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

Chapter VI. Selected legal opinions of the Secretariat of the United Nations and related inter-governmental organizations

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CHAPTER VI

SELECTED LEGAL OPINIONS OF THE SECRETARIAT OF THE UNITED NATIONS AND RELATED INTER-GOVERNMENTAL ORGANIZATIONS

A. LEGAL OPINIONS OF THE SECRETARIAT OF THE UNITED NATIONS

(Issued by the Office of Legal Affairs)

1. Accreditation of Permanent Observers by non-members at United Nations Headquarters.

Memorandum to the Acting Secretary-General

Policy of the Organization regarding Permanent Observers

1. In deciding whether or not to accord certain facilities to a Permanent Observer, it has been the policy of the Organization to make such facilities available only to those appointed by non-members of the United Nations which are full members of one or more specialized agencies and are generally recognized by Members of the United Nations.[1/]

Legal basis for the institution of Permanent Observers

2. There are no specific provisions relating to Permanent Observers of non-member States in the United Nations Charter, in the Headquarters Agreement with the United States Government or in General Assembly resolution 257 (III) of 3 December 1948 relating to Permanent Missions of Member States. The Secretary-General referred to Permanent Observers of non-members in his report to the fourth session of the Assembly on Permanent Missions (A/939), but no specific action was taken by the Assembly either at that time or later to provide an express legal basis for the institution of Permanent Observers. It therefore rests purely on practice as so far followed.

1/ A Permanent Observer was designated by the Government of Switzerland in the summer of 1946 and the practice of designating such Observers has been followed by Switzerland since that time. Observers were subsequently appointed by certain States which later became Members of the United Nations, including Austria, Finland, Italy and Japan. Certain other States, which are not Members of the Organization at the present time, maintain Permanent Observers, namely the Federal Republic of Germany (since October 1952), Monaco (since May 1956), the Republic of Korea (since February 1949), and the Republic of Viet-Nam (since March 1952).

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Facilities accorded to Permanent Observers

3. Since Permanent Observers of non-member States do not have an officially recognized status, facilities which are provided them by the Secretariat are strictly confined to those which relate to their attendance at public meetings and are generally of the same nature as those extended to distinguished visitors at United Nations Headquarters. The Protocol Section arranges for their seating at such meetings in the public gallery and for the distribution to them of the relevant unrestricted documentation. A list of their names is appended, for convenience of reference, to the List of Permanent Missions to the United Nations published monthly by the Secretariat, as Permanent Observers often represent their Governments at sessions of United Nations organs of which their Governments are members, or at conferences convened by the Organization to which their Governments have been invited to participate.

4. No other formal recognition or protocol assistance is extended to Permanent Observers by the Secretariat. Thus no special steps are taken to facilitate the granting of United States visas to them and their personnel, nor for facilitating the establishment of their offices in New York. Communications informing the Secretary-General of their appointment are merely acknowledged by the Secretary-General or on his behalf and they are not received by the Secretary-General for the purpose of presentation of credentials as is the case for Permanent Representatives of States Members of the Organization.

Permanent Observers and the question of privileges and immunities

5. Permanent Observers are not entitled to diplomatic privileges or immunities under the Headquarters Agreement or under other statutory provisions of the host State. Those among them who form part of the diplomatic missions of their Governments to the Government of the United States may enjoy immunities in the United States for that reason. If they are not listed in the United States diplomatic list, whatever facilities they may be given in the United States are merely gestures of courtesy by the United States authorities.

22 August 1962.

2. Legal position regarding the import of arms and war materials by the Central Government of the Republic of the Congo - Interpretation of paragraph 6 of General Assembly resolution 1474 (ES IV) of 20 September 1960 - Interpretation of paragraph 6 of the Security Council resolution of 24 November 1961.

Memorandum to the Secretary-General

1. The resolutions of the General Assembly and the Security Council relating to the Congo contain several provisions directed against the importation of arms or other materials of war into the Congo. The first of these provisions is found in paragraph 6 of General Assembly resolution 1474 (ES IV) of 20 September 1960. This paragraph reads as follows:

"The General Assembly ...

"6. Without prejudice to the sovereign rights of the Republic of the Congo, calls upon all States to refrain from the direct and indirect provision of arms or other materials of war and military personnel and other assistance for military purposes in the Congo during the temporary period of military assistance through the United Nations, except upon the request of the United Nations through the Secretary-General for carrying out the purposes of this resolution and of the resolutions of 14 and 22 July and of 9 August 1960 of the Security Council."

2. It was made clear by the sponsors of the resolution that this provision was intended to exclude all military aid to the Congo except through and at the request of the United Nations. The representative of Ghana, who introduced the resolution, declared that, under it, "no help whatsoever should be sent to the Congo without the express request of the United Nations, and that this help should go only through the medium of the Organization". (A/PV.860, para. 164). The representative of Tunisia, referring to this provision of the resolution, stated that "such a prohibition also imposes on the young Republic of the Congo itself the obligation to refrain from appealing for such assistance for military purposes during the period of military assistance through the United Nations". (A/PV.860, para. 113). He added that such a prohibition "in no way infringes the fundamental principle of respect for the absolute sovereignty of the Congolese Government and is, so to speak, merely a 'temporary injunction' in the interests of world peace, without prejudice to the sovereign rights of any State". (Ibid.) This observation by one of the sponsors of the resolution can

reasonably be regarded as expressing a general consensus that the injunction to the Republic of the Congo to refrain from seeking or accepting military assistance except through the United Nations was fully consonant with the independence and sovereignty of the Government.

3. In its resolution of 21 February 1961 the Security Council reaffirmed this resolution of the General Assembly and reminded all States of their obligations. Statements made by various representatives at the Council when this resolution was adopted indicate clearly the intention to authorize the United Nations to exclude the bringing of material into the Congo other than with the approval of the United Nations.

4. The most recent resolution of the Security Council, adopted on 24 November 1961, recalls the previous resolutions and contains the following paragraph relating to the supply of arms:

> "6. Requests all States to refrain from the supply of arms, equipment or other material which could be used for warlike purposes, and to take the necessary measures to prevent their nationals from doing the same, and also to deny transportation and transit facilities for such supplies across their territories, except in accordance with the decisions, policies and purposes of the United Nations;".

5. This resolution also includes several provisions directed against the secessionist activities of Katanga; and declares its full support for the Central Government of the Congo and "the determination to assist that Government, in accordance with the decisions of the United Nations, to maintain law and order and national integrity ..." (paragraph 9). In view of these provisions, it may be contended by some Member Governments that the furnishing of war materials to the Central Government, to be used by it to put down the secessionist activities in Katanga and elsewhere, would be "in accordance with the decisions, policies and purposes of the United Nations".

6. In answer to this argument, it may be maintained that, although the Security Council has taken a strong position against secession and in support of the Central Government in its resolution of 24 November 1961, it has not changed its previous position against unilateral military assistance to the Congo. Of particular significance in support of this interpretation, is the fact that the

Security Council reaffirmed the policies and purposes set out in the previous resolutions of the General Assembly and Council, including those which contained provisions against the importation of arms by the Government of the Republic of the Congo.

7. This latter consideration must be given weight since it would be reasonable to conclude that the Security Council, in reaffirming the previous resolutions, is maintaining the same position in respect of arms that it had previously taken, and that the intervening events which have occurred have not altered this stand. Should members of the Security Council desire a change in this position, the appropriate means would be by a new decision of the Security Council.

8. If the resolution of 24 November 1961 is construed as imposing an obligation on the Central Government as well as on all Member States to refrain from arms traffic to the Congo except when expressly approved by the United Nations, then the Secretary-General would be under a duty to take appropriate steps to prevent the importation of arms. Such steps would involve mainly representations to the States concerned[1/] to refrain from supplying material which could be used for war purposes; to take the necessary measures to prevent their nationals from doing the same; and to deny transportation and transit facilities for such supplies across their territories. Representations would also be made in this regard to the Central Government of the Congo, reminding it of the obligations under the several resolutions. We understand this has been done and that the Central Government has accepted the position. At this stage therefore it seems unnecessary to consider whether other measures by ONUC are required.

9. Should the Central Government raise the issue again, either expressly or by seeking to purchase arms, it may be advisable for the Secretary-General to bring the matter to the attention of the Security Council with a view to obtaining a clarification or reaffirmation of the Council's position.

13 March 1962.

1/ Since both the General Assembly and Security Council resolutions on this point are addressed to "all States" non-member States, as well as Members, would be covered. It will be recalled that the Secretary-General has already invoked the resolution in respect of the Federal Republic of Germany (S/4785).

3. Legal policy concerning the detention by the United Nations of mercenaries and other persons referred to in paragraph A-2 of the Security Council resolution of 21 February 1961 - Interpretation of paragraph 4 of the Security Council resolution of 24 November 1961 - Interpretation of article 3 of the 1949 Geneva Conventions - Right of communication and contact of consular officials with respect to persons placed under detention.

Note to the Under-Secretary for Special Political Affairs and the Under-Secretary for General Assembly Affairs

1. The records of the debates in the Security Council clearly show that the sponsors of the Council resolution of 24 November 1961 intended to recognize in operative paragraph 4 of the resolution the right of the Republic of the Congo to try under Congolese law mercenaries and other personnel referred to in paragraph A-2 of the Security Council resolution of 21 February 1961. They did not, however, assert that the Republic had the exclusive right to detain such persons until the outcome of their trial and that the United Nations was obliged to surrender them at the first request of the Congolese authorities. The Representative of the Congo himself did not claim such a right for his Government and raised no objections to the detention of mercenaries by ONUC. Speaking before the General Assembly, he said:

> "If the United Nations is unable to authorize its representatives in the Congo to detain the arrested persons, then nothing can prevent the Congolese Government from acting on its own initiative to detain, try and sentence to severe penalties any foreigners who, in defiance of the Congo's laws, are organizing an irregular army in our territory and taking part in subversive and terrorist movements." (A/PV.1035, para. 151)

Before the Security Council, he demanded that the mercenaries should be "brought before Congolese justice to be judged according to Congolese law" (traduits devant la justice congolaise et ... jugés selon la loi congolaise)(S/PV.973, para. 111). He did not, however, request that ONUC should relinquish custody over mercenaries and surrender them to Congolese authorities for detention prior to trial.

2. The actual text of paragraph 4 of the resolution reads as follows:

"/The Security Council/

...

"4. Authorizes the Secretary-General to take vigorous action, including the use of a requisite measure of force, if necessary, for the immediate apprehension, detention pending legal action and/or deportation of all foreign military and paramilitary personnel and political advisers not under the United Nations Command, and mercenaries as laid down in part A, operative paragraph 2 of the Security Council resolution of 21 February 1961;".

In using in the above text the very broad expression "legal action", the Security Council gave considerable latitude to the Secretary-General in the interpretation of the resolution. There is nothing to show that the Security Council intended that the Secretary-General should consider that a mere request to surrender a mercenary or even the opening of an investigation by Congolese authorities would constitute a "legal action" in the meaning of paragraph 4. It should be noted, in this respect, that the Russian text of the paragraph translates "legal action" by "judicial measures", a term which certainly excludes requests for surrender and any type of police action. The French text of the resolution renders "legal action" by "poursuites légales", which also excludes requests for surrender and mere police action.

3. Thus, neither the letter nor the spirit of the Security Council resolution of 24 November 1961 obliges the Secretary-General to surrender mercenaries or other A-2 personnel to the Congolese Government for detention pending trial. It would appear, on the other hand, that considerations of human rights, pertaining in particular to article 3 of the 1949 Geneva Conventions, would debar him from relinquishing custody over such personnel until he is satisfied that they would be properly treated by those to whom they would be surrendered.

4. The 1949 Geneva Conventions contain in article 3 identical provisions dealing with cases of "armed conflict not of an international character", as distinct from international war. Interpreting the meaning of the term "conflict",

the International Committee of the Red Cross recalled in the Official Commentary on the Geneva Conventions that in the course of the drafting of the Conventions, it was suggested that the term should be defined or that a list should be given of a certain number of conditions on which the application of article 3 would depend. The Committee observed that the idea was finally abandoned since it was felt that the scope of the article should be as wide as possible. The Committee expressed the view that:

> "There can be no drawbacks in this, since the article in its reduced form, contrary to what might be thought, does not in any way limit the right of a State to put down rebellion, nor does it increase in the slightest the authority of the rebel party. It merely demands respect for certain rules, which were already recognized as essential in all civilized countries, and embodied in the municipal law of the States in question, long before the Convention was signed. What Government would dare to claim before the world, in a case of civil disturbances which could justly be described as mere acts of banditry, that, article 3 not being applicable, it was entitled to leave the wounded uncared for, to torture and mutilate prisoners and take hostages? ... No Government can object to observing, in its dealings with internal enemies, whatever the nature of the conflict between it and them, a few essential rules which it in fact observes daily, under its own laws, even when dealing with common criminals." 1/

It can hardly be doubted, therefore, that article 3 is applicable to the situation in the Congo. It should be recalled, moreover, that the Secretary-General officially informed the President of the International Red Cross that ONUC would abide by its provisions.

5. Paragraph 1 of article 3 is of particular relevance to the detention by the United Nations of A-2 personnel. The paragraph reads:

> "(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

1/ International Committee of the Red Cross, The Geneva Conventions of 12 August 1949, Commentary IV, Geneva, 1958, p. 36.

"To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular, humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

6. These provisions clearly impose on the United Nations the duty to satisfy itself, before surrendering any A-2 personnel to the Congolese Government, that that Government is able and willing to treat such personnel humanely and, in particular, to afford it, in accordance with sub-paragraph (d) "all the judicial guarantees which are recognized as indispensable by civilized peoples".[1/] This duty appears all the more imperative in the light of ONUC's mandate to maintain law and order and in view of the situation prevailing in the Congo which the Security Council characterized as one of "systematic violations of human rights and fundamental freedoms and ... general absence of rule of law" (resolution S/4741 B of 21 February 1961).

7. In view of the foregoing, it is suggested that ONUC should retain custody over A-2 personnel, while affording the Congolese authorities all the required facilities to institute judicial proceedings against this personnel, such as questioning, confrontation with witnesses and trial. These proceedings should be held in premises where the United Nations could effectively retain custody over and afford protection to the persons concerned. The problem of surrendering a person in United Nations custody would only arise when such a person shall have been convicted and sentenced by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples". In that event, the United Nations would surrender the

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1/ It may be observed in this respect that article 12 of the Convention relative to the treatment of prisoners of war lays down the principle that the Detaining Power is responsible for the treatment of prisoners and has the duty, before transferring prisoners to another Power, to satisfy "itself of the willingness and ability of /the/ transferee Power to apply the Convention".

person to Congolese custody unless it had good reason to believe that the convicted individual would be subject to torture or to cruel, inhuman or degrading treatment or punishment.

8. As regards the national governments of A-2 personnel detained by ONUC, the United Nations should apply the rules of international law concerning the right of protection of States over citizens abroad. It should, in particular, respect the right of communication and contact of consular officials. With respect to persons placed under detention, this right has been formulated by the International Law Commission in sub-paragraphs (b) and (c) of paragraph 1 of article 36 of the Draft Articles on Consular Relations. These sub-paragraphs read:

> "(b) The competent authorities shall, without undue delay, inform the competent consulate of the sending State if, within its district, a national of that State is committed to prison or to custody pending trial or is detained in any other manner. Any communications addressed to the consulate by the person in prison, custody or detention shall also be forwarded by the said authorities without undue delay;
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> "(c) Consular officials shall have the right to visit a national of the sending State who is in prison, custody or detention, for the purpose of conversing with him and arranging 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 judgement." 1/

9. Since, however, operative paragraph 4 of the Security Council resolution S/5002 recognizes the right of the Republic of the Congo to try A-2 personnel under Congolese law, ONUC should not hand over such personnel to the consular officials concerned for purposes of repatriation unless it finds that in a given case, there is no prima facie evidence of an offence under Congolese law or that no trial offering the guarantees provided for in article 3 of the Geneva Conventions could be held.

24 April 1962.

1/ General Assembly, Official Records, Sixteenth Session, Supplement No. 9 (A/4843), p. 24.

4. Closure of debate - Interpretation of rule 118 of the rules of procedure of the General Assembly

Memorandum to the Secretary of the Economic and Social Council

When a motion for the closure of the debate has been adopted or when the Chairman with the consent of the Committee has declared the debate closed, the Committee proceeds to what is the final stage of its consideration of the item, i.e., the voting of the draft resolution or draft resolution which may have been submitted. Under the rules no further discussion is to take place except on procedural matters relating to the voting; explanations of votes may or may not take place as prescribed in rule 129. No amendment may be submitted to a draft resolution when the debate on such a draft resolution has been closed. To do otherwise would render the rule on the closure of debate meaningless as under the practice of United Nations organs the submission of amendments is to be considered an intrinsic part of the debate. While the sponsor may withdraw his draft resolution at any time before voting on it has commenced, the sponsor may not revise the text of the draft resolution after the debate has been declared closed. Similarly no amendment may be proposed to a draft resolution after the closure of debate, unless a motion for reconsideration of the decision to close the debate has been adopted under rule 124.

29 March 1962.

5. Non-Members invited to take part without right of vote in discussion of items on the agenda of the General Assembly

Memorandum to the Secretary of the First Committee of the General Assembly

We can confirm that the opinion you have expressed to the Vice-Chairman of the First Committee on 14 December is correct. It has beer the practice for a long time of United Nations organs, when inviting representatives of non-member

States to take part in discussions without the right of vote, to permit such representatives to participate in the discussions with the same rights as those enjoyed by the representatives of Members, the only exception being that the former do not participate in the voting.

On a number of such occasions representatives of non-member States made more than one statement; this included statements in reply to speeches made by representatives of Members. The question whether they would be entitled to make procedural motions, such as the ones listed in rule 120 /79/ of the rules of procedure of the General Assembly, or motions relating to the actual voting has not, to our knowledge, been clearly decided but would in our opinion, have to be answered in the negative.

21 December 1962.

6. Co-sponsorship of draft resolutions

Memorandum to the Secretary of the First Committee of the General Assembly

The following observations refer to the questions raised in your memorandum of 15 November 1962.

In our view, it is correct to consider that until such time as the Chairman of a Main Committee submits a draft resolution to the vote of the Committee, the proposed draft resolution remains that of the delegation or of the delegations which have introduced it to the Committee. This is evidenced in particular by the fact that in accordance with the Assembly's practice the sponsors may modify their original draft resolution by accepting, without the Committee being asked to concur by a vote or otherwise, formal amendments or other textual modifications. A further proof of the sponsors' "ownership" over the draft resolution may be found in rule 123 /82/ of the rules of procedure of the General Assembly which states "A motion may be withdrawn by its proposer at any time before voting on it has commenced, provided that the motion has not been amended ...".

It would thus appear that a delegation's request to become the co-sponsor of a draft resolution should be addressed not to the Secretary of the Committee but to the sponsors of the draft resolution. It would be normally up to the

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original sponsors to inform the Secretary of their acceptance of the request. In cases where it is the requesting delegation which informs the Secretary of it having become a co-sponsor, it would be natural for the Secretary to seek confirmation of the agreement of the original sponsors.

You have also referred to the practice which has developed of a great number of delegations associating themselves for the purpose of sponsoring draft resolutions before a Committee. In such cases it would appear that it would be for the original sponsors to agree among themselves as to whether they wish to accept or not a request from a delegation to become a co-sponsor of the draft resolution. As a matter of fact, it is usually well known which delegation is the principal sponsor of a draft resolution, or which delegations are especially interested in it (other delegations agreeing to their names being included in the sponsors list only for the purpose of signifying their political support). In practice, therefore, it might be in most cases sufficient for the Secretary of a Committee to obtain information from the principal sponsor, or sponsors, as to whether the request of additional delegations to be co-sponsors has been accepted.

In case of doubt, it would appear to be consistent with the Assembly's procedures for the Chairman to enquire, in the course of a meeting of the Committee, from the sponsors of a draft resolution whether they have any objection to an additional delegation being added to the list of sponsors.

20 November 1962.

7. List of representatives to the Economic and Social Council - Interpretation of rule 18 of the rules of procedure of the Council

Memorandum to the Secretary of the Economic and Social Council

1. In your memoramdum of 16 May 1962 you referred to some difficulties which have arisen recently in the application of rule 18 of the rules of procedure of the Economic and Social Council and asked for our advice.

2. We believe that the specific situations to which you refer should be resolved on the basis of the following two considerations: (a) respect of both

the letter and the spirit of the rules which the Council has adopted and which it is free to modify; (b) avoidance of undue rigidity which would hamper the normal requirements of delegations to Council sessions.

3. Taking into account these considerations, our advice with respect to the situations referred to in your memorandum and in the light of your comments would be as follows:

(1) The designation of two representatives to represent one member of the Council would not be permissible as it would run counter to the provisions of paragraph 4 of Article 61 of the Charter as well as those of rule 18 of the rules of procedure. The identity of the representative entitled to vote on behalf of a member of the Council or empowered to designate an alternate representative to do so in his place must be known to the Council at all times and all possible sources of confusion in this respect should be avoided.

(2) The tendency of some members of the Council to designate "deputy representatives" should not be encouraged. Rule 18 does not provide for such deputies. There is furthermore no significant difference between the meaning of the expression "deputy representative" and "alternate representative", each of these terms referring to a member of the delegation who may take the place of the representative upon designation by the latter.

(3) The situation of the representative, whether a Cabinet Minister or other, leaving the Council before the end of the session can be resolved on the basis of the last sentence of rule 19 which states: "This rule shall not, however, prevent a member from changing its representatives, alternate representatives, or advisers subsequently, subject to proper submission and examination of credentials, where needed." An indication in the credentials of the delegation concerned that upon the departure of the person designated as representative another person will act as representative would be adequate in this respect.

(4) It would be permissible in our opinion for delegations to the Council, while retaining the three designations referred to in rule 18, i.e., "representatives", "alternate representatives" and "advisers", to qualify these designations in such manner as "first alternate" or "senior alternate".

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Similarly the term "adviser" could be qualified if the delegation concerned so desires by such terms as "senior", "technical" or "special".

(5) The rules do not refer to designations such as "chairman of delegation"; the person designated as the representative to the Council is clearly the head of his delegation.

(6) "Secretary" or "Secretary-General of delegation" is not an expression used in rule 18. It might, however, be possible for one of the alternate representatives or advisers to be designated as performing such functions and the designation "secretary of delegation" might be included in the list in addition to "alternate representative" or "adviser".

(7) "Experts" are, presumably, included in delegations only for the purpose of extending advice to representatives; they may therefore be appropriately designated as "advisers". If a delegation wishes to have experts on certain special matters listed as special advisers on such matters, this could be permitted.

(8) "Members of delegation" is not a desirable designation. It is preferable that all members of delegations should receive one of the three designations referred to in rule 18.

4. Certain differences in designations may possibly be tolerated as between the E/INF/document which reproduces the list of delegations and the Official Records of the session. The former may be considered as the reproduction of information received from members of the Council, for the conformity of which with the Council's rules, neither the Council nor the Secretariat would have responsibility (an appropriate indication to that effect might be inserted in the document). The Official Records should be as fully as possible consistent with the Council's rules, as in the interval between the publication of the E/INF/document and that of the Official Records the officers of the Council and the Secretariat can usefully try to obtain the necessary rectifications.

6 June 1962.

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8. Inclusion of Jamaica and Trinidad and Tobago in the geographical scope of the Economic Commission for Latin America (ECLA) - Interpretation of paragraph 4 of the terms of reference of the Commission

Memorandum to the Secretary of the Economic and Social Council

1. You have raised the question whether paragraph 4 of ECLA's term of reference would have to be amended to encompass within ECLA's geographical scope Jamaica and Trinidad and Tobago, as a result of their having become States and Members of the United Nations. Paragraph 4 reads as follows:

> "4. The geographical scope of the Commission's work is the twenty Latin American States Members of the United Nations, participating territories in Central and South America which have frontiers adjoining any of these States, and participating territories in the Caribbean area."

2. We do not think that the intention of paragraph 4 has been to exclude participating territories from the regional scope of ECLA once they become full States. In the absence of supporting evidence to the contrary, such intention would indeed be unreasonable as no apparent justification seems to exist for excluding territories participating in ECLA's activities only because they have acceded to independence.

3. It is true that paragraph 4 refers to "participating territories", but it is equally true that the expression "territory" does not convey in the terms of reference invariably the narrowly defined concept of a territorial unit lacking sovereignty,[1/] but often is extended to cover States too. Thus, the last sentence of paragraph 3 (a) reading "if it has become responsible for its own international relations such territory, part or group of territories may be admitted as an associate member of the Commission on itself presenting its application to the Commission" has been interpreted as referring as well to States

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1/ An instance where this term is used in the narrower sense is found in the second sentence of paragraph 3 (a) which provides as follows: "Any territory, or part or group thereof, within the geographic scope of the Commission's work, may, on presentation of its application to the Commission by the Member responsible for the international relations of such territory, part or group of territories, be eligible for admission by the Commission as an associate member of the Commission."

1. Western Samoa, a former United Nations Trust Territory, became independent on 1 January 1962, and is not at present a member of either the United Nations or of any of the organizations participating in the Expanded Programme of Technical Assistance.

2. In the light of this background you raise several questions of which the first is whether Western Samoa would at present be eligible for regional projects financed under the Expanded Programme of Technical Assistance (EPTA). The answer to this is that a Government is eligible for technical assistance under the Expanded Programme only if it is a member of any of the organizations participating in EPTA. Although resolution 222 (IX) in which the Economic and Social Council established the Expanded Programme has not specifically laid down this requirement, on the basis of the discussion preceding its adoption it has since the inception of the programme been regarded as applicable. The General Assembly has clearly confirmed this interpretation in deciding in resolution 398 (V) that special authorization was needed for Libya to receive technical assistance under the Expanded Programme after its independence had been achieved but before it became a Member of the United Nations. The fact that a project is a regional one is irrelevant for the purpose of determining eligibility and is so considered in the examination of your first three questions.

3. Your second question is whether Western Samoa could in the present circumstances participate in regional projects under the United Nations regular programmes, such as programmes under General Assembly resolution 200 (III) and 723 (VIII). This question is examined together with your third question (i.e. would it be possible to send a regional adviser in public administration to Western Samoa, financed under resolution 723 (VIII)?) since for the present purpose a distinction between the two seems of no consequence.

4. Resolution 200 (III) on technical assistance for economic development provides for the rendering of such assistance "when requested ... by Member Governments". The intention of the General Assembly to so limit eligibility was further evidenced by the substitution, in the draft resolution on the subject, of the expression "Member Governments" for the expression "Governments participating in the work of the United Nations" which would have made non-member

countries participating in the work of the Regional Commissions eligible for assistance.[1/]

5. The terms of resolution 723 (VIII) on technical assistance in public administration do not specifically limit benefits thereunder to Member Governments. Such benefits are authorized by resolution 723 (VIII) to "Governments" in general, and to "underdeveloped countries" in resolution 518 (VI) which deals with technical assistance under the regular programme, including technical assistance in public administration.

6. A review of resolutions dealing with technical assistance under the United Nations Regular Programme shows that the General Assembly has not in all cases chosen to define eligibility in a precise manner. Thus, services of an executive and operational character (OPEX) were authorized under resolution 1256 (XIII) for "Governments" participating in the programmes in public administration, which resolution 1256 (XIII) was intended to supplement. The same reference to requests from "Governments" is found in General Assembly resolutions 418 (V) and 926 (X) concerning special forms of technical assistance, namely, advisory social welfare services and advisory services in the field of human rights, respectively. The latter resolution, in addition to authorizing assistance in the general field of human rights, consolidated the assistance programmes under resolution 729 (VIII) on technical assistance in promoting and safeguarding the right of women, 730 (VIII) on prevention of discrimination and protection of minorities, and 839 (IX) on technical assistance in freedom of information, all of which expressly limited their benefits to assistance requested by "Member States", a fact which is recorded in the relevant citations of the resolutions.

7. It would therefore appear that except in resolution 200 (III) the General Assembly has not consistently used language in the resolutions concerning the Regular Programme as to eligible Governments. This circumstance notwithstanding, there are strong indications that the General Assembly has not intended that forms of technical assistance under the Regular Programme be open

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1/ Official Records of the General Assembly, Third Session, Part I, Second Committee, Annexes to the Summary Records of Meetings, 1948, A/C.2/129, p.5, and A/C.2/157, p.19.

to all Governments irrespective of their membership in the United Nations. The whole system of the Regular Programme now in operation under various resolutions originated at an early date in the history of the United Nations by direction of the General Assembly to the Economic and Social Council contained in resolution 52 (I) to "study the question of providing effective ways and means for furnishing, in co-operation with the Specialized Agencies, expert advice in the economic, social and cultural fields to Member nations who desire this assistance" (underscoring supplied). The preamble of resolution 52 (I) leaves no doubt on the precise purpose of its operative part as it states that "Considering that the Members of the United Nations are not yet all equally developed, Considering that some Member nations may need expert advice in the various fields of economic, social and cultural development" (underscoring supplied). It will also be recalled that the legal basis for the programmes of technical assistance carried out by the United Nations lies in Article 66 (2) of the Charter which provides that "It (the Economic and Social Council) may, with the approval of the General Assembly, perform services at the request of Members of the United Nations and at the request of specialized agencies".

8. Your fourth question is whether the fact that Western Samoa was previously a United Nations Trust Territory would have any bearing on the problem. In this connexion, Mr. Spence, the Technical Assistance Board Representative, has relied upon resolution 1527 (XV) in asking the inclusion of an economic study project for Western Samoa in the 1962 programme. By that resolution which deals with "Assistance to former Trust Territories and other newly independent States", the General Assembly decided under certain conditions to increase technical assistance to newly independent States, and invited the Economic and Social Council to "encourage and facilitate the provision through the appropriate international organs" ... "of assistance requested by Governments" ... for various types of projects. The text of this resolution, however, shows no evidence that the General Assembly intended to include non-members among those "Governments" or to modify the generally accepted principles and rules regulating the provision of technical assistance. Thus, its preamble states that "Considering that the great increase in the membership of the United Nations of countries belonging to the underdeveloped sector of

the world economy underlines the urgency of substantially expanding the flow of technical and capital assistance to less developed countries" and "Bearing in mind ... that the present level of technical assistance to the newly independent States is wholly inadequate" ... "and that their share of such aid will need to be more than doubled and perhaps tripled if it is to be brought roughly into line with that of other Member States of the United Nations at comparable stages of development" (underscoring supplied).

9. Resolution 1415 (XIV) previously adopted on the same subject likewise indicates that the General Assembly had not envisaged that former Trust Territories (or other independent States) would not become Members of the United Nations. Its operative part invites "urgent and sympathetic consideration, without prejudice in any way to present assistance being given to other States Members of the United Nations, to all requests" for assistance from such former Trust Territories or newly independent States (underscoring supplied). It is of interest to note that this resolution refers specifically to the Trust Territories of the Cameroons under French administration, Togoland under French administration and Somaliland under Italian administration, for all of which the General Assembly had recommended admission to the United Nations in resolutions 1349 (XIII), 1416 (XIV) and 1418 (XIV), respectively. It may be concluded that the former status of Western Samoa and the aforementioned resolutions do not in themselves make Western Samoa eligible.

10. Apart from the questions you have raised, a further question might be raised arising out of the contemplated arrangements for the international representation of Western Samoa. It may be noted that the Constitutional Convention of Western Samoa has recommended that formal arrangements for future co-operation be concluded between New Zealand and Western Samoa as sovereign States inter alia for "assistance in carrying out its external affairs in such a manner as will not detract from the responsibility of the Government of the Independent State of Western Samoa to formulate its own international policy."[1/] The Prime Minister of Western Samoa stated in the Fourth Committee of the General Assembly that "the New Zealand Government had

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1/ Official Records of the General Assembly, Fifteenth Session, Fourth Committee, Agenda item 44, Annexes (A/C.4/454/Add.1), p.26.

expressed its willingness to consider an arrangement whereby New Zealand would assist Western Samoa in the conduct of certain aspects of external relations which for the time being the latter felt unable to undertake on its own ... and it was hoped that New Zealand would represent Western Samoa or watch over its interests in many international bodies."[1/] At the 1169th meeting of the Fourth Committee, during the sixteenth session of the General Assembly, the Prime Minister has stated, however, that "With regard to the conduct of external relations, while his Government had also discussed assistance in that field with New Zealand, it did not intend to make any rapid decisions but would rather let the system of external relations evolve according to need. As a small country, with limited resources, Western Samoa would have to devote its best endeavours to overcoming domestic problems ... His country did not intend to seek immediate membership of the United Nations but it might well join some of the specialized agencies whose work had particular relevance to Samoan problems, such as WHO, FAO and UNESCO."[2/]

11. It appears from the foregoing that Western Samoa would become eligible for assistance furnished under the Expanded Programme by becoming a member of any of the Organizations participating in EPTA. If according to information supplied by Mr. Spence, Western Samoa applies in May of this year for membership in WHO, and is admitted, it will immediately become eligible.

12. In regard to forms of assistance financed under the Regular Programme, it is doubtful whether Western Samoa would fulfil the conditions for eligibility if it does not become a Member of the United Nations. In the circumstances, it would appear that the General Assembly could take a special decision in this respect (at the request for instance of New Zealand) to authorize Western Samoa to receive assistance under that programme. This would be a case comparable to that of Libya, on which the General Assembly felt the need for a special resolution. The justification for a resolution on this subject might be of

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1/ Official Records of the General Assembly, Fifteenth Session, Part I, A/C.4/SR.1081, para.14.

2/ Ibid., Sixteenth Session, A/C.4/SR.1169, para.25.

course, like in the case of Libya, the "special responsibility" of the United Nations in the future of Western Samoa, as a former United Nations Trust Territory.

27 March 1962.

10. Participation of dependent territories in the United Nations Coffee Conference of 1962 - Interpretation of article 69 of the Havana Charter.

Letter to the British Embassy in Washington

We should like to clarify the legal situation regarding the participation of dependent territories in the forthcoming United Nations Coffee Conference.

United Nations commodity conferences are called pursuant to the provisions of Economic and Social Council resolution 296 (XI) of 2 August 1950. Under this resolution, the list of States to be invited to each conference is prepared by the Interim Co-ordinating Committee on International Commodity Arrangements (ICCICA), subject to certain provisions of the resolution. In order to be included on the list and to receive an invitation in its own name, a country must be a State under international law, that is, it must inter alia have the responsibility for the conduct of its own foreign relations; dependent territories cannot be included on the list of ICCICA.

The participation of dependent territories is the subject of a special provision of the resolution which states:

> "Where the State invited so wishes, there may be separate representation for dependent territories in accordance with the provisions of article 69 of the Havana Charter."

Article 69 of the Havana Charter reads as follows:

> "For the purposes of this Chapter, the terms 'Member' and 'Non-Member' shall include the dependent territories of a Member and non-Member of the Organization respectively. If a Member or non-Member and its dependent territories form a group, of which one or more units are mainly interested in the export of a commodity and one or more in the import of the commodity, there may be either joint representation for all the territories within the group, or where the Member or non-Member so wishes, separate representation for the territories mainly interested in exportation and separate representation for the territories mainly interested in importation."

The provisional rules of procedure of commodity conferences are prepared by ICCICA, which has established a standard pattern for these rules. The rules prepared for the Coffee Conference (E/CONF.42/2) adhere to that pattern. Rule 1 of the Coffee Conference rules provides:

> "Each State invited to the Conference shall be represented by a delegation which shall consist of a representative and such alternate representatives and advisers as may be required by the delegation; provided that upon notification from a State which, together with its dependent territories, forms a group of which one or more units are mainly interested in the exportation of coffee and one or more in the importation of coffee, separate representation shall be provided for the territories mainly interested in the exportation and separate representation for the territories mainly interested in the importation of coffee."

You will note that under the provisions of the Havana Charter and the provisional rules of procedure, a State which has both territories mainly interested in export and territories mainly interested in import has two choices: it may either send to a conference a single delegation representing all of its territories, or it may send two separate delegations, that is, in the words of the Havana Charter, it may provide "separate representation for the territories mainly interested in exportation and separate representation for the territories mainly interested in importation". In our view, however, it is not possible for such a State to send more than two delegations in order to provide individual representation for each of two or more territories which are mainly interested in exportation. The Havana Charter speaks of separate representation for importing and exporting territories, implying that all importing territories may have one representation, and all exporting territories another; but separate representation for each exporting territory appears to be excluded.

This interpretation of the language of the Havana Charter is reinforced by considerations of practical convenience. If there could be individual representation of each importing and each exporting territory, then States which possess a large number of territories - a word, incidentally, of somewhat indefinite meaning - could, simply by their own requests for "separate representation", greatly increase their own roles in conferences, and could perhaps even enlarge the number of delegations to a degree inconvenient for the conduct of the business.

The situation under discussion is different from that which arose with regard to Nigeria in the United Nations Tin Conference of 1960, when Nigeria had not yet attained independence. At that Conference the United Kingdom made in respect of Nigeria the notification provided for in rule 1 of the commodity conference rules of procedure, and the Nigerian delegation sat and voted separately from that of the United Kingdom, with its own placard bearing the word "Nigeria". In that case Nigeria was the only territory which the United Kingdom notification declared to be mainly interested in the exportation of tin, and consequently it could have a delegation by itself.

The procedure to be envisaged regarding the Coffee Conference is as follows. The United Kingdom, in reply to the letter of invitation, would make a notification that certain of its territories, whose names should be given, are mainly interested in the exportation of coffee, and that consequently separate representation will be provided for them. At the Conference, the representatives of those territories can be seated behind a single placard which will either give the names of all the territories concerned or will use some general expression such as "United Kingdom exporting territories". That delegation will have one vote, as will the United Kingdom delegation for the importing territories. It will be entirely for the exporting territories' delegation to make arrangements within itself as to who is to express the point of view of the delegation on particular subjects, and how the single vote is to be cast if any need of doing so arises.

We assume that the United Kingdom will issue credentials for both the exporting and the importing delegations, in a form satisfying rule 2 of the provisional rules of procedure. The two delegations will be listed separately in the list of delegations prepared by the Secretariat. With regard to the exporting delegation, there would be no objection to indicating in the list the various territories from which the different members of the delegation come, and the official posts they occupy in those territories.

13 June 1962.

11. Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages - Legal implications of various proposals to extend participation in the Convention

Statement made by the Legal Counsel at the 1142nd meeting of the Third Committee of the General Assembly on 4 October 1962 (A/C.3/L.985)

I understand that the distinguished representative of Ireland has requested that the Secretariat indicate how it would seek to implement the proposal now before this Committee (A/C.3/L.982 and Add.1) providing that the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages shall be automatically open for signature on behalf of all States. I also understand that my distinguished friend, Mr. Baroody of Saudi Arabia, has asked an additional question. I will reply to that in due course. Before defining the Secretariat's position, I would like to draw the attention of this Committee to the fact that there is not, so far as I can ascertain, any example of a convention concluded under the auspices of the United Nations providing that the convention is automatically open to all States. You will notice I use the word "automatically". I did so advisedly. Indeed, the Constitution of the World Health Organization, concluded under United Nations auspices, provides that membership in WHO is open to all States. However, this provision is qualified by the fact that under other provisions in the same Constitution, membership is only automatic in the case of Members of the United Nations, and certain other States invited to send observers to the Conference which drew up the Constitution. In the case of all other States, applications for membership have to be submitted to and approved by a majority of the Health Assembly.

I wish to note here, in parenthesis, that this seems to be near the proposal suggested today by Mr. Baroody. Furthermore, the provisions for membership in the WHO Constitution are in practice similar to a provision found in some United Nations conventions to the effect that they are open to Members of the United Nations and any other State to which the Assembly addresses an invitation to become a Party.

The reason for the absence of any example of a United Nations convention being automatically open to all States is, I think, very clear. The Secretary-General is responsible for the discharge of depository functions under United Nations conventions. These functions, for example, as you will see from the standard draft final clauses submitted in document A/4844, typically require the Secretary-General to send notifications to those States who are authorized to become Parties to the Convention, and particularly, to accept in deposit their instruments of ratification or accession. But it is also a universal characteristic for the final clauses of United Nations conventions that they tell to the Secretary-General precisely what States, or what classes of States, are authorized to become Parties. In the discharge of his responsibilities of an entirely legal and administrative character, the Secretary-General should not, and indeed cannot, be required to take a political decision of a very difficult character on whether or not a certain disputed entity is a State.

As the members of this Committee know, there are areas in the world the status of which is not clear. It would be inappropriate for the Secretary-General to determine, on his own initiative, whether or not these areas are "States" within the meaning of the depository clauses of a convention. If the "all States" formula were to be adopted, therefore, he would have no alternative but to seek explicit directives from this Committee and the General Assembly as to the complete list of States to which the Convention would be open. This, I believe, replies to the question put by the distinguished delegate of Ireland.

The distinguished delegate of Saudi Arabi submitted an idea that the Convention should be open to those States, besides the Member States of the United Nations, which submit a request to the General Assembly and are thereafter invited by it to become a Party of the Convention. There may be some political difficulties in the way of this suggestion, but it is not for me to comment upon them. I see no immediate legal difficulty, except perhaps one. The Assembly deals with matters only when, and only because, they have been put on its agenda. Article 13 of the rules of procedure defines who can put items on the provisional agenda of the General Assembly. I see no reference there

of any non-Member States being able to do that. There are, however, ways of avoiding this difficulty. For instance, any Member State can propose items. Perhaps this kind of request to become party to a convention should be addressed through another State which is a Member of the United Nations. There may be other alternatives. The procedure should, however, be defined. Otherwise how could a request received by the Secretariat be put on the agenda if the rules of procedure do not provide automatically for the inclusion of such an item? That is the only legal difficulty I can see.1/

1/ The following exchange of views (A/C.3/SR.1142, para. 28-31) took place after the Legal Counsel's statement:

The CHAIRMAN asked the Legal Counsel what would be the situation if a State, which was not a Member of the United Nations or a member of any of the specialized agencies, and which wished to become a Party to the Convention submitted its request through the Secretary-General. If that solution was possible, the wording suggested by the Saudi Arabian representative could be amended to take it into account.

Mr. STAVROPOULOS (Legal Counsel) pointed out that rule 13 (g) of the General Assembly's rules of procedure enabled the Secretary-General to ask for the inclusion in the provisional agenda of all items which he deemed it necessary to put before the General Assembly. That gave him the opportunity, if he saw fit, to place before the Assembly the request of any State which wished to become a Party to the Convention.

Mr. DIAZ CASANUEVA (Chile) thought that the Saudi Arabian representative's suggestion had certain merits. Instead of active powers being conferred on the General Assembly, the State concerned would be called upon to take the initiative. The principle of universality would thus be better safeguarded than by the wording proposed by the United States. Nevertheless, he asked the Legal Counsel whether, if either of the two formulas, and especially the United States proposal which gave the initiative to the General Assembly, were adopted, the Assembly would be competent to confer the status of a State on a given territory or country, seeing that it was not a legal, but essentially a political organ. Moreover, none of the proposed amendments specified the majority by which the Assembly should take a decision on the matter.

Mr. STAVROPOULOS (Legal Counsel) stressed that the General Assembly could not give legal recognition to a State if that entailed individual recognition by each Member of the Assembly. Nevertheless, in treating a country as a State, the Assembly would thereby confer upon it the status of a State in respect of its relations with the United Nations, whatever might be the value of such an act at the international level. In that connexion, he recalled that the General Assembly had already on two occasions, by means of a general definition, invited non-member countries to accede to conventions adopted by it. Those cases were the Convention on the Prevention and Punishment of the Crime of Genocide (General Assembly resolution 260 (III)) and the Convention on the Political Rights of Women, and the countries concerned, which were still not Members of the United Nations, were the Principality of Monaco, the Republic of Korea, Switzerland, the Principality of Liechtenstein, the Republic of Viet-Nam, the Federal Republic of Germany and the Republic of San Marino.

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12. Accession of new States to multilateral conventions concluded under the auspices of the League of Nations - Legal implications of a proposal to open those conventions to new parties with the tacit consent of a majority of the States already parties.

Statement made by the Legal Counsel at the 748th meeting of the Sixth Committee of the General Assembly of 29 October 1962 (A/C.6/L.506)

/Australia, Ghana and Israel had submitted a draft resolution (A/C.6/L.504/Rev.1) by which the General Assembly would (1) request the Secretary-General to ask the Parties to the Conventions listed in the Annex to the resolution to state, within a period of twelve months from the date of the inquiry, whether they object to the opening of those of the conventions to which they are Parties, for accession by any State Member of the United Nations or member of any specialized agency; (2) authorize the Secretary-General, if the majority of the Parties to a convention have not within the period referred to in paragraph 1 objected to opening that convention to accession, to receive in deposit instruments of accession thereto which are submitted by any State Member of the United Nations or member of any specialized agency; and (3) recommend that all States Parties to the conventions listed in the Annex of the resolution recognize the legal effect of instruments of accession deposited in accordance with paragraph 2./

The question has been raised whether it is legally possible to provide in a resolution of the General Assembly that the Secretary-General should receive instruments of accession to League of Nations Treaties from new States if only a majority of the States parties to those treaties, but not all of them, expressly or tacitly consent thereto. Can a majority rule be used in order to open the old treaties to new parties, or is it necessary to have unanimity of the States already parties?

The majority rule has already been used by the General Assembly in amending treaties of the League of Nations. At various dates between 1946 and 1953 the Assembly approved seven different Protocols amending League treaties on narcotic drugs, the traffic in persons, obscene publications, economic statistics and

slavery. All of these Protocols amended old treaties so as to permit accession by all Members of the United Nations and by certain non-members. All of the seven Protocols provided for the entry into force of the amendments when either a majority of the parties to the League treaties, or a specified number constituting about half of such parties, had become parties to the Protocols. Thus from the time that a simple majority of the parties - or a fixed number of them constituting approximately a simple majority - accepted the amendments, the Secretary-General was authorized to receive instruments of accession from new States.

The draft resolution before the Sixth Committee follows the same majority rule as was embodied in the seven Protocols which the General Assembly has approved. It goes beyond those precedents only in regard to the method by which the parties to the League treaties give their consent. Under the Protocols, they were required to take formal action to become parties to those Protocols; under the draft resolution, a simple failure to object within twelve months is taken as an indication of consent. A number of the Protocols made more extensive amendments than merely opening the old treaties to new parties, and hence a formal procedure for consent was suitable; but where the only object is to widen the possibilities for accession, the Committee may find that no such formality is necessary.1/

1/ The following exchange of views (A/C.6/SR.748, paras. 15, 16, 18 and 22-25) took place in the course of the same meeting:

Mr. SPERDUTI (Italy) said that he was prepared to support any appropriate proposal for opening to the new States the agreements concluded under the auspices of the League of Nations. However, he had misgivings about certain strictly technical and legal aspects of the revised draft resolution (A/C.6/L.504/Rev.1) before the Committee. It differed from the suggestions made in the International Law Commission's commentary of the draft articles on the law of treaties (A/5209, chap. II), in that its operative paragraph 1 envisaged not the express consent of the parties contemplated in the commentary, but a form of acquiescence - in other words, that the parties should be asked whether they objected to the opening of the conventions. There was obviously a distinct difference between express consent and acquiescence. In constitutional law, for example, a Government would generally have to secure parliamentary approval for express consent, but not for mere silence. ... In those circumstances, he wondered why the sponsors of the revised draft resolution had not required express consent

(foot-note continued on following page)

13. Exercise of the functions of the Secretary-General during the interim period between Mr. Hammarskjöld's death and the election of U Thant as Acting Secretary-General.

Memorandum to the Director of Personnel

/A staff member whose temporary appointment had been terminated by a decision personally approved on 31 August 1961 by Mr. Hammarskjöld requested a review of this decision. On 27 September 1961, the Director of Personnel undertook such review and upheld the decision. On 27 March 1962, the Office of Legal Affairs submitted to the Joint Appeals Board, at the latter's request, a statement of the legal grounds supporting, in the Administration's view, the procedure followed in respect of the review of the original decision. Extracts of this statement, which was contained in a memorandum addressed to the Director of Personnel, are reproduced below./

... There is no room for doubt that as Director of Personnel you were entitled on 27 September 1961 to perform the administrative review under Staff Rule 111.3(a).

It may be recalled in particular that the late Secretary-General decided on 24 June 1956 to delegate authority to make decisions in the personnel field to

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rather than mere absence of objection. If there were a rule of international law that absence of objection and express consent produced the same effects, express consent would be of course unnecessary; but he doubted whether that was an established rule of the law of treaties. He asked the Legal Counsel whether the seven Protocols cited as precedents had not required the express consent of a certain number of States parties to the conventions to be amended. ...

Mr. STAVROPOULOS (Legal Counsel) said, in reply to the representative of Italy, that in the present context it had been United Nations practice for the past sixteen years to prefer the term "rejected" to the term "accepted". That had been a matter of pure convenience, since experience had shown that, when inquiries were addressed to States concerning the opening of conventions to which they were parties for accession by other States, it was much more practical to state that their failure to reject those accessions within a certain period would be taken as evidence of assent, rather than to call upon them for a definite statement of acceptance. Owing to limitations of staff, many States were often slow in replying to inquiries; but it would not be fair to assume that their failure to reply meant that they were unwilling to permit the accession of other States. The case of the seven Protocols to which he had referred was quite different, since they had involved amendments, and it was inconceivable that an amendment could be accepted by tacit consent.

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the Director of Personnel, except for certain decisions which would either be taken by him personally or would be taken by the Director of Personnel and the Controller acting in agreement and which exceptions do not include decisions affirming a termination of temporary appointments. This delegation of authority would, in our opinion, by itself provide a sufficient legal basis for your decision of 27 September 1961 in the case under consideration.

As a further point, which is applicable during the interim period between Mr. Hammarskjöld's death and the election of U Thant as Acting Secretary-General, it is clearly established under precedents followed since January 1956 that each Under-Secretary, in the absence of the Secretary-General, exercised final responsibility for the work of his Department or Office. The exercise of the functions of the Secretary-General did not lapse, nor were they in abeyance, during the interim but continued to be exercised by each Under-Secretary within

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Mr. USTOR (Hungary) ... Moreover, some conventions involved the problem of State succession. Where a new State clearly indicated that it did or did not consider itself the successor of an original party to a convention, there would be no difficulty; but he wondered if the Secretary-General would always be able to state exactly which States were parties to a convention by virtue of State succession.

Mr. BERNSTEIN (Chile) said that his delegation agreed with the representative of Italy that the accession of new States would necessarily involve important constitutional problems which could not be ignored. In connexion with the Convention concerning the Use of Broadcasting in the Cause of Peace (A/C.6/L.498), he asked the Legal Counsel whether the accession to that Convention of new States which had not been Members of the League of Nations would be considered an amendment to its articles 8 and 10. In his opinion it would.

Mr. STAVROPOULOS (Legal Counsel) said, in reply to the representative of Hungary, that in practice either the Secretariat knew already which States were the successors of States parties to conventions, or, if there was any doubt, it asked States directly whether they considered themselves successors.

In reply to the representative of Chile, he said that there was no doubt that the accession of new States to the Convention concerning the Use of Broadcasting in the Cause of Peace would constitute an amendment to its articles 8 and 10.

the sphere of his competence. Consequently, even without the specific delegation of authority referred to in the preceding paragraph, you, as Director of Personnel, were entitled to exercise the functions of the Secretary-General under the Staff Rules and Regulations during the interim between the death of Mr. Hammarskjöld and the election of U Thant.

27 March 1962.

14. Meaning of the expressions "in consultation with" and "after consultation with" in the practice of the United Nations.

Note to the Legal Counsel of the Food and Agriculture Organization of the United Nations

United Nations practice

1. Relatively frequent references to the concept of "consultations" may be found in United Nations documents of a legal character. The expressions "in consultation with" and "after consultation with" have been used in the United Nations Charter, in international agreements concluded under the auspices of the Organization or to which the Organization was a party, and in various resolutions of the principal organs. It appears clearly from the examination of these texts that the obligation "to consult with" was consistently construed as requiring the "consulting party" to seek the views of the party which was to be consulted and to give due consideration to the views expressed in reaching the decision as to the specific action to be taken. The consulting party was considered as having the sole responsibility for taking such final decisions as it considered appropriate in the light of the consultations it previously held.

When the authors of the United Nations Charter, or representatives of Governments or members of the Secretariat who were responsible for the formulation of international agreements or resolutions, considered that the approval of another party was required for an action to be taken, they used such expressions as "with the agreement of",[1/] "in agreement with",[2/] or "with the prior concurrence of".[3/]

1/ E.g. General Assembly resolution 1405 (XIV).

2/ E.g. General Assembly resolutions 1609 (XV) and 1642 (XVI).

3/ E.g. General Assembly resolutions 1444 (XIV), 1445 (XIV) and 1736 (XVI).

2. In interpreting United Nations texts, therefore, "consultation" must be distinguished from "agreement", "concurrence" or "consent" unless it is clearly indicated in the text that the purpose of consultation is to obtain agreement. On the other hand, it may be said that while certain differences of emphasis may exist, the expressions "in consultation with" or "after consultation with" have a similar connotation as "taking into account the views of"[1/] or "bearing in mind the recommendations of"[2/] in the sense that these latter expressions do not require agreement with the views expressed or the recommendations made.

3. United Nations practice does not indicate any significant difference between the expressions "in consultation with" and "after consultation with". The former expression may refer to a more continuous process leading to the reaching of a decision by the consulting party; the latter may more clearly distinguish between the two stages, that of consultations and that of decision-making.

4. The following paragraphs contain a few illustrations based on United Nations practice of the meaning given in United Nations legal texts to the requirement "to consult".

Interpretation of the expression "in consultation with" as used in Article 87 of the Charter

5. The expression "in consultation with" may be found in Article 87 of the United Nations Charter, relating to the functions and powers of the General Assembly and the Trusteeship Council in relation to the international trusteeship system. Article 87 states:

> "The General Assembly and, under its authority, the Trusteeship Council, in carrying out their functions, may:
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> a. consider reports submitted by the administering authority;
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> b. accept petitions and examine them in consultation with the administering authority;
>
> c. provide for periodic visits to the respective trust territories at times agreed upon with the administering authority; and
>
> d. take these and other actions in conformity with the terms of the trusteeship agreements". (Underscoring supplied)

1/ E.g. General Assembly resolutions 1512 (XV) and 1572 (XV).

2/ E.g. General Assembly resolution 1517 (XV).

6. The procedure for the acceptance and the examination of petitions as described in the rules of procedure of the Trusteeship Council provides in particular for "complete and precise written observations by the Administering Authority concerned ... transmitted within three months of the date" of the receipt of the petitions by the Administering Authority. (Rule 86, paragraph 4)

Rule 92 provides that:

> "In the examination of all petitions the Administering Authority concerned shall be entitled to designate and to have present a special representative who should be well informed on the territory involved".

Under rule 90 the preliminary examination of the petitions is entrusted to a Standing Committee on Petitions. The Standing Committee on Petitions meeting between sessions of the Council may

> "conduct, in consultation with the representative of the Administering Authority concerned, a preliminary examination of those petitions on which written observations by the Administering Authority are available. In particular it may formulate any questions to be submitted to the Administering Authority, or to the special representative ...". (Underscoring supplied)

The practice of the Standing Committee is to adopt resolutions on the petitions submitted to it after a debate in which the special representative of the Administering Authority concerned is entitled to participate. The Standing Committee has never required either explicitly or implicitly the agreement or consent of the Administering Authority to the draft resolutions which it recommended to the Council.

Following their consideration by the Standing Committee draft resolutions on petitions are submitted for approval by the Trusteeship Council, of which each Administering Authority is a member. Draft resolutions on petitions have always been considered as adopted when they obtained a majority of the votes of the members of the Council, even when there was no concurring vote of the member representing the Administering Authority.

7. This interpretation of the term "in consultation with" as used in Article 87 b of the Charter is strengthened by a comparison with Article 87 c which provides for periodic visits to Trust Territories at times "agreed upon" with the Administering Authority.

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The distinction was given more specific expression in article 2 of the Trusteeship Agreements for the former Trust Territories of the Cameroons and Togoland under French Administration, which specified that the French Government, in its capacity of Administering Authority, undertook to collaborate fully with the General Assembly and the Trusteeship Council in the discharge of their functions as defined in Articles 87 and 88 of the Charter, and in particular:

> "2. To appoint a representative and, where necessary, qualified experts to participate, in consultation with the General Assembly or the Trusteeship Council, in the examination of petitions received by those bodies;
>
> "3. To facilitate such periodic visits to the Territory as the General Assembly or the Trusteeship Council may decide to arrange; to decide jointly with these bodies the dates on which such visits shall take place, and also to agree jointly with them on all questions concerned with the organization and accomplishment of these visits;". (Underscoring supplied)

Interpretation of the terms "for consultation with" and "after consultation with" as used in Article 71 of the Charter

8. Article 71 of the Charter provides that the Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations and that such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.

9. Paragraph 14 of resolution 288 B (X) of the Economic and Social Council, which sets forth one of the "Principles governing the nature of the consultative arrangements", reads in part as follows:

> "Decisions on arrangements for consultation should be guided by the principle that consultative arrangements are to be made, on the one hand, for the purpose of enabling the Council or one of its bodies, to secure expert information or advice from organizations having special competence in the subjects for which consultative arrangements are made, and, on the other hand, to enable organizations which represent important elements of public opinon to express their views ...". (Underscoring supplied)

10. In the case of national organizations, the practice has been for the Council Committee on Non-Governmental Organizations, which is responsible for the examination of applications for consultative status, to consider such applications from national organizations only if the consent of the Member State concerned has been previously obtained. This must be considered, however, as a

decision of the Committee as to its methods of work, which the Committee was entitled to adopt within its discretionary powers, without being obliged to do so because of the use of the words "after consultation with the Member of the United Nations concerned" (Article 71 of the Charter).

Articles 63 and 106 of the Charter

11. References to "consultations" may be found in two other Articles of the United Nations Charter.

Paragraph 2 of Article 63 of the Charter states that the Economic and Social Council "may coordinate the activities of the specialized agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the Members of the United Nations". (Underscoring supplied)

Consultations on various matters are provided for in the relevant agreements between the United Nations and the specialized agencies concluded under paragraph 1 of Article 63 of the Charter. They relate to such matters as proposals of agenda items, consideration of recommendations, location of Headquarters, employment of staff, co-ordination in budgetary and financial arrangements, financing of special services. It is well known that these agreements, as interpreted in the course of the years, have not been construed as requiring the consent of the organization which is to be consulted to enable the consulting organization to take such action as its competent organs may deem appropriate in the light of consultations held.

12. Article 106 of the Charter provides for transitional security arrangements pending the coming into force of special agreements referred to in Article 43. The United Kingdom, the United States, the USSR, China and France are to "consult with one another and as occasion requires with other Members of the United Nations with a view to such joint action on behalf of the Organization which may be necessary for the purpose of maintaining international peace and security". This Article has not yet received a formal interpretation by United Nations organs as to the meaning of consultations "with a view to joint action".

Discussion of the term "after consultation with" as used in the Trusteeship Agreement for the former Trust Territory of Somaliland and in the Declaration of Constitutional Principles annexed to that Trusteeship Agreement

13. The records of the discussions in January-April 1950 of the provisions of the Draft Trusteeship Agreement for the former Trust Territory of Somaliland under Italian Administration and of the Declaration of Constitutional Principles which was appended to the Agreement provide further indications as to the meaning given to the expression "after consultation with" in United Nations texts.

14. The Draft Trusteeship Agreement for the former Trust Territory of Somaliland under Italian Administration prepared in the Committee for Italian Somaliland[1/] contained the following provisions:

Article 6, paragraph 2:

> "The Administering Authority, after consultation with the Advisory Council, may establish installations and take all measures in the Territory including the progressive development of Somali defence forces, which may be necessary, within the limits laid down in the Charter of the United Nations, for the defense of the Territory and for the maintenance of international peace and security." (Underscoring supplied)

Article 14, second paragraph:

> "The Administering Authority shall not, without the consent in each case of a two-thirds majority of the members of the Territorial Council (provided for in the Annex), permit the acquisition by non-indigenous persons or by companies or associations controlled by such persons of any rights over land in the Territory save on lease for a period to be determined by law. In cases involving the alienation to non-indigenous persons or to companies or associations controlled by such persons of areas of agricultural lands in excess of one thousand acres, the Administering Authority shall also request the advice of the Advisory Council. The Administering Authority shall include in its annual report to the Trusteeship Council a detailed account of such alienations." (Underscoring supplied)

15. During the consideration of the draft trusteeship agreement at the sixth session of the Trusteeship Council, the representative of Belgium suggested that the wording "after consultation with the Advisory Council", in article 6, and the wording "shall also request the advice of the Advisory Council", in article 14, should be made uniform if the procedure envisaged in both cases were identical.[2/]

1/ T/449.

2/ Official Records of the Trusteeship Council, Fourth Year, Sixth Session, 4th meeting, para. 2.

16. The representative of the Philippines made the following observation:[1]

> "Divergent views had been advanced in the Committee for Italian Somaliland, certain members having held that the Administering Authority should not establish installations and take such measures as might be necessary for defence without the authorization of the appropriate United Nations bodies, whereas others had been opposed to such a restriction. Article 6 was a compromise, the Administering Authority being allowed to take the action provided for in paragraph 2 'after consultation with the Advisory Council'. Assuming that his interpretation of the Committee's attitude was correct, he would submit that the purpose of the formula was to ensure that the Administering Authority take no action before consulting the Advisory Council. The term 'consultation' was wider in its implications than the term 'requesting advice', and, in the view of his delegation, meant that unless and until the Advisory Council had agreed to the establishment of installations and the taking of measures, the Administering Authority could not take action for the defence of the Territory."

17. Commenting on the Philippine statement, the representative of Belgium considered that "after consultation with" was certainly more specific than "request the advice of", but neither concept was as strong as "with the agreement of".[2]

18. The representative of Italy agreed with the views expressed by the Philippine representative and stated that the word "consultation" had been used with the possibility in mind that, if for serious reasons connected with the maintenance of public order, the Administering Authority felt obliged to act without having concluded an arrangement with the Advisory Council, it would be incurring a "very serious political responsibility" towards the Trusteeship Council. The word "consultation", in his view, had been used to underline the serious nature of that responsibility.[3]

19. The representative of the United States concurred with the views of the Philippine representative on the difference between consultation and advice; the former implied a continuous process, the latter denoted a definite act. A request for advice could be answered either in the affirmative or in the negative, but consultation involved collaboration and discussion. He

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1/ Ibid., para. 4.

2/ Official Records of the Trusteeship Council, Sixth Session, 4th meeting, para. 8.

3/ Ibid., page 11.

was convinced that the term "after consultation" provided a correct and appropriate expression of the intentions of the Committee for Italian Somaliland.[1]

20. After this discussion, article 6, as drafted by the Committee for Italian Somaliland, was adopted by the Trusteeship Council.

21. The Committee for Italian Somaliland also drafted a Declaration of Constitutional Principles which was annexed to and constituted an integral part of the draft trusteeship agreement for Somaliland. The discussion in that Committee of a provision relating to defence and foreign affairs to be included in the draft Declaration may be considered as throwing light on the interpretation of the term "after consultation with" in article 6, paragraph 2, of the draft trusteeship agreement. On that occasion, India had proposed the following text, which was identical with the text proposed by the Philippines:[2]

> "In matters relating to defense and foreign affairs, the Administrator[3] shall be responsible to and carry out the directions of the United Nations acting through its appropriate organs." (Underscoring supplied)

22. The representatives of France and the United States considered that such an article was at variance with the provisions of article 5 (which later became article 6), paragraph 2, of the draft trusteeship agreement as adopted.[4] The representative of the United Kingdom said that while the General Assembly had considered some supervision of the Administering Authority's defence measures desirable, there could be no question of any initiative by the United Nations in the matter, as proposed in the Indian Text. Nor should the United Nations, at that stage of development of international security, seek to give a non-member State directions which it was not yet competent to issue to Member States.[5] The representative of Italy stated that the responsibility of the Administering Authority had no meaning if it excluded direct responsibility for defence and that, in any case, the whole matter had been settled by the adoption of article 5 of the draft trusteeship agreement.[6]

1/ Ibid., para. 12

2/ T/AC.18/L.5 (article 4 proposed by India and article 8 proposed by the Philippines).

3/ The Administrator was to be the executive Chief of the Territory.

4/ T/AC.18/SR.11, p. 5.

5/ Ibid., p. 6.

6/ Ibid., p. 6.

23. On the other hand, the representative of the Philippines favoured the retention of the Indian text for the reason that in the event of the Administering Authority taking such steps as establishing military bases and stationing troops in the Territory after consultation with the Advisory Council, the United Nations should be in a position to supervise the measures adopted.[1] The representative of Iraq proposed a version slightly different from the Indian text but similar in substance.

24. After discussion, the following text, based on the oral proposal of the representative of France, was adopted,[2] which later became article 6 of the Declaration:

> "In matters relating to defense and foreign affairs, as in other matters, the Administering Authority shall be responsible to the Trusteeship Council and shall take into account any recommendations which the Council may see fit to make."

25. Another instance dealing with the term "in consultation with" was the drafting of a provision relating to legislative authority for inclusion in the draft Declaration. In this case, the delegation of the Philippines proposed the following provision:[3]

> "In exceptional circumstances, the Administrator may, with the advice and consent of the Advisory Council, make and promulgate such ordinance as in his opinion the circumstances demand ...". (Underscoring supplied)

26. During the discussion in the Committee for Italian Somaliland, the representative of the United States moved the adoption of this provision, subject to the substitution of the words "after consultation with" for the words "with the advice and consent of".[4] This amendment was accepted by the representative of the Philippines and the text, as amended, was adopted by the Committee as the first paragraph of article 5 of the draft Declaration.

1/ Ibid., p. 5-6.

2/ Ibid., p. 7.

3/ T/AC.18/L.5 (article 10 of the Philippines' proposals).

4/ T/AC.18/SR.11, p. 4.

Practice with respect to the term "in consultation with" used for the purpose of making appointments

27. Since its first session the General Assembly has adopted a number of resolutions requesting the Secretary-General to make appointments in consultation with other bodies or Governments concerned. For instance, in its resolution 57 (I), the General Assembly requested the Secretary-General to appoint the Executive Director of the International Children's Emergency Fund in consultation with the Executive Board. In its resolution 302 (IV) the Assembly requested the Secretary-General to appoint the Director of the United Nations Relief and Works Agency for Palestine Refugees in the Near East in consultation with the Governments represented on the Advisory Commission established by the same resolution. In such cases the practice has been that the Secretary-General would call a meeting of the body concerned or contact the individual Governments concerned for the purpose of consultations. During such consultations he would indicate the name of the candidate he had in mind and seek to obtain the reactions of those consulted to his appointment. Subsequently to the consultations, the Secretary-General would announce the appointment he had decided to make. It may be noted in this connexion that since the opinion of the members of the body concerned or that of the individual Governments which are to be consulted may not be unanimous, it is necessary that the Secretary-General exercise his discretion in such cases by taking into account the various views expressed and making the appointment as he sees fit.

Practice with respect to the term "in consultation with" used for the purpose of preparing studies or reports

28. Numerous resolutions have been adopted by the General Assembly which requested the Secretary-General or certain other organs to prepare studies or reports in consultation with other bodies or governments. The following are given as examples of some of the recently adopted resolutions and their implementation in practice.

29. In its resolution 1424 (XIV), the General Assembly requested the Secretary-General to examine, in consultation with the Governments of Member States, ways and means of making further progress towards the early establishment of a United Nations capital development fund and invited the Secretary-General to

report on this matter to the Economic and Social Council and to the Assembly. The Secretary-General, in his report to the Economic and Social Council, stated that in accordance with the resolution, a communication was sent to Member States drawing their attention to the terms of the resolution and requesting "the expression of their views on" the early establishment of the fund. He further reported that the replies from Member Governments, which were annexed to the report, did not indicate any significant new developments in connexion with the establishment of the fund.[1/]

30. In its resolution 1558 (XV), the General Assembly requested the Secretary-General, in consultation with the Consultative Panel on Public Information and the Advisory Committee on Administrative and Budgetary Questions, as appropriate: (a) to give high priority to the opening of information centres or arranging for adequate information facilities in the less developed areas by effecting economies in other directions; (b) to intensify his efforts to achieve a more effective regional representation at the policy-making level of the Office of Public Information; and (c) to report to the General Assembly at its sixteenth session on the progress made in implementing the resolution. In compliance with this request, the Secretary-General submitted his report in which he stated that he had "consulted with" both organs named in the resolution "with regard both to the policies and programmes of the Office of Public Information and to the content of this report".[2/] It may be interesting to note with respect to the Consultative Panel on Public Information that at its first meeting the Panel specifically agreed that its functions were purely advisory to the Secretary-General and that there would be no voting at the conclusion of its deliberations.

31. On occasion, the General Assembly has explicitly indicated the meaning of consultation. Thus, in its resolution 1414 (XIV), the Assembly invited the Economic and Social Council to make a study of all opportunities for international co-operation which could be of interest to the former Trust Territories which had become independent, within the spheres and in the framework of programmes of international assistance, and recommended that the Council should consult with the Governments of such countries "for the purpose of ascertaining their views" (underscoring supplied) with respect to those questions.

1/ Official Records of the Economic and Social Council, Thirtieth Session, Annexes, agenda items 2 and 4, document E/3393, paras. 1-2 and 4.

2/ Official Records of the General Assembly, Sixteenth Session, Annexes, document A/4927, para. 3

32. In its resolution 1713 (XVI) on the role of patents in the transfer of technology to under-developed countries, the General Assembly requested the Secretary-General to prepare a report on the various aspects of the subject "in consultation with appropriate international and national institutions and with the concurrence of the Governments concerned". (Underscoring supplied)

33. It may therefore be said that either the language or the implementation in practice of such resolutions of the General Assembly as those illustrated above indicates that consultation is a process by which the views of the parties consulted are merely sought or ascertained and that the distinction is carefully made between the use of the expressions "in consultation with" or "after consultation with" and such expression as "with the concurrence of".

10 May 1962.

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B. LEGAL OPINIONS OF THE SECRETARIAT OF INTER-GOVERNMENTAL ORGANIZATIONS RELATED TO THE UNITED NATIONS

1. INTERNATIONAL LABOUR OFFICE

The following memoranda concerning the interpretation of international labour Conventions were prepared by the International Labour Office at the request of Governments:

(a) Memorandum concerning the Night Work (Bakeries) Convention, 1925 (No. 20), prepared at the request of the Government of Sweden, 8 May 1962. Official Bulletin, vol. XLV, No. 3, July 1962, p. 225-6. English, French, Spanish.

(b) Memoranda concerning the Sickness Insurance (Industry) Convention, 1927 (No. 24), the Sickness Insurance (Agriculture) Convention, 1927 (No. 25), the Medical Examination of Young Persons (Industry) Convention, 1946 (No. 77), the Holidays with Pay (Agriculture) Convention, 1952 (No. 101) and the Social Security (Minimum Standards) Convention, 1952 (No. 102), prepared at the request of the Chairman of a Sub-committee of the Northern Committee for Social Policy which was examining the possibilities of ratification of certain international labour Conventions by the States members of that Committee. 26 February and 26 April 1962. Official Bulletin, vol. XLV, No. 3, July 1962, p. 226-240. English, French, Spanish.

(c) Memorandum concerning the Maternity Protection Convention (Revised), 1952 (No. 103), prepared at the request of the Austrian Government, 14 May 1962. Official Bulletin, vol. XLV, No. 3, July 1962, p. 242-8.

(d) Memorandum concerning the Seafarers' Identity Documents Convention, 1958, (No. 108), prepared at the request of the Government of the United Kingdom, 13 August 1962. Official Bulletin, vol. XLVI, No. 3, July 1963, p. 466-7.

2. SECRETARIAT OF THE UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION

Although the Secretariat of UNESCO has no special authority to interpret the provisions of Conventions adopted by the General Conference of UNESCO, it has always considered it to be its duty to assist Governments in this respect, whenever

they so request, by placing at their disposal whatever information it possesses. During 1962 the Secretariat had occasion to prepare the following two memoranda concerning the interpretation of certain provisions of Conventions adopted by the General Conference:

(a) Meaning of the term "nationals" in article 3, paragraph (c) of the Convention against Discrimination in Education (1960).

1. The question raised ... concerns the exact meaning of the term "nationals as it appears in article 3, paragraph (c) of the Convention against Discrimination in Education, adopted by the General Conference of UNESCO on 14 December 1960.

2. Article 3 of the Convention reads, in part, as follows:

> "In order to eliminate and prevent discrimination within the meaning of this Convention, the States parties thereto undertake:
>
> .....
>
> (c) Not to allow any differences of treatment by the public authorities between nationals, except on the basis of merit or need, in the matter of school fees and the grant of scholarships or other forms of assistance to pupils and necessary permits and facilities for the pursuit of studies in foreign countries;
>
> ....."

3. Historically, the above provision appears to have its origin in one of ten "fundamental principles" embodied in a resolution adopted by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities in March 1957, on the proposal of its Special Rapporteur (M. Charles Ammoun of Lebanon). This principle was worded as follows:

> "7. No difference of treatment should be applied by the public authorities as between persons or distinct groups of persons, except on the basis of merit and need, in respect to:
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> (a) school fees and expenses;
>
> (b) assistance to pupils and students (in the form of educational material, board and lodging, clothing, scholarships or loans, etc.".

4. In the questionnaire sent to Member States (UNESCO/ED/167) a question was put regarding this principle, the wording "as between persons or distinct groups of persons" being retained.

5. In the draft text of the Convention contained in the Final Report of the Director-General (UNESCO/ED/167 Add.1) the clause was worded as follows:

> "The States parties to this Convention undertake:
>
> ...
>
> (d) not to allow any difference of treatment by the public authorities, except on the basis of merit and need in the matter of school fees; in the granting of permits and facilities which may be necessary for the pursuit of studies in foreign countries; in the award of scholarships and the grant of any form of assistance to pupils."

6. The Special Committee of Government Experts to whom the draft Convention was submitted made some changes in the provision quoted above, none of which were relevant to the question at hand. The report of the Committee (11C/5 Annex III) contains no reference to any discussion on this point.

7. At the General Conference, the draft Convention as adopted by the Special Committee of Governmental Experts was submitted to a working party of the Programme Commission. The report of that Working Party contains the following passage on article 3, paragraph (c):

> "25. Article 3 (c) declares that the States Parties to the Convention undertake not to allow any differences of treatment by the public authorities between nationals, except on the basis of merit or need, in the matter of school fees and the grant of scholarships or other forms of assistance to pupils and necessary permits and facilities for the pursuit of studies in foreign countries. Although article 1, which enumerates the factors constituting discrimination, makes no mention of 'nationality', the Working Party decided, on the proposal of the delegation of Italy and by 13 votes to 2, with 3 abstentions, that it was necessary - the 'discrimination' not being repeated in this provision - to mention that the prohibition of 'differences of treatment' applied only 'between nationals'. It was observed that, since this was chiefly a matter of the granting of advantages and the distribution of various forms of assistance, financial, technical and other necessities had to be borne in mind, and that in any event it would be unrealistic to insist that States should make no differentiation between their treatment of their own nationals and that of foreigners. The Working Party did not, however, accept the proposal of the delegation of Malaya that allowance should be made 'for the national policy of each individual State, in interpreting the provisions of this paragraph' (by 10 votes to 4, with 4 abstentions)." (11C/Resolutions, p. 210)

8. The records of the Programme Commission and of the plenary sitting of the General Conference at which the Convention was adopted contain no indication that the matter was reopened at a later stage.

9. As indicated in the above quotation from the report of the Working Party, the restrictive wording "between nationals" was introduced during the last stages of the preparation of the Convention, for reasons which are made clear in that report.

10. It appears therefore that the wording "between nationals" was meant to refer, as far as the States parties to the Convention are concerned, to "their own nationals."

11. It would seem to follow from the above, if this interpretation is accepted, that the question of reciprocity need not arise and that consequently a revision of the Convention, which could be brought about only in accordance with the procedure outlined in its article 18, would also appear unnecessary.

21 March 1962.

(b) Interpretation of certain provisions of the Convention concerning the International Exchange of Publications (1958) and of the Convention concerning the Exchange of Official Publications and Government Documents between States (1958). 1/

1. The question raised turns essentially on the interpretation which should be given to the word "destination" in article 5 of the Convention concerning the International Exchange of Publications (1958).2/

2. As the letter refers, in this connexion, to the Convention for the International Exchange of Official Documents, Scientific and Literary Publications, concluded at Brussels on 15 March 1886, it should be recalled, first, that this Convention - the so-called "Brussels Convention" - remains in force for the States

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1/ Original text in French. Translation by the Secretariat of the United Nations.

2/ United Nations, Treaty Series, vol. 416, p. 51.

which have ratified it. Moreover, the adoption by the General Conference of UNESCO, in 1958, of the Convention concerning the International Exchange of Publications did not have the effect of amending the Brussels Convention. In fact, article 11 of the 1958 Convention states very definitely that the Convention "shall not affect obligations previously entered into by the Contracting States by virtue of international agreements".

3. It follows that certain exchanges may continue to be governed wholly and exclusively by the provisions of the Brussels Convention and that the interpretation properly applicable to the provisions of the 1958 Convention cannot be extended automatically to the provisions of the Brussels Convention and vice versa.

4. On the other hand, the provisions of the 1958 Convention concerning the International Exchange of Publications should be considered in conjunction with those of a second Convention, adopted at the same time as the first, and relating to the exchange of official publications and government documents between States.[1/]

Indeed, these two Conventions partially overlap in scope, as the Convention concerning the International Exchange of Publications applies both to non-official publications and to the official publications with which the second Convention is solely concerned.

5. The exchange systems established in the two Conventions, however, definitely differ. In the case of the Convention concerning the Exchange of Official Publications and Government Documents between States, the exchanges contemplated are essentially from State to State - exchanges, that is, conducted between the national exchange services or other central exchange authorities. Under article 6 of this Convention, transmissions are, therefore, made directly between these authorities in both countries or, in some cases, between such authorities in the sending country and a recipient named by the authorities of the recipient country.

6. The Convention concerning the International Exchange of Publications meets a different sort of need. It deals not with exchanges between States but with exchanges between governmental bodies or non-governmental institutions defined in article 1, which the Contracting States, by virtue of that article, have merely undertaken to encourage.

1/ United Nations, Treaty Series, vol. 398, p. 9.

7. One method contemplated for this purpose in article 3 (a) is for the Contracting States to permit their national exchange services or other central exchange authorities to facilitate "the international exchange of publications, in particular by transmitting, when appropriate, the material to be exchanged." The role of the national services thus appears to be mainly to serve as a means of transmission, which may be used by the bodies and institutions desiring to undertake the exchange.

8. Article 4 of this Convention accordingly provides that the transmission may be made either directly between the bodies and institutions concerned, or through the national exchange service or exchange authorities.

9. Thus, according to the words of the Convention themselves, the national exchange service or central exchange authority is merely an intermediary between the real exchange partners - that is, between the bodies and institutions referred to in article 1. It seems, therefore, that the place of destination may be determined by the body or the institution which wishes the transmission to be effected - provided, naturally, that the national service to which the request is made agrees to undertake the transmission. In such cases, there would seem to be no reason why the transmission should not be made directly to the recipient body or institution; the sending State would then bear the cost of the transmission as far as this destination.

10. It may happen, however, that the national service or the central exchange authority in the sending country wishes to bear the cost of the transmission only as far as the corresponding national service in the recipient country. If the body or institution wishing the transmission to be effected agrees to this arrangement, the question would then arise as to who would bear the cost of the further transmission to the body or institution for which the transmission is intended.

11. The Convention does not seem to impose a clear obligation in such cases on the national service or the central authority of the recipient country. The Convention, in fact, provided expressly for only one case in which the recipient State would have to assume a part of the transport charges: in the case of transport by sea, the sending State assumes the cost of packing and carriage only as far as the customs office of the port of arrival; the cost of transmission from the port of arrival to the final destination consequently falls on the recipient State.

12. The national service or the central authority of the recipient country would, however, be free to accept this additional burden under special arrangements or, when appropriate, under bilateral agreements which would probably provide for reciprocal treatment with respect to the forwarding of transmissions to their final destination. Article 12 of the Convention provides expressly for such bilateral agreements.

8 March 1962.

3. SECRETARIAT OF THE INTERNATIONAL TELECOMMUNICATION UNION

The only relevant opinion published by the Secretariat of I.T.U. was a "Note on the operation of broadcasting stations on board ships or aircraft outside national territories". This appeared in English and French as I.T.U. document No. 757/CC (limited circulation) and was subsequently communicated to the Council of Europe which issued it in English and French as Confidential document EXP/Jur.Rad.Tel./Misc. (62) 6, dated 27 June 1962.

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