégation du Royaume-Uni qui se trouve au lieu même où siège son propre Gouvernement. Mais nous tenons à exprimer notre espoir que les délégués des Etats qui ont jugé utile de formuler des réserves pourront amener leurs gouvernements à ne pas y donner suite et à adhérer sans restrictions à la Convention.

Je me permets de rappeler à l'Assemblée les trois questions au sujet desquelles des réserves ont été faites. Elles ont trait aux articles 18 et 30 du projet de Convention. Pour ce qui est de l'article 18 *b*), certains Etats ont jugé nécessaire de faire une réserve provisoire sur le point de savoir si les fonctionnaires de l'Organisation des Nations

[1] Voir page 644.

tion whether officials of the United Nations Organization should be relieved of national taxation. That was a matter which, as you have heard, was considered by the Fifth Committee. It was obviously a matter of convenience; it was obviously inexpedient to have officials of the Organization at the same level remunerated on a basis which, in effect and in its real value to them, differed. But that was a matter of convenience dealt with by the Fifth Committee.

The matter to which we attach great importance, as a matter of principle, is that which arises under clause 18 (*c*) and which deals with the immunity of officials of the United Nations from any obligation of military service to their national States. We are attempting now to set up an international civil service. We want it to be an international civil service, to be free, to be independent. A man cannot serve two masters, and we believe that it will be impossible to establish an international civil service in the best sense of the word, in the true sense of the word, if its members remain under military obligations to particular Member States.

Loyalty to one's own State, allegiance to one's own country, are very important and, indeed, very admirable things. But, as civilization progresses and as this great Organization of the United Nations moves forward, there is perhaps something which is going to become even greater and more admirable than these, and that is loyalty to the United Nations, allegiance to this great Organization which we are founding. You cannot have a divided loyalty; you cannot have in this matter two allegiances.

We are asking very little of the States in regard to this matter. We are not asking them to give up battalions or divisions of their national armies—the national armies that we hope will never be used again. We are asking them merely to release a handful of men in order that we may establish a civil service which is truly international and truly free. I ventured to give in the Committee a case, a case which is completely hypothetical, in order to show how impossible it would be if members of our Secretariat remained under military obligation to their own States. Supposing that in some case it were found necessary to initiate a system of sanctions against the United Kingdom. I can give that case quite safely, for His Majesty's Government believes in the principle of accepting majority decisions of the General Assembly and will always accept decisions duly arrived at under the Charter. Sanctions will never be operated against us. But take that as a hypothetical case and suppose that some member of the Secretariat, a British subject, was in those circumstances called upon to perform his duties of military service for the United Kingdom. What would be the position then? Where would his loyalty lie? Would he serve the United Nations or would he serve the United Kingdom? One cannot risk that kind of conflict, that kind of division of allegiance arising, and I hope very earnestly that those States which have felt compelled to make reservations

Unies devront être exonérés de l'impôt national. Cette question, comme on vous l'a exposé, a été soumise à l'examen de la Cinquième Commission. Il s'agissait évidemment d'une question de commodité; il serait naturellement fâcheux qu'il existât dans l'Organisation des fonctionnaires qui, occupant le même rang, recevraient une rémunération ne représentant pas, en fait, le même pouvoir d'achat réel. Mais c'est là une question de commodité qui a été traitée par la Cinquième Commission.

La question à laquelle nous attachons une grande importance, en tant que question de principe, est celle qui s'élève relativement à l'article 18 *c*) et qui traite de l'exemption des fonctionnaires des Nations Unies de toutes obligations de service militaire envers les Etats dont ils sont ressortissants. Nos efforts actuels visent à établir une administration internationale. Une telle institution doit être libre et indépendante. Un homme ne peut pas servir deux maîtres, et nous estimons qu'il sera impossible d'instituer une administration internationale dans le meilleur sens du mot, dans le vrai sens du mot, si son personnel reste soumis à des obligations militaires envers les pays Membres auxquels ils appartiennent.

La loyauté et la fidélité envers son propre pays sont des sentiments admirables et dont je mesure l'importance. Mais avec le progrès de la civilisation et avec le développement de l'Organisation des Nations Unies, une vertu plus grande et plus admirable encore que ces sentiments se développera peut-être: la loyauté envers les Nations Unies, l'obéissance à cette grande Organisation que nous sommes en train de créer. On ne peut partager sa loyauté entre deux maîtres, on ne peut obéir à deux souverainetés.

Or, à ce propos nous demandons très peu aux Etats intéressés. Nous ne leur demandons pas de renoncer à des bataillons ou à des divisions de leurs armées nationales, armées auxquelles, nous l'espérons, on n'aura plus jamais recours. Nous ne leur demandons que de libérer une poignée d'hommes afin de pouvoir établir une administration qui soit vraiment internationale et réellement libre. Devant la Commission, j'ai exposé, à titre purement hypothétique, une thèse visant à démontrer l'impossibilité dans laquelle se trouvent les membres du Secrétariat de rester soumis aux obligations militaires vis-à-vis des Etats auxquels ils appartiennent. Supposons que, dans un cas donné, il s'avère nécessaire de mettre en œuvre un système de sanctions contre le Royaume-Uni. Je puis prendre cet exemple sans aucun risque car le Gouvernement de Sa Majesté est partisan du principe de l'acceptation des décisions de la majorité de l'Assemblée générale et acceptera toujours les décisions dûment prises en vertu de la Charte. Il n'y aura jamais de sanctions à prendre contre nous. Mais, prenons cet exemple à titre d'hypothèse et supposons qu'un membre donné du Secrétariat, sujet britannique, soit amené dans ces conditions à s'acquitter de ses obligations de service militaire envers le Royaume-Uni. Quelle serait alors la situation? Où serait son devoir de citoyen loyal? Devrait-il servir les Nations Unies ou bien le Royaume-Uni? On ne peut s'exposer à des conflits de ce

[illegible] possible to persuade their Governments to accede to this Convention unconditionally and that they will find their hands strengthened in doing that by the fact that all their colleagues here have been able to approve it with unanimity.

The final matter to which I want to refer only in a word is section 30 of the Convention, which deals with the reference of disputes to the International Court of Justice. Two or three States found it necessary to make some reservation in regard to that matter. I could not help thinking there was some misconception in regard to it, because that provision for reference of disputes under the Convention to the International Court only comes into operation in the event of the parties to a dispute not being able to agree to its settlement by any other means. If parties to a dispute under this Convention cannot agree to a settlement by any other means then it is, in our view, quite essential that something should be provided in the Convention so as to ensure that disputes, if they unhappily arise, are settled. It was the common practice in every international convention entered into after the establishment of the League of Nations to include a provision of this kind. Nobody ever objected to it; it was taken as a matter of course. And if we are going to treat this matter seriously, if we intend not only to accede to this Convention, but to operate it and stand by it, it is essential that at this moment, when we are surely moving forward rather than backward in regard to the rule of law in international affairs, we should include a clause of this kind, remembering that this was the common practice before the war, and that we should not take a retrograde step in regard to the matter.

I therefore commend these two draft Conventions to the General Assembly and I hope we shall adopt them unanimously and that all States will be able to accede to them in the very near future.

The PRESIDENT (*Translation from the French*): I call upon Mr. Vandenberg, representative of the United States of America.

Mr. VANDENBERG (United States of America): I rise only to make the position of the delegation of the United States perfectly plain in regard to the reports of the Fifth and Sixth Committees. We have reserved our position in respect of tax immunities in regard to the reports of both Committees. The Constitution of the United States gives the American Congress sole power to exempt American citizens from taxation.

The distinguished delegate for the United Kingdom made a very interesting and moving appeal in respect of rival allegiances, and suggested that a man cannot serve two masters. Quite in the spirit in which the able delegate for the United Kingdom spoke, the delegation of the United States does not propose to serve two masters. Its master is the Constitution of the United States. This does not, however, mean that the attitude of the Government of the United States

genre, et j'espère bien [illegible]ent que ceux des Etats qui ont été amenés [illegible]rmuler des réserves trouveront le moyen de persuader leurs Gouvernements de donner leur adhésion totale à cette Convention et que leur position se trouvera renforcée du fait que tous leurs collègues auront pu donner leur approbation à la Convention à l'unanimité.

J'en arrive au dernier point, à savoir la section 30 de la Convention qui traite du renvoi des différends à la Cour internationale de Justice. Deux ou trois Etats ont jugé nécessaire de formuler des réserves sur ce point. Je ne puis m'empêcher de penser que cela est dû au fait que la question n'a pas été bien comprise, étant donné que la clause relative au renvoi des différends à la Cour internationale de Justice n'est applicable que dans le cas où les parties en litige n'ont pu régler le différend par un autre moyen quelconque. Pour le cas où les parties en litige tombant sous le coup de la présente Convention n'arriveraient pas à s'entendre, il nous semble indispensable que la Convention comporte une clause permettant de régler les différends qui pourraient, malheureusement, s'élever. Dans les conventions internationales conclues après la création de la Société des Nations il était d'usage de prévoir des dispositions de ce genre. Personne ne s'est jamais élevé contre cette pratique qui semblait tout à fait naturelle. Si nous voulons considérer la question sérieusement, si nous nous proposons, non seulement d'adhérer à cette Convention, mais de veiller à son application et de la défendre, il est indispensable, au moment où nous faisons certainement un pas en avant plutôt qu'en arrière dans le domaine du règne du droit dans les affaires internationales, de prévoir des dispositions en ce sens, en nous rappelant que c'était là une pratique courante avant la guerre. En aucun cas, il ne faut reculer en cette matière.

En conséquence, je recommande ces deux projets de Convention à l'Assemblée générale et j'espère qu'elle les adoptera à l'unanimité et que tous les Etats pourront y adhérer très prochainement.

Le PRÉSIDENT: La parole est à M. Vandenberg, représentant des Etats-Unis d'Amérique.

M. VANDENBERG (Etats-Unis d'Amérique) (*Traduction de l'anglais*): Je ne prends la parole que pour préciser l'attitude de la délégation des Etats-Unis relativement aux rapports des Cinquième et Sixième Commissions. Nous avons réservé notre position en ce qui concerne les immunités fiscales envisagées dans les rapports de ces deux Commissions. La Constitution des Etats-Unis confère au Congrès américain exclusivement le pouvoir d'exonérer d'impôt les citoyens américains.

L'éminent délégué du Royaume-Uni a, en termes émouvants, fait un exposé fort intéressant relatif au conflit d'obéissances, et a déclaré qu'un homme ne pouvait servir deux maîtres. Inspirée des mêmes sentiments que ceux qui animent le délégué du Royaume-Uni, la délégation des Etats-Unis ne se propose pas non plus de servir deux maîtres. Son seul maître, c'est la Constitution des Etats-Unis. Néanmoins ceci ne signifie pas que le Gouvernement des Etats-Unis

is not totally at one with a co-operative attitude, and wholly hospitable in regard to all co-operation which we, as the host country, shall undertake to give to this great institution when it goes upon its way. Indeed, even so far as privileges and immunities are concerned, I am very happy to say that the last session of the American Congress has already passed a statute which includes, I should say, about ninety-five per cent of the things which the report and general Convention from the Sixth Committee anticipate.

The delegation of the United States also reserves its position in respect of national service exemptions under the general Convention reported by the Sixth Committee. This again is due to the fact that the Constitution of the United States permits no authority other than the American Congress to deal with this matter, and we are not in a position to prejudge that ultimate consideration.

With these exceptions, we have been very happy to accept the balance of the report of the Fifth Committee, and we are very glad to vote, with these reservations, for the general Convention.

So far as the special Convention is concerned, we shall abstain from voting, because the special Convention is one to which the Government of the United States will be a party, and we consider it would be inappropriate for us to prejudge the case here.

In this entire attitude, I want to repeat that the purpose and the intention and the heartfelt desire, not only of the delegation of the United States, but of the American people, I am sure I speak for them in this matter with complete justification, is to extend every consideration, and to give every possible co-operation, to the United Nations Organization as it proceeds upon the greatest and most hopeful adventure in the history of human kind.

The PRESIDENT (*Translation from the French*): As there are no more speakers on the list, we shall proceed to vote. I think the best method is to vote on the resolutions one by one, so that delegations which wish to abstain on any particular decision may do so.

The first resolution concerns the general Convention on privileges and immunities of the United Nations. Is there any objection to this text? If there is none, it is adopted.

Decision: *The resolution was adopted.*

The PRESIDENT (*Translation from the French*): The second resolution is that concerning negotiations to be entered into with the competent authorities in the United States with regard to the measures to be taken in connection with the establishment in the United States of the permanent headquarters of the United Nations, together with the draft Convention to serve as a basis of discussion. I call for a vote on this text.

Decision: *The resolution was adopted, with one abstention.*

ne s'inspire pas d'un esprit de coopération sans réserve et, en tant que pays hôte, il ne manquera pas d'adopter cette attitude vis-à-vis de cette grande Organisation lorsqu'elle se mettra au travail. En fait, en ce qui concerne les privilèges et les immunités, j'ai le plaisir de vous faire connaître que le Congrès américain, au cours de sa dernière session, a voté une loi qui, dans la proportion de quatre-vingt-quinze pour cent environ, donne déjà satisfaction aux demandes formulées par la Sixième Commission dans le rapport et dans la Convention générale.

La délégation des Etats-Unis réserve également son attitude en ce qui concerne l'exemption du service militaire national envisagée par la Convention générale qui fait l'objet du rapport de la Sixième Commission. Cette attitude est due au fait que la Constitution des Etats-Unis ne permet à aucune autre autorité en dehors du Congrès de traiter de cette question, et nous ne sommes pas à même de préjuger la décision qui sera prise ultérieurement sur ce point.

Sous ces réserves, nous sommes heureux d'adopter les autres parties du rapport de la Cinquième Commission et de nous prononcer en faveur de la Convention générale avec les réserves que je viens de formuler.

En ce qui concerne la Convention spéciale, nous nous abstiendrons de prendre part au vote, étant donné que le Gouvernement des Etats-Unis sera partie à cette Convention et qu'il serait tout à fait inopportun pour nous de préjuger la question ici.

Cette mise au point étant faite, je tiens à répéter que le but, l'intention et le désir profond non seulement de la délégation des Etats-Unis, mais aussi du peuple américain, sont d'accorder toute l'aide et toute la coopération possibles à l'Organisation des Nations Unies dans l'entreprise la plus grandiose de l'histoire de l'humanité qui suscite de si grands espoirs.

Le PRÉSIDENT: Il n'y a plus d'orateurs inscrits. Nous allons donc procéder au vote. Je pense que la façon de procéder la plus claire consiste à voter successivement sur les différentes résolutions, ce qui permettrait en outre aux délégations qui le désirent de s'abstenir sur certaines des décisions à prendre.

La première résolution est relative à l'adoption de la Convention générale sur les privilèges et immunités à accorder à l'Organisation. Il n'y a pas d'opposition à l'adoption de ce texte? Sinon, je considérerai la résolution comme adoptée.

Décision: *La résolution est adoptée.*

Le PRÉSIDENT: La deuxième résolution est relative aux négociations à entamer avec les autorités compétentes des Etats-Unis d'Amérique sur les dispositions à prendre à la suite de l'établissement aux Etats-Unis d'Amérique du siège permanent de l'Organisation, ainsi qu'au projet de Convention destiné à servir de base de discussion pour ces négociations. Je mets ce texte aux voix.

Décision: *La résolution est adoptée: il y a une abstention.*

6. Privileges and Immunities of the United Nations

22(I) A.

Resolution relating to the adoption of the general convention on privileges and immunities of the United Nations, and text of the convention.

The General Assembly approves the annexed convention on the privileges and immunities of the United Nations and proposes it for accession by each Member of the United Nations.

Thirty-first plenary meeting, 13 *February* 1946.

Convention on the Privileges and Immunities of the United Nations

Whereas 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 fulfilment of its purposes and

Whereas Article 105 of the Charter of the United Nations provides that the Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes and that representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of the functions in connection with the Organization:

Consequently the General Assembly by a resolution adopted on 13 February 1946 approved the following convention and proposes it for accession by each Member of the United Nations.

Article I

Juridical Personality

Section 1. The United Nations shall possess juridical personality. It shall have the capacity:

(*a*) to contract;

(*b*) to acquire and dispose of immovable and movable property;

(*c*) to institute legal proceedings.

Article II

Property, Funds and Assets

Section 2. The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.

Section 3. The premises of the United Nations shall be inviolable. The property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

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

Section 5. Without being restricted by financial controls, regulations or moratoria of any kind,

(*a*) The United Nations may hold funds, gold or currency of any kind and operate accounts in any currency;

(*b*) The United Nations shall be free to trans- [illegible] any currency held by it into any other currency.

Section 6. In exercising its rights under section 5 above, the United Nations shall pay due regard to any representations made by the Government of any Member in so far as it is considered that effect can be given to such representations without detriment to the interests of the United Nations.

Section 7. The United Nations, its assets, income and other property shall be:

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

(*b*) exempt from customs duties and prohibitions and restrictions on imports and exports in respect of articles imported or exported by the United Nations for its official use. It is understood, however, that articles imported under such exemption will not be sold in the country into which they were imported except under conditions agreed with the Government of that country;

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

Section 8. While the United Nations will not, as a general rule, claim exemption from excise duties and from taxes on the sale of movable and immovable property which form part of the price to be paid, nevertheless, when the United Nations is making important purchases for official use of property on which such duties and taxes have been charged or are chargeable, Members will, whenever possible, make appropriate administrative arrangements for the remission or return of the amount of duty or tax.

Article III

Facilities in respect of Communications

Section 9. The United Nations shall enjoy in the territory of each Member for its official communications treatment not less favourable than that accorded by the Government of that Member to any other Government, including its diplomatic mission, in the matter of priorities, rates and taxes on mails, cables, telegrams, radiograms, telephotos, telephone and other communications; and press rates for information to the press and radio. No censorship shall be applied to the official correspondence and other official communications of the United Nations.

Section 10. The United Nations shall have the right to use codes and to dispatch and receive its correspondence by courier or in bags, which shall have the same immunities and privileges as diplomatic couriers and bags.

Article IV

The Representatives of Members

Section 11. Representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, shall, while exercising their functions and during their journey to and from the place of meeting, enjoy the following privileges and immunities:

(*a*) immunity from personal arrest or deten- [illegible]

all acts done by them in their capacity as repre-

sentatives, immunity from legal process of every kind;

(*b*) inviolability for all papers and documents;

(*c*) the right to use codes and to receive papers or correspondence by courier or in sealed bags;

(*d*) exemption in respect of themselves and their spouses from immigration restrictions, aliens registration or national service obligations in the State they are visiting or through which they are passing in the exercise of their functions;

(*e*) the same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;

(*f*) the same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys, and also;

(*g*) such other privileges, immunities and facilities, not inconsistent with the foregoing, as diplomatic envoys enjoy, except that they shall have no right to claim exemption from customs duties on goods imported (otherwise than as part of their personal baggage) or from excise duties or sales taxes.

Section 12. In order to secure for the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, complete freedom of speech and independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer the representatives of Members.

Section 13. Where the incidence of any form of taxation depends upon residence, periods during which the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations are present in a State for the discharge of their duties shall not be considered as periods of residence.

Section 14. Privileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connection with the United Nations. Consequently a Member not only has the right but is under a duty to waive the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded.

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

Section 16. In this article the expression "representatives" shall be deemed to include all delegates, deputy delegates, advisers, technical experts and secretaries of delegations.

Article V

Officials

Section 17. The Secretary-General will specify the categories of officials to which the provisions of this article and article VII shall apply. He shall submit these categories to the General Assembly. Thereafter these categories shall be communicated to the Governments of all Members. The names of the officials included in these categories shall from time to time be made known to the Governments of Members.

Section 18. Officials of the United Nations shall:

(*a*) be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity;

(*b*) be exempt from taxation on the salaries and emoluments paid to them by the United Nations;

(*c*) be immune from national service obligations;

(*d*) be immune, together with their spouses and relatives dependent on them, from immigration restrictions and alien registration;

(*e*) be accorded the same privileges in respect of exchange facilities as are accorded to the officials of comparable ranks forming part of diplomatic missions to the government concerned;

(*f*) be given, together with their spouses and relatives dependent on them, the same repatriation facilities in time of international crisis as diplomatic envoys;

(*g*) have the right to import free of duty their furniture and effects at the time of first taking up their post in the country in question.

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

Section 20. Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. In the case of the Secretary-General, the Security Council shall have the right to waive immunity.

Section 21. The United Nations shall co-operate at all times with the appropriate authorities of Members to facilitate the proper administration of justice, secure the observance of police regulations, and prevent the occurrence of any abuse in connection with the privileges, immunities and facilities mentioned in this article.

Article VI

Experts on Missions for the United Nations

Section 22. Experts (other than officials coming within the scope of article V) performing mis-

sions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular they shall be accorded:

(*a*) immunity from personal arrest or detention and from seizure of their personal baggage;

(*b*) in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations;

(*c*) inviolability for all papers and documents;

(*d*) for the purpose of their communications with the United Nations, the right to use codes and to receive papers or correspondence by courier or in sealed bags;

(*e*) the same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;

(*f*) the same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys.

Section 23. Privileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations.

Article VII

United Nations Laissez-Passer

Section 24. The United Nations may issue United Nations *laissez-passer* to its officials. These *laissez-passer* shall be recognized and accepted as valid travel documents, by the authorities of Members, taking into account the provisions of section 25.

Section 25. Applications for visas (where required) from the holders of United Nations *laissez-passer,* when accompanied by a certificate that they are travelling on the business of the United Nations, shall be dealt with as speedily as possible. In addition, such persons shall be granted facilities for speedy travel.

Section 26. Similar facilities to those specified in section 25 shall be accorded to experts and other persons who, though not the holders of United Nations *laissez-passer,* have a certificate that they are travelling on the business of the United Nations.

Section 27. The Secretary-General, Assistant Secretaries-General and Directors travelling on United Nations *laissez-passer* on the business of the United Nations shall be granted the same facilities as are accorded to diplomatic envoys.

Section 28. The provisions of this article may be applied to the comparable officials of specialized agencies if the agreements for relationship made under Article 63 of the Charter so provide.

Article VIII

Settlement of Disputes

Section 29. The United Nations shall make provisions for appropriate modes of settlement of:

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

(*b*) disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.

Section 30. All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.

Final Article

Section 31. This convention is submitted to every Member of the United Nations for accession.

Section 32. Accession shall be effected by deposit of an instrument with the Secretary-General of the United Nations and the convention shall come into force as regards each Member on the date of deposit of each instrument of accession.

Section 33. The Secretary-General shall inform all Members of the United Nations of the deposit of each accession.

Section 34. It is understood that, when an instrument of accession is deposited on behalf of any Member, the Member will be in a position under its own law to give effect to the terms of this convention.

Section 35. This convention shall continue in force as between the United Nations and every Member which has deposited an instrument of accession for so long as that Member remains a Member of the United Nations, or until a revised general convention has been approved by the General Assembly and that Member has become a party to this revised convention.

Section 36. The Secretary-General may conclude with any Member or Members supplementary agreements adjusting the provisions of this convention so far as that Member or those Members are concerned. These supplementary agreements shall in each case be subject to the approval of the General Assembly.

B.

Resolution relating to negotiations with the competent authorities of the United States of America concerning the arrangements required as a result of the establishment of the seat of the United Nations in the United States of America, and text of a draft convention to be transmitted as a basis of discussion for the conference

1. *The General Assembly* authorizes the Secretary-General (with the assistance of a committee

composed of persons appointed by the governments of Australia, Belgium, Bolivia, China, Cuba, Egypt, France, Poland, United Kingdom, Union of Soviet Socialist Republics) to negotiate with the competent authorities of the United States of America the arrangements required as a result of the establishment of the seat of the United Nations in the United States of America.

2. The following draft convention is transmitted by the General Assembly to the Secretary-General for use in these negotiations as a basis of discussion.

3. The Secretary-General shall report to the General Assembly the results of these negotiations.

4. Any agreement apart from purely temporary agreements with the competent authorities of the United States resulting from these negotiations shall be subject to approval by the General Assembly before being signed on behalf of the United Nations.

Thirty-first plenary meeting, 13 February 1946.

Convention between the United Nations and the Government of the United States of America

(This draft has been prepared on the assumption that there will be no private persons living within the zone containing the seat of the United Nations.)

The United Nations and the Government of the United States of America:

Desiring to conclude a convention for the purpose of carrying out the resolution adopted by the General Assembly....., to establish the seat of the United Nations in..... and to regulate questions arising as a result thereof:

Have appointed as their plenipotentiaries for this purpose:

The United Nations.....
Secretary-General

The Government of the .....
United States of America

who have agreed as follows:

Article I

Definitions

Section 1. In this convention:

(*a*) the expression "zone" means the area referred to in section 2, including any additions to it;

(*b*) the expression "law of the United States of America" includes federal, state, and local laws, however designated;

(*c*) the expression "Government of the United States of America" includes a State or a competent state authority wherever the context so requires;

(*d*) the expression "courts of the United States of America" includes federal and state courts;

(*e*) the expression "United Nations" means the International Organization established by the Charter of the United Nations.

Article II

The United Nations Zone

Section 2. The seat of the United Nations shall be the area situated..... and marked pink on the map which forms annex I. Additions may be made later to this area in accordance with the provisions of section 8.

Section 3. The Government of the United States of America undertakes, on the entry into force of this convention, to cause to be vested in the United Nations possession immediately and full ownership as soon as possible of all land in the zone as shown in annex I and of all buildings situated thereon at the time of transfer.

Section 4. The Government of the United States of America shall be responsible for expropriating and compensating so far as necessary and as soon as possible all interests in land and buildings conveyed to the United Nations.

Section 5. Having regard to section 4, the United Nations shall pay to the United States of America a fair price for any land and buildings conveyed to the United Nations. The amount so payable shall be credited to the United States of America in the accounts of the United Nations and shall be set off, during such period as may be fixed, against contributions due from the United States of America. In default of agreement, this price and this period shall be determined by an expert selected by the President of the International Court of Justice.

Section 6. The United Nations shall have exclusive rights over the subsoil of land conveyed to it, and in particular the right to make constructions underground and to obtain therefrom supplies of water. It shall not, however, have the right to exploit minerals.

Section 7. The United Nations may establish in the zone any type of installation which it deems necessary for the purpose of its work, and in particular may establish its own radio telegraph sending and receiving stations, including broadcasting, teletype, and telephoto services. The United Nations shall make arrangements with the International Telecommunications Union with regard to wavelengths and other similar matters.

Section 8. The Government of the United States of America shall, at the request of the Secretary-General acting in pursuance of a resolution of the General Assembly, cause to be vested in the United Nations possession immediately and full ownership as soon as possible over such further land as may be required for the purpose of constructing an airport, railway station, or radio telegraphic station or for such other purposes as may be required by the United Nations. The provisions of sections 4, 5 and 6 shall apply to land so conveyed.

Section 9. In the event of the land conveyed in accordance with section 8 not being contiguous to the remainder of the zone, the Government of the United States of America shall guarantee unimpeded communication and transit between parts of the zone.

Article III

Law and Authority in the Zone

Section 10. The zone, including the air space above it and the subsoil below it, shall be inviolable.

Section 11. Save as otherwise provided in this convention, the zone shall be under the control and authority of the United Nations.

Section 12. Without prejudice to the generality of section 11, the Government of the United States of America renounces jurisdiction over any matters relating to entry into the zone and to the

conditions under which persons may remain or reside there, and over any matters relating to the construction or removal of buildings in the zone.

Section 13. Officers or officials of any authority in the territory of the United States of America, whether administrative, judicial, military, or police, shall not enter the zone to perform any official duties therein except with the permission of and under conditions agreed by the Secretary-General. The service of legal process, including the seizure of private property, shall take place within the zone under conditions approved by the Secretary-General.

Section 14. Without prejudice to the provisions which are contained in annex II and subsequently in the General Convention referred to in section 32, and which relate to the immunities of officials of the United Nations and of the representatives of Members, the United Nations shall not permit the zone to become a refuge either for persons who are avoiding arrest under the law of the United States of America or are required by the Government of the United States of America for extradition to another country, or for persons who are endeavouring to avoid service of legal process.

Section 15. Subject to section 16, the law of the United States of America shall apply within the zone, and in particular the ordinary civil and criminal law.

Section 16. The United Nations may enact regulations making provisions of an administrative character for the zone. Any such regulation shall prevail over any provisions in the law of the United States of America which are inconsistent with it. It is agreed that within the zone the protection afforded by the Constitution of the United States to personal liberty and to the basic human freedoms of expression and worship shall not be lessened, and no form of racial discrimination shall be permitted.

Section 17. The courts of the United States of America shall, without prejudice to any provisions of annex II and subsequently of the General Convention referred to in section 32, have jurisdiction over acts done and transactions taking place in the zone, in the same manner as they have over similar acts and transactions taking place outside the zone.

Section 18. The courts of the United States of America, when dealing with cases arising out of or relating to acts done or transactions taking place in the zone, shall take cognizance of the regulations enacted by the United Nations under section 16, though they shall not be obliged to inflict penalties for infraction of such regulations unless the Government of the United States of America has agreed to these regulations before the infraction was committed.

Article IV

Communications and Transit to and from the Zone

Section 19. The Government of the United States of America shall guarantee at all times adequate means of communication to and from the zone through the territory of the United States of America, for the passage of persons, the transmission of postal correspondence and telegrams, and the transport of goods required for use and consumption in the zone.

Section 20. Representatives of Members, irrespective of the relations existing between their Government and the Government of the United States of America, officials both of the United Nations and of the specialized agencies, and the families of these representatives and officials, shall at all times enjoy the right of unimpeded and safe transit through the territory of the United States of America to and from the zone.

Section 21. The accredited representatives of news agencies, whether press, radio, or films, and of non-governmental organizations recognized by the United Nations for the purpose of consultation, shall also enjoy the rights referred to in section 20.

Section 22. Immigration and other regulations in force in the United States of America, regarding the entry and residence of foreigners, shall not be applied in such a manner as to interfere with the rights referred to in sections 20 and 21. Visas required by the persons referred to in those sections shall be granted without charge, without delay and without requirement of personal attendance for the issue of the visa.

Section 23. The Government of the United States of America shall give or cause to be given facilities for the issue of visas to, and for the use of the available means of transport by, persons coming from abroad (other than those referred to in sections 20 and 21) who desire to visit the zone. The Secretary-General of the United Nations and the Government of the United States of America shall, at the request of either of them, enter into discussion with regard to the application of this section.

Section 24. The provisions of this article shall not prevent the Government of the United States of America from taking precautions in the interests of national security, provided that such precautions shall not have the effect of interfering with the rights referred to in sections 19, 20 and 21.

Article V

Resident Representatives to the United Nations

Section 25. Persons accredited to the United Nations by Members as resident representatives and their staffs, whether residing inside or outside the zone, shall be recognized by the Government of the United States of America as entitled on its territory to the same privileges and immunities as that Government accords to the diplomatic envoys accredited to it, and the staffs of these envoys.

Article VI

Police Protection of the Zone

Section 26. The Government of the United States of America shall cause to be provided on the boundaries of the zone such police protection for the zone as is required, and shall be responsible for ensuring that the tranquillity of the zone is not disturbed by the unauthorized entry of bodies of persons from outside or by disturbances in its immediate vicinity.

Section 27. If so requested by the Secretary-General, the Government of the United States of America shall cause to be provided a sufficient number of police to perform duties inside the zone for the preservation of law and order therein, and for the removal of persons who have committed

or are suspected of having committed or of being about to commit offences, including infractions to the administrative regulations of the United Nations.

Article VII

Public Services for and the Amenities of the Zone

Section 28. The Government of the United States of America will exercise all the powers which it possesses to ensure that the zone shall be supplied on equitable terms with the necessary public services (including electricity, water, gas, post, telephone, telegraph, drainage, collection of refuse) and that these services shall not be interrupted. In case of any interruption or threatened interruption of any of these services, the Government of the United States of America will consider the needs of the zone as being of equal importance with the essential services of the United States Government itself. Consequently, in that event it will take all those steps which it would take in case of interruption or threatened interruption of these services to the essential Departments of the United States Government to ensure that the work of the United Nations is not prejudiced.

Section 29. The Government of the United States of America shall be responsible for ensuring that the amenities of the zone are not prejudiced and the purposes for which the zone is required are not obstructed by any use made of the land in its vicinity.

Article VIII

Matters Relating to the Operation of this Convention

Section 30. The Secretary-General and the Government of the United States of America shall settle by agreement the channel or channels through which shall be conducted correspondence relating to the application of the provisions of this convention and to other questions affecting the zone. If the Secretary-General so requests, the Government of the United States of America shall appoint a special representative for the purpose of liaison with the Secretary-General.

Section 31. In so far as the fulfilment of this convention requires co-operation and action by any state or other non-federal authority of the United States of America, the Government of the United States will conclude with that state or authority such agreements as are necessary for this purpose. The conclusion of these agreements, together with the enactment of any necessary legislation by the United States and by the state, shall be completed before the notice is given which is required under section 35 to be given by the Government of the United States of America before this convention enters into force.

Article IX

Relation between this Convention and the General Convention

Section 32. Until the Government of the United States of America becomes a party to the general convention relating to the privileges and immunities of the United Nations, the provisions of annex II shall apply between the United Nations and the Government of the United States of America. Thereafter, those provisions shall be replaced by the provisions of the General Convention, which shall continue in force so long as the present convention remains in operation.

Section 33. The provisions of this convention shall be complementary to the provisions of the general convention and, until the Government of the United States of America becomes a party to the general convention, to the provisions of annex II.

Section 34. In so far as any provision of this convention and any provision of the general convention (or of annex II as the case may be) relate to the same subject matter, the two provisions shall, wherever possible, be treated as complementary, so that both provisions shall be applicable and neither shall narrow the effect of the other; but in any case of absolute conflict, the provisions of this convention shall prevail.

Article X

Final Provisions

Section 35. This convention, having already been approved by a resolution of the General Assembly, shall enter into force as soon as the Government of the United States of America notifies the Secretary-General that it has all the powers necessary to fulfil the provisions of the convention. The Government of the United States of America shall take every possible step to enable it to give this notification as soon as possible, and in any case not later than.....

Section 36. This convention shall remain in force so long as the seat of the United Nations is maintained in the territory of the United States of America.

Section 37. The seat of the United Nations shall only be removed from the territory of the United States of America if the United Nations should so decide.

Section 38. If the seat of the United Nations is removed from the territory of the United States of America, the Government of the United States of America shall pay to the United Nations an equitable sum for the land in the zone and for all buildings and installations thereon. An expert nominated by the President of the International Court of Justice shall decide, in default of agreement between the parties, what sum is equitable, having regard to

(*a*) the then value to the United States of America of the land, buildings and installations; and

(*b*) the cost incurred by the United Nations in acquiring the land and in erecting the buildings and installations.

Section 39. Any difference between the United Nations and the Government of the United States of America concerning the interpretation or application of this convention or of any supplementary agreement or agreement which is not settled by negotiation shall be referred to the arbitration of an umpire appointed for the purpose by the President of the International Court of Justice.

Section 40. Either party may ask the General Assembly to request of the International Court of Justice an advisory opinion on any legal question arising in the course of the proceedings referred to in section 39. Pending the receipt of the opinion of the Court, an interim decision of the umpire shall be observed by both parties. Thereafter the umpire shall render a final decision, having regard to the opinion of the Court.

In witness thereof the above-mentioned plenipotentiaries have signed this convention:

Done this ..... day of ..... at ..... in duplicate.

ANNEX I

MAP

(Not reproduced here)

ANNEX II

ARTICLE I

Juridical Personality

Section 1. The United Nations shall possess juridical personality. It shall have the capacity:

(*a*) to contract;

(*b*) to acquire and dispose of immovable and movable property;

(*c*) to institute legal proceedings.

ARTICLE II

Property, Funds and Assets

Section 2. The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as, in any particular case, it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.

Section 3. The premises of the United Nations shall be inviolable. The property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation, and any other form of interference, whether by executive, administrative, judicial or legislative action.

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

Section 5. Without being restricted by financial controls, regulations of moratoria of any kind,

(*a*) the United Nations may hold funds, gold or currency of any kind and operate accounts in any currency;

(*b*) the United Nations shall be free to transfer its funds, gold or currency between the United States of America and any other State, and from one place to another within the United States of America, and to convert any currency held by it into any other currency.

Section 6. In exercising its rights under section 5 above, the United Nations shall pay due regard to any representations made by the Government of the United States, in so far as it is considered that effect can be given to such representations without detriment to the interests of the United Nations.

Section 7. The United Nations, its assets, income and other property shall be:

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

(*b*) exempt from customs duties and prohibitions and restrictions on imports and exports in respect of articles imported or exported by the United Nations for its official use. It is understood, however, that articles imported under such exemption will not be sold in the United States of America except under conditions agreed with the Government of the United States of America;

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

Section 8. While the United Nations will not, as a general rule, claim exemption from excise duties and from taxes on the sale of movable and immovable property which form part of the price to be paid, nevertheless, when the United Nations is making important purchases for official use of property on which such duties and taxes have been charged or are chargeable, the Government of the United States of America will, whenever possible, make appropriate administrative arrangements for the remission or return of the amount of duty or tax.

ARTICLE III

Facilities in respect of Communications

Section 9. The United Nations shall enjoy in the territory of the United States of America for its official communications treatment not less favourable than that accorded by the Government of the United States of America to any other government, including its diplomatic mission, in the matter of priorities, rates and taxes on mails, cables, telegrams, radiograms, telephotos, telephone and other communications; and press rates for information to the press and radio. No censorship shall be applied to the official correspondence and other official communications of the United Nations.

Section 10. The United Nations shall have the right to use codes and to despatch and receive its correspondence by courier or in bags, which shall have the same immunities and privileges as diplomatic couriers and bags.

ARTICLE IV

The Representatives of Members

Section 11. Representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, shall, while exercising their functions and during their journey to and from the place of meeting, be accorded by the Government of the United States of America the following privileges and immunities:

(*a*) immunity from personal arrest or detention and from seizure of their personal baggage, and, in respect of words spoken or written and all acts done by them in their capacity as representatives, immunity from legal process of every kind;

(*b*) inviolability for all papers and documents;

(*c*) the right to use codes and to receive papers or correspondence by courier or in sealed bags;

(*d*) exemption in respect of themselves and their spouses from immigration restrictions, aliens registration or national service obligations in the State they are visiting or through which they are passing in the exercise of their functions;

(*e*) the same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions to the Government of the United States;

(*f*) the same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys, and also;

(*g*) such other privileges, immunities and facilities, not inconsistent with the foregoing, as diplomatic envoys enjoy, except that they shall have no right to claim exemption from customs duties on goods imported (otherwise than as part of their personal baggage) or from excise duties or sales taxes.

Section 12. In order to secure for the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, complete freedom of speech and independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer the representatives of Members.

Section 13. Where the incidence of any form of taxation depends upon residence, periods during which the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations are present in the United States of America for the discharge of their duties shall not be considered as periods of residence.

Section 14. Privileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in

connection with the United Nations. Consequently a Member not only has the right but is under a duty to waive the immunity of its representative in any case where the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded.

Section 15. The provisions of sections 11, 12 and 13 may not be invoked against the authorities of the United States of America:

(*a*) by a national of the United States of America;

(*b*) by a representative of the United States of America;

(*c*) by a representative of another Member, when that Member has waived the immunity in question.

Section 16. In this article the expression "representatives" shall be deemed to include all delegates, deputy delegates, advisers, technical experts and secretaries of delegations.

Article V

Officials

Section 17. The Secretary-General will specify the categories of officials to which the provisions of this article and article VII shall apply. He shall submit these categories to the General Assembly. Thereafter these categories shall be communicated to the governments of all Members. The names of the officials included in these categories shall from time to time be made known to the Government of the United States of America.

Section 18. Officials of the United Nations shall:

(*a*) be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity;

(*b*) be exempt from taxation on the salaries and emoluments paid to them by the United Nations;

(*c*) be immune from national service obligations;

(*d*) be immune, together with their spouses and relatives dependent on them, from immigration restrictions and alien registration;

(*e*) be accorded the same privileges in respect of exchange facilities as are accorded to the officials of comparable ranks forming part of diplomatic missions to the Government of the United States of America;

(*f*) be given, together with their spouses and relatives dependent on them, the same repatriation facilities in time of international crisis as diplomatic envoys;

(*g*) have the right to import free of duty their furniture and effects at the time of first taking up their post in the country in question.

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

Section 20. Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. In the case of the Secretary-General the Security Council shall have the right to waive immunity.

Section 21. The United Nations shall co-operate at all times with the appropriate authorities of the United States of America to facilitate the proper administration of justice, secure the observance of police regulations, and prevent the occurrence of any abuse in connection with the privileges, immunities and facilities mentioned in this article.

Article VI

Experts on Missions for the United Nations

Section 22. Experts (other than officials coming within the scope of article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular they shall be accorded:

(*a*) immunity from personal arrest or detention and from seizure of their personal baggage;

(*b*) in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations;

(*c*) inviolability for all papers and documents;

(*d*) for the purpose of their communications with the United Nations, the right to use codes and to receive papers or correspondence by courier or in sealed bags;

(*e*) the same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions to the Government of the United States of America;

(*f*) the same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys.

Section 23. Privileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations.

Article VII

United Nations Laissez-Passer

Section 24. The United Nations may issue United Nations *laissez-passer* to its officials. These *laissez-passer* shall be recognized and accepted as valid travel documents, by the authorities of the United States of America, taking into account the provisions of section 25.

Section 25. Applications for visas (where required) from the holders of United Nations *laissez-passer*, when accompanied by a certificate that they are travelling on the business of the United Nations, shall be dealt with as speedily as possible. In addition, such persons shall be granted facilities for speedy travel.

Section 26. Similar facilities to those specified in section 25 shall be accorded to experts and other persons who, though not the holders of United Nations *laissez-passer*, have a certificate that they are travelling on the business of the United Nations.

Section 27. The Secretary-General, Assistant Secretaries-General and Directors travelling on United Nations *laissez-passer* on the business of the United Nations shall be granted the same facilities as are accorded to diplomatic envoys.

Section 28. The provisions of this article may be applied to the comparable officials of specialized agencies if the agreements for relationship made under Article 63 of the Charter so provide.

Article VIII

Settlement of Disputes

Section 29. The United Nations shall make provision for appropriate modes of settlement of:

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

(*b*) disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.

C.

RESOLUTION ON THE PRIVILEGES AND IMMUNITIES OF THE INTERNATIONAL COURT OF JUSTICE.

1. *The General Assembly,* with a view to ensuring that the International Court of Justice shall enjoy the privileges, immunities and facilities necessary for the exercise of its functions and the fulfilment of its purposes, in the country of its seat and elsewhere, invites the members of the Court at their first session to consider this question and to inform the Secretary-General of their recommendations.

2. *The General Assembly* decides that the question of the privileges and immunities of the Court shall be considered as soon as possible after the receipt of the recommendations of the Court.

3. *The General Assembly* recommends that, until further action has been taken, the rules which have been applied to the Permanent Court of International Justice should be observed by Members in relation to the International Court of Justice.

Thirty-first plenary meeting, 13 *February,* 1946.

D.

RESOLUTION ON THE CO-ORDINATION OF THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS AND THE SPECIALIZED AGENCIES.

The General Assembly considers that there are many advantages in the unification as far as possible of the privileges and immunities enjoyed by the United Nations and the various specialized agencies.

While recognizing that not all specialized agencies require all the privileges and immunities which may be needed by others, and that certain of these may, by reason of their particular functions, require privileges of a special nature which are not required by the United Nations itself, the General Assembly considers that the privileges and immunities of the United Nations should be regarded, as a general rule, as a maximum within which the various specialized agencies should enjoy such privileges and immunities as the appropriate fulfilment of their respective functions may require, and that no privileges and immunities which are not really necessary should be asked for.

Therefore the General Assembly instructs the Secretary-General to open negotiations with a view to the re-consideration, in the light both of the General Convention adopted by the United Nations and of the considerations above, of the provisions under which the specialized agencies at present enjoy privileges and immunities.

Thirty-first plenary meeting, 13 *February* 1946.

E.

RESOLUTION RELATING TO THE INSURANCE AGAINST THIRD PARTY RISKS OF MOTOR-CARS OF THE ORGANIZATION AND OF MEMBERS OF THE STAFF.

It has been found that a frequent source of difficulty is road accidents in which motor cars, owned or driven by persons possessing immunity from legal process, are involved.

It is the intention of the United Nations to prevent the occurrence of any abuse in connection with privileges, immunities and facilities granted to it under Articles 104 and 105 of the Charter and the general convention on privileges and immunities, which determines the details of the application of these articles.

Therefore the General Assembly instructs the Secretary-General to ensure that the drivers of all official motor-cars of the United Nations and all members of the staff, who own or drive motor-cars, shall be properly insured against third party risks.

Thirty-first plenary meeting, 13 *February* 1946.

F.

RESOLUTION RELATING TO ARRANGEMENTS TO BE MADE SO THAT OFFICIALS OF MEMBERS WHO ARE TRANSFERRED OR SECONDED FOR SERVICE WITH THE UNITED NATIONS SHOULD NOT LOSE THEIR ACCRUED PENSION RIGHTS BY REASON OF SUCH TRANSFER OR SECONDMENT.

In order to facilitate the engagement, as members of the staff of the United Nations, of persons who have accrued pension rights as officials, either of the central government of Members, or of subordinate governmental or other administrative authorities within the territory of Members, it is desirable that arrangements should be made to secure that accrued pension rights are not lost when such persons accept posts on the staff of the United Nations, by way either of transfer or of secondment.

Therefore, the General Assembly recommends that:

after such discussion with the Secretary-General as may be necessary to settle details the governments of Members adopt such legislative or administrative measures as may be required to preserve such pension rights.

Thirty-first plenary meeting, 13 *February* 1946.

23(1)

7. REGISTRATION OF TREATIES AND INTERNATIONAL AGREEMENTS

The Executive Secretary sent a circular letter to the Members of the United Nations on 8 November 1945 informing them that from the date of the entry into force of the Charter treaties and international agreements would be received and filed on a provisional basis until the adoption of detailed regulations prescribing the procedure to be followed in the registration and publication of treaties and international agreements under the provisions of Article 102 of the Charter. The Executive Secretary also invited the Governments of Members to transmit to the Secretariat for filing and publication treaties and international agreements not included in the treaty series of the League of Nations and entered into in recent years before the date of the entry into force of the Charter.

It is desirable, as a matter of practical convenience, that arrangements should be made for the publication of any treaties or international agreements which non-member States may voluntarily transmit and which have not been included in the treaty series of the League of Nations. These arrangements should not, however, extend to treaties or international agreements transmitted by any non-member State such as Spain, the Government of which has been founded with the support of the Axis powers and does not, in view of its origin, its nature, its record and its close association with the aggressor States, possess qualifications necessary to justify membership in the United Nations under the provisions of the Charter.

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MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL

Status as at 31 December 1997

UNITED NATIONS
New York, 1998

CHAPTER III. PRIVILEGES AND IMMUNITIES, DIPLOMATIC AND CONSULAR RELATIONS, ETC.

1. Convention on the Privileges and Immunities of the United Nations

Adopted by the General Assembly of the United Nations on 13 February 1946[1]

ENTRY INTO FORCE: For each State, on the date of deposit of its instrument of accession, in accordance with section 32.
REGISTRATION: 14 December 1946, No. 4.
TEXT: United Nations, *Treaty Series*, vol. 1, p. 15, and vol. 90, p. 327 (corrigendum to vol. 1).
STATUS: Parties: 138.

Participant	*Accession, succession (d)*
Afghanistan	5 Sep 1947
Albania	2 Jul 1957
Algeria	31 Oct 1963
Angola	9 Aug 1990
Antigua and Barbuda	25 Oct 1988 *d*
Argentina	12 Oct 1956
Australia	2 Mar 1949
Austria	10 May 1957
Azerbaijan	13 Aug 1992
Bahamas	17 Mar 1977 *d*
Bahrain	17 Sep 1992
Bangladesh	13 Jan 1978 *d*
Barbados	10 Jan 1972 *d*
Belarus	22 Oct 1953
Belgium	25 Sep 1948
Bolivia	23 Dec 1949
Bosnia and Herzegovina	1 Sep 1993 *d*
Brazil	15 Dec 1949
Bulgaria	30 Sep 1960
Burkina Faso	27 Apr 1962
Burundi	17 Mar 1971
Cambodia	6 Nov 1963
Cameroon	20 Oct 1961 *d*
Canada	22 Jan 1948
Central African Republic	4 Sep 1962 *d*
Chile	15 Oct 1948
China	11 Sep 1979
Colombia	6 Aug 1974
Congo	15 Oct 1962 *d*
Costa Rica	26 Oct 1949
Côte d'Ivoire	8 Dec 1961 *d*
Croatia	12 Oct 1992 *d*
Cuba	9 Sep 1959
Cyprus	5 Nov 1963 *d*
Czech Republic[2]	22 Feb 1993 *d*
Democratic Republic of the Congo	8 Dec 1964
Denmark	10 Jun 1948
Djibouti	6 Apr 1978 *d*
Dominica	24 Nov 1987 *d*
Dominican Republic	7 Mar 1947
Ecuador	22 Mar 1956
Egypt	17 Sep 1948
El Salvador	9 Jul 1947
Estonia	21 Oct 1991
Ethiopia	22 Jul 1947
Fiji	21 Jun 1971 *d*
Finland	31 Jul 1958
France	18 Aug 1947
Gabon	13 Mar 1964
Gambia	1 Aug 1966 *d*
Germany[3,4]	5 Nov 1980
Ghana	5 Aug 1958
Greece	29 Dec 1947
Guatemala	7 Jul 1947
Guinea	10 Jan 1968
Guyana	28 Dec 1972
Haiti	6 Aug 1947
Honduras	16 May 1947
Hungary	30 Jul 1956
Iceland	10 Mar 1948
India	13 May 1948
Indonesia	8 Mar 1972
Iran (Islamic Republic of)	8 May 1947
Iraq	15 Sep 1949
Ireland	10 May 1967
Israel	21 Sep 1949
Italy	3 Feb 1958
Jamaica	9 Sep 1963
Japan	18 Apr 1963
Jordan	3 Jan 1958
Kenya	1 Jul 1965
Kuwait	13 Dec 1963
Lao People's Democratic Republic	24 Nov 1956
Latvia	21 Nov 1997
Lebanon	10 Mar 1949
Lesotho	26 Nov 1969
Liberia	14 Mar 1947
Libyan Arab Jamahiriya	28 Nov 1958
Liechtenstein	25 Mar 1993
Lithuania	9 Dec 1993
Luxembourg	14 Feb 1949
Madagascar	23 May 1962 *d*
Malawi	17 May 1966
Malaysia	28 Oct 1957 *d*
Mali	28 Mar 1968
Malta	27 Jun 1968 *d*
Mauritius	18 Jul 1969 *d*
Mexico	26 Nov 1962
Mongolia	31 May 1962
Morocco	18 Mar 1957
Myanmar	25 Jan 1955
Nepal	28 Sep 1965
Netherlands	19 Apr 1948
New Zealand[5]	10 Dec 1947
Nicaragua	29 Nov 1947
Niger	25 Aug 1961 *d*
Nigeria	26 Jun 1961 *d*
Norway	18 Aug 1947
Pakistan	8 Jan 1948
Panama	27 May 1947
Papua New Guinea	4 Dec 1975 *d*

Participant	*Accession, succession (d)*
Paraguay	2 Oct 1953
Peru	24 Jul 1963
Philippines	28 Oct 1947
Poland	8 Jan 1948
Republic of Korea	9 Apr 1992
Republic of Moldova	12 Apr 1995
Romania	5 Jul 1956
Russian Federation	22 Sep 1953
Rwanda	15 Apr 1964
Saint Lucia	27 Aug 1986 *d*
Senegal	27 May 1963 *d*
Seychelles	26 Aug 1980
Sierra Leone	13 Mar 1962 *d*
Singapore	18 Mar 1966 *d*
Slovakia[2]	28 May 1993 *d*
Slovenia	6 Jul 1992 *d*
Somalia	9 Jul 1963
Spain	31 Jul 1974
Sudan	21 Mar 1977

Participant	*Accession, succession (d)*
Sweden	28 Aug 1947
Syrian Arab Republic	29 Sep 1953
Thailand	30 Mar 1956
The former Yugoslav Republic of Macedonia[6]	18 Aug 1993 *d*
Togo	27 Feb 1962 *d*
Trinidad and Tobago	19 Oct 1965
Tunisia	7 May 1957
Turkey	22 Aug 1950
Ukraine	20 Nov 1953
United Kingdom	17 Sep 1946
United Republic of Tanzania	29 Oct 1962
United States of America	29 Apr 1970
Uruguay	16 Feb 1984
Viet Nam	6 Apr 1988
Yemen[7]	23 Jul 1963
Yugoslavia	30 Jun 1950
Zambia	6 Jun 1975 *d*
Zimbabwe	13 May 1991

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Declarations and Reservations
(Unless otherwise indicated, the declarations and reservations were made upon accession or succession.)

ALBANIA[8]

The People's Republic of Albania does not consider itself bound by the provisions of section 30, which provide that any difference arising out of the interpretation or application of the present Convention shall be brought before the International Court of Justice, whose opinion shall be accepted as decisive by the parties; with respect to the competence of the Court in disputes relating to the interpretation or application of the Convention, the People's Republic of Albania will continue to maintain, as it has heretofore, that in every individual case the agreement of all the parties to the dispute is required in order that the dispute may be laid before the International Court of Justice for a ruling.

ALGERIA[8]

The Democratic and Popular Republic of Algeria does not consider itself bound by section 30 of the said Convention which provides for the compulsory jurisdiction of the International Court of Justice in the case of differences arising out of the interpretation or application of the Convention. It declares that, for the submission of a particular dispute to the International Court of Justice for settlement, the consent of all parties to the dispute is necessary in each case. This reservation also applies to the provision of the same section that the advisory opinion given by the International Court of Justice shall be accepted as decisive.

BAHRAIN

Declaration:

"The accession by the State of Bahrain to the said Convention shall in no way constitute recognition of Israel or be a cause for the establishment of any relations of any kind therewith."

BELARUS[8]

The Byelorussian Soviet Socialist Republic does not consider itself bound by the provision of section 30 of the Convention which envisages the compulsory jurisdiction of the International Court and, in regard to the competence of the International Court in differences arising out of the interpretation and application of the Convention, the Byelorussian Soviet Socialist Republic will, as hitherto, adhere to the position that, for the submission of a particular dispute for settlement by the International Court, the consent of all the parties to the dispute is required in every individual case. This reservation is equally applicable to the provisions contained in the same section, whereby the advisory opinion of the International Court shall be accepted as decisive.

BULGARIA[8, 9]

CANADA

"With the reservation that exemption from taxation imposed by any law in Canada on salaries and emoluments shall not extend to a Canadian citizen residing or ordinarily resident in Canada."

CHINA[8]

The Government of the People's Republic of China has reservations on section 30, article VIII, of the Convention.

CZECH REPUBLIC [2, 8]

HUNGARY[8, 10]

INDONESIA

"Article 1 (b) section 1: The capacity of the United Nations to acquire and dispose of immovable property shall be exercised with due regard to national laws and regulations.

"Article VIII, section 30: With regard to competence of the International Court of Justice in disputes concerning the interpretation or application of the Convention, the Government of Indonesia reserves the right to maintain that in every individual case the agreement of the parties to the dispute is required before the Court for a ruling."

LAO PEOPLE'S DEMOCRATIC REPUBLIC

1. Laotian nationals domiciled or habitually resident in Laos shall not enjoy exemption from the taxation payable in Laos on salaries and income.

2. Laotian nationals who are officials of the United Nations shall not be immune from National Service obligations.

LITHUANIA[11]

Reservation:

"The Government of the Republic of Lithuania has made the reservation in respect of article 1 (1) (b), that the United Nations shall not be entitled to acquire land in the territory of the Republic of Lithuania, in view of the land regulations laid down by the article 47 of the Constitution of the Republic of Lithuania."

MEXICO

(*a*) The United Nations and its organs shall not be entitled to acquire immovable property in Mexican territory, in view of the property regulations laid down by the Political Constitution of the United Mexican States.

(*b*) Officials and experts of the United Nations and its organs who are of Mexican nationality shall enjoy, in the exercise of their functions in Mexican territory, exclusively those privileges which are granted them by section 18, paragraphs (*a*), (*d*), (*f*) and (*g*), and by section 22, paragraphs (*a*), (*b*), (*c*), (*d*) and (*f*) respectively, of the Convention on the Privileges and Immunities of the United Nations, on the understanding that the inviolability established in the aforesaid section 22, paragraph (*c*), shall be granted only for official papers and documents.

MONGOLIA[8, 12]

NEPAL[8]

"Subject to the reservation with regard to section 18 (*c*) of the Convention, that United Nations officials of Nepalese nationality shall not be exempt from service obligations applicable to them pursuant to Nepalese law; and

"Subject to the reservation with regard to section 30 of the Convention, that any difference arising out of the interpretation or application of the Convention to which Nepal is a party, shall be referred to the International Court of Justice only with the specific agreement of His Majesty's Government of Nepal."

REPUBLIC OF KOREA

Reservation:

[The Government of the Republic of Korea declares] that the provision of paragraph (c) of section 18 of article V shall not apply with respect to Korean nationals.

ROMANIA[8]

The Romanian People's Republic does not consider itself bound by the terms of section 30 of the Convention which provide for the compulsory jurisdiction of the International Court in differences arising out of the interpretation or application of the Convention; with respect to the competence of the International Court in such differences, the Romanian People's Republic takes the view that, for the purpose of the submission of any dispute whatsoever to the Court for a ruling, the consent of all the parties to the dispute is required in every individual case. This reservation is equally applicable to the provisions contained in the said section which stipulate that the advisory opinion of the International Court is to be accepted as decisive.

RUSSIAN FEDERATION[8, 13]

The Soviet Union does not consider itself bound by the provision of section 30 of the Convention which envisages the compulsory jurisdiction of the International Court, and in regard to the competence of the International Court in differences arising out of the interpretation and application of the Convention, the Soviet Union will, as hitherto, adhere to the position that, for the submission of a particular dispute for settlement by the International Court, the consent of all the parties to the dispute is required in every individual case. This reservation is equally applicable to the provision contained in the same section, whereby the advisory opinion of the International Court shall be accepted as decisive.

SLOVAKIA[2, 8]

THAILAND

"Officials of the United Nations of Thai nationality shall not be immune from national service obligations".

TURKEY[14]

With the following reservations:

(*a*) The deferment, during service with the United Nations, of the second period of military service of Turkish nationals who occupy posts with the said Organization, will be arranged in accordance with the procedures provided in Military Law No. 1111, account being taken of their position as reserve officers or private soldiers, provided that they complete their previous military service as required under Article 6 of the above-mentioned Law, as reserve officers or private soldiers.

...

(*e*) Turkish nationals entrusted by the United Nations with a mission in Turkey as officials of the Organization are subject to the taxes payable by their fellow citizens. They must make an annual declaration of their salaries in accordance with the provisions set forth in chapter 4, section 2, of Law No. 5421 concerning income tax.

UKRAINE[8]

The Ukrainian Soviet Socialist Republic does not consider itself bound by the provision of section 30 of the Convention which envisages the compulsory jurisdiction of the International Court and, in regard to the competence of the International Court in differences arising out of the interpretation and application of the Convention, the Ukrainian Soviet Socialist Republic will, as hitherto, adhere to the position that, for the submission of a particular dispute for settlement by the International Court, the consent of all the parties to the dispute is required in every individual case. This reservation is equally applicable to the provision contained in the same section, whereby the advisory opinion of the International Court shall be accepted as decisive.

UNITED STATES OF AMERICA

"(1) Paragraph (*b*) of section 18 regarding immunity from taxation and paragraph (*c*) of section 18 regarding immunity from national service obligations shall not apply with respect to United States nationals and aliens admitted for permanent residence.

"(2) Nothing in article IV, regarding the privileges and immunities of representatives of Members, in article VI, regarding the privileges and immunities of United Nations officials, or in article VI, regarding the privileges and immunities of experts on missions for the United Nations, shall be construed to grant any person who has abused his privileges of residence by activities in the United States outside his official capacity exemption from the laws and regulations of the United States regarding the continued residence of aliens, provided that:

"(*a*) No proceedings shall be instituted under such laws or regulations to require any such person to leave the United States except with the prior approval of the Secretary of State of the United States. Such approval

shall be given only after consultation with the appropriate Member in the case of a representative of a Member (or member of his family) or with the Secretary-General in the case of any person referred to in articles V and VI;

"(*b*) A representative of the Member concerned or the Secretary-General, as the case may be, shall have the right to appear in any such proceedings on behalf of the person against whom they are instituted;

"(*c*) Persons who are entitled to diplomatic privileges and immunities under the Convention shall not be required to leave the United States otherwise than in accordance with the customary procedure applicable to members of diplomatic missions accredited or notified to the United States.

VIET NAM[8]

1. Disputes concerning the interpretation or application of the Convention shall be referred to the International Court of Justice for settlement only with the consent of all parties concerned.

2. The opinion of the International Court of Justice referred to in article VIII, section 30, shall be merely advisory and shall not be considered decisive without the consent of all parties concerned.

NOTES:

[1] Resolution 22 A (I). See *Resolutions adopted by the General Assembly during the First Part of its First Session* (A/64), p. 25.

[2] Czechoslovakia had acceded to the Convention on 7 September 1955 with a reservation to section 30 of the Convention. The reservation was subsequently withdrawn by a notification received on 26 April 1991. For the text of the reservation, see United Nations, *Treaty Series*, vol. 214, p. 348. See also 8 note below and 11 in chapter I.2.

[3] The German Democratic Republic had acceded to the Convention on 4 October 1974 with a reservation. For the text of the reservation, see United Nations, *Treaty Series*, vol. 950, p. 354. See also note 8 below and note 14 in chapter I.2.

[4] In a communication accompanying the instrument of accession, the Government of the Federal Republic of Germany declared that the said Convention shall also apply to Berlin (West) with effect from the date on which it enters into force for the Federal Republic of Germany.

In this regard, the Secretary-General received, on the dates indicated, the following communications:

Union of Soviet Socialist Republics (9 November 1981):

The declaration made by the Government of the Federal Republic of Germany when depositing the instrument of accession, to the effect that the said Convention shall extend to Berlin (West), is incompatible with the Quadripartite Agreement of 3 September 1971. That Agreement, as is generally known, does not grant the Federal Republic of Germany the right to extend to West Berlin international agreements which affect matters of security and status. The above-mentioned Convention belongs precisely to that category of agreement.

In particular, the 1946 Convention regulates the granting of privileges and immunities to United Nations organs and officials in the State territory of countries parties to it, including immunity from legal proceedings and immunity from arrest or detention. Thus, the Convention concerns sovereign rights and obligations which cannot be exercised by a State in a territory which does not come under its jurisdiction.

In view of the foregoing, the Soviet Union considers the declaration made by the Federal Republic of Germany on extending the application of the Convention on the Privileges and Immunities of the United Nations to Berlin (West) to be illegal and to have no legal force.

German Democratic Republic (23 December 1981):

"Concerning the application of the Convention on Privileges and Immunities of the United Nations on 13 February 1946 to Berlin (West) the German Democratic Republic states in accordance with the Quadripartite Agreement of 3 September 1971, that Berlin (West) continues not to be a constituent part of the Federal Republic of Germany and cannot be governed by it.

"The declaration made by the Federal Republic of Germany to the effect that the said Convention shall be extended to Berlin (West) is contrary to the Quadripartite Agreement in which it is stipulated that international agreements affecting matters of security and status of Berlin (West) cannot be extended by the Federal Republic of Germany to Berlin (West).

"In view of the foregoing, the declaration made by the Federal Republic of Germany will have no validity."

France, the United Kingdom of Great Britain and Northern Ireland and the United States of America (8 June 1982):

"In a communication to the Government of the Union of Soviet Socialist Republics, which is an integral part (annex IV A) of the Quadripartite Agreement of 3 September 1971, the Governments of France, the United Kingdom and the United States, confirmed that, provided matters of security and status are not affected and provided that the extension is specified in each case international agreements and arrangements entered into by the Federal Republic of Germany may be extended to the Western Sectors of Berlin in accordance with established procedures. For its part, the Government of the Union of Soviet Socialist Republics, in a communication to the Governments of the Three Powers, which is similarly an integral part (annex IV B) of the Quadripartite Agreement of 3 September 1971, affirmed that it would raise no objection to such extension.

The established procedures referred to above, which were endorsed in the Quadripartite Agreement, are designed *inter alia* to afford the authorities of the Three Powers the opportunity to ensure that international agreements and arrangements entered into by the Federal Republic of Germany which are to be extended to the Western Sectors of Berlin are extended in such a way that matters of security and status are not affected.

When authorizing the extension of the above-mentioned Convention to the Western Sectors of Berlin, the authorities of the Three Powers took such steps as were necessary to ensure that the application of the Convention to the Western Sectors of Berlin remained subject to Allied rights and responsibilities in the field of privileges and immunities of international organisations. Accordingly, the validity of the Berlin declaration made by the Federal Republic of Germany in accordance with established procedures is unaffected and the application of the Convention to the Western Sectors of Berlin continues in full force and effect, subject to Allied rights and responsibilities.

With reference to the said communication for the Government of the German Democratic Republic we wish to state that States which are not party to the Quadripartite Agreement are not competent to comment authoritatively on its provisions. The three Governments do not consider it necessary, nor do they intend to respond to any further communications from States which are not party to the Quadripartite Agreement. We wish to point out that the absence of a response to further communications of a similar nature should not be taken to imply any change in their position on this matter.

Federal Republic of Germany (16 August 1982):

"By their note of 28 May 1982, . . . the Governments of France, the United Kingdom and the United States answered the assertions made in the communication referred to above. The Government of the Federal Republic of Germany, on the basis of the legal situation set out in the note of the Three Powers, wishes to confirm that the application in Berlin (West) of the above-mentioned Convention extended by it under established procedures continues in full force and effect, subject to Allied rights and responsibilities.

The Government of the Federal Republic of Germany wishes to point out that the absence of a response to further communications

of a similar nature should not be taken to imply any change of its position in this matter."

Union of Soviet Socialist Republics (29 December 1982):

The Soviet side once again confirms, as was already stated in the Mission's note of 9 November 1981, that the declaration of the Federal Republic of Germany concerning the extension to West Berlin of the application of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 is a violation of the Quadripartite Agreement of 3 September 1971 and therefore has no legal force.

The Quadripartite Agreement, as is well known, clearly determined that by no means all international treaties of the Federal Republic of Germany may be extended to West Berlin, but only those which do not affect matters of status and security. The above-mentioned Convention, by reason of its content, directly affects such matters.

The declarations by the Governments of France, the United Kingdom and the United States of America that in the extension of the Convention to West Berlin by the Federal Republic of Germany the established procedures are being observed do not alter the substance of the problem. Those procedures may be applied only in relation to international treaties which the Federal Republic of Germany is entitled to extend to West Berlin. The Convention of 13 February 1946 is not such a treaty.

At the same time the Soviet side wishes to point out that the Quadripartite Agreement of 3 September 1971 contains provisions relating to West Berlin which have universal force of international law. The extension of the Convention of 13 February 1946 to West Berlin by the Federal Republic of Germany notwithstanding those provisions naturally affects the interests of other parties to the Convention, which have the right to express their opinions in the matter. That right cannot be disputed by anyone.

Accordingly, the Soviet side rejects as unfounded the assertions made by the Governments of France, the United Kingdom and the United States of America concerning the declaration by the German Democratic Republic [. . .]. The view set forth in that declaration by the German Democratic Republic as a party to the Convention on the Privileges and Immunities of the United Nations is fully consistent with the Quadripartite Agreement of 3 September 1971.

United States of America, France and the United Kingdom of Great Britain and Northern Ireland (7 July 1983):

"The three Missions wish to recall the position set forth in their communication to the Secretary-General's Note [. . .] dated 20 July 1982. They wish further to recall that the Quadripartite Agreement is an international agreement concluded between the four contracting parties and not open to participation by any other State. In concluding this agreement, the Four Powers acted on the basis of their quadripartite rights and responsibilities, and the corresponding wartime and post-war agreements and decisions of the Four Powers which are not affected. The Quadripartite Agreement is part of conventional, not customary international law. States which are not parties to the Quadripartite Agreement are not competent to comment authoritatively on its provisions. The absence of a response to further communications of a similar nature should not be taken to imply any change of their position in this matter."

See also note 3 above.

5 In a communication received on 25 November 1960, the Government of New Zealand gave notice of the withdrawal of the reservation made upon deposit of its instrument of accession. For the text of that reservation, see United Nations, *Treaty Series*, vol. 11, p. 406.

6 On 16 March 1994, the Secretary-General received from the Government of Greece the following communication:

"Accession of the former Yugoslave Republic of Macedonia to the Convention on the Privileges and Immunities of the United Nations 1946 does not imply its recognition on behalf of the Hellenic Republic."

7 The formality was effected by the Yemen Arab Republic. See also note 33 in chapter I.2.

8 The Government of the United Kingdom of Great Britain and Northern Ireland notified the Secretary-General, on the dates indicated, that it was unable to accept certain reservations made by the States listed below because in its view they were not of the kind which intending parties to the Convention have the right to make.

Date of the receipt of the objection, or date on which it was circulated by the Secretary-General		*With respect to reservation by:*
4 August	1954*	Belarus
4 August	1954*	Ukraine
4 August	1954*	Russian Federation
1 December	1955*	Czechoslovakia**
6 September	1956*	Romania
4 September	1956*	Hungary
3 October	1957*	Albania
20 June	1967*	Algeria
20 June	1967*	Bulgaria
20 June	1967*	Mongolia
20 June	1967*	Nepal
21 September	1972	Indonesia
29 November	1979	German Democratic Republic***
8 November	1979	China
30 January	1990	Viet Nam

* Date the objection was circulated.

**See also note 2 above.

***See also note 3 above.

9 In a communication received on 7 August 1989, the Government of Bulgaria notified the Secretary-General that it had decided to withdraw, with effect on that same date, the reservation in respect to Section 30 of the Convention made upon accession. For the text of the reservation, see United Nations, *Treaty Series*, vol. 376, p. 402.

10 In a communication received on 8 December 1989, the Government of Hungary notified the Secretary-General that it had decided to withdraw the reservation in respect to Section 30 of the Convention made upon accession. For the text of the reservation, see United Nations, *Treaty Series*, vol. 248, p. 358.

11 Subsequently, the Government of Lithuania notified the Secretary-General of the following:

"Article 47 of the Constitution gives an exhaustive list of subjects who have the right to ownership over land plots. The provisions of article 47 of the Constitution of the Republic of Lithuania and other laws of the Republic of Lithuania do not entitle international intergovernmental organizations to own the plot of land.

It is important to note that the Constitution of the Republic of Lithuania and other laws of the Republic of Lithuania provide the right to the subjects, international intergovernmental organizations among others, to long-term land lease which might be up to 99 years. In accordance with procedural and administrative requirements of the national legislation, international intergovernmental organizations, for the effective performance of their obligations, may conclude agreements, acquire and dispose of necessary movable and immovable property and may institute legal proceedings.

[The Government of Lithuania] would like to emphasize that this reservation has a temporary character and in light of legal reform, changes in the current legislation are feasible."

12 In a communication received on 19 July 1990, the Government of Mongolia notified the Secretary-General of its decision to withdraw the reservation it had made upon accession. For the text of the reservation see United Nations, *Treaty Series*, vol. 429, p. 246.

13 By a communication received on 5 January 1955, the Government of Lebanon notified the Secretary-General that it objected to this reservation.

14 By a notification received by the Secretary-General on 20 June 1957, the Government of Turkey withdrew the second, third and fourth reservations contained in its instrument of accession. For the text of the reservations, see United Nations, *Treaty Series*, vol. 70, p. 266.

As article VI does not provide for tax exemption on any stipends paid to experts on missions for the United Nations, there is no tax implication for them in the proposed reservation.

8. In addition to the reservation stated in the third article of the Law, as examined above, the second article of the Law contains a reservation concerning the capacity of the United Nations under section 1 of the Convention to acquire immovable property. It subjects that capacity to the conditions established in the national Constitution and to any restrictions established in the Law therein provided for. According to the Constitution, the acquisition of real property by international organizations may be authorized only in accordance with conditions and restrictions established by law. The Secretariat of the United Nations has no information as to whether such a law has as yet been adopted.

9. It is unnecessary to re-emphasize the urgent desire of the United Nations to see an early accession by your country to the Convention on the Privileges and Immunities of the United Nations. The General Assembly itself has repeatedly stated in its resolutions on the subject that, if the United Nations is to achieve its purposes and perform its functions effectively, it is essential that the States Members should unanimously accede to the Convention at the earliest possible moment. The Secretary-General would only wish that the instrument of accession should not be subject to a reservation conflicting with the Charter, so as to avoid the necessity of placing the question before the General Assembly.

22 October 1963

23. Right of the United Nations to visit and converse with staff members in custody or detention

Internal memorandum

1. In connexion with the recent arrest of a staff member, the question has arisen of the extent of the right of the United Nations to visit and converse with staff members held in custody or detention by the authorities of a State.

2. It is established by the advisory opinion of the International Court of Justice of 11 April 1949, on Reparation for injuries suffered in the service of the United Nations (I.C.J. Reports, 1949, p. 174), that in the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, the United Nations has the capacity to bring an international claim against the responsible State (whether it is or not a Member of the Organization), with a view to obtaining the reparation due in respect of the damage caused both to the United Nations and to the victim or to persons entitled through him. The United Nations therefore has, beyond any doubt, a right of diplomatic protection of its staff, at least within the limits of the questions put to the Court in the request for the advisory opinion.

3. The right to visit and converse with the person in respect of whom a State may possibly have violated its international obligations is a necessary consequence of a right of diplomatic protection. The State or organization having such a right of protection cannot exercise it unless there is an adequate opportunity to find out the facts of a case, and where the person concerned is in custody or detention, the only such opportunity is through access to that person. This is recognized, for example, in the Vienna Convention on Consular Relations of 24 April 1963 (A/CONF. 25/12). Consuls are the usual channel through which States ascertain the facts about persons to whom they are in a position to afford diplomatic protection. Consequently the Convention provides in article 36:

"1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

...

"(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. . ."

4. It is therefore clear that the United Nations has the right to visit and converse with one of its staff members in custody or detention whenever there is any possibility that the United Nations or the staff member in the performance of his duties may have been injured through the violation by a State of any of its obligations either toward the United Nations or toward the person concerned. During such visits and conversations the United Nations representatives must have the right to pursue any line of discussion which would clarify the questions both whether an injury has occurred, and whether it was incurred in connexion with performance of the staff member's duties. The mere fact that there is no obvious connexion between the reason given for the detention by the State and the staff member's duties is insufficient to nullify the right of the United Nations to visit. If that were so, the right of protection of the United Nations would be made entirely dependent upon the reasons given by the detaining State, and that would make the right practically ineffective.

5. Even if in fact there is no connexion between the staff member's duties and the reason for the detention, the United Nations should nevertheless be allowed to visit a staff member under detention, and to ascertain through all appropriate discussions not only whether there has been any legal injury but also whether the person is being treated with humanity and with full observance of an international standard of human rights. This is particularly true when the presence of the staff member in what is to him a foreign country is due to his employment by the United Nations. In such cases it is inappropriate to apply narrowly the test of connexion with official duty, since the person's very presence in the country is the result of, and a necessary condition for, the performance of that duty, and hence, in a sense, is connected with it. This broader scope of protection by the United Nations follows from the undesirability—stressed by the International Court of Justice in its advisory opinion on Reparation for injuries—that staff members should have to rely on protection by their own States. The Court said (I.C.J. Reports, 1949, pp. 183-184):

"In order that the agent of [the United Nations] may perform his duties satisfactorily, he must feel that this protection is assured to him by the Organization, and that he may count on it. To ensure the independence of the agent, and consequently, the independent action of the Organization itself, it is essential that in performing his duties he need not have to rely on any other protection than that of the Organization (save of course for the more direct and immediate protection due from the State in whose territory he may be). In particular, he should not have to rely on the protection of his own State. If he had to rely on that State, his independence might well be compromised, contrary to the principle applied by Article 100 of the Charter. And lastly, it is essential that—whether the agent belongs to a powerful or to a weak State; to one more affected or less affected by the complications of international life; to one in sympathy or nor in sympathy with the mission of the agent—he should know that in the performance of his duties he is under the protection of the Organization. This assurance is even more necessary when the agent is stateless."

6. It follows from the foregoing that, when a United Nations staff member is arrested or detained by the authorities of a State, the Organization always has a right to send representatives to visit and converse with him with a view to ascertaining whether or not an injury has occurred to the United Nations or to him through non-observance by the State concerned of its international obligations, and whether or not such injury is connected with the performance of his duties. Furthermore, at least when the staff member is not a national of the detaining State, there are reasons for recognizing a broader interest of the United Nations in the matter, so that the staff member will not have to rely exclusively on the protection of his own State.

10 July 1963

a greater degree of contact with ITU and knowledge of its current practices, though we assume that you could, in this instance too, be guided by your previous precedents, if they clearly met the reforwarding problem at the time.

8. Before you settle your final policy, we therefore suggest you have an examination made of (1) the correspondence or other understandings with ITU in 1952 concerning carriage of specialized agency traffic on the New York–Geneva link; (2) the rules on joint user of leased telegraph circuits; and (3) the 1952 understandings, if any, and otherwise the current ITU interpretations, on reforwarding.

2 December 1963

21. Immunity from legal process of United Nations officials

Memorandum to the Deputy Chef de Cabinet

1. With reference to your inquiry we should like to confirm that the Secretary-General has, on a number of occasions, informed delegations that United Nations Secretariat personnel do not enjoy immunity from arrest or prosecution for alleged acts which are not related to their official duties. The immunity accorded to Secretariat officials is expressed in section 18 of the Convention on the Privileges and Immunities of the United Nations [24] providing that officials of the United Nations—i.e. Secretariat staff members—shall be "immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity". There is, of course, a clear distinction between Secretariat officials and officials of Member governments.

2. Needless to say, this position has been taken on many occasions and in a number of countries in which United Nations personnel work. For example, we are attaching a copy of a press release dated 24 June 1949 containing a statement by the Secretary-General on this point raised as a result of a case in regard to which the Secretary-General also considered that he could not assert immunity from arrest or interrogation where the alleged acts were not connected with the staff member's official duties.

3. May we add that there should be no misunderstanding whatsoever by Secretariat personnel regarding this position. It is expressly stated in the Convention on the Privileges and Immunities and it has been repeated on various occasions in specific statements made by or on behalf of the Secretary-General.

11 July 1963

22. Proposed accession by a Member State to the Convention on the Privileges and Immunities of the United Nations [24] subject to a reservation denying to any United Nations official of that State's nationality any privilege or immunity under the Convention—Interpretation of articles IV, V and VI of the Convention

Aide-Mémoire to the Permanent Representative of a Member State

1. The first article of the Law approving accession by your country to the Convention on the Privileges and Immunities of the United Nations approves the Convention subject to the reservations set out in the second and third articles of the Law.

The third article of the Law sets forth a reservation to the effect that the proviso contained in article IV, section 15, of the Convention shall also apply in respect of articles V and VI.

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

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11 July 1963

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The third article of the Law sets forth a reservation to the effect that the proviso contained in article IV, section 15, of the Convention shall also apply in respect of articles V and VI.

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

Section 15 of the Convention on the Privileges and Immunities of the United Nations reads:

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

Article IV of the Convention, in which not only section 15 is found but also the three sections cross-referenced therein, relates only to representatives which Member States delegate to represent them. Article V of the Convention, to which the proposed reservation seeks to apply the proviso contained section 15, specifies the privileges and immunities of officials of the Organization and the limitations under which they are intended to be enjoyed. Article VI does the same for experts on missions for the United Nations.

As section 15 of the Convention expressly relates only to the provisions of sections 11, 12 and 13 which, being contained in article IV, have no legal relationship to articles V or VI, it will be assumed that the intent of the reservation in the third article of the Law is to state that the privileges and immunities specified in articles V and VI are not applicable as between an official (or an expert on mission for the United Nations) of your country's nationality and the Government of your country.

2. In the opinion of the Secretary-General, a closer examination of the true legal operation of this reservation, as so interpreted, will leave no doubt that it is incompatible with the United Nations Charter. It may therefore be that you would wish to consider the possibility of suggesting to your Government that the actual deposit of any instrument of accession intended to embody the foregoing reservation be delayed pending an urgent reconsideration of its legal consequences. In this connexion it may be borne in mind that, should an instrument containing this reservation be submitted to the Secretary-General, he would be obliged to take action in two separate capacities, not merely as depositary of the Convention in question under its section 32, but also as the authority designated by section 36 for entering into negotiations with any Member Government as to any adjustments to the terms of the Convention so far as that Member is concerned.

In view of this dual responsibility the following analysis of the proposed reservation is offered for the consideration of your Government.

3. Numerous privileges and immunities specified in article V are not ordinarily understood to have practical application as between an official of the United Nations and his Government of nationality. Such an official will have no occasion, unless in rare circumstances, to require immunity from immigration restrictions in his own country, or privileges in respect of exchange facilities, or repatriation facilities in time of international crisis; he cannot by definition require immunity from alien registration, and it would be exceptional for him to have reason to claim duty-free entry for his personal effects on taking up his post in the country.

4. The situation is quite otherwise in the matter of his official acts, and it is here that the reservation cannot be reconciled with the Charter. Section 18(*a*) in article V requires that officials of the United Nations be "immune from legal process in respect of words spoken or written and all acts performed by them in *their official capacity*." (Underscoring supplied.) It follows that your country, in proposing the reservation quoted above, has (no doubt unintentionally) reserved the right to prosecute United Nations officials of its nationality for words spoken or written or for any acts performed by them in their official capacity, indeed for actions which are in effect the acts of the Organization itself. It would equally be the consequence of the reservation that your country would be reserving jurisdiction to its national courts to entertain private lawsuits against its citizens for acts performed by them as officials of the United Nations.

5. Article 105 of the Charter provides in its second paragraph that officials of the Organization shall "enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization." Likewise, by the second paragraph of Article 100 each Member of the United Nations "undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff". It needs no argument to demonstrate that the reservation by a Member of the right, even in the abstract, to exercise jurisdiction over the official acts of United Nations staff, either through its courts or through other organs or authorities of the State, would be incompatible with the independent exercise and the exclusively international character of the responsibilities of such officials of the Organization. This derogation from the clear terms of the Charter would in no way be affected by the common nationality of the international official and the prosecuting authority. The Secretary-General cannot believe that the legal effect of the reservation in question, although indisputable when examined in this light, was consciously intended.

6. The situation is similar with regard to article VI of the Convention. Experts of your country's nationality would not normally perform their missions for the United Nations on national territory. On the other hand, the inevitable consequence of reserving article VI would be to permit the exercise over nationals of your country, who have performed or are performing official United Nations missions, of jurisdiction in respect of words spoken or written and acts done by them in the course of the performance of their mission. For example, an officer who might be seconded by your Government for service abroad as a United Nations Military Observer would technically be subject on his return to inculpation or sanction for some aspect of his activity on behalf of the Organization. This is particularly evident from the fact that one of the provisions reserved states (in section 22(*b*) of the Convention):

"This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations."

Papers and documents of the United Nations in his possession could likewise be deprived of their inviolability, while the confidential character of his communications with the United Nations could equally be overridden. In such circumstances the Organization itself could not be said to enjoy in the territory of the Member in question the privileges and immunities necessary for the fulfillment of its purposes, as required by Article 105, paragraph 1 of the Charter.

7. A comment may also be in order with respect to the effect on a Member Government of its reserving the application of section 18(*b*). That clause provides that officials of the United Nations shall "be exempt from taxation on the salaries and emoluments paid to them by the United Nations". Officials of the Organization, having been intended by the General Assembly and the Convention to be exempt from national taxation on their official salaries, are already subject to a staff assessment by the United Nations equivalent to national taxation. By resolution 973 (X), therefore, the General Assembly authorized the refund and reimbursement to the staff by the Secretary-General of the amount of any national income taxes to which they might be subjected on the same salary. At the same time, the General Assembly created by that resolution a Tax Equalization Fund and established thereby a procedure for charging against each Member State the total of any amounts which the Organization might thus be obliged to refund to the staff. It should accordingly be understood that the consequence of the reservation in question in so far as it reserves the right to tax nationals of your country on their United Nations salaries, will be to place upon the Organization the administrative burden of reimbursing the income taxes on official salaries while nevertheless increasing your Government's annual contributions to the expenses of the Organization by the full amounts so reimbursed.

As article VI does not provide for tax exemption on any stipends paid to experts on missions for the United Nations, there is no tax implication for them in the proposed reservation.

8. In addition to the reservation stated in the third article of the Law, as examined above, the second article of the Law contains a reservation concerning the capacity of the United Nations under section 1 of the Convention to acquire immovable property. It subjects that capacity to the conditions established in the national Constitution and to any restrictions established in the Law therein provided for. According to the Constitution, the acquisition of real property by international organizations may be authorized only in accordance with conditions and restrictions established by law. The Secretariat of the United Nations has no information as to whether such a law has as yet been adopted.

9. It is unnecessary to re-emphasize the urgent desire of the United Nations to see an early accession by your country to the Convention on the Privileges and Immunities of the United Nations. The General Assembly itself has repeatedly stated in its resolutions on the subject that, if the United Nations is to achieve its purposes and perform its functions effectively, it is essential that the States Members should unanimously accede to the Convention at the earliest possible moment. The Secretary-General would only wish that the instrument of accession should not be subject to a reservation conflicting with the Charter, so as to avoid the necessity of placing the question before the General Assembly.

22 October 1963

23. Right of the United Nations to visit and converse with staff members in custody or detention

Internal memorandum

1. In connexion with the recent arrest of a staff member, the question has arisen of the extent of the right of the United Nations to visit and converse with staff members held in custody or detention by the authorities of a State.

2. It is established by the advisory opinion of the International Court of Justice of 11 April 1949, on Reparation for injuries suffered in the service of the United Nations (I.C.J. Reports, 1949, p. 174), that in the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, the United Nations has the capacity to bring an international claim against the responsible State (whether it is or not a Member of the Organization), with a view to obtaining the reparation due in respect of the damage caused both to the United Nations and to the victim or to persons entitled through him. The United Nations therefore has, beyond any doubt, a right of diplomatic protection of its staff, at least within the limits of the questions put to the Court in the request for the advisory opinion.

3. The right to visit and converse with the person in respect of whom a State may possibly have violated its international obligations is a necessary consequence of a right of diplomatic protection. The State or organization having such a right of protection cannot exercise it unless there is an adequate opportunity to find out the facts of a case, and where the person concerned is in custody or detention, the only such opportunity is through access to that person. This is recognized, for example, in the Vienna Convention on Consular Relations of 24 April 1963 (A/CONF. 25/12). Consuls are the usual channel through which States ascertain the facts about persons to whom they are in a position to afford diplomatic protection. Consequently the Convention provides in article 36:

"1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

...

4. We must therefore reiterate the principles set forth in the Secretary-General's aide-mémoire of 23 January 1964. We are certain that you will appreciate that any other course would impair the international status of the military observers which is essential for the independent exercise of their functions in connexion with the Organization.

We would appreciate your bringing these comments to the attention of your Government.

21 October 1964

26. IMMUNITY FROM LEGAL PROCESS OF UNITED NATIONS OFFICIALS ACTING IN THEIR OFFICIAL CAPACITY—SECTIONS 18 (*a*), 20 AND 29 (*b*) OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS [67]

Internal memorandum

With reference to the inquiry concerning section 18 (*a*) of the Convention of the Privileges and Immunities of the United Nations, we should like to make the following comment:

1. The immunity from legal process in respect to official acts provided under section 18 (*a*) of the Convention applies vis-à-vis the home country of an official as well as vis-à-vis the country in which he is serving. Therefore, a question prior to the determination of what jurisdiction may try the case is whether the Secretary-General should waive the immunity of an official in a particular case.

2. Section 20 of the Convention provides that privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General has the right and duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. If the Secretary-General, in a particular case, decides that immunity would impede the course of justice and could be waived without prejudice to the interests of the Organization, then he will waive under this section.

3. Normally, in the case of automobile accidents, where a satisfactory settlement is not negotiated, a waiver will be made with respect to the civil claim and a civil action can be tried in the country where the accident occurred or where the staff member may be located. As an alternative, arrangements could be made for arbitration under section 29 (*b*). Such arrangements under section 29 (*b*) are usually made on an *ad hoc* basis permitting the choice of the most appropriate method for each case. In the past, there have been few criminal cases in which the question of waiver arose and the Secretary-General's decision under section 20 has been taken in each case in the light of the particular circumstances.

4. Generally speaking, the same provisions apply to the specialized agencies, but we are not in a position to furnish detailed information with respect to their practice.

3 November 1964

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

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Conclusion

10. Assuming that the Council wishes to interpret General Assembly resolution 2248 (S-V) as indicated in paragraph 4 above, it would appear that there is sufficient precedent for the Council to consider making arrangements for the issue of travel documents to nationals of South West Africa. In this respect it may be of relevance to note that one of the South West African political groupings is already issuing its own form of travel document for South West Africans applying for it.

11. If the Council decides to proceed further with this matter, it may also wish to consider authorizing the Commissioner for South West Africa to issue travel documents to nationals of the Territory, as one of the "executive and administrative tasks" which the Council may entrust to the Commissioner under part II, paragraph 3, of resolution 2248 (S-V).

12. Should the Council authorize the Commissioner to proceed as just outlined, it is his view that, in the light of the UNTEA precedent, it might be preferable to call the documents issued "travel documents", rather than "passports". Their practical validity will depend on the acceptance by Member Governments and it would therefore be necessary for the Secretary-General, once the Council has taken a positive decision, to circularize the membership on this matter as he did in September 1962. Important procedural questions such as the determination of the *bona fide* of the applicant and the place where the travel document is to be delivered to him should, it is suggested, be left to the judgement of the Commissioner, who will have to issue appropriate rules and regulations, and who will also report to the Council on the various measures he undertakes in these respects.

27 October 1967

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2. Question of privileges and immunities of the United Nations, of representatives of Member States and of officials of the Organization [5]

Statement made by the Legal Counsel at the 1016th meeting of the Sixth Committee of the General Assembly on 6 December 1967

1. I believe it is necessary and desirable that I make a statement for the record concerning some of the principles involved in the question of privileges and immunities of the United Nations, of representatives of the Members and of officials of the Organization. I do this, first in order to put the record straight so far as the Secretary-General is concerned and secondly to explain the role which the Secretary-General has played, and would intend to continue, with respect to these privileges and immunities.

2. May I first comment briefly on the 1961 Vienna Convention on Diplomatic Relations. [6] It may be noted that the Convention does not directly apply to representatives to international organizations and conferences but only to the exchange of permanent diplomatic missions between States. Material provisions of the Convention, however, are recognized as evidentiary of general or customary international law binding on all Members of the international community. In this perspective it would seem immaterial whether one or both parties to a dispute were also parties to the Convention. The Secretary-General, in interpreting diplomatic privileges and immunities, would look to provisions of the Vienna Convention so far as they would appear relevant *mutatis mutandis*

[5] Extract from document A/C.6/385, reproduced from *Official Records of the General Assembly, Twenty-second Session, Annexes*, agenda item 98.

[6] See *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records*, vol. II (United Nations publication, Sales No.: 62.X.1), p. 82.

to representatives to United Nations organs and conferences. It should of course be noted that some provisions such as those relating to *agrément*, nationality or reciprocity have no relevancy in the situation of representatives to the United Nations.

3. I should now like to turn to the Convention on the Privileges and Immunities of the United Nations, which was adopted by the General Assembly on 13 February 1946 and proposed for accession by each Member of the United Nations. [7] It must first be noted that this Convention is of a very special character—in fact, it is a Convention *sui generis*. Nearly all multilateral conventions refer to the ratifying and acceding States as parties and the rights and obligations created are between the parties.

4. The Convention on the Privileges and Immunities of the United Nations is different. Throughout, in referring to rights and obligations, it refers to Members of the United Nations. It does not refer to parties to the Convention at any point. The word "parties", in fact, is used only three times in the Convention and appears in lower case—twice in section 30 where it means parties to differences or disputes, and once in section 35 where the reference is to a party to a revised convention. The word "Member", on the other hand, appears with a capital "M" and is used in the three paragraphs of the preamble and in seventeen sections of the Convention, including section 11, which refers to "representatives of Members".

5. Section 35 makes clear the character of the Members' obligations, which run from each Member to the Organization. This section reads:

> "This convention shall continue in force as between the United Nations and every Member (I repeat, 'between the United Nations and every Member') which has deposited an instrument of accession for so long as that Member remains a Member of the United Nations, or until a revised general convention has been approved by the General Assembly and that Member has become a party to this revised convention."

6. Moreover, the fact that the obligations run from the Members to the United Nations is not a mere formality. It should be obvious that the Organization itself has a real interest in assuring the privileges and immunities necessary to enable the representatives of Members to attend and participate freely in all meetings and conferences. If the representatives of Members are prevented from performing their functions or from travelling to and from meetings, the Organizations cannot function properly. It therefore seems elementary that the rights of representatives should properly be protected by the Organization and not left entirely to bilateral action of the States immediately involved. The Secretary-General would therefore continue to feel obligated in the future, as he has done in the past, to assert the rights and interests of the Organization on behalf of representatives of Members as the occasion may arise. I would not understand from the discussion in this Committee that the Members of the Organization would wish him to act in any way different from that which I have just indicated. Likewise, since the Organization itself has an interest in protecting the rights of representatives, a difference with respect to such rights may arise between the United Nations and a Member and consequently be the subject of a request for an advisory opinion under section 30 of the Convention. It is thus clear that the United Nations may be one of the "parties", as that term is used in section 30.

7. There is another aspect relating to the nature of the Convention which I should like to develop on behalf of the Secretary-General. It may be observed that the preamble of the Convention refers to Articles 104 and 105 of the Charter of the United Nations. The preamble notes that Article 105 provides:

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

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

Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization."

8. It will be recalled that the Covenant of the League of Nations itself provided that representatives of the Members and Officials of the League when engaged on the business of the League should enjoy diplomate privileges and immunities, a term which has a well-understood meaning in international law. Article 105 of the United Nations Charter on the other hand refers to "necessary" privileges and immunities rather than to "diplomatic" privileges and immunities. Some privileges and immunities are obviously necessary for the fulfilment of the purposes of the Organization and the exercise of the functions of representatives and officials and may therefore be derived without difficulty directly from the first two paragraphs of Article 105. The third paragraph of that Article envisaged that further content could be given to the term "necessary" by the General Assembly. This paragraph provided that the Assembly might make recommendations with a view to determining the details of the application of the first two paragraphs or might propose conventions to the Members of the United Nations for this purpose. The purpose of the Convention was therefore to determine the details of the application of the first two paragraphs of Article 105. In this connexion, article 34 of the Convention significantly states that it is understood that, when an instrument of accession is deposited, the Member will be in a position under its own law to give effect to the terms of the Convention.

9. There are three points which I believe should be made. In the first place, Article 105 itself accords such privileges and immunities as are necessary. This is an obligation on all Members of the United Nations, whether or not they have acceded to the Convention, whose purpose was to determine the details of application. If a privilege or immunity is necessary for the fulfilment of the purposes of the Organization or for the independent exercise of the functions of representatives and officials, then it must be accorded by all Members as a Charter obligation whether or not they have acceded to the Convention. It would, therefore, seem to the Secretary-General that Article 105 itself establishes an obligation for all Member States to accord these rights to the representatives of all other Members.

10. In the second place, the Convention defines certain privileges and immunities which the General Assembly considered to be necessary in all Member States. In effect, it provided the minimum privileges and immunities which the Organization required, wherever it might be or wherever representatives of Members or officials of the Organization might find themselves. I have said "minimum" since it has been recognized that in States where the United Nations has major offices or operations, such as its Headquarters in New York, and its peace-keeping and development Missions in various areas of the world, additional privileges and immunities have been necessary for the fulfilment of its purposes and the exercise of the functions of representatives and officials. Thus, the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations[8] provides that the provisions of that Agreement and of the Convention "shall be complementary" and so far as possible that the provisions of both "shall be applicable and neither shall narrow the effect of the other". Likewise, additional privileges and immunities have been determined to be essential for various missions. In general, therefore, it may be said that the privileges and immunities as defined in the Convention are the minimum privileges and immunities deemed necessary by the Assembly to be accorded by all Member States in implementation of Article 105 of the Charter.

[8] *Ibid.*, vol. 11 (1947), No. 147.

The Assembly in the past has not only called on all Member States to accede to the Convention, but also, in resolution 93 (I) of 11 December 1946, recommended that Members, pending their accession, should follow, so far as possible, the provisions of the Convention in their relations with the United Nations, its officials, the representatives of its Members and experts on missions for the Organization.

11. In the third place, it should be noted that there are now ninety-six States which have acceded to the Convention. Moreover, in most of the remaining Member States as well as in many non-member States, the provisions of the Convention have been applied by special agreement. While it may be true that in 1946 many of the provisions of the Convention had the character of *lege ferenda*, in the nearly twenty-two years since the adoption of the Convention by the Assembly its provisions have become the standard and norm for governing relations between States and the United Nations throughout the world. I doubt that I am being over-bold in suggesting that the standards and principles of the Convention have been so widely accepted that they have now become a part of the general international law governing the relations of States and the United Nations.

12. Under a narrower view than that which I have just outlined, every representative in this room, other than those who are at the same time members of a Permanent Mission, might be subject to arrest and detention, since the host country has not yet acceded to the Convention, and the Headquarters Agreement provides protection only for members of Permanent Missions. Yet I doubt whether many of the members of this Committee, or an international tribunal to which the issue might be submitted, would agree that representatives to the General Assembly lacked this fundamental protection under the Charter and under general international law.

13. I, therefore, in summary submit: first, that the obligations of Member States under the Convention, including those affecting representatives of other Members, are obligations to the Organization, and the Secretary-General has an interest and a role in their protection and observance; secondly, that the privileges and immunities which we have been discussing are obligatory for all Member States whether or not they have acceded to the Convention. Article 105 creates a direct obligation on all Members to accord the privileges and immunities necessary for the fulfilment of the purposes of the Organization and the exercise of the functions of representatives and officials. Certain of the privileges and immunities which the General Assembly has deemed to be necessary in all Member States are defined in the Convention, whose standards and principles have been so widely accepted as to become a part of the general international law governing the relations between States and the United Nations.

14. I hasten to add that this should not be a reason for any State's delaying further its accession to the Convention, since the Convention, with such implementing legislation as may be necessary, provides the best method for the fulfilment and implementation on the domestic level of the international obligations of Members under the Charter and ander general international law.

6 December 1967

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14. Scope and effect of the privileges and immunities required under the 1946 Convention on the Privileges and Immunities of the United Nations for locally recruited staff

Memorandum from the General Counsel of UNRWA

1. The purpose of this memorandum is to explain the privileges and immunities to which locally-recruited United Nations staff are entitled within the territory of a State party to the 1946 Convention. There are three points of particular importance which require emphasis before entering into the detailed discussion of particular privileges.

2. Firstly, and most important, none of the privileges or immunities are intended for the personal benefit or advantage of the individual concerned. As Section 20 of the Convention states:

> "Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. In the case of the Secretary-General, the Security Council shall have the right to waive immunity."

The basic purpose of these privileges and immunities is to ensure the independence of the individual *in all that concerns his official acts*, for, as Article 100 of the United Nations Charter recognizes, it is imperative that, in the performance of official duties, a staff member be not subject to instructions or control by any government or authority external to the United Nations. Thus, Article 100 embodies not only obligations on the staff, but also obligations on every Member State. It will also be noted that Article 105, paragraph 2, is mandatory in providing that

> "... officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization".

It was this provision of the United Nations Charter which, together with paragraph 1 of the same article, the 1946 Convention was intended to implement.

3. Secondly, locally-recruited personnel of the Agency no less than internationally-recruited personnel are staff within the meaning of Article 101, paragraph 1, of the Charter. In accordance with General Assembly resolution 76 (I) of 7 December 1946, privileges and immunities under Section 18 of the Convention apply to all officials of the United Nations except those who are both locally-recruited and assigned to hourly rates. This is a decision of the General Assembly and as such neither the Secretary-General nor the Commissioner-General have authority to agree to any modification of this decision.

4. Thirdly, locally-recruited staff do not enjoy the same extent of privileges and immunities as do expatriate staff, recruited abroad. Several of the privileges and immunities mentioned in Section 18, Article V, of the Convention on the Privileges and Immunities of the United Nations are only relevant in the case of staff working outside their country of normal residence. Privileges which fall into this category include the repatriation facilities mentioned in paragraph (*f*) of Section 18, and the right to import furniture and effects free of duty when first taking up a post in the country in question, which is conferred by paragraph (*g*) of Section 18. The exchange facilities mentioned in paragraph (*e*) will usually fall into the same category, because, if an Agency official is normally resident and working in a host State prior to employment by UNRWA, it is not likely that circumstances will arise in which the transfer of funds, into or out of the host State will be regarded as an act related to his employment by UNRWA. The immunity from immigration restrictions and alien regis-

tration, which is mentioned in paragraph (*d*) of Section 18, is also concerned primarily with non-residents.

5. Thus, the categories of privileges and immunities directly relevant to locally-recruited staff are the following:

(a) *Immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity (Section 18(a))*

Paragraph (*a*) of Section 18, which confers immunity from legal process in respect of words spoken or written and all acts performed by officials in their official capacity, is the most important provision of that section. The United Nations has never agreed to any derogation from this provision. The extreme importance of this provision lies in the fact, that, when acting in their official capacity, the acts of the official are in effect the acts of the United Nations itself, and the nationality of the official is totally irrelevant. Without this immunity, officials would be liable to be sued or prosecuted for acts done in their official capacity; they would be liable to be forced to appear as witnesses in court to give evidence on official matters; they would be liable to arrest and interrogation by State authorities on matters arising out of their official duties. Removal of such protection would place officials in a situation where they could be subjected to external pressures and influence directly contrary to Article 100 of the Charter. It will also be apparent that subjection of staff to legal process could lead to the disclosure of matters which, within any civil service, are properly regarded as internal matters of a confidential nature. It could also lead to the circumvention of Section 4 of the Convention (on the inviolability of archives and documents) in that the contents of such documents might be divulged under oral examination of Agency staff. It must also be apparent that, precisely because it is the basic principle of Article 100 which is at stake here, the notion of "legal process" has to be given a broad interpretation. Thus, where a Member State uses a system of administrative bodies or tribunals, rather than courts *stricto sensu*, for conducting enquiries or hearings, the immunity from jurisdiction applies with equal force. This has been accepted both by Member States and even by non-member States with whom the United Nations has made agreements on privileges and immunities of the Organization. It must be remembered, however, that for all staff other than the Commissioner-General himself this immunity is not the general immunity conferred on diplomatic agents but is strictly limited to the official acts of the staff member: it is a strictly "functional" immunity.

Admittedly, there can be borderline cases in which it may be disputed whether the act is "official" or "non-official" and, as the employer, the Agency must reserve the right to make this decision. But a host Government will find reassurance in the fact that any acts by a staff member which are truly part of political activities are by definition "non-official". The abstention from political activities is not only a characteristic of United Nations employment but is reinforced by specific obligations undertaken by the staff member. Thus, the immunity for official acts cannot be used by staff as a protection behind which they may shelter whilst engaging in political activities directed against the Government. Indeed, such action would lead to disciplinary action by the Agency including, where necessary, dismissal from the Agency's employment. A host Government has the further reassurance that, even where an act is official, the immunity of the official not only can but must be waived by the Secretary-General (or the Commissioner-General, acting on his behalf) "where the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations" (Section 20). The Government can always, therefore, request a waiver in a particular case where these conditions would be met. Even where the Agency is not prepared to waive the immunity of a staff member, this does not mean that no possibilities exist for the Agency to assist the administrative or judical

authorities of the host Government. The Agency has, on frequent occasions, given information to these authorities and has transmitted to local courts information from Agency files relevant to proceedings before those courts. Moreover, the Agency has, on occasion, engaged in joint investigations with the local authorities over matters such as the theft of Agency property. In some cases the Agency has first dismissed the staff member and then actually requested the local authorities to prosecute and been joined, at its request, as a "partie civile" in the criminal action. These are all practical measures which the Agency can take, and has taken, with a view to fulfilling its obligation under Section 21 of the Convention to "cooperate at all times with the appropriate authorities of Members to facilitate the proper administration of justice, secure the observance of police regulations etc...".

(b) *Exemption from taxation on the salaries and emoluments paid by the United Nations (Section 18(b))*

This exemption is not designed to create a specially-privileged class. In fact, the levels of salaries paid tax-free to UNRWA officials are fixed by reference to the levels of salaries of governmental officials holding comparable posts *after deduction of tax*. The true purpose of the exemption is twofold. First, given the desirability of equality in salary treatment for officials of equal rank, it enables the Agency to fix comparable salary levels for comparable posts throughout the entire area of the Agency's operations, without the need for continuous adjustment which would be necessary if changes and variations in national tax legislation had to be taken into account. Second, and even more important, the exemption ensures that the funds contributed by Member States and private organizations for the support of the Agency, on a voluntary basis, [32] are not diverted into the Treasuries of host States by means of national taxation of the salaries of locally-recruited officials. It is basic to all United Nations operations within the territory of a host State that it is not the purpose, direct or indirect, of these operations to constitute a profit to the national Treasury. Indeed, it must be obvious that the Agency could not expect contributing States to increase their contributions for the purpose of offsetting the increased costs which the Agency would incur if salaries had to be paid subject to tax: the increased costs would have to be met by cutting services to the refugees, and it can scarcely be imagined that the host States would wish this to occur.

(c) *Immunity from national service obligations (Section 18(c))*

This immunity is based upon the need to ensure that the efficient conduct of United Nations operations is not jeopardized by the withdrawal from United Nations service of officials of an international organization for the purpose of serving a period of national military service. The immunity also reflects an assumption, which Member States may be expected to share, that service in the United Nations is as contructive a role for the individual to play in the preservation of international peace and security as would be service in national armed forces. Obviously, the possible jeopardy to the Agency's operations is greatest in the case of senior, locally-recruited officials who could be replaced only with the greatest difficulty: heads of departments, medical officers, vocational training instructors are obvious examples. For this category of senior officials the Agency would be bound to maintain this immunity.

However, there are other lower categories of staff for whom practical arrangements might be made so as to reconcile any conflicting claims to their services by both Agency and Government. For example, a system of deferment from national service might be

[32] It is the voluntary nature of these contributions which also prevents UNRWA from operating a tax equalization fund comparable to that used by the United Nations.

arranged for such period as would allow the Agency to make alternative staffing arrangements. One point must, however, be emphasized. The Agency could not undertake obligations (such as are placed on employers in some States) to continue payments of salary, either in whole or in part, or of any other emoluments or benefits during a period of military service. Obligations of this kind would in effect mean that the United Nations was subsidizing military service in a particular State—a use of funds scarcely likely to be acceptable to contributing States and private entities—and paying double salaries for one post, since a replacement staff member would also have to be paid.

There is, however, a major disadvantage to the relaxation of this immunity in that it would force the Agency to deal somewhat harshly with one or other of the individuals affected. That is to say, the Agency would either have to terminate the staff member required to do military service *or* appoint a replacement on a purely temporary basis on the condition that he would have to be terminated when the previous staff member completed his military service. There is yet a further disadvantage in the wastage and relative inefficiency of the Agency's training and re-training of staff so as to accommodate periods of absence for military service. Thus, taking all considerations into account, the justification for retaining this immunity is a very compelling one. The Agency would hope to secure a host State's acceptance of the proposition that to impose military service on Agency officials would do harm to the Agency which would far outweigh any benefit to the host State.

6. It has already been emphasized that privileges and immunities do not exist for the benefit of the individual and that, in a proper case, the Secretary-General and on his delegation the Commissioner-General can waive these privileges and immunities. Thus, any abuse of these privileges and immunities would lead to internal disciplinary action by the Agency and to the possibility that, consequent upon a waiver, the host State's own courts might assume jurisdiction over an offender.

7. The host State has ample opportunity for conveying its views about possible abuse to the Commissioner-General. In the event that the Agency should not feel able to share the host State's view that an abuse had occurred, the host State would still have open to it ample safeguards. It could convey its views directly to the Secretary-General of the United Nations who, by reason of his acquaintance with the world-wide application of the 1946 Convention, could take his decision upon the reasonableness of opposed views. And, in final analysis, it could utilize the disputes procedure provided by the Convention itself in Section 30.

15 May 1968

15. Question whether the salary of a staff member can be attached as a result of a court order

Letter to the Legal Liaison Officer, United Nations Industrial Development Organization

You refer to the hypothetical situation where a court of law, in the execution of a judgement against a staff member for a debt owed by him, attempts to require the UNIDO to pay a part of the salary of the staff member to his creditor. Such a proceeding is sometimes referred to as garnishment, or attachment, of salary.

There is no doubt that such a proceeding with respect to the UNIDO is null and void. In the first place, service of the court order upon UNIDO is a legal process from which the

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Government of India in its instrument of acceptance, which was submitted for deposit with the Secretary-General on 6 January 1959. As that declaration could have been construed as a reservation, the Secretary-General declined to receive the instrument for definitive deposit and referred the matter to the Organization.

Pending the decision of the Organization, the question of the Indian reservation in its wider aspect relating to the procedure to be followed generally by the Secretary-General in relation to reservations to multilateral treaties was considered by the General Assembly at its fourteenth session. In a statement made during the debate in the Sixth Committee,[32] the representative of India explained that the Indian declaration was a declaration of policy and that it did not constitute a reservation. In its resolution 1452 (XIV) of 7 December 1959, the General Assembly, *inter alia*, noted the said statement, expressed the hope that, in the light of that statement, an appropriate solution might be reached in the Inter-Governmental Maritime Consultative Organization at an early date to regularize the position of India, and requested the Secretary-General to transmit the resolution, together with relevant records and documentation, to the Organization.

The Council of the Organization was seized with the question at its third session and on 1 March 1960 adopted resolution number C.1 (III) in which it took, *inter alia*, the following action: (*a*) took note of the statement made on behalf of India as recorded in the resolution of the General Assembly referred to above; (*b*) noted that the declaration therefore has no legal effect with regard to the interpretation of the Convention; (*c*) considered India to be a member of the Organization. As a result of that resolution, the instrument of acceptance of the Convention by the Government of India was formally deposited with the Secretary-General.

Having regard to the foregoing considerations, the Secretary-General, before proceeding with the deposit of the instrument of acceptance of the Convention by the Government of the Member State concerned, would appreciate it if that Government would clarify its position regarding the declarations contained therein, in the sense that they have been intended as declarations of policy and do not constitute a reservation. Such a clarification formally communicated to the Secretary-General by the said Government would obviate the necessity of referring the question to the Organization for its consideration and would permit the Secretary-General to receive the instrument for definitive deposit.

3 July 1969

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14. Exclusive authority of the Secretary-General as regards permission to execute the waivers of privileges and immunities required by a Member State from staff members maintaining or seeking permanent resident status in that State—Policy of the United Nations in that respect

Memorandum to the Chief of the Rules and Procedures Section, Office of Personnel

1. You have asked whether the Secretary-General's delegation of authority to the Administrator of the United Nations Development Programme (UNDP) and to the Executive Director of the United Nations Children's Fund (UNICEF) can be viewed as including authority to permit staff members to waive privileges and immunities of the United Nations. The Secretary-General's authority with respect to the Organization's privileges and immunities (of which those applicable to officials are, of course, only a part) is not essentially a personnel matter; and without an express provision on this point, no such delegation

[32] *Official Records of the General Assembly, Fourteenth Session, Sixth Committee*, 614th meeting.

could be inferred from the delegation of powers relating to administration of the Staff Regulations and Rules on appointment and selection of staff.

2. In our view, the authority has not been formally delegated and, moreover, it should not be.

3. Authority to waive privileges and immunities is vested exclusively (except for his own privileges and immunities, which the Security Council may waive) in the Secretary-General. The immigration law of the Member State concerned, in its provision requiring waivers of immunity as a condition for United Nations staff members to acquire or maintain resident status in that State, does proceed on the apparent assumption that at least some of the privileges and immunities accorded to United Nations officials as such can be waived by them personally. Nonetheless, the Charter, the Convention on the Privileges and Immunities of the United Nations[33] and the Staff Regulations make it clear that, so far as the United Nations is concerned, in its relations with staff members, privileges and immunities are not perquisites of staff members: on the contrary, they are the prerogatives of the Organization itself and are related to the Organization's functions, and it is reserved to the Secretary-General to determine when they should be waived. Accordingly, permission to staff members to execute the waivers is tantamount to a waiver of the United Nations immunity.

4. Policy on the conditions under which a staff member is permitted to waive should, in our view, be uniformly applied throughout the Organization. The policy formulated and maintained by the Secretary-General, pursuant to General Assembly expression of intention and understanding, is against appointing persons having permanent resident status in the Member State concerned as staff members in the professional category and against permitting staff members in the professional category to waive privileges and immunities as is necessary to acquire such status. Exceptions have been limited to cases where the staff member seeking permission is stateless, *de facto* or *de jure*. In the case of general service staff, the policy is to grant requests for permission to execute the waiver.

5. Notwithstanding the suggestion that geographical distribution is less important a consideration for the recruitment of professional staff for UNICEF and UNDP than for other United Nations professional staff, we do not think this would justify excluding staff of these organs from the Organization's policy in regard to the waivers. Although consideration of geographical distribution weighed heavily in the formulation of the General Assembly's position on the subject, it cannot be assumed to have been the only consideration; nor can it be said that in principle geographic distribution is irrelevant to the appointment and selection of UNICEF and UNDP professional staff.

11 July 1969

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15. Issuance of visas to members of the families of United Nations officials assigned in the United States

Letter to a private person

You may wish to have the following information on the international law basis and the established procedures for the United Nation's facilitating the entry into the United States of members of families of United Nations officials. Of course, the right to a United States visa under United States law as such is not within the purview of the United Nations.

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

member concerned may not be compelled to appear and indeed should not appear as a witness without specific authorization.

3. On the other hand, Section 20 of the Convention provides that "The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and be waived without prejudice to the interests of the United Nations". If this evidence is important to the case, it is entirely possible that permission would be granted for her to appear. However, such appearance would require specific authorization.

4. The staff member concerned may give a written statement on the understanding that it does not result therefore that she would appear in any proceedings. Her statement should be restricted to plain facts as she herself recalls them or can check on the records.

17 May 1974

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23. EXTENT OF THE IMMUNITY FROM LOCAL PROSECUTION ENJOYED BY UNITED NATIONS OFFICIALS UNDER EXISTING INTERNATIONAL AGREEMENTS

Letter to the Assistant to the Secretary-General of an international organization

The question with which you are concerned is whether an internationally recruited staff member having committed a serious offence within the country of his duty station could be prosecuted and punished under the law of the country to whose territory he is returned.

As concerns United Nations staff below the Assistant Secretary-General level, whether internationally or locally recruited and whether or not "seconded" from government service, their immunity under the Convention on the Privileges and Immunities of the United Nations is limited to acts committed in the course of their official duties. A staff member would have no special immunity from local prosecution for a criminal offence by virtue of his United Nations employment. Whether or not he was prosecuted would not be a matter of direct concern to the United Nations although the Organization would intervene to ascertain whether in fact his official functions were involved and to offer such general assistance and good offices as the particular situation required, e.g. obtaining counsel, advising family and officials of his own government, etc. Appropriate disciplinary measures under the Staff Regulations and Rules of the United Nations would be considered independently of the action of either the local government or his home government. There have in fact been cases of arrest and prosecution of internationally recruited staff in the country of their duty station. In some instances their return to their home country after conviction or even prior to prosecution was arranged but without United Nations intervention.

Apart from those holding the rank of Assistant Secretary-General or above, United Nations officials do not have "diplomatic" status under the Convention on the Privileges and Immunities of the United Nations. However in some countries where United Nations offices are maintained, senior United Nations staff below that level are by special agreement accorded diplomatic privileges and immunities. In adddition, under the Headquarters Agreements between host governments and the United Nations for the economic commissions all officials are immune from "personal arrest or detention". Nonetheless, we have had, so far as I know, no occasion to consider the problem of jurisdiction over offences committed by such staff.

Of course, immunity granted to officials is justified in terms of the effective functioning of the Organization. Under section 20 of the Convention on the Privileges and Immunities of the United Nations, it would always be incumbent on the Secretary-General to waive the immunity from arrest or prosecution in any case "where in his opinion the immunity would impede the course of justice and can be waived without prejudice to the interest of the United Nations".

1 April 1974

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financial penalty and the Organization's policy of self-insurance with respect to damage to its vehicles.

"8. It is our understanding that there are occasions in mission areas where staff members who are not full-time drivers find it necessary to drive themselves on official United Nations business. The imposition of a financial penalty on such staff members in cases not involving gross negligence on their part would seem to us to be even more unjustifiable than in cases involving full-time drivers.

"9. We would recommend for these reasons that the financial penalty proposed in Section VII of the draft statement not be applied in the type of case we have referred to in category (*b*) in paragraph 3 above; and that the provisions of Section VII of the draft statement be amended accordingly."

2. I would like to add, by way of clarification in relation to paragraph 9 of the memorandum, that determination of a staff member's financial responsibility for losses to the Organization should in no case be considered a "financial penalty". The assessments or "surcharges" as the Board may recommend under Financial Rule 110.15 (*b*)[76] are in the character of a recuperation of at least part of the losses incurred. One should therefore keep always in mind that these surcharges are not to be equated with the disciplinary measures provided for in chapter X of the Staff Rules.

6 October 1975

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26. IMMUNITY OF STAFF MEMBERS AND THEIR IMMEDIATE FAMILIES FROM IMMIGRATION RESTRICTIONS AND FROM EXCLUSION AND DEPORTATION PROCEEDINGS UNDER THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS, THE HEADQUARTERS AGREEMENT BETWEEN THE UNITED NATIONS AND THE UNITED STATES AND THE IMMIGRATION LAW OF THE UNITED STATES

Internal memorandum

1. This opinion deals with the visa status of two nationals of a Member State who were locally recruited and who both serve in the General Service category at Headquarters. Both hold probationary appointments. One entered the United States on a business visa (B-1) and the other entered the United States under a treaty-trader visa (E-1). Both currently hold G-4 visas, which were applied for by the United Nations on their behalf and which were summarily granted. Some time after the commencement of their appointments and the granting of their G-4 visas, both staff members applied under the appropriate staff rules and regulations to have members of their family join them and requested through the United Nations that those family members be granted G-4 visas. . . .

2. Under both the provisions of the Convention on the Privileges and Immunities of the United Nations[77] (hereafter referred to as the "Convention") and the Headquarters Agreement between the United Nations and the United States[78] (hereafter referred to as the "Headquarters Agreement"), immunity is granted to officials of the

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[76] Financial Rule 110.15 reads as follows:

"*Writing-off losses of property*

"(*a*) The Controller may, after full investigation in each case, authorize the writing-off of losses of United Nations property or such other adjustments of the records as will bring the balance shown by the record into conformity with the actual quantities.

"(*b*) Final determination as to all surcharges to be made against staff members or others as the result of losses will be made by the Controller."

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

[78] *Ibid.*, vol. 11, p. 12.

United Nations in matters relating to immigration restriction and alien registration. Article V, section 18, of the Convention in part states:

"Officials of the United Nations shall:

"...

"(*d*) Be immune, together with their spouses and relatives dependent on them, from immigration restrictions and alien registration; . . ."

Article IV, section 11 of the Headquarters Agreement states in its relevant part:

"The federal, state or local authorities of the United States shall not impose any impediments to transit to or from the headquarters district of: (1) representatives of Members or officials of the United Nations, . . . or the families of such representatives or officials."

Furthermore, article IV, section 13, states in part:

"(*a*) Laws and regulations in force in the United States regarding the entry of aliens shall not be applied in such manner as to interfere with the privileges referred to in Section 11. When visas are required for persons referred to in that section, they shall be granted without charge and as promptly as possible."

Sub-paragraph (*b*) (1) of section 13 further states that:

"No proceedings shall be instituted under such laws or regulations to require any such person to leave the United States except with the prior approval of the Secretary of State of the United States. Such approval shall be given only after consultation with the appropriate Member, in the case of a representative of a Member (or a member of his family), or with the Secretary-General. . . . in the case of any other person referred to in Section 11."

Under the Convention, the immunities granted to United Nations officials may be waived by the Secretary-General. Article V, section 20, states in relevant part:

"The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations . . ."

On the other hand, where a dispute arises in which the Secretary-General is not disposed to waive the immunity of staff members and in which the United Nations seeks an enforcement of the status granted such officials, it may resort to the dispute settlement provision of the Headquarters Agreement embodied in article VIII, section 21 (*a*), reading as follows:

"Any dispute between the United Nations and the United States concerning the interpretation or application of this agreement or any other supplemental agreement, which is not settled by negotiation or other agreed mode of settlement, shall be referred for final decision to a tribunal of three arbitrators, one to be named by the Secretary-General, one to be named by the Secretary of State of the United States, and the third to be chosen by the two, or, if they should fail to agree upon a third, then by the President of the International Court of Justice."

3. In addition to the Convention and Headquarters Agreement, United Nations officials are also given immunity from certain visa restrictions under Title 8 of the United States Code, which embodies the United States law regarding aliens and nationality, section 1102 provides that, as long as they continue in the nonimmigrant classes enumerated in that section,

"ineligibility to receive visas and exclusion or deportation of aliens shall not be construed to apply to non-immigrants . . . (3) within the classes described in paragraphs ... (15) (G) (iv) of section 1101 (*a*) of this title, except for those provisions relating to reasonable requirements of passports and visas as a means of identification and documentation necessary to establish their qualifications under such paragraphs . . .".

Section 1101 (*a*) (15) (G) (iv) in turn states that nonimmigrant aliens include "officers or employees of such international organizations, and the members of their immediate families". Therefore, it appears that under United States immigration law, neither section 1226 relating to the procedure for the exclusion of aliens, nor section 1251 relating to procedures for deportation of aliens may be applied to either staff members or their families where such individuals fall within the definition of section 1101 (*a*) (15) (G) (iv) and the protection afforded under section 1102 (3).

4. It is clear under the Convention, the Headquarters Agreement and the United States immigration law that (1) staff members holding G-4 visas and subject to the relevant provisions of immunity cannot be subjected to exclusion or deportation proceedings, and (2) the privileges and immunities granted those staff members are also extended to members of their families who, in turn, may not be lawfully refused G-4 visas and may not be lawfully excluded from the United States.

21 October 1975

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27. Question whether a United Nations official may be granted special leave to complete military service in his country of origin, in the light of the relevant provisions of the Convention on the Privileges and Immunities of the United Nations and of Appendix C of the Staff Rules

Internal memorandum

The Office of Legal Affairs has been requested to give its opinion regarding the applicable law relating to military service of a staff member who is a national of a Member State. The staff member has requested that he be allowed to take special leave from the Organization to complete such service.

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

2. Under section (*c*) of Appendix C of the Staff Rules, a staff member who has completed one year of satisfactory probationary service or who holds a permanent or regular appointment may, if called by a Member Government for military service, be granted special leave without pay by the Organization for the duration of that service. This is true even though section (*a*) of Appendix C recognizes that staff members who are nationals of those Member States having acceded to the Convention on the Privileges and Immunities of the United Nations are immune from such service. Section (1) of Appendix C furthermore states that the Secretary-General may apply the provisions of that Appendix where a staff member volunteers for military service or requests a waiver of his immunity under article V, section 18 (*c*) of the Convention.

3. The Secretary-General, therefore, has discretionary authority to grant special leave in the case of the staff member in question, even though the staff member is

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"ineligibility to receive visas and exclusion or deportation of aliens shall not be construed to apply to non-immigrants . . . (3) within the classes described in paragraphs ... (15) (G) (iv) of section 1101 (*a*) of this title, except for those provisions relating to reasonable requirements of passports and visas as a means of identification and documentation necessary to establish their qualifications under such paragraphs . . .".

Section 1101 (*a*) (15) (G) (iv) in turn states that nonimmigrant aliens include "officers or employees of such international organizations, and the members of their immediate families". Therefore, it appears that under United States immigration law, neither section 1226 relating to the procedure for the exclusion of aliens, nor section 1251 relating to procedures for deportation of aliens may be applied to either staff members or their families where such individuals fall within the definition of section 1101 (*a*) (15) (G) (iv) and the protection afforded under section 1102 (3).

4. It is clear under the Convention, the Headquarters Agreement and the United States immigration law that (1) staff members holding G-4 visas and subject to the relevant provisions of immunity cannot be subjected to exclusion or deportation proceedings, and (2) the privileges and immunities granted those staff members are also extended to members of their families who, in turn, may not be lawfully refused G-4 visas and may not be lawfully excluded from the United States.

21 October 1975

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27. QUESTION WHETHER A UNITED NATIONS OFFICIAL MAY BE GRANTED SPECIAL LEAVE TO COMPLETE MILITARY SERVICE IN HIS COUNTRY OF ORIGIN, IN THE LIGHT OF THE RELEVANT PROVISIONS OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS AND OF APPENDIX C OF THE STAFF RULES

Internal memorandum

The Office of Legal Affairs has been requested to give its opinion regarding the applicable law relating to military service of a staff member who is a national of a Member State. The staff member has requested that he be allowed to take special leave from the Organization to complete such service.

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

2. Under section (*c*) of Appendix C of the Staff Rules, a staff member who has completed one year of satisfactory probationary service or who holds a permanent or regular appointment may, if called by a Member Government for military service, be granted special leave without pay by the Organization for the duration of that service. This is true even though section (*a*) of Appendix C recognizes that staff members who are nationals of those Member States having acceded to the Convention on the Privileges and Immunities of the United Nations are immune from such service. Section (1) of Appendix C furthermore states that the Secretary-General may apply the provisions of that Appendix where a staff member volunteers for military service or requests a waiver of his immunity under article V, section 18 (*c*) of the Convention.

3. The Secretary-General, therefore, has discretionary authority to grant special leave in the case of the staff member in question, even though the staff member is

exempt from national service obligation. The staff member may not waive his own immunity. Such immunity may be waived only by the Secretary-General in conformity with article V, section 20, of the Convention.

24 December 1975

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28. EXEMPTION FROM TAXATION OF SALARIES AND EMOLUMENTS OF UNITED NATIONS OFFICIALS BY VIRTUE OF RELEVANT PROVISIONS OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS AND APPLICABLE GENERAL ASSEMBLY RESOLUTIONS WITH PARTICULAR REFERENCE TO THE POSITION OF MEMBERS OF THE SECRETARIAT AT UNITED NATIONS HEADQUARTERS IN NEW YORK

Letter to a member of a Permanent Mission to the United Nations

I am instructed to reply to your letter dated 3 February 1975 concerning the exemption from taxation to which officials of the United Nations stationed in New York are entitled.

The tax status of United Nations staff members is governed by the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946. Article V, section 18, of the Convention provides, *inter alia*, as follows:

"Section 18. Officials of the United Nations shall:

"...

"(*b*) Be exempt from taxation on the salaries and emoluments paid to them by the United Nations."

Article V, section 17, of the Convention specifies the categories of officials to which article V shall apply. It reads as follows:

"Section 17. The Secretary-General will specify the categories of officials to which the provisions of this Article and Article VII shall apply. He shall submit these categories to the General Assembly. Thereafter these categories shall be communicated to the Governments of all Members. The names of the officials included in these categories shall from time to time be made known to the Governments of Members."

On 7 December 1946, the General Assembly adopted resolution 76 (I), entitled "Privileges and Immunities of the Staff of the Secretariat of the United Nations". In that resolution, the General Assembly approved

"the granting of the privileges and immunities referred to in Articles V and VII of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946, to all members of the staff of the United Nations, with the exception of those who are recruited locally and are assigned to hourly rates".

The categories specified by General Assembly resolution 76 (I) have remained unchanged.

As regards members of the staff of the United Nations Development Programme stationed in your country, it would appear that their tax status is governed by article IX of the Standard Basic Agreement concerning Assistance concluded with UNDP. Although your country is not a party to the Convention on the Privileges and Immunities of the United Nations, the relevant provisions of article V of the Convention

determine the reasons why "the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations".

In previous cases immunities granted to diplomatic personnel or officials of international organizations have not been a bar to such persons testifying voluntarily as witnesses. As a recent example from practice I refer to a case which was heard in New York City Criminal Court, Part III, and in which United Nations officials from the Secretariat's Security Service testified as witnesses against defendants on 15 September 1970.

8 January 1976

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29. DECISION RENDERED BY A CRIMINAL COURT OF THE UNITED STATES IN A CASE INVOLVING A UNITED NATIONS STAFF MEMBER APPEARING AS COMPLAINANT ON BEHALF OF THE ORGANIZATION—IT IS EXCLUSIVELY FOR THE SECRETARY-GENERAL AND NOT FOR THE JUDICIAL AUTHORITIES OF A HOST STATE TO DETERMINE WHETHER, IN ANY GIVEN INSTANCE, A STAFF MEMBER HAS PERFORMED AN OFFICIAL ACT OR HAS ACTED IN EXCESS OF AUTHORITY AND WHETHER IMMUNITY SHOULD BE WAIVED—PROCEDURES AVAILABLE FOR THE SETTLEMENT OF DISPUTES WHICH MIGHT ARISE FROM DETERMINATIONS OF THE SECRETARY-GENERAL IN THOSE RESPECTS

Letter to the Permanent Representative of a Member State

I have the honour to refer to a decision rendered in the Criminal Court of the City of New York, on 19 January 1976 in the case of the *People of the State of New York* v. *Mark S. Weiner* (published 20 January 1976 under New York County, Criminal Court, Trial Term, Part 17).[145] In this case a United Nations Security Officer is appearing on behalf of the United Nations as complainant, in a matter relating to his official duties, and the Judge's decision contains a number of remarks which bear upon the privileges and immunities of the United Nations, and which give rise to the most serious concern on the part of the Organization. This concern compels me to bring the matter to your attention, and to place on record the position of the Secretary-General on the major legal issues involved.

Facts of the case

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

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

As already indicated, one of the United Nations Security Officers who detained the defendant is the chief witness and complainant on behalf of the Secretariat. The Security Officer therefore was directed by his supervisors to appear voluntarily, as

[145] 378 N.Y.S. 2d 966. For a summary of the decision, see p. 249 of this *Yearbook*.

and when requested by the Court, and to testify as to his personal knowledge of facts and circumstances relevant to the complaint and the charge.

There have been four hearings in the case, all of which were held before the same Judge. Responding to pleadings by Counsel for the defendant, the Court, at the hearing held on 25 November 1975, requested the Secretariat to submit a legal memorandum on the question of the Court's jurisdiction over acts against United Nations property situated within the Headquarters District. On 9 December, I, as United Nations Legal Counsel, wrote to the Judge stating the Secretariat's view on the jurisdictional issue and,[146] at the hearing held on 12 December 1975, the Judge indicated that he did not intend to sustain the objections made against the Court's jurisdiction.

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

Pursuant to this request, on 8 January 1976, the Officer-in-charge of the Office of Legal Affairs wrote to the Judge stating the Secretariat's position on the extent of the immunity from jurisdiction enjoyed by United Nations officials appearing voluntarily as witnesses in criminal proceedings.[147]

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

At the hearing on 9 February, the District Attorney proposed adjournment of the case in contemplation of dismissal. However, this was refused by the defendant and his attorney, both of whom insisted on a full hearing. The Judge fixed such a hearing for 27 February 1976, at 9:30 a.m.

Legal position of the Secretariat

The Secretariat has no comments on the actual decision of the Judge to deny the motion to dismiss for lack of jurisdiction in his ruling of 19 January. Its concern, however, is raised by some of the reasoning advanced on the matter of the Security Officer's privileges and immunities. In effect, it would seem, the Judge was arguing that it was in the last instance for him, and not for the Secretary-General, to determine whether the Security Officer was acting in an official capacity and, furthermore, whether the Guard had exceeded his authority through the use of excessive force, such excess, in the Judge's view, rendering inapplicable the Guard's immunity for official acts. While the Judge's remarks are in the nature of *obiter dicta,* their circulation in published form, without the Secretariat's contrary views being on record, could have a most serious effect upon the position of United Nations officials in countries throughout the world.

First and foremost, in the view of the United Nations Secretariat, it is exclusively for the Secretary-General to determine the extent of the authority, duties and functions

[146] See *Juridical Yearbook*, 1975, p. 157.
[147] The letter in question is reproduced on p. 234 of this *Yearbook.*

of United Nations officials. These matters cannot be determined by, or be subject to scrutiny in national courts. It is clear that if such courts could over-rule the Secretary-General's determination that an act was "official", a mass of conflicting decisions would be inevitable, given the many countries in which the Organization operates. In many cases it would be tantamount to a total denial of immunity.

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

In the present case, the Secretary-General at no point waived the immunity of the Security Officer concerned, under Section 18 (*a*) of the Convention on the Privileges and Immunities of the United Nations[148] and also Section 288 d (*b*) of the United States International Organizations Immunities Act.* The authority granted in Section 20 of the Convention to waive the immunity of any official is enjoyed exclusively by the Secretary-General, and waiver cannot be effected instead by the Court. That this is a reasonable understanding of the Convention is borne out not only by the specification in Section 20 of the conditions under which the Secretary-General may waive, but also by the provisions in Article VII for the settlement of disputes regarding all differences arising out of the interpretation or application of the Convention. As already mentioned, the Convention foresees that disputes are not to be settled by the courts of a Member State party to the Convention, but that differences between the United Nations on the one hand and a Member on the other hand are to be decided by an advisory opinion of the International Court of Justice. The fact that such a procedure is available conclusively demonstrates the weakness of the assumption by the Judge that national courts may determine the extent of immunity from jurisdiction enjoyed by a United Nations official acting in his official capacity as directed by the Secretary-General.

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

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

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

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

Finally, I trust you will agree it is crucial that testimony by United Nations Security Officers may be admitted and accepted as competent by criminal courts in cases that involve the safety of United Nations personnel or property. The absolute need for such testimony, both by officials and by members of permanent missions in relation to complaints made by such missions, has been constantly stressed by United States representatives in the Committee on Relations with the Host Country. The Secretariat, however, would be most reluctant to instruct its officials to testify if it is accepted that the particular Court before which they are to appear may strip them of the proper immunities accorded to them by international and national law.

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

11 February 1976

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30. DETERMINATION FOR UNITED NATIONS PURPOSES OF THE MARITAL STATUS OF A STAFF MEMBER

Letter to the Director of Administration, Office of the United Nations High Commissioner for Refugees

I refer to your letter of 8 December concerning the marital status of a staff member.

A review of the case as it appears from the files of the Office of Legal Affairs and from the papers which we have received from the Geneva Personnel Office indicate the following:

—The staff member concerned, a national of Uruguay, married a national of the United Kingdom, in New York State in 1953; the marriage was registered with the Uruguayan Consulate in New York.

—He obtained a divorce, which became final on 7 January 1969, in the State of Tlaxcala in Mexico where neither he nor his wife resided. He appeared through his attorney and accepted the jurisdiction of the court; his wife did not participate at all in the proceedings.

—On 18 January 1969 a marriage certificate was issued by the Registrar of the Court in Tlaxcala declaring the marriage of the staff member and a national of the United Kingdom, by a proxy ceremony where both parties appeared through representatives.

—In June 1969 the first wife wrote to the United Nations Personnel Office in New York stating her position that her marital status remained unchanged and referring to her status for such United Nations purposes as visa, medical insurance, pension entitlements, etc.

—In October 1969 the staff member requested the Geneva Personnel Office to change his marital status for United Nations purposes to reflect his divorce and remarriage as evidenced by the translations from the Tlaxcala documents of divorce and marriage which he provided.

6. For the reasons set out above, it therefore appears that the question of the United Nations radio communications within the host country of ECA, including radio communications between UNDP project personnel in the field and the radio station of ECA's Headquarters, may have to be taken up with the appropriate authorities of the Government with a view to obtaining a solution that adequately meets the operational requirements of the United Nations. In this connexion, the legal position of the United Nations would be that the ECA Headquarters Agreement is confined in scope to activities of the ECA, and that the subject of radio communications for other United Nations activities in the country concerned is not regulated bilaterally, but that the United Nations is recognized by the International Telecommunication Union as a Telecommunication Administration with the same rights as States Members of the International Telecommunication Union, and that such rights in principle also may be exercised in the country in question.

22 December 1976

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18. STANDARDS OF CONDUCT TO BE OBSERVED BY STAFF MEMBERS OF THE UNITED NATIONS OUTSIDE PROFESSIONAL ACTIVITIES—STAFF MEMBERS BELOW THE LEVEL OF ASSISTANT SECRETARIES GENERAL ENJOY IMMUNITY FROM LEGAL PROCESS ONLY IN RESPECT OF ACTS PERFORMED BY THEM IN THEIR OFFICIAL CAPACITY

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

I have read the letter complaining about disruptive behaviour of four staff members of the United Nations on the occasion of a meeting at a University.

As you have noted, staff members are, under staff regulation 1.4, obliged at all times to conduct themselves in a manner befitting their status as international civil servants and to avoid any action and any kind of public pronouncement which may adversely reflect on their status, or on the integrity, independence and impartiality which are required by that status. Violation of this obligation could, depending on the seriousness of the matter to the United Nations and the particular circumstances, justify disciplinary action under Chapter X of the Staff Regulations and Rules quite apart from whether any local criminal proceedings are involved. The Administrative Tribunal has specifically acknowledged that "misconduct punishable under staff regulation 10 could be either misconduct committed in the exercise of a staff member's professional duties or acts committed outside his professional activities but prohibited by provisions creating general obligations for staff members".[113] There have been cases where behaviour outside of official duties and after working hours have been referred to the Joint Disciplinary Committee for advice.

Of course any complaint received by the United Nations in respect of behaviour outside official activities should be communicated to the staff member with a request for his side of the story. Thereafter it is a matter for the Secretary-General's discretion whether or not to pursue the matter by further investigation or action.

As for the immunity question, United Nations officials (other than Assistant Secretaries General and above who have "diplomatic" status) do not have immunity from legal process except as respects their official acts. The staff members concerned here, therefore, enjoy no immunity from suit or criminal process in respect of their

[113] See for example *Judgements of the United Nations Administrative Tribunal*, Numbers 1 to 70, Judgement No. 30, p. 133.

non-United Nations activities. Even if they did, it would be for the Secretary-General and not the staff members themselves to determine whether the immunity should be asserted or waived (staff regulation 1.8). No plea of immunity based on United Nations employment could properly be made by a staff member without the knowledge of the Secretary-General. If the staff member did so he would be in violation of staff regulation 1.8.

So far as I know there has been no detailed discussion of the standards of conduct for international civil servants since the ICSAB 1954 "Report on Standards of Conduct in the International Civil Service"[114] which does deal with special requirements relating to outside activities, political activities and private life of staff members. I do believe however that it would still be reasonable so to interpret staff regulations 1.4 and 1.7 and staff rule 101.8 as to preclude an international civil servant from repeatedly and publicly taking in his personal capacity strongly partisan positions on political issues. I also believe that, under staff rule 101.8, a staff member should be guided by any instruction given under authority of the Secretary-General with respect to future conduct in this regard.

18 August 1976

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19. REGISTRATION OF TREATIES AND INTERNATIONAL AGREEMENTS UNDER ARTICLE 102 OF THE CHARTER—ANY ACTION (INCLUDING TERMINATION OR DENUNCIATION) EFFECTING A CHANGE IN A REGISTERED TREATY OR INTERNATIONAL AGREEMENT MUST ALSO BE REGISTERED—PRACTICE OF THE SECRETARIAT AS TO REGISTRABILITY ISSUES

Letter to a private individual

Your letter of 18 June 1976 was referred to me for reply. In response to your inquiry concerning the practice of the Secretariat with regard to denunciations of treaties, I should like to provide you with the following information.

1. Under article 2 of the Regulations to give effect to Article 102 of the Charter,[115] any subsequent action which effects a change in a treaty or international agreement registered with the Secretariat must also be registered. This includes any certified statements regarding terminations and denunciations.

2. While the Secretary-General has no competence to decide the legality of an action taken by a party, it will notify a party of any appearances of inconsistency with the terms of the agreement and ask for clarification of the party's position. I would like in this respect to refer you to an extract of the preface to the monthly *Statement of Treaties and International Agreements Registered or Filed and Recorded with the Secretariat* which sets forth the position of the Secretariat:

> "In some cases, the Secretariat may find it necessary to consult with the registering party concerning the question of registrability. However, since the terms 'treaty' and 'international agreement' have not been defined either in the Charter or in the Regulations, the Secretariat, under the Charter and the Regulations, follows the principle that it acts in accordance with the position of the Member States submitting an instrument for registration that so far as that party is concerned the instrument is a treaty or an international agreement

[114] Document COORD/Civil Service/5.
[115] Adopted on 14 December 1946 by General Assembly resolution 97 (I).

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WITHIN THE MEANING OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

Letter to the Legal Liaison Officer, United Nations Industrial Development Organization

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

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

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

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

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

The functional and non-personal nature of the privileges and immunities of United Nations officials is made clear by the language of the Convention on the Privileges and Immunities of the United Nations and Staff Regulation 1.8[103]. The Secretary-General's position with respect to suggestions of immunity has always been that he and he alone may decide what constitutes an official act, when to invoke immunity and when to waive immunity.

There is no precise definition of the expressions "official capacity", "official duties", or "official business". These are functional expressions and must be related to a particular context. Indeed, it is doubtful whether a definition would be desirable since it would not

[103] Reading as follows:

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

be in the interest of the Organization to be bound by a definition which may fail to take into account the many and varied activities of United Nations officials.

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

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

12 December 1977

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

1. INTERNATIONAL LABOUR ORGANISATION

(*a*) MEMORANDA DEALING WITH THE INTERPRETATION OF INTERNATIONAL LABOUR CONVENTIONS

The following memoranda, dealing with the interpretation of international labour Conventions, were drawn up by the International Labour Office at the request of Governments:

(*a*) Memorandum on the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144), drawn up at the request of the Government of Sweden, 28 October 1977. Document GB.206/13/3; 206th Session of the Governing Body, May-June 1978.

(*b*) Memorandum on the Human Resources Development Convention, 1975 (No. 142), drawn up at the request of the Government of the Federal Republic of Germany, 31 March 1978. Document GB.206/13/3; 206th Session of the Governing Body, May-June 1978.

(*b*) NOTICE OF WITHDRAWAL REQUIRED UNDER ARTICLE 1, PARAGRAPH 5 OF THE CONSTITUTION OF THE INTERNATIONAL LABOUR ORGANISATION FROM ANY STATE MEMBER INTENDING TO WITHDRAW FROM THE ORGANISATION — QUESTION WHETHER AN EXTENSION OF THE NOTICE IS LEGALLY PERMISSIBLE

Opinion of the Legal Adviser of the International Labour Office

1. Article 1, paragraph 5 of the Constitution of the ILO provides as follows:

"5. No Member of the International Labour Organisation may withdraw from the Organisation without giving notice of its intention so to do to the Director-General of the International Labour Office. Such notice shall take effect two years after the date of its reception by the Director-General, subject to the Member having at that time fulfilled all financial obligations arising out of its membership. When a Member has ratified any international labour Convention, such withdrawal shall not

18. PRIVILEGES AND IMMUNITIES OF OFFICIALS OF THE UNITED NATIONS AND THE SPECIALIZED AGENCIES — CONCEPT OF FUNCTIONAL IMMUNITY — RIGHT OF THE SECRETARY-GENERAL UNDER THE INTERNATIONAL INSTRUMENTS IN FORCE TO INDEPENDENTLY DETERMINE, IN CASE A STAFF MEMBER IS BEING SUBJECTED TO LEGAL PROCESS, WHETHER AN OFFICIAL ACT IS INVOLVED — MEANING OF THE TERM "OFFICER" IN THE CONVENTIONS ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS AND OF THE SPECIALIZED AGENCIES

Statement made by the Legal Counsel at the 59th meeting of the Fifth Committee of the General Assembly on 1 December 1981

1. The Legal Counsel, referring to the report of the Secretary-General on respect for the privileges and immunities of officials of the United Nations and the specialized agencies (A/C.5/36/31), said he would like to thank the members of the Committee for the expressions of concern regarding respect for the privileges and immunities of international officials and the affirmation that the international instruments dealing with the status, privileges and immunities of such officials must be strictly respected in order to ensure the independence and integrity of the international civil service. The increase in membership in international organizations and the corresponding increase in the number of States which were hosts to international organizations and their subsidiary bodies gave added importance to the question of immunities. Conditions in any one duty station had an impact on all the staff of the international organizations, wherever they might serve, and directly affected the morale and efficiency of the international civil service.

2. The law of international immunities, which was based principally on the United Nations Charter, the Conventions on the Privileges and Immunities of the United Nations and of the Specialized Agencies and other instruments referred to in paragraph 3 of the Secretary-General's report, distinguished between diplomatic and functional immunities. The very great majority of officials of the United Nations and specialized agencies were accorded functional rather than diplomatic immunities. That distinction was significant both from the point of view of the scope and content of the immunity and because of the fundamentally different character of the two types of immunity. While diplomatic immunity attached to the person, the functional immunity of international officials was organizational. Thus, section 20 of the Convention on the Privileges and Immunities of the United Nations provided that "Privileges and immunities are granted to officials of the United Nations in the interests of the United Nations and not for the personal benefit of the individuals themselves". An identical provision was contained in the Convention on the Privileges and Immunities of the Specialized Agencies.

3. That distinction was essential to an understanding of the nature of the violation of immunities reported by the Secretary-General in document A/C.5/36/31. The various cases referred to in the report involved a breach of the organizations' rights. For example, where violations involving immunity from legal process — the type of case most frequently cited — were concerned, the substance of the Secretary-General's protest in such cases was not that a particular staff member had been subjected to legal process but that he had been prevented from exercising his right under the international instruments in force to independently determine whether or not an official act had been involved. Where a determination was made that no official act was involved, the Secretary-General had, by the terms of the Convention on Privileges and Immunities of the United Nations, both the right and the duty to waive the immunity of any official.

4. As the Secretary-General stated in his report, Member States had on the whole respected the Organization's right to functional protection, which had been clearly enunciated by the International Court of Justice in its advisory opinion of 1949 in the Bernadotte[27] case and which now formed part of generally accepted international law. It was not the intent of the provisions regarding immunity from legal process or the principle of functional protection to place officials above the law but to ensure, before any action was taken against them, that no official act was involved and that no interest of the Organization was prejudiced.

5. A second question concerned who was entitled to privileges and immunities. It had been suggested by some delegations that locally recruited staff members were not officials of the United Nations and specialized agencies for the purpose of privileges and immunities and that they were

first and foremost nationals of the country concerned and, as such, were subject to its laws. On that point, he would like to clarify the meaning of the term "officials" as it was used in the Conventions. Section 17 of the Convention on the Privileges and Immunities of the United Nations stated that the Secretary-General would specify the categories of officials to which articles V and VII of the Convention should apply. The Convention on the Privileges and Immunities of the Specialized Agencies and the IAEA Agreement contained similar provisions. In 1946, the General Assembly had adopted resolution 76 (I), in which it had approved the granting of the privileges and immunities referred to in articles V and VII of the Convention on the Privileges and Immunities of the United Nations to all members of the staff of the United Nations, with the exception of those who were recruited locally and were assigned to hourly rates. The specialized agencies and IAEA had taken similar actions. Consequently, all staff members regardless of rank, nationality or place of recruitment, whether Professional or General Service, were considered as officials of the organizations for the purposes of privileges and immunities except for those who were both locally recruited and employed at hourly rates. United Nations locally recruited staff such as clerks, secretaries and drivers were in nearly every case paid according to established salary or wage scales and not at hourly rates and they were, therefore, covered by the terms of General Assembly resolution 76 (I).

6. With regard to the discrepancy which existed between the régime applicable at United Nations Headquarters in New York and that which was applicable in virtually all other duty stations, including the headquarters seats in Geneva, Nairobi, Vienna and the seats of the regional economic commissions, it was perfectly true, as one delegation had pointed out, that in New York the range of staff members to whom diplomatic privileges and immunities were accorded was narrower than the range in other duty stations. The more restrictive régime, which was patterned exclusively on the provisions of the Conventions on Privileges and Immunities adopted in 1946 and 1947, had been made applicable at United Nations Headquarters in New York at a time when it had been anticipated that the staff of the United Nations would be largely concentrated in New York and a more liberal régime would have resulted in very large numbers of staff members being assimilated to diplomatic personnel. Although that discrepancy in treatment was undesirable and it would have been preferable to obtain equality of treatment for staff members regardless of their duty station, it should be noted that in absolute terms the number of staff members having diplomatic privileges and immunities in New York and the other major duty stations was roughly comparable.

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19. Legal provisions governing the question of importation of household effects and automobiles of United Nations officials assigned to a regional economic commission — Question whether field service officers are officials within the meaning of the Convention on the Privileges and Immunities of the United Nations and of the relevant Headquarters Agreement — Meaning of the term "furniture and effects" under the above-mentioned instruments

Note verbale to the Permanent Representative of a Member State

The Legal Counsel of the United Nations presents his compliments to the Permanent Representative of [name of a Member State] to the United Nations and has the honour to refer to the status, privileges and immunities of United Nations Field Service Officers assigned to the Economic and Social Commission for Asia and the Pacific in Bangkok. By letters dated 20 November 1980 and 20 January 1981 the Director of the Office of the Legal Counsel brought to the attention of the Permanent Representative certain problems encountered by Field Service personnel regarding, in particular, the importation of their household effects including automobiles. The Legal Counsel is dismayed to learn that despite these earlier interventions these problems have not been resolved and that discussions between the ESCAP Secretariat and the Ministry of Foreign Affairs have reached an impasse. The Legal Counsel wishes, therefore, to take the opportunity to set out comprehensively the legal issues in the hope that the authorities concerned will be able to resolve

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Justice, Attorney General's Office) to appear or otherwise to move the court to dismiss the suit on the ground of the Organization's immunities. When the plaintiff is a staff member or a former staff member, the Organization will usually inform the Ministry of the internal recourse procedures available under the Organization's Staff Regulations and Rules.

B. *Actions involving garnishment or attachment of salaries of staff members*

4. In the execution of a judgement against a staff member for a debt owed by the staff member, attempts are sometimes made to require the Organization to pay a part of the salary of the staff member to the creditor. The policy of the Organization is that such a proceeding, which is sometimes referred to as garnishment or attachment of salary, is null and void as far as the Organization is concerned. Service of a garnishment or attachment order upon the Organization is a form of legal process from which the Organization is immune by virtue of section 2 of the Convention on the Privileges and Immunities of the United Nations. In addition, the proceedings would be tantamount to a seizure of assets of the Organization from which the United Nations is exempt under section 3 of the Convention; this is so because any salary to be seized, before it is actually paid to the staff member, forms part of the assets of the Organization.

5. However, since the Organization's immunities afford no justification for a staff member's failure to meet his or her legal obligations, the United Nations lives up to its obligations under the Convention by taking measures to prevent immunity from legal process from defeating creditors' rights. The Organization, therefore, returns garnishment orders to the creditor or to the court office with an explanation of the Organization's immunity and its policy concerning private legal obligations of staff members. The staff member is requested, usually by the Office of Personnel Services, to settle the matter in such a way, either by payment or by further court action, as to avoid embarrassment to the United Nations. Should the staff member disclaim the debt or intend to appeal the judgement, he or she is required, as a matter of proper conduct, to take whatever legal steps are necessary to delay any direct actions *vis-à-vis* his or her salary. The Organization tries to avoid involvement in the question of the validity of court judgements concerning staff in their unofficial capacity. It is against established policy to authorize deductions from regular salary checks for debts to judgement creditors; however, deductions from final salary or other terminal payments due to a staff member upon separation may be made in favour of judgement creditors upon satisfactory evidence being presented.

III. POLICY OF THE ORGANIZATION AS REGARDS DEMANDS FOR INFORMATION ABOUT STAFF MEMBERS

6. It is not the policy of the Organization to respond to demands for personal information concerning staff members. However, the Organization will confirm that a staff member is employed by it and, to the extent that the information requested is in the public domain, the party requesting the information may be referred to a particular source, such as the Staff Regulations and Rules. In some instances the information requested is formally made available to the staff member and the requesting party is notified thereof so that it can make appropriate demands therefor from that person.

AA26.15/AA31.2.2 USA

53. POTENTIAL CIVIL AND CRIMINAL LIABILITY OF MEMBERS OF THE SECURITY AND SAFETY SERVICE—APPLICABILITY OF FEDERAL, STATE AND LOCAL LAW WITHIN THE HEADQUARTERS DISTRICT—IMMUNITY OF UNITED NATIONS OFFICIALS FROM LEGAL PROCESS IN RESPECT OF ACTS PERFORMED BY THEM IN THEIR OFFICIAL CAPACITY

Memorandum to the Assistant Secretary-General for General Services

1. I wish to refer to your memorandum of 18 January 1983 on the potential civil and criminal liability of members of the Security and Safety Service. As your memorandum of the same date to the concerned staff members states, their request for advice on the applicability of the Penal Law

and the Code of Criminal Procedure of New York State and their relation to the Headquarters Agreement is redundant since the subject-matter was most carefully reviewed in 1976 at the time when the Handbook for Personnel of the Security and Safety Service was revised. For the benefit of the staff concerned, however, the following further clarifications may be useful.

2. As a general rule, federal, state and local law applies within the Headquarters District. The Handbook reflects this general rule by incorporating the appropriate standards and norms of local law. The exception which is provided for in section 8 of the Headquarters Agreement, the power to make regulations operative within the Headquarters District, has been utilized sparingly. Only three such regulations have been adopted: regulation No. 1 which deals with the United Nations Social Security System; regulation No. 2 which relates to qualifications for professional or other special occupational services with the United Nations; and regulation No. 3 which concerns the operation of services within the Headquarters District.

3. Of more relevance to the potential civil and criminal liability of the members of the Security and Safety Service is the question of immunity from legal process. Under section 18 (*a*) of the Convention on the Privileges and Immunities of the United Nations, to which the United States is a party, officials of the United Nations shall be immune from legal process "in respect of words spoken or written and all acts performed by them in their official capacity". The United Nations has consistently maintained that it is exclusively within the competence of the Secretary-General to determine when an act is carried out in an official capacity and that this is not a matter which is subject to review by the local authorities (see, for example, the letter dated 11 February 1976 from the Legal Counsel addressed to the Permanent Representative of the United States of America to the United Nations, commenting on a decision rendered in the Criminal Court of the City of New York in the case of *People of the State of New York* v. *Mark S. Weiner*[29]). The potential civil or criminal liability of members of the Security and Safety Service for acts carried out in the performance of their duties is no different from that of any other staff member falling within the purview of section 18 (*a*) of the Convention, that is to say that staff are *prima facie* immune from legal process in respect of such acts, such immunity, however, being subject to a waiver by the Secretary-General in any case where the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations (section 20 of the Convention). It should be noted that under section 29 (*b*) of the Convention the United Nations shall make provisions for appropriate modes of settlement of disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.

5 April 1983

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54. Establishment in a Member State of a parallel exchange rate providing for a more favourable rate of exchange for the United States dollar than the official rate—Question whether the organizations of the United Nations system are entitled to the benefits of the best prevailing rate of exchange

Memorandum to the Deputy Administrator, United Nations Development Programme

1. On 10 January 1983 the Government of [name of a Member State] established a parallel exchange rate which provided for a more favourable rate of exchange for the United States dollar than the official rate. The question has been raised whether the organizations of the United Nations system are entitled to the benefits of the best prevailing rate of exchange which is legally obtainable or whether they must be restricted to the official rate of exchange.

2. The general principle which derives from the law and practice of international immunities is that international organizations are entitled to the benefits of the most favourable legal rate of exchange. This principle, which ensures that any benefit arising from the existence of differential rates accrues to the organizations concerned in the interests of the most efficient use of international

4. The rationale behind the provision is that UNICEF [illegible] in extended society for the interest and benefit of children in the State in question. It is the Government's obligation to ensure that such assistance is used to its fullest for its intended purpose and not in any way for other governmental purposes. Charging duties or taxes to government departments responsible under the UNICEF Plan of Operations would in effect result in UNICEF assistance going to unintended purposes.

5. Therefore, imposition of any tax or duty on the equipment or supplies furnished by UNICEF, whether or not payable by UNICEF, would be inconsistent with the provision under article VII of the Agreement referred to above and should be resisted on that basis.

16 February 1984

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32. IMMUNITY OF UNRWA FROM EVERY FORM OF LEGAL PROCESS UNDER THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS—SYSTEM OF LAW BY WHICH THE QUESTION OF UNRWA'S IMMUNITY FROM JURISDICTION IS TO BE JUDGED—NATURE OF THE IMMUNITY UNDER THAT SYSTEM OF LAW

Memorandum to the Legal Adviser, United Nations Relief and Works Agency for Palestine Refugees in the Near East

Your letter dated 8 February 1984 regarding the arbitration between UNRWA and a company located in the territory of a Member State has been forwarded to this Office for advice on the questions of immunity raised by the Arbitrator in his letter of 2 November 1983 and the accompanying statement of issues on facts and law.

With regard to the questions raised in the Arbitrator's letter, the principal issue is whether the immunity of UNRWA is a matter to be judged under domestic law or some other system of law. For reasons of principle, as well as on sound practical grounds, we are strongly of the opinion that this matter should not be judged by domestic law except to the extent, of course, that it incorporates relevant international obligations. Domestic law may, therefore, be considered as a secondary but not a primary source of evidence of the law.

Fortunately, there is another, well-established system of law by which this matter may be judged, namely, the public international law governing the status, privileges and immunities of international organizations. The formal sources of the system of law are to be found in the relevant constitutive instruments (of the United Nations and UNRWA), and multilateral and bilateral agreements to which the Member State in question is a party and by which it is, therefore, legally bound (*inter alia*, the Convention on the Privileges and Immunities of the United Nations[29]). It can be pointed out in connection with the above-mentioned Convention that Member States obligate themselves to be in a position under their own laws to give effect to the Convention.

A word about the nature of international organization immunity might also be useful in order to head off any arguments by the company in question based on restrictive immunity. The immunity accorded international organizations under this system of law is an absolute immunity and must be distinguished from sovereign immunity which in some contemporary manifestations, at least, is more restrictive. While international immunities may be and, in some cases, must be waived, such waivers must be express. No such waiver has ever been executed in this case.

Where proceedings are brought by a party in the face of such absolute immunity, this may, in our view, give rise to a legally enforceable cause of action and it would not be necessary to establish that the party bringing the action has acted unreasonably. Since the law of international immunity makes specific provisions for the settlement of disputes of a private nature, a party which nevertheless proceeds against an international organization in the

domestic courts infringes the immunity and the international public policy which underlies the law. Organizations must therefore be in a position to defend themselves from such acts of harassment which clearly interfere with their effective functioning and the fulfilment of their programmes and policies.

Since international organizations are recognized entities in international law, courts are required to recognize their immunities. It is not necessary for international organizations to claim the immunities to which they are entitled since such immunity exists as a matter of law and is a fact of which judicial notice must be taken. In practice, a suggestion of immunity is normally made to a court on behalf of an international organization by the competent executive authorities of the States concerned. It goes without saying that in such cases the international organization is not submitting to the jurisdiction of the court.

In the statement of the issues of law and fact, the Arbitrator raises the question whether the goods were immune from arrest in the courts of the State concerned. Assuming that it can be shown that at the relevant time the goods were the property of UNRWA (about which there seems to be no doubt), it is clear that the proceedings taken by the company in question and the decisions of the local court were in violation of and contrary to sections 2 and 3 of the Convention on the Privileges and Immunities of the United Nations which provide immunity from legal process and from any interference, whether by executive, administrative, judicial or legislative action.

Consequently, the company committed an actionable wrong in causing the goods to be unlawfully arrested and UNRWA suffered material losses for which it is entitled to be compensated.

I trust that these comments and advice will be of assistance to you in your response to the Arbitrator's letter.

28 February 1984

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33. Liability questions which might arise from the use of vehicles of the United Nations Disengagement Observer Force by local civilian personnel hired by the contingent of a Member State

Memorandum to the Director, Office of Field Operational and External Support Activities

1. Please refer to your memorandum of 5 March 1984 in which you requested our advice in connection with the use of United Nations Disengagement Observer Force (UNDOF) vehicles by local civilian personnel hired by the contingent of a Member State.

2. The concern in this case is the Organization's liability in the event of an accident involving an UNDOF vehicle if the driver and/or passenger(s) are local civilian personnel hired by the contingent in question. Assuming that the driver is authorized to drive the UNDOF vehicle and does so within the scope of his authorization, the Organization and the driver would be covered by insurance against claims by third parties for bodily injury or property damage. For this purpose, passengers would presumably be regarded as third parties and the Organization as well as the driver would be covered by insurance in respect of claims by passengers.

3. The Organization would have no problem with claims *against* the driver, but there could be a problem with claims *by* the driver, against the United Nations as owner. In that connection, we would recommend that the contingent concerned be requested to confirm that it would insure the drivers either through "self-insurance" along the lines of Appendix D to the Staff Rules, or through commercial insurance, and that it would hold the United Nations harmless from any claims by their drivers. If such confirmation is forthcoming, we do not foresee any problem of a legal nature as far as insurance is concerned.

tive of (name of Member State) to the United Nations and has the honour to refer to the 1985 Finance Law, articles 37 and 57 of which stipulate *inter alia* that all employees of international organizations who are of the nationality of the Member State must pay one twelfth of their annual salary and 20 per cent of their indemnities as a special contribution in 1985.

The Legal Counsel wishes to draw the attention of the Permanent Representative to the following: By decision of the General Assembly in resolution 76 (I) of 7 December 1946, all staff members of the United Nations, regardless of nationality, place of recruitment or rank, are officials within the meaning of section 17 of the Convention on the Privileges and Immunities of the United Nations and enjoy exemption from taxation on the salaries and emoluments paid to them by the United Nations pursuant to section 18 (*b*) of the Convention, to which the State concerned acceded on 27 April 1962. Consequently, in the view of the United Nations, the 1985 Finance Law is not applicable to United Nations staff members of the nationality of that State.

The Legal Counsel also wishes to take this opportunity to point out that article IX, paragraph 1, of the United Nations Development Programme Standard Basic Assistance Agreement, to which the State concerned is a party, also makes applicable to the United Nations and its organs, including UNDP and subsidiary organs of the United Nations acting as UNDP Executing Agencies, and to their officials, the provisions of the Convention.

The Legal Counsel would be grateful if the foregoing views of the United Nations could be brought to the attention of the appropriate authorities with a view to ensuring the non-application of the 1985 Finance Law to officials of the United Nations.

19 March 1985

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24. TRAFFIC ACCIDENT INVOLVING AN EMPLOYEE OF A COMPANY WHICH IS A SUBCONTRACTOR TO THE UNITED NATIONS DEVELOPMENT PROGRAMME—QUESTION WHETHER THE PERSON IN QUESTION COULD BE REGARDED AS HAVING BEEN ENGAGED IN OFFICIAL BUSINESS AT THE TIME OF THE ACCIDENT

Letter to the Permanent Representative of a Member State to the United Nations

I wish to refer to our meeting of 16 May 1985, at which we discussed an accident involving an employee of a company which is a subcontractor to UNDP/Office for Project Execution (OPE). You indicated that, while your authorities do not question the applicability of the UNDP/Standard Basic Assistance Agreement (SBAA) (and through the SBAA the Convention on the Privileges and Immunities of the United Nations) to this case, some questions have been raised as to whether the person in question could be regarded as having been engaged in official business at the time of the accident.

In response to your request for clarification on this point we are pleased to confirm the following: The United Nations (and UNDP) as a matter of law and practice take the view that any act which is performed by officials, experts, consultants or, in the case of UNDP, "persons performing services" for UNDP within the meaning of article IX of the UNDP/SBAA which is directly related to the mission or project, such as driving to and from a project site, would constitute prima facie an official act within the meaning of section 18 (*a*) of the Convention on the Privileges and Immunities of the United Nations. Travel to and from a project site necessarily forms part of the work of the persons engaged in the project. In the particular case of the person concerned, the fact that he was driving a project vehicle at the time of the accident would be an additional indication that prima facie he was performing an official act. Subsequent to our meeting, we requested information from UNDP regarding traffic accidents involving its official vehicles in Africa within the last few months and in which the Organization has followed the practice outlined above. Since December 1984 three accidents have occurred. In two of those cases the accidents occurred while the official concerned was driving to or from a project site, while in the third case the accident occurred while the official was driving from the UNDP office to the local airline office to arrange for home leave travel.

We also wish to take this opportunity to underline that, while the Secretary-General alone deter-

mines what may constitute an official act, the United Nations is under an obligation to cooperate with the appropriate authorities to facilitate the proper administration of justice and to prevent any abuse of privileges and immunities. You may, therefore, rest assured that before making a final determination under section 18 (*a*) of the Convention the Secretary-General always gives due consideration to all of the relevant circumstances. In the present case, if facts come to light which would indicate that it would be improper to invoke section 18 (*a*), the Secretary-General will refrain from doing so.

As we also informed you, the United Nations insures all of its vehicles and as a matter of policy seeks to settle all insurance claims either directly by the insurance company or, if necessary, by arbitration or judicial determination. It is not the policy of the United Nations to interpose its immunity to prevent the settlement of such claims.

22 May 1985

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25. TRADE CONTROL REGULATIONS ISSUED IN A HOST STATE—APPLICABILITY OF THE REGULATIONS TO THE SHIPMENT OF FURNITURE AND PERSONAL EFFECTS TO THE HOME COUNTRY BY MEMBERS OF A PERMANENT MISSION TO THE UNITED NATIONS—ARTICLE 31 OF THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS

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

The Legal Counsel of the United Nations presents his compliments to the Permanent Representative of (name of the host State) to the United Nations and has the honour to refer to the question of the shipment of the furniture and personal effects of members of the Permanent Mission of (name of a Member State) to the United Nations on their return to their home country. The United Nations has been advised that several members of the Permanent Mission have recently encountered difficulties in making the necessary arrangements for the shipment of their furniture and personal effects to the home country due to the trade control regulations issued in the host State.

The applicability of the regulations to the shipments of members of the Permanent Mission of (name of the Member State) to the United Nations is governed by the relevant rules of international law as well as by the language of the domestic regulations.

Under article 31 of the Vienna Convention on Diplomatic Relations of 1961,[26] a diplomatic agent enjoys immunity from the civil and administrative jurisdiction of the receiving State except in the case of (*a*) a real action, (*b*) an action relating to succession or (*c*) an action relating to any professional or commercial activity exercised by the diplomatic agent outside his official functions. The shipment of a diplomatic agent's furniture and personal effects clearly forms part of his official functions and would, therefore, be immune from the civil and administrative jurisdiction of the host State, including the regulations in question. Furthermore, the regulations themselves would seem to bear out that it was not the intention of the executive department, to which the President has delegated his authority in this respect, to prevent the shipment of furniture and personal effects by diplomatic and official personnel of the Member State in question employed by the diplomatic missions of that State or its missions to international organizations located in the host State. An appropriate section of the regulations, for example, expressly authorizes certain imports for diplomatic or official personnel, as follows:

> "All transactions ordinarily incident to the importation of any goods or services into the [name of the host State] from [name of Member State] are authorized if such imports are destined for official or personal use by personnel employed by diplomatic missions [of this State] or [its] missions to international organizations located in the host State, and such imports are not for resale."

Although no equivalent export provision appears in the regulations, the logical implication of the section in question is that the exportation of furniture and personal effects lawfully imported shall be permitted.

In the light of the foregoing, the Legal Counsel would be most grateful if the Permanent Representative of (name of the host State) to the United Nations could intervene with the appropriate author-

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They do not appear to shed any additional light or provide guidance on these matters.

10. However, for a "non-unanimity" procedure, or a weighted-voting system, to be included in a treaty, such procedure or system must be adopted by the parties either at the conclusion stage or, alternatively, in full compliance with the provisions of the treaty, if the treaty has entered into force.

11. Thus, in the case of the 1958 Agreement, the procedure provided for in article 12 for the amendment of the Regulations could only be modified in accordance with the provisions of article 13.

23 August 1991

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24. DECISION OF A COURT OF A MEMBER STATE REFUSING TO GRANT UNICEF IMMUNITY—SUGGESTION THAT UNICEF SHOULD ENGAGE COUNSEL TO PLEAD IMMUNITY ON APPEAL OR IN ANY PROCEDURE TO REVIEW THE DECISION—OBLIGATIONS OF THE MEMBER STATE IN QUESTION UNDER THE AGREEMENT IT CONCLUDED WITH UNICEF AND UNDER THE 1946 CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

Memorandum to the Executive Director, United Nations Children's Fund

1. I should like to refer to the memorandum of 14 January 1991 concerning a former UNICEF employee. Attached to the memorandum is a copy of a letter dated 14 January 1991 from a legal officer in the Ministry of External Affairs of (name of a Member State) to the representative of UNICEF in this country concerning the recent decision of the Industrial Court refusing to grant UNICEF immunity in a case brought by the person in question and entering a judgement in that person's favour.

2. We are pleased that the Ministry agrees with our position that UNICEF should neither submit to the jurisdiction of the Court nor contest the merits of the case absent a waiver of immunity.

3. We cannot, however, agree with the procedure suggested by the Ministry that UNICEF engage counsel to plead immunity on appeal or in any procedure to review the decision. We cannot agree either to the suggestion that UNICEF bring to the notice of the Court in question the certificate prepared by the Ministry of External Affairs affirming UNICEF's immunity.

4. In our view, the representative of UNICEF in the country in question should inform the Ministry of External Affairs at the highest possible level that the United Nations Secretariat is confident that the Government intends to honour its commitments to the United Nations and UNICEF contained both in the Agreement it entered into with UNICEF in 1978 and in the 1946 Convention on the Privileges and

Immunities of the United Nations.[33] The attention of the Ministry should be drawn in particular to the following provisions of article II of the 1946 Convention:

"*Section 2.* The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.

"*Section 3.* The premises of the United Nations shall be inviolable. The property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action."

5. In addition, the Ministry should be requested to take whatever measures are necessary to ensure implementation of the above-mentioned treaty obligations. Any attempt by the officials of the State in question to enforce the decision in question or extend any measures of execution against the United Nations or UNICEF would constitute a breach of those obligations. It is for the Ministry of External Affairs to communicate with other branches of the Government, including the judiciary, with regard to the Government's international legal obligations, not the United Nations.

6. You may also wish to inform the representative of UNICEF that we will also be contacting the Permanent Mission of the State concerned at Headquarters along the same lines.

29 January 1991

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25. STATUS OF A DIPLOMAT WHO WAS ALREADY A PERMANENT RESIDENT IN THE HOST STATE BEFORE BEING APPOINTED TO A PERMANENT MISSION TO THE UNITED NATIONS—ARTICLE 38 OF THE 1961 VIENNA CONVENTION ON DIPLOMATIC RELATIONS—QUESTION WHETHER THE UNITED NATIONS SHOULD REQUIRE CREDENTIALS FOR THE APPOINTMENT OF A CHARGÉ D'AFFAIRES OF A PERMANENT MISSION IN GENEVA—ARTICLE 19, PARAGRAPH 1, OF THE VIENNA CONVENTION

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

1. This is with reference to your cable dated 18 June 1991 concerning the status of the chargé d'affaires a.i. of the Permanent Mission of (name of a Member State) in Geneva.

2. In his letter of 13 June 1991, the Deputy Permanent Observer of Switzerland raised a question concerning the current Swiss policy with respect to diplomats whose residence in Switzerland was already of a permanent nature before being appointed to a permanent mission to the

The above provisions clearly indicate that ESCAP officials are entitled, within six months after first taking up their post in the host State, to import free of duty and other levies and restrictions on imports their "furniture and effects". However, as far as the importation of automobiles is concerned, a different requirement is applicable, namely, an entitlement to the same regulations as are in force in the host State for the resident members of diplomatic missions of comparable rank.

Such an understanding is correctly reflected in the Regulation of the Ministry of Foreign Affairs on motor vehicles in relation to persons entitled to privileges, which came into force on 19 June 1989. According to article 5.4 of the Regulation, staff members of the office of an international organization of level and rank equivalent to that of a (article 5.1) diplomatic agent of ambassadorial rank or of a (article 5.2) diplomat of lower ranks or a career consular officer shall be entitled to the same number of motor vehicles as the above-specified individuals. The Regulation does not establish any time-limit for the above categories of individuals concerning the right to import a free-of-duty automobile after first taking up their posts in the host State. The six-month time-limit is specified by the Regulation, pursuant to article 5.3, only with respect to the administrative and technical staff of a diplomatic mission.

Therefore, in the view of the Organization, the provisions of the second part of subparagraph (*i*) of section 17 should not be considered as establishing a six-month time-limit for the importation of duty-free automobiles by ESCAP officials at the Professional level.

The Legal Counsel trusts that the host State will bring its treatment of ESCAP officials into complete conformity with its obligation under the 1954 Agreement with a view to ensuring the applicability to them of the same regulations concerning the importation of automobiles as are in force in the host State for resident members of diplomatic missions of comparable rank.

31 October 1991

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29. QUESTION WHETHER THE SECRETARY-GENERAL SHOULD WAIVE IMMUNITY OF A UNICEF STAFF MEMBER TO ENABLE HER TO TESTIFY BEFORE A NATIONAL COMMISSION OF INQUIRY—ARTICLE V, SECTIONS 18 (*a*) AND 20, OF THE 1946 CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS—ALERNATIVE WAYS FOR UNICEF TO COOPERATE WITH THE COMMISSION OF INQUIRY

Memorandum to the Director, Division of Personnel, United Nations Children's Fund

1. This is in response to your inquiry as to whether the United Nations should waive immunity in the case of a UNICEF staff member to enable her to testify before a commission of inquiry appointed by national

authorities to investigate an incident in which she was one of the unfortunate victims.

2. According to the information contained in the documents attached to your memorandum, the staff member was, at the time of the incident, travelling on official business of the Organization. In accordance with article V, section 18 (*a*), of the 1946 Convention on the Privileges and Immunities of the United Nations,[44] to which the State concerned became a party in 1948 without any reservations, officials of the Organization are immune from legal process, *inter alia*, in respect of all acts performed by them in their official capacity. The acceptance by the State in question of the application of that Convention to UNICEF was confirmed in article VII of the Agreement it concluded with UNICEF on 5 April 1978.[45]

3. Under article V, section 20, of the Convention, the Secretary-General "shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations". In this regard, we fully share the view expressed in your memorandum that, taking into account all relevant circumstances of this particular incident, the United Nations should not waive immunity in this case and, therefore, the staff member in question should not testify before the commission of inquiry.

4. It should be noted, however, that the commission of inquiry is entrusted with an important task and, among other things, should consider and recommend measures which may be adopted to prevent the recurrence of such incidents. Therefore, our Office is of the view that UNICEF should cooperate with the commission and provide it, to the extent possible, with the information that could facilitate its work. We would recommend that UNICEF should, in a note to the Ministry of Foreign Affairs, indicate its readiness to reply in writing to the questions which the Ministry would address to it on behalf of the Commission.

5. At this stage, in our view, it would be premature to approach the authorities concerned at the level of the Secretary-General. We would prefer the second alternative suggested in your memorandum, whereby the local representative of UNICEF will send a note to the Ministry of Foreign Affairs invoking immunity from legal process on behalf of the United Nations.

5 April 1991

Organization, and to guarantee them such privileges and immunities as are necessary for the independent exercise of their functions.

3. In response to the inquiry as to whether all United Nations officials enjoy only functional immunities, we would like to point out that under article V, section 19, of the aforementioned Convention officials of the United Nations at the level of Under-Secretary-General and Assistant Secretary-General enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law. In addition, most of the headquarters agreements of the regional commissions concluded by the United Nations with host Governments contain provisions envisaging that officials of those commissions starting from a certain level enjoy privileges and immunities accorded to diplomats. Thus, the Agreement relating to the headquarters of the United Nations Economic and Social Commission for Western Asia,[1[illegible]] signed on 13 June 1979 between the United Nations and the Government of the host country, provides in paragraph 3 of article 7 that officials of the Commission at the P-4 level and above, regardless of their nationality, shall enjoy during their residence in the State in question and their service with the Commission the facilities, privileges and immunities granted by the Government of that State to diplomats of comparable rank of the diplomatic missions. Privileges and immunities enjoyed by diplomats under international law are spelled out in the 1961 Vienna Convention on Diplomatic Relations, to which (name of the Member State) is a party. It is our understanding that the Coordinator refers in his memorandum to the provisions of that Convention. The 1979 headquarters Agreement of ESCWA also provides that all officials of the Commission, irrespective of their level, enjoy immunity from seizure of their personal and official effects and baggage. However, it should be noted in this regard that the provisions of the 1979 headquarters Agreement are applicable only to the officials of ESCWA and do not apply to United Nations officials who are presently located in the Member State performing functions which are unrelated to ESCWA.

4. It should be kept in mind that, although the 1979 Headquarters Agreement of ESCWA generally provided wider privileges and immunities than the 1946 Convention, in some instances it was more restrictive, which reflected new emerging tendencies in international law. In particular, many Governments, concerned about security matters, insisted on the inclusion in their agreements with international organizations of provisions envisaging that immunity from seizure of baggage of officials or experts could be provided except in cases of *in flagrante delicto*. The 1979 headquarters Agreement of ESCWA also contains a similar restriction. Subparagraphs 1 (*b*) and 6 (*a*) of article 8 of that Agreement state that the officials of the Commission and its experts, *inter alia*, enjoy immunity from seizure of their personal and official effects and baggage except in case of *in flagrante delicto*.

6 October 1992

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44. REQUEST FOR WAIVER OF IMMUNITY IN CONNECTION WITH A MOTOR VEHICLE ACCIDENT OF A UNITED NATIONS VOLUNTEER PERFORMING SERVICES ON BEHALF OF THE UNITED NATIONS DEVELOPMENT PROGRAMME — QUESTION WHETHER THE VOLUNTEER WAS ACTING IN AN OFFICIAL CAPACITY WHEN THE ACCIDENT OCCURRED — LEGAL STATUS OF

THE VOLUNTEER UNDER THE UNDP STANDARD BASIC ASSISTANCE AGREEMENT AND THE 1946 CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

Memorandum to the Senior Policy Officer (Legal), Division of Personnel, United Nations Development Programme

1. This is in reply to your memorandum of 7 January 1992 in which a waiver of immunity has been requested in connection with the motor vehicle accident involving a United Nations volunteer which occurred on 6 May 1991 while he was driving a Government-owned vehicle from work to his home. The Resident Representative has stated that the volunteer, performing services on behalf of UNDP in (name of a Member State), was "on duty station" at the time the accident occurred.

2. The legal status of United Nations Volunteers, in the context of the activities of UNDP in the State in question, is governed by the UNDP Standard Basic Assistance Agreement (SBAA) signed with the State in question on 5 November 1980. Under article IX, paragraph 4 (*a*), of this Agreement, "the Government shall grant all persons other than Government nationals employed locally, performing services on behalf of the UNDP, . . . the same privileges and immunities as officials of the United Nations". In accordance with article IX, paragraph 5, of the Agreement, the expression "persons performing services" includes volunteers. Accordingly, the person in question, a volunteer assigned to serve with UNDP in the country in question, enjoys the privileges and immunities granted to United Nations officials as provided for in article V, section 18, of the 1946 Convention on the Privileges and Immunities of the United Nations,[101] and not those inherent to diplomatic envoys as indicated in his letter dated 3 December 1991.

3. Under article V, section 20, of the above-mentioned Convention, "Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves . . .". Accordingly, privileges and immunities of United Nations officials are essentially linked to official acts they perform on behalf of the Organization and as such are functional.

4. As a general rule, travel between home and office is not in itself considered to be an official act within the meaning of article V, section 18, of the Convention. Therefore, officials who commit traffic violations in transit between their home and the office and vice versa are not considered to be performing an official act for which they can assert immunity from legal process. The position taken by the United Nations in this connection has been published as a legal opinion in the *United Nations Juridical Yearbook*.[102] In any event, as a matter of good conduct, the United Nations expects its staff members, regardless of rank and status, to observe local laws and regulations.

5. However, there may be exceptions to the above-mentioned general rule in the light of particular circumstances, and in such a case, the Secretary-General would consider raising the question of functional immunity if the particular facts surrounding the incident would warrant it. Therefore, in order to enable the Secretary-General to take a decision regarding a possible waiver of immunity, it is necessary to clarify whether the United Nations official involved in a given matter was acting in an official capacity or not. This determination is necessary as a precondition to any decision since no question of a waiver of

immunity would arise unless it is determined that the official was acting in his official capacity.

6. Accordingly, it is necessary in the case currently under consideration to determine, before raising the question of waiver of immunity, whether the volunteer was acting, when the accident occurred, in an official capacity. From the information contained in your above-mentioned memorandum and attachments thereto, it does not seem that the facts surrounding the accident could warrant that he was indeed acting in an official capacity. For the purpose of determining that the volunteer was driving home from work in an official capacity, we would need to be informed of the circumstances and reasons, if any, of such determination. A mere statement made by the Resident Representative is not sufficient.

7. As to the civil action against the volunteer, we gather that the automobile that was used when the accident occurred was a Government-owned vehicle which he uses to carry out his official duties. It would be appreciated if you could provide our Office with details regarding ownership of the vehicle and the conditions under which the vehicle has been made available to the volunteer. This information is necessary, in respect of the third-party claims filed against the United Nations volunteer, for purposes of determining the applicability of article X, paragraph 2, of the SBAA, which provides that the Government of the State in question "shall be responsible for dealing with claims which may be brought by third parties against the UNDP or an Executing Agency, their officials or other persons performing services on their behalf, and shall hold them harmless in respect of claims or liabilities arising from operations under this Agreement. The foregoing provision shall not apply where the parties and the Executing Agency are agreed that a claim or liability arises from the gross negligence or wilful misconduct of above-mentioned individuals."

8. However, considering the conditions under which the United Nations Volunteers serve outside their home countries and the possibility of the volunteer being convicted under the criminal charges, we would advise that UNDP consider engaging an attorney in the country in question to represent the volunteer in the criminal proceedings instituted against him. The attorney engaged by UNDP should also be requested to enter a defence for him in the civil proceedings as well, pending our determination as to whether the entire civil proceedings should be taken over by the Government. Once the attorney is engaged, we would like to receive a report from him on his assessment of the two cases and the fees he would charge.

23 January 1992

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45. CONSEQUENCES ON LIABILITY TO PAY UNITED STATES INCOME TAX OF A DELAYED SUBMISSION OF A WAIVER OF PRIVILEGES AND IMMUNITIES BY A STAFF MEMBER — IMMIGRATION AND THE TAX STATUS OF THE STAFF MEMBER IN QUESTION — QUESTION OF THE REIMBURSEMENT BY THE UNITED NATIONS OF TAXES IMPOSED BY THE UNITED STATES INTERNAL REVENUE SERVICE

Memorandum to the Director of the Accounts Division, Office of Programme Planning, Budget and Finance

1. Reference is made to your memoranda of 7 November 1991 and 15 March 1992 requesting our views as to the consequences on liability to pay

(NAMES REDACTED)

91

PCS/RZ/ob

Mr. Joseph N. Acar, Personnel Officer
Headquarters, New York

5 May 1982

Mr. Padamjit Singh, Chief
Personnel Services Section

Paul C. Szasz, Principal Officer
Office of the Legal Counsel

Permanent Residence Status.

1. Your memorandum dated 15 March 1982 addressed to Mrs. [redacted] has been forwarded to this Office. We apologize for the delay in our reply, which is confined to the legal issues raised in your memorandum. Those questions which address matters of personnel policy and administration may be more authoritatively dealt with by the Office of Personnel Services.

2. As a preliminary observation it should be underlined that, as set out in both Mr. [redacted] memorandum to Mr. Mr. [redacted] of 15 December 1976 and Mr. J.F. Scott's memorandum to Mr. [redacted] of 10 September 1979, the broader implications of the retention or acquisition of permanent residence status by staff members in the professional category for the principle of geographical distribution militate very strongly against such status (whether in the country of duty station or a third country) and therefore such status must, in any event, be considered an exception to the general rule.

With regard to the question raised in part A of your memorandum, Staff Rules 104.4(c) and 104.7(c) and Information Circular ST/AFS/SER.A/238 do not deal with exactly the same subject matter. While Rule 104.4(c) establishes the general obligation of staff members to notify the Secretary-General of any intent to acquire permanent residence status and Rule 104.7(c) recites the consequences of such change of status, the Circular addressed the particular problems arising from the visa status of non-United States staff members serving in the United States. In particular, ST/AFS/SER.A/238 clarified that a staff member wishing to retain permanent residence status in the United States is required to execute a written waiver of privileges and immunities. Since privileges and immunities of United Nations officials attach not to the individual but to the Organization and only the Secretary-General may waive the immunity of officials, the execution of such a waiver requires the express authority of the Secretary-General. Only the Secretary-General has the authority to waive immunity, an authority which has not been delegated to any other organ in the United Nations system, and which he has not delegated to any other official.
In its Judgement No. 66 ([redacted] v. Secretary-General of the United Nations) the Administrative Tribunal specifically discussed the Circular and upheld the Secretary-General's authority to deny permission for a waiver.

/..

With regard to the questions in part B, I believe that Mr. Scott's memorandum of 10 September 1979 summarizes the situation as clearly as possible. It may not be possible to provide a more precise policy, but the Office of Personnel Services may be in a position to do so.

With regard to the points raised in part C of your memorandum, we would only wish to point out that Switzerland does not require staff members to execute a waiver of immunity and that, therefore, the question of authorization by the Secretary-General does not arise in the same context as in New York. Staff Rules 104.4(c) and 104.7(c), of course, apply and the general policy of the Organization referred to in paragraph 2 above is equally applicable to all duty stations.

Finally, with regard to the case of the UNICEF staff member referred to in paragraph 4 of your memorandum, as pointed out in paragraph 3 above the Secretary-General alone may waive immunities and it appears likely that the waiver in this case was improperly executed. The application of the general policy of the Organization in this case would normally lead to a request to the staff member to relinquish his permanent residence status in the United States.

In deciding whether or not he should be required to relinquish his residence status at this time, the following factors should be taken into account:

(a) The general policy of the Organization, as stated in paragraph 2 above;

(b) Whether or not the waiver of immunity was properly authorized;

(c) If properly authorized, are the circumstances that were taken into account in granting such authorization (e.g. some special reason for maintaining close ties to the United States) still relevant;

(d) Are there at present any special circumstances for maintaining residence status;

(e) Can the staff member argue that he was in any way disadvantaged by having been permitted to maintain his residence status all these years while now being required to relinquish it (i.e. would he have made different personal plans);

(f) The fact that under existing United States law and circumstances the staff member may, on separation, find it very difficult to regain his resident status — and so should not be asked to relinquish it if he is close to retirement.

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RZ/ob

2 April 1984

Mr. Philippe Giblain
Principal Legal Liaison Officer, UNOG

[NAMES REDACTED]

John F. Scott, Director and Deputy to the
Under-Secretary-General in charge of the
Office of Legal Affairs

Request for a further waiver of immunity in respect of Mr. [redacted].

1. Reference is made to your memorandum of 22 March 1984 concerning the request by the Departement de Justice et Police of Geneva for a further waiver of immunity in respect of Mr. [redacted]. The request dated 22 February 1984 relates to private loans contracted for by the staff member while serving as his country's ambassador to Belgium in 1977.

2. It is clear from the facts that no conceivable United Nations interest can be served by permitting the staff member to shelter behind an immunity from legal process in this matter. Furthermore, since the loan was entered into before Mr. [redacted] became a staff member, the United Nations has no interest in discussing the matter with the Government of Benin or anyone else.

3. Pursuant to Section 17 and taking into account Section 18 of the Agreement between the United Nations and Switzerland of 1946, the Secretary-General has agreed to a waiver of immunity of Mr. [redacted], it being understood that this waiver extends solely to actions arising from the personal loans contracted by Mr. [redacted] and referred to in the letter dated 22 February 1984. In our view, it is for the Swiss authorities to decide whether the acts performed by Mr. [redacted] while ambassador in Belgium in 1977 are entitled to the cloak of diplomatic immunity and, if so, what steps should be taken vis-à-vis the Government in that regard.

Translated from French

The Secretary-General

23 July 1984

Sir,

I have the honour to acknowledge receipt of your letter of 12 April 1984, which I received on 24 May 1984.

On 22 February 1984 the Department of Justice and Police in Geneva formally requested that immunity from jurisdiction and execution should be lifted in respect of all the debts of Mr. [deleted]. In view of the facts, and taking into account the provisions of sections 17 and 18 of the Interim Arrangement on Privileges and Immunities of the United Nations, concluded between the Secretary-General of the United Nations and the Swiss Federal Council in 1946, I was obliged to lift the immunity of Mr. [deleted] in order not to obstruct justice and to prevent immunity from being abused. At the same time, we stipulated that it was for the Swiss authorities to determine whether the acts committed by Mr. [deleted] in his capacity as Ambassador of Benin at Brussels in 1977 might be covered by an immunity based on the diplomatic position held by Mr. Tevoedjre at the time. A diplomatic immunity of that kind would not be affected by the lifting of the immunity which Mr. [deleted] held by virtue of his United Nations post.

Before replying to your letter, I asked our services in Geneva to inform me of the current state of affairs in Switzerland. According to the information gathered, it seems that the lifting of immunity has had no judicial consequences to date; the creditor is no doubt aware of the state of health of Mr. [deleted].

In closing, I wish to assure you, Sir, that despite the lifting of immunity, the United Nations services in Geneva will continue to provide assistance to Mr. [deleted] and to his family so that this problem can be resolved.

Accept, Sir, the assurances of my highest consideration.

(Signed) Javier Pérez de Cuéllar

His Excellency Mr. [deleted]
Minister for Foreign Affairs
and Cooperation
[deleted]

(NAMES REDACTED)

94

RZ/ob

Mr. [redacted], Principal Legal Liaison Officer
United Nations at Geneva

8 January 1985

John F. Scott, Director and Deputy
to the Under-Secretary-General
Office of the Legal Counsel, OLA

Request by the Swiss authorities for a waiver of or renunciation of immunity of a United Nations official in connection with his activities as a member of the board (administrateur) of a cooperative apartment building.

1. I wish to refer to your memorandum of 17 December 1985 on the above subject which was addressed to the Legal Counsel.

2. In our view, in case of a real action relating to private immovable property, there is no necessity for the Secretary-General to agree to a waiver or to make any provision for renunciation of immunity since Article 31 of the Vienna Convention on Diplomatic Relations provides that a diplomatic agent shall not enjoy immunity from civil and administrative jurisdiction in such cases.

3. However, it is conceivable that a board member of a cooperative or condominium apartment may be sued, in that capacity, in an action which is related to the property (e.g. negligence) but which is nevertheless not a real action within the meaning of Article 31 of the Vienna Convention. In such cases, it would be in accordance with the spirit and the law governing the Geneva headquarters arrangements to record our understanding that no immunity from civil and administrative jurisdiction would apply and that the Secretary-General does not intend to invoke immunity in such cases.

PCS/FMS/FE/et/zm

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UNITED NATIONS NATIONS UNIES

POSTAL ADDRESS—ADRESSE POSTALE: UNITED NATIONS, N.Y. 10017
CABLE ADDRESS—ADRESSE TELEGRAPHIQUE: UNATIONS NEWYORK

REFERENCE:

31 May 1988

Dear Ms. [redacted],

File No.: 111LRB399192J
Insured: United Nations
Claimant: [redacted]
D/L: 1/14/85

This responds to your letter to Mr. Frank Eppert of 19 May 1988 regarding the claim against the United Nations by Ms. [redacted].

Our letter of 3 May addressed to Mr. [redacted], Claim Representative of The Travelers Companies, authorized your company to enter a voluntary appearance on behalf of the United Nations in Ms. [redacted] case, but also stated that such authority was limited to the insurance coverage of $3,000,000. We note, in this respect, that your attorneys have advised that a voluntary appearance cannot be qualified and that once waived, the Organization's immunity cannot be re-asserted in respect of any award in excess of the insurance limit. Consequently, you requested an unqualified waiver of the Organization's immunity to enable The Travelers to enter the voluntary appearance, or otherwise authorize The Travellers to assert the United Nations' immunity.

The United Nations is immune from every form of legal process by virtue of, among others, the Convention on the Privileges and Immunities of the United Nations, 1 U.N.T.S. 15, 21 U.S.T. 1418, TIAS 6900. It should be noted, in this respect, that the Convention requires the United Nations to provide appropriate modes for settlement of disputes of a private law nature to which the United Nations is a party, and while it permits waiver of immunity from suit to allow adjudication of such claims, according to Section 2 of the Convention, "no waiver of immunity shall extend to any measure of execution". The policy of insurance with The Travellers purchased by the United Nations was intended to provide the requisite mechanism for satisfaction of claims, such as that of Ms. [redacted], through negotiations or by court action if necessary by waiving the immunities of the Organization. Therefore, it is not the intention of the Organization to assert its immunity in this case. However, any waiver of immunity authorizing an appearance on behalf of the Organization, is of necessity subject to the provisions of Section 2 of the Convention referred to above.

Very truly yours,

Paul C. Szasz, Deputy to
the Under-Secretary-General
and Director, General Legal Division
Office of Legal Affairs

(NAMES REDACTED)

Mrs. Meike Noll-Hagenfeld
Senior Legal Officer
United Nations Office at Geneva

17 November 1989

Ralph Zacklin, Director and
Deputy to the Under-Secretary-General
Office of Legal Affairs

Request for a waiver of immunity in respect of Mr. [redacted]

1. I wish to refer to your memorandum of 6 November 1989 by which you provided further clarifications in connection with the above subject.

2. Although the provisions of Article 31(1)(b) of the Vienna Convention on Diplomatic Relations referred to in my memorandum of 26 October 1989 could have been applicable in this case, it seems that the time factor involved in the nature of the claim and in the above-mentioned provisions of the Vienna Convention, raised a slight difference in the interpretation of the case at hand.

3. In the light of all circumstances and taking into account Section 17 of the Geneva Headquarters Agreement whereby the Secretary-General has the right and the duty to waive the immunity of any official where such immunity would impede the course of justice and can be waived without prejudice to the interest of the Organization, favourable action has been taken on the request made by the Swiss authorities and Mr. [redacted] himself for the waiver of immunity of the latter. Accordingly, the Secretary-General has agreed to a waiver of immunity of Mr. [redacted], it being understood that this waiver extends solely to actions arising from his activities as an administrator of the bank accounts of Mr. [redacted], as described in your memorandum dated 10 October 1989.

UNITED NATIONS NATIONS UNIES

INTEROFFICE MEMORANDUM MEMORANDUM INTERIEUR

97

TO: A: Mr. Federico Riesco, Director
Staff Administration and Training Division
OHRM

DATE: 19 March 1990

REFERENCE: [illegible]

THROUGH: S/C DE:

FROM: DE: Sinha Basnayake, Director
General Legal Division, OLA

(NAMES REDACTED)

SUBJECT: OBJET: [redacted]

1. Reference is made to your memorandum of 15 February 1990 on the above-referred to subject, which was the subject of an earlier exchange of memoranda between us (see yours of 27 April 1989 and my reply of 1 December 1989).

2. Our comments on the issues raised in your latest memorandum are as follows:

A. Procedure (see para. 2(a) of your memorandum)

3. The applicable immigration regulation (see 8 C.F.R. section 247.11, attached) requires that an individual lawfully admitted for permanent residence status, who is also entitled to G-4 status, execute the waiver; if he does not do so, he will have his status re-adjusted from that of permanent resident to that of G-4 by the U.S. Immigration and Naturalization Service. There is no requirement under that regulation that, in the case of a UN staff member, evidence be produced of the Secretary-General's consent to the execution of the waiver (see, however, our comments contained in para. 5 below). A copy of the standard form of waiver to be executed is attached for your information. As to the procedure followed by U.S. authorities, we understand that normally the standard form of waiver is executed on the day the individual is interviewed by a U.S. immigration official. On occasion when, for some reason, the waiver is not executed before a U.S. immigration official, the U.S. Permanent Mission to the UN will arrange, as a matter of convenience, for the waiver's execution at the Mission.

B. Is the Secretary-General's consent required for the waiver to be legally effective under U.S. law? (see para. 2(b) of your memorandum)

4. Privileges and immunities are granted to UN officials in the interests of the Organization, and not for the benefit of the individuals themselves. It is for the Secretary-General alone to decide whether to waive the privileges and immunities granted to individuals based on their status as officials (see, generally, Article ~~V, Section~~ 20, Convention on the Privileges and Immunities of the UN ["Convention"]). From the UN standpoint, therefore, a waiver extended without authority from the Secretary-General would be ineffective.

5. Following the U.S. Senate's advice and consent to its ratification, the U.S. President ratified the Convention on 15 April 1970, and it became the law of the U.S. as from 29 April 1970 when the instrument of accession was deposited with the Secretary-General. Even if the applicable immigration regulation (see para. 3 above) were to confer some legitimacy on a waiver executed pursuant thereto, we doubt that the provisions of the Convention could be superseded or negated by a regulation promulgated by a Department of the U.S. Executive Branch of government. In our opinion, therefore, it would follow that a waiver executed by a UN official without authorization from the Secretary-General would be ineffective under U.S. law based on that government's accession to the Convention. However, we cannot be certain as to what view the U.S. authorities would take in such a case when the lack of authorization is brought to their attention.

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UNITED NATIONS NATIONS UNIES

INTEROFFICE MEMORANDUM MEMORANDUM INTERIEUR

TO: A: Ms. Meike Noll-Wagenfeld
Senior Legal Officer
Legal Liaison Office, UNOG

DATE: 18 May 1992

REFERENCE:

THROUGH: S/C DE:

FROM: DE: Ralph Zacklin, Director and Deputy to the Under-Secretary-General, OLC

SUBJECT: OBJET: Waiver of immunity of Mr. [redacted]

1. Reference is made to your fax of 11 May 1992 requesting our views as to whether Mr. [redacted] may appeal the decision to waive his immunity in connection with a suit brought against him by his former household employee.

2. Staff Regulation 1.8 provides as follows:

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

3. It is thus clear that is for the Secretary-General to decide whether to waive privileges and immunities in a particular case. In this case there seems no reason why it would be in the interests of the Organization to prevent a household employee of a UN staff member from pursuing a private claim against that staff member in national courts. Although it might be argued that the staff member could appeal such a decision, since Article 1.8 of the Staff Regulations is part of the staff members terms and conditions of employment, such appeal stands little chance of success. In any event, an appeal by Mr. [redacted] does not prevent a decision from taking effect.

4. You may, therefore, advise the Swiss authorities that Mr. [redacted] immunity is waived.

c.c. Mr. Abdou Ciss

UNITED NATIONS NATIONS UNIES

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[NAMES REDACTED]

The Legal Counsel of the United Nations presents his compliments to the United States Mission to the United Nations and has the honour to refer to the latter's note verbale HC-20-93 of 14 April 1993 requesting a waiver of immunity of Mr. [redacted], Mrs. [redacted] and, where applicable, the [redacted] children for purposes of proceedings initiated by Mrs. [redacted] against her spouse, Mr. [redacted] in the Family Court of the State of New York, County of Westchester (Case No. 0-1570-93, File No. 29177). The waiver of immunity is requested "for the purpose of allowing service of summons in this case on Mr. [redacted], and to permit this matter, as set forth in the ... petition, to be heard and adjudicated by the Family Court".

In accordance with the provisions of Section 20 of the Convention on the Privileges and Immunities of the United Nations (1 UNTS 15[1946], 21 UST 1418, [1570] TIAS No. 6900) and in order not to impede the proper administration of justice, the Secretary-General has decided to accede to the request. Accordingly, the immunity of Mr. [redacted], his spouse Mrs. [redacted] and, where applicable, the [redacted] children is waived. This waiver is strictly limited to the purposes set out in the referenced note verbale, that is to say allowing service of the summons in this case on Mr. [redacted] and permitting the legal proceedings to take place at the Family Court of the State of New York, County of Westchester and the adjudication by that Court, and shall not be deemed as a waiver, either expressed or

implied, of immunity for any other purpose.

The Legal Counsel of the United Nations avails himself of the opportunity to renew to the United States Mission to the United Nations the assurances of his highest consideration.

26 April 1993

UNITED NATIONS NATIONS UNIES

POSTAL ADDRESS—ADRESSE POSTALE UNITED NATIONS, N.Y. 10017
CABLE ADDRESS—ADRESSE TELEGRAPHIQUE UNATIONS NEWYORK

(NAMES REDACTED)

REFERENCE:

24 January 1995

Dear Mr. [redacted]

Re: [redacted] Electric Installation Company, [redacted] and [redacted] -- Amended Verified Complaint No. AE-94-1181 16F-94-0424, City of new York Commission on Human Rights

As you will recall, in connection with the above-referenced case, I addressed to you a copy of my letter of 8 August 1994 to the New York City Commission on Human Rights.

By that letter, the United Nations notified all concerned that insofar as it purported to express a cause of action against "[redacted]", the Verified Amended Complaint must be dismissed since Mr. [redacted], being an official of the United Nations, "is immune from suit pursuant to the provisions of Article V, Section 18(a) of the Convention on the Privileges and Immunities of the United Nations (the "General Convention"), adopted on 13 February 1946, 1 UNTS 15 (1946), and acceded to by the United States on 29 April 1970, 21 U.S.T. 148 (1970), T.I.A.S. No.6900".

Recently, a copy of your letter dated 11 January 1995 addressed to Mr. [redacted], Attorney Trainee of the New York City Commission on Human Rights has been brought to my attention. The letter correctly states that "As a United Nations official, Mr. [redacted] enjoys, pursuant to Section 18(a) of the Convention on the Privileges and Immunities of the United Nations (21 U.S.T. 148), immunity from legal process in respect of words spoken or written and all acts performed (by him) in (his) official capacity".

Mr. [redacted]
Minister Counsellor
[redacted] Mission to the
United Nations
New York

However, the United Nations cannot accept as a matter of principle, the assertion contained in your letter that "Whether the alleged acts by Mr. [redacted] giving rise to this suit were performed in his official capacity is a question for the court or other appropriate adjudicative entity. Defendants enjoying official acts immunity must assert that the acts alleged were performed in their official capacity and participate in the process insofar as issues relate to the determination of immunity. If the court or other adjudicative entity finds that the acts complained of were performed in the defendant's official capacity, the defendant is immune from the litigation".

As you know, according to the provisions of Article 97 of the Charter of the United Nations, the Secretary-General "shall be the chief administrative officer of the Organization". Furthermore, under Section 20 of the Convention on the Privileges and Immunities of the United Nations, the Secretary-General has been granted "... the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations" (emphasis added). Based on these provisions, it has been a long-lasting and uncontested practice that the competence to determine what constitutes an "official" or "unofficial" act performed by a staff member is vested solely in the Secretary-General.

In view of the aforegoing observations, the United Nations has never recognized or accepted that courts of law or any other national authorities of Member States have jurisdiction in making determinations in these matters.

Sincerely yours,

Hans Corell
Under-Secretary-General for Legal Affairs
The Legal Counsel

(NAMES REDACTED)

UNITED NATIONS NATIONS UNIES

POSTAL ADDRESS—ADRESSE POSTALE UNITED NATIONS, N Y 10017
CABLE ADDRESS—ADRESSE TELEGRAPHIQUE UNATIONS NEWYORK

REFERENCE.

20 September 1995

Dear Sir or Madam,

RE: In re International Association of Conference Interpreters ("AIIC") and United States Region of the AIIC -- Federal Trade Commission Docket No. 9270

It has come to our attention that the following staff members of the United Nations have been served with subpoenas ad testificandum in connection with the above-captioned proceedings of the Federal Trade Commission: Ms. [redacted], Ms. [redacted], Ms. [redacted], and Mr. [redacted].

The AIIC is not an organ or entity of the United Nations and the activities of its members or associates are not, therefore, activities falling within the official functions of United Nations staff members who may also be members of or associated with the AIIC.

In accordance with Article V, Section 18, of the 1946 Convention on the Privileges and Immunities of the United Nations, 1 UNTS 15 (1946), to which the Government of the United States of America acceded in 1970, 21 UST 1418, [1970] TIAS No. 6900, officials of the United Nations "shall be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity". I am writing to advise you that the privileges and immunities accorded to the above-referenced staff members under the Convention are being maintained in respect of these proceedings by the Organization in regard to their official activities.

Insofar as the scope of the subpoenas ad testificandum which have been served by the FTC on the above-referenced staff members involves the activities of the AIIC and does not extend to the official activities of the staff members for the United Nations, then the above-referenced privileges and immunities would not apply. I request that the Organization be consulted in the event that there is a desire to extend the scope of the FTC's investigation to the official functions of the above-referenced staff members.

Sincerely yours,

Bruce C. Rashkow

Bruce C. Rashkow
Director
General Legal Division
Office of Legal Affairs

By Hand
Mr. [redacted]
Counsel to the Commission
[redacted]

(NAMES REDACTED)

102

UNITED NATIONS NATIONS UNIES

POSTAL ADDRESS—ADRESSE POSTALE: UNITED NATIONS, N.Y. 10017
CABLE ADDRESS—ADRESSE TELEGRAPHIQUE: UNATIONS NEWYORK

REFERENCE:

The Secretary-General of the United Nations presents his compliments to the Minister for Foreign Affairs of [redacted] and has the honour to inform him that Mr. [redacted], a member of the Board of Trustees of the United Nations Trust Fund for the Victims of Contemporary Forms of Slavery, was arrested by the competent authorities of [redacted] on 17 January 1998. The Secretary-General has been informed that, following hearings on 8 and 9 February 1998, Mr. [redacted] was sentenced, on 12 February 1998, to thirteen months detention.

The Secretary-General has the honour to inform the Minister for Foreign Affairs that pursuant to Article IX of the Agreement between the Government of the [redacted] and the United Nations Development Programme signed on 19 July 1979 (SBAA), the Government shall apply to the United Nations and its organs, their property, funds and assets, and to their officials, the provisions of the Convention on the Privileges and Immunities of the United Nations (the Convention).

In accordance with Article VI, section 22 of the Convention, "experts performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions". In particular, section 22(a) provides that such experts shall be accorded "immunity from personal arrest or detention". Section 22(b) further provides that experts on mission enjoy immunity from legal process of every kind in respect of words spoken or written and acts done by them in the course of the performance of their mission. In accordance with Section 22(c), experts on mission shall also be accorded inviolability for all papers and documents. As a member of the Board of Trustees of the United Nations Trust Fund for the Victims

of Contemporary Forms of Slavery, Mr. [redacted] is and continues to be an expert on mission for the United Nations within the meaning of Article VI of the Convention. In this connection, the United Nations maintains the position that it is exclusively for the Secretary-General, not for the Government of the [redacted], to determine whether certain words or acts fall within the course of the performance of a United Nations mission. However, in order for the Secretary-General to determine whether the acts complained of in the charges against Mr. [redacted] fall within the course of the performance of his mission as a member of the Board of Trustees of the United Nations Trust Fund for the Victims of Contemporary Forms of Slavery, the Secretary-General urgently requests that the United Nations be granted immediate access to Mr. [redacted]. The United Nations is also entitled to appear in legal proceedings to defend any United Nations interest affected by the arrest or detention.

In addition to the foregoing, the Secretary-General has received reports that, in the course of their investigation, the competent authorities of [redacted] seized documents located in Mr. [redacted] house belonging to the United Nations and/or relating to his mission on behalf of the United Nations. Pursuant to Section 4, Article II of the Convention, "the archives of the United Nations, and in general all documents belonging to it or held by it shall be inviolable wherever located". Accordingly, the Secretary-General strongly protests any confiscation of United Nations documents as a serious violation of their inviolability. The Secretary-General therefore urgently requests a complete inventory of all documents confiscated, as well as the immediate return to the United Nations of any documents belonging to it.

Finally, any interpretation of the provisions of the Convention must be carried out within the spirit of the underlying principles of the Charter of the United Nations, and in particular Article 105 thereof, which provides that the Organization shall enjoy such privileges and immunities as are necessary for the fulfilment of its purposes and that its officials shall similarly enjoy such privileges and immunities as are

necessary for the independent exercise of their functions in connection with the Organization.

In the light of the foregoing, the Secretary-General trusts that the Minister for Foreign Affairs will immediately request the competent authorities to resolve this matter as soon as possible in a manner consistent with the obligations of the [redacted] under the SBAA, the Convention on the Privileges and Immunities of the United Nations and the Charter of the United Nations.

The Secretary-General avails himself of this opportunity to renew to the Minister for Foreign Affairs of [redacted] the assurances of his highest consideration.

25 February 1998

(NAMES REDACTED)

103

UNITED NATIONS NATIONS UNIES

POSTAL ADDRESS—ADRESSE POSTALE UNITED NATIONS, N.Y. 10017
CABLE ADDRESS—ADRESSE TELEGRAPHIQUE UNATIONS NEWYORK

REFERENCE.

The Secretary-General of the United Nations presents his compliments to the Permanent Representative of the [redacted] to the United Nations and has the honour to convey his appreciation for the President of the [redacted] decision to pardon Mr. [redacted], a Member of the Board of Trustees of the United Nations Trust Fund for the Victims of Contemporary Forms of Slavery (the Board).

As a member of the Board, [redacted] is deemed to be an expert on mission for the United Nations within the meaning of Article VI of the Convention on the Privileges and Immunities of the United Nations (the Convention). Although [redacted] is not a party to the Convention, the Government has a legal obligation to apply the Convention to the United Nations pursuant to Article IX of the Standard Basic Assistance Agreement signed on 19 July 1979.

In accordance with Article VI, section 22 of the Convention, "experts performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions". In particular, section 22(a) provides that such experts shall be accorded immunity from personal arrest or detention. Section 22(b) further provides that experts on mission enjoy immunity from legal process of every kind in respect of words spoken or written and acts done by them in the course of the performance of their mission. In accordance with Section 22(c), experts on mission shall also be accorded inviolability for all papers and documents.

As the competent local authorities did not allow representatives of the United Nations to formally meet with Mr. [redacted] during his detention and imprisonment, the United Nations was not in a position to determine whether the actions leading to Mr. [redacted] arrest and conviction were related to his functions as a member of the Board until he was released from prison pursuant to the President's pardon.

Although the immunity from legal process enjoyed by experts on mission is in respect of words spoken or written and acts done by them in the course of the performance of their mission, the United Nations' interest in ensuring the uninterrupted administration of the United Nations Trust Fund for the Victims of Contemporary Forms of Slavery necessitates Mr. [redacted] availability to perform his functions as a member of the Board. Accordingly, the United Nations would like to recall the Government's obligations, under Section 22 of the Convention, to respect the independent exercise of Mr. [redacted] functions during the period of his missions, including his freedom of movement within and outside [redacted] and the inviolability of his papers and documents.

The Secretary-General avails himself of this opportunity to renew to the Permanent Representative of the [redacted] the assurances of his highest consideration.

27 April 1998

(NAMES REDACTED)

104

UNITED NATIONS NATIONS UNIES

POSTAL ADDRESS—ADRESSE POSTALE: UNITED NATIONS, N.Y. 10017
CABLE ADDRESS—ADRESSE TELEGRAPHIQUE: UNATIONS NEWYORK

EXECUTIVE OFFICE OF THE SECRETARY-GENERAL
CABINET DU SECRETAIRE GENERAL

REFERENCE:

27 April 1998

Dear Mr. [redacted],

The Secretary-General and others of us in the Secretariat are, of course, relieved that your liberties have been restored after your sentencing under [redacted] law. You should be aware that, immediately after we heard of your detention, we made clear to the [redacted] authorities that it was unacceptable that you be detained in connection with any words or acts in your capacity as a United Nations expert on mission. However, we could not assert the extension of such immunity to words or acts in your personal capacity as a citizen of the country. In order to remove any ambiguities in this connection, your entitlement to immunity from legal process is outlined below.

As a Member of the Board of Trustees of the United Nations Trust Fund for the Victims of Contemporary Forms of Slavery (the Board), you are deemed to be an expert on mission for the United Nations within the meaning of Article VI of the Convention on the Privileges and Immunities of the United Nations (the Convention). Although the [redacted] is not a party to the Convention, the Government has a legal obligation to apply the Convention to the United Nations pursuant to Article IX of the Standard Basic Assistance Agreement between the United Nations Development Programme and the Government signed on 19 July 1979.

Mr. [redacted]
Member, Board of Trustees
of the United Nations Trust Fund for
the Victims of Contemporary Forms of Slavery
[redacted]

In accordance with Article VI, section 22 of the Convention, "experts performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions". In particular, Section 22(b) further provides that experts on mission enjoy immunity from legal process of every kind in respect of words spoken or written and acts done by them in the course of the performance of their mission (emphasis added). In accordance with Section 22(c), experts on mission shall also be accorded inviolability for all papers and documents.

Based on the information contained in Mr. [redacted] report on his meeting with you on 5 April 1998 and in the light of the mandate of the members of the Board, we cannot conclude that the actions leading to your recent arrest and conviction are related to your functions as a member of the Board or that they were done by you in the course of the performance of your mission. Pursuant to General Assembly resolution 46/122 of 17 December 1991 (copy attached for ease of reference), which established the United Nations Trust Fund for the Victims of Contemporary Forms of Slavery (the Fund), the members of the Board are appointed by the Secretary-General to give advice on the administration of the Fund. Thus, although your actions to expose and eradicate slavery are laudable, they do not derive from your United Nations mandate to give advice on the administration of the Fund.

Notwithstanding the foregoing, the United Nations does have an interest in ensuring the proper administration of the Fund and your availability to perform your mandate as a member of its Board. Accordingly, the United Nations will take steps to reaffirm the [redacted] obligations, under Section 22 of the Convention, to respect the independent exercise of your functions during the period of your missions, including your freedom of movement within and outside [redacted] and the inviolability of your papers and documents.

Iqbal Riza
Chef de Cabinet

105

ST/SGB/1998/8

Staff Regulations

United Nations • New York, 1998

ST/SGB/1998/8
1 March 1998

SECRETARY-GENERAL'S BULLETIN

STAFF REGULATIONS

The Secretary-General promulgates the following, with respect to the Staff Regulations of the United Nations, established by the General Assembly according to Article 101 of the Charter of the United Nations:

1. By its resolution 52/216 of 22 December 1997, the General Assembly approved, with effect from 1 March 1998, the revised base scale of gross and net salaries for staff in the Professional and higher categories contained in annex I to the Staff Regulations, and the consequential amendment to staff regulation 3.3 (b) (i).

2. The revised text of the Staff Regulations is attached to the present bulletin. The new text is effective as from 1 March 1998.

3. The present bulletin supersedes the following Secretary-General's bulletins:

(a) ST/SGB/Staff Regulations/Rev.23 of 1 January 1995;

(b) ST/SGB/Staff Regulations/Rev.23/Amend.1 of 23 May 1995;

(c) ST/SGB/Staff Regulations/Rev.23/Amend.2 of 7 May 1997.

(Signed) Kofi A. ANNAN
Secretary-General

CHARTER OF THE UNITED NATIONS

Provisions relating to service of the staff

Article 8

The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs.

Article 97

The Secretariat shall comprise a Secretary-General and such staff as the Organization may require. The Secretary-General shall be appointed by the General Assembly upon the recommendation of the Security Council. He shall be the chief administrative officer of the Organization.

Article 100

1. In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any Government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.

2. Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities.

Article 101

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

2. Appropriate staffs shall be permanently assigned to the Economic and Social Council, the Trusteeship Council, and, as required, to other organs of the United Nations. These staffs shall form a part of the Secretariat.

3. The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

Article 105

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

2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.

Amendments to the Staff Regulations

The General Assembly established the Staff Regulations of the United Nations according to Article 101 of the Charter by resolution 590 (VI) of 2 February 1952 and amended them thereafter by resolutions 781 (VIII) and 782 (VIII) of 9 December 1953, resolution 882 (IX) of 14 December 1954, resolution 887 (IX) of 17 December 1954, resolution 974 (X) of 15 December 1955, resolution 1095 (XI) of 27 February 1957, resolutions 1225 (XII) and 1234 (XII) of 14 December 1957, resolution 1295 (XIII) of 5 December 1958, resolution 1658 (XVI) of 28 November 1961, resolution 1730 (XVI) of 20 December 1961, resolution 1929 (XVIII) of 11 December 1963, resolution 2050 (XX) of 13 December 1965, resolution 2121 (XX) of 21 December 1965, resolution 2369 (XXII) of 19 December 1967, resolutions 2481 (XXIII) and 2485 (XXIII) of 21 December 1968, resolution 2742 (XXV) of 17 December 1970, resolution 2888 (XXVI) of 21 December 1971, resolution 2990 (XXVII) of 15 December 1972, resolution 3008 (XXVII) of 18 December 1972, resolution 3194 (XXVIII) of 18 December 1973, resolutions 3353 (XXIX) and 3358 B (XXIX) of 18 December 1974, resolution 31/141 B of 17 December 1976, resolution 32/200 and decision 32/450 B of 21 December 1977, resolution 33/119 of 19 December 1978, decision 33/433 of 20 December 1978, resolution 35/214 of 17 December 1980, decision 36/459 of 18 December 1981, resolution 37/126 of 17 December 1982, resolution 37/235 C of 21 December 1982, resolution 39/69 of 13 December 1984, resolutions 39/236 and 39/245 of 18 December 1984, decision 40/467 of 18 December 1985, resolutions 41/207 and 41/209 of 11 December 1986, resolutions 42/221 and 42/225 of 21 December 1987, resolution 43/226 of 21 December 1988, resolution 44/185 of 19 December 1989, resolution 44/198 of 21 December 1989, resolutions 45/241 and 45/251 of 21 December 1990, resolution 45/259 of 3 May 1991, resolution 46/191 of 20 December 1991, resolution 47/216 of 12 March 1993, resolution 47/226 of 30 April 1993, resolutions 48/224 and 48/225 of 23 December 1993, resolutions 49/222 and 49/223 of 23 December 1994, resolution 49/241 of 6 April 1995, resolution 51/216 of 18 December 1996, resolution 52/216 of 22 December 1997 and resolution 52/225 of 4 February 1998.

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STAFF REGULATIONS OF THE UNITED NATIONS

Scope and purpose

The Staff Regulations embody the fundamental conditions of service and the basic rights, duties and obligations of the United Nations Secretariat. They represent the broad principles of personnel policy for the staffing and administration of the Secretariat. The Secretary-General, as the chief administrative officer, shall provide and enforce such staff rules consistent with these principles as he considers necessary.

Article I

Duties, obligations and privileges

Regulation 1.1: Members of the Secretariat are international civil servants. Their responsibilities are not national but exclusively international. By accepting appointment, they pledge themselves to discharge their functions and to regulate their conduct with the interests of the United Nations only in view.

Regulation 1.2: Staff members are subject to the authority of the Secretary-General and to assignment by him to any of the activities or offices of the United Nations. They are responsible to him in the exercise of their functions. The whole time of staff members shall be at the disposal of the Secretary-General. The Secretary-General shall establish a normal working week.

Regulation 1.3: In the performance of their duties members of the Secretariat shall neither seek nor accept instructions from any Government or from any other authority external to the Organization.

Regulation 1.4: Members of the Secretariat shall conduct themselves at all times in a manner befitting their status as international civil servants. They shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations. They shall avoid any action and in particular any kind of public pronouncement that may adversely reflect on their status, or on the integrity, independence and impartiality that are required by that status. While they are not expected to give up their national sentiments or their political and religious convictions, they shall at all times bear in mind the reserve and tact incumbent upon them by reason of their international status.

Regulation 1.5: Staff members shall exercise the utmost discretion in regard to all matters of official business. They shall not communicate to any person any information known to them by reason of their official position that has not been made public, except in the course of their duties or by authorization of the Secretary-General. Nor shall they at any time use such information to private advantage. These obligations do not cease upon separation from the Secretariat.

Regulation 1.6: No staff member shall accept any honour, decoration, favour, gift or remuneration from any Government excepting for war service; nor shall a staff member accept any honour, decoration, favour, gift or remuneration from any source external to the Organization without first obtaining the approval of the Secretary-General. Approval shall be granted only in exceptional cases and where such acceptance is not incompatible with the terms of staff regulation 1.2 and with the individual's status as an international civil servant.

Regulation 1.7: Staff members may exercise the right to vote but shall not engage in any political activity that is inconsistent with or might reflect upon the independence and impartiality required by their status as international civil servants.

Regulation 1.8: The immunities and privileges attached to the United Nations by virtue of Article 105 of the Charter are conferred in the interests of the Organization. These privileges and immunities furnish no excuse to the staff members who enjoy them for non-performance of their private obligations or failure to observe laws and police regulations. In any case where these privileges and immunities arise, the staff member shall immediately report to the Secretary-General, with whom alone it rests to decide whether they shall be waived.

Regulation 1.9: Members of the Secretariat shall subscribe to the following oath or declaration:

> "I solemnly swear (undertake, affirm, promise) to exercise in all loyalty, discretion and conscience the functions entrusted to me as an international civil servant of the United Nations, to discharge these functions and regulate my conduct with the interests of the United Nations only in view, and not to seek or accept instructions in regard to the performance of my duties from any Government or other authority external to the Organization."

Regulation 1.10: The oath or declaration shall be made orally by the Secretary-General at a public meeting of the General Assembly. All other members of the Secretariat shall make the oath or declaration before the Secretary-General or his authorized representative.

Article II

Classification of posts and staff

Regulation 2.1: In conformity with principles laid down by the General Assembly, the Secretary-General shall make appropriate provision for the classification of posts and staff according to the nature of the duties and responsibilities required.

Article III

Salaries and related allowances

Regulation 3.1: Salaries of staff members shall be fixed by the Secretary-General in accordance with the provisions of annex I to the present Regulations.

Regulation 3.2: (a) The Secretary-General shall establish terms and conditions under which an education grant shall be available to a staff member residing and serving outside his or her recognized home country whose dependent child is in full-time attendance at a school, university or similar educational institution of a type that will, in the opinion of the Secretary-General, facilitate the child's reassimilation in the staff member's recognized home country. The grant shall be payable in respect of the child up to the end of the fourth year of post-secondary studies or the award of the first recognized degree, whichever is the earlier. The amount of the grant per scholastic year for each child shall

be 75 per cent of the admissible educational expenses actually incurred, subject to a maximum grant as approved by the General Assembly. Travel costs of the child may also be paid for an outward and return journey once in each scholastic year between the educational institution and the duty station, except that in the case of staff members serving at designated duty stations where schools do not exist that provide schooling in the language or in the cultural tradition desired by staff members for their children, such travel costs may be paid twice in the year in which the staff member is not entitled to home leave. Such travel shall be by a route approved by the Secretary-General but not in an amount exceeding the cost of such a journey between the home country and the duty station;

(b) The Secretary-General shall also establish terms and conditions under which, at designated duty stations, an additional amount of 100 per cent of boarding costs subject to a maximum amount per year as approved by the General Assembly may be paid in respect of children in school attendance at the primary and secondary levels;

(c) The Secretary-General shall also establish terms and conditions under which an education grant shall be available to a staff member serving in a country whose language is different from his or her own and who is obliged to pay tuition for the teaching of the mother tongue to a dependent child attending a local school in which the instruction is given in a language other than his or her own;

(d) The Secretary-General shall also establish terms and conditions under which an education grant shall be available to a staff member whose child is unable, by reason of physical or mental disability, to attend a normal educational institution and therefore requires special teaching or training to prepare him or her for full integration into society or, while attending a normal educational institution, requires special teaching or training to assist him or her in overcoming the disability. The amount of this grant per year for each disabled child shall be equal to 100 per cent of the education expenses actually incurred, up to a maximum amount approved by the General Assembly;

(e) The Secretary-General may decide in each case whether the education grant shall extend to adopted children or stepchildren.

Regulation 3.3: (a) An assessment at the rates and under the conditions specified below shall be applied to the salaries and such other emoluments of staff members as are computed on the basis of salary, excluding post adjustments, provided that the Secretary-General may, where he deems it advisable, exempt from the assessment the salaries and emoluments of staff members engaged at locality rates;

(b) (i) The assessment shall be calculated at the following rates for staff members whose salary rates are set forth in paragraphs 1 and 3 of annex I to the present Regulations:

Assessment

Total assessable payments (United States dollars)	Staff assessment rates for purposes of pensionable remuneration and pensions (percentage)
Up to 20 000 per year	11
20 001 to 40 000 per year	18
40 001 to 60 000 per year	25
60 001 and above per year	30

Total assessable payments (United States dollars)	Staff assessment rates used in conjunction with gross base salaries (percentage)	
	Staff member with a dependent spouse or a dependent child	Staff member with neither a dependent spouse nor a dependent child
First 15 000 per year	9.0	11.8
Next 5 000 per year	18.1	24.5
Next 5 000 per year	21.5	27.0
Next 5 000 per year	24.9	31.5
Next 5 000 per year	27.5	33.4
Next 10 000 per year	30.1	35.7
Next 10 000 per year	31.8	38.2
Next 10 000 per year	33.5	38.8
Next 10 000 per year	34.4	39.8
Next 15 000 per year	35.3	40.8
Next 20 000 per year	36.1	44.2
Remaining assessable payments	37.0	47.4

(ii) The assessment shall be calculated at the following rates for staff members whose salary rates are established under paragraph 7 of annex I to the present Regulations:

Total assessable payments (United States dollars)	Assessment (percentage)
Up to 20 000 per year	19
20 001 to 40 000 per year	23
40 001 to 60 000 per year	26
60 001 and above per year	31

(iii) The Secretary-General shall determine which of the scales of assessment set out in subparagraphs (i) and (ii) above shall apply to each of the groups of personnel whose salary rates are established under paragraph 5 of annex I to the present Regulations;

(iv) In the case of staff members whose salary scales are established in currencies other than United States dollars, the relevant amounts to which the assessment applies shall be fixed at the local currency equivalent of the above-mentioned dollar amounts at the time the salary scales of the staff member concerned are approved;

(c) In the case of a person who is not employed by the United Nations for the whole of a calendar year or in cases where there is a change in the annual rate of payments made to a staff member, the rate of assessment shall be governed by the annual rate of each such payment made to him or her;

(d) The assessment computed under the foregoing provisions of the present regulation shall be collected by the United Nations by withholding it from payments. No part of the assessment so collected shall be refunded because of cessation of employment during the calendar year;

(e) Revenue derived from staff assessment not otherwise disposed of by specific resolution of the General Assembly shall be credited to the Tax Equalization Fund established by General Assembly resolution 973 A (X);

(f) Where a staff member is subject both to staff assessment under this plan and to national income taxation in respect of the salaries and emoluments paid to him or her by the United Nations, the Secretary-General is authorized to refund to him or her the amount of staff assessment collected from him or her provided that:

(i) The amount of such refund shall in no case exceed the amount of his or her income taxes paid and payable in respect of his or her United Nations income;

(ii) If the amount of such income taxes exceeds the amount of staff assessment, the Secretary-General may also pay to the staff member the amount of such excess;

(iii) Payments made in accordance with the provisions of the present regulation shall be charged to the Tax Equalization Fund;

(iv) A payment under the conditions prescribed in the three preceding subparagraphs is authorized in respect of dependency benefits and post adjustments, which are not subject to staff assessment but may be subject to national income taxation.

Regulation 3.4: (a) Staff members whose salary rates are set forth in paragraphs 1 and 3 of annex I to the present Regulations shall be entitled to receive dependency allowances for a dependent child, for a disabled child and for a secondary dependant at rates approved by the General Assembly as follows:

(i) The staff member shall receive an allowance for each dependent child, except that the allowance shall not be paid in respect of the first dependent child if the staff member has no dependent spouse, in which case the staff member shall be entitled to the dependency rate of staff assessment under subparagraph (b) (i) of regulation 3.3;

(ii) The staff member shall receive a special allowance for each disabled child. However, if the staff member has no dependent spouse and is entitled to the dependency rate of staff assessment under subparagraph (b) (i) of regulation 3.3 in respect of a disabled child, the allowance shall be the same as the allowance for a dependent child in (i) above;

(iii) Where there is no dependent spouse, a single annual allowance shall be paid for a secondary dependant in respect of either a dependent parent, a dependent brother or a dependent sister;

(b) If both husband and wife are staff members, one may claim, for dependent children, under subparagraph (a) (i) and (ii) above, in which case the other may claim only under subparagraph (a) (iii) above, if otherwise entitled;

(c) With a view to avoiding duplication of benefits and in order to achieve equality between staff members who receive dependency benefits under applicable laws in the form of governmental grants and staff members who do not receive such dependency benefits, the Secretary-General shall prescribe conditions under which the dependency allowance for a child specified in subparagraph (a) (i) above shall be payable only to the extent that the dependency benefits enjoyed by the staff member or his or her spouse under applicable laws amount to less than such a dependency allowance;

(d) Staff members whose salary rates are set by the Secretary-General under paragraph 5 or paragraph 6 of annex I to the present Regulations shall be entitled to receive dependency allowances at rates and under conditions determined by the Secretary-General, due regard being given to the circumstances in the locality in which the office is located;

(e) Claims for dependency allowances shall be submitted in writing and supported by evidence satisfactory to the Secretary-General. A separate claim for dependency allowances shall be made each year.

Article IV

Appointment and promotion

Regulation 4.1: As stated in Article 101 of the Charter, the power of appointment of staff members rests with the Secretary-General. Upon appointment each staff member, including a staff member on secondment from government service, shall receive a letter of appointment in accordance with the provisions of annex II to the present Regulations and signed by the Secretary-General or by an official in the name of the Secretary-General.

Regulation 4.2: The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

Regulation 4.3: In accordance with the principles of the Charter, selection of staff members shall be made without distinction as to race, sex or religion. So far as practicable, selection shall be made on a competitive basis.

Regulation 4.4: Subject to the provisions of Article 101, paragraph 3, of the Charter, and without prejudice to the recruitment of fresh talent at all levels, the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the United Nations. This consideration shall also apply, on a reciprocal basis, to the specialized agencies brought into relationship with the United Nations.

Regulation 4.5: (a) Appointment of Under-Secretaries-General and of Assistant Secretaries-General shall normally be for a period of five years, subject to prolongation or renewal. Other staff members shall be granted either permanent or temporary appointments under such terms and conditions consistent with the present Regulations as the Secretary-General may prescribe;

(b) The Secretary-General shall prescribe which staff members are eligible for permanent appointments. The probationary period for granting or confirming a permanent appointment shall normally not exceed two years, provided that in individual cases the Secretary-General may extend the probationary period for not more than one additional year.

Regulation 4.6: The Secretary-General shall establish appropriate medical standards that staff members shall be required to meet before appointment.

Article V

Annual and special leave

Regulation 5.1: Staff members shall be allowed appropriate annual leave.

Regulation 5.2: Special leave may be authorized by the Secretary-General in exceptional cases.

Regulation 5.3: Eligible staff members shall be granted home leave once in every two years. However, in the case of designated duty stations having very difficult conditions of life and work, eligible staff members shall be granted home leave once in every twelve months. A staff member whose home country is either the country of his or her official duty station or the country of his or her normal residence while in United Nations service shall not be eligible for home leave.

Article VI

Social security

Regulation 6.1: Provision shall be made for the participation of staff members in the United Nations Joint Staff Pension Fund in accordance with the regulations of that Fund.

Regulation 6.2: The Secretary-General shall establish a scheme of social security for the staff, including provisions for health protection, sick leave and maternity leave, and reasonable compensation in the event of illness, accident or death attributable to the performance of official duties on behalf of the United Nations.

Article VII

Travel and removal expenses

Regulation 7.1: Subject to conditions and definitions prescribed by the Secretary-General, the United Nations shall in appropriate cases pay the travel expenses of staff members, their spouses and dependent children.

Regulation 7.2: Subject to conditions and definitions prescribed by the Secretary-General, the United Nations shall pay removal costs for staff members.

Article VIII

Staff relations

Regulation 8.1: (a) The Secretary-General shall establish and maintain continuous contact and communication with the staff in order to ensure the effective participation of the staff in identifying, examining and resolving issues relating to staff welfare, including conditions of work, general conditions of life and other personnel policies;

(b) Staff representative bodies shall be established and shall be entitled to initiate proposals to the Secretary-General for the purpose set forth in subparagraph (a) above. They shall be organized in such a way as to afford equitable representation to all staff members, by means of elections that shall take place at least biennially under electoral regulations drawn up by the respective staff representative body and agreed to by the Secretary-General;

(c) Cancelled.

Regulation 8.2: The Secretary-General shall establish joint staff/management machinery at both local and Secretariat-wide levels to advise him regarding personnel policies and general questions of staff welfare as provided in regulation 8.1.

Article IX

Separation from service

Regulation 9.1: (a) The Secretary-General may terminate the appointment of a staff member who holds a permanent appointment and whose probationary period has been completed, if the necessities of the service require abolition of the post or reduction of the staff, if the services of the individual concerned prove unsatisfactory, or if he or she is, for reasons of health, incapacitated for further service;

The Secretary-General may also, giving his reasons therefor, terminate the appointment of a staff member who holds a permanent appointment:

(i) If the conduct of the staff member indicates that the staff member does not meet the highest standards of integrity required by Article 101, paragraph 3, of the Charter;

(ii) If facts anterior to the appointment of the staff member and relevant to his suitability come to light that, if they had been known at the time of his appointment, should, under the standards established in the Charter, have precluded his appointment;

No termination under subparagraphs (i) and (ii) shall take place until the matter has been considered and reported on by a special advisory board appointed for that purpose by the Secretary-General;

Finally, the Secretary-General may terminate the appointment of a staff member who holds a permanent appointment if such action would be in the interest of the good administration of the Organization and in accordance with the standards of the Charter, provided that the action is not contested by the staff member concerned;

(b) The Secretary-General may terminate the appointment of a staff member with a fixed-term appointment prior to the expiration date for any of the reasons specified in subparagraph (a) above, or for such other reason as may be specified in the letter of appointment;

(c) In the case of all other staff members, including staff members serving a probationary period for a permanent appointment, the Secretary-General may at any time terminate the appointment if, in his opinion, such action would be in the interest of the United Nations.

Regulation 9.2: Staff members may resign from the Secretariat upon giving the Secretary-General the notice required under the terms of their appointment.

Regulation 9.3: (a) If the Secretary-General terminates an appointment the staff member shall be given such notice and such indemnity payment as may be applicable under the Staff Regulations and Staff Rules. Payments of termination indemnity shall be made by the Secretary-General in accordance with the rates and conditions specified in annex III to the present Regulations;

(b) The Secretary-General may, where the circumstances warrant and he considers it justified, pay to a staff member terminated under the final paragraph of staff regulation 9.1 (a) a termination indemnity payment not more than 50 per cent higher than that which would otherwise be payable under the Staff Regulations.

Regulation 9.4: The Secretary-General shall establish a scheme for the payment of repatriation grants within the maximum rates and under the conditions specified in annex IV to the present Regulations.

Regulation 9.5: Staff members shall not be retained in active service beyond the age of sixty years or, if appointed on or after 1 January 1990, beyond the age of sixty-two years. The Secretary-General may, in the interest of the Organization, extend this age limit in exceptional cases.

Article X

Disciplinary measures

Regulation 10.1: The Secretary-General may establish administrative machinery with staff participation which will be available to advise him in disciplinary cases.

Regulation 10.2: The Secretary-General may impose disciplinary measures on staff members whose conduct is unsatisfactory.

He may summarily dismiss a member of the staff for serious misconduct.

Article XI

Appeals

Regulation 11.1: The Secretary-General shall establish administrative machinery with staff participation to advise him in case of any appeal by staff members against an administrative decision alleging the non-observance of their terms of appointment, including all pertinent regulations and rules.

Regulation 11.2: The United Nations Administrative Tribunal shall, under conditions prescribed in its statute, hear and pass judgement upon applications from staff members alleging non-observance of their terms of appointment, including all pertinent regulations and rules.

Article XII

General provisions

Regulation 12.1: The present Regulations may be supplemented or amended by the General Assembly, without prejudice to the acquired rights of staff members.

Regulation 12.2: Such staff rules and amendments as the Secretary-General may make to implement the present Regulations shall be provisional until the requirements of regulations 12.3 and 12.4 below have been met.

Regulation 12.3: The full text of provisional staff rules and amendments shall be reported annually to the General Assembly. Should the Assembly find that a provisional rule and/or amendment is inconsistent with the intent and purpose of the Regulations, it may direct that the rule and/or amendment be withdrawn or modified.

Regulation 12.4: The provisional rules and amendments reported by the Secretary-General, taking into account such modifications and/or deletions that may be directed by the General Assembly, shall enter into full force and effect on 1 January following the year in which the report is made to the Assembly.

Regulation 12.5: Staff rules shall not give rise to acquired rights within the meaning of regulation 12.1 while they are provisional.

Annex I

SALARY SCALES AND RELATED PROVISIONS

1. The Secretary-General shall establish the salary of the Administrator of the United Nations Development Programme and the salaries of United Nations officials in the Director category and above, in accordance with amounts determined by the General Assembly, subject to the staff assessment plan provided in staff regulation 3.3 and to post adjustments wherever applied. If otherwise eligible, they shall receive the allowances that are available to staff members generally. With effect from 1 January 1998, the Administrator of the United Nations Development Programme shall receive a gross salary of US$ 175,344 per annum.

2. The Secretary-General is authorized, on the basis of appropriate justification and/or reporting, to make additional payments to United Nations officials in the Director category and above to compensate for such special costs as may be reasonably incurred, in the interests of the Organization, in the performance of duties assigned to them by the Secretary-General. Similar additional payments in similar circumstances may be made to heads of offices away from Headquarters. The maximum total amount of such payments is to be determined in the programme budget by the General Assembly.

3. Except as provided in paragraph 5 of the present annex, the salary scales and the scales of post adjustment for staff members in the Professional and higher categories shall be as shown in the present annex.

4. Subject to satisfactory service, salary increments within the levels set forth in paragraph 3 of the present annex shall be awarded annually, except that any increments above step XI of the Associate Officer level, step XIII of the Second Officer level, step XII of the First Officer level, step X of the Senior Officer level and step IV of the Principal Officer level shall be preceded by two years at the previous step. The Secretary-General is authorized to reduce the interval between salary increments to ten months and twenty months, respectively, in the case of staff subject to geographical distribution who have an adequate and confirmed knowledge of a second official language of the United Nations.

5. The Secretary-General shall determine the salary rates to be paid to personnel specifically engaged for short-term missions, conference and other short-term service, to consultants, to Field Service personnel and to technical assistance experts.

6. The Secretary-General shall fix the salary scales for staff members in the General Service and related categories, normally on the basis of the best prevailing conditions of employment in the locality of the United Nations Office concerned, provided that the Secretary-General may, where he deems it appropriate, establish rules and salary limits for payment of a non-resident allowance to General Service staff members recruited from outside the local area. The gross pensionable remuneration of such staff shall be determined in accordance with the methodology specified in article 54 (a) of the Regulations of the United Nations Joint Staff Pension Fund and are shown in the salary scales applicable to such staff.

7. The Secretary-General shall establish rules under which a language allowance may be paid to staff members in the General Service category who pass an appropriate test and demonstrate continued proficiency in the use of two or more official languages.

8. In order to preserve equivalent standards of living at different offices, the Secretary-General may adjust the basic salaries set forth in paragraphs 1 and 3 of the present annex by the application of non-pensionable post adjustments based on relative costs of living, standards of living and related factors at the office concerned as compared to New York. Such post adjustments shall not be subject to staff assessment.

9. No salary shall be paid to staff members in respect of periods of unauthorized absence from work unless such absence was caused by reasons beyond their control or duly certified medical reasons.

SALARY SCALE FOR STAFF IN THE PROFESSIONAL CATEGORY AND ABOVE*

Annual gross salaries and net equivalents after application of staff assessment

Effective 1 March 1998

(United States dollars)

Level		STEPS I	II	III	IV	V	VI	VII	VIII	IX	X	XI	XII	XIII	XIV	XV
Under-Secretary-General																
USG	Gross	147 420														
	Net D	102 130														
	Net S	91 883														
Assistant Secretary-General																
ASG	Gross	133 994														
	Net D	93 671														
	Net S	84 821														
Director																
D-2	Gross	109 741	112 164	114 591	117 016	119 442	121 869									
	Net D	78 390	79 919	81 447	82 975	84 504	86 032									
	Net S	72 056	73 338	74 615	75 890	77 167	78 443									
Principal Officer																
D-1	Gross	97 119	99 168	101 216	103 261	105 310	107 358	109 407	111 476	113 552						
	Net D	70 324	71 633	72 942	74 249	75 558	76 867	78 176	79 485	80 793						
	Net S	65 012	66 156	67 299	68 440	69 583	70 726	71 869	72 976	74 068						
Senior Officer																
P-5	Gross	85 685	87 516	89 347	91 192	93 046	94 898	96 751	98 605	100 457	102 310	104 164	106 016	107 869		
	Net D	62 983	64 168	65 352	66 537	67 721	68 905	70 089	71 274	72 457	73 641	74 826	76 009	77 194		
	Net S	58 486	59 570	60 653	61 705	62 740	63 773	64 807	65 842	66 875	67 909	68 944	69 977	71 011		
First Officer																
P-4	Gross	70 619	72 382	74 141	75 913	77 700	79 483	81 269	83 054	84 839	86 623	88 406	90 197	92 003	93 811	95 619
	Net D	53 196	54 353	55 507	56 660	57 817	58 971	60 126	61 281	62 436	63 590	64 744	65 901	67 055	68 210	69 365
	Net S	49 523	50 584	51 643	52 700	53 758	54 814	55 871	56 928	57 985	59 041	60 096	61 150	62 158	63 166	64 175
Second Officer																
P-3	Gross	57 720	59 351	60 984	62 613	64 246	65 889	67 542	69 197	70 851	72 506	74 159	75 824	77 500	79 176	80 854
	Net D	44 669	45 754	46 839	47 923	49 008	50 093	51 178	52 263	53 348	54 434	55 518	56 603	57 687	58 772	59 858
	Net S	41 685	42 683	43 682	44 679	45 678	46 675	47 670	48 667	49 662	50 658	51 654	52 648	53 640	54 632	55 626
Associate Officer																
P-2	Gross	46 458	47 883	49 305	50 728	52 149	53 572	54 996	56 453	57 915	59 372	60 830	62 291			
	Net D	37 035	38 006	38 976	39 946	40 916	41 886	42 857	43 826	44 798	45 768	46 737	47 709			
	Net S	34 741	35 622	36 500	37 380	38 258	39 138	40 017	40 909	41 804	42 696	43 588	44 482			
Assistant Officer																
P-1	Gross	35 382	36 718	38 051	39 386	40 719	42 052	43 388	44 722	46 081	47 449					
	Net D	29 317	30 251	31 183	32 116	33 048	33 979	34 914	35 845	36 777	37 710					
	Net S	27 655	28 515	29 372	30 230	31 087	31 944	32 804	33 661	34 508	35 353					

D = Rate applicable to staff members with a dependent spouse or child.
S = Rate applicable to staff members with no dependent spouse or child.

* = This scale will be implemented in conjunction with a consolidation of 3.1 per cent of post adjustment. There will be consequential adjustments in the post adjustment indices and multipliers at all duty stations, effective 1 March 1998. Thereafter, changes in post adjustment classifications will be effected on the basis of the movements of the consolidated post adjustment indices.

Annex II

LETTERS OF APPOINTMENT

(a) The letter of appointment shall state:

(i) That the appointment is subject to the provisions of the Staff Regulations and of the Staff Rules applicable to the category of appointment in question and to changes which may be duly made in such regulations and rules from time to time;

(ii) The nature of the appointment;

(iii) The date at which the staff member is required to enter upon his or her duties;

(iv) The period of appointment, the notice required to terminate it and period of probation, if any;

(v) The category, level, commencing rate of salary and, if increments are allowable, the scale of increments, and the maximum attainable;

(vi) Any special conditions which may be applicable;

(b) A copy of the Staff Regulations and the Staff Rules shall be transmitted to the staff member with the letter of appointment. In accepting appointment the staff member shall state that he or she has been acquainted with and accepts the conditions laid down in the Staff Regulations and in the Staff Rules;

(c) The letter of appointment of a staff member on secondment from government service signed by the staff member and by or on behalf of the Secretary-General, and relevant supporting documentation of the terms and conditions of secondment agreed to by the Member State and the staff member, shall be evidence of the existence and validity of secondment from government service to the Organization for the period stated in the letter of appointment.

Annex III

TERMINATION INDEMNITY

Staff members whose appointments are terminated shall be paid an indemnity in accordance with the following provisions:

(a) Except as provided in paragraphs (b), (c) and (e) below and in regulation 9.3 (b), the termination indemnity shall be paid in accordance with the following schedule:

	Months of gross salary, less staff assessment, where applicable[a] or Months of pensionable remuneration less staff assessment, where applicable[b]		
Completed years of service	Permanent appointments	Temporary appointments which are not for a fixed term	Temporary appointments for a fixed term exceeding six months
Less than 1	Not applicable	Nil)	One week for each month
1	Not applicable	1)	of uncompleted service
2	3	1)	subject to a minimum of
3	3	2)	six weeks' and a
4	4	3)	maximum of three months'
5	5	4)	indemnity pay
6	6	5	3
7	7	6	5
8	8	7	7
9	9	9	9
10	9.5	9.5	9.5
11	10	10	10
12	10.5	10.5	10.5
13	11	11	11
14	11.5	11.5	11.5
15 or more	12	12	12

[a] For staff in the Professional and higher categories and in the Field Service category.

[b] For staff in the General Service and related categories.

(b) A staff member whose appointment is terminated for reasons of health shall receive an indemnity equal to the indemnity provided under paragraph (a) of the present annex reduced by the amount of any disability benefit that the staff member may receive under the Regulations of the United Nations Joint Staff Pension Fund for the number of months to which the indemnity rate corresponds;

(c) A staff member whose appointment is terminated for unsatisfactory services or who for disciplinary reasons is dismissed for misconduct other than by summary dismissal may be paid, at the discretion of the Secretary-General, an indemnity not exceeding one half of the indemnity provided under paragraph (a) of the present annex;

(d) No indemnity payments shall be made to:

A staff member who resigns, except where termination notice has been given and the termination date agreed upon;

A staff member who has a temporary appointment that is not for a fixed term and that is terminated during the first year of service;

A staff member who has a temporary appointment for a fixed term that is completed on the expiration date specified in the letter of appointment;

A staff member who is summarily dismissed;

A staff member who abandons his or her post;

A staff member who is retired under the Regulations of the United Nations Joint Staff Pension Fund;

(e) Staff members specifically engaged for conference and other short-term service or for service with a mission, as consultants or as experts, and staff members who are locally recruited for service in established offices away from Headquarters may be paid termination indemnity if and as provided in their letters of appointment.

Annex IV

REPATRIATION GRANT

In principle, the repatriation grant shall be payable to staff members whom the Organization is obligated to repatriate and who at the time of separation are residing, by virtue of their service with the United Nations, outside their country of nationality. The repatriation grant shall not, however, be paid to a staff member who is summarily dismissed. Eligible staff members shall be entitled to a repatriation grant only upon relocation outside the country of the duty station. Detailed conditions and definitions relating to eligibility and requisite evidence of relocation shall be determined by the Secretary-General.

Years of continuous service away from home country	Staff member with a spouse or dependent child at time of separation	Staff member with neither a spouse nor dependent child at time of separation	
		Professional and higher categories	General Service category
	Weeks of gross salary, less staff assessment, where applicable[a] or Weeks of pensionable remuneration less staff assessment, where applicable[b]		
1	4	3	2
2	8	5	4
3	10	6	5
4	12	7	6
5	14	8	7
6	16	9	8
7	18	10	9
8	20	11	10
9	22	13	11
10	24	14	12
11	26	15	13
12 or more	28	16	14

[a] For staff in the Professional and higher categories and in the Field Service category.

[b] For staff in the General Service and related categories.

4. The contributions of Zimbabwe and Saint Vincent and the Grenadines for 1980 and 1981 shall be applied to the same basis of assessment as for other Member States, except that in the case of appropriations or apportionments approved under General Assembly resolutions 34/7 C of 3 December 1979 and 35/45 A of 1 December 1980 for the financing of the United Nations Disengagement Observer Force, and resolution 35/115 A of 10 December 1980 for the financing of the United Nations Interim Force in Lebanon, the contributions of those States, as determined by the group of contributors to which they may be assigned by the Assembly, shall be calculated in proportion to the calendar year;

5. The advances of Zimbabwe and Saint Vincent and the Grenadines to the Working Capital Fund, under regulation 5.8 of the Financial Regulations of the United Nations, shall be calculated by the application of the rates of assessment of 0.02 and 0.01 per cent, respectively, to the authorized level of the Fund, such advances to be added to the Fund pending the incorporation of the new Members' rates of assessment in a 100 per cent scale.

105th plenary meeting
18 December 1981

36/232. Respect for the privileges and immunities of officials of the United Nations and the specialized agencies and related organizations

The General Assembly,

Recalling its resolution 35/212 of 17 December 1980,

Recalling the Convention on the Privileges and Immunities of the United Nations of 13 February 1946,[55] the Convention on the Privileges and Immunities of the Specialized Agencies of 21 November 1947,[56] the Agreement on the Privileges and Immunities of the International Atomic Energy Agency of 1 July 1959 and the agreements between the United Nations and the specialized agencies and related organizations and the respective host Governments,

Noting the report of the Secretary-General,[57]

Noting also the position consistently upheld by the United Nations in the event of the arrest and detention of United Nations staff members by governmental authorities,

Reaffirming the responsibility and authority of the Secretary-General as the Chief Administrative Officer of the United Nations under the Charter,

Mindful of Article 100 of the Charter of the United Nations, under which each Member State has undertaken to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities,

Mindful also of the fact that under the same Article of the Charter, the Secretary-General and the staff shall not, in the performance of their duties, seek or receive instructions from any Government or from any other authority external to the Organization,

Recalling that the International Court of Justice has held that international organizations have the power and responsibility to protect members of their staff,

Recalling also the obligations of the staff in the conduct of their duties to observe the laws and regulations of Member States,

Reaffirming the relevant staff regulations,

Aware of the absolute necessity that staff members be enabled to discharge their tasks as assigned to them by the Secretary-General without interference on the part of any Member State or any other authority external to the Organization,

Realizing that staff members of the specialized agencies and related organizations enjoy similar privileges and immunities in accordance with the instruments mentioned in the second preambular paragraph above,

1. *Appeals* to any Member State which has placed under arrest or detention a staff member of the United Nations or of a specialized agency or related organization to enable the Secretary-General or the executive head of the organization concerned, in accordance with the rights inherent under the relevant multilateral conventions and bilateral agreements, to visit and converse with the staff member, to apprise himself of the grounds for the arrest or detention, including the main facts and formal charges, to enable him also to assist the staff member in arranging for legal counsel and to recognize the functional immunity of a staff member asserted by the Secretary-General or by the appropriate executive head, in conformity with international law and in accordance with the provisions of the applicable bilateral agreements between the host country and the United Nations or the specialized agency or related organization concerned;

2. *Requests* the Secretary-General and the executive heads of the organizations concerned to ensure that the staff observe the obligations incumbent upon them, in accordance with the relevant staff rules and regulations, the Convention on the Privileges and Immunities of the United Nations, the Convention on the Privileges and Immunities of the Specialized Agencies and the Agreement on the Privileges and Immunities of the International Atomic Energy Agency;

3. *Requests* the Secretary-General to bring the present resolution to the attention of all specialized agencies and related organizations of the United Nations system, with the request that they furnish information to him on cases where there are clear indications that the principles expressed in paragraph 1 above or the status of the staff members of such an organization have not been fully respected;

4. *Requests* the Secretary-General to submit to the General Assembly at each regular session, on behalf of the Administrative Committee on Co-ordination, an updated and comprehensive annual report relating to cases in which the Secretary-General or the competent executive head has not been able to exercise fully his responsibility in respect of the protection of staff members of the United Nations or of a specialized agency or related organization in accordance with the multilateral conventions and applicable bilateral agreements with the host country.

105th plenary meeting
18 December 1981

36/233. Report of the International Civil Service Commission

The General Assembly,

Having considered the seventh annual report of the International Civil Service Commission,[58]

Recalling that it established the Commission for the regulation and co-ordination of the conditions of service of the United Nations common system as set forth in article 1 of the statute of the Commission,

[55] Resolution 22 A (I).

[56] Resolution 179 (II).

[57] A/C.5/36/31.

[58] *Official Records of the General Assembly, Thirty-sixth Session, Supplement* No. 30 (A/36/30 and Corr.1).

gency of the Organization, partial or interim steps could enhance the liquidity of the Organization and alleviate its financial difficulties to some extent,

Noting with satisfaction that the project on the issue of special postage stamps on the social and economic crisis in Africa is well under way,

1. *Recalls* that it decided, by its resolution 39/239 A of 18 December 1984, to place one half of the revenue earned therefrom at the disposal of the Secretary-General for the implementation of objectives as detailed in the Declaration on the Critical Economic Situation in Africa,[36] adopted by the General Assembly on 3 December 1984, and to place the remaining half in a special account;

2. *Requests* the Secretary-General to take all necessary steps to economize on the operational expenses of the project on the issue of special postage stamps with a view to increasing the net revenue and to submit a financial report to the General Assembly at its forty-second session.

101st plenary meeting
11 December 1986

41/205. Respect for the privileges and immunities of officials of the United Nations and the specialized agencies and related organizations

The General Assembly,

Recalling Article 100 of the Charter of the United Nations,

Recalling that, under Article 105 of the Charter of the United Nations, officials of the Organization shall enjoy in the territory of each of its Member States such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization, which is indispensable for the proper discharge of their duties,

Reaffirming its previous resolutions, in particular resolutions 39/244 of 18 December 1984 and 40/258 C of 18 December 1985,

Reiterating the obligation of the staff in the conduct of their duties to observe fully the laws and regulations of Member States,

1. *Takes note with concern* of the report submitted to the General Assembly by the Secretary-General,[37] on behalf of the Administrative Committee on Co-ordination, and of a number of negative developments reported therein, which together represent a deterioration of the situation with regard to the observance of the principles related to the respect for the privileges and immunities of officials of the United Nations and the specialized agencies and related organizations;

2. *Takes note with particular concern* of the views expressed by the Secretary-General in paragraph 3 of his report;

3. *Deplores* the growing number of cases where the functioning, safety and well-being of officials have been adversely affected, including cases of detention in Member States and abduction by armed groups and individuals;

4. *Also deplores* the increasing number of cases in which the lives and well-being of officials have been placed in jeopardy during the exercise of their official functions;

5. *Calls upon* all Member States scrupulously to respect the privileges and immunities of all United Nations officials and to refrain from any acts that would impede such officials in the performance of their functions, thereby seriously affecting the proper functioning of the Organization;

6. *Calls upon* all Member States currently holding United Nations officials under arrest or detention, or otherwise impeding them in the proper discharge of their duties, to review these cases and to co-ordinate efforts with the Secretary-General to resolve each case with all due speed;

7. *Calls upon* the staff of the United Nations and the specialized agencies and related organizations to comply with the obligations resulting from the Staff Regulations and Rules of the United Nations, in particular regulation 1.8, and from the equivalent provisions governing the staff of the other agencies;

8. *Calls upon* the Secretary-General, as chief administrative officer of the United Nations, to continue personally to act as the focal point in promoting and ensuring the observance of the privileges and immunities of officials of the United Nations and the specialized agencies and related organizations by using all such means as are available to him;

9. *Urges* the Secretary-General to give priority, through the United Nations Security Co-ordinator and his other special representatives, to the reporting and prompt follow-up of cases of arrest, detention and other possible matters relating to the security and proper functioning of officials of the United Nations and the specialized agencies and related organizations;

10. *Requests* the Secretary-General, as Chairman of the Administrative Committee on Co-ordination, to review and appraise the measures already taken to enhance the proper functioning, safety and protection of international civil servants and to modify them where necessary.

101st plenary meeting
11 December 1986

41/206. Personnel questions

A

Composition of the Secretariat

The General Assembly,

Recalling Article 101, paragraph 3, of the Charter of the United Nations, which states:

> "The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible",

Recalling its previous resolutions on personnel questions, in particular resolutions 33/143 of 20 December 1978, 34/219 of 20 December 1979, 35/210 of 17 December 1980, 37/235 of 21 December 1982, 39/245 of 18 December 1984 and 40/258 A of 18 December 1985,

Noting that, despite the suspension of recruitment activities owing to the financial difficulties of the Organization, vacant posts are being filled by internal candidates through promotion,

Concerned that the targets set in the first phase of the 1986-1987 medium-term plan of recruitment were not achieved because, *inter alia*, of the suspension of recruitment.

[36] Resolution 39/29, annex.
[37] A/C.5/41/12 and Corr.1

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to comment, as appropriate, on the recommendations contained therein;

13. *Requests* the Joint Inspection Unit to report to the General Assembly at its forty-third session on the progress made in the implementation of the present resolution;

14. *Requests* the Secretary-General to bring the present resolution to the attention of the executive heads of the participating organizations of the Joint Inspection Unit.

99th plenary meeting
21 December 1987

42/219. Respect for the privileges and immunities of officials of the United Nations and the specialized agencies and related organizations

The General Assembly,

Recalling that, under Article 100 of the Charter of the United Nations, each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities,

Recalling that, under Article 105 of the Charter, all officials of the Organization shall enjoy in the territory of each of its Member States such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization,

Recalling the Convention on the Privileges and Immunities of the United Nations,[50] the Convention on the Privileges and Immunities of the Specialized Agencies,[51] the Agreement on the Privileges and Immunities of the International Atomic Energy Agency and the United Nations Development Programme Standard Basic Assistance Agreements,

Recalling also its resolution 76 (I) of 7 December 1946, in which it approved the granting of the privileges and immunities referred to in articles V and VII of the Convention on the Privileges and Immunities of the United Nations to all members of the staff of the United Nations,

Reiterating the obligation of all officials of the Organization in the conduct of their duties to observe fully the laws and regulations of Member States,

Mindful of the responsibilities of the Secretary-General to safeguard the functional immunity of all United Nations officials,

Mindful also of the importance in this respect of the provision by Member States of adequate and timely information concerning the arrest and detention of staff members and, more particularly, their granting of access to them,

Bearing in mind the wider considerations of the Secretary-General to guarantee minimum standards of justice and due process to United Nations officials,

Reaffirming its previous resolutions, in particular resolution 41/205 of 11 December 1986,

1. *Takes note with concern* of the report submitted by the Secretary-General,[52] on behalf of the Administrative Committee on Co-ordination, and of a number of developments indicated therein, in particular those regarding new cases of arrest and detention and those regarding previously reported cases under this category;

2. *Also takes note with concern* of the information provided by the Secretary-General in his report regarding other questions involving the status, privileges and immunities of officials;

3. *Further takes note with concern* of the restrictions on duty travel of officials as indicated in the report;

4. *Deplores* the growing number of cases where the functioning, safety and well-being of officials have been adversely affected, including cases of detention in Member States and abduction by armed groups and individuals;

5. *Also deplores* the increasing number of cases in which the lives and well-being of officials have been placed in jeopardy during the exercise of their official functions;

6. *Calls upon* all Member States scrupulously to respect the privileges and immunities of all officials of the United Nations, the specialized agencies and related organizations and to refrain from any acts that would impede such officials in the performance of their functions, thereby seriously affecting the proper functioning of the Organization;

7. *Also calls upon* all Member States currently holding under arrest or detention officials of the United Nations, the specialized agencies and related organizations, as spelt out in the Secretary-General's report, to enable the Secretary-General or the executive head of the organization concerned to exercise fully the right of functional protection inherent in the relevant multilateral conventions and bilateral agreements, particularly with respect to immediate access to detained staff members;

8. *Further calls upon* all Member States otherwise impeding officials of the United Nations, specialized agencies and related organizations in the proper discharge of their duties to review the cases and to co-ordinate efforts with the Secretary-General or the executive head of the organization concerned to resolve each case with all due speed;

9. *Calls upon* the staff of the United Nations and the specialized agencies and related organizations to comply with the obligations resulting from the Staff Regulations and Rules of the United Nations, in particular regulation 1.8, and from the equivalent provisions governing the staff of the other agencies;

10. *Calls upon* the Secretary-General to use all such means as are available to him to bring about an expeditious solution of the cases still pending, which were referred to in the report;

11. *Also calls upon* the Secretary-General, as chief administrative officer of the United Nations, to continue personally to act as the focal point in promoting and ensuring the observance of the privileges and immunities of officials of the United Nations and the specialized agencies and related organizations by using all such means as are available to him;

12. *Urges* the Secretary-General to give priority, through the United Nations Security Co-ordinator and his other special representatives, to the reporting and prompt follow-up of cases of arrest, detention and other possible matters relating to the security and proper functioning of officials of the United Nations and the specialized agencies and related organizations;

13. *Requests* the Secretary-General, as Chairman of the Administrative Committee on Co-ordination, to review and appraise the measures already taken to enhance

[50] Resolution 22 A (I).
[51] Resolution 179 (II).
[52] A/C.5/42/14 and Corr.1.

the proper functioning, safety and protection of international civil servants and to modify them where necessary.

99th plenary meeting
21 December 1987

42/220. Personnel questions

A

COMPOSITION OF THE SECRETARIAT

The General Assembly,

I

Recalling Articles 100 and 101 of the Charter of the United Nations,

Recalling its resolutions 35/210 of 17 December 1980, 41/206 A of 11 December 1986 and 41/213 of 19 December 1986,

Taking note of the report of the Secretary-General on the composition of the Secretariat,[53]

Recognizing the importance of maintaining a qualified, independent and geographically balanced international civil service,

Concerned about the negative effect of the reduction of posts and of the recruitment freeze on the geographical distribution of the Secretariat,

1. *Urges* the Secretary-General to keep under review the freeze on the recruitment of external candidates with a view to lifting the freeze at the earliest possible date and to report to the General Assembly on possible alternatives to the policy of suspending such recruitment;

2. *Requests* the Secretary-General, whenever making appointments to posts subject to geographical distribution, to make every effort to recruit nationals of unrepresented and underrepresented Member States and candidates successful in the national competitive examinations, taking into consideration also paragraph 4 of resolution 41/206 A;

3. *Also requests* the Secretary-General, as part of the elaboration of the career development policies and practices in the Secretariat and bearing in mind Article 101 of the Charter and resolution 41/213, to give urgent consideration to the necessity of increasing the mobility of staff in the Professional category and, in particular, the movement of such staff between Headquarters offices and offices in the field;

4. *Further requests* the Secretary-General, bearing in mind resolution 41/213, to conduct a comprehensive review of the career development policies and practices for all staff, in particular staff in the General Service category;

II

Recalling its resolution 41/206 B of 11 December 1986 on the composition of the upper echelons of the Secretariat and its resolution 41/213 by which it, *inter alia*, approved the recommendations of the Group of High-level Intergovernmental Experts to Review the Efficiency of the Administrative and Financial Functioning of the United Nations,[22] in particular those concerning the upper echelons of the Secretariat, that is, the Under-Secretary-General and Assistant Secretary-General levels,

Reaffirming that no post should be considered the exclusive preserve of any Member State or group of States and that the Secretary-General should ensure that this principle is applied faithfully in accordance with the principle of equitable geographical distribution,

Taking note of the negative effect of the reduction of posts on the representation of Member States in the upper echelons of the Secretariat,

1. *Requests* the Secretary-General, in order to preserve the principles of equitable geographical distribution and of rotation in the upper echelons of the Secretariat, to ensure that equal opportunity is given to candidates of all Member States when making appointments to all posts in the upper echelons;

2. *Reaffirms* that the Secretary-General, in making appointments to the upper echelons, should strive to appoint only a candidate from a Member State other than that of the incumbent to be replaced in order to reinforce the principle of rotation in the upper echelons of the Secretariat, unless there are exceptional circumstances, in the light of Article 101, paragraph 3, of the Charter;

3. *Requests* the Secretary-General to review the composition of the upper echelons of the Secretariat in the context of the relevant recommendations of the Group of High-level Intergovernmental Experts to Review the Efficiency of the Administrative and Financial Functioning of the United Nations, with particular reference to length of service in the upper echelons;

III

Recalling its resolutions 35/210, 40/258 A of 18 December 1985 and 41/206 C of 11 December 1986 and other relevant resolutions,

Having examined the report of the Secretary-General on the system of desirable ranges for the geographical distribution of staff in the Professional category and above,[54]

1. *Requests* the Secretary-General to base the desirable ranges for all Member States, with effect from 1 January 1988, on the following criteria:

(*a*) The base figure for the calculations will initially be 2,700;

(*b*) The weight of the membership factor will be 40 per cent of the base figure;

(*c*) The population factor, which will be allotted a weight of 5 per cent, will be directly related to the population of Member States and posts subject to this factor will be distributed among Member States in proportion to their population;

(*d*) The contribution factor will be based on the distribution of the remaining posts among Member States in proportion to the scale of assessments;

(*e*) The upper and lower limits of each range will be based on a flexibility of 15 per cent upwards and downwards from the mid-point of the desirable range, but not less than 4.8 posts up and down, the upper limit of the range being not less than 14 posts;

(*f*) The base figure will be adjusted whenever the actual number of posts subject to geographical distribution increases or decreases by 100, the weights of the three factors being maintained;

[53] A/42/636.

[54] A/C.5/42/7 and Corr.1.

General Assembly resolution 36/235 of 18 December 1981;

3. *Invites* Member States to continue to make voluntary contributions, in line with existing procedures, to the existing language training facilities of the United Nations;

4. *Invites* the Secretary-General to submit to the General Assembly at its forty-fifth session a report on the implementation of the present resolution.

84th plenary meeting
21 December 1988

43/225. Respect for the privileges and immunities of officials of the United Nations and the specialized agencies and related organizations

The General Assembly,

Recalling that, under Article 100 of the Charter of the United Nations, each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities,

Recalling that, under Article 105 of the Charter, all officials of the Organization shall enjoy in the territory of each of its Member States such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization,

Recalling the Convention on the Privileges and Immunities of the United Nations,[91] the Convention on the Privileges and Immunities of the Specialized Agencies,[92] the Agreement on the Privileges and Immunities of the International Atomic Energy Agency and the United Nations Development Programme Standard Basic Assistance Agreements,

Recalling also its resolution 76 (I) of 7 December 1946, in which it approved the granting of the privileges and immunities referred to in articles V and VII of the Convention on the Privileges and Immunities of the United Nations to all members of the staff of the United Nations,

Recalling its resolution 43/173 of 9 December 1988 containing, *inter alia*, a body of principles for the protection of all persons under any form of detention or imprisonment, including the principle that all persons under arrest or detention be provided whenever necessary with medical care and treatment,

Reiterating the obligation of all officials of the Organization in the conduct of their duties to observe fully the laws and regulations of Member States,

Mindful of the responsibilities of the Secretary-General to safeguard the functional immunity of all United Nations officials,

Mindful also of the importance in this respect of the provision by Member States of adequate and timely information concerning the arrest and detention of staff members and, more particularly, their granting of access to them,

Bearing in mind the wider considerations of the Secretary-General to guarantee minimum standards of justice and due process to United Nations officials,

Reaffirming its previous resolutions, in particular resolution 42/219 of 21 December 1987,

1. *Takes note with concern* of the report of the Secretary-General,[93] submitted on behalf of the Administrative Committee on Co-ordination, and of the developments indicated therein, in particular the significant number of new cases of arrest and detention and those regarding previously reported cases under this category;

2. *Also takes note with concern* of the restrictions on duty travel of officials as indicated in the report of the Secretary-General;

3. *Further takes note with concern* of the information contained in the report of the Secretary-General related to taxation and the status, privileges and immunities of officials;

4. *Deplores* the increase in the number of cases where the functioning, safety and well-being of officials have been adversely affected;

5. *Also deplores* the increasing number of cases in which the lives and well-being of officials have been placed in jeopardy during the exercise of their official functions;

6. *Calls upon* all Member States scrupulously to respect the privileges and immunities of all officials of the United Nations and the specialized agencies and related organizations and to refrain from any acts that would impede such officials in the performance of their functions, thereby seriously affecting the proper functioning of the Organization;

7. *Calls upon* those Member States holding under arrest or detention officials of the United Nations and the specialized agencies and related organizations to enable the Secretary-General or the executive head of the organization concerned to exercise fully the right of functional protection inherent in the relevant multilateral conventions and bilateral agreements, particularly with respect to immediate access to detained staff members;

8. *Calls upon* all Member States otherwise impeding officials of the United Nations and the specialized agencies and related organizations in the proper discharge of their duties to review the cases and to co-ordinate efforts with the Secretary-General or the executive head of the organization concerned to resolve each case with all due speed;

9. *Calls upon* the staff of the United Nations and the specialized agencies and related organizations to comply with the obligations resulting from the Staff Regulations and Rules of the United Nations, in particular regulation 1.8, and from the equivalent provisions governing the staff of the other agencies;

10. *Calls upon* the Secretary-General to use all such means as are available to him to bring about an expeditious solution of the cases still pending, which were referred to in the report;

11. *Also calls upon* the Secretary-General, as chief administrative officer of the United Nations, to continue personally to act as the focal point in promoting and ensuring the observance of the privileges and immunities of officials of the United Nations and the specialized agencies and related organizations by using all such means as are available to him;

12. *Urges* the Secretary-General to give priority, through the United Nations Security Co-ordinator and his other special representatives, to the reporting and prompt follow-up of cases of arrest, detention and other possible matters relating to the security and proper functioning of officials of the United Nations and the specialized agencies and related organizations;

[91] Resolution 22 A (I).
[92] Resolution 179 (II).

[93] A/C.5/43/18.

13. *Requests* the Secretary-General, as Chairman of the Administrative Committee on Co-ordination, to review and appraise the measures already taken to enhance the proper functioning, safety and protection of international civil servants and to modify them where necessary.

84th plenary meeting
21 December 1988

43/226. United Nations common system: report of the International Civil Service Commission

The General Assembly,

Having considered the fourteenth annual report of the International Civil Service Commission[94] and other related reports,[95]

I

COMPREHENSIVE REVIEW OF THE CONDITIONS OF SERVICE OF THE STAFF IN THE PROFESSIONAL AND HIGHER CATEGORIES

Recalling that, in section III of its resolution 42/221 of 21 December 1987, it requested the International Civil Service Commission to undertake a comprehensive review of the conditions of service of the staff in the Professional and higher categories in order to provide a sound and stable methodological basis for their remuneration,

Reaffirming the guidelines provided in section III, paragraph 1, of resolution 42/221,

Recalling also that, in section III, paragraph 2, of resolution 42/221, the Commission was requested to submit to the General Assembly at its forty-third session a preliminary report on the comprehensive review containing an analysis of the subject, together with an outline of one or more possible alternatives,

Noting that the preliminary report on the comprehensive review contained in chapter III, section C, of the report of the Commission,[94] does not contain the analysis requested,

Bearing in mind that the Commission should allocate the highest priority to the comprehensive review in its programme of work for 1989,

Recognizing that the scope of the review should not necessarily be limited to the four areas identified by the Commission in its preliminary report,

Mindful of the interrelationship between these four areas and of the need for conditions of service whose component parts are appropriately balanced,

Emphasizing, in the light of the long-term consequences of this review, the desirability in the review process for close co-operation between the Commission, the organizations of the United Nations common system and the staff representatives,

1. *Requests* the International Civil Service Commission, as a priority, to pursue the comprehensive review and, if necessary, to adjust its programme of work and schedule of meetings for 1989, in order to provide conditions for substantive discussion and finalization of the comprehensive review at its second session of 1989;

2. *Invites* the Commission to make arrangements to allow for the fullest participation of organizations and staff representatives in all aspects and at all stages of the comprehensive review;

3. *Also requests* the Commission to submit a comprehensive report to the General Assembly at its forty-fourth session together with a preliminary assessment of the impact of the relevant recommendations therein on pensionable remuneration;

4. *Further requests* the Commission in its review to be guided by the following:

(*a*) The Commission should examine all elements of the present conditions of service, and after identifying problems related to staff recruitment, retention and mobility should propose solutions to these problems;

(*b*) The proposed solutions should be accompanied by an indication of their financial implications, together with an estimate of the overall costs;

(*c*) The overall costs should, as far as possible, be comparable to the costs of the current remuneration system;

(1) *Comparator*

(*a*) The Noblemaire principle should continue to serve as the basis of comparison between United Nations emoluments and those of the highest-paying civil service—currently the United States federal civil service—which, by its size and structure, lends itself to such comparison;

(*b*) The Commission should review how best the application of the Noblemaire principle can ensure the competitiveness of United Nations remuneration without resorting to comparison with the private sector;

(*c*) In this connection the Commission should undertake a comparative study of the concept of the margin including the way in which it is intended to compensate for expatriation;

(2) *Remuneration system*

(*a*) A single world-wide salary scale should be a fundamental goal of the remuneration system. Within this framework, a review should be made of how best special recruitment needs can be accommodated. The Commission should look into the present multiplicity of salary scales with a view to their correlation and possible amalgamation;

(*b*) In the context of equalizing purchasing power, the Commission should consider among other alternatives:

(i) The division of the pay package into its major component parts, one of which would be housing, reflecting the spending patterns of staff;

(ii) Major simplification of the post adjustment system, including eliminating negative post adjustment, separating out the housing component, streamlining the cost-of-living survey and computation process;

(*c*) The Commission should also review the rationale and magnitude of all elements of remuneration;

(3) *Motivation and productivity*

Consideration should be given to enhancing productivity through the introduction of incentives for merit and rewards on promotion payable on a one-time basis, coupled with less financial reward for longevity, which should be linked to a more rigorous performance appraisal system. Consideration should also be given to the introduction of administrative arrangements and of

[94] *Official Records of the General Assembly, Forty-third Session, Supplement No. 30* and corrigendum (A/43/30 and Corr.1).

[95] *Ibid., Supplement No. 7* (A/43/7 and Add.1-13), document A/43/7/Add.3; and A/C.5/43/12 and Add.1, A/C.5/43/19, A/C.5/43/21 and A/C.5/43/26.

5. *Requests* the Secretary-General to make every effort to increase the representation of women from those countries with a low representation of women;

6. *Also requests* the Secretary-General, in accordance with General Assembly resolution 44/185 C of 19 December 1989, to develop an action programme for the advancement of women in the Secretariat for the period 1991-1995, incorporating as necessary the unfulfilled points of the 1985-1990 action programme and to report thereon to the Assembly at its forty-sixth session;

7. *Further requests* the Secretary-General to include in the action programme for the advancement of women in the Secretariat for the period 1991-1995: (*a*) a comprehensive evaluation and analysis by the Secretariat of the main obstacles to the improvement of the status of women in the Organization; (*b*) proposed measures to overcome the underrepresentation of women from certain Member States; and (*c*) a detailed programme of activities, including monitoring procedures and a timetable for their completion;

8. *Requests* the Secretary-General to maintain the existing Secretariat machinery and to consider the adequacy of the existing machinery to implement the action programme, taking account of the work-loads in the relevant offices, and to report thereon when submitting the action programme for the period 1991-1995;

9. *Requests* Member States to continue to support the efforts of the United Nations, the specialized agencies and related organizations to increase the participation of women in the Professional category and above by, *inter alia,* nominating more women candidates, especially for senior policy-level and decision-making posts, by encouraging women to apply for vacant posts and by creating national rosters of women candidates to be shared with the Secretariat, specialized agencies and related organizations.

72nd plenary meeting
21 December 1990

45/240. Respect for the privileges and immunities of officials of the United Nations and the specialized agencies and related organizations

The General Assembly,

Recalling that, under Article 100 of the Charter of the United Nations, each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities,

Also recalling that, under Article 105 of the Charter, all officials of the Organization shall enjoy in the territory of each of its Member States such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization,

Further recalling the Convention on the Privileges and Immunities of the United Nations,[37] the Convention on the Privileges and Immunities of the Specialized Agencies,[38] the Agreement on the Privileges and Immunities of the International Atomic Energy Agency and the United Nations Development Programme Standard Basic Assistance Agreements,

Stressing that respect for the privileges and immunities of officials of the United Nations and the specialized agencies is becoming even more imperative owing to the growing number of assignments entrusted to the organizations of the United Nations system by the member States,

Recalling its resolution 76 (I) of 7 December 1946, in which it approved the granting of the privileges and immunities referred to in articles V and VII of the Convention on the Privileges and Immunities of the United Nations to all members of the staff of the United Nations, with the exception of those who are recruited locally and are assigned to hourly rates,

Also recalling its resolution 43/173 of 9 December 1988, to which is annexed the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, including the principle that all persons under arrest or detention shall be provided whenever necessary with medical care and treatment,

Reiterating the obligation of all officials of the Organization in the conduct of their duties to observe fully both the laws and regulations of Member States and their duties and responsibilities to the Organization,

Affirming that persistent obstruction of the exercise of the duties of United Nations officials constitutes an obstacle to the implementation of the mission entrusted by the member States to the organizations of the United Nations system and may affect programme delivery,

Mindful of the responsibilities of the Secretary-General to safeguard the functional immunity of all United Nations officials,

Mindful also of the importance in this respect of the provision by Member States of adequate and immediate information concerning the arrest and detention of staff members and, more particularly, their granting of access to them,

Bearing in mind the considerations of the Secretary-General to guarantee appropriate standards of justice and due process to United Nations officials,

Reaffirming its previous resolutions on this subject,

1. *Takes note with grave concern* of the report of the Secretary-General,[39] submitted on behalf of the Administrative Committee on Co-ordination, and of the developments indicated therein, in particular the significant number of new cases of arrest and detention;

2. *Deplores* the increase in the number of cases where the functioning, safety and well-being of officials have been placed in jeopardy;

3. *Also deplores* the disregard for Article 105 of the Charter of the United Nations displayed by some Member States;

4. *Calls upon* all Member States scrupulously to respect the privileges and immunities enjoyed by officials of the United Nations and the specialized agencies and

[37] Resolution 22 A (I).

[38] Resolution 179 (II).

[39] A/C.5/45/10 and Corr.1.

related organizations and to refrain from any acts that would impede such officials in the performance of their functions, thereby seriously affecting the proper functioning of the organizations;

5. *Urges* Member States and others responsible for the illegal detention of United Nations staff members to release them immediately;

6. *Calls upon* the Secretary-General to use all such means as are available to him to bring about an expeditious solution of the cases still pending, which were referred to in his report;

7. *Urges* the Secretary-General to give priority to the prompt follow-up of cases of arrest, detention and other possible matters relating to the security and proper functioning of officials of the United Nations and the specialized agencies and related organizations;

8. *Calls upon* those Member States holding under arrest or detention officials of the United Nations and the specialized agencies and related organizations to enable the Secretary-General or the executive head of the organization concerned to exercise fully the right of functional protection inherent in the relevant multilateral conventions and bilateral agreements, particularly with respect to immediate access to detained staff members;

9. *Calls upon* all Member States to take the necessary measures in order to promote knowledge of and compliance with the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, including the principle that all persons under arrest or detention shall be provided whenever necessary with medical care and treatment;

10. *Affirms* that, in providing medical assistance, the use of independent medical teams should be considered;

11. *Calls upon* the staff of the United Nations and the specialized agencies and related organizations to comply fully with the provisions of Article 100 of the Charter and with the obligations resulting from the Staff Regulations and Rules of the United Nations, in particular regulation 1.8, and from the equivalent provisions governing the staff of the other agencies;

12. *Takes note with concern* of the restrictions on duty travel of officials as indicated in the report of the Secretary-General;

13. *Also takes note with concern* of the information contained in the report of the Secretary-General related to taxation on salaries and emoluments, and requests the Member States concerned and the Secretary-General to agree urgently on the appropriate action to be taken;

14. *Calls upon* all Member States otherwise impeding officials of the United Nations and the specialized agencies and related organizations in the proper discharge of their duties to review the cases and to co-ordinate their efforts with the Secretary-General or the executive head of the organization concerned to resolve each case with all due speed;

15. *Calls upon* the Secretary-General, as chief administrative officer of the United Nations, to continue personally to act as the focal point in promoting and ensuring the observance of the privileges and immunities of officials of the United Nations and the specialized agencies and related organizations by using all such means as are available to him;

16. *Urges* all Member States that have not yet become parties to the existing international legal instruments covering the question of privileges and immunities of officials, in particular to the Convention on the Privileges and Immunities of the United Nations[37] and the Convention on the Privileges and Immunities of the Specialized Agencies,[38] to do so promptly;

17. *Welcomes* the advisory opinion of 15 December 1989 of the International Court of Justice on the applicability of article VI, section 22, of the Convention on the Privileges and Immunities of the United Nations[40] that this section is applicable to persons other than United Nations officials to whom a mission has been entrusted by the Organization and who are therefore entitled to enjoy the privileges and immunities provided for in that section with a view to the independent exercise of their function;

18. *Requests* the Secretary-General, as Chairman of the Administrative Committee on Co-ordination, to review and appraise the measures already taken to enhance the proper functioning, safety and protection of international civil servants;

19. *Also requests* the Secretary-General, in compiling the information for incorporation into the reports on privileges and immunities of officials submitted on behalf of the Administrative Committee on Co-ordination, to include, to the extent possible, the views of the Member States.

72nd plenary meeting
21 December 1990

45/241. United Nations common system: report of the International Civil Service Commission

The General Assembly,

Having considered the sixteenth annual report of the International Civil Service Commission[41] and other related reports,[42]

I

1. *Reaffirms* the central role of the International Civil Service Commission in the regulation and co-ordination of conditions of service, including pensionable remuneration of all graded and ungraded staff, of the United Nations common system;

2. *Endorses* the efforts of the Commission to maintain the integrity and unity of those conditions of service in order to strengthen the effectiveness of common system activities and to ensure equity of treatment of all staff;

3. *Reiterates its request* to the Secretary-General and to the executive heads of the organizations of the com-

[40] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, p. 177.

[41] *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 30* and addendum (A/45/30 and Add.1).

[42] *Ibid., Supplement No. 9* (A/45/9); *ibid., Supplement No. 7* (A/45/7 and Add.1-14), document A/45/7/Add.7; and A/C.5/45/23, A/C.5/45/24 and A/C.5/45/43.

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47/28. Respect for the privileges and immunities of officials of the United Nations and the specialized agencies and related organizations

The General Assembly,

Recalling that, under Article 105 of the Charter of the United Nations, all officials of the Organization shall enjoy in the territory of each of its Member States such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization,

Also recalling that, under Article 100 of the Charter, each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities,

Further recalling the Convention on the Privileges and Immunities of the United Nations,[2] the Convention on the Privileges and Immunities of the Specialized Agencies,[3] the Agreement on the Privileges and Immunities of the International Atomic Energy Agency and the United Nations Development Programme Standard Basic Assistance Agreements,

Stressing that respect for the privileges and immunities

of officials of the United Nations and the specialized agencies is becoming even more imperative owing to the growing number of assignments entrusted to the organizations of the United Nations system by Member States,

Recalling its resolution 76 (I) of 7 December 1946, in which it approved the granting of the privileges and immunities referred to in articles V and VII of the Convention on the Privileges and Immunities of the United Nations to all members of the staff of the United Nations, with the exception of those who are recruited locally and are assigned to hourly rates,

Also recalling its resolution 43/173 of 9 December 1988, to which is annexed the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, including the principle that all persons under arrest or detention shall be provided whenever necessary with medical care and treatment,

Reiterating the obligation of all officials of the Organization in the conduct of their duties to observe fully both the laws and regulations of Member States and their duties and responsibilities to the Organization,

Mindful of the responsibilities of the Secretary-General to safeguard the functional immunity of all United Nations officials,

Mindful also of the importance in this respect of the provision by Member States of adequate and immediate information concerning the arrest and detention of staff members and, more particularly, their granting of access to them,

Bearing in mind the considerations of the Secretary-General to guarantee appropriate standards of justice and due process to United Nations officials,

1. *Takes note with grave concern* of the report submitted by the Secretary-General[4] on behalf of the members of the Administrative Committee on Coordination, and of the developments indicated therein;

2. *Strongly deplores* the unprecedented and still increasing number of fatalities which have occurred among United Nations personnel, including those engaged in peace-keeping operations;

3. *Deplores* the continuing existence of cases where the functioning, safety and well-being of officials have been placed in jeopardy;

4. *Condemns and deplores* the disregard for Article 105 of the Charter of the United Nations displayed by some Member States;

5. *Reaffirms* in its entirety its resolution 45/240 of 21 December 1990;

6. *Reiterates* the importance of providing access of United Nations medical teams to detained staff, and requests Member States to facilitate medical care deemed necessary by such teams;

7. *Requests* the Secretary-General to take all necessary measures to ensure the safety of United Nations personnel, as well as those engaged in peace-keeping and humanitarian operations;

8. *Reminds* host countries of their responsibility for the safety of peace-keeping and all United Nations personnel on their territory;

9. *Strongly affirms* that disregard for the privileges and immunities of officials has always constituted one of the main obstacles to the implementation of the missions and programmes assigned to the organizations of the United Nations system by Member States;

10. *Requests* the Secretary-General and Member States to continue their efforts to ensure respect for the privileges and immunities of officials, and requests the Secretary-General to continue to submit, on behalf of the Administrative Committee on Coordination, reports thereon to the General Assembly.

72nd plenary meeting
25 November 1992

47/41. Financing of the United Nations Operation in Somalia

The General Assembly,

Having considered the report of the Secretary-General on the financing of the United Nations Operation in Somalia[5] and the related report of the Advisory Committee on Administrative and Budgetary Questions,[6]

Bearing in mind Security Council resolution 751 (1992) of 24 April 1992, by which the Council, *inter alia*, decided to establish under its authority a United Nations Operation in Somalia, requested the Secretary-General to deploy military observers to monitor the cease-fire in Mogadishu and agreed, in principle, to the deployment of a United Nations security force under the overall direction of the Special Representative of the Secretary-General to provide security and to escort deliveries of humanitarian supplies,

Bearing in mind also Security Council resolution 767 (1992) of 27 July 1992, by which the Council, *inter alia*, approved the establishment of four operational zones in Somalia as part of the consolidated Operation in Somalia and Council resolution 775 (1992) of 28 August 1992, by which the Council, *inter alia*, authorized the increase in the strength of the Operation in Somalia,

Recognizing that the costs of the Operation in Somalia are expenses of the Organization to be borne by Member States in accordance with Article 17, paragraph 2, of the Charter of the United Nations,

Recognizing also that, in order to meet the expenditures caused by the Operation in Somalia, a different procedure is required from the one applied to meet expenditures of the regular budget of the United Nations,

Taking into account the fact that the economically more developed countries are in a position to make relatively larger contributions and that the economically less developed countries have a relatively limited capacity to contribute towards such an operation,

Bearing in mind the special responsibilities of the States permanent members of the Security Council, as indicated in General Assembly resolution 1874 (S-IV) of 27 June 1963, in the financing of such operations,

Mindful of the fact that it is essential to provide the Operation in Somalia with the necessary financial resources to enable it to fulfil its responsibilities under the relevant resolutions of the Security Council,

1. *Endorses* the observations and recommendations contained in the report of the Advisory Committee on Administrative and Budgetary Questions;[6]

2. *Requests* the Secretary-General to establish firm internal control on all financial transactions, including

staff, a report on the hiring and use of consultants, following the format of past reports on the subject;[121]

VII. REPORTING TO THE GENERAL ASSEMBLY

Requests the Secretary-General to submit to the General Assembly, under the appropriate agenda items, reports on the following questions:

(*a*) *As soon as possible*

A family leave programme for United Nations staff;

(*b*) *At its resumed fifty-first session*

The findings of the review of the first cycle of the performance appraisal system;

(*c*) *At its fifty-second session*

(i) The appropriate action taken against personnel responsible for malpractices identified by the Board of Auditors;

(ii) Comprehensive policy guidelines on consultants, to be submitted through the Advisory Committee on Administrative and Budgetary Questions;

(*d*) *At its fifty-third session*

(i) Information on measures taken to ensure equitable representation of Member States at the senior and policy-making levels of the Secretariat, to be included in the report on the composition of the Secretariat;

(ii) The full implementation of the strategy for the management of the human resources of the Organization;

(iii) Delegation of authority;

(iv) The simplification and streamlining of all personnel rules and procedures;

(v) Staff-management consultative mechanisms;

(vi) The practices of Member States relative to national staff representation;

(vii) Proposals on the introduction of a probationary period for successful candidates in the competitive examination for promotion to the Professional category of staff members from other categories;

(viii) The question of geographical imbalance resulting from promotions of successful candidates in the competitive examination for promotion to the Professional category of staff members from other categories;

(ix) Career development policy;

(x) Linguistic qualifications in the context of the performance appraisal system and the recruitment and promotion policy;

(xi) The feasibility of holding the national competitive examinations in the six official languages, including proposals to ensure that nationals of Member States whose mother tongue is not an official language of the United Nations are not placed at a disadvantage;

(xii) Mobility;

(xiii) The efforts made by the Secretary-General to achieve the level of 70 per cent of permanent appointments in posts subject to geographical distribution;

(xiv) Detailed proposals for the implementation of a dual-track system of career and non-career appointments;

(xv) The hiring of retirees and the hiring and use of consultants.

95th plenary meeting
3 April 1997

51/227. Respect for the privileges and immunities of officials of the United Nations and the specialized agencies and related organizations

The General Assembly,

Recalling that, under Article 105 of the Charter of the United Nations, all officials of the Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization,

Also recalling that, under Article 100 of the Charter, each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities,

Further recalling the Convention on the Privileges and Immunities of the United Nations,[122] the Convention on the Privileges and Immunities of the Specialized Agencies,[123] the Agreement on the Privileges and Immunities of the International Atomic Energy Agency[124] and the United Nations Development Programme Standard Basic Assistance Agreements,

[121] A/51/533, para. 44.

[122] Resolution 22 A (I).

[123] Resolution 179 (II).

[124] United Nations, *Treaty Series*, vol. 374, p. 147.

Stressing that respect for the privileges and immunities of officials of the United Nations and the specialized agencies is becoming even more imperative owing to the growing number of assignments entrusted by Member States to the organizations of the United Nations system,

Recalling its resolution 76 (I) of 7 December 1946, in which it approved the granting of the privileges and immunities referred to in articles V and VII of the Convention on the Privileges and Immunities of the United Nations to all members of the staff of the United Nations, with the exception of those who are recruited locally and are assigned to hourly rates,

Also recalling its resolution 43/173 of 9 December 1988, to which is annexed the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, including the principle that all persons under arrest or detention shall be provided whenever necessary with medical care and treatment,

Reiterating the obligation of all officials of the Organization in the conduct of their duties to observe fully both the laws and regulations of Member States and their duties and responsibilities to the Organization,

Mindful of the responsibility of the Secretary-General to safeguard the functional immunity of all United Nations officials,

Mindful also of the importance in this respect of the immediate provision by Member States of adequate information concerning the arrest and detention of staff members and, more particularly, of their granting access to them,

Bearing in mind the responsibility of the Secretary-General to guarantee appropriate standards of justice and due process to United Nations officials,

Recalling the relevant conventions and also its resolution 49/59 of 9 December 1994, by which it adopted the Convention on the Safety of United Nations and Associated Personnel, and its resolution 51/137 of 13 December 1996,

1. *Takes note* of the report of the Secretary-General on respect for the privileges and immunities of officials of the United Nations and the specialized agencies and related organizations, as well as their security and safety,[125] and of the statement made to the Fifth Committee by the United Nations Security Coordinator on 15 October 1996;[126]

2. *Expresses its deep appreciation* to United Nations personnel, including those engaged in peacekeeping and humanitarian operations and locally recruited staff, for their efforts to contribute to achieving peace and security and to alleviating the suffering of the people living in areas of conflict;

3. *Deplores* the risks confronting United Nations personnel, including those engaged in peacekeeping and humanitarian operations and locally recruited staff;

4. *Requests* the Secretary-General to submit to the General Assembly at its fifty-second session a report on respect for the privileges and immunities of officials of the United Nations and the specialized agencies and related organizations as well as their security and safety;

5. *Also requests* the Secretary-General to pay special attention to Member States' restrictions, which may impede the ability of officials of the United Nations and the specialized agencies and related organizations to carry out their functions, and to report thereon to the General Assembly at its fifty-third session.

95th plenary meeting
3 April 1997

51/228. Financing of the Military Observer Group of the United Nations Verification Mission in Guatemala[127]

The General Assembly,

Having considered the report of the Secretary-General on the financing of the Military Observer Group of the United Nations Mission for the Verification of Human Rights and of Compliance with the Commitments of the Comprehensive Agreement on Human Rights in Guatemala[128] and the related report of the Advisory Committee on Administrative and Budgetary Questions,[129]

Recalling Security Council resolution 1094 (1997) of 20 January 1997, in which the Council authorized the attachment to the United Nations Mission for the Verification of Human Rights and of Compliance with the Commitments of the Comprehensive Agreement on Human Rights in Guatemala of a group of one hundred and fifty-five military observers and requisite medical personnel for a period of three months,

Recognizing that the costs of the Observer Group are expenses of the Organization to be borne by Member States in accordance with Article 17, paragraph 2, of the Charter of the United Nations,

Recognizing also that, in order to meet the expenditures caused by the Observer Group, a different procedure is required from that applied to meet expenditures of the regular budget of the United Nations,

Taking into account the fact that the economically more developed countries are in a position to make relatively larger contributions and that the economically less developed

[125] A/C.5/51/3.

[126] See *Official Records of the General Assembly, Fifty-first Session, Fifth Committee*, 7th meeting (A/C.5/51/SR.7), and corrigendum.

[127] In accordance with resolution 51/198 B, paragraph 5, the United Nations Mission for the Verification of Human Rights and of Compliance with the Commitments of the Comprehensive Agreement on Human Rights in Guatemala has been renamed the United Nations Verification Mission in Guatemala.

[128] A/51/815.

[129] A/51/826.

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FIFTH COMMITTEE
Agenda item 107

PERSONNEL QUESTIONS

Respect for the privileges and immunities of officials of the United Nations and the specialized agencies

Report of the Secretary-General

1. By resolution 35/212 of 17 December 1980, the General Assembly appealed to all Member States to respect the privileges and immunities accorded to officials of the United Nations and the specialized agencies by the Conventions on the Privileges and Immunities of the United Nations and of the Specialized Agencies. The Secretary-General was requested to bring the resolution to the attention of all organs, organizations and bodies of the United Nations system and to report to the General Assembly, on behalf of the Administrative Committee on Co-ordination (ACC), any cases in which the international status of the staff members of the Organization or of the specialized agencies had not been fully respected.

2. Pursuant to paragraph 2 of resolution 35/2 2, on 6 February 1981 the Legal Counsel addressed letters to the specialized agencies, the International Atomic Energy Agency (IAEA) and the General Agreement on Tariffs and Trade (GATT), as well as to the appropriate offices and organs of the United Nations system, drawing to their attention the text of the resolution and requesting any relevant information.

3. At its first regular session in 1981, ACC adopted decision 1981/8, in which it took note of General Assembly resolution 35/212 and concluded that for the purposes of furnishing information:

(a) The law governing the status, privileges and immunities of staff members should consist principally of the Charter of the United Nations and other constituent instruments of the organizations concerned, the Conventions on the Privileges and Immunities of the United Nations, of the specialized agencies and of IAEA, the various Headquarters Agreements, the Standard Basic Assistance Agreements of the United Nations Development Programme and the practice developed by the United Nations system in respect of the implementation of the foregoing Agreements;

(b) The term "staff members" should cover officials, experts on mission, locally recruited employees and, in general, all persons performing functions or services for the United Nations system;

(c) The term "cases" should relate solely to instances where an actual, verified breach of the status of an individual staff member had occurred, which breach had not been remedied by the Government concerned.

4. The report which follows is based on information received from the following organs, organizations and bodies of the United Nations system as of 31 August 1981: Economic Commission for Latin America (ECLA), Economic and Social Commission for Asia and the Pacific (ESCAP), Economic Commission for Africa (ECA), Economic Commission for Western Asia (ECWA), United Nations Disengagement Observer Force (UNDOF), United Nations Peace-keeping Force in Cyprus (UNFICYP), United Nations Industrial Development Organization (UNIDO), United Nations Interim Force in Lebanon (UNIFIL), United Nations Truce Supervision Organization in Palestine (UNTSO), Office of the United Nations High Commissioner for Refugees (UNHCR), United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), United Nations Children's Fund (UNICEF), United Nations Development Programme (UNDP), International Labour Organisation (ILO), Food and Agriculture Organization of the United Nations (FAO), United Nations Educational, Scientific and Cultural Organization (UNESCO), International Civil Aviation Organization (ICAO), World Health Organization (WHO), International Monetary Fund (IMF), World Intellectual Property Organization (WIPO) and IAEA.

Arrest and detention of staff members

5. The largest number of reported cases relate to breaches arising from the arrest and detention of staff members. The increase in the number of such cases in recent years led to the issuance by the United Nations Assistant Secretary-General for General Services in January 1980 of a memorandum on the immediate reporting of arrest and detention of staff members, other agents of the United Nations and members of their families. The memorandum was addressed to the Executive Secretaries of the regional commissions, UNDP resident representatives, representatives of UNICEF, directors of United Nations information centres, and heads of United Nations peace-keeping missions.

6. Based on the immunity provisions of the Charter and the Privileges and Immunities Conventions and Agreements, the memorandum restates the position constantly upheld by the United Nations that when a governmental authority arrests or detains a United Nations staff member, whether internationally or locally recruited, the United Nations has the right to visit and converse with the staff member, to be apprised of the grounds for the arrest or detention, including the main facts and formal charges, to assist the staff member in arranging for legal counsel and to appear in legal proceedings to defend any United Nations interest affected by the arrest or detention.

7. The United Nations position in this regard, which is shared by the specialized agencies, is based on a number of considerations. First, the distinction between

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acts performed in an official capacity and those performed in a private capacity, which lies at the heart of the concept of functional immunity, is a question of fact which depends on the circumstances of the particular case. The position of the United Nations is that it is exclusively for the Secretary-General to determine the extent of the duties and functions of United Nations officials.

8. Second, it follows from the advisory opinion of the International Court of Justice of 11 April 1949 on reparations for injuries suffered in the service of the United Nations that the United Nations has a right of functional protection of those of its staff members in respect of whom a State possibly may have violated its international obligations.

9. Third, to enable the Secretary-General to make the determination whether an act was done in the course of official functions and, in the affirmative, to decide whether to waive immunity, as well as to enable the Organization to exercise its right of functional protection, there must be an adequate opportunity to learn the facts of the case. Where a staff member has been arrested or is in detention, the only such opportunity is through access to the staff member concerned.

10. While the position outlined above has, on the whole, been respected and complied with by Member States, there have been a number of cases during the present reporting period in which the United Nations and specialized agencies have been denied access to arrested or detained staff members and, in general, have been prevented from exercising their right of functional protection.

11. UNRWA has reported a total of 26 cases of arrest and detention of Agency staff members in the Gaza Strip, the West Bank, east Jordan and the Syrian Arab Republic. Of these staff members, 22 were released, without having been charged or brought to trial, after periods of detention ranging from 4 days to 10 weeks. One staff member in the Gaza Strip was brought to trial after having been detained for five months, sentenced to a term of imprisonment and subsequently released.

12. Of the remaining three UNRWA staff members, Mr. Sughi Mustafa Ahmad, an instructor at the Kalandia Vocational Training Centre in the West Bank, was sentenced to a term of five years imprisonment on 5 March 1981; Mr. Izzedine Hussein Abu Khreish, a teacher of mathematics at Kastal School in Damascus, has been held in detention in the Syrian Arab Republic since 11 September 1980 without having been charged or brought to trial; and Mr. Abdallah Daher Hayatli, a teacher at Al Jish School in Homs, Syrian Arab Republic, has been missing since 20 April 1980 without any record of his arrest or detention. Mr. Sughi Mustafa Ahmad and Mr. Izzedine Hussein Abu Khreish are alleged to have been members of proscibed organizations. In all these cases, however, UNRWA has experienced difficulties in obtaining adequate and timely information and, consequently, has been unable to ascertain whether official functions have been involved.

13. UNDP has reported 11 cases of arrest and detention of staff members or their dependants in two of which there is evidence of a clear violation of the status of the staff member concerned. In Uganda, a locally recruited driver was assaulted and detained while on duty, and in the United Arab Emirates, a non-national,

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locally recruited staff member was arrested on UNDP premises. No formal charges were filed by the authorities concerned in either of the cases, and following the intervention of United Nations officials, the staff members were promptly released.

14. The case of one UNDP staff member, Alicja Wesolowska, arrested in August 1979 in her native country, Poland, while en route to a new assignment, is still pending. The staff member was tried on charges of having engaged in activities detrimental to the security interests of Poland, convicted by a military tribunal and sentenced to a term of seven years imprisonment. Since all access to the staff member has been denied to the United Nations, the Secretary-General has been unable to verify the nature of the alleged violation and, in general, has been prevented from exercising functional protection. During the period under review, the Secretary-General continued his efforts to secure the release of the staff member. In a letter dated 12 January 1981 addressed to the Chairman of the Council of State of the Polish People's Republic, the Secretary-General reiterated an earlier appeal for clemency in this case. In his response, the Chairman of the Council of State stated that the request for clemency "can be examined exclusively on humanitarian grounds, taking into account all the circumstances of the case". The appeal was renewed by a cabled message from the Secretary-General on 17 April 1981. On 24 July 1981, the Secretary-General requested the personal intervention of the First Secretary of the Central Committee of the Polish United Workers Party in order to obtain clemency. Although the Secretary-General has been informed on a number of occasions that his appeal is under positive consideration, no decision has yet been taken by the Polish authorities.

15. UNICEF has reported the arrest and detention of three staff members, two in Afghanistan and one in Mozambique. In Afghanistan, an international official was arrested, questioned for two and one-half hours, released and requested to leave the country; a locally recruited official, Mr. Tawakal, arrested on 30 June 1981, remains under detention. The Legal Counsel has been officially informed that this staff member is under investigation in connexion with security matters and that upon completion of the interrogation no objection will be placed on a visit by a United Nations official. In Mozambique, a locally recruited staff member detained on 6 March 1981 was released on 15 August 1981 without having been charged or sent to trial.

16. The common link in these cases has been the difficulties encountered by UNICEF in providing functional protection at the time of arrest or during detention because of the failure of the authorities concerned to provide timely information and access to the staff members.

17. Two of the regional commissions have drawn the attention of the Secretary-General to earlier cases involving breaches of status, privileges and immunities, and concerning which the United Nations right of functional protection continues to be denied.

18. One locally recruited staff member of the Economic Commission for Africa (ECA) was released from prison in Ethiopia i July 1981 after 21 months of detention.

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three other locally recruited staff members, Ms. Desta, Ms. Abay and Mr. Belay, remain under detention in Ethiopia at the present time. Ms. Desta was arrested in June 1979, but despite repeated efforts on the part of ECA officials permission to visit and converse with the staff member continues to be denied. No formal charges against the staff member have been made known to the United Nations. Ms. Abay was arrested in August 1979 and in January 1980 was charged with having participated in "anti-government activities". She has been visited in prison by an ECA security officer. Mr. Belay was arrested in October 1978. Repeated requests by United Nations Headquarters and ECA for visiting rights have been ignored or denied. The family of Mr. Belay informed ECA in June 1979 that his clothes had been returned, an indication that the staff member was no longer alive. The Secretary-General, the Legal Counsel and the Executive Secretary of ECA have repeatedly sought to obtain verification of the whereabouts and/or fate of Mr. Belay without success. In the absence of any information regarding this case, the Secretary is obliged to draw the conclusion that the staff member died while under detention.

19. ECLA has reported no cases in the current period but has specifically drawn attention to earlier violations involving the arrest or abduction of two staff members in Chile in which the conduct of the authorities has never been explained to the satisfaction of the United Nations. The cases of Carmelo Soria and Fernando Olivares are the subject of formal claims by the Organization. The Government concerned has denied responsibility in these cases and considers them to be under investigation, in accordance with domestic legal procedures.

20. Reports have been received from two of the specialized agencies regarding the arrest and detention of international staff members. In one case, a staff member of WHO was detained for 24 hours but released immediately, once his status was verified. In the second case, a high official of UNESCO was arrested in March 1980 and remains under detention at the present time.

21. Mr. Percy Stulz, the Director of the Cultural Heritage Division of UNESCO and a national of the German Democratic Republic, was detained and arrested while visiting his country in March 1980. The Director-General of UNESCO was advised by governmental authorities, as well as by a letter purporting to have been written by Mr. Stulz, that in view of the criminal charges lodged against him alleging activities against the State, he was obliged to offer his resignation from UNESCO. The Director-General informed the authorities concerned of the status, privileges and immunities attaching to UNESCO officials by virtue of Article 105 of the Charter of the United Nations and article XII of the UNESCO Constitution, and, in particular, drew their attention to the fact that Mr. Stulz's immunity from legal process had not been waived by the Director-General. The Director-General informed Mr. Stulz that his resignation could only be considered if submitted in accordance with the procedures laid down in the Staff Rules and at his duty station, Paris. Further contacts between the Organization and the Government in both Berlin and Paris confirmed the position of each side.

22. The case was brought to the attention of the Executive Board of UNESCO at its 109th session, held from 30 April to 6 June 1980. The Executive Board expressed its concern regarding the continued detention of Mr. Stulz and gave its full support to the Dirctor-General for his efforts in pursuing the release of the staff member. The Chairman of the Executive Board advised the President of the German Democratic Republic National Commission for UNESCO on 11 June 1980 of the Board's action.

23. On 24 August 1980, the Director-General of UNESCO was informed by the Permanent Representative of the German Democratic Republic that Mr. Stulz had been sentenced by a Berlin military court to three years of imprisonment. On 12 September 1980, the Executive Board adopted a resolution in which it decided to draw the question to the attention of the UNESCO General Conference at its Belgrade session, held from 23 September to 28 October 1980. The General Conference adopted resolution 25.1, entitled "Independence of the international civil service", in which, after expressing its profound concern that a high official had been arrested, detained and sentenced to a term of imprisonment despite the protests of the Director-General and the Executive Board, it invited the Director-General to continue his efforts to obtain a satisfactory solution to the problem. The text of the resolution was circulated by the Director-General to all States members of UNESCO on 27 February 1981, and in a letter to the President of the Council of State of the German Democratic Republic, the Director-General requested that a favourable reply be given to the request for the release of Mr. Stulz. The Attorney-General of the German Democratic Republic responded negatively to that request. At its 112th session, in May 1981, the Executive Board again examined the case, taking into account the most recent developments and General Assembly resolution 35/212. The Executive Board adopted decision 5.1.6 and again expressed its support for the efforts of the Director-General.

24. On 15 June 1981, a hand-written letter of resignation from Mr. Stulz was transmitted to the Director-General. On behalf of the Director-General, the Assistant Director-General advised Mr. Stulz on 1 July 1981 that his resignation could only be accepted if it was made in accordance with the normal procedures and presented at the duty station; the Director-General continued to regard him as a staff member. On 28 August 1981, Mr. Stulz wrote another letter to the Director-General in which he repeated that he had resigned from the secretariat of the Organization.

Immunity from legal process

25. Section 18 (a) of the Convention on the Privileges and Immunities of the United Nations provides that officials of the United Nations shall be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity. Similar provisions are to be found in the other privileges and immunities instruments. The expression "legal process" has been interpreted by the United Nations as comprising the entire judicial proceedings by

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which a court assumed jurisdiction and compels the appearance of the defendant and witnesses. 1/

26. Other than cases involving arrest and detention, which have been set out in paragraphs 5-22 above, only one case, involving a staff member of the United Nations Environment Programme, has been reported in which immunity from legal process was not fully respected.

Exemption from taxation

27. Few problems have been encountered in the reporting period with regard to the question of taxation on the salaries and emoluments of officials. Where problems have arisen, usually in respect of locally recruited officials, the matter has been satisfactorily resolved, once the law and practice of the organizations has been explained. Although a small number of cases of this kind are pending, the Secretary-General is of the opinion that they do not, at the present time, fall within the purview of resolution 35/212.

Immunity from immigration restrictions, alien registration and travel restrictions

28. The immunity provisions with regard to immigration restrictions are designed principally to facilitate the unimpeded travel of officials. The United Nations has taken the position that under section 18 (d) of the Convention on the Privileges and Immunities of the United Nations, States parties to the Convention are bound to issue visas to officials of the United Nations without restrictions. 2/ Occasional difficulties in this regard have been encountered by some of the regional commissions and by UNDP during the reporting period.

29. The most serious and persistent restrictions on duty travel of officials have been encountered by UNRWA. Three international staff members have been denied facilities for travel on official duty in the West Bank and the Gaza Strip by Israeli authorities. Two locally recruited staff members have also been refused entry into the occupied territories. Although the matter has been the subject of repeated protests by the Agency and the United Nations Legal Counsel, the restrictions continue. The Agency has been given to understand that the denial of facilities in these cases relates to security (though no specific information as been given to the Agency) and to the refusal of some Governments to permit Israeli nationals employed in international organizations to visit or work in their territory. These restrictions do not apply to Agency staff members who joined prior to 1974 and who have already been cleared for travel in the occupied territories. The international staff members whose travel is thus restricted are nationals of Pakistan, Sri Lanka and Tunisia; the locally recruited staff members are nationals of Lebanon.

1/ Yearbook of the International Law Commission, 1967 (United Nations publication, Sales No. E.68.V.2), p. 266, para. 250.

2/ United Nations Juridical Yearbook, 1973 (United Nations publication, Sales No. E.75.V.1), p. 168.

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30. One locally recruited staff member of UNRWA, a national of Lebanon, has been denied entry into the Syrian Arab Republic. This case is the subject of negotiations between the Agency and the Government.

Duty-free importation of furniture and effects

31. Section 18 (g) and 19 (f) of the Conventions on the Privileges and Immunities of the United Nations and of the Specialized Agencies accord officials the right of duty-free import of furniture and effects upon first taking up their posts. While this has generally been observed in the practice of States, difficulties have arisen during the reporting period in regard to three Field Service officers assigned by the United Nations to serve with ESCAP.

32. The Government of Thailand has declined to permit the duty-free import of the personal automobiles of the Field Service officers concerned, notwithstanding the efforts of the Commission's secretariat and the Office of Legal Affairs to secure compliance with the relevant provisions of the Convention and the ESCAP Headquarters Agreement. In view of the impasse which has been reached in the matter, the Legal Counsel has concluded that there exists a difference of interpretation or application of the instruments in question which should be settled in accordance with the procedures provided for in the Convention.

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PERSONNEL QUESTIONS

RESPECT FOR THE PRIVILEGES AND IMMUNITIES OF OFFICIALS OF THE UNITED NATIONS AND SPECIALIZED AGENCIES AND RELATED ORGANIZATIONS

UNRWA staff detained in Lebanon by the Israeli authorities

Report of the Secretary-General

By resolution 37/236 B of 21 December 1982 the General Assembly, after drawing ttention to the unprecedented character of the mass arrest by the Israeli uthorities in the territory of Lebanon of a great number of officials of the nited Nations Relief and Works Agency for Palestine Refugees in the Near East UNRWA), called upon the Secretary-General to establish the whereabouts, find out he charges made and arrange a meeting with the detained officials, in order to ecure their earliest release and requested him to inform Member States promptly bout the measures taken by him and their results.

As was indicated by the Secretary-General in his report to the thirty-seventh ession of the General Assembly entitled "Respect for the privileges and immunities f officials of the United Nations and the specialized agencies and related rganizations" (A/C.5/37/34), following the Israeli invasion into south Lebanon in une 1982, more than 200 cases of arrest of UNRWA staff members in Lebanon by the sraeli Defence Forces were reported. 1/ Sixty-eight staff members were still elieved to in detention on 17 October 1983, 29 of whom have been reported arrested n 1983 (see annex). Repeated attempts have been made to obtain information egarding the detained staff, to secure access to them and to obtain their early elease. The steps that have been taken in this regard are outlined below.

The Director, UNRWA West Bank Field Office, 2/ took up the matter with the sraeli Ministry of Foreign Affairs at a meeting on 19 July 1982 as soon as UNRWA eceived information about the detention of some members of its staff in Lebanon by

the Israeli Defence Forces (IDF). This was followed, at the direction of UNRWA headquarters, with a note on 24 July 1982 to the Ministry of Foreign Affairs forwarding a list of staff then known to have been arrested. Since then UNRWA has followed up periodically with the Israeli Ministry of Foreign Affairs as well as with the Israeli armed forces in Lebanon. Thus the Lebanon Field Office took the matter up with the local IDF command in meetings in August and September 1982, as well as in writing.

4. On 13 and 18 October 1982 the Director, UNRWA West Bank Field Office, contacted the Israeli Ministry of Foreign Affairs while the UNRWA Field Office in Lebanon continued its efforts with IDF there. On 13 December 1982, the Commissioner-General of UNRWA took the matter up with senior officials of the International Organizations Department of the Israeli Ministry of Foreign Affairs. This was followed by a letter of 29 December 1982 from the Director, UNRWA West Bank Field Office, to the Ministry.

5. On 4 January 1983, the UNRWA Field Director in Lebanon, at a meeting in south Lebanon with an Israeli minister and certain other senior Israeli officials pressed again for access to staff under detention, for their early release and for information on them. As this meeting also did not yield concrete results, the Acting Commissioner-General of UNRWA wrote to the Israeli Ministry of Foreign Affairs on 14 January 1983, followed by a letter from the Director, UNRWA West Bank Field Office, on 15 February 1983 updating information on UNRWA staff detained thus far and reiterating the earlier requests including again, in particular, the request that arrangements be made for the Agency to visit its staff under detention. A reply was received from the Ministry on 18 March 1983 to the Acting Commissioner-General's letter of 14 January.

6. This reply made the point inter alia that no distinction could be made between UNRWA employees and other detainees regarding visits. It was also stated that UNRWA staff detained in Ansar in south Lebanon by IDF were not detained for any activities related to their official capacities and that, therefore, no question of the infringement of their functional immunities should arise. The Commissioner-General wrote in reply on 28 March 1983 to the Ministry of Foreign Affairs, focusing on the right of UNRWA (a) to be informed of the arrest of any of its staff; (b) to be informed of the reasons for the arrest so that it might judge whether that arrest related to the official functions of the staff member concerned; and (c) to have access to detained staff. Since then the Agency has taken the matter up both in south Lebanon with officials of the Israeli Defence Force and in Israel, but without success.

7. On 3 May 1983 the Secretary-General wrote to the Permanent Representative of Israel to the United Nations drawing attention to the position of the United Nations under international law and to the terms of the General Assembly resolution 37/236 B and requesting inter alia that his representatives be given facilities to visit UNRWA staff detained in south Lebanon at an early date, to speak to them and to assist them in their legal representation. The Israeli Permanent Representative in New York replied on 13 June 1983 to the Secretary-General's letter. In substance, the Israeli authorities took the position that they had the right to decide unilaterally the question of what constitutes an official function of a

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United Nations official and that, furthermore, the Government of Israel considered that the United Nations had no standing as regards proceedings taken against its own staff members.

8. The Secretary-General, in his reply of 28 June 1983 to the Israeli Permanent Representative, noted that the position taken by the Government of Israel was not in conformity with international law and practice. In that letter, the Secretary-General also referred to the recognized principle that it is exclusively for the Secretary-General, as the chief administrative officer of the Organization, to determine the extent of the duties and functions of the United Nations officials. Given the large number of countries in which the United Nations operates, the possibility of conflicting decisions by national authorities as to whether a given act was official or not would be tantamount to a denial of immunity. With regard to the question of standing, the Secretary-General pointed out that the position of the Israeli Government was contrary to the well established right, under international law, of functional protection of the Organization. It was recalled that the International Court of Justice had held that international organizations had the power and responsibility to protect members of their staff. The Secretary-General urged that the Israeli authorities be informed of his deepest concern at their failure to respond to the appeals of the General Assembly and himself and that the matter be reconsidered urgently. The position of the Government of Israel as referred to above was also conveyed to the Commissioner-General of UNRWA on 1 June 1983 (in reply to his letter of 28 March 1983) to which the Commissioner-General replied on 21 June 1983, again drawing attention to the United Nations position and requesting a positive response from the Government of Israel.

9. On 12 October 1983, the Permanent Representative of Israel replied to the Secretary-General's letter of 28 June 1983. After assuring the Secretary-General that the Government of Israel fully appreciated his concern for the well-being of UNRWA employees detained at the Ansar Camp, the Permanent Representative went on to state that:

> "Israel has detained certain individuals in Lebanon on account of their involvement in hostile activities, either directly or as accessories, with a view to preventing their involvement in further hostile activities which would endanger the people of southern Lebanon as well as the citizens of Israel. Their detention has no connection whatsoever with their professional activities, but only with actions which violated their functions as officials of the United Nations. It is quite impracticable for the Government of Israel to attempt to differentiate between locally recruited personnel who performed their hostile actions outside the scope of their functions and other detainees. In neither case is there any immunity."

The Permanent Representative closed by stating:

> "However, I am glad to be able to inform Your Excellency that, as part of the ongoing review of the situation in southern Lebanon, a number of detainees - including some UNRWA employees - will be released in addition to those who have already been released so far. Under prevailing circumstances this release cannot comprise all the persons in whom you have expressed

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interest, until their background and activities have been fully investigated. At the same time, as Your Excellency is certainly aware, all detainees are being visited on a regular basis by the representative of the International Committee of the Red Cross and are permitted to appeal their detention before an Administrative Appeals Board."

In his reply dated 25 October 1983, the Secretary-General welcomed the promise of the release of a further number of UNRWA officials and expressed the hope that it would take place without delay. He further drew the attention of the Permanent Representative to the points raised in the Secretary-General's letter of 28 June 1983 which had not been addressed by the Permanent Representative stating:

"My concern for the well being of UNRWA detainees comprises not only the conditions under which they are being detained but also the respect for a fundamental principle underlying the international civil service. As you are aware from the debates in the Fifth Committee of the General Assembly, the Organization's right of functional protection with regard to arrested and detained staff members has been strongly reaffirmed by the General Assembly in a number of resolutions, most notably resolution 36/232 of 18 December 1981. I would, therefore, once again refer to the contents of operative paragraph 1 of resolution 36/232 and reiterate my previous requests that the Organization's right of functional protection be observed by the authorities concerned."

10. In a related development, the Secretary-General has taken note of a judgement which was given on 13 July 1983 in the Supreme Court of Israel sitting as the High Court of Justice. The petitioners in this case, the inmates of the Ansar detention camp, had applied to the High Court of Justice for an order directing the respondents, the Minister of Defence and commander of the camp, to inform them of the legal basis of their detention and to show cause why they should not be permitted to see their lawyers. The court ruled that the respondents were entitled to arrest and detain the petitioners in territory occupied by the Israeli army and that the detainees were subject to the rules laid down in article 78 of the Fourth Geneva Convention. 3/ The court also recorded the respondents' undertaking that the petitioners would be entitled to meet their lawyers, subject to the necessary safeguards. 4/

11. In the view of the Secretary-General, the proceedings in the Supreme Court of Israel, in so far as they address the right of access and legal representation of detainees under the rules of the Fourth Geneva Convention, supplement and reinforce the United Nations position which is based on the right of functional protection. The Secretary-General notes, in particular, that Counsel for the respondents informed the court that respondents had decided in principle to permit visits and were considering the practical arrangements to be made for that purpose.

12. Taking into consideration all of the measures set out above and the observations and judgement of the Supreme Court of Israel, the Secretary-General can only reiterate his request that the continued detention of UNRWA staff be urgently reconsidered by the Government of Israel and that the Organization's right of functional protection be recognized. The Secretary-General will continue to

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monitor the release of the UNRWA detainees by the Israeli authorities and, in view of the recent assurance given by the Permanent Representative, will provide to the General Assembly an updated list of UNRWA detainees taking into account any actions taken since 30 June 1983.

Notes

1/ The total number of UNRWA area staff posts in Lebanon on 1 April 1983 is 2,391 [Joint Inspection Unit, Report on UNRWA, (A/38/143) 1 August 1983, p. 118].

2/ The designations of UNRWA offices used in this report follow the UNRWA organizational chart (see document A/38/143, annex).

3/ Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949. Article 78 provides as follows:

"If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may; at the most, subject them to assigned residence or to internment.

"Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals should be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power.

"Protected persons made subject to assigned residence and thus required to leave their homes shall enjoy the full benefit of Article 39 of the present Convention."

4/ This judgement was reported in The Jerusalem Post of 21 August 1983.

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PERSONNEL QUESTIONS: RESPECT FOR THE PRIVILEGES AND IMMUNITIES OF OFFICIALS OF THE UNITED NATIONS AND THE SPECIALIZED AGENCIES AND RELATED ORGANIZATIONS

Report of the Secretary-General

INTRODUCTION

1. The General Assembly, in its resolution 43/225 of 21 December 1988, called upon the Secretary-General, as chief administrative officer of the United Nations, to continue personally to act as the focal point in promoting and ensuring the observance of the privileges and immunities of officials of the United Nations and the specialized agencies and related organizations by using all such means as were available to him. It further urged the Secretary-General to give priority, through the United Nations Security Co-ordinator or his other special representatives, to the reporting and prompt follow-up of cases of arrest, detention and other possible matters relating to the security and proper functioning of officials of the United Nations and the specialized agencies and related organizations.

2. The current report, covering the period from 1 July 1988 to 30 June 1989, is submitted by the Secretary-General in pursuance of the aforementioned resolution on behalf and with the approval of the Administrative Committee on Co-ordination (ACC). As in previous years, it is based on the information obtained from United Nations subsidiary organs, offices or missions as well as specialized agencies and related organizations. A list of organizations, organs, offices and missions that have been requested to provide information is contained in annex III to the present report.

3. The reporting period has been marked by one particularly disturbing development, namely the report of the brutal murder of Lieutenant-Colonel William Richard Higgins. Colonel Higgins, an officer of the United States of America, was serving as the chief of a group of military observers assigned to the

United Nations Interim Force in Lebanon (UNIFIL) when he was abducted on 17 February 1988. On 31 July 1989, an announcement at Beirut by his captors stated that he had been killed. The Security Council took note with great concern of the reports from Beirut that day, saying that, if true, the murder of Colonel Higgins was "a cruel and criminal act" (S/20758). On 1 August the Secretary-General sent Mr. Marrack Goulding, Under-Secretary-General for Special Political Affairs, to the area to ascertain, as far as was possible, what had happened to Colonel Higgins. Despite extensive conversations with various parties who may have been in a position to know the facts, Mr. Goulding could not obtain definitive proof of Colonel Higgins' fate. On 9 August, the Secretary-General, having received Mr. Goulding's report on his mission, announced that he had regretfully come to the conclusion that it was almost certain that Colonel Higgins was dead. He said he would continue to try to establish the facts and, if his fears were confirmed, to recover the body.

4. The Middle East continued to be an area of prime concern with the most cases of arrest, detention and abduction of officials. Efforts to improve the situation, however, have not produced encouraging results. The number of cases of arrest and detention without charge or trial of staff members of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) remained very high. There have been regrettable cases of abuse of privileges and immunities in certain other regions that required, on a number of occasions, the personal intervention of the Secretary-General. At the same time, it should be noted that in the great majority of Member States, privileges and immunities of officials are scrupulously respected and any emerging cases are promptly resolved in a spirit of close co-operation between the parties concerned.

5. The Secretary-General, assisted by the United Nations Security Co-ordinator, his special representatives and the respective executive heads of the organizations concerned have continued, throughout the reporting period, to promote and ensure the observance of the privileges and immunities of officials of the United Nations and the specialized and related agencies, intervening, if required, with the Member States concerned on the basis of the relevant international legal instruments. In this endeavour, as in the past, they have enjoyed the full support of the representatives of the staff unions. While seeking the co-operation of Member States in fulfilling their obligations under the international instruments in force, the Secretary-General has also, as noted on several occasions in his previous reports, been conscious of the need to clarify for all officials the precise nature, scope and functional character of their privileges and immunities.

6. As was indicated in the report of the Secretary-General to the General Assembly at its forty-second session (A/C.5/42/14), when staff members of the United Nations and the specialized agencies and related organizations are arrested and detained, both legal and humanitarian considerations are taken into account by the Secretary-General or the executive head concerned in seeking access to them. The legal considerations derive from the relevant international instruments on privileges and immunities and relate principally to the determination of whether or not a staff member has been arrested or detained because of his or her official activities. This determination must be made by the organization concerned and, if the organization determines on the basis of visits to the detained or arrested

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staff members that the arrest or detention is related to official functions, then immunity is asserted. If, however, the visiting official is satisfied, both from an interview with the detainee and from the charges brought, that the matter is not related to official functions, there is no legal basis for asserting immunity and the legal as distinct from the humanitarian grounds for further intervention by the organization no longer exist.

7. The humanitarian considerations involved are much broader and, pursuant to such considerations, the Secretary-General or the executive head concerned seeks to ensure that any staff member who is arrested and detained is treated fairly, properly charged and promptly brought to trial.

I. ARREST, DETENTION AND ABDUCTION OF OFFICIALS

8. While the majority of cases of arrest, detention or disappearance of officials are resolved to the satisfaction of the Secretary-General, a considerable amount of time is often spent both at Headquarters and at the duty station of the official concerned in obtaining such resolution. In particular, the arrest of locally recruited officials sometimes results in protracted negotiations with government officials on the rights of the organization vis-à-vis the official. It must be recalled that the term "official" in the context of the relevant conventions includes all members of the staff, with the exception of those who are both recruited locally and paid at hourly rates. To the great regret and disappointment of the Secretary-General, the number of cases of arrest, detention or disappearance of officials for which the organizations have not been able fully to exercise their rights has increased substantially in the reporting period. Particulars regarding these cases are contained in the reports submitted by individual organizations and agencies, which are summarized in annex II to the present report. With particular reference to the present reporting period the following should be added.

9. Despite the serious expression of concern voiced by the Secretary-General in his last report (A/C.5/43/18), the number of UNRWA staff arrested and detained has remained at the high level recorded for the previous year, and has, in fact, marginally increased. During the period 1 July 1988 to 30 June 1989, 157 UNRWA staff were arrested or detained. However, there was a decrease in the number of staff detained by one or other of the militia groups in Lebanon; this number fell from 24 last year, to 11. Nine of the 157 staff were detained twice during the reporting period. Ninety-three of the 157 staff were arrested or detained and released without charge or trial, including 11 who had been held by militia groups. Eight were charged, tried and sentenced to various terms of imprisonment.

10. In no case has UNRWA received adequate and timely information on the reasons for the arrest and detention despite requests to the authorities. UNRWA has had access to 26 detained staff from the occupied West Bank and to 37 detained staff from the Gaza Strip. Several of these staff, however, were being held in prisons in Israel, having been transferred there from the occupied West Bank and the Gaza Strip.

11. As a result of the efforts undertaken by the Secretary-General, designated officials and officials in the field and with the strong support and activities of the staff unions, it has been possible to achieve the release of many staff members who were previously reported as being under arrest or detention. Mr. Shimelis Teklu, a staff member of the Office of the United Nations High Commissioner for Refugees (UNHCR), detained in Ethiopia since 2 January 1984, was released in June 1989. In Lebanon, Mr. Omar Mustafa Hussein, a staff member of UNRWA who had been listed as missing since 15 April 1987 was also released. Eleven other UNRWA staff members detained in Lebanon during the reporting period by militias or unknown elements were released. In Chad, active intervention assured the quick release on 24 May 1989 of Mr. Nassar Dandjita, local administrative assistant of the World Food Programme (WFP), who was arrested on 6 May 1989. In Jordan, Mr. Jibril Taher Mohammed Jibril, a staff member of UNRWA, detained since 31 December 1987, and whose case became a matter of strenuous efforts of the Administration and the Federation of International Civil Servants' Association (FICSA), was released on 21 February 1989. Of those arrested during the reporting period, 39 staff members of UNRWA in the occupied Gaza Strip and 35 in the occupied West Bank were released without charge or trial. Mr. Ahmad Mahmoud Lababidi, arrested in 1988 in the Syrian Arab Republic, Mr. Abdel Karim Keswamy and Mr. Jousef Juma'a, arrested by the Syrian armed forces in 1989 in Lebanon, all of whom are staff members of UNRWA, were released in the first half of 1989. Mr. Khalil Ahmad Abu Sleema, also a staff member of UNRWA, arrested in Egypt on 25 August 1988, was released without charge or trial on 20 December 1988.

12. The Secretary-General regrets to report that there have been negative developments in respect of some previously reported cases. Mr. Zeidan Jassin, a locally recruited UNRWA staff member who was listed in last year's report as detained in Lebanon by Syrian armed forces since 27 May 1987 (see A/C.5/43/18, annex I), died in prison on 17 December 1988. No additional information has been received regarding other staff members of UNRWA listed in the 1987 report (A/C.5/42/14) as detained in Lebanon by militias or unknown elements and the Syrian armed forces. There has been no further progress in the case of Mr. Tesfamariam Zeggae, a staff member of the United Nations Economic Commission for Africa (ECA). Despite the personal intervention of the Secretary-General of the United Nations and several interventions by the administration of ECA, Mr. Zeggae, who has been detained since 2 March 1982, was sentenced by the First Instance Court in March 1987 to life imprisonment. Details of his case are contained in annex II to the present report.

13. On 18 May 1988, Mr. Abdul Diallo and on 22 May 1988 Ms. Afton Ba Diallo, staff members of the United Nations Development Programme (UNDP), were detained by the Mauritanian authorities to ascertain their nationality. They were subsequently accused of fraudulently obtaining Mauritanian citizenship and expelled to Senegal. These actions were immediately protested by the resident representative of UNDP. Further to these representations, on 16 June 1989 the Administrator of UNDP sent to the Minister for Foreign Affairs of Mauritania an aide-mémoire, in which, inter alia, he stated that the actions of the Government of Mauritania not only impeded the proper functioning of the UNDP mission in Nouakchott, in contravention of the 1979 Basic Agreement between the United Nations and Mauritania, but also constituted a violation of the provisions of Article 105 of the Charter of the

United Nations. It was pointed out that any expulsion of staff members from the UNDP mission in the country would, in the view of the Secretary-General, constitute a denial of the immunities guaranteed to United Nations officials by the Charter and considered necessary for the independent exercise of their functions in connection with the Organization. The Secretary-General felt obliged to intervene twice with regard to this matter. First, during his visit to Mauritania on 20 and 21 June 1989 and secondly, with the Minister for Foreign Affairs of Mauritania at the Assembly of Heads of State and Government of the Organization of African Unity (OAU) at Addis Ababa from 24 to 27 July 1989. Despite the assurance received by him that the situation would be corrected, these incidents are still pending resolution. It should also be noted with regret that representations made by the Food and Agriculture Organization of the United Nations (FAO) failed to prevent the arrest by Mauritanian authorities and expulsion to Senegal of the following five staff members of FAO: Mr. Abdoulaye Diaw, Mr. Ndiome Pouye, Mr. Demba Niang, Mr. Amadou Dieng and Mr. Mouhamedou Ba.

II. RESTRICTIONS ON OFFICIAL AND PRIVATE TRAVEL OF OFFICIALS OF THE UNITED NATIONS, THE SPECIALIZED AGENCIES AND RELATED ORGANIZATIONS

14. UNRWA has continued to meet difficulties in the movement of staff into and out of the West Bank and the Gaza Strip. There has been substantial delay in the issue of entry permits and, in some cases, they have been refused. The movement of staff within the occupied territories was also seriously affected by frequent imposition of curfews and the designation of areas as closed military zones.

15. Restrictive regulations imposed by the United States authorities on travel beyond a 25-mile radius of Columbus Circle, New York, by staff members and their dependants who are nationals of particular countries, remained in force. On [illegible] January 1989, these restrictions were extended to non-official travel of staff members who are nationals of China. This measure was protested by the Secretary-General as another instance of discrimination in the treatment by the host country of staff members of the United Nations Secretariat solely on the basis of their nationality. The Secretary-General maintains the position he has expressed on previous occasions that, under the given circumstances, the compliance by individual staff members with such restrictive conditions cannot be considered to prejudice the legal position of the United Nations. In the reporting period, existing arrangements for official travel in the United States of the United Nations staff members have remained unchanged.

16. Some United Nations bodies that are not based in the United States have experienced delays in obtaining G-4 visas for entry into the United States by staff members of certain nationalities. On several occasions, such delays jeopardized the envisaged mission, or have rendered it impossible. In such circumstances, the management of United Nations bodies not based in the United States is severely constrained in sending staff members of certain nationalities on urgent business to United Nations Headquarters or to Washington-based institutions.

III. TAXATION OF OFFICIALS

17. Section 18 (b) of the Convention on the Privileges and Immunities of the United Nations provides that officials of the Organization shall be exempt from taxation on the salaries and emoluments paid to them by the United Nations. The rationale for this provision is to assure equality of treatment for all staff members, irrespective of their nationality, and to guarantee that funds contributed by Members of the Organization to its budget are not diverted to individual States by means of revenue-raising measures such as an income tax. The Convention on the Privileges and Immunities of the Specialized Agencies envisages in section 19 (b) that officials of the specialized agencies shall enjoy the same exemptions from taxation in respect of the salaries and emoluments paid to them by these agencies and on the same conditions as are enjoyed by officials of the United Nations. The Secretary-General regrets to report that, notwithstanding the above-mentioned provisions, as has been indicated in the previous reports to the forty-first and forty-third sessions (A/C.5/41/12 and Corr.1 and A/C.5/43/18), a number of States, parties to both Conventions, have continued to impose taxes on the salaries of locally recruited officials.

18. Despite all efforts undertaken by the United Nations and some specialized agencies, there has been no change in Egypt in the recently enacted legislation concerning work permits. Under this legislation staff members of international organizations who are Egyptian nationals are required to obtain, for a considerable fee, work permits. Such a fee amounts to a direct tax on the emoluments of staff members of international organizations and as such is contrary to the provisions of the two Conventions referred to in the preceding paragraph. The Egyptian authorities have been requested to bring Egyptian legislation into conformity with these Conventions.

19. Early in 1988, the tax authorities of the Republic and Canton of Geneva decided to apply a global-rate system (taux global) to the taxable earnings of staff members of the United Nations and the specialized agencies at Geneva holding short-term contracts, thus taking into account the exempted income earned by such officials from their organizations in determining the rate of tax on earnings deriving from other sources. That decision seemed to be based on non-recognition of that category of employees as staff members (officials) of organizations in the United Nations common system. On behalf of the United Nations Office at Geneva and all the specialized agencies at Geneva, the Secretary-General took action on this question by sending a letter to the President of the Swiss Confederation, referring in particular to the right of the organizations to freely determine the categories of their personnel whom they considered to be officials, solely within the limits of the relevant charters, constitutions and staff regulations and subject to control only by Member States as collectively represented in the various governing bodies. In May 1989 the Head of the Federal Department for Foreign Affairs informed the Secretary-General that the Federal Council had requested the State Council of the Republic and Canton of Geneva to desist from applying the global-rate system to the taxable income of officials holding short-term contracts and that the Geneva Council of State had acceded to this request.

20. In Burundi, the Government adopted on 31 December 1988 a decree establishing a

service tax on imported or exported articles, including "exempted articles". Such a tax represents a direct tax from payment of which the United Nations and specialized agencies are exempt under section 7 (a) of the Convention on the Privileges and Immunities of the United Nations and section 9 (a) of the Convention on the Privileges and Immunities of the Specialized Agencies respectively. Therefore, the adoption of the decree gave rise to concerted action on the part of the organizations of the United Nations system represented in Burundi, whereby they expressed their concern over the adoption of such a measure which contradicts the provisions of the above Conventions. The Government of Burundi admitted the legitimacy of such concern and on 29 March 1989 agreed to refrain from applying the aforementioned tax to the United Nations and specialized agencies.

21. The United Nations Truce Supervision Organization (UNTSO) reported problems experienced by it with regard to taxation. They are disclosed in detail in annex II to the present report. The 2 per cent ad valorem tax mentioned by UNTSO similarly affects the activities of the United Nations Interim Force in Lebanon (UNIFIL).

IV. OTHER MATTERS INVOLVING THE STATUS, PRIVILEGES AND IMMUNITIES OF OFFICIALS

22. As was indicated in the previous report, the United States informed the Secretariat of the United Nations by note verbale dated 14 June 1988 about its policy with regard to the implementation of laws applicable to the employment of non-resident aliens in the United States (see A/C.5/43/18, paras. 25-27). The Secretariat of the United Nations in its response to this note expressed concern that the stringent application of the immigration regulations would substantially interfere with the authority of the Secretary-General to recruit staff under Article 101 of the Charter of the United Nations and would entail serious financial consequences for the Organization.

23. In order to resolve the difficulties, consultations were undertaken between officials of the United Nations and the United States. They resulted in the achievement in March 1989 of a working arrangement for visa conversion and local recruitment. It is understood that this arrangement is without prejudice to the position taken by the Secretary-General on the stringent application of immigration regulations by the United States authorities, or to any further discussions that may be held on the issue.

24. The Secretary-General deems it important to report recent developments relating to Mr. Dumitru Mazilu, a former member of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, charged by the Sub-Commission in 1985 with the preparation of a report on the question of human rights and youth. Mr. Mazilu was not permitted by the Romanian authorities to travel to Geneva to present his report to the Sub-Commission and the Secretary-General was unable to establish personal contact with Mr. Mazilu.

25. In the circumstances, the Economic and Social Council of the United Nations adopted, on 24 May 1989, resolution 1989/75 entitled "Status of special

rapporteurs". This resolution contained a request to the International Court of Justice to give its advisory opinion "on the legal question of the applicability of article VI, section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of Mr. Dumitru Mazilu as Special Rapporteur of the Sub-Commission". In accordance with article 65 of the Statute of the Court, the Secretary-General transmitted to it a dossier of documents likely to throw light upon the question. In addition, the Legal Counsel of the United Nations, on behalf of the Secretary-General, submitted to the Court, on 28 July 1989, a detailed written statement outlining the legal position of the United Nations on the matter. Following oral hearings held on 4 and 5 October 1989, the Court is expected to give its advisory opinion before the end of the year.

V. MEASURES AND PROPOSALS IN FURTHERANCE OF THE SAFETY AND THE SECURITY OF OFFICIALS

26. The procedures recommended by the United Nations Staff-Management Co-ordination Committee (SMCC), which were outlined in paragraph 7 of the report at its thirty-ninth session to the General Assembly (A/C.5/39/17) remained in place. The United Nations Security Committee has met regularly to review and follow-up cases involving disregard for the privileges and immunities of officials and to advise the Secretary-General on cases that cannot be resolved at the local level. The United Nations Security Co-ordinator has served as a focal point for assuring the flow of information within the United Nations system with regard to the protection of privileges and immunities of staff members and in helping to develop a concerted response by the system to the violations of these privileges and immunities. Whenever the situation so required, the Secretary-General has intervened personally or had recourse to special representatives. The heads of agencies and related organizations acted likewise.

VI. CONCLUSION

27. During the reporting period, the number of cases involving arrest and detention of officials remained very high. As underscored in the report, most of them are concentrated in one geographical area where, in the past several years, the situation has given rise to extreme concern. An additionally disturbing factor is that some other areas, from time to time, witness outbursts of breaches of respect for the privileges and immunities of officials. The Secretary-General strongly believes that any change for the better requires mutual efforts by Member States and international organizations. Discussions at the General Assembly of the reports presented by the Secretary-General on behalf of ACC provides an opportunity to identify the problems of greatest concern and to eleborate measures to remedy the situation. It also assists in bringing about a more informed approach of Member States towards respect for privileges and immunities of officials. The Secretary-General is determined, as in the past, to work together with the respective executive heads and with the authorities of Governments concerned to assure strict implementation of the international agreements concerning privileges and immunities of international organizations and their officials.