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

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

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Chapter VI

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

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

1. FORMS OF ASSOCIATION OF STATES WITH THE UNITED NATIONS APART FROM FULL MEMBERSHIP—QUESTION WHETHER STATES NOT MEMBERS OF THE UNITED NATIONS MAY BENEFIT UNDER THE TECHNICAL CO-OPERATION PROGRAMMES OF THE UNITED NATIONS FAMILY ON THE SAME BASIS AS MEMBER STATES

Extracts from a letter to the Prime Minister of a Transitional Government

As to forms of association with the United Nations, the Charter makes no provision except for full membership. Nevertheless, non-member States do participate in the work of certain United Nations bodies, which include *inter alia* the United Nations Conference on Trade and Development, the United Nations Industrial Development Organization, the United Nations Environment Programme and the United Nations Development Programme. Such participation is contingent upon membership in one of the specialized agencies or the International Atomic Energy Agency. The terms of reference of the Economic Commission for Africa do not presently provide for membership of independent States that are not members of the United Nations ....

With regard to the question whether a State that is not a member of the United Nations may benefit under the social and economic programmes of the United Nations specialized agencies on the same footing as Member States, the answer is generally speaking in the affirmative provided that the State concerned is a member of one of the specialized agencies or of the International Atomic Energy Agency. This, however, does not hold true in the case of the International Bank for Reconstruction and Development and the International Monetary Fund since the resources and facilities of these institutions are, under their respective Articles of Agreement,[1] available only to member Governments. It should be mentioned that the International Bank for Reconstruction and Development on occasion acts as an executing agency for United Nations Development Programme projects and that in that capacity it does provide assistance to the Government or Governments concerned.

12 June 1975

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2. QUESTION OF THE RESPONSIBILITY OF THE UNITED NATIONS FOR ACTIVITIES CONDUCTED BY ONE OF ITS ORGANS IN THE TERRITORY OF A STATE

Internal memorandum

You have asked for information in relation to a provision of the draft articles

[1] United Nations, *Treaty Series*, vol. 2, p. 39.

being prepared by the International Law Commission on State responsibility. This provision[2] reads as follows:

> "The conduct of an organ of an international organization shall not be considered as an act of a State under international law by the mere fact that such a conduct has taken place in the territory of that State or in any territory under its jurisdiction."

The carrying-out of activities by an organ or body of the United Nations in the territory of a State is normally subject to an agreement concluded between the State in question and the international organization concerned. The agreements relating to technical assistance programmes concluded between the United Nations or the specialized agencies and beneficiary Governments usually provide that the host country will hold harmless the international organization, its employees and agents.[3]

Agreements concluded for the conduct of peace-keeping operations contain provisions for the settlement of damages resulting from acts causing injury to third parties. Thus, the agreement of 27 November 1961 relating to the legal status, facilities, privileges and immunities of the United Nations Operation in the Congo (ONUC)[4] stipulates in its paragraph 10(*b*) that "if as a result of any act performed by a member of the Force or an official in the course of his official duties, it is alleged that loss or damage that may give rise to civil proceedings has been caused to a citizen or resident of the Congo, the United Nations shall settle the dispute by negotiation or any other method agreed between the Parties and that if it is not found possible to arrive at an agreement in this manner, the matter shall be submitted to arbitration at the request of either Party." Under paragraph 10(*c*) the same procedure would apply to the settlement of civil disputes not related to official duties. The agreement concerning the status of the United Nations Peace-Keeping Force in Cyprus of 31 March 1964[5] provides in its paragraph 38(*b*) that:

> "(*b*) Any claim made by
>
> "(i) a Cypriot citizen in respect of any damages alleged to result from an act or omission of a member of the Force relating to his official duties;
>
> "(ii) the Government against a member of the Force; or
>
> "(iii) the Force or the Government against one another, that is not covered by paragraphs 39 or 40 of these arrangements,
>
> "shall be settled by a Claims Commission established for that purpose."

An identical provision is to be found in the agreement of 8 February 1957 concerning the status of the United Nations Emergency Force in Egypt.[6] Pursuant to a provisional arrangement concerning the United Nations Emergency Force in Lebanon,[7] "civil claims or disputes involving a member of the Force acting in the course of his official duty shall be settled in accordance with the provision of Article VIII of the Convention on the Privileges and Immunities of the United Nations." The above provisions regarding peace-keeping operations provide for submission of claims directly to the international organization for acts or omissions of members of the Forces.

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[2] Adopted provisionally by the International Law Commission at its twenty-seventh session as article 13 of the draft articles (see *Official Records of the General Assembly, Thirtieth Session, Supplement No. 10* (A/10010/Rev.1), p. 39).

[3] For examples, see Chapter II of this and previous editions of the *Juridical Yearbook.*

[4] United Nations, *Treaty Series,* vol. 414, p. 229.

[5] *Ibid.,* vol. 492, p. 57; also reproduced in the *Juridical Yearbook,* 1964, p. 40.

[6] United Nations, *Treaty Series,* vol. 268, p. 61.

[7] *Ibid.,* vol. 266, p. 125.

It should also be noted that claims against ONUC lodged with the United Nations by nationals of various countries were the subject of global settlements between the United Nations and the countries concerned. Agreements in the form of exchanges of letters were thus concluded with Belgium,[8] Greece,[9] Luxembourg,[10] Italy,[11] Switzerland[12] and Zambia.

In the exchange of letters with Belgium, on which subsequent agreements with other countries were patterned, the Secretary-General of the United Nations wrote as follows:

> "The United Nations has agreed that the claims of Belgian nationals who may have suffered damage as a result of harmful acts committed by ONUC personnel, not arising from military necessity, should be dealt with in an equitable manner.
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> "It has stated it would not evade responsibility where it was established that United Nations agents had in fact caused unjustifiable damage to innocent parties."

10 June 1975

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3. PROVISIONS OF THE HEADQUARTERS AGREEMENT BETWEEN THE UNITED NATIONS AND THE UNITED STATES OF AMERICA CONCERNING ACTION BY THE HOST STATE IN CASE OF ABUSE OF THE PRIVILEGES OF RESIDENCE GRANTED BY THE AGREEMENT —QUESTION WHETHER THE HOST STATE IS REQUIRED IN SUCH A CASE TO CONSULT THE ORGANIZATION BEFORE TAKING ACTION

Telegram to the Secretariat of the United Nations Conference on the Representation of States in their Relations with International Organizations[13]

Section 13 of the Headquarters Agreement[14] concluded between the United Nations and the United States does not require the host State to consult the Organization [before taking action in case of abuse of privileges of residence]. In practice, the Organization is always informed by the host State of its action and of the grounds therefore since otherwise the Organization cannot render the kind of assistance referred to in articles 22 and 53 [Assistance by the Organization in respect of privileges and immunities] of the International Law Commission's draft and cannot verify that the action of the host State is in conformity with the Headquarters Agree-

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[8] *Ibid.*, vol. 535, p. 191; also reproduced in the *Juridical Yearbook*, 1965, pp. 39-40.

[9] United Nations, *Treaty Series*, vol. 565, p. 3.

[10] *Ibid.*, vol. 585, p. 147.

[11] *Ibid.*, vol. 588, p. 197.

[12] *Ibid.*, vol. 564, p. 193.

[13] This telegram was sent in reply to a request for information in connexion with article 9 of the ILC's draft on the representation of States in their relations with international organizations (see *Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 10* (A/8410/Rev.1), Chapter II) which was the basic proposal before the Conference and became in an amended form the Convention on the Representation of States in their Relations with International Organizations of a Universal Character. Draft article 9 read:

> "Subject to the provisions of articles 14 [on the size of the mission] and 72 [on nationality], the sending State may freely appoint the members of the mission."

In the course of the Conference, amendments to this draft article were submitted (A/CONF.67/L.1, L.18 and L.28 (see *Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations, Official Documents* (A/CONF.67/18/Add.1—United Nations publications, Sales No. E.75.V.12)), the object of which was to allow the host State, after consultation with the sending State *and the Organization*, to notify the sending State and the Organization that the head or a member of the staff of the mission was no longer acceptable to the host State.

[14] United Nations, *Treaty Series*, vol. 11, p. 12.

ment, i.e. not based on activities performed by the person concerned in his official capacity. Article 75 of the Commission's draft is worded only in terms of the duty of recall by the sending State and if article 9 is to provide for the right of the host State to expel—which is a different matter—it should in our view be limited to cases of abuse of privileges of residence in activities outside official capacity. In this connexion, we refer you to the observations of the Secretariat of the United Nations on the provisional draft articles adopted by the Commission in 1968, 1969 and 1970[15] as well as to the Secretariat study entitled "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities".[16] The Secretary-General's report to the General Assembly at its second session on the Headquarters Agreement states, with reference to Section 13(*b*):

> "This procedure is in line with that followed in diplomatic relations in the case of a serious offence committed by a diplomatic representative in the country to which he is accredited but can only apply within very narrow limits since the United States is the host country and not the country to which beneficiaries of article IV are accredited.
>
> "The procedure laid down in section 13 cannot, for example, be applied in the case of a *persona non grata*: there must have been some activity outside his official capacity coming within the scope of specific laws or regulations."[17]

In addition, the report of the Sub-Committee on Privileges and Immunities[18] approved by the Sixth Committee and incorporated in its report to the General Assembly states:

> "The Sub-Committee considers that section 13(*b*) of the Agreement, providing for the application by the United States of America of the laws and regulations in force in its territory regarding the residence of aliens in the United States of America, should be construed to mean that before any person can be required to leave the country on charges of having abused his privileges, there must be really serious grounds which would preclude the possibility of unwarranted accusations against such a person.
>
> "The Sub-Committee also emphasized the importance of section 13(*b*)(i), which provides that before any demand is made for the departure of a particular person on the grounds stated in section 13(*b*), there shall be consultations between the United States authorities and the appropriate Government, in the case of a representative of such a Government, or between the United States authorities and the Secretary-General of the United Nations or the principle executive officer of the appropriate specialized agency in the case of any other person referred to in section 11."[19, 20]

13 February 1975

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[15] *Official Records of the General Assembly, Twenty-third Session, Supplement No. 10* (A/8410/Rev.1), pp. 143-145.

[16] Reproduced in the *Yearbook of the International Law Commission, 1967*, vol. II, document A/CN.4/L.118 and Add.1 and 2, pp. 181-182 and 199-200.

[17] *Official Records of the Second Session of the General Assembly*, Sixth Committee, Annex 11, p. 331.

[18] Established by the Sixth Committee at its 36th meeting in 1947 (*ibid.*, p. 3).

[19] *Official Records of the Second Session of the General Assembly*, Plenary Meetings, vol. II, p. 1521.

[20] Article 9 of the ILC's draft articles was maintained without change by the Conference and became article 9 of the Convention on the Representation of States in their Relations with International Organizations of a Universal Character, reproduced on p. 92 of this *Yearbook*.

4. PRIVILEGES AND IMMUNITIES TO WHICH REPRESENTATIVES OF THE COUNCIL FOR MUTUAL ECONOMIC ASSISTANCE WOULD BE ENTITLED IN THE UNITED STATES AS HOST STATE TO THE HEADQUARTERS OF THE UNITED NATIONS IN THE LIGHT OF GENERAL ASSEMBLY RESOLUTION 3209 (XXIX)

Letter to the Permanent Representative of a Member State

You have requested me to set out my views concerning the privileges and immunities to which representatives of the Council for Mutual Economic Assistance (CMEA) would be entitled in the United States, as host State to the Headquarters of the United Nations, in the light of General Assembly resolution 3209 (XXIX) of 11 October 1974 [entitled "Status of the Council for Mutual Economic Assistance in the General Assembly"].

I am happy to confirm what I have already mentioned to you orally. By its resolution 3209 (XXIX), the Assembly has requested the Secretary-General "to invite the Council for Mutual Economic Assistance to participate in the sessions and work of the General Assembly in the capacity of observer." The representatives of the CMEA, appointed pursuant to the invitation just mentioned, would benefit from the following provisions of the Headquarters Agreement between the United Nations and the host State:

(i) section 11, which provides that the federal, state or local authorities of the United States "shall not impose any impediments to transit to or from the headquarters district of... persons invited to the headquarters district by the United Nations" and that "the appropriate American authorities shall afford any necessary protection to such persons while in transit to or from the headquarters district";

(ii) section 12, which provides that section 11 is applicable irrespective of relations between the Governments of the persons referred to in the latter section and the host State, and

(iii) section 13, which provides that the host State shall grant visas "without charge and as promptly as possible" to persons referred to in section 11 and also exempts such persons from being required to leave the United States on account of any activities performed by them in their official capacity.

In addition to the foregoing privileges and immunities, it is my belief that it necessarily follows from the obligations imposed by Article 105 of the Charter of the United Nations that a CMEA delegation would enjoy immunity from legal process in respect of words spoken or written and all acts performed by members of the delegation in their official capacity before relevant United Nations organs.

The above privileges and immunities represent in my view the scope of such privileges and immunities which the host State is obliged under existing international instruments to accord to a CMEA delegation. The host State may, of course, as a matter of courtesy, extend a wider variety of privileges and immunities to the delegation. However, this is for the CMEA, or its members, to negotiate with the host State.

7 January 1975

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5. JUDICIAL JURISDICTION AND LAW APPLICABLE IN THE HEADQUARTERS DISTRICT UNDER THE HEADQUARTERS AGREEMENT BETWEEN THE UNITED NATIONS AND THE UNITED STATES OF AMERICA

Letter to a judge of the Criminal Court of the City of New York

I am directed by the Secretary-General of the United Nations to refer to the

case against... in which a Security Officer of the United Nations Secretariat is the complainant.

... the Court has requested legal memoranda from the United Nations Secretariat, as well as from the defendant, on the question of the Court's jurisdiction in the case.

In compliance with the Court's request, I am directed to state the following. It is understood that the defendant's objection to the Court's jurisdiction relies on the fact that the alleged act was directed against United Nations property situated within the Headquarters District of the United Nations.

The question of jurisdiction is governed by Article III, entitled "Law and Authority in the Headquarters District" of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations. This Agreement is part of the law of the land, having been adopted as Public Law 357 by the Eightieth Congress, First Session;[21] it appears at 22 U.S.C. 287.

Article III, Section 7 (*b*) and (*c*) of the Headquarters Agreement provide:

> "(*b*) Except as otherwise provided in this agreement or in the General Convention, the federal, state and local law of the United States shall apply within the headquarters district.
>
> "(*c*) Except as otherwise provided in this agreement or in the General Convention, the federal, state and local courts of the United States shall have jurisdiction over acts done and transactions taking place in the headquarters district as provided in applicable federal, state and local laws."

The proviso in the two paragraphs quoted above regarding the agreement refers to Section 8 of the Headquarters Agreement, which empowers the United Nations to make regulations operative within the headquarters district. I am authorized to state that no regulation in the field of, or affecting the application of, criminal law has been adopted by the United Nations. Only three regulations have been adopted, relating to entirely different matters.[22]

The other proviso regarding the General Convention refers to the Convention on the Privileges and Immunities of the United Nations, approved by the General Assembly of the United Nations on 13 February 1946, and acceded to by the United States of America on 29 April 1970. This Convention, however, contains no provision which would afford immunity from legal process to the defendant nor does any of the provisions of the Convention limit the general principle of Sections 7(*b*) and (*c*) of the Headquarters Agreement, quoted above.

In this connexion it is important to observe that the United Nations has no criminal jurisdiction or tribunals under any law or treaty. Therefore, if the Court were to treat acts of a criminal nature committed within the headquarters district as excluded from the jurisdiction of the federal, state or local courts of the United States, the consequence would be to create a jurisdictional vacuum in the sense that there would be no courts before which crimes could be tried. Such a situation would be to the advantage neither of the United Nations nor of the people of the State of New York.

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[21] See United Nations Legislative Series, *Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations* (ST/LEG/SER.B/10—United Nations publication, Sales No.: 60.V.2), p. 134.

[22] For the text of these three Regulations, entitled, respectively, "United Nations Social Security System", "Qualifications for professional or other occupational services with the United Nations" and "Operation of services within the Headquarters District", see General Assembly resolution 604 (VI) of 1 February 1952.

A precedent supporting the above reasoning is found in the case of *People* v. *Nicholas Coumatos* 224 NYS 2d 504. The Court in this case quoted in its entirety a letter from the United Nations Office of Legal Affairs relating to defendant's motion to dismiss on the ground that the court lacked jurisdiction over allegedly fraudulent transactions because such transactions had taken place within the headquarters district of the United Nations.[23]

For all the above reasons of law, it is our view that the jurisdiction of the courts of New York State is not affected by the question whether or not the alleged act took place inside or outside the headquarters district of the United Nations.

The question of judicial jurisdiction within the headquarters district has been discussed in legal literature, *inter alia* in an article by Mr. Yuen-li Liang, entitled "Legal Status of the United Nations in the United States," *International Law Quarterly*, 1948-49, pp. 577-602, especially p. 596, and in a note entitled "Status of International Organizations under the Law of the United States," *Harvard Law Review*, 1957-58, p. 1300. Of particular interest is the information contained in the last mentioned note on page 1313, footnote 99, to the effect that "although the New York legislature authorized cession of jurisdiction over the land to be occupied by the United Nations, there was no cession. See New York Attorney General's Report 97 (1951)."

9 December 1975

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6. COMMENTS ON THE JURIDICAL STATUS OF THE UNITED NATIONS DEMOGRAPHIC CENTRE IN BUCHAREST, IN THE LIGHT OF THE AGREEMENT BETWEEN THE UNITED NATIONS AND ROMANIA REGARDING THE ESTABLISHMENT OF THE CENTRE

Memorandum to the Chief of the Operations Section, Population Programmes and Projects Office, Population Division, Department of Economic and Social Affairs

1. I wish to refer to your memorandum dated 11 March 1975 in which you relayed to me the request of the Director of the Demographic Centre in Bucharest, for the views of the Office of Legal Affairs "on the exact meaning of the Centre's having a juridical personality".

2. The Agreement between the United Nations and the Government of the Socialist Republic of Romania regarding the Establishment of a Demographic Centre at Bucharest, signed 28 August 1974, entered into force upon ratification by Romania on 28 October 1974.[24] As stated in your memorandum, the question of the Centre's juridical personality is the subject of Article I, section 5, of the Agreement reading:

> "The Centre shall have a legal personality distinct from that of the Parties, and shall not be considered as a body of the United Nations or of the Government. The Government shall publish statutory orders concerning the legal status of the Centre."

3. Considering that both Parties to the Agreement are themselves international entities, and since there is no indication to the contrary, the normal interpretation of section 5 is that the Parties intended to confer international legal personality on the Centre, on the understanding that the Centre should not be a subsidiary organ of any of the Parties.

4. Your memorandum and the request of the Director of the Centre, however, indicate that your query also concerns whether the Centre has a juridical (or legal)

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[23] For a summary of the case, see *Yearbook of the International Law Commission*, 1967, vol. II, p. 233.

[24] See *Juridical Yearbook*, 1974, p. 25.

personality under Romanian internal law in addition to the Centre's standing in international law. In this connexion, it is arguable that the Parties intended section 5 to confer legal personality only under international and not necessarily under Romanian law. But if so, the last sentence of section 5 according to which the Romanian Government will publish the regulations determining the legal status of the Centre, would not have been required. Regulations issued by a Government could not authoritatively regulate an entity's legal status under international law in most respects, but if issued pursuant to and under the authority of the Agreement between the Parties (section 5, last sentence), such regulations would be a normal mode for determining the Centre's status in domestic law.

5. It appears therefore that the Centre was intended by the Parties as an international entity distinct from the Parties themselves. Moreover, the attributes of the Centre's international legal personality would be defined by, or derive from, the terms and purposes of the Agreement, and it is this personality which, in turn, the Romanian Government would recognize and the acts of which it would regulate for the purposes of Romanian internal law in the regulations referred to in the last sentence of section 5. Thus, the formal and substantive requirements applicable to the Centre's capacity to enter into contracts, to sue or be sued, etc. would be stated in the regulations to the extent required by Romanian internal law.

6. In view of the foregoing, the exact attributes of the Centre's legal personality could not be effectively described without detailed reference to Romanian law. While the Office of Legal Affairs will be prepared to render advice and counsel on such concrete questions as may arise, it is suggested that, whenever appropriate, such questions could with advantage be addressed in the first instance to the competent Romanian authorities.

24 March 1975

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7. INSURANCE OF UNEF/UNDOF VEHICLES AGAINST THIRD PARTY LIABILITY—QUESTION WHETHER UNITED NATIONS IMMUNITY FROM LEGAL PROCESS SHOULD BE INVOKED OR WAIVED, WHERE JUDICIAL PROCEEDINGS ARE INSTITUTED AGAINST THE UNITED NATIONS IN CONNEXION WITH MOTOR VEHICLE ACCIDENTS

Memorandum to the Chief, Salary and Allowances, Office of Financial Services

1. I refer to your memorandum of 10 March 1975.

2. There is a resolution of the General Assembly on the subject of third party liability insurance of United Nations motor-vehicles, namely resolution XIII.6(E) of 13 February 1946. As long as the resolution continues to apply, insurance of United Nations motor-vehicles against third party liability would be necessary.

3. The question whether United Nations immunity from legal process should be invoked or waived, where judicial proceedings are instituted against the Organization, is, in our opinion, a matter that ought to be examined in the light of the facts of each case. A general position to the effect that United Nations immunity shall not be waived with respect to a certain category of third party liabilities, because the Organization does not carry insurance against such liabilities, may not be either reasonable or appropriate. Moreover, as arbitration of a claim may be necessary where United Nations immunity from suit is invoked, we should not assume that the invoking of immunity would be a non-expensive course or in every case the less expensive course.

4. Aside from the requirements of General Assembly resolution XIII.6(E), it is our view that third party liability insurance of UNEF/UNDOF vehicles should con-

tinue to be purchased. In this connexion, it should be kept in mind that the costs of defending third party claims whether in judicial or arbitration proceedings could be substantial: retention of a local counsel would in all probability be necessary in the more difficult cases; and, where personal injury is involved, costs of expert medical testimony would need to be considered as well. It should also be noted that to place a ceiling on the compensation that may be awarded in death or personal injury cases is difficult, and the compensation could be considerable. Moreover, we should not lose sight of the possibility, however remote that possibility may now appear to be, that a claimant in a death or personal injury case may be a national or a resident of a country outside the region where the compensation awarded in death or personal injury cases may be astronomical. A third element is, as you have noted, the additional burden which a system of non-insurance would place on already heavily worked United Nations offices, including the relevant field offices. Finally, we should keep in mind that the United Nations should be as free from unnecessary controversy as possible and that non-submission to the jurisdiction of a local court in a personal injury case may prove a controversial matter in the area concerned.

5. You are right in assuming that certain countries make purchase of third party liability insurance for a motor vehicle compulsory. We are not aware of what the requirements are under the law of the countries of the region. Should you wish to have the question clarified, the relevant United Nations field offices should be able to be of assistance. The Organization has not as yet concluded status of forces agreements with Egypt, Israel or Syria. Such agreements in the past have exempted United Nations vehicles from local vehicle registration requirements.

18 March 1975

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8. ADVICE ON THE PROCEDURE TO BE FOLLOWED TO COLLECT COMPENSATION FOR DAMAGE CAUSED TO UNEF PROPERTY BY MEMBERS OF MILITARY CONTINGENTS

Memorandum to the Chief, Field Operations Service, Office of General Services

1. I refer to your memorandum of 8 August 1975 requesting our comments as to whether UNEF may apply the policy of collecting moneys from military personnel through their Contingent Commanders with respect to damage caused by them to UNEF property.

2. While in general, Contingent Commanders have broad disciplinary authority, they have little or no authority to impose financial assessments upon members of the Contingents. The Financial element which may attach to the disciplinary powers of military commanders is limited and is more in the nature of a fine than of a compensation for damage.

3. Normally, a determination as to the financial assessment of military personnel lies with national jurisdictional organs and involves a judicial or quasi-judicial administrative process under domestic law. We believe that because of constitutional and structural requirements, it is unlikely that the exercise of such judicial or jurisdictional power would be or may be extended to Contingent Commanders.

4. Even if some Contingent Commanders were empowered to collect moneys for damage caused by members of the contingent to United Nations property and turn those moneys over to UNEF, the financial circumstances of enlisted men would make it difficult or impossible in practice that assessments of a certain importance be satisfied.

5. Consequently, we consider that in the light of legal and practical considerations, it is advisable that damage to United Nations property resulting from acts or omissions of military members of Contingents should be settled internationally, namely through a direct relationship between the United Nations and the Government concerned. This conclusion is supported by the practice followed in previous and existing peace-keeping forces; the situation is different in the case of United Nations military observers who are seconded to the United Nations in their individual capacity and can be assessed on emoluments paid to them by the United Nations.

6. A possible procedure to collect compensation for damage caused to United Nations property by members of Contingents may be that the assessments of the Property Survey Board, together with the proceedings of the Board and the opinion of the Contingent Commander, should be transmitted to the competent service at Headquarters, which in turn would either set up a debit against the Government concerned (applied to offset United Nations obligations to the said Government) or would submit a claim to the Government for reimbursement of the amount of damage involved. The refund to the Government by the military member concerned of the compensation would thus fall within the exclusive competence of such Government, in accordance with its own legislation.

7. However, we see no objection to UNEF accepting compensation moneys collected by a Contingent Commander from military members of its Contingent and voluntarily paid to the Organization.

20 August 1975

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9. "Trade Names", "Trade Marks" and "Franchises"

Note prepared at the request of the Under-Secretary-General for Political and Security Council Affairs

1. *Trade name and trade mark*

Section 1(1)(*d*) of the Model Law for Developing Countries on Marks, Trade Names, and Acts of Unfair Competition[25] defines the term "trade name" as "the name or designation identifying the enterprise of a natural or legal person." The trade name of an enterprise may consist of the name of the owner, or it may be a pseudonym, an invented name, an abbreviation, a description of the enterprise, or some other designation.[26]

Whereas a trade name refers to an enterprise, the term "trademark" refers to goods.[27] Section 1(1)(*a*) of the Model Law defines "trademark" as "any visible sign serving to distinguish the goods of one enterprise from those of other enterprises". The goods may be manufactured products or natural products; they may be produced or merely sold by the owner of the mark, or may be distributed by him without charge, as in the case of wrappings or advertising materials.[28]

Many firms use their trade name as a trade mark on the products they produce or distribute. Nevertheless, the two concepts are legally distinct.

The owner of a trade name or trade mark can license another party to use it in his own business. Such licensing is usually accompanied by further arrange-

[25] Model Law drafted and recommended by the United International Bureaux for the Protection of Intellectual Property, BIRPI, Geneva, 1967.

[26] Commentary to Section 1 of the Model Law by BIRPI, p. 16.

[27] The Model Law also gives definition of the associated terms "service mark", "collective mark", "indication of source" and appellation of origin".

[28] Commentary to Section 1 of the Model Law by BIRPI, p. 15.

ments and is frequently part of a "franchise contract" under which the franchisee pays for the benefit of sharing the franchisor's goodwill and the reputation of his products or services. Thus, agreements to operate service stations or retail outlets in accordance with the franchisor's detailed instructions have been called "rent-a-name" business.[29]

2. *Economic and legal aspects of "franchising"*

The basis of the franchise system has been described as "a trademark combined with know-how and often coupled with special designs and special décor of the premises, both inside and out."[30]

The franchisee is often required to buy the supplies and materials he needs only from the franchisor or from sources specified by the franchisor. From these sales of supplies and materials the franchisor receives a profit which is in addition to the license fees which are usually charged for the use of the trade name or trade mark. The requirement that the franchisee purchase from designated sources also helps the franchisor maintain quality control and a consistent image among all his franchisees.

The main reason for the rapidly growing popularity of "franchising" as a tool of uniform marketing strategy can be seen in the mutual benefits: the franchisor is able to maintain a large network of standardized production and distribution without investing capital in the outlets, and the franchisee is provided with a pre-established market based on the reputation of the trade name or trade mark as well as with technical assistance in conducting his business. Franchising agreements are to be found in many areas of economic activity, but they are particularly used in the distribution of consumer goods (*e.g.* cars, petroleum products, furniture, electrical appliances, food) and services (*e.g.* hotels, restaurants, car-rentals).

The most common types of agreement are:

(*a*) The *manufacturing franchise* in which the franchisor exploits some manufacturing process, secret formula, or other know-how by licensing others to manufacture and distribute the end product under his trade mark or trade name;

(*b*) The *distributing franchise* in which the franchisor produces the goods to be sold and the franchise system provides a means of marketing his wares, either at the wholesale or retail level;

(*c*) The *chainstyle (service) franchise* in which the franchisor does not produce the goods to be sold but is interested in exploiting a valuable service mark, the trade mark, design, etc. which he owns by licensing its use to franchisees who agree to operate service facilities or retail outlets in accordance with the franchisor's instructions.[31]

Since the franchise agreement is fundamentally a commercial concept rather than a legal concept and because individual franchise agreements contain a wide variety of terms, it is impossible to give a single legal definition which would be universally valid. Instead, the use of the term "franchise" varies from country to

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[29] E.g., J. Thomas McCarthy, "Trademark Franchising and Antitrust: The Trouble with Tie-ins", 58 *California Law Review* (1970), pp. 1085 and 1089.

[30] L. W. Melville, *Precedents on intellectual property and international licensing*, 2nd ed., London, 1972, p. 270.

[31] E.g., J. Thomas McCarthy, op. cit., loc. cit.

country and even within a given legal system.[32] Indeed, in many countries the term is not known at all. The same commercial agreements called franchises in other countries are denominated as "concessions" or regarded as ordinary trade mark license agreements which contain additional terms.[33]

It follows from the above indications that the mere reference to franchises granted by foreign companies to local entities established in Southern Rhodesia as an area in which the Security Council Committee [established in pursuance of resolution 253 (1968) concerning the question of Southern Rhodesia] may wish to recommend possible restrictions or outright prohibitions would probably not, by reason of its vagueness, achieve the results sought by the Security Council Committee. It is suggested that, instead, reference should be made to the separate elements, such as the licensing of a trade mark or the transfer of know-how, which may form the content of a franchise agreement. If it were decided to draw up such a list of commercial agreements, the Office of Legal Affairs would be happy to assist the Committee in the preparation thereof.[34]

3 September 1975

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10. GUIDELINES FOR IMPLEMENTATION OF GENERAL ASSEMBLY RESOLUTIONS GRANTING OBSERVER STATUS ON A REGULAR BASIS TO CERTAIN REGIONAL INTERGOVERNMENTAL ORGANIZATIONS, THE PALESTINE LIBERATION ORGANIZATION AND THE NATIONAL LIBERATION MOVEMENTS IN AFRICA

Note for the use of the Secretariat

1. The General Assembly has adopted a number of resolutions inviting certain organizations to participate on a regular basis in its meetings or conferences as ob-

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[32] E.g., differences of terminology and substantive development in the United States and Europe are examined by Jean Guyénot, "La franchise commerciale", 26 *Revue trimestrielle de droit commercial*, 1973, No. 2, p. 11.

[33] The California Franchise Investment Act (Cal. Corp. Code § 31005 (West Supp. 1971)) which is a recent statute intended to eliminate certain abuses on the part of franchisors describes a franchise as an agreement by which:

"(*a*) A franchisee is granted the right to engage in the business of offering, selling or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor; and

"(*b*) The operation of the franchisee's business pursuant to such plan or system is substantially associated with the franchisor's trade mark, service mark, trade name, logotype, advertising or other commercial symbol designating the franchisor or its affiliate; and

"(*c*) The franchisee is required to pay, directly or indirectly, a franchise fee."

[34] In its special report to the Security Council (S/11913, para. 13), the Committee, while bearing in mind the reservations expressed by some delegations as summarized in the Annex to the report, decided to recommend to the Security Council that insurance, trade name and franchises should be included within the scope of the mandatory sanctions against Southern Rhodesia.

At its 1907th meeting, on 6 April 1976, the Security Council had before it a fifteen-power draft resolution (S/12037), operative paragraph 2 of which read as follows:

"*The Security Council,*

"...

"2. *Decides* that all Member States shall take appropriate measures to prevent their nationals and persons in their Territories from granting to any commercial, industrial or public utility undertaking in Southern Rhodesia the right to use any trade name or from entering into any franchising agreement involving the use of any trade name, trade mark or registered design in connexion with the sale or distribution of any products, commodities or services of such an undertaking;".

The Council adopted the draft resolution unanimously.

servers. The purpose of the present note is to provide some guidelines concerning the procedure and arrangements for the implementation of those resolutions particularly by the Secretariat.

2. The relevant resolutions are the following:

Resolution 253 (III) of 16 October 1948: invitation of the Organization of American States

Resolution 477 (V) of 1 November 1950: invitation of the League of Arab States

Resolution 2011 (XX) of 11 October 1965: invitation of the Organization of African Unity

Resolution 3208 (XXIX) of 11 October 1974: invitation of the European Economic Community

Resolution 3209 (XXIX) of 11 October 1974: invitation of Council of Mutual Economic Assistance

Resolution 3237 (XXIX) of 22 November 1974: invitation of the Palestine Liberation Organization

Resolution 3280 (XXIX) of 10 December 1974: invitation of the national liberation movements recognized by the Organization of African Unity[35]

Where appropriate, the similarities and differences in the terms of those resolutions, in so far as they relate to practical arrangements, are indicated.

I. *Invitation and representation*

A. *Notification of sessions*

(a) *Addressees*

3. Notification of sessions of the General Assembly should be addressed to the administrative heads of OAS, AOU and the League of Arab States as indicated in resolutions 253 (III), 477 (V) and 2011 (XX).

4. The notifications with respect to the sessions and the work of the General Assembly or to the convening of an international conference under the auspices of the General Assembly should in the case of EEC, CMEA and PLO be addressed directly to the organization concerned in accordance with resolutions 3208 (XXIX), 3209 (XXIX) and 3237 (XXIX).

5. In the case of the African national liberation movements, a communication should be addressed in the first instance to the OAU requesting a list of movements recognized by that Organization and only subsequently should individual notifications be addressed to the designated national liberation movements.

(b) *Content of notifications*

6. The letter of notification should refer to the relevant authorizing resolution. A copy of the provisional agenda, if issued, should be forwarded. The letter should request the designation of a representative or representatives to the session or conference.

B. *Protocol matters and facilities*

7. Passes appropriate to observers should be issued by the Protocol Office.

8. Use of facilities at United Nations or conference sites, such as facilities for issuing press releases, holding press conferences, paging and catering, should be granted consistent with the status of observer.

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[35] At its thirtieth session, the General Assembly, by resolution 3369 (XXX) of 10 October 1975, decided to invite the Islamic Conference to participate in the sessions and the work of the General Assembly and of its subsidiary organs in the capacity of observer.

9. The letter from an observer organization or movement designating a representative or representatives does not constitute "credentials" within the meaning of the relevant rules of procedure and is not examined by the Credentials Committee established at the session or conference.

10. The names of the designated representative or representatives should be included in the attendance list of the session or conference under an appropriate heading.

II. *Participation*

A. *Forum*

(a) *General Assembly and Main Committees*

11. Resolutions 253 (III), 477 (V), 2011 (XX), 3208 (XXIX), 3209 (XXIX) and 3237 (XXIX) refer to "sessions" of the General Assembly. OAS, the League of Arab States, OAU, EEC, CMEA and PLO are therefore entitled to participate, as observers in both plenary and Main Committee meetings, although in practice their participation in plenary is limited to seating and not extended to making statements.

12. Resolution 3280 (XXIX) provides for participation as observers by national liberation movements in Africa recognized by OAU "in the relevant work of the Main Committees of the General Assembly and its subsidiary organs concerned". The national liberation movements may therefore participate in relevant meetings of Main Committees but not in plenary.

(b) *Subsidiary organs of the General Assembly*

13. Resolutions 3208 (XXIX), 3209 (XXIX) and 3237 (XXIX) refer to "the sessions and the work of the General Assembly". This phrase would appear *prima facie* to be all inclusive and to embrace subsidiary organs of the Assembly. However, the possibility of participation by observers in the work of particular subsidiary organs would seem also to depend upon the terms of reference, structure, functions and methods of work of the organ in question. It is reasonable to assume that in principle participation by observers in the sessions and the work of the Assembly under those three resolutions is not meant to be more than that accorded to Member States of the United Nations which are not members of the organ concerned.

14. As stated above, under resolution 3280 (XXIX) national liberation movements in Africa are invited to participate in the relevant work of the Main Committees of the Assembly *and* its subsidiary organs concerned.

(c) *International conferences*

15. In resolution 3237 (XXIX), the General Assembly invites the PLO "to participate in the sessions and the work of all international conferences convened under the auspices of the General Assembly" (para. 2) and considers that the PLO "is entitled to participate in the sessions and the work of all international conferences convened under the auspices of other organs of the United Nations (para.3)." The latter provision is a strong recommendation to other organs, such as the Economic and Social Council, to take decision to invite the PLO to participate in international conferences convened by it.

16. Under resolution 3280 (XXIX), African liberation movements are invited to participate "in conferences, seminars and other meetings held under the auspices of the United Nations *which relate to their countries*" (emphasis added).

B. *Seating arrangements*

(a) *Physical arrangement*

17. In the Assembly Hall, the established practice is to seat observers in areas normally reserved for them. The practice in Main Committees has been to seat the

observer on the floor of the Committee room with a name plate only when and if he participates.

(b) *Permanent seating or limited seating*

18. Resolutions 253 (III), 477 (V), 2011 (XX), 3208 (XXIX), 3209 (XXIX) and 3237 (XXIX) do not contain language which would appear to limit the participation of these organizations to items of particular interest although a general rule has developed through practice according to which observers participate only with regard to items in which they have a functional interest. This is clearly spelled out in resolution 3280 (XXIX) on the other hand which provides for participation "in the relevant work" of the Main Committees or subsidiary organs. The *travaux préparatoires* of resolutions 3208(XXIX) and 3209(XXIX) confirm this.[36]

III. *Procedural rights at meetings*

19. On the basis of past practice and in the light of more recent developments, participation by an observer includes the right to make oral statements, including the right of reply.

20. An observer may have his written statements or documents circulated by the Secretariat to all delegations. The rules of procedure of some recent conferences include provisions on this point.[37] Written statements by African liberation movements recognized by OAU were circulated in the Fourth Committee by decision of the Chairman at the twenty-seventh, twenty-eighth and twenty-ninth sessions of the General Assembly.

21. Observers do not have the right to vote and are not entitled to sponsor or co-sponsor substantive proposals (including amendments) or procedural motions, or to raise points of order or challenge rulings.

31 January 1975

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11. RULING BY THE PRESIDENT OF THE TWENTY-NINTH SESSION OF THE GENERAL ASSEMBLY REGARDING THE POSITION OF THE DELEGATION OF SOUTH AFRICA—QUESTION WHETHER SUCH A RULING SHOULD BE CONSIDERED AUTOMATICALLY APPLICABLE AT THE SEVENTH SPECIAL SESSION OF THE ASSEMBLY, SCHEDULED TO OPEN BEFORE THE OFFICIAL CLOSURE OF THE TWENTY-NINTH REGULAR SESSION

Memorandum to the Under-Secretary-General for Political and General Assembly Affairs

1. The question has arisen whether the ruling made by the President of the General Assembly at the twenty-ninth session regarding the position of the delegation of South Africa will be automatically applicable at the seventh special session. This ruling was made at the 2281st plenary meeting, on 12 November 1974, under item 3 of the agenda, entitled "Credentials of representatives to the twenty-ninth session of the General Assembly". It related to the first report of the Credentials Committee (A/9779)[38] at the twenty-ninth session, in which the Committee rejected the credentials

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[36] See A/PV.2266.

[37] See for example, rule 59(2) of the rules of procedure of the United Nations Conference on the Representation of States in their Relations with International Organizations (*Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations, Summary records of the plenary meeting and of the meetings of the Committee of the Whole* (A/CONF.67/18—United Nations publication, Sales No. E.75.V.11) and rule 63(2) of the rules of procedure of the Third United Nations Conference on the Law of the Sea (A/CONF.62/30/Rev.1—United Nations publication, Sales No. E.74.I.18).

[38] *Official Records of the General Assembly, Twenty-ninth Session, Annexes*, agenda item 3.

submitted on behalf of the delegation of South Africa, the Committee's report being approved by the General Assembly in its resolution 3206 (XXIX) of 30 September 1974. These credentials "authorized and appointed" certain persons named therein "to represent the Government of the Republic of South Africa at the twenty-ninth regular session of the General Assembly of the United Nations."

2. In his ruling, the President drew attention to the fact that "Since its twenty-fifth session the General Assembly has been regularly rejecting, each year, the credentials . . ." of South Africa. He referred to the ruling made by the President of the General Assembly at the twenty-fifth session in 1970, regarding South African participation in the Assembly, as a ruling which related only to the wording of an amendment then before the Assembly, and said: "That opinion did not mean that if the amendment had been worded in some other way it might not have had different consequences for the legal position of the South African delegation in this Assembly." The President ruled "that the General Assembly refuses to allow the delegation of South Africa to participate in its work." He did so "as President of the twenty-ninth session of the General Assembly", and he stated that his interpretation referred "exclusively to the position of the delegation of South Africa within the strict framework of the rules of procedure of the General Assembly."[39]

3. Under the Assembly's rules of procedure, credentials are separately examined at each session of the Assembly, and a subsequent session is not bound by any decisions of a previous session regarding credentials. The history of the question of South Africa's credentials in the Assembly, the subject of a separate decision at each session since 1970, bears this out. In addition, from the context as described above of the President's ruling at the twenty-ninth session, it is clear that that ruling was meant to be confined to the twenty-ninth session. The need for a separate decision at each session applies equally to special sessions and to regular sessions. The ruling of the President at the twenty-ninth session therefore will have no automatic application at the seventh special session, and any decisions or rulings at that session regarding credentials will have to be made under item 3 of the provisional agenda of the seventh special session, which is entitled "Credentials of representatives to the seventh special session of the General Assembly".

4. It is immaterial to the position set out above that the seventh special session will be held at a time when the twenty-ninth regular session will still not have been officially closed. The seventh special session is entirely separate from the twenty-ninth regular session and will take its own decisions regarding credentials. This is borne out by practice. For example, the sixth special session was held in 1974 at a time when the twenty-eighth regular session had not been closed, and the sixth special session nevertheless established its own credentials committee, and took a separate decision regarding credentials for that session (resolution 3200 (S-VI) of 30 April 1974).

27 August 1975

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12. QUESTION WHETHER THE SECRETARY-GENERAL AND THE ADMINISTRATIVE COMMITTEE ON CO-ORDINATION COULD LEGALLY TAKE STEPS TO GIVE EFFECT TO PROPOSALS IN REGARD TO THE POST-ADJUSTMENT SYSTEM DESIGNED TO REMEDY CERTAIN DEFICIENCIES IN THE PRESENT SYSTEM OR WHETHER SUCH PROPOSALS INVOLVING SUBSTANTIAL INCREASES IN EXPENDITURE SHOULD BE LEFT FOR THE GENERAL ASSEMBLY

Memorandum to the Secretary, Administrative Committee on Co-ordination

1. You have asked for a legal opinion on the question, raised in the Administrative Committee on Co-ordination at its sixty-fourth session, whether the Secretary-General

[39] A/PV.2281, pp. 73-75 and 76.

and the ACC could legally take steps to give effect to proposals like those recently made by UNESCO and GATT in regard to the post adjustment system, or whether decisions in regard to such proposals should be left for the General Assembly. Those proposals are designed to remedy certain deficiencies of the present system, particularly with respect to staff without dependants and to some extent with respect to staff in the higher grades, when the value of the United Nations currency of account declines in relation to local currencies, and both proposals involve separating the effects of currency fluctuations from those of changes in the cost of living in the calculation of post adjustments. Since the reason for the proposals is to remedy a serious impairment of the value of compensation for portions of the staff, it is evident that giving effect to them is very likely, at least in the short run, to involve a substantial increase in the expense of post adjustments.

2. In the United Nations, the Charter provides in Article 17, paragraph 1, that "The General Assembly shall consider and approve the budget of the Organization". Thus the General Assembly always remains the ultimate budgeting authority, and while it may on occasion authorize the Secretary-General, in consultation with appropriate bodies, to take decisions involving an increase in expenditure in order to meet changing circumstances, such authorization must always be explicit. In the present case, no such authorization exists, and it appears rather that the General Assembly has reserved the problem for its own consideration. It follows that the Secretary-General and the ACC cannot, without the approval of the Assembly, take steps to give effect to proposals like those here under discussion.

3. Post adjustments are paid to United Nations staff in pursuance of Annex I, paragraph 9, of the Staff Regulations, which provides:

> "In order to preserve equivalent standards of living at different offices, the Secretary-General may adjust the basic salaries set forth in paragraphs 1 and 3 of the annex by the application of non-pensionable relative costs of living, standards of living and related factors at the office concerned as compared to New York. Such post adjustments shall not be subject to the staff assessment plan and their amount shall vary by salary level as determined from time to time by the General Assembly."

The amounts of post adjustments are thus set by the General Assembly, and the Secretary-General cannot alter them on his own authority; his function is the "application" of the post adjustments already decided on. While Staff Rule 103.7 (*d*) does allow him to "establish a schedule of post adjustments for any duty station which, by reason of cost of living, standard of living and related factors, cannot appropriately be placed within the schedules", he is not entitled to alter schedules approved by the Assembly, and even less to alter the mode of calculation which has been used to establish them.

4. At its last session the General Assembly adopted resolution 3357 (XXIX) of 18 December 1974, to which is annexed the Statute of the International Civil Service Commission. Article 10 of that Statute provides that:

> "The Commission shall make recommendations to the General Assembly on:
>
> "(*a*) the broad principles for the determination of the conditions of service of the staff;
>
> "(*b*) the scales of salaries and post adjustments for staff in the Professional and higher categories; . . ."

This provision implies that changes in the system of calculating post adjustments will be considered by the ICSC in the first instance, that it will make recommendations (but not decisions) relating thereto, and that decisions regarding such recommendations will be taken by the Assembly itself.

5. The effect of currency instability on the general financial situation of the United Nations has long preoccupied the General Assembly, which has accepted the post adjustment system, as established by it, as the means to remedy the consequences of that instability in regard to the compensation of professional and higher staff. At its twenty-eighth session (2206th meeting), the Assembly established a Working Group on Currency Instability, which met between sessions to study the situation, but found no generally agreed alternatives to existing policies. Accordingly, at its next session, the Assembly adopted resolution 3360 (XXIX) of 18 December 1974, which registered the lack of agreement and simply requested

> ". . . the Secretary-General, in consultation with the other members of the Administrative Committee on Co-ordination, to keep these problems under review, taking into account the report of the Working Group, the views expressed during the consideration of the item during the twenty-ninth session, and other views that may be expressed by or received from Member States, and to report to the General Assembly at its thirtieth session."

That resolution is certainly not an invitation to the Secretary-General or the ACC to take direct action on the problem as it affects staff compensation.

6. Finally, it may be added that under the WAPA[40] scheme, post adjustments are closely linked with both contributions to and benefits from the United Nations Joint Staff Pension Fund, and that this linkage would require reconsideration by the General Assembly in connexion with modification of the post adjustment system.

7. It is therefore concluded, as stated above in paragraph 2, that authority does not exist to implement the proposals of UNESCO and GATT without legislative action.

14 May 1975

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13. QUESTION WHETHER, PENDING ACTION BY THE ECONOMIC AND SOCIAL COUNCIL, THE ECONOMIC COMMISSION FOR WESTERN ASIA MAY INVITE THE PALESTINE LIBERATION ORGANIZATION TO PARTICIPATE IN ITS SESSION AS AN OBSERVER TAKING INTO ACCOUNT GENERAL ASSEMBLY RESOLUTION 3237 (XXIX)

Opinion prepared at the request of the Secretariat of the Economic Commission for Western Asia

1. General Assembly resolution 3237 (XXIX) of 22 November 1974 concerning invitations to the Palestine Liberation Organization does not expressly deal with the participation of the PLO in the sessions of the Economic and Social Council or its subsidiary organs and the Council has not as yet taken decisions in this regard, although action is expected at the present (fifty-eighth) session in connexion with the Council's review of its rules of procedure.[41] Pending action by the Council, resolution 3237 (XXIX) provides strong policy guidelines in accordance with which ECWA might itself invite the PLO to participate in its sessions in the capacity of observer. In this connexion, it may be noted that the Commission on Human Rights, a functional

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[40] World average post adjustment.

[41] By resolution 1949 (LVIII) of 8 May 1975, the Council decided to adopt as its rules of procedure, with effect from the close of the fifty-eighth session, the rules of procedure annexed to the resolution. Rule 73 of those rules entitled "Participation of national liberation movements" reads as follows:

> "The Council may invite any national liberation movement recognized by or in accordance with resolutions of the General Assembly to participate, without the right to vote, in its deliberations on any matter of particular concern to that movement."

commission of the Economic and Social Council, did invite the PLO to participate as an observer in its recent session in Geneva.[42]

2. On the basis of past practice and in the light of more recent developments, participation by an observer includes the right to make oral statements, including the right of reply. An observer may have his written statements or documents circulated by the Secretariat to all delegations.

3. It is axiomatic that observers do not have the right to vote—a right which may only be accorded to full members. Likewise, in the General Assembly and its subsidiary organs, observers are not entitled to sponsor or co-sponsor substantive proposals (including amendments) or procedural motions, or to raise points of order or challenge rulings. In the Economic and Social Council, observers of Member States, non-members of the Council, have been accorded the right to submit proposals which may be put to the vote by request of any member.[43] This provision is retained in the draft devised rules of procedure[44] which have been prepared for submission to the Council at its present session.[45] On the other hand, the draft rule dealing with national liberation movements reads as follows:

> "Observers designated by national liberation movements recognized by or in accordance with resolutions of the General Assembly may participate without the right to vote at meetings of the Council, its committees and sessional bodies and their subsidiary bodies."[46]

4. As this rule, unlike the one concerning non-member State, does not provide an entitlement to sponsor proposals, the general practice excluding such right should prevail.

1 May 1975

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14. QUESTION WHETHER ADMISSION TO MEMBERSHIP IN THE UNITED NATIONS OF A STATE WITHIN THE GEOGRAPHICAL SCOPE OF THE ECONOMIC AND SOCIAL COMMISSION FOR ASIA AND THE PACIFIC AUTOMATICALLY ENTITLES SUCH A STATE TO MEMBERSHIP IN THE COMMISSION

1. I refer to your memorandum of 21 October 1975 on the question of the membership in the Economic and Social Commission for Asia and the Pacific (ESCAP)[47] of a recently admitted Member of the United Nations within the geographical scope of the Commission. You ask in particular whether formal steps should be taken by the Commission (presumably at its next session in 1976) to admit the Member State in question as a full member of ESCAP in accordance with paragraph 3 of the terms of reference of the Commission[48] and whether a draft resolution would have to be submitted to the Economic and Social Council.

2. We have always held that the application of the proviso of paragraph 3 of the terms of reference of ESCAP is automatic. In other words, a State which has

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[42] See *Official Records of the Economic and Social Council, Fifty-eighth Session, Supplement No. 4* (E/5635), decision 2 (XXXI).

[43] See *Juridical Yearbook*, 1971, p. 203.

[44] E/5677, Annex.

[45] Rule 72 A of the draft revised rules of procedure (E/5677).

[46] The provision in question is to be found in paragraph 3 of rule 72 of the revised rules of procedure.

[47] Formerly ECAFE.

[48] See *Official Records of the Economic and Social Council, Fifty-ninth Session, Supplement No. 7* (E/5656), Annex III, p. 143. The proviso in question reads: "... provided that any State in the area which may hereafter become a Member of the United Nations shall be thereupon admitted as a member of the Commission".

been admitted to membership in the United Nations does not have to wait for a decision of the Commission to become a member of the Commission. The proviso of paragraph 3 referred to above is couched in mandatory terms. The use therein of the word "admitted" does not imply that the State concerned requires a formal action of admission by the Commission. This interpretation is confirmed by the French text of the proviso which uses the word "deviendrait" and by the following precedents.

3. By resolution 1134 (XII) of 17 September 1957, the General Assembly admitted the Federation of Malaya as a Member of the United Nations. The report of the Economic Commission for Asia and the Far East on its fourteenth session held from 5 to 15 March 1958 stated that "the Commission was gratified to note that the General Assembly, by its resolution 1134 (XII) of 17 September 1957, had admitted the Federation of Malaya as a Member of the United Nations, and that, in accordance with article 3 of the terms of reference of the Commission, the Federation of Malaya had become a member of the Commission . . .".[49] The fourteenth session of ECAFE was held in fact at Kuala Lumpur and at the first meeting of the session the Commission heard a statement by the President of the Federation of Malaya. The Under-Secretary-General for Economic and Social Affairs then read a message from the Secretary-General congratulating the Federation of Malaya on having become a member of ECAFE.[50] At the same meeting, the head of the delegation of the Federation of Malaya was elected Chairman of the Commission. Moreover, the agenda for the Commission at that session did not contain any item on the admission of the Federation of Malaya to membership in ECAFE.

4. By resolution 2010 (XX) of 21 September 1965, the General Assembly admitted Singapore to membership in the United Nations. In the report of ECAFE on the work of its twenty-second session held from 22 March to 4 April 1966,[51] under the heading "Membership and attendance", Singapore was listed among members of the Commission. As in the case of the Federation of Malaya, the agenda of the Commission for its twenty-second session did not contain an item on the admission of Singapore to membership in ECAFE.

5. It should be noted that both the Federation of Malaya and Singapore prior to their admission as Members of the United Nations were associate members of ECAFE.

6. In view of the foregoing, no resolution by the Commission would be required for the Member State concerned to become a member of ESCAP.

4 November 1975

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15. QUESTION OF ASSOCIATE MEMBERSHIP IN THE ECONOMIC AND SOCIAL COMMISSION FOR ASIA AND THE PACIFIC OF THE TWO DEPENDENT TERRITORIES—THE GILBERT ISLANDS AND TUVALU—RESULTING FROM THE SEPARATION OF THE ELLICE ISLANDS FROM THE FORMER GILBERT AND ELLICE ISLANDS COLONY

Memorandum to the Chief of the Regional Commissions Section, Department of Economic and Social Affairs

1. With reference to your memorandum of 5 November, we are now in a position to advise as follows.

2. By a letter dated 24 September 1975 addressed to the Secretary-General, the Permanent Representative of the United Kingdom of Great Britain and Northern

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[49] *Official Records of the Economic and Social Council, Twenty-sixth Session, Supplement No. 2* (E/3102), para. 258.

[50] *Ibid.*, para. 218.

[51] *Ibid., Forty-first Session, Supplement No. 2* (E/4180/Rev.1), para. 337

Ireland drew attention to the fact that, as from 1 October 1975, the Ellice Islands would be separated from the Gilbert and Ellice Islands Colony to form a new dependent territory with the name of Tuvalu. The remainder of the present colony would then take the name of Gilbert Islands. He further stated that this separation took place with the full consent of the Government of the Gilbert and Ellice Islands and following a referendum which was observed by a Visiting Mission of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (A/C.4/786).

3. At its 2171st meeting on 19 November 1975, the Fourth Committee of the General Assembly adopted by consensus a draft resolution (A/C.4/L.1106) under the subtitle "Question of the Gilbert Islands". Introducing the draft resolution at the previous meeting, the representative of Sierra Leone stated that a striking feature of the draft resolution was that it pertained only to the Gilbert Islands, and not to the Ellice Islands, because of the referendum held the previous year in which the people of the Ellice Islands had opted for separate administration. He commended the fact that the separation had been carried out without incident. The Territory of the Gilbert Islands, he said, was, to a large extent, self-governing and therefore qualified for a separate draft resolution.[52]

4. At its 2176th meeting on 28 November 1975, the Fourth Committee, by a vote of 111 in favour to 1 against with 10 abstentions, adopted a draft resolution (A/C.4/L.1115) under the subtitle "Question of the New Hebrides, Pitcairn and *Tuvalu*" (italics added).

5. As both draft resolutions are expected to be adopted by the General Assembly, it is clear that the Assembly recognizes the separation of the two territories.[53] Insofar as their associate membership in ESCAP is concerned, it will be for the Government of the United Kingdom to request, if it so wishes, separate associate membership for the two Territories. Once such a request is made, Gilbert Islands will remain an associate member of ESCAP and Tuvalu may be admitted by the Commission to associate membership. Alternatively, the Commission may decide that henceforth the two Territories will have separate associate membership. In either case, the consequential change to be made by the Economic and Social Council in paragraphs 2 and 4 of the terms of reference of the Commission will be of an editorial character.[54] Since under paragraph 5 of its terms of reference[55] the Commission has the authority to admit territories to associate membership, no action by the Economic and Social Council is required.[56]

2 December 1975

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[52] A/C.4/SR.2170, p. 5.

[53] Both draft resolutions were adopted by the General Assembly at its 2431st meeting, on 8 December 1975, the first one by consensus and the second one by a recorded vote of 121 votes to 1, with 11 abstentions, thus becoming respectively General Assembly resolutions 3426 (XXX) and 3433 (XXX).

[54] For the terms of reference of ESCAP, see *Official Records of the Economic and Social Council, Fifty-ninth Session, Supplement No. 7* (E/5656), Annex III, p. 143.

[55] Paragraph 5 of the terms of reference of ESCAP reads as follows:

"Any territory, part or group of territories within the geographical scope of the Commission as defined in paragraph 2 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 admitted by the Commission as an associate member of the Commission. 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."

[56] At its thirty-second session (24 March-2 April 1976), the Economic and Social Commission for Asia and the Pacific observed that the Government of the United Kingdom

16. FIFTH UNITED NATIONS CONGRESS ON THE PREVENTION OF CRIME AND THE TREATMENT OF OFFENDERS—QUESTION OF ISSUING INVITATIONS TO STATES NOT MEMBERS OF THE UNITED NATIONS AND TO INDIVIDUAL PARTICIPANTS FROM SUCH STATES

Memorandum to the Assistant Director, Crime Prevention and Criminal Justice Section

1. May I refer to your memorandum dated 26 February 1975 in which you requested advice on the invitations that you, in your capacity as Executive Secretary, may be required to issue to non-member States of the United Nations and to individual participants from such States.

2. At the outset, it is recalled that the intention is to admit five categories of participants to the Congress. With respect to three of these categories, namely—

(1) Observers from liberation movements;

(2) Observers from specialized agencies, intergovernmental or non-governmental organizations;

(3) Officials of the Secretariat,

the issue on which you requested advice would not arise.

3. I shall therefore limit myself to commenting on the invitation of the two remaining categories which in rule 1 of the draft provisional rules of procedure[57] are described as follows:

(*a*) Members officially designated by their Governments as delegates to the Congress, and

(*b*) Individual members having a direct interest in the field of crime prevention and criminal justice, including representatives of criminological institutes

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had informed the Executive Secretary (document E/CN.11/1260/INF) that, on the separation of the Ellice Islands from the Gilberts on 1 October 1975, the name of the Gilbert and Ellice Islands Colony had been changed to that of the Gilbert Islands, and that the responsibilities accepted by the Gilbert and Ellice Islands as an associate member of ESCAP were henceforth assumed by the Gilbert Islands. The Commission also noted that the Government of the United Kingdom had informed the Executive Secretary (document E/CN.11/1261/INF), in accordance with article 5 of the Commission's terms of reference and at the request of the Government of the territory concerned, of the application of Tuvalu, the former Ellice Islands, for admission as an associate member of the Commission. The Commission unanimously decided that Tuvalu be admitted as an associate member of ESCAP and included within its geographical scope. It recommended that the Economic and Social Council approve the consequential amendments to paragraphs 2 and 4 of the Commission's terms of reference and adopted a draft resolution to that effect for action by the Council.

[57] A/CONF.56/2. Rule 1 of the rules of procedure as adopted by the Congress reads as follows:

"The Congress shall include four categories of participants:

"(*a*) Members officially designated by their Governments as delegates to the Congress;

"(*b*) Individual members having a direct interest in the field of crime prevention and criminal justice, including representatives of criminological institutes and of national organizations concerned with crime prevention and criminal justice;

"(*c*) Observers designated by national liberation movements invited to the Congress;

"(*d*) Observers from the specialized agencies of the United Nations, or from other intergovernmental organizations or from non-governmental organizations in consultative status with the Economic and Social Council and interested in the matters before the Congress."

and of national organizations concerned with crime prevention and criminal justice.

4. The basic authorization for the Secretariat to arrange the Congress is contained in General Assembly resolution 415(V) adopted on 1 December 1950. Neither the resolution nor its annex contain specific provisions on the categories of governments or individuals entitled to receive invitations to the recurring Congresses. In this connexion, section (*d*) of the annex limits itself to stating that "The United Nations shall convene every five years an international congress similar to those previously organized by the IPPC". The only resolution specifically concerned with the Fifth Congress is General Assembly resolution 3139 (XXVIII) which contains no directives on participation but "requests the Secretary-General to ensure that the Secretariat's preparatory work for the Congress is fully adequate for its successful outcome."

5. In the absence of specific directives by a deliberative body, the Secretariat should act in conformity with the present practice followed by the General Assembly in convening international conferences of the United Nations. In recent years and until its twenty-eighth session, the General Assembly's practice was to invite representatives of States Members of the United Nations or members of a specialized agency or of the International Atomic Energy Agency or parties to the Statute of the International Court of Justice. However, in several resolutions at its twenty-eighth session, the General Assembly adopted a formula inviting "all States" to the conferences convened by it. With this development, it is clear that the criterion has become which entities are considered by the General Assembly to be States, a question which must be determined on the basis of unequivocal indications by the General Assembly. At the present time, in addition to States included in the formula in use until the twenty-eighth session, the General Assembly has indicated that the Democratic Republic of Vietnam is considered to be a State. This was done in resolution 3067 (XXVIII) and in resolution 3104 (XXVIII) in which the Democratic Republic of Vietnam was expressly designated as a State in connexion with its invitation to, respectively, the Third United Nations Conference on the Law of the Sea and the United Nations Conference on Prescription (Limitation) in the International Sale of Goods.[58]

6. In view of the foregoing, it would be appropriate for you as the Executive Secretary of the Congress to issue invitations to the States Members of the United Nations or members of the specialized agencies or the International Atomic Energy Agency and States Parties to the Statute of the International Court of Justice and also to the Democratic Republic of Vietnam.

7. The individual members referred to under paragraph 3 (*b*) above constitute a special category which has participated in past Congresses. The Office of Legal Affairs in a memorandum dated 18 April 1969 advised the Officer-in-Charge of the Social Development Division on the history and scope of the provision on admission of individual members, in particular regarding the issuance of information circulars to individual members of past Congresses. The memorandum reached the following conclusion:

"It is clear from the historical background that the intention is to seek the widest possible participation of experts in the Congress, which is of a technical

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[58] The Democratic Republic of Vietnam has since become a member of WHO and ITU.

character. .... Since the right to vote at the Congress is accorded only to those experts who are governmental delegates, the participation of individuals does not give rise to the question of the legal status of their Governments vis-à-vis the United Nations. Consequently there is no legal difficulty in distributing the information circular among past individual participants. It is, however, not appropriate to refer to them in United Nations documents as individual participants "from non-member States", for the use of the term "non-member States" would involve the Secretariat in a political judgement which the Secretary-General has consistently declined to make. In this connexion I should like to suggest that in the next report by the Secretariat on the Congress, it would be better not to list the individual participants under the countries of which they are nationals, since nationality is not the criterion of their participation."

8. There appears to be no legal grounds to deviate from the practice followed in respect of admission of individual members to past Congresses, as that practice is stated in the above excerpt from the Legal Office's memorandum of 18 April 1969. To ensure consistency with the reason for their selection as participants, we would wish, however, to reiterate our advice that it would be preferable not to list the individual members by countries of their nationality in the official documentation of the Congress. With respect to those from any area not covered in paragraph 6 above, their selection shall also be on the basis of their individual expertise and not because of affiliation with any institute or organizations having any governmental character.

7 March 1975

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17. Question whether the United Nations Special Fund may give assistance to national liberation movements under the provisions of the General Assembly resolutions establishing the Fund and defining its operations

Statement made by the Legal Counsel at the 8th meeting (first session) of the Board of Governors of the United Nations Special Fund on 4 April 1975

The question was raised at the fifth and sixth meetings of the Board of Governors, during the discussion of the rules of procedure of the Board, whether the Special Fund may give assistance to national liberation movements.

This question of course is one that depends not on the rules of procedure of the Board but on the resolutions of the General Assembly establishing the Special Fund and defining its operations, that is, resolutions 3202 (S-VI) of 1 May 1974 and 3356 (XXIX) of 18 December 1974. Article I, entitled "Purpose", of the provisions adopted by resolution 3356 (XXIX) specifies that the Special Fund "shall provide emergency relief and development assistance to the *countries most seriously affected* in accordance with the relevant provisions of section X of General Assembly resolution 3202 (S-VI) of 1 May 1974" (emphasis added); the three paragraphs of Article VI similarly refer to "countries most seriously affected" or to "developing countries".

The use of the word "countries" would appear to preclude assistance to entities other than States. This interpretation is reinforced by the relevant section (Section X. Special Programme) of resolution 3202 (S-VI), which sets out in paragraph (*c*) the criteria for determining the countries to which emergency assistance should be granted. All of these criteria, such as ratio of import costs to export earnings, or of debt servicing to export earnings, or the relative importance of foreign trade in the development process, are such as cannot be applied to entities other than States.

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18. ESTABLISHMENT BY THE WORLD FOOD CONFERENCE OF AN INTERNATIONAL FUND FOR AGRICULTURAL DEVELOPMENT—CONVENING BY THE SECRETARY-GENERAL, AT THE REQUEST OF THE CONFERENCE, OF A "MEETING OF INTERESTED COUNTRIES" TO WORK OUT THE DETAILS OF THE FUND—QUESTION WHETHER THE UNITED NATIONS IS RESPONSIBLE FOR THE EXPENSES OF THE MEETING AND ITS *Ad Hoc* WORKING GROUP

Memorandum to the Acting Controller, Office of Financial Services

1. I refer to your memorandum of 8 August 1975 in which you have asked for our advice on the following questions:

(1) What is the legal relationship between the United Nations, on the one hand, and the "meeting of interested countries"[59] and the *Ad Hoc* Working Group it established, on the other?

(2) Is there any basis for payment of the expenses of the "meeting of interested countries" and of the *Ad Hoc* Working Group?

2. Paragraph 5 of resolution XIII adopted by the World Food Conference provides that:

> "The Secretary-General of the United Nations should be requested to convene urgently a meeting of all interested countries, mentioned in paragraph 3 above, and institutions to work out the details, including the size of, and commitments to, the Fund;".

In operative paragraph 5 of its resolution 3348 (XXIX), the General Assembly

> "*Requests* the Secretary-General and the executive heads of the subsidiary organs of the General Assembly and of the specialized agencies to take expeditious action in line with the resolutions adopted at the World Food Conference;".

3. From the legal point of view, where a conference convened by the United Nations requests the Secretary-General to perform certain functions, such a request must be approved by the competent organ of the Organization before the Secretary-General could undertake the said functions. In the present case, it is clear from the above-quoted provisions of resolution 3348 (XXIX) that the General Assembly has endorsed the request of the World Food Conference. The "meeting of interested countries" convened by the Secretary-General is therefore a meeting authorized by the General Assembly, and the *Ad Hoc* Working Group established by the meeting is a subsidiary organ of the United Nations. The recommendation made by the Economic and Social Council in its resolution 1969 (LIX) of 30 July 1975 concerning the functions of the *Ad Hoc* Working Group is further evidence that the Working Group is such an organ.

4. It follows from the foregoing that the United Nations is responsible for the expenses of the "meeting of interested countries" and of the *Ad Hoc* Working Group.

5. I note that before the adoption by the General Assembly of resolution 3348 (XXIX) and before the decision to establish the *Ad Hoc* Working Group was taken, no statement of financial implications required by rule 153 of the rules of procedure of the General Assembly had been submitted. Regrettable as this may be, it does not alter the legal status of the meetings in question as United Nations meetings.

22 August 1975

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[59] I.e. the meeting which the Secretary-General of the United Nations was requested to convene under resolution XIII of the World Food Conference (see report of the World Food Conference (E/CONF.65/20—United Nations publication, Sales No. 75.II.A.3), p. 12), to work out the details of the International Fund for Agricultural Development.

19. Use of government-financed personnel within the United Nations—Associate experts and junior professionals

Memorandum to the Deputy Director, Administrative Division, United Nations Children's Fund

From your memorandum of 30 May and our conversation, we understand that you were approached about UNICEF's interest in associate experts to be provided by a Member State under a proposed "memorandum of understanding", and that you replied that UNICEF employed "junior professionals" but not associate experts.

We think it is necessary to take account of the historic and functional differences between these two categories of government-financed personnel. As for the associate experts, the Member State which approached you was one of the originators of the "volunteer" arrangement which was set forth in Economic and Social Council resolution 849 (XXXII) of 4 August 1961; that resolution was entitled "Use of volunteer workers in the operational programmes of the United Nations and related agencies designed to assist in the economic and social development of the less developed countries". (As you can see from the title and text of the resolution, the term "volunteer" was used to describe personnel provided at no cost to the United Nations; operational personnel so provided under the resolution are now called "associate experts".)

The resolution sets forth the principles which shall govern the use of these "volunteer technical personnel" and provides that these principles should apply to their assignment to programmes and projects carried out by the United Nations with funds provided by the Expanded Programme of Technical Assistance, the Special Fund and other voluntary funds of the United Nations (including UNICEF).

The associate experts programme (now used by the United Nations and specialized agencies) involves (1) an agreement with the government providing the experts and, (2) special letters of appointment. (The associate experts, although staff members and project personnel, have letters of appointment which contain all the terms of their appointment with no reference to the 200 Series of the Staff Rules.)

In recent years, the Member State concerned has proposed changes in the associate expert programme which were discussed among the agencies who execute the various technical assistance programmes and who use technical assistance experts and associate experts. One difficulty was a proposed provision for periodic reports to the government on the performance of experts which was not acceptable to the United Nations;[60] the said Member State has not concluded any new associate experts agreement with the United Nations, although it remains the supplier of numerous highly qualified associate experts to United Nations technical assistance projects under what seems to be mutually satisfactory conditions.

The junior professional officer arrangement is different because junior professionals are not "operational" or "project personnel". Obviously there are policy reasons for limiting the number, length of service and types of posts for this kind of government-provided staff who work not on projects in countries receiving assistance but in regional offices for the UNDP or UNICEF Secretariat. Project personnel generally are different from professional staff as regards geographical distribution, career expectations, role with respect to United Nations administration, recipient government approval, etc. The policy objection to governments subsidizing their own nationals in United Nations service is generally less relevant to project personnel than to other staff.

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[60] See *Juridical Yearbook*, 1973, p. 169.

Within the United Nations, only UNICEF and UNDP employ government-financed "junior professionals". They were used first by UNDP, which does not of course employ staff members to execute projects and hence employs no technical assistance experts, but did wish to accept a Member Government's offer of "volunteers" to serve only at the junior professional, i.e. P.1/P.2, level and in non-established posts in resident representatives' offices. These "junior professionals" are paid from funds-in-trust pursuant to an agreement with the Government and are appointed under the usual United Nations fixed-term letters of appointment. UNICEF, as you know, followed suit and has concluded agreements in this field with two Member States.

13 June 1975

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20. QUESTION WHETHER LOCALLY RECRUITED PERSONNEL EMPLOYED IN CONNEXION WITH A SPECIFIC UNDP PROJECT ARE UNITED NATIONS STAFF MEMBERS

Memorandum to the Deputy Director, Support Services Branch, Office of Technical Co-operation

1. This is in reply to your memorandum of 14 April 1975 on the above subject.

2. It appears from the documentation which was provided to this Office that the Government of a Member State has undertaken to contribute in cash to the project "In-Service Training Programme for Regional Development" a certain amount of convertible currency and a certain amount of local currency and that part of the amount in local currency is to be utilized to defray the cost of the services of locally recruited Professional Counterpart and Support Personnel Cash Counterpart.

3. The relevant Project Document provides as follows with regard to such counterpart personnel:

> "The personnel recruited under the provisions of this paragraph will be recruited by the Project, after mutual consultation between the Project Manager, the Project Director and the Project Co-ordinator. The contracts will be signed by the Project Manager and it is emphasized that personnel hired locally under the provisions of this paragraph will not be United Nations staff members."

The basic legal question presented by these provisions is whether the statement that the persons referred to "will not be United Nations staff members" is legally valid.

4. It may be helpful to define at this point the concepts of employer and employee. The relationship of employer-employee arises out of a contract, express or implied, between a person (the employee) who renders services to another for a salary, and who, in the performance of such services, is subject to the direction and control of that other person (the employer).

5. It follows from this definition of the employer-employee relationship that a project cannot be an employer. This is because a project is an activity and, manifestly, an activity does not have the legal capacity to enter into a contract or to perform any other juridical act. Only a real person or a legal person such as a corporation can possess the requisite legal capacity to perform a juridical act. Where a project provides assistance to an institute, centre or other body, such institute, centre or other body, if it possesses the requisite legal capacity under the applicable body of law, may be the employer of project personnel. Such institute, centre or other body, however, is not the project, but rather the recipient of assistance to the project. In any event, as there is no institute, centre or other body directly involved in the project under consideration, the employer of the persons concerned can only be the United Nations or the Government of the Member State concerned.

6. As has been noted, the Project Document provides that the persons concerned "will not be United Nations staff members". In our opinion, there is a distinct possibility that this provision may not conclusively settle the question for the United Nations, the other parties to the Project Document or the employees concerned. If it is the case that this provision in the Project Document rests upon the erroneous legal conception that the Project is the employer of the persons concerned, then it may well be that the United Nations will be held to be the employer. Moreover, unless the employee concerned manifests his assent to this provision in the Project Document, expressly or by implication, it is not at all certain that it is binding upon him, since he is not a party to that agreement.

7. The determination of the question as to who is the employer of a particular person is to be made on the basis of the facts in each case. The relevant information contained in the Project Document and your memorandum of 14 April 1975 appear to be insufficient to enable the Office of Legal Affairs to express an authoritative opinion as to whether the United Nations or the Government concerned is the employer of the locally engaged personnel whose salaries are paid from the counterpart contribution in cash. There appears however to be little evidence to support the view that the Government is the employer of the persons concerned. According to the Project Document, the Government appears to perform two functions in respect of such employees: (*a*) it contributes the funds for the payment of their salaries, and (*b*) through the Project Director and Project Co-ordinator (both Government officials whose services are provided as part of the counterpart contribution in kind), it consults with the Project Manager on the recruitment of the persons concerned. It appears that the provisions in the Project Document concerning consultation of the Project Manager, Project Director and Project Co-ordinator apply only in respect of personnel whose salaries are to be paid from the counterpart contribution in local currency. The Project Document contains no comparable provision for personnel whose salaries are to be paid from the counterpart contribution in convertible currency. In any event, it seems evident that the performance of such functions is not sufficient to make the Government the employer of the persons concerned.

8. This is particularly so because of the functions performed by the United Nations in respect of such persons. According to the Project Document, the Project Manager, who is a staff member of the United Nations, signs the contracts of employment. There is nothing to indicate that in the performance of such acts he is acting on behalf of or as an agent of the Government concerned. From the legal point of view, he cannot sign on behalf of the Project, since, as has been noted, a project is an activity, and a person cannot sign a contract on behalf of or as an agent of an activity. Further, it is the United Nations, and not the Government, who pays the salaries of the persons concerned. In this connexion, it may be relevant to observe that the Project Document states that "the Project Manager will in consultation with the Project Director (1) Be responsible on behalf of the United Nations for the execution of this Project in accordance with the provided work plan".

9. In summary, it appears from the limited information available (*a*) that it is legally impossible for the Project to be an employer; (*b*) that there is virtually no evidence to establish that the Government concerned is the employer of persons whose salaries are paid from its counterpart contributions in cash—whether in local or convertible currency; and (*c*) there is strong evidence to support the view that it is the United Nations who is the employer of such persons.

2 May 1975

21. POLICY OF THE ORGANIZATION WITH RESPECT TO THE ACCEPTANCE OF THE SERVICES OF GOVERNMENT OFFICIALS OR EXPERTS ON A NON-REIMBURSEMENT LOAN BASIS—STATUS OF OFFICIALS OR EXPERTS ENGAGED ON SUCH BASIS

Memorandum to the Controller, Assistant Secretary-General, Office of Financial Services

1. This is in reply to your memorandum of 12 June 1975 requesting our views regarding the policy which should be followed by the Organization with respect to the acceptance of the services of government officials or experts on a non-reimbursable basis.

2. The Organization's policy regarding the acceptance of services on reimbursable and non-reimbursable loan has been laid down by the Office of Personnel in a document entitled "TARS procedures," dated 13 January 1972.

3. The provisions of that document which appear relevant to the matter under consideration may be briefly summarized as follows. An expert who is a government employee and is to be loaned to the Organization on a non-reimbursable basis may be engaged by the Organization under a Special Service Agreement (Section 6.1.3, p. 3, para. 19). The expert engaged under such an Agreement has the legal status of an independent contractor, is not a staff member of the Organization, and is not subject to the United Nations Staff Rules (*ibid.*, p. 8, para. 23). He is an expert on mission within the meaning of the Convention on the Privileges and Immunities of the United Nations,[61] and, as such, is entitled to the privileges and immunities provided for in Article VI of that Convention (*ibid.*, pp. 7 and 8, paras. 19 and 24).

4. We see no objection from the legal point of view to the policy or procedures laid down by the Office of Personnel with regard to reimbursable and non-reimbursable loans. The prohibition in the Charter against seeking or receiving instructions from any government or from any other authority external to the Organization applies only to the Secretary-General and to the staff. It has no applicability to a person having the status of an independent contractor since, by definition, such a person is not an employee or staff member of the Organization.

5. Similarly, there appears to be no impediment under the Financial Regulations to TARS policy and procedures, as set forth above. Under Regulation 7.2, voluntary contributions whether in cash or in kind may be accepted provided that the purposes for which the contributions are made are consistent with the policies, aims and activities of the Organization. In our opinion, the acceptance by the Organization of a proposed contribution by a government of services by its employees or by the employees of a private firm does not in and of itself violate the terms of the said Regulation.

20 June 1975

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22. ISSUANCE OF LAISSEZ-PASSERS TO OFFICIALS OF THE WORLD INTELLECTUAL PROPERTY ORGANIZATION—SPECIAL ARRANGEMENTS TO TAKE EFFECT AFTER THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE SPECIALIZED AGENCIES ENTERS INTO FORCE IN RESPECT OF WIPO—PROVISIONAL ISSUANCE OF LAISSEZ-PASSERS FOR THE INTERIM PERIOD

Letter to the Legal Counsel of the World Intellectual Property Organization

This is in reply to your letter dated 12 June 1975, in which you referred to the question whether the laissez-passers to be issued to officials of the World Intellectual

[61] United Nations, *Treaty Series*, vol. 1, p. 15.

Property Organization under the proposed special arrangements[62] should be given effect pursuant to the Convention on the Privileges and Immunities of the United Nations[63] or the Convention on the Privileges and Immunities of Specialized Agencies,[64] or possibly both Conventions.

The delay in preparing the present answer to the letter was caused in part by absence from Headquarters and also by the need to search the Secretariat's files in order to provide you with information you requested concerning the practice followed during the so-called hiatus period which you defined as the period between 21 November 1947, when the General Assembly approved the Specialized Agencies Convention with its draft annexes, and the respective dates of entry into force of that Convention in respect of the various specialized agencies.

From this research it appears that from 1947 United Nations laissez-passers were issued to officials of specialized agencies with whom agreement had been reached concerning the issuance of laissez-passer. The laissez-passer carried a statement to the effect that the laissez-passer was issued to a member of a specialized agency in accordance with section 28 of the Convention on the Privileges and Immunities of the United Nations. In 1948 the Economic and Social Council in its resolution 136 (VI) requested the Secretary-General to make arrangements to issue laissez-passers to officials of specialized agencies and pursuant to this request on 17 March 1948, the Secretary-General sent a circular letter to Member States informing them of the conditions under which laissez-passers were issued. In the course of 1949, agreements were entered into between the United Nations and the Specialized Agencies setting out Standard Terms for the issuance of laissez-passers on a regular basis. The Standard Terms superseded the provisional arrangements entered into in accordance with resolution 136 (VI) of the Economic and Social Council. Circular letters were sent by the Secretary-General in May and June 1949 to Member States informing them of the transition from the provisional arrangements to the Standard Terms. It appears that the procedure just referred to was followed until late 1956 or early 1957 at which time the Convention on the Privileges and Immunities of the Specialized Agencies had been widely accepted by Member States and it therefore was felt that it was undesirable to have laissez-passers in circulation which referred to United Nations officials and to the Convention on the Privileges and Immunities of the United Nations, when in fact they were issued to officials of a specialized agency and the correct reference should be to the Convention on the Privileges and Immunities of the Specialized Agencies.

Although it may be said in retrospect that the laissez-passer issued before 1957 to officials of the specialized agencies should not have referred to the Convention on the Privileges and Immunities of the United Nations—except for a reference to

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[62] Under Article 17 of the Agreement between the United Nations and the World Intellectual Property Organization (approved by the General Assembly of WIPO on 27 September 1974 and by the General Assembly of the United Nations on 17 December 1974 [see General Assembly resolution 3346 (XXIX)]), which recognized WIPO as a specialized agency brought into relationship with the United Nations in accordance with Articles 57 and 63 of the Charter,

> "Officials of the Organization shall be entitled, in accordance with such special arrangements as may be concluded between the Secretary-General of the United Nations and the Director-General of the Organization, to use the laissez-passer of the United Nations."

The relationship agreement between the United Nations and WIPO came into force on 17 December 1974.

[63] United Nations, *Treaty Series*, vol. 1, p. 15.

[64] *Ibid.*, vol. 33, p. 261.

section 28 as containing the authority for the Secretary-General to issue the laissez-passers—it is relevant to emphasize that the laissez-passer does not in itself convey privileges or immunities to the bearer. The full effect of the laissez-passers is that they "shall be recognized as valid travel documents" by the authorities of Member States.

Turning now to the situation with which we are presently seized, I would like to say that from our side the proposed special arrangements on the issuance of laissez-passers to officials of the World Intellectual Property Organization were intended only for the situation after the entry into force of the Specialized Agencies Convention in respect of the World Intellectual Property Organization.[65] On this assumption we feel that it would be sufficient to refer in the arrangements only to section 26 of the Convention on the Privileges and Immunities of the Specialized Agencies as containing the legal basis for the issuance and not to any provisions of the United Nations Convention.[66]

Concerning the provisional issuance of laissez-passers pending entry into force of the Specialized Agencies Convention in respect of the World Intellectual Property Organization as well as the conclusion of the special arrangements just referred to, the Secretariat has agreed that this may be done on the basis of section 28 of the Convention on the Privileges and Immunities of the United Nations. It is our understanding that the World Intellectual Property Organization desired to provide its officials with a travel document which could be issued without delay. It cannot be assumed, however, that officials of the World Intellectual Property Organization will enjoy the protection of the Specialized Agencies Convention in the interim period until that Convention has entered into force in respect of WIPO.

3 October 1975

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23. PRIVILEGES AND IMMUNITIES OF MEMBERS OF THE STAFF OF THE UNITED NATIONS—MEANING OF THE TERM "OFFICIALS OF THE UNITED NATIONS" FOR THE PURPOSE OF APPLICATION OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

Memorandum to the Chief, Centres Administrative Unit, Field Operations Service

1. I refer to your memorandum of 18 August 1975 which raises the question of the privileges and immunities of local staff members of the United Nations Information Centre in [name of a Member State].

2. The General Assembly, in resolution 76 (I) of 7 December 1946, defined the categories of "officials of the United Nations" to which the relevant provisions of the Convention on the Privileges and Immunities of the United Nations were to apply; namely, it approved "the granting of the privileges and immunities referred to in

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[65] Under section 37, the Convention will become applicable to WIPO when it has transmitted to the Secretary-General of the United Nations the final text of the annex relating to it and has informed him that it accepts the standard clauses, as modified by this annex, and undertaken to give effect to specified sections and any provisions of the annex placing obligations on WIPO. Under section 44, the Convention shall enter into force for each State party in respect of WIPO when it has become applicable to it in accordance with section 37 and the State party has undertaken to apply the provisions of the Convention to WIPO in accordance with section 43.

[66] The arrangements which have been agreed upon by an exchange of letters dated 1 and 15 March 1976 between the United Nations and WIPO and which are to come into force on the date when the Convention on the Privileges and Immunities of the Specialized Agencies becomes applicable to WIPO refer to article VIII (sections 26-30) of the Convention on the Privileges and Immunities of the Specialized Agencies.

articles V and VII of the Convention on the Privileges and Immunities of the United Nations . . . to all members of the staff of the United Nations, with the exception of those who are recruited locally *and* are assigned to hourly rates." (Italics added.)

It will be noted that in this definition of the term "officials of the United Nations" (which, as indicated above, the General Assembly adopted for the purpose of application of the Convention), no distinction is made among staff members of the United Nations as to nationality or residence.

3. The categories established in resolution 76 (I) have remained unchanged and the Secretary-General has accordingly maintained that the determination made by the General Assembly in that resolution precludes any distinction being drawn (e.g. on grounds of nationality or residence) so as to exclude a given category of staff from the benefit of the privileges and immunities referred to in articles V and VII of the Convention, except in the case of locally recruited staff employed at hourly rates.

4. It follows from the position, as stated above, of the General Assembly and the Secretary-General that there is in our view no legal objection to the printed text appearing on the United Nations identity card for the Information Centre staff,[67] it being understood that that card may not be issued to locally recruited staff employed at hourly rates. It is to be noted in this connexion that the Member State concerned acceded to the Convention without any reservation and thus undertook to accord the privileges and immunities provided for therein in accordance with the provisions of General Assembly resolution 76 (I).

Should nevertheless the Government object to the said text, it may be pointed out, *inter alia*, that the immunity of United Nations officials from legal process (section 18 (*a*)) is limited to official acts and that in any case where, in the Secretary-General's opinion, maintaining the immunity of an official would impede the course of justice and it can be waived without prejudice to the interests of the United Nations, the Secretary-General would have the right and the duty to waive the immunity. It goes without saying that the Secretary-General would always very carefully examine the facts in any case where the possibility of a waiver of immunity may be raised. In this connexion it may be advisable, when issuing identity cards to the staff members concerned, to draw their attention to the provisions of sections 20 and 21 of the Convention.

23 September 1975

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24. CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS AND CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE SPECIALIZED AGENCIES—QUESTION WHETHER UNDER THOSE CONVENTIONS A HOST STATE IS REQUIRED TO EXTEND FULL DIPLOMATIC PRIVILEGES TO HIGH OFFICIALS OF THE ORGANIZATION CONCERNED WHO ARE ITS NATIONALS OR PERMANENT RESIDENTS

Letter to the Adviser for International Organizations Affairs, International Labour Office

This is further to your letter of 28 January 1975 in which you refer to "The Specialized Agencies of the United Nations (Immunities and Privileges) Order 1974" and "The United Nations and International Court of Justice (Immunities and Privileges) Order 1974" of the United Kingdom (Statutory Instruments 1974 Nos. 1260 and 1261).[68] You have mentioned article 15, paragraph 2 of the two Orders, which deny

[67] Reading as follows:

"Mr. ... whose photograph and signature appear on the opposite page hereof is an official of the United Nations and as such enjoys the protection of the UN Convention on Privileges and Immunities duly enacted as law in [name of the Member State concerned and references to the relevant Act]."

[68] Reproduced in the *Juridical Yearbook*, 1974, pp. 7 and 11.

the diplomatic privileges provided for high officials in section 21 of the Convention on the Privileges and Immunities of the Specialized Agencies and section 19 Convention on the Privileges and Immunities of the United Nations to "any person who is a citizen of the United Kingdom and Colonies or a permanent resident of the United Kingdom". You have asked for the matter to be considered at the forthcoming session of the Preparatory Committee of the Administrative Committee on Co-ordination.

In the first place, I would like to stress that the privileges granted by sections 19 and 20 of the Specialized Agencies Convention, like those under section 18 of the United Nations Convention, are and must be enjoyed by all officials, regardless of nationality. Section 21 and section 19 of the respective conventions, however, refer to "the privileges and immunities exemptions and facilities accorded to diplomatic envoys, in accordance with international law", and two interpretations of that phrase seem to be possible.

In the ordinary diplomatic context, States are not required to extend full diplomatic privileges to persons who are their nationals or permanent residents, even if they have consented to receive such persons in a diplomatic capacity. Article 38 of the Vienna Convention on Diplomatic Relations[69] (1961) provides in paragraph 1:

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

Similar provisions are made in article 71 of the Vienna Convention on Consular Relations (1963)[70] and article 40 of the Convention on Special Missions (1969).[71] Substantially the same wording is used in the draft articles on the representation of States in their relations within international organizations, prepared by the International Law Commission in 1971[72] and now being considered by a United Nations Conference of plenipotentiaries in Vienna.[73] Article 37, paragraph 1 of that draft states that

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

Article 68 makes the same provision in respect of delegations to organs and conferences, and article V of the Annex to the draft (relating to observers) repeats it yet again.[74]

Those articles have not yet been discussed by the current Vienna Conference, which will end only on 14 March 1975. If, however, provisions like those in the Commissions's draft articles are adopted, it will appear that the States participating do not consider that international law requires a host State to accord full diplomatic privileges to diplomatic envoys accredited to an international organization who are nationals of or permanently resident in that State. If that view is taken, sections 21 and 19 of the respective Conventions on Privileges and Immunities would tend to be interpreted in the same way in regard to high officials. As a practical matter, it does

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[69] United Nations, *Treaty Series*, vol. 500, p. 95.

[70] *Ibid.*, vol. 596, p. 261; See also *Juridical Yearbook*, 1963, p. 109.

[71] General Assembly resolution 2530 (XXIV). See also *Juridical Yearbook*, 1969, p. 125.

[72] *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 10* (A/8410/Rev.1), Chapter II.

[73] For the text of the relevant Convention and in particular of its article 37 as adopted by the Conference, see p. 87 of this *Yearbook*.

[74] In the final text of the Convention, the relevant provisions are to be found in article 67 and 72 respectively.

not seem that arguments to the effect that high officials of organizations ought to be treated more favourably than diplomatic envoys sent to those organizations would meet with much support.

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

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

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

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

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

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

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

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

25 February 1975

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25. Question of the financial responsibility to the Organization of members of the staff for accidental damage caused to United Nations vehicles while driving such vehicles—Policy of the Organization in this respect

Memorandum prepared for the Secretary of the Property Survey Board[75] *at the United Nations Office in Geneva*

1. The responsibility of a United Nations staff member for accidental damage to United Nations vehicles and, as the case may be, the amount for which he should be

[75] The Property Survey Board is a Secretariat board whose function is to advise the Director of General Services and the Controller on losses of United Nations property and disposal of surplus property.

considered financially responsible towards the Organization, are determined in the light of a legal opinion contained in a memorandum dated 17 October 1969, from the Legal Counsel to the Chairman of the Headquarters Property Survey Board, commenting on a draft text that attempted to establish assessment policy guide-lines. The draft was never finalized, but paragraphs 3-9 of the Legal Counsel's memorandum (which comment on Section VII of the draft) are very relevant to the subject in question. They read as follows:

"Section VII

"3. Section VII of the draft would, as we understand it, make a driver of a United Nations vehicle financially accountable, subject to certain limitations, for damage caused to the vehicle if it is damaged (*a*) while being used on official business as a result of gross negligence on the part of the driver, (*b*) while being used on official business as a result of negligence, but not gross negligence, on the part of the driver, and (*c*) while being used for a recreational purpose (a permissible use in certain missions) as a result of negligence, whether gross or not, on the part of the driver.

"4. A case of gross negligence in our opinion would be one involving an element of recklessness such as driving a vehicle at an obviously excessive speed or while intoxicated or in obvious breach of the rules of the road.

"5. To require a driver to be financially accountable in cases of the type referred to in (*a*) and (*c*) above would not appear to be unreasonable. It does not seem reasonable to us, however, that a United Nations driver should be made financially accountable in the type of case referred to in (*b*). It is usual for owners of vehicles to insure themselves against, among other risks, the risk of damage to their vehicles as a result of negligence on the part of the driver, whether the driver be the owner himself or someone driving on his behalf. An owner may of course find it more economical to be self-insured, namely, not to purchase insurance (and have an insurer bear the risk of damage) but to bear the risk himself. As you are aware, such is the case with the United Nations, which has decided that it is less expensive to be self-insured with respect to damage to its vehicles than to purchase insurance. In these circumstances it seems to us to be only equitable, if a United Nations vehicle is damaged while driven on official business in circumstances involving negligence but not gross negligence on its driver's part, that the Organization should meet resulting costs and not require the driver to bear such costs totally or in part.

"6. There is a further consideration which should also be taken into account in this connexion, namely, that if in such cases United Nations drivers are required to bear resulting costs even partially, they would in the performance of their duties be subject to a degree of financial risk to which other staff members are not exposed.

"7. We would not consider the imposition of a financial penalty in such cases as justifiable on the ground that the penalty may act as a deterrent against careless driving. In terms of Section III of the draft statement, in the event of an accident involving negligence on the part of a United Nations driver, the driver loses his entitlement to a safe driver's bonus for the car in question. He would also be open to administrative censure and perhaps to other non-financial administrative penalties as well. . . . It seems to us that these are in themselves significant deterrents. To impose an additional deterrent by way of a financial penalty seems to us to be excessive in cases where gross negligence is not found. If an additional deterrent is felt to be desirable, it should not in our opinion take the form of a financial penalty in view of the inconsistency that would exist between such a

financial penalty and the Organization's policy of self-insurance with respect to damage to its vehicles.

"8. It is our understanding that there are occasions in mission areas where staff members who are not full-time drivers find it necessary to drive themselves on official United Nations business. The imposition of a financial penalty on such staff members in cases not involving gross negligence on their part would seem to us to be even more unjustifiable than in cases involving full-time drivers.

"9. We would recommend for these reasons that the financial penalty proposed in Section VII of the draft statement not be applied in the type of case we have referred to in category (*b*) in paragraph 3 above; and that the provisions of Section VII of the draft statement be amended accordingly."

2. I would like to add, by way of clarification in relation to paragraph 9 of the memorandum, that determination of a staff member's financial responsibility for losses to the Organization should in no case be considered a "financial penalty". The assessments or "surcharges" as the Board may recommend under Financial Rule 110.15 (*b*)[76] are in the character of a recuperation of at least part of the losses incurred. One should therefore keep always in mind that these surcharges are not to be equated with the disciplinary measures provided for in chapter X of the Staff Rules.

6 October 1975

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26. Immunity of staff members and their immediate families from immigration restrictions and from exclusion and deportation proceedings under the Convention on the Privileges and Immunities of the United Nations, the Headquarters Agreement between the United Nations and the United States and the immigration law of the United States

Internal memorandum

1. This opinion deals with the visa status of two nationals of a Member State who were locally recruited and who both serve in the General Service category at Headquarters. Both hold probationary appointments. One entered the United States on a business visa (B-1) and the other entered the United States under a treaty-trader visa (E-1). Both currently hold G-4 visas, which were applied for by the United Nations on their behalf and which were summarily granted. Some time after the commencement of their appointments and the granting of their G-4 visas, both staff members applied under the appropriate staff rules and regulations to have members of their family join them and requested through the United Nations that those family members be granted G-4 visas. . . .

2. Under both the provisions of the Convention on the Privileges and Immunities of the United Nations[77] (hereafter referred to as the "Convention") and the Headquarters Agreement between the United Nations and the United States[78] (hereafter referred to as the "Headquarters Agreement"), immunity is granted to officials of the

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[76] Financial Rule 110.15 reads as follows:

"*Writing-off losses of property*

"(*a*) The Controller may, after full investigation in each case, authorize the writing-off of losses of United Nations property or such other adjustments of the records as will bring the balance shown by the record into conformity with the actual quantities.

"(*b*) Final determination as to all surcharges to be made against staff members or others as the result of losses will be made by the Controller."

[77] United Nations, *Treaty Series*, vol. 1, p. 15.

[78] *Ibid.*, vol. 11, p. 12.

United Nations in matters relating to immigration restriction and alien registration. Article V, section 18, of the Convention in part states:

"Officials of the United Nations shall:

". . .

"(*d*) Be immune, together with their spouses and relatives dependent on them, from immigration restrictions and alien registration; . . ."

Article IV, section 11 of the Headquarters Agreement states in its relevant part:

"The federal, state or local authorities of the United States shall not impose any impediments to transit to or from the headquarters district of: (1) representatives of Members or officials of the United Nations, . . . or the families of such representatives or officials."

Furthermore, article IV, section 13, states in part:

"(*a*) Laws and regulations in force in the United States regarding the entry of aliens shall not be applied in such manner as to interfere with the privileges referred to in Section 11. When visas are required for persons referred to in that section, they shall be granted without charge and as promptly as possible."

Sub-paragraph (*b*) (1) of section 13 further states that:

"No proceedings shall be instituted under such laws or regulations to require any such person to leave the United States except with the prior approval of the Secretary of State of the United States. Such approval shall be given only after consultation with the appropriate Member, in the case of a representative of a Member (or a member of his family), or with the Secretary-General.... in the case of any other person referred to in Section 11."

Under the Convention, the immunities granted to United Nations officials may be waived by the Secretary-General. Article V, section 20, states in relevant part:

"The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations . . ."

On the other hand, where a dispute arises in which the Secretary-General is not disposed to waive the immunity of staff members and in which the United Nations seeks an enforcement of the status granted such officials, it may resort to the dispute settlement provision of the Headquarters Agreement embodied in article VIII, section 21 (*a*), reading as follows:

"Any dispute between the United Nations and the United States concerning the interpretation or application of this agreement or any other supplemental agreement, which is not settled by negotiation or other agreed mode of settlement, shall be referred for final decision to a tribunal of three arbitrators, one to be named by the Secretary-General, one to be named by the Secretary of State of the United States, and the third to be chosen by the two, or, if they should fail to agree upon a third, then by the President of the International Court of Justice."

3. In addition to the Convention and Headquarters Agreement, United Nations officials are also given immunity from certain visa restrictions under Title 8 of the United States Code, which embodies the United States law regarding aliens and nationality; section 1102 provides that, as long as they continue in the nonimmigrant classes enumerated in that section,

"ineligibility to receive visas and exclusion or deportation of aliens shall not be construed to apply to non-immigrants . . . (3) within the classes described in paragraphs ... (15) (G) (iv) of section 1101 (*a*) of this title, except for those provisions relating to reasonable requirements of passports and visas as a means of identification and documentation necessary to establish their qualifications under such paragraphs . . .".

Section 1101 (*a*) (15) (G) (iv) in turn states that nonimmigrant aliens include "officers or employees of such international organizations, and the members of their immediate families". Therefore, it appears that under United States immigration law, neither section 1226 relating to the procedure for the exclusion of aliens, nor section 1251 relating to procedures for deportation of aliens may be applied to either staff members or their families where such individuals fall within the definition of section 1101 (*a*) (15) (G) (iv) and the protection afforded under section 1102 (3).

4. It is clear under the Convention, the Headquarters Agreement and the United States immigration law that (1) staff members holding G-4 visas and subject to the relevant provisions of immunity cannot be subjected to exclusion or deportation proceedings, and (2) the privileges and immunities granted those staff members are also extended to members of their families who, in turn, may not be lawfully refused G-4 visas and may not be lawfully excluded from the United States.

21 October 1975

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27. QUESTION WHETHER A UNITED NATIONS OFFICIAL MAY BE GRANTED SPECIAL LEAVE TO COMPLETE MILITARY SERVICE IN HIS COUNTRY OF ORIGIN, IN THE LIGHT OF THE RELEVANT PROVISIONS OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS AND OF APPENDIX C OF THE STAFF RULES

Internal memorandum

The Office of Legal Affairs has been requested to give its opinion regarding the applicable law relating to military service of a staff member who is a national of a Member State. The staff member has requested that he be allowed to take special leave from the Organization to complete such service.

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

2. Under section (*c*) of Appendix C of the Staff Rules, a staff member who has completed one year of satisfactory probationary service or who holds a permanent or regular appointment may, if called by a Member Government for military service, be granted special leave without pay by the Organization for the duration of that service. This is true even though section (*a*) of Appendix C recognizes that staff members who are nationals of those Member States having acceded to the Convention on the Privileges and Immunities of the United Nations are immune from such service. Section (1) of Appendix C furthermore states that the Secretary-General may apply the provisions of that Appendix where a staff member volunteers for military service or requests a waiver of his immunity under article V, section 18 (*c*) of the Convention.

3. The Secretary-General, therefore, has discretionary authority to grant special leave in the case of the staff member in question, even though the staff member is

exempt from national service obligation. The staff member may not waive his own immunity. Such immunity may be waived only by the Secretary-General in conformity with article V, section 20, of the Convention.

24 December 1975

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28. EXEMPTION FROM TAXATION OF SALARIES AND EMOLUMENTS OF UNITED NATIONS OFFICIALS BY VIRTUE OF RELEVANT PROVISIONS OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS AND APPLICABLE GENERAL ASSEMBLY RESOLUTIONS WITH PARTICULAR REFERENCE TO THE POSITION OF MEMBERS OF THE SECRETARIAT AT UNITED NATIONS HEADQUARTERS IN NEW YORK

Letter to a member of a Permanent Mission to the United Nations

I am instructed to reply to your letter dated 3 February 1975 concerning the exemption from taxation to which officials of the United Nations stationed in New York are entitled.

The tax status of United Nations staff members is governed by the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946. Article V, section 18, of the Convention provides, *inter alia*, as follows:

> "Section 18. Officials of the United Nations shall:
>
> "...
>
> "(*b*) Be exempt from taxation on the salaries and emoluments paid to them by the United Nations."

Article V, section 17, of the Convention specifies the categories of officials to which article V shall apply. It reads as follows:

> "Section 17. The Secretary-General will specify the categories of officials to which the provisions of this Article and Article VII shall apply. He shall submit these categories to the General Assembly. Thereafter these categories shall be communicated to the Governments of all Members. The names of the officials included in these categories shall from time to time be made known to the Governments of Members."

On 7 December 1946, the General Assembly adopted resolution 76 (I), entitled "Privileges and Immunities of the Staff of the Secretariat of the United Nations". In that resolution, the General Assembly approved

> "the granting of the privileges and immunities referred to in Articles V and VII of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946, to all members of the staff of the United Nations, with the exception of those who are recruited locally and are assigned to hourly rates".

The categories specified by General Assembly resolution 76 (I) have remained unchanged.

As regards members of the staff of the United Nations Development Programme stationed in your country, it would appear that their tax status is governed by article IX of the Standard Basic Agreement concerning Assistance concluded with UNDP. Although your country is not a party to the Convention on the Privileges and Immunities of the United Nations, the relevant provisions of article V of the Convention

apply by virtue of article IX, paragraph 1, of the Standard Basic Agreement concerning Assistance, reading as follows:

> "1. The Government shall apply to the United Nations and its organs, including the UNDP and United Nations subsidiary organs acting as UNDP Executing Agencies, their property, funds and assets, and to their officials, including the resident representative and other members of the UNDP mission in the country, the provisions of the Convention on the Privileges and Immunities of the United Nations."[79]

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

12 May 1975

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29. POLICY OF THE UNITED NATIONS REGARDING REQUESTS FROM GOVERNMENTAL AUTHORITIES FOR TESTIMONY OF STAFF MEMBERS NOT HAVING DIPLOMATIC STATUS

Cable prepared for the Liaison Office of the International Atomic Energy Agency at United Nations Headquarters

The policy of the United Nations regarding responses by staff members to inquiries from parliamentary bodies has not been formally articulated but is generally as follows:

1. If testimony is sought from a staff member not having diplomatic status vis-a-vis the authority concerned, there is immunity only concerning the work of the Organization and the staff member's duties therefor. The Organization will waive such immunity so as not to impede normal governmental processes but only if it deems it in its own interest to do so. In such case, it may also voluntarily offer testimony through an official, who may be sworn if necessary.

2. Any testimony given on the work of the Organization and the staff member's duties, whether offered voluntarily or pursuant to a waiver by the Organization of immunity against compelled responses, is subject to the direction

[79] See *Juridical Yearbook*, 1973, p. 25.

of the Organization, that is, the Organization can instruct the staff member as to what to say and what responses to refuse.

3. If the testimony does not involve any official duties, a staff member not having diplomatic status is not immune from compulsion to testify, and not prohibited from testifying either voluntarily or under compulsion. Such testimony is not subject to instructions from the Organization but should be consonant with the obligations of staff members in particular regulation 1.4 of Staff Regulation, reading as follows:

> "Members of the Secretariat shall conduct themselves at all times in a manner befitting their status as international civil servants. They shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations. They shall avoid any action and in particular any kind of public pronouncement which may adversely reflect on their status, or on the integrity, independence and impartiality which are required by that status. While they are not expected to give up their national sentiments or their political and religious convictions, they shall at all times bear in mind the reserve and tact incumbent upon them by reason of their international status."

2 December 1975

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30. LEGAL VALIDITY OF THE USE BY A STAFF MEMBER OF THE UNITED NATIONS OF A NAME OTHER THAN THAT ACQUIRED AT BIRTH IN THE LIGHT OF NEW YORK LAW WHICH AS THE LAW OF THE STAFF MEMBER'S RESIDENCE IS THE APPLICABLE LAW IN THIS MATTER

Memorandum to the Director, Division of Personnel Administration, Office of Personnel Services

We have been asked to state our opinion as to the legal validity of the use by an employee of the United Nations of a name other than that acquired at birth.

1. It is our understanding that this employee has over a substantial period of time used the name by which she prefers to be known. She originally applied for a position with the United Nations under that name. Furthermore, she received her security clearance through the United States Civil Service Commission, indicating clearly both her name of birth and the name by which she currently holds herself out. She holds a social security card and bank account in the name which she has adopted. Therefore, all indications are that she is currently known by only that name. In addition, we have no indication that the adoption of that name represents fraud, is an attempt to evade creditors or in any way prejudices the rights of others. Failing such indication, the legal presumption should be that she has assumed that name for valid personal reasons not intended to prejudice the rights of others.

2. The employee is a resident of the State of New York, and for purposes of determining the legal validity of her change of name, the United Nations should look to the law of her residence.

3. Under New York law, a citizen may change his name in one of two ways, either by petition to a court of competent jurisdiction under section 60 of the Civil Rights Law of New York or by function of the common law of the jurisdiction. A change of name under the common law is a right independent of any statutory right and does not require authorization by the courts. At common law, the employee is entitled to change her name to anything she may wish by simply using the name as her own over a period of time, absent of fraud or the prejudicing of the rights of others. See *Manor Homes, Inc.* v. *Sava*, 73 Misc. 2d 660, 342 N.Y.S. 2d 291 (Civ.Ct. Queens

Co., 1973); *Application of Middleton*, 60 Misc. 2d 1056, 304 N.Y.S. 2d 145 (Civ.Ct. N.Y. Co., 1969).

4. The employee has held the name she has adopted for a substantial period of time. There is no evidence or presumption that her change of name involves either fraud or prejudice to the rights of others. Therefore, at common law the name in question is not only a name which she uses but is legally her name as prescribed by the law of the state of her residence.

It is therefore the opinion of this Office that the employee's name consistent with her wishes and the law of New York State should be accepted. Of course, for administrative purposes and for purposes of continuity of employee records alone, your office may wish to make a note in its records of her former name as well as the name she has adopted.

3 June 1975

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31. REGISTRATION OF TREATIES WITH THE SECRETARIAT OF THE UNITED NATIONS UNDER ARTICLE 102 OF THE CHARTER—QUESTION WHETHER TERMINATED TREATIES SHOULD BE REGISTERED

Note verbale to the Permanent Representative of a Member State

1. The Secretary-General of the United Nations ... has the honour to acknowledge the receipt of the Permanent Representative's note transmitting additional documentation for the purpose of registration, under Article 102 of the Charter, of the Trade Agreement of 7 April 1975 between the Permanent Representative's country and [name of a Member State].

2. The above-mentioned Agreement was registered as of 17 June 1975.

3. On the same date the registration was also effected of the certified statement concerning the termination of the Trade and Economic Agreement of 7 June 1966 between the two countries, which was replaced by the Agreement of 7 April 1975.

4. Due note has been taken that the Permanent Representative's Government is of the view that the Understanding of 22 May 1974, which refers to the Special Accounts under the previous Agreement of 7 June 1966, need not be registered because the corresponding funds have to date been exhausted.

In this connection, it might be pertinent to point out that neither Article 102 of the Charter nor the General Assembly Regulations to give effect to Article 102 exclude the registration of agreements which have been terminated, and that such agreements have actually been registered (see for instance United Nations, *Treaty Series*, vol. 642, p. 246).

In addition to the general desirability of ensuring the completeness of the United Nations *Treaty Series*, there would seem to be two justifications for registering agreements already terminated:

(*a*) The first one is that an agreement, although no longer in force, may have created lasting legal situations, possibly leading to the invocation of the treaty before an organ of the United Nations—an invocation which would be prohibited by Article 102, paragraph 2, of the Charter, should the agreement not have been registered.

(*b*) The second reason is a broader one, linked to the general goal of Article 102 of the Charter, namely making international agreements public; that goal would clearly not be achieved if registration of agreements were to

be waived in consideration of the latter being of a short duration or having expired.

Consequently, should the Permanent Representative's Government wish it to be done, it would be quite feasible to effect registration of the Understanding of 22 May 1974.

6 October 1975

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32. DEPOSITARY FUNCTIONS OF THE SECRETARY-GENERAL—RULE THAT ANY ACT HAVING THE PURPOSE OF MODIFYING THE APPLICATION OF A TREATY MUST EMANATE FROM ONE OF THE AUTHORITIES EMPOWERED TO BIND THE STATE INTERNATIONALLY

Note verbale to the Permanent Representative of a Member State

...

9. It should be emphasized that the Secretary-General, in performing his depositary functions in respect of multilateral treaties, considers himself bound to respect the well-established international practice whereby acts having the purpose of modifying the application of a treaty must emanate from one of the three authorities empowered to bind the State internationally (Head of State, Head of Government, Minister for Foreign Affairs). When, for reasons which can be very varied but usually relate to the urgency of the formality, as is very often the case particularly where commodity agreements are concerned, the document does not bear the signature of one of those three authorities, the Secretary-General, while accepting deposit of the document, customarily requests the Government concerned to confirm the notification over the signature of one of the three authorities mentioned above.

10. This international practice is reflected in the Vienna Convention on the Law of Treaties, which, although it has not yet entered into force, is in large measure a codification of international custom. On this point, it follows from article 7, paragraph 2, of the Convention that representatives accredited to an international organization—i.e., in the present context, permanent representatives to the United Nations—are, in virtue of their functions and without having to produce full powers, considered as representing their State solely for the purpose of *adopting* a treaty between that State and the organization. This provision was reiterated and confirmed in article 12 of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character done at Vienna on 14 March 1975.[80] In the case of multilateral treaties in respect of which the Secretary-General performs depositary functions and thus acts on behalf of the contracting States and not in his capacity as chief administrative officer of the United Nations, such as the Coffee Agreement, only the three traditional authorities—Head of State, Head of Government and Minister for Foreign Affairs—are empowered to bind the State.

11. A recent example illustrates the soundness of this practice. The Secretary-General received for deposit a notification made by a Permanent Mission on behalf of its Government pursuant to article 1, section B (2), of the Convention relating to the Status of Refugees of 28 July 1951 (geographical extension of obligations under the Convention). As the notification was in the form of a note verbale from the Permanent Mission of the State concerned, the Secretary-General, while accepting deposit of it, requested the Permanent Mission to submit a document in good and due form in accordance with the practice described above. In a subsequent communication, the Permanent Mission informed the Secretary-General that the formalities

[87] Reproduced on p. 87 of this *Yearbook*.

required in order to make a notification in good and due form had not yet been completed and that the initial notification by the Permanent Mission should therefore be considered withdrawn (see circular C.N. 105.1975. TREATIES-1 dated 25 April 1975).

12. In conclusion, the Secretary-General considers it desirable that any instrument, notification or other document having the purpose of modifying the application of a treaty in respect of which he performs depositary functions should bear the signature of the Minister for Foreign Affairs or, if preferred, of the Head of State or the Head of Government. Notifications which do not modify the legal effects of the treaty—such as the designation of laboratories, of administrative or judicial authorities responsible for the administration of certain provisions of the treaty, etc.—could, however, be made over the signature of the permanent representative of the permanent mission. This procedure seems most likely, in the present state of international law, to ensure the certainty of international commitments by eliminating any doubt as to the extent of the mutual rights and obligations of States parties; it would therefore seem to be in the interest of all States.

17 June 1975

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33. PARTICIPATION OF BELGIUM AND LUXEMBOURG IN MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, IN THE LIGHT OF THEIR MEMBERSHIP IN THE BELGO-LUXEMBOURG ECONOMIC UNION[81]

Internal note

1. The question of the participation of Belgium and Luxembourg in multilateral treaties deposited with the Secretary-General in the light of their membership in the Belgo-Luxembourg Economic Union is related to the problem of the representation of a sovereign State by another in certain fields of international treaty relations, which was briefly discussed in the *Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements* (ST/LEG/7, paras. 142 and 143).[82]

The *Summary* gives the example of Switzerland's instrument of accession to the Protocol on narcotic drugs of 11 December 1946, which specified that "the present declaration of accession is also valid for the Principality of Liechtenstein" (instrument deposited on 25 September 1947). It gives the further example of a notification—again by Switzerland—stating, under reference to article II of the Agreement providing for the provisional application of the Draft International Customs Conventions on Touring, on Commercial Road Vehicles and on the International Transport of Goods by Road, dated 16 June 1949 (Agreement signed on behalf of Switzerland on 16 June 1949), that the provisions of the draft conventions would also apply to the Principality of Liechtenstein, as the Principality formed part of the Customs Territory of the Swiss Confederation (notification received by the Secretary-General on 6 December 1949).

2. The question may present itself in two forms:

(*a*) A State acts on its own behalf and also on behalf of one or more other States by virtue of the powers for so acting which it possesses under an agreement concluded between that State and the other State or States—as, for example, when Belgium ratifies a multilateral treaty on its own behalf

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[81] See also *Juridical Yearbook*, 1964, pp. 241-244.

[82] A distinction must be made between the question of the representation of one State by another and the question of "multiple representation"—i.e., the representation of two or more States by one delegation or one individual duly empowered by all the States represented.

and on behalf of Luxembourg by virtue of the relevant provisions of the Convention between Belgium and Luxembourg, for the establishment of a Belgo-Luxembourg Economic Union;

(*b*) A State acts directly on behalf of an entity (an economic union, an intergovernmental organization, etc.) although the participation of the entity as such is not provided for in the agreement; in this case, the Secretary-General will treat any reference to the entity as a reference to its constituent States (provided, of course, that the States constituting the entity are qualified individually to participate in the agreement, and the outcome is the same as in case (*a*) above.[83]

3. It should also be noted that the question may arise at any stage in the elaboration or adoption of a multilateral treaty or during its lifetime—for example, when a conference of plenipotentiaries is being convened and it must be decided who is to be invited, or in connexion with participation in the proceedings of the conference (taking of decisions and voting rights), or in such matters as signature and ratification.

4. The main problem, however, is to what extent the Secretary-General, as depositary, must accept formal acts emanating from the Government of a State which declares that it represents one or more other States by virtue of an agreement between the latter and the State in question.

...

6. The Secretary-General received for deposit on behalf of both the countries concerned Switzerland's instrument of accession to the Protocol of 11 December 1946 amending various agreements on narcotic drugs, which instrument was submitted as being valid also for Liechtenstein (cf. para. 1 above). It is true that the Government of the Netherlands and the Secretary-General of the League of Nations, the depositaries of the original agreements, had themselves accepted instruments issued by the Swiss Government stating that, under the terms of the arrangements concluded between Liechtenstein and Switzerland in 1929 and 1935 (in application of the Customs Union Treaty concluded on 29 March 1923), Liechtenstein would participate, so long as the said Treaty remained in force, in the international conventions which had been or might thereafter be concluded in the matter of narcotic drugs, it being neither necessary nor advisable for that country to accede to them separately. However, while Liechtenstein appears on the League of Nations list of States applying the agreements in question, no date of accession is given after its name; the declaration by Switzerland was simply reproduced in a foot-note.[84] The accession to the Protocol of 11 December 1946, notification of which was made on behalf of Switzerland and Liechtenstein represents a new departure, in that what is

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[83] Usually, the Government which executes the formal act (the most frequent cases by far are ones involving the Government of Belgium) declares that it is acting either on behalf of the entity itself or on behalf of the constituent States, without apparently attaching any particular legal significance to the choice of one formula rather than the other. If the participation of the entity as such is provided for by the competent forums or by the terms of the agreement, the Secretary-General will, of course, have no difficulty in accepting any formal acts pertaining to the elaboration and implementation of the multilateral treaty executed by the State to which the treaty constituting the economic union or the organization assigned the function of representation, provided that, where necessary, the latter treaty has been registered in accordance with Article 102 of the Charter.

[84] See "twenty-first list" of the League of Nations, *Official Journal, Special Supplement No. 193*, p. 120.

involved here is not simply Liechtenstein's participation in an agreement applied by Switzerland but rather a formal accession by both countries.

7. At the United Nations Coffee Conference in 1962, Belgium was allowed to participate as the representative of the Belgo-Luxembourg Economic Union (in other words, of Belgium and Luxembourg). That decision, however, was clearly an exception, since it was not repeated the following year at the United Nations Olive Oil Conference. It should be noted, moreover, that the accession of Belgium and Luxembourg to the 1962 Coffee Agreement was confirmed in separate documents issued by Belgium and Luxembourg.[85]

8. In the case of the 1968 Coffee Agreement, the instrument of accession issued by the Belgian Government on its own behalf and on behalf of the Luxembourg Government under reference to the relevant provisions of the Belgo-Luxembourg Economic Union Convention was accepted without Luxembourg's being required to furnish separate powers (instrument deposited on 31 December 1969). Nor were such powers required of Luxembourg when the Belgian Government, in 1973, accepted on its own behalf and on behalf of the Luxembourg Government the extension of the same 1968 Coffee Agreement (in view of the procedure followed for the accession of the two countries to the 1968 Agreement itself). Similarly, the Protocol for the continuation in force of the International Coffee Agreement, 1968, as extended, was signed by Belgium on behalf of Luxembourg on the strength of full powers issued by the Belgian Government on behalf of Belgium and the Grand Duchy of Luxembourg pursuant to article 31 of the Consolidated Convention instituting the Belgo-Luxembourg Economic Union.

9. The 1972 Cocoa Agreement is a hybrid case. The Agreement was signed for Belgium and Luxembourg on 1 March 1973 by a plenipotentiary appointed by the Belgian Government, and no confirmation was required of the Luxembourg Government at that time. However, the notification of intention to ratify the Agreement made on 18 June 1973 by Belgium "on behalf of the Belgo-Luxembourg Economic Union" was followed first by a telegram of confirmation from the Minister for Foreign Affairs of Luxembourg, received on 18 June 1973 and then by a note verbale from the Permanent Representative of Luxembourg, received on 27 June 1973. Finally, on 28 June 1973, the Secretariat received from the Deputy Permanent Representative of Belgium a notification of provisional application of the Agreement, again "on behalf of the Belgo-Luxembourg Economic Union", the notification being deposited on behalf of Belgium and Luxembourg.

10. Where principles are concerned, these would appear to be two vital considerations:

(*a*) Economic unions and treaties of union between two or more States are a fact of international treaty relations and cannot be ignored by the Secretary-General in so far as they are an expression of State sovereignty;

(*b*) On the other hand, the Secretary-General, as the depositary of a multilateral treaty, acts on behalf of the parties to the treaty. This requires him, among other things, to ensure that the various formal acts provided for in the treaty are performed as precisely as possible, so that there may be no doubt in the minds of the parties as to the existence and scope of their mutual rights and obligations.

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[85] Communications received by the Secretary-General on 27 July and 28 September 1964, respectively; see *Multilateral Treaties in respect of Which the Secretary-General Performs Depositary Functions* (ST/LEG/SER.D/8; United Nations publication, Sales No. E.75.V.9), p. 408, foot-note 2.

11. It seldom happens that treaties of economic union contain clauses relating to the conclusion of and participation in "common" treaties of such clarity as to preclude any doubt concerning their scope. To cite only the case of the Belgo-Luxembourg Economic Union, article 31, paragraph 1, of the original 1921 Convention (subsequently revised and "consolidated") does provide that "Treaties and agreements relating to tariffs and trade, and international payment agreements relating to external trade, shall be common" (see United Nations, *Treaty Series*, vol. 547, p. 157); but article 31 also provides that treaties of that kind "shall be concluded by Belgium on behalf of the union, subject to the right of the Luxembourg Government to sign such treaties or agreements jointly with the Belgian Government", and that "No such treaty or agreement may be concluded, modified or denounced without the Luxembourg Government's having been consulted." This means that, when the depositary accepts deposit of an instrument issued by the Belgian Government which is presented as also binding the Luxembourg Government without requiring a document of confirmation from the latter, he is tacitly accepting that the relevant provisions of the treaty concluded between the two countries have been complied with. Yet it is open to question whether the depositary is qualified to make such a judgement. Moreover—and although in the case of the Belgo-Luxembourg Economic Union the likelihood of any difficulties is very remote—it seems extremely dangerous in principle to treat as binding on a Government an act for which it has not itself explicitly accepted responsibility. The certainty of international commitments is based largely on the clear and direct expression of the will of Governments.

8 May 1975

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34. DEPOSITARY PRACTICE OF THE SECRETARY-GENERAL REGARDING THE PARTICIPATION OF NEW STATES IN TREATIES APPLIED TO THEIR TERRITORY PRIOR TO INDEPENDENCE—REQUIREMENT THAT A DECISION OF SUCCESSION BE COMMUNICATED TO THE DEPOSITARY IN THE FORM OF A NOTIFICATION EMANATING FROM THE HEAD OF STATE, HEAD OF GOVERNMENT OR MINISTER FOR FOREIGN AFFAIRS

Letter to the Secretary, International Narcotics Control Board

This is a reply to your letter of 8 July 1975 concerning the status of the Single Convention on Narcotic Drugs, 1961.[86]

2. You mention that there seems to be a discrepancy between a publication of the Government of the United States, which shows Barbados, Botswana, The Gambia, Guyana, Nauru and Swaziland as being party to that Convention,[87] and our annual publication *Multilateral Treaties in respect of which the Secretary-General performs depositary functions*, which does not list those States.

3. It appears from the information obtained by your office from the United States Mission at Geneva that the inclusion of the six States concerned in the above-mentioned publication is based either on "declarations of principles" communicated by the Governments of those States to the Secretary-General, or on the provisions of "devolution agreements" concluded between the States in question and the State previously responsible for their international relations, taking into account that the Single Convention on Narcotic Drugs had been made applicable to the territory of the former prior to independence.

4. The listing of the six States concerned in the United States publication seems to reflect differences in the respective depositary practices of the Secretary-

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[86] United Nations, *Treaty Series*, vol. 520, p. 151.

[87] Treaties in force, *A list of Treaties and Other International Agreements of the United States in Force on January 1, 1975*, Department of State, United States of America.

General and of the Government of the United States with respect to the treatment of "declarations of principles" and provisions of a general nature regarding the position of new States in respect of treaties applied to their territory prior to independence.

5. As you know, a decision of succession results in having the succeeding State become bound, in its own name, by the treaty to which that decision applies, with exactly the same rights and obligations as if that State had ratified or acceded to, or otherwise accepted, the treaty. Consequently, it has always been the position of the Secretary-General, in his capacity as the depositary, to record a succeeding State as a party to a given treaty solely on the basis of a formal document similar to instruments of ratification, accession, etc., that is, a notification emanating from the Head of State, the Head of Government or the Minister for Foreign Affairs, which should specify the treaty by which the State concerned recognizes itself to be bound. Such notifications are deposited with the Secretary-General and the State concerned is henceforth officially listed in the records of the treaty as a party thereto.

6. The general declarations on the basis of which five of the six States referred to above were listed in the United States publication are not sufficiently authoritative, in our view, to have the States in question listed as parties in the official records of the Convention. In essence, those declarations indicated that a review of the treaties applied to the territory of the State before accession to independence was in progress and that the State concerned would specify in due course which treaties should continue to be considered as binding and which ones should be considered as having lapsed. Those declarations also mentioned that pending completion of the review it should be "presumed" (sometimes, "legally presumed") that each treaty had been suceeded to by the State concerned, and that action should be based on that presumption. However, such a "presumption", while it could be used as a basis for practical action, could certainly not be taken as a formal acknowledgement of the obligations contained in a given treaty, since it could be unilaterally reversed at any time in respect of any treaty. Finally, it should be emphasized that such "declarations of principles" are not sent to the Secretary-General in his capacity as depositary of multilateral treaties, but for the purpose of circulation to Member States of the United Nations and the specialized agencies.

7. The same reasoning applies to general provisions of succession contained in "devolution agreements" concluded between the new States and the States formerly responsible for their international relations. Here again, the very general wording does not allow for a formal action to be taken by the Secretary-General as the depositary of an individual treaty. To quote the exchange of letters of 20 June 1966 between the United Kingdom and The Gambia, for instance: "... it is the understanding of the (two Governments) that the Government of The Gambia are in agreement (i) that all obligations and responsibilities of the Government of the United Kingdom which arose from any valid instrument applying to The Gambia immediately before the 18th of February, 1965, continued to apply to The Gambia and were assumed by the Government of The Gambia as from that date ...".

Apart from the difficulty just mentioned, it should be stressed that participation in a multilateral treaty is normally the result of procedures specifically provided by the treaty and effected with the parties to that treaty or with the depositary appointed by them. A change in participation entails a change in the obligations and rights of all parties to the treaty, and it cannot therefore result from the provisions of another treaty, by virtue of the rule *Pacta tertiis nec nocent nec prosunt* which has been codified as article 34 of the Vienna Convention on the Law of Treaties.

In the case of The Gambia, as a matter of fact, you will note that specific notifications of succession were transmitted to the Secretary-General after the conclusion

of the exchange of letters of 20 June 1966: such notifications were, of course, deposited with the Secretary-General, and The Gambia is listed in the official records as a party to the treaties concerned. No such notification, however, has been received from The Gambia in respect of the Single Convention on Narcotic Drugs.

24 July 1975

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35. STATUS IN REGARD TO THE INTERNATIONAL COCOA AGREEMENT 1972 OF A NEWLY INDEPENDENT STATE TO WHOSE TERRITORY THE AGREEMENT HAD BEEN EXTENDED PRIOR TO INDEPENDENCE (1) DURING THE NINETY-DAY PERIOD WITHIN WHICH SUCH A STATE MAY NOTIFY THE SECRETARY-GENERAL THAT IT ASSUMES THE RIGHTS AND OBLIGATIONS OF A CONTRACTING PARTY; OR (2) AFTER THIS PERIOD HAS EXPIRED WITHOUT SUCH A NOTIFICATION HAVING BEEN MADE

Letter to the Secretary of the Council, International Cocoa Organization

1. I refer to your letter concerning the status, in regard to the International Cocoa Agreement 1972,[88] of [name of a dependent territory to which the Agreement was extended under article 70 (1) of the Agreement], once the territory attains independence.

2. You raised two questions:

(1) What would be the status of the newly independent State in regard to the Agreement from the date of its independence until the date when it has notified the Secretary-General, in accordance with article 70 (4), that it has assumed the rights and obligations of a Contracting Party?

(2) What would be the legal position if at the expiration of the ninety-day period provided for by article 70 (4), the newly independent State had not made the notification?

3. Since our exchanges on the subject, these questions have been settled in a way, because the State in question has notified the Secretary-General, immediately upon independence, that it had assumed the rights and obligations of a Contracting Party to the Agreement. However, the same situation could arise in connexion with another territory, and therefore our comments in this regard might still be useful.

4. The difficulty, as we see it, results from the ambiguous nature of the notification provided for by article 70 (4) of the present Agreement:[89] while its very terms suggest that it is much in the nature of a standard notification of succession, giving any retroactive effect thereto would seem to run counter to the provision in the same article 70 (4), to the effect that the notifying State "shall, as from the date of such notification, be a Contracting Party to this Agreement". Also, retroactive effect could hardly be reconciled with various other provisions in the Agreement which imply that the membership of the International Cocoa Organization be known with certainty at all times.

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[88] TD/COCOA.3/9.

[89] Article 70 (4) reads as follows:

"(4) When a territory to which this Agreement has been extended under paragraph 1 subsequently attains independence, the Government of that territory may within 90 days after the attainment of independence, declare by notification to the Secretary-General of the United Nations, that it has assumed the rights and obligations of a Contracting Party to this Agreement. It shall, as from the date of such notification, be a Contracting Party to this Agreement. If such a Party is an exporting member and is not listed in Annex A or Annex C the Council shall, as appropriate, establish a basic quota for it which shall be deemed to be listed in Annex A. If such Party is listed in Annex A, the basic quota specified therein shall be the basic quota for that Party."

5. In order to avoid a similar difficulty in the case of the 1975 Cocoa Agreement, we have proposed, through our Legal Liaison Officer in Geneva, to make present paragraph 4 into sub-paragraph (*a*), and to add a new paragraph (*b*) along the following lines:

> "(*b*) The Government of a new State which intends to make a notification under the preceding paragraph but which has not yet been able to complete the procedure necessary to enable it to do so may notify the Secretary-General of the United Nations that it will apply this Agreement provisionally. Such a Government shall be a provisional member of the Organization until it makes its notification under the preceding paragraph or until the expiry of the 90-day period referred to therein, whichever is earlier."

Thus a new State would not be treated as a party to the Agreement or a member of the Organization until it had effected one of the two notifications provided for by the new article 70 (4). A new State which had made a notification under article 70 (4)(*b*) would cease to be a provisional member of the Organization if, at the expiry of a 90-day period from the date of independence, it had not effected the formal notification provided for by the new article 70 (4)(*a*).[90]

6. We hope that no additional difficulties of that kind will be experienced in connexion with the 1972 Agreement. Should it be the case however, the Secretary-General, as the depositary, would take note of the decisions that the International Cocoa Council, which is responsible for the interpretation of the Agreement under article 61 thereof, may adopt. A decision such as the one that you mentioned, to the effect that a former dependent territory could be granted interim membership in the International Cocoa Organization, pending a formal notification by that territory that it has assumed the rights and obligations of a Contracting Party to the Agreement, would appear consistent with the powers of the Council. As we pointed out, there could be difficulties in accepting as a member of the Organization a State which has not yet accepted the obligations of the Agreement. We agree, however, that such a decision may constitute the best available solution on the practical plane; however, in order to avoid a controversy, such a decision should be taken without negative vote.

17 October 1975

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36. PARTICIPATION IN THE INTERNATIONAL COFFEE AGREEMENT 1968—POSITION OF THE SECRETARY-GENERAL, AS DEPOSITARY OF THE AGREEMENT, WITH RESPECT TO ENTITIES THE STATUS OF WHICH IS UNCLEAR

Cable to the Executive Director, International Coffee Organization

In response to separate requests from two national liberation movements, addressed to the Secretary-General in his capacity as depositary of the International Coffee Agreement,[91] with regard to membership in the International Coffee Organization, this office has provided the Secretary-General of the United Nations with the following advice:

1. Membership in the International Coffee Organization and other matters relating to the Organization are governed by the provisions of the International Coffee

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[90] In accordance with this proposal, an additional paragraph 5 along the lines of the text quoted above has been inserted in the relevant article (article 71) of the International Cocoa Agreement 1975.

[91] United Nations, *Treaty Series*, vol. 647, p. 3.

Agreement 1968, as extended.[92] Aside from the depositary functions which he exercises with respect to the Agreement, the Secretary-General has no authority with respect to the Agreement of the Organization.

2. Article 3 of the Agreement provides for membership in the Organization of Contracting Parties and their dependent territories; where a dependent territory achieves independence, article 65[93] of the Agreement provides for the procedural steps to be followed in order for the Government of such a territory to assume the rights and obligations of a Contracting Party.

3. In the absence of recognition accorded by the members of the international community, that is to say action taken by a political organ of the United Nations or one of the specialized agencies, the Secretary-General has no authority to grant recognition to a government. Once such recognition is accorded by the members of the international community, however, the Secretary-General would, in accordance with the provisions of article 65 of the Agreement, fulfil his depositary functions.

3 December 1975

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37. DEPOSITARY PRACTICE OF THE SECRETARY-GENERAL WHEN HE RECEIVES, IN CONNEXION WITH A MULTILATERAL TREATY NOT CONTAINING A RESERVATIONS CLAUSE, AN INSTRUMENT WHICH INCLUDES RESERVATIONS

Letter to the Director, Office of International Standards and Legal Affairs, United Nations Educational, Scientific and Cultural Organization

1. I have the honour to refer to your recent telex message concerning the practice of the Secretary-General as depositary of multilateral treaties when he receives, in connexion with a multilateral treaty not containing a reservations clause, an instrument which includes reservations.

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[92] The International Coffee Agreement 1968, which was to expire on 30 September 1973, (1) was extended until 30 September 1975 with modifications by resolution No. 264 of the International Coffee Council approved on 14 April 1973, and (2) was further extended until 30 September 1976. A new Agreement has been concluded on 30 December 1975.

[93] Article 65 of the International Coffee Agreement 1968, as extended, reads as follows:

"*Notifications in respect of Dependent Territories*

"(1) Any Government may, at the time of deposit of an instrument of acceptance or accession, or at any time thereafter, by notification to the Secretary-General of the United Nations, declare that the extended Agreement shall apply to any of the territories for the international relations of which it is responsible and the extended Agreement shall apply to the territories named therein from the date of such notification.

"(2) Any Contracting Party which desires to exercise its rights under Article 4 in respect of any of its dependent territories, or which desires to authorize one of its dependent territories to become part of a Member Group formed under Article 5 or 6, may do so by making a notification to that effect to the Secretary-General of the United Nations, either at the time of deposit of its instrument of acceptance or accession, or at any later time.

"(3) Any Contracting Party which has made a declaration under paragraph (1) of this Article may at any time thereafter, by notification to the Secretary-General of the United Nations, declare that the Agreement shall cease to extend to the territory named in the notification and the Agreement shall cease to extend to such territory from the date of such notification.

"(4) The Government of a territory to which the Agreement has been extended under paragraph (1) of this Article and which has subsequently become independent may, within 90 days after the attainment of independence, declare by notification to the Secretary-General of the United Nations that it has assumed the rights and obligations of a Contracting Party to the Agreement. It shall, as from the date of such notification, become a party to the Agreement."

You ask in particular whether this practice, as described in the report of the Secretary-General dated 29 January 1964, which was issued as document A/5687,[94] has been modified since the adoption of the 1969 Vienna Convention on the Law of Treaties in order to take account of the rules contained in that Convention.

2. I confirm my reply by telegram of 28 August informing you that there has been no major change in this practice since resolution 1452 B (XIV) of 7 December 1959, which contains the most recent instructions of the General Assembly on the subject. As you know, the General Assembly, in that resolution, requested the Secretary-General to apply to all multilateral treaties of which he is the depositary the rules laid down in resolution 598 (VI) of 12 January 1952; according to the latter resolution, if reservations were formulated in relation to a treaty not containing any clauses on the subject the Secretary-General was to communicate the text of the reservations to all States concerned, leaving it to each State to draw legal consequences from such communications.

3. In performing his depositary functions, the Secretary-General is bound by the clauses of each treaty, by the decisions of the parties concerned and, failing these, by the instructions of the General Assembly. The Convention on the Law of Treaties (which in any event is not yet in force) is an instrument apart, the principles of which are not automatically applicable to the activities of the Secretary-General as depositary. The Secretary-General does not believe that he has any authority, in the absence of new instructions from the General Assembly, to adjust his practice to Vienna Convention rules which would be contrary to his present instructions.

4. The main difference between the present practice of the Secretary-General with regard to reservations and the rules of the Vienna Convention on the Law of Treaties concerns the time factor for implied acceptance of reservations. On this point, article 20, paragraph 5, of the Convention provides that, unless there are clauses to the contrary in the treaty, a reservation "is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of 12 months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later". In accordance with the General Assembly's instructions, the practice of the Secretary-General does not at present allow for any time factor with regard to tacit acceptance.

5. Since 1959, however, the Secretary-General has had occasion to modify his practice on some points not covered by the General Assembly's instructions. For instance, in the case of new reservations formulated by a State upon succession to treaties which were applicable to its territory prior to independence, it has become the custom to accept the reservations in so far as they would have been permissible upon ratification or accession and to treat them, as regards the date of their entry into effect, as though they had been formulated upon ratification or accession (this means, in particular, that the newly formulated reservations will take effect only on the expiry of the period, if any, specified by the agreement for the entry into force of ratifications, accessions, etc.). This practice has not met with any objections by the States concerned; I would refer you in this connexion to the commentaries in the report of the International Law Commission on the work of its twenty-fourth session.[95]

2 September 1975

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[94] Reproduced in the *Yearbook of the International Law Commission, 1965*, vol. II, p. 74.

[95] *Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 10* (A/8710/Rev.1), p. 42.

38. International Covenant on Economic, Social and Cultural Rights[96]—Fulfilment of the conditions provided for by article 27 (1) of the Covenant for the purpose of its entry into force

Communication sent to all States entitled to become parties to the aforementioned instrument[97]

I have the honour, upon instructions from the Secretary-General, to inform you that, on 3 October 1975, the instruments of ratification by the Government of Jamaica of the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the Optional Protocol to the International Covenant on Civil and Political Rights, all opened for signature at New York on 19 December 1966, were deposited with the Secretary-General.

The ratification by the Government of Jamaica of the International Covenant on Economic, Social and Cultural Rights has brought to 35 the number of instruments of ratification and accession deposited with the Secretary-General in so far as concerns the said Covenant, and the conditions provided for by article 27 (1) of the latter for the purpose of its entry into force have consequently been fulfilled.

It should be noted, however, that several of the 35 instruments thus deposited with the Secretary-General in respect of that Covenant were accompanied with reservations or declarations that were communicated in due course to the States concerned by means of circular letters [see the Secretariat publication entitled *Multilateral Treaties in respect of which the Secretary-General performs depositary functions—List of Signatures, Ratifications, Accessions etc. as at 31 December 1974* (doc. ST/LEG/SER. D/8), where all such reservations and declarations that were made before 1 January 1975 are also reproduced]. Among the above-mentioned reservations three drew objections from a signatory State (see circular letters C.N.66.1969.TREATIES-6 of 7 May 1969, C.N.134.1969.TREATIES-8 of 7 August 1969, C.N.82.1970.TREATIES-6 of 1 June 1970, C.N.107.1970.TREATIES-8 of 29 July 1970, C.N.13.1971.TREATIES-1 of 18 February 1971 and C.N.47.1971.TREATIES-2 of 15 April 1971: the reservations and objections in question also appear in the above-mentioned Secretariat publication).

In this connexion, it will be recalled that, by resolutions 598 (VI) and 1452 B (XIV), the General Assembly instructed the Secretary-General not to pass, in the exercise of his functions as depositary, on the legal effects of documents containing reservations or objections, and to leave it to each State to draw legal consequences from such communications.

It may be assumed that, without prejudice to the position which they may adopt concerning the application of the Covenant as between themselves and each of the reserving States, the intention of the States concerned is to have all the 35 instruments deposited with the Secretary-General as at 3 October 1975 be taken into account for the purpose of determining the date of entry into force of the Covenant: reference is made in this regard to the Convention of 29 April 1958 on the High Seas, the entry into force of which raised a similar problem (see the Secretary-General's report (A/5687) entitled "Depositary Practice in relation to Reservations", Part II, paragraphs 31 to 33, in *Yearbook of the International Law Commission, 1965*, Vol. II, p. 103).

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[96] Opened for signature at New York on 19 December 1966. For the text see *Juridical Yearbook*, 1966, p. 170.

[97] Under article 26, participation in the Covenant is open to any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the ICJ and by any other State which has been invited by the General Assembly of the United Nations to become a party to the Covenant.

Accordingly, the Covenant would enter into force three months after the date of the deposit of the instrument of ratification by Jamaica, that is to say on 3 January 1976. In the absence of a notification to the contrary by the Contracting States within 90 days from the date of this letter, it will be the Secretary-General's understanding that those States are in agreement with the above.[98]

3 October 1975

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39. RESERVATIONS OR DECLARATIONS MADE BY STATES AT THE TIME OF SIGNING, RATIFYING OR ACCEDING TO MULTILATERAL CONVENTIONS IN RESPECT OF WHICH THE SECRETARY-GENERAL PERFORMS DEPOSITARY FUNCTIONS—PRACTICE FOLLOWED BY THE DEPOSITARY REGARDING COMMUNICATIONS THE NATURE OF WHICH IS UNCLEAR, IN THE CASE OF CONVENTIONS PROVIDING FOR A SPECIFIC PROCEDURE TO BE APPLIED IN RESPECT OF RESERVATIONS

Memorandum to the Deputy Director, Division of Human Rights

. . .

Your memorandum concerning communications made by States when signing, ratifying of acceding to the International Convention on the Elimination of All Forms of Racial Discrimination[99] raises general questions regarding the manner by which the Secretary-General in his capacity as the depositary of an international agreement ascertains the intent of the government concerned as to the nature of a communication (reservation or declaration), and the possible legal effects of a mere declaration or statement of interpretation on the obligations of the State concerned with respect to the Convention.

6. Concerning the first part of that question, I would like to refer you to the report prepared by the Secretary-General, pursuant to General Assembly resolution 1452B (XIV), on the subject of the depositary practice in relation to reservations (document A/5687, reproduced in the *Yearbook of the International Law Commission*, 1965, vol. II, p. 74), and more specifically to Part II, paragraphs 1 to 5, of that report. As you will see, the Secretary-General in his capacity as the depositary of an international agreement, acts solely, under the General Assembly directives, as the representative of the parties. When a treaty—for instance, the Convention on the Elimination of All Forms of Racial Discrimination—provides for a specific procedure to be applied in respect of reservations, the Secretary-General has of course to determine, at least tentatively, whether the statement would result in expanding or diminishing the scope of the treaty, in which case it should be regarded as a reservation. To that end, the Secretary-General will not necessarily abide by the description given by the State concerned: he may have to explore the substance of the matter and ask for clarifications from the Government. Assuming a doubt remains even after such clarifications, he may seek from the Government an additional statement to the effect that the declaration does not purport to modify the application of the treaty: the latter statement will be communicated to the other States concerned together with the first one, which will then not be treated as a reservation. On the other hand, it has happened that a statement described by a Government as a "reservation" appeared to constitute in fact a mere declaration not modifying the scope of the treaty, and that it was communicated as such to the States concerned after consultation with the declaring State.

7. In the case of the Convention on the Elimination of All Forms of Racial

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[98] The Covenant entered into force on 3 January 1976.

[99] United Nations, *Treaty Series*, vol. 660, p. 195; also reproduced in the *Juridical Yearbook*, 1965, p. 63.

Discrimination, the circular letters by which the Secretary-General informed the States entitled to become parties to the Convention of a ratification or accession accompanied by a reservation did not include the date of entry into force of the Convention with respect to the reserving State until the expiry of the ninety-day period provided for by article 20 of the Convention for the purpose of formulating objections to the reservations. After the expiry of the ninety-day period, another circular letter would be sent to the States concerned to inform them of the entry into force of the Convention in respect of the reserving State.

8. As to the second aspect of the general question raised in your memorandum, i.e. the procedure applied by the Secretary-General to declarations that are not deemed to constitute reservations, and the possible legal effects of such declarations, it will be noted that all such declarations were communicated by circular letters to the States entitled to become parties to the Convention together with the ratifications and accessions to which they were appended. The date of entry into force of the Convention with respect to the declaring State was, of course, indicated in the circular letter. Finally, declarations other than reservations should be deemed to be without legal effect on the obligations of the declaring State under the Convention, since they would otherwise have to be considered as reservations.

23 July 1975

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

1. WORLD HEALTH ORGANIZATION

ATTACHMENT OF TERMINAL EMOLUMENTS OF A STAFF MEMBER

Memorandum to the Chief of Administration and Finance of a field programme issued by the Service for Constitutional and Legal Matters

With reference to your memorandum of 18 August 1975, concerning the "saisie-arrêt" ordered by a court at the request of a creditor of Mr. X, I should like to advise you that the Organization enjoys immunity from every form of legal process under Sections 4 and 5 of the Convention on the Privileges and Immunities of the Specialized Agencies[100] to which the Government concerned has acceded and which reads as follows:

"Section 4

"The specialized agencies, their property and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case they have expressly waived their immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.

"Section 5

"The premises of the specialized agencies shall be inviolable. The property and assets of the specialized agencies, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action."

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[100] United Nations, *Treaty Series*, vol. 33, p. 261.

The immunities granted by these clauses have consistently been interpreted both by the organizations of the United Nations system and by the courts of various countries, as preventing the issue of a garnishee order or "saisie-arrêt" against an Organization in respect of the salary to be paid to a staff member who has incurred a private debt (see *Yearbook of the International Law Commission, 1967*, Vol. II, pp. 223-226 and 303).

On the other hand, it has been recognized that this interpretation, the essence of which is the maintenance of freedom of the Organization enjoying the immunity, does not imply that the Organization may not itself decide to take part in such garnishee proceedings, in particular if it considers that the requirements of justice so demand, but only that the determination in each case is one to be made by the Organization itself (*ibid.*, p. 224, para. 76).

Since the present case might well qualify for this course of action, I would suggest that the WHO Representative inform the Foreign Ministry that the Organization, while generally asserting its immunity from proceedings of this nature, has decided on a voluntary basis to refrain for the moment from paying over to the former staff member his terminal emoluments.

The Organization would make its decision as to whether payment should be made to the creditor or to the former staff member as soon as the former's claim has been finally determined by the competent courts and the Organization has been so informed by the Foreign Ministry.

In the meantime, Mr. X. should be informed of the situation by copies of the judicial documents received and should be invited to submit without delay any comments he may wish to make and, if he contests the claim, to defend his cause in the appropriate manner before the competent courts.

17 September 1975

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2. UNIVERSAL POSTAL UNION

LIABILITY IN RESPECT OF DAMAGE CAUSED BY A CORRESPONDENCE ITEM OR BY A POSTAL PARCEL TO OTHER POSTAL ITEMS (1969 TOKYO CONVENTION, ARTICLE 42, AND POSTAL PARCELS AGREEMENT, ARTICLE 41)

Opinion given by the International Bureau

An administration asked the International Bureau if, under article 42 of the 1969 Tokyo Universal Postal Convention,[101] the sender of a postal item causing damage to another postal item is liable, within the same limits as administrations themselves, for any damage caused to other postal items as a result of non-compliance with the conditions of acceptance. In its reply, the International Bureau gave the following opinion.

1. The Vienna Congress of 1964 accepted proposal 3143 which introduced, with respect to letter-post items, liability similar to that already existing for senders of postal parcels under the relevant Agreement (article 41 of the Agreement). The texts of articles 42 of the Convention and 41 of the Postal Parcels Agreement[102] are

[101] United Nations, *Treaty Series*, vol. 809, p. 91.
[102] *Ibid.*, p. 260.

strictly identical, with the possible exception of paragraph 3, the application of which is not really at issue in the case under consideration. These two articles should therefore have the same scope and be applied uniformly, since the same liability is involved.

2. This liability applies to damage caused by a correspondence item or by a postal parcel to other postal items. It is quite different and independent from that assumed by postal administrations, which varies, depending on whether letter-post items or postal parcels are involved. It would be wrong to suppose that the wording "within the same limits as administrations themselves" could mean that the sender's liability extends solely to the loss of registered items because the liability of postal administrations is limited to losses with respect to letter-post items. This phrase must be understood to mean that the indemnity paid to the sender of a damaged item is limited to registered items and to the indemnity paid by administrations for the loss of such items, which is at present 40 gold francs.

3. With regard to payment of the indemnity, it is the responsibility of the administration of origin to indemnify the sender of the damaged item up to the amount payable in cases of total loss and to recover the indemnity from the sender who is liable, since this indemnity comes under the UPU Acts and its payment incumbent on postal administrations. Article 44 of the Convention is therefore applicable, *mutatis mutandis*, to the case in question. Furthermore, according to article 42, paragraph 3, of the same Convention, where appropriate it is for the administration of origin to take action against the offending sender. In that event, as in cases where there is no action at law, it is the responsibility of the administration of origin to indemnify the sender of the damaged item without awaiting the result of the action at law.

4. The conditions governing the application of article 42 of the Convention are as follows:

(*a*) The damaged item must belong to one of the categories for which postal administrations assume liability.

(*b*) There must be a direct and definite causal means between the damaged item and the item causing the damage.

(*c*) The damage must have been caused by one item to another item, without this being due to fault or negligence on the part of postal administrations or carriers.

(*d*) The item which caused the damage must fail to meet the requirements concerning packaging or be subject to a prohibition under article 29 of the Convention. It should be noted that, according to article 42, paragraph 2, the acceptance by the office of posting of an item shall not relieve the sender of his liability.