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

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

CONTENTS (continued)

CONTENTS (continued)

CONTENTS (continued)

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. Legal obstacles to the installation of a non-United Nations radio transceiver and antenna within United Nations premises

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

As I indicated to you in our conversation of yesterday, the installation and operation of a radio transceiver and antenna within United Nations premises by a non-United Nations entity for non-United Nations purposes is not permissible. I promised to convey this opinion to you in writing.

It is a principle of fundamental importance to United Nations premises that on such premises only United Nations and United Nations connected activities are allowable. It is on this principle that United Nations premises are accorded a special status by Member States under the Charter, the Convention on the Privileges and Immunities of the United Nations[1] and the agreements between the United Nations and States in which United Nations offices are located. A departure from this principle would not be supportable from a legal point of view nor from the point of view of general United Nations policy.

The installation, operation and maintenance of the radio transceiver and antenna within ESCAP premises would also, in our view, require that persons not on ESCAP business be permitted to enter the premises to a degree not anticipated in the very limited special entry provision contained in article III, section 4(*a*) of the Agreement between the United Nations and Thailand concerning the headquarters of ESCAP in Thailand[2].

The United Nations, given its special status and world-wide operations, is not in a position to permit installation and operation of Government radio transceivers and antennas on its buildings. The Organization would have no control over the use of such facilities, which could lead to confusion as to the source of the material transmitted which, in turn, could cause serious difficulties for the Organization...

16 June 1977

2. Question whether the use of pictures of United Nations buildings for commercial purposes is lawful under existing General Assembly resolutions concerning the protection of the United Nations emblem, name and flag, the law of the host State on copyright and the Agreement between the United Nations and the host State concerning the site where the buildings concerned are located

[1] United Nations, *Treaty Series*, vol. 33, p. 261.
[2] *Ibid.*, vol. 260, p. 35.

Letter to the Legal Liaison Officer, United Nations Office in Geneva

I refer to your letter concerning the question of postcards representing the Palais des Nations and/or monuments located on the grounds of the Palais, produced and distributed by a commercial firm for profit.

We agree with your second paragraph that the United Nations building as such is not directly covered under General Assembly resolutions 92(I) and 167(II) concerning the United Nations emblem and name, and flag, respectively; and hence photographs of the building are not *prima facie* subject to the same restrictions as are applicable to the use of the United Nations emblem, name or flag.

It should be mentioned, however, that we have had occasion to question and object to the use of pictures of the United Nations building in connexion with a commercial purpose, where such use involved directly or indirectly unauthorized use of the United Nation's name (i.e. when even where the building was not identified by name, the suggestion of United Nations endorsement of a commercial product was implied); and in our communications with the commercial firms concerned we have, generally speaking, applied the same reasoning and principles as underlie General Assembly resolutions 92(I) and 167(II).

Instances which we found objectionable also involved, for example, the use of the name "United Nations [Headquarters] [Building]", with or without a picture of the building, in advertisements claiming rightly or not that certain commercial products, particularly fixtures or construction materials, were being used at the United Nations Headquarters; or the use of a picture of the United Nations building, without any claim of being a supplier of United Nations Headquarters, but simply to draw attention to a commercial product being offered for sale, e.g. stamps, coins, commemorative medals (such picture appearing in an advertisement for the product or on the product itself — or on its wrappings, with the implied suggestion that the United Nations endorsed the product or other commercial activity).

It may also be noted, in this connexion, that one of the conditions printed on the order form used by the company which manages the Souvenir Shop at Headquarters under a contract with the United Nations in placing orders for the manufacture of articles for sale in the United Nations Souvenir Shop reads as follows:

> "(*a*) Except for the articles to be manufactured with United Nations authorization for [name of the company concerned], the manufacturer expressly undertakes not to manufacture or sell, or assist any other person in the manufacture or sale of, any article bearing representations of the United Nations emblem, or the United Nations flag, *or the United Nations Headquarters Building,* or the words "United Nations" or any abbreviation thereof.
>
> "(*b*) The manufacturer expressly undertakes that, if it becomes aware of the manufacture or sale of any such article by any other person, it shall immediately bring the matter to the attention of the United Nations." (emphasis added).

Thus, a manufacturer accepting an order from the company concerned is under a contractual obligation not to manufacture any articles bearing, *inter alia,* a representation of the United Nations Headquarters Building, except for sale at the Souvenir Shop, and to bring any instances of unauthorized manufacture or sale of such articles of which he may be aware immediately to the attention of the United Nations.

To sum up, it may be said that while there is nothing in the text of the relevant General Assembly resolutions giving us the right to refuse permission to photograph the United Nations building, on the other hand, the use of a picture of the United Nations building for commercial purposes would be in violation of the provisions of those resolutions if the name or emblem of the Organization were used without authorization to

identify the building, or — even if this were not the case — if such use in any other manner deceptively suggested United Nations endorsement of a commercial product.

It would therefore be of interest (1) to see an actual specimen of the postcards in question, to ascertain whether the United Nations name or emblem is being used to identify the building or grounds, and (2) to know whether the host State, being a non-member State, has adopted legislation pursuant to General Assembly resolution 92(I) (which is addressed to Member States), i.e. special legislation for the protection of the United Nations emblem and name; or, in the alternative, whether the existing domestic legislation on trademarks provides adequate protection of the United Nations emblem and name.

We have examined the [domestic] Law of 7 December 1922, with particular reference to article 30 thereof. While it is true that architectural works seem to be covered by this copyright law, the protection is extended for a limited period of time — for 50 years following the death of the "author" or, if the author's identity is unknown or in doubt, for 50 years following the year in which the work was made public. After that, the work enters the public domain. The Palais des Nations, being less than 50 years old, would still be protected by the Law in question and it would be of interest to know whether the other buildings or monuments in question are equally protected.

Assuming that they are, it also seems to us that the controlling issue is whether the "Parc de l'Ariana" can be considered a "voie ou place publique" within the meaning of article 30. The law contains no definition of this term.

In this connexion the following provisions of the Agreement between the United Nations and the host State on the Ariana Site[3] appear to be relevant:

Article 2(a) provides that the Palais des Nations and other buildings on that site shall be the property of the United Nations and that the land on which they are erected and the soil surrounding them over a width of 100 metres shall be subject to a transferable and *exclusive* real right of user of the surface by the United Nations. This right shall continue as long as the buildings themselves.

Article 3, concerning access roads, provides that the United Nations shall likewise have a transferable and *exclusive* real right of use over the parts of those roads lying within the limits of Plot 2070 (basically, the Parc de l'Ariana; see map attached to Agreement). Outside Plot 2070, these roads are part of the public domain.

Article 4(a) gives the United Nations a *servitude personnelle* of non-transferable and *exclusive* use of all the parts of Plot 2070 not covered by the real right conferred on the United Nations under article 2(*a*).

Article 5 provides for the public to be admitted to the grounds of Plot 2070 covered by the servitude referred to in article 4(*a*), unless it should be necessary to restrict or prohibit public access to these grounds in order to safeguard peaceful working conditions and security.

In summary, it would appear from article 2(*a*) that the Palais des Nations, other buildings on the site, and the land on which they are situated belong to the United Nations or are subject to its exclusive right of use and are, therefore, not public places. Their private nature is further indicated by article 3 which draws a distinction between those parts of the roads within the Parc de l'Ariana and those without. The fact that the latter are deemed to be part of the public domain implies that the former are not. Article 5 provides for public admittance to the grounds, but the fact that this may be restricted under certain circumstances when required by the United Nations indicates that the Organization is the dominant authority.

Thus, it might be argued that the Palais is excluded from the field of article 30 and that, therefore, the unauthorized taking of pictures by a commercial firm for profit is

[3] United Nations, *Treaty Series*, vol. 1, p. 153.

illegal under the domestic law. Even if the copyright law is not applicable, it might be assumed that because of the private character of the grounds in question, the United Nations are entitled under the domestic law to protection against unwanted intruders. If the sums involved would make it worth while and you believe that a sufficiently strong case can be made using the above arguments, consideration might be given to consulting a local lawyer to ascertain what, if any, steps could be taken to obtain discontinuance of the objectionable commercial practice involved.

6 January 1977

3. REPRESENTATION OF MEMBER STATES IN ORGANS OF THE UNITED NATIONS — REQUIREMENT OF FULL POWERS UNDER THE RULES OF PROCEDURE OF THE PRINCIPAL ORGANS OF THE UNITED NATIONS — DESIGNATION IN THE CREDENTIALS OF PERMANENT REPRESENTATIVES OF THE ORGANS BEFORE WHICH THEY ARE AUTHORIZED TO ACT

Internal note

1. Permanent missions of Member States are established to ensure the proper representation of States to the Organization with a view to keeping the necessary liaison with the Secretariat in periods between sessions of the different organs of the United Nations [General Assembly resolution 257 (III)].

2. Since the creation of the United Nations, a practice has developed that the head of a permanent mission, designated by his Government, present to the Secretary-General, who is the chief administrative officer of the Organization, his letter of accreditation or appointment — so-called credentials — issued either by the Head of State or Government or by the Minister for Foreign Affairs.

3. The practice in the United Nations has always been that, unless the credentials provide otherwise, the permanent representative is authorized to act before all organs of the Organization for which there are no special requirements as regards representation. Since, however, the rules of procedure of the principal organs of the United Nations (General Assembly, Security Council, Economic and Social Council, Trusteeship Council) require full powers to be communicated to the Secretary-General, the General Assembly in resolution 257 A (III) has recommended that Member States desiring their permanent representative to represent them on one or more of the organs of the United Nations should specify the organs in the credentials.

4. In the report "Permanent Missions to the United Nations" submitted by the Secretary-General at each regular session of the General Assembly, Member States which have authorized their permanent representative to represent them in all organs of the United Nations are marked with an asterisk and when the authorization relates to certain organs, with two asterisks.

Full powers before all organs sometimes use the phrase: *"any organs, commissions or other bodies of the United Nations other than specialized agencies"*, or *"all principal and subsidiary organs"*, or *"all matters brought before the United Nations"*.

As to full powers for certain organs, it will be noted that the organ generally specified in the credentials is the Security Council. However, States which are members of the Security Council generally submit full powers to this effect in a separate instrument. No mention to that effect appears in the report of the Secretary-General referred to above.

5. Finally it will be noted that a certain number of credentials (11 out of 147 as of 27 April 1977) contain full powers of signature for treaties concluded under the auspices of the United Nations.

29 April 1977

4. APPROPRIATE FORM FOR A NOTIFICATION TO THE SECRETARY-GENERAL OF THE APPOINTMENT OF A CHARGÉ D'AFFAIRES AD INTERIM

Memorandum to the Assistant Chief of Protocol

1. I refer to our conversations on the question of the appropriate form for a notification to the Secretary-General of the appointment of a *Chargé d'affaires a.i.* More particularly, the question has arisen whether a third person note from a Permanent Mission is sufficient for this purpose.

2. It is my understanding that, whatever the practice in the past may have been, all Permanent Missions have recently been informed by the Protocol and Liaison Section that the designation of a *Chargé d'affaires a.i.* by a Permanent Representative should be in the form of a letter to the Secretary-General, signed by the Permanent Representative and not in the form of a third person note from the Permanent Representative. In the light of this arrangement, a third person note from a Mission would clearly not be sufficient (except as advance notification of the decision to be conveyed in due course in proper form).

3. In our view, it is correct in principle that the Secretary-General should receive notification of the appointment of a *Chargé d'affaires a.i.* either directly from the sending State, or from a Permanent Representative in the form indicated at the outset of the previous paragraph. Where there is no Permanent Representative, it follows that the notification (in cabled form if necessary) must come directly from the sending State. As a *Chargé d'affaires a.i.* is a head of mission, even if for a limited time, it is only natural that his designation should be notified in a more formal manner than certain other changes in Mission staff. It is to be recalled, in this respect, that a Permanent Representative (to whom a *Chargé d'Affaires a.i.* is equated if for a limited period) requires credentials issued by the Head of State or Government, or Minister for Foreign Affairs.

4. The procedures just outlined accord with established diplomatic practice as reflected in the Vienna Convention on Diplomatic Relations,[4] article 19, paragraph 1, of the Convention providing that:

> "If the post of head of the mission is vacant, or if the head of the mission is unable to perform his functions a chargé d'affaires ad interim shall act provisionally as head of the mission. The name of the chargé d'affaires ad interim shall be notified, either by the head of the mission or in case he is unable to do so, by the Ministry for Foreign Affairs of the sending State to the Ministry for Foreign Affairs of the receiving State or such other ministry as may be agreed."

Essentially the same text appears in the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character,[5] article 16 thereof stating that:

> "If the post of head of mission is vacant, or if the head of mission is unable to perform his functions, the sending State may appoint an acting head of mission whose name shall be notified to the Organization and by it to the host State." [Underlining added.]

7 July 1977

5. QUESTION OF THE ADMISSION BY A NON-MEMBER STATE INTO ITS TERRITORY OF HOLDERS OF SOUTHERN RHODESIAN PASSPORTS IN THE LIGHT OF THE UNILATERAL DECLARATION, BY THE NON-MEMBER STATE CONCERNED, THAT IT WOULD TAKE CARE

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

[5] *Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, Documents of the Conference (A/CONF.67/18/Add.1 – Sales No. E.75.V.12), p. 207.

TO PREVENT ITS TERRITORY FROM BEING USED FOR THE PURPOSE OF CIRCUMVENTING THE SECURITY COUNCIL SANCTIONS — PARAGRAPH 5 OF SECURITY COUNCIL RESOLUTION 253 (1968)

Memorandum to the Director, Security and Political Committees Division, Department of Political and Security Council Affairs

1. I have received your memorandum of 7 July 1977, informing us that the Security Council Committee established in pursuance of resolution 253 (1968) concerning the question of Southern Rhodesia decided at its 292nd meeting on 9 June 1977 to request an opinion of the Legal Counsel regarding the position taken by [a non-member State] in a note of 17 February 1977 with respect to the admission of holders of Southern Rhodesian passports into its territory and, in particular, the potential implications for Member States of the acceptance of that State's position that the practice of admitting holders of Southern Rhodesian passports "implies no recognition of nationality, since passports are considered simply as travel papers".

2. The statement in question was made in connexion with the Committee's examination of Case No. 227 dealing with the admission by certain States into their territories of persons holding Southern Rhodesian passports contrary to the mandatory sanctions imposed by the Security Council and, in particular, paragraph 5 of Security Council resolution 253 (1968).

3. As was pointed out in an earlier opinion dealing with the import of fertilizers into Southern Rhodesia through a company of the same non-member State known as Nitrex A.G., there is no need to discuss whether or to what extent the Security Council in resolution 253 (1968) intended to impose a legal obligation upon non-members of the United Nations, or the extent to which such an obligation would be binding upon non-members without their consent. The Government in question in a note of 4 September 1968 replied as follows to the Secretary-General (S/8786/Add.1):

> "In its statement of 10 February 1967 concerning the Security Council resolution of 17 December 1966, the Federal Council explained that, for reasons of principle [the State concerned], as a neutral State, cannot submit to the mandatory sanctions of the United Nations. However, independently and without recognizing any legal obligations to do so, it has taken steps to ensure that any possibility of increasing Rhodesian trade is excluded and that the United Nations sanctions policy cannot be contravened. The Federal Council will maintain this position. With reference to the latest [253] resolution of the Security Council, it will attempt independently and always in the context of the legal order [of the State concerned], to see that Rhodesian trade cannot avoid the Security Council sanctions through its territory."

This unilateral declaration by the Government concerned that it would ensure that United Nations sanctions policy cannot be contravened, albeit without recognizing any legal obligation to do so, has been reaffirmed and strengthened in the note of 17 February 1977:

> "The . . . Government, would however, independently and without recognizing any legal obligation in the matter, take care to prevent [its] territory from being used for the purpose of circumventing the Security Council sanctions".

4. It seems clear on the basis of the foregoing, that with respect to the denial of entry to Rhodesian passport holders the Government concerned has unilaterally and unreservedly accepted the obligation. To cite the note of 17 February 1977: "The . . . . Government would . . . . take care to prevent [its] territory from being used for the purpose of circumventing the Security Council sanctions." This statement would seem to be unequivocal and subject to no reservations unlike, for example, the earlier position with respect to trade sanctions where the Government had only undertaken to ensure that any possibility of *increasing* Rhodesian trade is excluded.

5. The State concerned having unilaterally undertaken to comply with paragraph 5 of Security Council resolution 253 (1968), it is necessary to examine the language of that paragraph in order to determine whether it is clear in intent. The paragraph in question provides as follows:

> "[The Security Council]
>
> "*Decides* that all States Members of the United Nations shall:
>
> "(*a*) Prevent the entry into their territories, save on exceptional humanitarian grounds, of any person travelling on a Southern Rhodesian passport, regardless of its date of issue, or on a purported passport issued by or on behalf of the illegal regime in Southern Rhodesia;
>
> ". . ."

The meaning and intent of this paragraph is clear, namely, that save on exceptional humanitarian grounds (which do not appear to be the case here) States should prevent all entry into their territories of holders of Southern Rhodesian passports. The fact that a passport may be considered by a particular Government merely as a "travel paper" and implying no recognition of the issuing authority or of nationality would appear to be irrelevant. The admission of persons holding Southern Rhodesian passports manifestly violates the spirit and the intent of the resolution, paragraph 5 in particular, and would seem to be contrary to the Government's own statement that it will prevent its territory from being used for the purpose of circumventing Security Council sanctions.

. . .

8 December 1977

6. Comments on some procedural questions in connexion with the proposal that the thirty-third session of the General Assembly be held away from United Nations Headquarters

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

1. This memorandum responds to several procedural questions that have been raised in connexion with the proposal that the thirty-third session of the General Assembly meet in [name of the capital of a Member State].

I. *Majority required for a decision by the General Assembly to meet away from Headquarters*

2. It has been suggested that a decision by the General Assembly to hold a session away from Headquarters requires an absolute majority, i.e. the affirmative vote of a majority (75)[6] of all the Members of the United Nations, as provided in the final clause of rule 3 and in rule 4 of the Assembly's rules of procedure. These rules state:

> "*Place of meeting*
>
> "RULE 3
>
> "The General Assembly shall meet at the Headquarters of the United Nations unless convened elsewhere in pursuance of a decision taken at a previous session or at the request of a majority of the Members of the United Nations.
>
> "RULE 4
>
> "Any Member of the United Nations may, at least one hundred and twenty days before the date fixed for the opening of a regular session, request that the session be held elsewhere than at the Headquarters of the United Nations. The Secretary-

[6] At the date of drafting of the above opinion, the membership of the United Nations stood at 150.

General shall immediately communicate the request, together with his recommendations, to the other Members of the United Nations. If within thirty days of the date of this communication a majority of the Members concur in the request, the session shall be held accordingly."

5. These rules clearly distinguish between a decision to hold a session away from Headquarters made by the Assembly during a session and a determination to hold a session away from Headquarters made outside the Assembly in accordance with the procedure specified in rule 4. The latter, for which an absolute majority is required, is not a decision of the General Assembly but a determination made by the membership of the United Nations.

4. The majority required for decisions of the General Assembly is specified in paragraphs 2 and 3 of Article 18 of the Charter (which are reflected in rules 83–86 of the rules of procedure): a two-thirds majority of the members present and voting for decisions on important questions and on those additional categories decided by the Assembly, and a simple majority of the members present and voting for other questions.[7] As these are Charter provisions, the Assembly itself cannot vary them, either by adopting particular rules of procedure or on an *ad hoc* basis, so as to provide that certain decisions be taken by majorities different from those specified in the Charter.

5. Under the Charter and the rules of procedure, absolute majorities of the membership are only required for decisions when these are not taken in and by the Assembly itself: the convening of special sessions pursuant to Article 20 of the Charter, in accordance with rules 8 and 9 of the rules of procedure, and the determination of the place of meeting in accordance with rules 3 and 4. Absolute majorities are required in those cases because, in the absence of a meeting at which a quorum can be determined, the only standard by which approval can be measured is that of the total membership of the Organization. On the other hand, when these same decisions are taken by the Assembly itself, as is possible under rule 7 for the convening of a special session or under the first part of rule 3 for establishing a different place of meeting, the majorities indicated in paragraph 4 above must be used.

6. Finally, it should be noted that a decision on the place of meeting does not appear to be an "important question" within the meaning of paragraph 2 of Article 18 of the Charter. This is so whether or not there are any financial implications to the proposed choice of the place of meeting, since it has been held several times that the mere existence of financial implications does not make a decision a "budgetary question" within the meaning of that paragraph. Consequently, the decision on the place of meeting can be taken by a simple majority under paragraph 3 of Article 18 of the Charter and rule 85 of the rules of procedure, unless the Assembly should decide, by a simple majority under the same provisions, that this question be decided by a two-thirds majority.

II. *May a secret ballot be taken in connexion with this question*

7. The question has been raised whether the General Assembly or its General Committee can take a decision by secret ballot with regard to issues relating to the holding of a regular Assembly session away from Headquarters. In the General Committee this would apply to the decision whether to recommend the inclusion of the additional item in the agenda of the Assembly. In the plenary of the Assembly the question could be raised with regard to the decision on the adoption of the recommendation of the General Committee (i.e. inclusion or not in the agenda) and/or eventually with regard to a vote on the actual proposal to hold a session of the Assembly away from Headquarters.

[7] The only case where an absolute majority of votes is required in the General Assembly is for elections of the members of the International Court of Justice. This majority is specified in Article 10 of the Statute of the Court, which is an integral part of the Charter, and is restated in rule 151 of the rules of procedure of the Assembly.

8. Rules 87 and 127 of the rules of procedure specify the methods of voting, respectively in the plenary and in committees; they have identical contents and provide that the Assembly or a committee shall normally vote by show of hands or by standing, but that any representative may request a roll-call. The only references to secret ballot are contained in rules 92 and 103, which govern elections. The rules of procedure of the Assembly thus do not provide for a secret ballot other than for elections.

9. The absence of a provision for secret ballots for other matters does not, however, absolutely prevent the General Assembly from resorting to such a procedure.[8] In fact, there are precedents for doing so, in the practice of the Assembly as well as of subsidiary organs and conferences with rules of procedure similar to those of the Assembly. For example, at the twenty-first session of the Assembly, the Second Committee decided without objection that the site of the future headquarters of UNIDO should be decided by secret ballot.[9] At its second session in October 1965, the Trade and Development Board voted by secret ballot on the location of the site for the Secretariat of UNCTAD.[10] During the sixth session of the Third United Nations Conference on the Law of the Sea in July 1977, the venue of the seventh session of the Conference was decided upon by secret ballot.[11] It may be relevant to note that in all these cases the choice of a site or venue was involved.

10. On all these occasions the secret ballot procedure was resorted to by general agreement of all members of the body concerned. This accords with the principle that the strict observance of rules of procedure can be avoided by virtue of a general agreement among the members of the body concerned, since the essential purposes of rules of procedure — orderly proceedings and protection of the interests of the minority — are thus not endangered. It is on the basis of the same principle that in the practice of the General Assembly the application of certain rules of procedure has frequently been suspended by common accord: for example, many elections have not taken place by secret ballot as provided in rule 92.

11. The question arises, however, whether in the absence of a common agreement among the membership, the General Assembly may decide by a majority vote to resort to a secret ballot. When this question was put to the Legal Counsel by the Second Committee during the debate on the choice of the UNIDO Headquarters site referred to above, he advised that the Committee could not decide, on the basis of a vote, to suspend the application of any rule of procedure, or to take a secret ballot.[12] While this opinion of the Legal Counsel applies to the proceedings of any sessional organ, including the General Committee, it does not exclude the authority of the General Assembly itself to decide by a majority vote to resort to secret ballot, since even if this is considered as amounting to a suspension or amendment of the rules of procedure, such power is vested in the Assembly by Article 21 of the Charter.

12. While it would therefore not be possible for the General Committee to decide, except in the absence of any objection, to resort to a secret ballot on its recommendation concerning the inclusion of an additional item in the agenda of the General Assembly, the latter could decide by a majority vote to take a secret ballot on deciding on the recommendation of the General Committee or on the substance of a proposal to hold a session away from Headquarters. If the question is referred to a committee (see Part IV below),

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[8] In this connexion, see the statement made by the Legal Counsel at the 103rd meeting of the thirty-second session of the General Assembly, on 15 December 1977 (A/PV.103, p. 17–20).

[9] *Official Records of the General Assembly, Twenty-first Session, Second Committee,* 1102nd to 1104th meetings.

[10] *Official Records of the Trade and Development Board, Second Session,* 56th meeting, para. 25.

[11] *Official Records of the Third United Nations Conference on the Law of the Sea,* Vol. VII (Sales No. E.78.V.2), summary record of the 81st plenary meeting, paras. 4 and 5.

[12] *Official Records of the General Assembly, Twenty-first Session, Second Committee,* 1102nd meeting, paras. 23–28.

then that body would be under the same constraints as the General Committee, unless the plenary decided, by a majority vote, to authorize the committee to decide on its substantive recommendation to the plenary by secret ballot.

III. *Procedure for placing an additional item on the agenda of the Assembly in spite of a negative recommendation of the General Committee*

13. The procedure for placing "additional items" on the agenda of a regular session of the Assembly is governed by rules 15 and 40 (second sentence) of the rules of procedure.

14. If the General Committee should decide to recommend against placing an additional item on the agenda, that recommendation would be communicated to the Assembly in the report of the Committee.

15. The normal course for the General Assembly would be to vote on the recommendation of the General Committee contained in its report. Several alternative procedural situations may be foreseen:

(a) *Rejection of the Committee's recommendation*

If the plenary should reject a negative recommendation of the Committee on the inclusion of the item on the agenda, this would not by itself result in that item being so included. This is so because the rejection of a proposal, which could occur by two successive tie votes under rule 95 or by the failure to obtain a two-thirds majority where that is required, can therefore not be interpreted as a positive decision in the opposite sense. However, it would then be in order to take action on and to adopt a separate proposal for the inclusion of the item on the agenda.

(b) *Proposed amendment of the Committee's recommendation*

A proposal to amend a negative recommendation of the Committee so as to reverse its sense, i.e., to include the agenda item in question, would be out of order since rule 90 provides that "A motion is considered an amendment if it *merely* adds to, deletes from or revises part of the proposal" (emphasis added). It has repeatedly been held that a motion that would completely change the sense of a previous proposal cannot be considered as an amendment to it, but has to be treated as a separate proposal.[13]

(c) *Submission of a separate proposal to include the item on the agenda*

A proposal to include an additional item on the agenda in spite of a negative recommendation of the General Committee would be in order, as there is no requirement that the Assembly act only on a favourable recommendation of the Committee. Such a proposal would, however, under rule 91, be voted on only after a decision is taken on the recommendation of the Committee — unless, under the same rule, the Assembly decides to vote first on the separate proposed to include.

(i) If the motion to vote first on the separate proposal prevails, then a vote would be taken on that proposal. If it is accepted, the item is thereby placed on the agenda, and no vote would be taken on the Committee's negative recommendation; if the separate proposal fails, then the item is not placed on the agenda and there would be no need to vote on the Committee's recommendation, though that could be done.

(ii) If the motion to vote first on the separate proposal fails, then a vote would first

[13] The Legal Counsel so advised the plenary at the twenty-seventh session of the General Assembly, when a proposal was made that a recommendation of the General Committee to include an item be "amended" so that the item would instead have been included in the provisional agenda of the next session (*Official Records of the General Assembly, Twenty-seventh Session, Plenary Meetings,* 2037th meeting, paras. 221–223).

be taken on the Committee's recommendation. If that recommendation is not adopted, then the situation is as described in subparagraph (*a*) above. If the recommendation of the Committee is approved, then a vote on a separate proposal to include the item on the agenda would constitute a reconsideration which, under rule 81, would require a prior decision taken by a two-thirds vote — which, if successful, would be followed by a vote on the proposal to include the item; however, more likely, after the Committee's negative recommendation has been approved, the separate proposal would be withdrawn by its sponsor(s) under rule 80, or a decision not to vote on it would be taken under the second sentence of rule 91.

IV. *Further proceedings if an additional item is placed on the agenda*

17. If it is decided to place on the agenda of the current session an additional item relating to the place of the thirty-third session, then the second sentence of rule 15 requires that:

(*a*) Consideration of the item in the plenary be postponed:

(i) for 7 days, *and*

(ii) until a committee has reported thereon; *unless*

(*b*) The plenary decides otherwise by a two-thirds majority.

18. The requirement of a committee report could be satisfied by submission of the item to and a report from a Main Committee (in particular the Fifth), the General Committee (though the latter probably has no substantive competence under rules 41-42), or an *ad hoc* body. In this connexion, the history of previous considerations of the question of relocating sessions of the General Assembly may be of interest:

(*a*) At the first session of the Assembly a proposal to relocate the second session was considered only in plenary, and defeated. (The requirement of consideration by a committee did not arise because the item was not an "additional" one.)[14]

(*b*) At the second session of the Assembly a proposal for relocating the third session was first considered in the plenary from the point of view of principle, and thereafter its administrative and budgetary implications were submitted to the Fifth Committee. After the plenary had thereupon decided on a session in Europe, the choice of site was left to an *ad hoc* committee of 9 members, designated by the President.[15]

(*c*) At the fifth session of the Assembly the proposed relocation of the sixth session was first considered by the Fifth Committee (though objection was raised against its competence to consider[16] the substance of the item), and then was adopted by the plenary.

19. These precedents indicate that submission of the question to the Fifth Committee would be the most normal course to follow, though the establishment of an *ad hoc* committee is not to be excluded. The report of the Committee could:

(*a*) restrict itself entirely to a discussion of financial, administrative and other implications;

(*b*) also include some procedural suggestions for the method whereby the plenary would conduct its own consideration (e.g., that a secret ballot be taken);

(*c*) include, as is customary, a substantive recommendation on the proposal.

2 December 1977

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[14] *Official Records of the Second Part of the First Session, Plenary Meetings,* 67th meeting, p. 1465.

[15] *Official Records of the Second Session of the General Assembly, Plenary Meetings,* 108th and 113th meetings.

[16] *Official Records of the General Assembly, Fifth Session, Plenary Meetings,* 316th meeting, paras. 181–182 and 324th meeting, paras. 101–140.

7. STATUTE OF THE JOINT INSPECTION UNIT APPROVED BY GENERAL ASSEMBLY RESOLUTION 31/192 — QUESTION WHETHER A SPECIALIZED AGENCY MAY RESERVE ITS POSITION WITH RESPECT TO ANY OF THE ARTICLES OF THE STATUTE — PROCEDURE WHICH MIGHT BE FOLLOWED IN THIS RESPECT

Memorandum to the Under-Secretary-General, Department of Administration and Management

1. I refer to your memorandum of 25 August 1977 seeking my advice on the question of whether or not any agency may reserve its position with respect to any of the articles of the new Statute of the Joint Inspection Unit. The question has arisen in connexion with the letter addressed to the Secretary-General of the United Nations dated 19 July 1977 by the Secretary-General of the International Telecommunications Union with respect to Article 1, paragraph 2 of the Statute.[17]

2. The Statute of the JIU was approved by the General Assembly in resolution 31/192 of 22 December 1976. Operative paragraph 2 of this resolution invites the organizations within the United Nations system to notify the Secretary-General of the acceptance of the Statute as soon as possible. The Statute itself specifies that the functioning of the JIU with respect to any particular agency is dependent upon an act of acceptance by that agency (article 1, paragraph 2) to be notified in writing by its executive head to the Secretary-General of the United Nations. The Statute provides for amendment (article 21) and withdrawal (article 22) but contains no express provision either permitting or barring reservations.

3. It is a generally accepted rule of international law, now embodied in the Vienna Convention on the Law of Treaties of 1969 (article 19),[18] that in the absence of an express provision regarding reservations, a party to an agreement may formulate a reservation provided that the reservation is not incompatible with the object and purpose of the agreement. The question therefore arises as to the procedure to be followed in formulating reservations and in determining whether a particular reservation is or is not incompatible with the object and purpose of the Statute.

4. The Statute provides that the Secretary-General of the United Nations shall exercise the depositary function, a function which the Secretary-General also fulfils with respect to a large number of multilateral agreements under Article 102 of the Charter. A depositary practice of the Secretary-General in relation to these agreements has developed which may be applied *mutatis mutandis* to the Statute of the JIU. Particularly apposite in this connexion would be the practice with respect to the Convention on the Privileges and Immunities of the Specialized Agencies since under its final articles the specialized agencies are called upon to take various actions.

5. Under this practice, the Secretary-General notifies the executive heads of the specialized agencies of the terms of any reservation and simultaneously places the question of any such reservation on the agenda of the Administrative Committee on Coordination (ACC). In practice, however, there has always been a specific request from one or more agencies to discuss any proposed reservation in the Preparatory Committee of the ACC. In every instance of a reservation to the Convention, the ACC has requested the Secretary-General to communicate with the reserving party indicating the extent to which the

[17] Reading *in toto* as follows:

"2. The Unit shall perform its functions in respect of and shall be responsible to the General Assembly and similarly to the competent legislative organs of those specialized agencies and other international organizations within the United Nations system which accept the present statute (all of which shall hereinafter be referred to as the organizations). The Unit shall be a subsidiary organ of the legislative bodies of the organizations".

[18] *Official Records of the United Nations Conference on the Law of Treaties* Documents of the Conference (A/CONF.39/11/Add.2-Sales No. E.70.V.5), p. 287.

agencies considered the reservation to be incompatible with the object and purpose of the Convention and with a view to seeking an understanding acceptable to all concerned.

6. It is suggested, therefore, that the foregoing procedure might be adopted with respect to reservations formulated by individual agencies to the Statute of the JIU.

11 November 1977

8. RESOLUTION OF THE GENERAL ASSEMBLY CONTAINING A REQUEST TO THE SECRETARY-GENERAL CONCERNING THE INVESTMENT OF THE ASSETS OF THE UNITED NATIONS JOINT STAFF PENSION FUND — UNDER THE REGULATIONS OF THE PENSION FUND, THE SECRETARY-GENERAL HAS THE ULTIMATE AUTHORITY OVER THE INVESTMENTS OF THE FUND BUT IS NOT PRECLUDED FROM RECEIVING ADVICE IN THIS CONNEXION FROM THE GENERAL ASSEMBLY

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

1. The present memorandum has been prepared in response to your request for a legal opinion concerning the effect of General Assembly resolution 31/197 of 22 December 1976 on the investment of the assets of the United Nations Joint Staff Pension Fund for which the Secretary-General is responsible and questions which have been raised with respect to that resolution. We further understand that among these is the question whether the General Assembly has the power to advise the Secretary-General with respect to the investment of the assets of the United Nations Joint Staff Pension Fund, for example, by adopting the above-mentioned resolution.[19]

2. Article 19(*a*) of the Regulations of the Pension Fund provides that the investment of its assets is to be decided upon by the Secretary-General, after consultation with an Investments Committee (provided for in article 20) and in the light of observations and suggestions made from time to time by the United Nations Joint Staff Pension Board (provided for in article 5) on investments policy. Although it is not specifically foreseen that the Secretary-General might also consult or receive advice from others, he is not precluded from doing so, nor is the United Nations General Assembly precluded from tendering advice. In other words, the Regulations do not contain prohibitions analogous to those in Article 100 of the Charter of the United Nations.

3. It is not therefore to be concluded that in resolution 31/197 the General Assembly failed to respect the ultimate authority of the Secretary-General over the investments of the Pension Fund nor that the Secretary-General would interpret the resolution as so doing. Only if the Assembly should attempt to direct the Secretary-General to undertake particular investment policies or decisions, as it has never done, would an issue arise. In other words, as matters now stand the Secretary-General would not be bound by any resolution of the General Assembly in this field. This, however, does not preclude him from following suggestions made, if, in his judgement, in carrying out his responsibilities as trustee, he were to decide that it was in the best interest of the Pension Fund. Such decisions must of course be consistent with the Scope and Purpose of the Fund and with the limitations on the use of the assets of the Fund as set forth in the Regulations of the Fund.

6 May 1977

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[19] Paragraph 1 of that resolution

"*Requests* the Secretary-General... to ensure that the resources which the United Nations Joint Staff Pension Fund holds invested in shares of transnational corporations are invested on safe and profitable terms and, to the greatest extent practicable, in sound investments in developing countries."

9. RECOMMENDATION OF THE INTERNATIONAL CIVIL SERVICE COMMISSION ESTABLISHED BY GENERAL ASSEMBLY RESOLUTION 3357 (XXIX) FOR THE APPLICATION, WITHIN THE ORGANIZATIONS PARTICIPATING IN THE UNITED NATIONS COMMON SYSTEM, OF NEW SALARY SCALES APPLICABLE TO THEIR GENERAL SERVICE STAFF BASED IN GENEVA — QUESTION WHETHER THERE WOULD BE LEGAL OBSTACLES TO THE IMPLEMENTATION OF THAT RECOMMENDATION BY THE SECRETARY-GENERAL — CONCEPTS OF "ACQUIRED RIGHTS" AND "CONTRACTUAL RIGHTS"

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

I. INTRODUCTION

1. This is in response to your memorandum of 16 September on this subject, requesting a legal opinion on possible legal obstacles to implementing a recommendation of the International Civil Service Commission, for the establishment, as of 1 January 1978, of new General Service salary scales in Geneva that would be lower than the existing ones by 15.7% to 19.5% as to net salaries and from 17.3% to 21.8% as to gross salaries, i.e., pensionable remuneration. We also understand that consideration is being given to mitigating the implementation of the proposed new scales by the use of transitional personal allowances that would ensure that the payments made to a staff member are not actually reduced, but which would be phased out to the extent of each future salary increase awarded to him (whether as a result of step-in-grade increments, promotions or general salary increases) so that such increases would not result in any additional payments to him until the increases exceed the amount of the personal allowance as of 1 January 1978.

2. There are thus several questions to be explored:

(*a*) may net salaries be reduced;

(*b*) assuming that net salaries may not be reduced, is it permissible to maintain them unchanged for a time by eliminating or postponing entitlements to regularly scheduled increments;

(*c*) whether or not net salaries may be reduced, is it permissible to reduce pensionable remuneration.

II. HISTORICAL BACKGROUND

3. In 1932, in view of the prevailing economic conditions, the League of Nations considered reducing staff salaries as an economy measure. After discussion by the Fourth Committee of the Assembly and by the Supervisory Commission, a Committee of Jurists was established to report whether the Assembly, by unilateral action, could legally reduce staff salaries. The jurists were unanimously of the opinion that the Assembly did not have the right, even in exercise of its budgetary authority, to reduce staff salaries, unless such a right had been explicitly recognized in the contracts of appointment.[20] The Fourth Committee accepted this view. However, as a result of this consideration new procedures of appointment were adopted by the League, in particular by promulgating a new Article 30 *bis* of the Staff Regulations providing that all appointments made after 15 October 1932 "are subject to such modifications of their terms as may be necessary to bring them into conformity with any decision of the Assembly, relating to the conditions of employment of officials . . . which the Assembly may decide to apply to officials already in service and that as to all promotions made after that date "it is implied that the promoted official shall

[20] *League of Nations, Official Journal, Special Suppl. No. 107,* Minutes of 4th Committee, pp. 206–208.

thenceforward be subject to decisions of the Assembly fixing the rates of salary."[21] Article 80 of the Regulations provided that "The present Regulations and their Annexes may be amended by the Secretary-General, without prejudice always to the acquired rights of officials."

4. The Preparatory Commission of the United Nations, evidently drawing on the League experience, included in the Draft Provisional Staff Regulations it submitted to the General Assembly Regulation 26, which permitted the General Assembly to supplement or amend the Regulations "without prejudice to the acquired rights of members of the staff." Similarly, in the Draft Provisional Staff Rules prepared by the Commission, Rule 2 provided that letters of appointment be issued to and countersigned by each new staff member, which would *inter alia* "cover . . . the initial salary and other basis of remuneration" and should "state that the appointment is subject to the Staff Regulations and Staff Rules . . . and to all supplements and amendments which may be made thereto."[22] As indicated in paragraph 11 below, substantially the same provisions now appear in respectively Staff Regulations 12.1[23] and Annex II to the Staff Regulations.[24]

5. When the General Assembly was considering, at its fourth session in 1949, the establishment of the United Nations Administrative Tribunal, the United States proposed an addition to article 2 of the draft Statute whereby "Nothing in this Statute shall be construed in any way as a limitation on the authority of the General Assembly or of the Secretary-General acting on instructions of the General Assembly to alter at any time the rules and regulations of the Organization including, but not limited to, the authority to reduce salaries, allowances and other benefits to which staff members may have been entitled".[25] This amendment was eventually withdrawn, on the ground that on the basis of the debate it appeared that Article 2(*1*) of the draft Statute was "broad enough to give sufficient scope to the General Assembly, and to the Secretary-General acting on its behalf, to carry out the necessary functions of the United Nations, in spite of the fact that such action

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[21] This account is condensed from the ILO Memorandum reproduced in *ICJ Pleadings, Effect of Awards of compensation made by the United Nations Administrative Tribunal*, pp. 56–59.

[22] *Report of the Preparatory Commission of the United Nations, Chapter VIII*, Sections 3 and 4, pp. 97–98.

[23] Reading as follows:

"These Regulations may be supplemented or amended by the General Assembly, without prejudice to the acquired rights of staff members."

[24] Reading as follows:

"Annex II

"LETTERS OF APPOINTMENT

"(*a*) The letter of appointment shall state:

(i) That the appointment is subject to the provisions of the Staff Regulations and the Staff Rules applicable to the category of appointment in question and to changes which may be duly made in such regulations and rules from time to time;

(ii) The nature of the appointment;

(iii) The date at which the staff member is required to enter upon his duties;

(iv) The period of appointment, the notice required to terminate it and period of probation, if any;

(v) The category, level, commencing rate of salary and, if increments are allowable, the scale of increments and the maximum attainable;

(vi) Any special conditions which may be applicable.

"(*b*) A copy of the Staff Regulations and the Staff Rules shall be transmitted to the staff member with the letter of appointment. In accepting appointment, the staff member shall state that he has been made acquainted with and accepts the conditions laid down in the Staff Regulations and the Staff Rules."

[25] *Official Records of the General Assembly, Fourth Session, Fifth Committee*, Annex, agenda item 44, document A/C.5/L.4/Rev.2, p. 165.

[26] *Ibid.*, A/C.5/SR.214, para. 40; see also paras. 25, 37 and 41.

might require changes and reductions in the existing benefits granted to the staff".[26] This interpretation was reflected in the Fifth Committee's report to the plenary as follows:

> "(*b*) ... the tribunal would have to respect the authority of the General Assembly to make such alterations and adjustments in the staff regulations as circumstances might require. It was understood that the tribunal would bear in mind the General Assembly's intent not to allow the creation of any such acquired rights as would frustrate measures which the Assembly considered necessary. It was understood also that the Secretary-General would retain freedom to adjust per diem rates as a result, for example, of currency devaluations or for other valid reasons.
>
> "No objection was voiced in the Committee to those interpretations, subject to the representative of Belgium expressing the view that the text of the statute would be authoritative and that it would be for the tribunal to make its own interpretation."[27]

6. At its fifth session in 1950, the General Assembly considered and adopted proposals for a thorough restructuring of the salary, allowance and leave system of the United Nations, which reflected, *inter alia,* extensive consultations with specialized agencies and the recommendations of a Committee of Experts and of the Advisory Committee on Administrative and Budgetary Questions (ACABQ). The new system required the reduction of the salaries and allowances of a great number of officials, and consequently one of the principal issues in adopting it was the extent to which the Assembly was obliged, taking into account also some special assurances that had been given to the staff by the Secretary-General[28] to maintain, by the use of pensionable personal allowances, both the actual level of emoluments of each staff member and his expectation of future increases. After an extensive debate,[29] in which a few representatives maintained the view that staff members had acquired contractual rights from which the Organization could not derogate and others took a different view, while all concurred in the importance of maintaining staff morale by meeting justified expectations, the Fifth Committee rejected a proposal by the Secretary-General for an essentially complete maintenance of existing levels of emoluments and of expectations of future increases, for an alternative that maintained these levels and expectations substantially but not completely[30] (See General Assembly resolution 470(V), para. 3).

7. This brief historical survey suggests that after the League of Nations had first recognized that it could not unilaterally reduce staff salaries unless the right to make such amendments was specified in the contracts of staff members, appropriate provisions to that effect were introduced into the Staff Regulations of the League, and that subsequently similar provisions were adopted by the United Nations in its Staff Regulations and in the Letters of Appointment it issues pursuant to the Regulations. Furthermore, the debate in connexion with the establishment of the United Nations Administrative Tribunal showed not only that the General Assembly was conscious of the possible need on occasion to reduce salaries and other benefits, but suggests that it considered that the then existing (and now still effective) legal provisions sufficiently authorized it to do so — hence the caution in drafting the Tribunal Statute so as not to interfere with that authority. Similarly the results of the 1959 debate show that the General Assembly, while conscious of the undesirability of disappointing staff expectations arising out of a prevailing system, did not consider itself legally bound to preserve all existing emoluments and formulae when it considers that it has adequate reasons to depart therefrom.

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[27] *Ibid., Plenary Meetings,* Annex, agenda item 44, document A/1127, p. 168, para. 9.

[28] ST/AFS/SER.A/12 (18 February 1950), reproduced in *Official Records of the General Assembly, Fifth Session, Annexes,* agenda item 39(*b*), document A/C.5/L.83, pp. 112–113.

[29] *Official Records of the General Assembly, Fifth Session, Fifth Committee,* A/C.5/SR.265, paras. 9–10, 30–31, 53, 77—78, 81 and 82; A/C.5/SR.266, paras. 33, 42–49, 58 and 71; A/C.5/SR.267, paras. 14, 16–17, 20–21, 32 and 51; A/C.5/SR.269, paras. 35–46.

[30] *Ibid., Annexes,* agenda item 39(*b*), documents A/C.5/408 and 410; see also A/C.5/400, part I, paras. (*j*)–(*l*) and part II, paras. 12–18; and A/1732, paras. 24–25.

III. LEGAL FRAMEWORK

8. Paragraph 7 of Annex I to the Staff Regulations[31] provides that the Secretary-General shall fix General Service salary scales "normally on the basis of the best prevailing conditions of employment in the locality of the United Nations office concerned". Staff Rule 103.2 provides that these salary scales and the conditions of salary increments be published in Appendix B to the Rules, which in turn sets out, for each major post (including Geneva), gross and net salary figures for each General Service level at that post (G.1-7 in Geneva) and for each step available in each level (11 for each level in Geneva), with a note that "Salary increments within the levels shall be awarded annually on the basis of satisfactory service."

9. In approving the Statute of the International Civil Service Commission (resolution 3357(XXIX), Annex), the General Assembly has relatively recently circumscribed the discretion of the Secretary-General in establishing local General Service salary scales, by requiring the Commission to establish "the methods by which the principles for determining conditions of service should be applied" and to "establish the relevant facts for, and make recommendations as to, the salary scales of staff in the General Service . . ." (Statute, Arts. 11(*a*) and 12(*l*)). Moreover, at its thirty-first session, the General Assembly specifically urged the Commission to assume forthwith these statutory functions, in particular in respect of the General Service salaries in Geneva, which, as the Assembly recognized, had recently been substantially increased following a strike (para. 1 of resolution 31/141 A and paras. 1-3 of Section I of resolution 31/193 B.

10. Pursuant to Staff Regulation 3.1,[32] the Secretary-General sets the salaries of individual staff members in accordance with Annex I to the Staff Regulations. For General Service staff this is done by determining their level (and step) and their duty station, from which the amount of salary automatically follows according to the scales referred to in paragraph 8 above. The duty station, level and consequent gross commencing salary, as well as the maximum gross salary for the level, are set out in the Letter of Appointment of each General Service staff member, which Letter is required by Staff Regulation 4.1 and is required by Annex II to the Staff Regulations to set out such level and salary rates (see footnote 24 above).

11. The General Assembly has reserved to itself the right to supplement and amend the Staff Regulations, but "without prejudice to the acquired rights of staff members" (Staff Regulation 12.1 — see footnote 23 above). Similarly, the Staff Rules (which include the Appendix setting out the General Service salary scales) may be amended by the Secretary-General "in a manner consistent with the Staff Regulations" (Staff Rule 112.2(*a*)) — which presumably means not only that the Staff Rules must always be consistent with the Staff Regulations, but also that the process of amending the rules must respect the acquired rights of staff members. Each Letter of Appointment provides, in accordance with Annex II to the Staff Regulations, that the appointment is subject to the Staff Regulations and Rules, together with such amendments as may be made from time to time in such Regulations and Rules (see footnote 24 above).

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[31] Reading *in toto* as follows:

"7. The Secretary-General shall fix the salary scales for staff members in the General Service category and the salary or wage rates for manual workers, normally on the basis of the best prevailing conditions of employment in the locality of the United Nations office concerned, provided that the Secretary-General may, where he deems it appropriate, establish rules and salary limits for payment of a non-resident's allowance to General Service staff members recruited from outside the local area."

[32] Reading as follows:

"Salaries of staff members shall be fixed by the Secretary-General in accordance with the provisions of annex I to the present Regulations."

IV. ACQUIRED RIGHTS

12. In reserving to itself the right to change the Staff Regulations and to the Secretary-General to change the Staff Rules, and providing that all Letters of Appointment be explicitly subject to such changes, the General Assembly (as the League had before it) nevertheless restricted itself from prejudicing "the acquired rights" of staff members. Although the General Assembly does not seem to have had occasion to define or even to debate that term (except as noted in para. 6 above), it should be noted that neither the League nor the United Nations Assembly appeared to consider that it had thereby barred any prospective reduction in emoluments, as long as staff contracts provided that they were subject to Regulations and Rules that could be amended by the Organization.

13. The most substantive body of interpretative language about the term "acquired rights" thus appears in decisions of Administrative Tribunals of the League of Nations, the ILO and the United Nations, the relevant judgements of which are summarized and briefly analyzed in the remainder of this section. It should, however, be noted that none of these opinions is directly on point, i.e., none deals with legality of a general salary reduction; furthermore, in the light of the discussions in the Assembly on the establishment of the United Nations Tribunal, it may be doubted whether that organ has jurisdiction to consider and therefore to express an authoritative opinion on such a decision.

14. In a series of 14 judgements in 1946 (e.g., Judgement No. 24, *Mayras* v. *Secretariat of the League of Nations;* also Nos. 25–37) the Administrative Tribunal of the League, citing the opinion of the Committee of Jurists (see para. 3 above), held that the League had wrongfully deprived a number of League and ILO officials of their acquired rights by reducing their termination indemnity by an amendment of the Staff Regulations adopted by the Assembly immediately after the start of the Second World War. However, each of these officials had been appointed before the 1932 amendment to the Staff Regulations (see para. 3 above), so that the Tribunal's holdings in effect merely held illegal a unilateral change in contract when the right to make such change had not been reserved.[33] These decisions are thus among those that identify "acquired rights" with "contractual rights" — as to which, see section V below.

15. In 1960, the ILO Tribunal considered a complaint brought by 69 non-local General Service staff members of FAO (in re *Poulain d'Andecy,* Judgement No. 51) who asserted that their acquired rights to a non-resident's allowance had been violated when the Director-General, on direction of the FAO Council, introduced on 26 June 1959 a new emoluments scheme as of 1 January 1959 whereby General Service salaries were increased but the non-resident's allowance was decreased. The Tribunal, noting the amendment provisions of the FAO Staff Regulations (substantially similar to those of the United Nations), held that there was no acquired right to the amount of the allowance, which was determined by taking into account differences in living standards between various countries and thus depended on factors external to the Organization and its staff and was not set individually for any staff member. However, as to the amount of the allowance payable from 1 January 1959 to the promulgation of the amendment, it held that there was an acquired right which could not be modified even by the simultaneous increase in salaries, since the allowance served a different purpose. This decision thus stands for the

[33] It should be noted that the League Assembly refused to comply with those judgements on the ground that the Tribunal had exceeded its jurisdiction in considering the propriety of a decision of the Assembly; see ILO Memorandum, op. cit., *supra,* note 2, pp. 59–70. Under the current Statutes of the United Nations and ILO Tribunals, such a question of jurisdiction (see paras. 5 and 13 above) could and presumably would be referred to the International Court of Justice for a binding advisory opinion.

proposition that, while the principle of acquired rights bars any reduction in an emolument already earned, it does not necessarily bar a reduction in the level of future entitlements to an entire class of staff members, especially if based on objective considerations.

16. In 1961 the United Nations Administrative Tribunal considered an application from an ICAO professional staff member who complained that as a result of the Organization amending its Staff Regulations and Rules, including the definition of "dependency", to conform more closely to the common system, he was deprived of his right to a dependency allowance on behalf of his spouse and of the right to receive post adjustment at the dependency rate; although his total emoluments were not reduced as a result of a simultaneous reclassification of his duty station into a higher post adjustment category and the grant of a personal allowance to him, that personal allowance would be offset against future increases of salary, from which he would thus not benefit until they exceeded the amount of his personal allowance. In its Judgement (*Purez* v. *ICAO,* Judgement No. 82) the Tribunal held that ICAO's Staff Regulations, which permitted amendments that did not "adversely affect entitlement to . . . any benefits actually earned through service prior to the effective date of the amendments" (the less authoritative French and Spanish translations of which referred respectively to *"droits acquis"* and *"derechos adquiridos"*) merely prevented amendments that had "an adverse retroactive effect in relation to a staff member" but nothing prohibited "an amendment of the regulations where the effects of such amendment apply only to benefits and advantages accruing through service after the adoption of such amendment". Furthermore, the Tribunal explicitly accepted the scheme of transitional personal allowances designed to prevent any actual decrease in emoluments but delaying future increases.

17. In 1967, the same Tribunal decided a claim involving the question whether an amendment favourable to a participant in the United Nations Joint Staff Pension Fund (UNJSPF) applied to him or only to future participants (*Khamis* v. *UNJSPF,* Judgement No. 108). In affirming such applicability in the light of Article XXXVII of the Regulations of the Pension Fund (now Article 50—see para. 39 below), which precluded amendments prejudicial to "rights to benefits acquired through contributory service accumulated prior to that date", the Tribunal, essentially in the nature of dicta, quoted *Maxwell on the Interpretation of Statutes* (11th ed. p. 206), concerning the retroactive construction of statutes, to the effect that: "It is chiefly where the enactment would prejudicially affect vested rights, or the legality of past transactions, or impair contracts, that the rule in question [the presumption against retroactive operation] prevails"; from this the Tribunal concluded "that the principle of law against 'retroactive' construction relates mainly to cases where certain acquired rights are disturbed or denied" — incidentally disregarding the stricture against impairment of contracts.

18. In 1975 an IMCO staff member complained about an amendment to the Staff Rule relating to education grants, whereby the amount of reimbursement would depend on the expenditures incurred by the staff member in educating his child, asserting that the amendment impaired his acquired rights in violation of IMCO Staff Regulation 12.1 (essentially the same as that of the United Nations — see footnote 23 above). The Tribunal, in rejecting the claim (*Queguiner* (Education grant) v. *IMCO,* Judgement No. 202)[34], analyzed the limitation on the right of amendment set out in the cited provision, stating that it "obviously concerns the rights of the staff member expressly stipulated in the contract" (citing the *Kaplan* case discussed in para. 21 below) and that "Respect for acquired rights also means that the benefits and advantages accruing to staff members for services rendered before the entry into force of an amendment cannot be prejudiced".

19. Thus, the above-cited judgements interpreting the term "acquired rights" for the most part relate these to rights deriving from past service, and consequently the pro-

[34] See *Juridical Yearbook,* 1975, p. 129.

tection of such rights merely prohibits retroactive derogations. A few decisions, however, also relate acquired rights to contractual ones, and these are analyzed in the section below.

V. CONTRACTUAL RIGHTS

20. Most of the judicial analysis relevant to the questions posed in paragraph 2 above has not been directly in terms of "acquired" rights, but in terms of "contractual" ones. As mentioned in connexion with some of the cases analyzed in the previous section (see paras. 14, 17 and 18), the Administrative Tribunals have sometimes indicated that contractual rights to prospective benefits are among the "acquired" rights protected from amendment by the limitation that the Assembly has itself imposed on its right to amend the Regulations; in some other cases discussed below, the Tribunals appear to have considered the sanctity of contractual rights as existing independently. In any event, both the United Nations and ILO Tribunals have recognized that the rights of staff members are in part contractual, which may not be varied unilaterally by the Organizations and in part statutory, which may be varied with prospective effect; the question is therefore whether particular rights are considered contractual or statutory.

21. In a series of judgements in 1953 (e.g. *Kaplan* v. *UN*, Judgement No. 19; see also Nos. 20-25, 27) the Tribunal considered the claims of a number of former staff members of the United Nations whose temporary-indefinite contracts had been terminated under Staff Regulation 9.1(*c*), which had been added to the Regulations after the applicants had commenced their United Nations employment and in alleged violation of their acquired rights protected by former Regulation 28 (now Regulation 12). In dismissing this aspect of the claim the Tribunal held:

> "In determining the legal position of staff members a distinction should be made between contractual elements and statutory elements:
>
> "All matters being contractual which affect the personal status of each member — e.g., nature of his contract, salary, grade;
>
> "All matters being statutory which affect in general the organization of the international civil service, and the need for its proper functioning — e.g., general rules that have no personal reference.
>
> "While the contractual elements cannot be changed without the agreement of the two parties, the statutory elements on the other hand may always be changed at any time through regulations established by the General Assembly, and these changes are binding on staff members.
>
> "The Tribunal interprets the provisions of regulation 28 of the Provisional Staff Regulations and article XII of the new Staff Regulations in this manner.
>
> "With regard to the case under consideration the Tribunal decides that a statutory element is involved and that in fact the question of the termination of temporary appointment is one of a general rule subject to amendment by the General Assembly and against which acquired rights cannot be invoked."

It should therefore be noted that the examples of contractual elements given by the Tribunal are mere dicta, not relevant to the disposition of these cases and thus not thoroughly analyzed.

22. In 1962 the ILO Tribunal considered an application by an ITU staff member (and several intervenors) relating to changes made in the ITU Staff Regulations in conforming to the "common system" and to his transfer from the ITU Staff Superannuation and Benevolent Fund to the UNJSPF (*In re Lindsey*, Judgement No. 61). The ILO Tribunal relied on a distinction between contractual and statutory elements similar to that previously established by the United Nations Tribunal in the *Kaplan* case; it stated that "provisions which appertain to the individual terms and conditions of an official, in consideration of which he accepted appointment . . . should to a large extent be assimilated

to contractual stipulations. Hence, if the efficient functioning of the organization in the general interest of the international community requires that the latter type of provisions should not be frozen at the date of appointment and continue so for its entire duration, such provisions may be modified in respect of a serving official and without his consent but only in so far as modification does not adversely affect the balance of contractual obligations or infringe the essential terms in consideration of which the official accepted appointment". After discussing the changes in the provisions relating to the applicant, the Tribunal concluded that, on balance, the changes in the pension arrangements "seriously impaired a right that could have induced complainant to enter the service of the Union" and thus "infringed the terms of his appoinment"; similarly it found a serious infringement in the provisions regarding termination in the event of abolition of post; on the other hand it considered that the changes in regard to family allowances could not be challenged because they merely altered the conditions for the grant of the allowance, and were generally favourable to the interests of those concerned. This case would thus appear to stand for the proposition that any substantial diminution of the rights of an official, at least as compared to the terms that might have induced him to accept his appointment, are prohibited; however, the ILO Tribunal does not discuss the effect of any provision permitting the amendment of contracts of appointment or of staff regulations incorporated therein, and thus it is likely that there were no such provisions in the ITU contracts in question.

23. In 1967 the United Nations Administrative Tribunal rejected the contention of an ICAO official that the "dependency" definition formed part of his "contractual rights" and could therefore not be amended without unlawfully interfering with those rights (*Manckiewicz* v. *ICAO,* Judgement No. 110). The Tribunal pointed out that the Applicant's employment contract "specifically stated that it was subject to the provisions of the Service Code in force and 'as amended from time to time'."

24. The above-cited Tribunal decisions are not particularly helpful in distinguishing between the contractual (and thus unilaterally unamendable) and the statutory (and thus amendable) elements of the employment relationship of international organizations with members of their staffs. The *Lindsey* case (para. 22 above), which discusses the distinction extensively in an essentially theoretical dissertation thereafter reaches its decision not by defining particular contractual elements but by deciding whether certain amendments were such as to make the material conditions less attractive than when the appointment was accepted; the *Queguiner* case (para. 18 above) also explores this question; the *Kaplan* case (para. 21 above), which is the only one that explicitly lists salary as a contractual right, does so only as dicta in a case in which that issue did not arise at all.

25. One superficially plausible distinction between contractual and statutory elements requires explicit refutation: it cannot be said that those items that are explicitly set out in Letters of Appointment (whether or not required by Annex II to the Staff Regulations) are the contractual elements and those merely set out in the Staff Regulations and Rules are the statutory ones. Those explicitly set out in the Letter mostly relate to the "initial assignment", and include items such as "Function", "Department or Office" and "Official Duty Station", which can be changed through reassignment by the Secretary-General at any time pursuant to Staff Regulation 1.2. On the other hand, rights that Tribunals have considered contractual, such as pension rights or termination allowances, are never explicitly set out in the Letters or contracts.

VI. AGREEMENTS WITH STAFF ASSOCIATIONS

26. One final question requires examination before reaching conclusions on the questions presented: do the "agreements" entered into between the excutive heads of the Geneva-based associations and the representatives of their respective staffs constitute any

obstacle to a change in salary levels from those established on the basis of those instruments? The instruments in question are the "Declaration of the Executive Heads of the United Nations Office in Geneva, ILO, WHO, ITU, WMO, WIPO, ICITO/GATT" of 3 March 1976, the "Appendix II: General Service salaries and dependency allowances in Geneva" recording an agreement reached and signed on 23 April 1976 and the "Method for interim adjustments of the Geneva General Service salaries" of 1 September 1976.

27. In the first place, it should be noted that none of these instruments specify how long the regime they establish is to be in effect — their concern is with the past and with the immediate time at which they were concluded, though obviously it is foreseen that these regimes would continue for at least some time. However, the 1 September 1976 paper explicitly specifies, in paragraph 4 that:

> "The present arrangement is without prejudice to the outcome of the examination by the International Civil Service Commission of the question of General Service salaries with full participation of Administrations and Staff in accordance with the concept expressed by the International Civil Service Commission in paragraph 19 of its first report to the General Assembly of the United Nations (A/10030, Supplement No. 30)."

28. More importantly, it must be recognized that relations between the international organizations following the common system and their staffs do not depend on negotiated "collective bargaining agreements". Rather, the staff associations or unions that are established and recognized pursuant to the Staff Regulations of the respective organizations are authorized to intervene with the Executive Heads of the organizations and with specialized organs such as the ICSC, and perhaps to a limited extent with the political organs, to assist them in formulating the decisions that these organs take in respect of Staff Regulations and Rules, including salary scales and other emoluments. Neither the executive heads nor the staff associations are authorized to enter into binding contractual commitments in respect of any of these matters.

VII. CONCLUSIONS

A. *Reduction of net salaries*

29. When the relevant provisions of the Staff Regulations and Rules discussed in Section III above are considered in the light of the historical background recalled in Section II, it appears that the General Assembly took every necessary precaution to reserve to itself, or as appropriate to the Secretary-General, the right to reduce salary scales and emolument levels in appropriate circumstances. A conclusion that such scales or levels cannot now be reduced could therefore only be based on the premise that civil service salaries can never, under any circumstances, be reduced legally — a premise that would differ from that of the 1932 Commission of Jurists (see para. 3 above) and be unsupportable on the basis of either international administrative or general legal principles.

30. Can it, however, be said that the intention of the General Assembly is nullified because of the inclusion of the "assessable salary"[35] on "initial assignment" in the Letters of Appointment of staff members? First of all, it should be noted that such inclusion is required by the Staff Regulations themselves (Regulation 4.1 and Annex I) and it cannot be supposed that the Assembly, which adopted these Regulations while conscious of the importance of maintaining the right to reduce salary scales, would have desired to frus-

[35] As indicated, the salary figures in Letters of Appointment are "assessable" (i.e., gross, or pensionable) rather than net. This, however, does not affect the argument in this paragraph or this subsection, as it is not being suggested that net salaries be reduced by an increase in staff assessments while leaving the gross unchanged. In effect, the ICSC investigation has determined what the proper net rates should be, and the gross rates are derived from these by reverse application of the existing assessment rates.

trate its own intention. Second, as discussed in paragraph 25 above, the fact of such inclusion does not make "salary" or initial salary an unamendable contractual as opposed to a statutory element. Finally, if the initial salary set out in the Letter of Appointment were considered sacrosanct for each staff member, this would lead to the absurd result that the extent to which any staff member's salary could be reduced would depend on how long ago he received his appointment, and on whether or not he had since been promoted. Incidentally, the application of the principle suggested by the ILO Tribunal in the *Lindsey* case (see para. 22 above) would lead to a similar result: any staff member's salary could be reduced to a level no lower than that which induced him to accept his initial, or perhaps his most recent appointment — an interpretation which, aside from being administratively difficult to implement, would protect best those most recently employed.

31. Does the *Kaplan* case (see para. 21 above) and those that follow it require any different conclusion? As already pointed out, the statement of the United Nations Administrative Tribunal that salary is a contractual matter because it affects the personal status of each staff member, was entirely dicta — the case did not relate to salary, nor did the decision of the Tribunal depend on the distinction between contractual and statutory elements it had established. However, in the context in which the reference to salary appears, it would at most seem to be an assertion of the principle that an individual staff member's salary cannot be reduced, either by departing from the salary scale applicable to him or by changing his grade (another of the listed "contractual" elements).

32. It should, incidentally, be noted that emoluments can certainly be reduced on various unassailable bases, which reaffirms the proposition that neither salaries in general nor the initial salaries stated in Letters of Appointment are protected against otherwise proper amendments of the scales:

(*a*) For a professional officer, an initial net salary stated in his Letter of Appointment can be reduced if assigned to a duty station with a negative post adjustment (see Annex I to the Staff Regulations, para. 9 and the third table);

(*b*) For professional officers, the net emoluments he actually receives can be and frequently are reduced either if the post adjustment level of his duty station is reduced, or if he personally is transferred (whether or not at his initiative) to a duty station with a lower post adjustment;

(*c*) General Service salaries can be reduced if there is an actual reduction in the "best prevailing conditions of employment in the locality of the United Nations office concerned".

33. The situation here under consideration differs from that referred to in subparagraph 32(*c*) above merely in that there has been no actual reduction in the best prevailing salary conditions in Geneva, but rather that the Organization's perception of what those conditions are has changed. This change is not arbitrarily based on any alteration of the principle established by the General Assembly in paragraph 7 of Annex I to the Staff Regulations (see footnote 31 above), but on the basis of a thorough study by the competent and specially qualified organ established by the General Assembly and accepted by most of the organizations of the common system, responding to a specific request addressed to it by the General Assembly (see para. 9 above); in performing its task it invited the participation of all the interested staff associations. Thus the revised scales presumably represent the most precise possible calculation of what the proper international salary levels in Geneva should be pursuant to the applicable provisions of the Staff Regulations relating to the establishment of General Service salaries.

B. *Implementation of transitional personal allowances*

34. As it was concluded in subsection A above that there is no legal obstacle to the implementation of the recommended reduced salary scales, *a fortiori* there should be

no obstacle to mitigating such reduction by use of personal allowances that would ensure that the salary of no General Service staff member is actually reduced, or that would impose only a modified reduction (e.g., the limited and thus partial mitigation authorized by para. 3 of General Assembly resolution 470(V) in respect of certain changes in professional salaries — see para. 6 above), even if future increases, including annual increments, are thereby delayed until such time as their total exceeds the amount of the personal allowance for the staff member in question.

35. Moreover, even if the dicta in the *Kaplan* case (see paras. 21 and 31 above) were accepted as properly stating as a legal principle that the amount of each staff member's emoluments is contractual and thus irreducible, this does not necessarily mean that the elements that make up the total emoluments are also contractual and that even a formula for the increase of emoluments is also contractual. By its very nature such a formula would appear to be statutory. In other words, even should an "acquired right" to an existing salary (i.e., amount of emoluments) be recognized, this would not imply a legal basis for "acquired expectations" derived from a particular dynamic scheme. Therefore, whatever legal or other objections might be raised against a reduction in current emoluments, there would be no contractual impediment to mitigating the effects of a general reduction of salary scales by use of transitional personal allowances that delay or reduce future increases in emoluments.

36. It should also be noted that the United Nations Administrative Tribunal has several times upheld schemes that involved the use of transitional personal allowances; such a scheme is extensively discussed in the *Purez* case (see para. 16 above) and to a lesser extent in the *Manckiewicz* case (see para. 23 above). But in the *Lindsey* case (see para. 22 above), the ILO Tribunal found other types of transitional provisions (relating to the pension fund) inadequate.

C. *Reduction in pensionable remuneration*

37. Pensionable remuneration is defined by Staff Rule 103.16(*a*).[36] It should be noted that the remuneration specified in Letters of Appointment is, by reason of that definition, the principal (and for many General Service staff the only) element in determining pensionable remuneration. This does not imply, for the reasons stated above (in particular para. 25), that such remuneration is entitled to greater protection than net salaries. Nor can any argument be derived from the Staff Regulations and Rules for according any higher protection to pensionable than to actual remuneration. Although Staff Rule 103.16(*c*)[37] does prohibit any reduction in pensionable remuneration on the promotion of any General Service staff member to the Professional level, this rule is not designed to prevent any general erosion of pensionable remuneration but merely ensures (as does Staff Rule 103.9) that there should be no pecuniary disadvantages to a promotion.

38. A reduction in pensionable remuneration is of course objectionable, from the point of view of the staff member concerned, for two reasons: not only may it result in a lower pension (if retirement takes place at a time when such reduced pensionable re-

[36] Reading as follows:

"(*a*) For the purpose of the Regulations of the United Nations Joint Staff Pension Fund, pensionable remuneration shall, subject to paragraphs (*b*) and (*c*) below, consist of the sum of:

"(i) The amount of the gross salary of the staff member established in accordance with staff regulation 3–1;

"(ii) The amount of any non-resident's allowance and/or language allowance payable under staff rules 103.5 and 103.6, respectively."

[37] Reading as follows:

"(*c*) Where a promotion from the General Service category to the Professional category would result in a reduction of the staff member's pensionable remuneration, the level of pensionable remuneration reached prior to the promotion shall be maintained until it is surpassed by the level based on the staff member's salary in the Professional category."

muneration still affects the "final average remuneration" (see para. 39 below), but it may therefore lead him to feel that he "wasted" his temporarily higher contribution which ultimately may not increase his pension (unless he retires soon after the reduction). Nevertheless, the normal pattern of steadily increasing pensionable remuneration is not guaranteed in the Staff Regulations, and thus such an expectation is not protected as a matter of law. It is true that the *Lindsey* case (see para. 22 above) may suggest the contrary, but the principal issue therein was an amendment of the ITU pension provisions (in the course of joining the UNJSPF) of a type that would probably be improper under the UNJSPF Regulations (see para. 39 below); the proposition that there is a legally protected expectation of a steadily increasing pensionable remuneration was stated only in the context of whether a particular transitional provision was an adequate corrective for an otherwise improper amendment.

39. Article 50(*b*) of the UNJSPF Regulations provides that they may be amended by the General Assembly "but without prejudice to rights to benefits acquired through contributory service prior to that date". This provision, however, does not mean that pensionable remuneration cannot be reduced by mechanisms other than through an amendment of the Pension Fund Regulations. Such a conclusion would be contrary to the definition of "Final average remuneration" in Article 1(*h*) of the UNJSPF Regulations, which define FAR to mean the average annual pensionable remuneration during the 36 completed calendar months of highest pensionable remuneration within the last five years of contributory service; if pensionable remuneration could never be reduced, then this formula could be replaced by one merely averaging the remuneration of the last three years of contributory service. Actually, of course, there are several mechanisms by which pensionable remuneration, for an individual or for a whole class of officials, may be reduced:

(*a*) Since the pensionable remuneration of professional staff members is by Staff Rule 103.16(*b*) related directly to WAPA, that rule explicitly provides that any sufficiently large increases or decreases in WAPA are to be appropriately reflected in pensionable remuneration.

(*b*) If General Service salary scales at a duty station should be reduced under the conditions specified in subparagraph 32(*c*) above, this would automatically result in a corresponding reduction in pensionable remuneration.

(*c*) If a General Service staff member is transferred to a duty station whose salary scales are lower, or if a staff member is changed to a lower salary level in accordance with Staff Rule 103.8(*b*), then his pensionable remuneration will be reduced correspondingly.

Consequently, there appears to be no legal obstacle to reduction in pensionable remuneration consequent on a reduction in general salary scales.

40. It should be noted that if a system of transitional personal allowances, such as discussed in subsection B above, is adopted, then such allowances can be made pensionable (as provided by the General Assembly in resolution 470 (V), para. 3) or non-pensionable — though the former appears more logical as the allowance would be granted in respect of pensionable income.

41. On the other hand, any attempt to maintain pensionable remuneration while reducing actual remuneration would be considered objectionable as violating at least the spirit of the mutual arrangements on which the Pension Fund is based, which include the expectation, maintained by the common system, that pensionable remuneration should not be substantially divorced from the actual payments that an organization makes to its staff. Any different approach would permit a participating organization to undermine the actuarial soundness of the Fund by assuring its staff of high pensions at the cost of merely 14% of an artificially inflated pensionable remuneration figure.

3 October 1977

10. Question whether the United Nations has the obligation to pay emoluments to the members of the Human Rights Committee established by the International Covenant on Civil and Political Rights and its Optional Protocol — Question of how the resulting expenditures connected with the first (1977) session of the Committee are to be met

Memorandum to the Chief, Economic, Social and Human Rights Section, Budget Division, Office of Financial Services

1. With regard to the questions posed in your memorandum of 7 February 1977, on the above-mentioned subject, our views are given below.

2. By its resolution 2200(XXI) of 16 December 1966, the General Assembly adopted the Covenant on Civil and Political Rights and opened it for signature, ratification and accession. Article 28 of the Covenant provides for the establishment of a Human Rights Committee consisting of eighteen members, which are to be elected, under article 30 by the State Parties to the Covenant, the initial election being held no later than six months after the date of entry into force of the Covenant.[38]

3. Article 35 of the Covenant reads as follows:

> "The members of the Committee shall, with the approval of the General Assembly of the United Nations receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide, having regard to the importance of the Committee's responsibilities".

When the Third Committee recommended the adoption of resolution 2200 (XXI) to the General Assembly, it had before it a note of the Secretary-General on the financial implications of the above quoted article (A/C.3/L.1382) and before the General Assembly adopted resolution 2200 (XXI) it had before it three documents submitted respectively by the Secretary-General (A/C.5/1102), the Advisory Committee on Administrative and Budgetary Questions (A/6585) and the Fifth Committee (A/6591), concerning the financial implications of the draft Covenant.[39]

4. Rule 154 of the Assembly's rules of procedure at that time read as follows:

> "No resolution involving expenditures shall be recommended by a committee for approval by the General Assembly unless it is accompanied by an estimate of expenditures prepared by the Secretary-General. No resolution in respect of which expenditures are anticipated by the Secretary-General shall be voted by the General Assembly until the Administrative and Budgetary Committee has had an opportunity of stating the effect of the proposal upon the budget estimates of the United Nations."[40]

5. From the listing of the documents in paragraph 3 above — the last three of which will be analyzed later in this memorandum insofar as they relate to article 35 of the Covenant — it is clear that the requirement of rule 154 had been met. Consequently, the adoption of the Covenant including article 35 thereof imposes on the United Nations an obligation to pay emoluments to the members of the Human Rights Committee.

6. Article 35 of the Covenant provides that the members of the Committee shall receive emoluments "on such terms and conditions as the General Assembly may decide, having regard to the importance of the Committee's responsibilities". In his note on the

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[38] The Covenant came into force on 23 March 1976 and the first election was held on 20 September 1976 at United Nations Headquarters (see *Official Records of the General Assembly, Thirty-second Session, Supplement No. 44* (A/32/44).

[39] The three documents in question are reproduced in *Official Records of the General Assembly, Twenty-first Session*, agenda item 62.

[40] A/520/Rev.8.

financial implications of the draft Covenant, the Secretary-General, expressing the concern that article 35 if approved would constitute an exception to the decision taken by the General Assembly at its sixteenth session,[41] nevertheless stated that

> "should the General Assembly decide that emoluments are in fact to be paid to the members of the human rights committee under article 35, provision will have to be made in the budget, beginning with 1968, to meet the resulting expenditure, the magnitude of which would depend on the terms and conditions to be established by the Assembly" (underlining added).[42]

The Secretary-General then proceeded to recommend that

> "To discharge its responsibilities under rule 154 of the General Assembly's rules of procedure, the Fifth Committee might wish to advise the Assembly that:
>
> "(*a*) Adoption of part IV of the draft Covenant on Civil and Political Rights recommended by the Third Committee in document A/6546 would have the following financial implications:
>
> (i) As regards the human rights committee:
>
> a. Provisions would need to be made in the annual budget, beginning with 1968, to cover the costs of the emoluments which the General Assembly might decide to grant to the members of the committee: the amount of that provision would depend on the terms and conditions established by the Assembly" (underlining added).[43]

These statements show that the phrase "on such terms and conditions as the General Assembly may decide" in article 35 refers to the amount to be paid and not to any terms or conditions under which no payment can be made.

7. The ACABQ in its report on financial implications of the draft Covenant,[44] after summarizing the actions which resulted in the earlier decision by the Assembly reaffirming the basic principles governing the emoluments of persons who serve on organs and subsidiary organs of the United Nations, according to which neither fee nor remuneration should normally be paid, expressed the opinion that the General Assembly should maintain its decision of principle and that any payment of honoraria should be limited to those members of organs and subsidiary organs to whom the General Assembly had already authorized payments on an exceptional basis.[45] However, in view of the importance of the Covenant and Optional Protocol recommended by the Third Committee for adoption by the General Assembly, the Advisory Committee suggested that the Fifth Committee might wish to recommend to the General Assembly that, should any such expenditure become necessary during 1967, it should be authorized under the terms of the General Assembly resolution relating to unforeseen and extraordinary expenses for 1967 with the prior concurrence of the Advisory Committee.[46]

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[41] By that decision the Assembly reaffirmed "the basic principle governing the emoluments of persons who serve in organs and subsidiary organs of the United Nations, according to which neither fee nor other remuneration shall normally be paid to: .... members serving on organs or subsidiary organs of the United Nations in an individual personal capacity. Where appropriate, a subsistance allowance at the standard rate, together with travel expenses, shall be payable, but the allowance shall not be deemed to contain any element of fee or remuneration; ... [These] decisions shall not be deemed to embrace any honoraries which the General Assembly has already authorized for payment on an exceptional basis (*Official Records of the General Assembly, Sixteenth Session, Annexes,* agenda item 54, document A/5005, para. 10).

[42] *Official Records of the General Assembly, Twenty-first Session, Annexes,* agenda item 62, document A/C.5/1102, para. 5.

[43] *Ibid.,* para. 16.

[44] *Ibid.,* document A/6585.

[45] *Ibid.,* para. 27.

[46] *Ibid.,* para. 16.

8. The report of the Fifth Committee to the Assembly on the financial implications of the draft Covenant contained the following statements:

> "Concurring with the recommendation of the Advisory Committee on this matter, the Committee decided to inform the General Assembly that, at this time, no financial implications were foreseen in so far as the budget estimates for 1967 were concerned. The Committee decided, however, to recommend that the General Assembly should authorize the Secretary-General, with the prior concurrence of the Advisory Committee, to meet any necessary expenditures which might occur in 1967 under the terms of the General Assembly resolution relating to unforeseen and extraordinary expenses for the financial year 1967. The Committee decided to inform the Assembly that requirements for 1968 would be taken into account in the initial budget estimates for that year.
>
> "The Committee further recommended that the General Assembly should take note of the observations expressed by the Secretary-General and the Advisory Committee relating to the payment of emoluments to members of the proposed human rights committee referred to in article 35 of the draft Covenant."[47]

9. Although the statements on financial implications mentioned in the preceding paragraphs related to the financial year following the adoption of the Covenant, the views expressed therein on the principles and procedures are relevant to the question dealt with in the present memorandum. In particular the question of payment of emoluments to the members of the Human Rights Committee was one which was considered in depth by the ACABQ and on which the Secretary-General and the Fifth Committee also expressed concern. Secondly, both the ACABQ and the Fifth Committee recommended that the General Assembly should authorize the Secretary-General with the prior concurrence of the Advisory Committee to meet any necessary expenditures under the terms of the General Assembly resolution relating to unforeseen and extraordinary expenses.

10. Having regard to the background of the adoption of article 35 of the Covenant as reviewed above, we have reached the following conclusions:

(1) that the United Nations has the obligation to pay emoluments to the members of the Human Rights Committee;

(2) that in view of the postponement by the General Assembly of its consideration of the question of honoraria to its next session and of the fact that the Committee is scheduled to hold its first session from 21 March to 1 April 1977, the Secretary-General should deal with the matter under General Assembly resolution 3540 (XXX) on unforeseen and extraordinary expenses for the biennium 1976-1977 and try to obtain the concurrence of the ACABQ, if possible before the opening of the first session of the Human Rights Committee.

25 February 1977

11. Advice regarding the manner in which a relationship agreement between the United Nations and the World Tourism Organization should be negotiated

Memorandum to the Director and Secretary of the Economic and Social Council

1. Reference is made to your memorandum dated 21 December 1976, in which you requested our guidance regarding the manner in which the Economic and Social Council should be advised in connexion with the negotiation of an agreement between the United Nations and the World Tourism Organization (formerly the International Union of Official Travel Organizations). You will recall that, by its resolution 2529 (XXIV), of 5 December 1969, the General Assembly *inter alia* decided that:

[47] *Ibid.*, document A/6591, paras. 2 and 3.

"(*a*) An agreement between the United Nations and the Union should be concluded which would establish close co-operation and relationships between the United Nations and the transformed Union, define the modalities of such co-operation and relationships and recognize the decisive and central role that the Union is to play in the field of world tourism in co-operation with the existing machinery within the United Nations;

"(*b*) The Union should function as an executive agency of the United Nations Development Programme and participate in the activities of the Programme in order to assist in the preparation and implementation of technical assistance and pre-investment projects in the field of tourism, financed by the Programme, and consideration should be given to enabling the Union to function as a participating and executing agency of the Programme;

"(*c*) Necessary procedures should be elaborated to enable the Union to submit, for the consideration of the Economic and Social Council, recommendations and proposals relating to international agreements to be drawn up in the field of tourism;"

2. It is clear from the record that the agreement envisaged in resolution 2529 (XXIV), and other relevant General Assembly and Economic and Social Council resolutions, was never intended to bring the latter organization into relationship with the United Nations as a specialized agency in accordance with Articles 57 and 63 of the Charter. All those resolutions, for instance, while recognizing the need for a formal agreement, avoid any mention of WTO as a specialized agency of the United Nations.

3. It is true that the agreement, when finally approved by the competent organs, will in effect establish a new kind of relationship between the United Nations and an intergovernmental organization exercising functions of an economic and social nature giving the latter a status vis-à-vis the Council broader than that which derives from rule 79 of the rules of procedure of the Council. In any case, this rule governs only the participation of intergovernmental organizations in the proceedings of the Council, and the agreement between the United Nations and the World Tourism Organization is clearly intended by the Assembly (see paragraph 1 above) to be much broader in scope than this.

4. As to the way in which the Council should proceed when the agreement comes before it for consideration, the following alternatives are suggested:

(*a*) Since the agreement has been carefully negotiated, the Council may wish to approve the draft text and recommend it to the Assembly for approval without considering it in detail;

(*b*) Should the Council wish to consider the text of the agreement in more depth, it might consider it advisable to refer the agreement for study and report to a working group established for the purpose, composed of States that are particularly interested in the field of tourism, or, possibly, to its Committee on Negotiations with Intergovernmental Agencies.

Of course, the Council should be expressly reminded when the matter comes before it for consideration that the agreement between the United Nations and the World Tourism Organization is not a specialized agency agreement in accordance with Articles 57 and 63 of the Charter.[48]

6 January 1977

[48] By its decision 254 (XLIII) of 3 August 1977, the Economic and Social Council decided to approve and transmit to the General Assembly at its thirty-second session the text of a draft agreement on cooperation and relationships between the United Nations and the World Tourism Organization. The General Assembly, by its resolution 32/156 of 19 December 1977, approved the agreement as set forth on the annex to the resolution.

12. COMMENTS ON THE ADMISSION OF THE PALESTINE LIBERATION ORGANIZATION (PLO) AND OF EGYPT IN THE ECONOMIC COMMISSION FOR WESTERN ASIA (ECWA)

Memorandum to the Under-Secretary-General, Department of Economic and Social Affairs

1. This is in response to the memorandum addressed to me, on your behalf, on 25 May, concerning the proposed admission of the Palestine Liberation Organization and of Egypt to the Economic Commission for Western Asia.

I. MEMBERSHIP OF PLO

2. On 26 April 1977, ECWA adopted resolution 36(IV) on the "Application by the Palestine Liberation Organization for full membership of the Economic Commission for Western Asia" in which (consistent with our view that this application could not be considered under the existing terms of reference of the Commission) it called upon the Economic and Social Council to amend article 2 of its resolution 1818(LV) (the terms of reference of ECWA) so as to make the PLO a member of ECWA.[49] At present that paragraph only provides for membership in the Commission by Member States of the United Nations situated in Western Asia, which used to call on the services of the Economic and Social Office in Beirut or those whose applications are decided on by the Council upon the recommendation of ECWA.[50]

3. It should be noted that the regional commissions of the United Nations have been established by the Economic and Social Council pursuant to Article 68 of the Charter, which provides that: "The Economic and Social Council shall set up commissions in economic and social fields . . . .". That article does not explicitly specify that the membership of commissions established pursuant to it should be restricted to Members of the United Nations, or to States, or even to entities having international personality. As a matter of fact, research in the history of the Charter shows that in the original draft prepared at Dumbarton Oaks it had been foreseen that commissions established by the Economic and Social Council would consist of individual experts.[51] Although this requirement was deleted at the San Francisco Conference, this was only done so as not to limit the Council's discretion in determining the composition of its commissions.[52] The Preparatory Commission for the United Nations consequently recommended that these Commissions "should contain a majority of responsible, highly-qualified governmental representatives".[53] When these recommendations were considered at the first session of the General Assembly, a joint sub-committee of the Second and Third Committees indicated that some members doubted whether the recommendation that most commissions should contain a majority of governmental representatives was desirable and whether it allowed the Council sufficient freedom; this recommendation of the Preparatory Commission was therefore approved on the understanding that no limitation should be put on the Council in choosing the members of commissions (A/17).[54] Except for this liminal consideration by the General Assembly, that organ has not otherwise intervened in the Council's authority to establish or to determine the composition of regional commissions.

[49] *Official Records of the Economic and Social Council, Sixty-third Session, Supplement No. 10* (E/5969), p. 22.

[50] See Economic and Social Council resolution 1818 (LV).

[51] *Documents of the United Nations Conference on International Organization, San Francisco, 1945*, London and New York, United Nations Information Organization, 1945, Vol. 3, Doc. I G/1, p. 21.

[52] *Ibid.*, Vol. 8, Doc. 924, II/12, p. 88.

[53] *Report of the Preparatory Commission of the United Nations*, 1945 (PC/20), p. 39 para. 37.

[54] *Official Records of the First Part of the First Session of the General Assembly, Plenary Meetings*, Annex 3, p. 573.

4. In the past, the composition of the four earlier regional commissions was extensively considered by the Economic and Social Council on several occasions, generally in the context of proposals to make non-member States of the United Nations or non-self-governing territories full members of certain commissions. In connexion with these considerations, several legal opinions were expressed by the Secretariat:

(*a*) At a meeting of the Committee of the Whole of ECAFE held in New York on 10 July 1947, the Assistant Secretary-General in charge of the Legal Department concluded that while there was no explicit provision in the Charter on the question of whether non-member States of the United Nations could become full members of ECAFE, the Charter envisaged a clear difference between Members and non-members and "that this difference rested upon the fundamental principle that rights of membership should not be granted unless the obligations of membership were also assumed." On the other hand, the grant of full commission membership to non-self-governing territories "would be contrary to the special regime prescribed for such territories in Chapters XI, XII and XIII of the Charter" (E/491).[55]

(*b*) During the thirteenth session of the Council in September 1951, an opinion of the Legal Department of the United Nations was read to the Council which emphasized that neither Article 68 nor any other provision of the Charter imposed any conditions on the composition of regional commissions. Recalling the history of that provision (as cited in para. 3 above), the opinion concluded that the Council "having wide discretion in determining the composition of its commissions, may accord to non-member States the right to vote in ECE".[56]

(*c*) In response to a request made at the fifteenth session of the Economic and Social Council for a legal study on the question whether full membership with voting rights in commissions could be granted to non-member States, the Secretary-General prepared a memorandum (E/2458)[57] in which he examined in detail the history of Article 68 of the Charter, the practice of the Economic and Social Council, the possible implications of Article 69 (relating to the procedures of the Council itself) and of Article 4 (relating to membership in the Organization) and concluded that the Council "has authority by virtue of Article 68 of the Charter to grant full membership in the regional commissions to States which are not Members of the United Nations".

5. Although these previous opinions only addressed the possibility of membership in regional commissions by non-member States or by non-self-governing territories, the history and reasoning on which they were based could support the proposition that in view of the silence of the Charter and of the General Assembly on this subject, the Economic and Social Council has authority to grant membership in these commissions to entities that are not even States or territories. However, although the Council did establish functional commissions composed of individuals, as to the regional commissions it has been the invariable practice of the Council to grant full membership only to States — in general Members of the Organization, though there have been some exceptions (e.g., the membership of Switzerland in ECE). This practice rests on the principle that the membership of certain organs, as of the Organization itself, must be restricted to States; the unprecedented creation of mixed organs, consisting of both States and other entities, would imply a departure from this well-established practice. Before doing so, the Council might wish to consult the General Assembly, which is the organ that under Article 60 of the Charter is vested with primary responsibility for the discharge of the functions of the Organization in relation to international economic and social co-operation, and under whose authority the Council functions.

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[55] See *Official Records of the Economic and Social Council, Fifth Session, Supplement No. 6,* Part II, p. 19.

[56] *Ibid., Thirteenth Session,* 555th meeting, para. 8.

[57] *Ibid., Seventeenth Session, Annexes,* agenda item 8.

6. In respect of the PLO, the General Assembly has in its resolution 3237 (XXIX) provided that that entity should enjoy observer status in various organs and conferences of the United Nations. The Economic and Social Council has granted such status to the PLO under rule 73 of the rules of procedure, and ECWA has granted the PLO permanent observer status by resolution 12(II).[58] If the Council were, on its own authority, to grant full membership to the PLO in ECWA, it might be considered as going beyond the letter and possibly the spirit of the resolution of the Assembly, which is the organ preeminently qualified to make political decisions in the Organization (see, e.g., General Assembly resolution 396(V)).

7. However, the Council has in the past created the category of associate members in respect of three of the regional commissions (ECA, ECLA, ESCAP) in order to provide for the participation of non-self-governing territories (and in ECA, also of the administering authorities thereof), evidently considering that, not being States, they lacked the capacity to become full members of these commissions; such a category, which has not yet been, but could also be created for ECWA, would seem more appropriate for an entity such as the PLO. In addition, it might be noted that the Council has, in respect of each regional commission, also provided that various States and other entities (e.g., the former Free Territory of Trieste, in respect of ECE) not members of a commission, might enjoy a "consultative capacity" therein.[59]

8. Consequently, our specific responses to the three queries in the above mentioned memorandum are as follows:

(i) As the composition of each of the five existing regional commissions is formulated uniquely, a change in the composition of one commission would not directly affect or imply a change in the composition of the others — except as the establishment or the disregard of certain principles in respect of one commission might be considered as precedents relevant to the others (see subparagraph (iii) below).

(ii) In view of the silence of the Charter on the subject of the composition of regional commissions, no decision of either the General Assembly or the Council on this subject would imply a change in that instrument, though the creation of a mixed-type (i.e., both States and other entities) full membership in a regional commission would constitute an important change in the constitutional practice of the past thirty years.

(iii) Although, as indicated in subparagraph (ii) above, no amendment of the Charter would be required to change the nature of the composition of regional commissions, the creation of a mixed full membership in one of them would be a precedent relevant to both the other such commissions and to other intergovernmental organs at present consisting solely of representatives of States.

9. Summing up, there is no legal impediment to the Council granting membership to the PLO in ECWA. However, for the above-stated reasons, it would appear more consistent with constitutional practice for the Council to create a special category of membership in ECWA to accommodate the PLO.[60]

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[58] *Ibid., Fifty-ninth Session, Supplement No. 11* (E/5658), p. 13.

[59] See Economic and Social Council resolution 36 (IV) of 28 March 1947, para. 9.

[60] Further to resolution 36(IV) of the Economic Commission for Western Asia, the Economic and Social Council adopted resolution 2089 (LXIII) of 22 July 1977 whereby it decided to amend paragraph 2 of the terms of reference of ECWA to read:

"2. The members of the Commission shall consist of the States Members of the United Nations situated in Western Asia which used to call on the services of the United Nations Economic and Social Office in Beirut and of the Palestine Liberation Organization. Future applications for membership by Member States shall be decided on by the Council on the recommendation of the Commission."

II. MEMBERSHIP OF EGYPT

10. On 28 April 1977, ECWA adopted resolution 37(IV) on the "Application by the Arab Republic of Egypt for membership of the Economic Commission for Western Asia, in which it recommended that the Economic and Social Council approve the admission of Egypt as a member of ECWA.[61] Although this recommendation would appear consistent with the existing text governing the composition of ECWA (see para. 2 above), there are several legal questions that require comment.

11. Unlike the ECA, ECLA and ESCAP, but not ECE, ECWA's geographical scope is not defined explicitly in its terms of reference, though a certain restriction is implied by its name. The question might therefore be raised whether the admission of Egypt would:

(*a*) expand the geographical scope of the Commission, certainly beyond its existing scope (that previously serviced by UNESOB) by including the Sinai, and possibly even beyond the scope implied by its name, if the principal part of the country's territory (i.e., that in Africa) is also considered to be included. Either expansion might also raise once more the issue of whether the Economic and Social Council would not be improperly excluding a Member of the Organization that is clearly within the region serviced by the Commission, certainly as thus expanded.

(*b*) merely be that of a non-regional member (such as, e.g., the United Kingdom and the United States in ESCAP and Canada and the United States in ECE)?

12. Egypt is already a member of ECA, being explicitly mentioned as such in the latter's terms of reference:[62] admission to ECWA would thus give that country dual membership. While this would not be unprecedented (e.g., the United States is a member of ECE, ECLA and ESCAP; Canada is a member of ECE and ECLA; the United Kingdom is a member of ECE and of ESCAP, and originally was also of ECA), it should be noted that this would be the first instance in which a potential recipient of assistance from regional commissions would be enabled to receive assistance from more than one. If it wishes to grant Egypt membership in ECWA as a regional member (see para. 11 above), the Council might at the same time specify either that it is to be eligible to receive assistance from only ECA or ECWA, or that assistance in respect of the principal territory would have to come from ECA and in respect of the Sinai from ECWA.

13. There would thus seem to be no legal obstacle to the admission of Egypt as a full member of ECWA, in particular if it is understood that such admission is in the capacity of a non-regional member not entitled to assistance from the Commission (except, perhaps, in respect of the Sinai), or alternatively if the extent of the extension of the geographical scope of the Commission is adequately defined and appropriate provisions are made to prevent the possible duplication of eligibility for assistance.[63]

16 June 1977

13. COMMENTS ON THE QUESTION OF THE DESIGNATION BY A MEMBER OR ASSOCIATE MEMBER OF ESCAP OF ITS REPRESENTATIVE ON THE COMMISSION AS OBSERVER

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

1. I refer to the letter from the Special Assistant to the Executive Secretary of ESCAP of which a copy is attached to your memorandum to me of 24 March 1977.

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[61] See *Official Records of the Economic and Social Council, Sixty-third Session, Supplement No. 10* (E/5969), p. 22.

[62] *Ibid., Sixty-first Session, Supplement No. 11* (E/5783), Annex III. para. 5.

[63] By its resolution 2088 (LXIII) of 22 July 1977, the Economic and Social Council decided to admit the Arab Republic of Egypt as a member of the Economic Commission for Western Asia.

2. My observations on that letter will be based on the assumption that the phrase "an intergovernmental ESCAP meeting" in the second paragraph refers to a meeting of the Commission itself or of a subsidiary organ of the Commission composed of States.

3. I shall address myself first to the question of the designation by the Government of a State member of ESCAP of its representative on the Commission as observer.

4. To our knowledge it has never occurred in the practice of the United Nations that a State member of any principal or subsidiary organ of the Organization has designated an observer to represent it on that organ.

5. The function of an observer, as is clear from his title, is essentially to "observe". His role is, in fact, even more limited than that of certain participants which, without enjoying the rights attendant upon full membership, are nevertheless entitled to unrestricted participation in the discussions and, in some instances where the relevant rules so provide, are allowed to make proposals (which, however, are usually put to the vote only at the request of a full participant).[64]

6. It is, therefore, hardly necessary to emphasize the anomaly of a request by a State member of a United Nations organ to participate in meetings of that organ through an observer. (It may be noted that the reference here is to organs, as distinct from conferences, for there is no legal objection to States invited to conferences attending officially as observers rather than as participants.)

7. To this it may be added that the granting of such a request would give rise to considerable difficulties. It appears doubtful whether the Rules of Procedure of ESCAP,[65] rule 9 of which provides that each member is to be represented by "an accredited representative", permit representation of a member by an observer. Further difficulties would arise from the uncertainty as to the intention of the member of ESCAP wishing to participate through an observer and as to the related question of the precise legal effects to be attributed to the fact that a member of the Commission has been allowed to participate in this fashion.

8. It may be noted further that the participation of States members of United Nations organs in the work of those organs through observers would not, it appears, serve any useful purpose. For a State member of such an organ can, without in any way departing from established practice, limit its participation in the work of the organ as much as it wishes. (It may, in fact, if the organ in question is a subsidiary one, request the parent organ to allow it to withdraw from the subsidiary organ.) It may, if it so wishes, refrain altogether from appointing a representative on the organ. Nor is it obliged, if it does choose to appoint one, to participate actively in the work of the organ. (Thus, its representative may refrain from speaking and abstain from voting or, in accordance with practice, declare that he does not participate in the voting.)

...

11. I turn now to the question of associate members of the Commission being represented by observers. In this respect I would first note that paragraphs 6 and 7 of the Commission's terms of reference speak of "representatives of associate members", for which reason it would seem that "representative" is a more proper term for designating the person appointed to represent an associate member than "observer". Given the limited character of the rights of participation enjoyed by associate members of the Commission and the fact that an associate member can limit his participation as much as he wishes to, it seems very unlikely that any associate member wishing to participate through an

[64] See the memorandum on the facilities accorded to observers at United Nations conferences and meetings held away from Headquarters, reproduced in the *Juridical Yearbook*, 1972, p. 159.

[65] *Official Records of the Economic and Social Council, 1978, Supplement No. 8* (E/1978/48), p. 93.

observer rather than a representative would intend thereby to restrict or modify in any way its rights under the terms of reference and rules of procedure of the Commission. Accordingly, it seems to us that if any associate member requests observer status for its representative on the Commission, the Secretariat of ESCAP should advise against such action by pointing out that this use of the term observer, in addition to being devoid of practical utility, would be of doubtful propriety and give rise to confusion.

1 April 1977

14. Confidential procedures established by successive resolutions of the Economic and Social Council for the handling, within the Commission on Human Rights and its Sub-Commission on Prevention of Discrimination and Protection of Minorities, of communications relating to human rights and fundamental freedoms — Specific case of communications from non-governmental organizations in consultative status with the Economic and Social Council — Practice followed in the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities — Question of the suspension or withdrawal of consultative status of non-governmental organizations

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

1. This refers to the issues that the Permanent Representative of [a Member State] raised in his letter of 30 March addressed to you.

2. The main issue raised in the above-mentioned letter is whether a communication received from the International University Exchange Fund, a non-governmental organization in category II consultative status with the Economic and Social Council, and distributed as document E/CN.4/NGO.202 at the thirty-third session of the Commission on Human Rights, was not in fact subject to the confidential procedure approved by the Economic and Social Council in its relevant resolutions, particularly resolutions 1503 (XLVIII) and 1919 (LVIII). The other issue raised in the letter concerns the suspension or withdrawal of consultative status of NGOs under Economic and Social Council resolution 1296(XLIV).

3. In order to examine the legal aspects of the main issue involved, the pertinent provisions contained in the most relevant resolutions of the Economic and Social Council are first set out below, followed by an analysis of the manner in which such provisions have been implemented by the competent organs of the Council and by the Secretariat. This analysis is the result of a cursory review of the resolutions referred to in this memorandum. The short time available does not permit a thorough examination of all the pertinent resolutions, some of which are interrelated, nor of the relevant reports of the organs concerned and the proceedings leading to the adoption of such resolutions. Finally a short section is included on the question of withdrawal of consultative status of NGOs.

A. Basic provisions (in chronological order)

4. Under Economic and Social Council resolution 728 F (XXVIII) of 30 July 1959, communications dealing with principles involved in the promotion of universal respect for, and observance of, human rights should first be compiled by the Secretariat in a non-confidential list and other communications concerning human rights, in a confidential list. While both lists containing a brief indication of the substance of each communication are distributed to members of the Commission on Human Rights the latter list could only be furnished to members of the Commission in private meeting. The Council further suggested to the Commission on Human Rights that it should at each session appoint an

ad hoc committee to meet shortly before its next session for the purpose of reviewing the former list and of recommending which of these communications, in original, should be made available to members of the Commission on request.

5. At its twenty-third session on 16 March 1967, the Commission on Human Rights adopted its resolution 8 (XXIII), the operative part of which read:

"[*The Commission on Human Rights*]

"1. *Decides* to give annual consideration to the item entitled 'Question of violations of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of *apartheid,* in all countries, with particular reference to colonial and other dependent countries and territories', without prejudice to the functions and powers of organs already in existence or which may be established within the framework of measures of implementation included in international conventions on the protection of human rights and fundamental freedoms;

"2. *Requests* the Sub-Commission on the Prevention of Discrimination and Protection of Minorities to prepare, for the use of the Commission in its examination of this question, a report containing information on violations of human rights and fundamental freedoms from all available sources;

"3. *Requests* the Secretary-General to provide assistance and facilities to the Sub-Commission in accomplishing its task;

"4. *Requests* the Economic and Social Council to authorize the Commission and the Sub-Commission in conformity with the provisions of operative paragraph 1 above, to examine information relevant to gross violations of human rights and fundamental freedoms, such as *apartheid* in all its forms and manifestations, contained in the communications listed by the Secretary-General pursuant to Economic and Social Council resolution 728 F (XXVIII);

"5. *Further requests* authority, in appropriate cases, and after careful consideration of the information thus made available to it, in conformity with the provisions of operative paragraph 1 above, to make a thorough study and investigation of situations which reveal a consistent pattern of violations of human rights, and to report with recommendations thereon to the Economic and Social Council;

"6. *Invites* the Sub-Commission to bring to the attention of the Commission any situation which it has reasonable cause to believe reveals a consistent pattern of violations of human rights and fundamental freedoms, in any country, including policies of racial discrimination, segregation and *apartheid,* with particular reference to colonial and other dependent territories."

The foregoing resolution was endorsed by the Economic and Social Council in its resolution 1235 (XLII) of 6 June 1967.

6. Subsequent to resolution 728 F (XXVIII), the Economic and Social Council adopted resolution 1503 (XLVIII) of 27 May 1970 which further expands on the procedure for dealing with communications relating to violations of human rights and fundamental freedoms. The relevant provisions of this resolution are reproduced below:

"[*The Economic and Social Council,*]

". . .

"1. *Authorizes* the Sub-Commission on Prevention of Discrimination and Protection of Minorities to appoint a working group* consisting of not more than five of its members, with due regard to geographical distribution, to meet once a year in private meetings for a period not exceeding ten days immediately before the sessions of the Sub-Commission to consider all communications, including replies

* In pursuance of this provision the Sub-Commission established its Working Group on Communications by its resolution 2 (XXIV) of 16 August 1971.

of Governments thereon, received by the Secretary-General under Council resolution 728 F (XXVIII) of 30 July 1959 with a view to bringing to the attention of the Sub-Commission those communications together with replies of Governments, if any, which appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms within the terms of reference of the Sub-Commission;

". . .

"4. *Further requests* the Secretary-General:

"(*a*) To furnish to the members of the Sub-Commission every month a list of communications prepared by him in accordance with Council resolution 728 F (XXVIII) and a brief description of them, together with the text of any replies received from Governments;

"(*b*) To make available to the members of the working group at their meetings the originals of such communications listed as they may request, having due regard to the provisions of paragraph 2 (*b*) of Council resolution 728 F (XXVIII) concerning the divulging of the identity of the authors of communications;

"(*c*) To circulate to the members of the Sub-Commission, in the working languages, the originals of such communications as are referred to the Sub-Commission by the working group;

"5. *Requests* the Sub-Commission on Prevention of Discrimination and Protection of Minorities to consider in private meetings, in accordance with paragraph 1 above, the communications brought before it in accordance with the decision of a majority of the members of the working group and any replies of Governments relating thereto and other relevant information, with a view to determining whether to refer to the Commission on Human Rights particular situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights requiring consideration by the Commission;

"6. *Requests* the Commission on Human Rights after it has examined any situation referred to it by the Sub-Commission to determine:

"(*a*) Whether it requires a thorough study by the Commission and a report and recommendations thereon to the Council in accordance with paragraph 3 of Council resolution 1235 (XLII);

". . .

"8. *Decides* that all actions envisaged in the implementation of the present resolution by the Sub-Commission on Prevention of Discrimination and Protection of Minorities or the Commission on Human Rights shall remain confidential until such time as the Commission may decide to make recommendations to the Economic and Social Council".

7. In its resolution 1919 (LVIII) of 5 May 1975, paragraph 2, the Economic and Social Council,

"*Confirms* that communications from non-governmental organizations containing complaints of alleged violations of human rights shall be handled according to the provisions of Council resolutions 454 (XIV)* and 728 F (XXVIII), paragraph 2(*b*);"

* In the first preambular paragraph of resolution 1919 (LVIII) the Council refers to resolution 454 (XIV) as follows:

"*Considering* that in its resolution 454 (XIV) of 28 July 1952 it decided that all communications emanating from non-governmental organizations in consultative status containing complaints of alleged violations of human rights should be dealt with not under the rules of consultative relationship but under the decisions for the inclusion of such material in confidential lists of communications prepared for the Commission on Human Rights, as further set out in paragraph 2 (*b*) of Council resolution 728 F (XXVIII) of 30 July 1959".

and

"*Decides* that in future non-governmental organizations in consultative status:

"...

"(*b*) Must also observe strictly the provisions of paragraph 8 of Council resolution 1503 (XLVIII)".

B. THE QUESTION OF THE APPLICATION OF CONFIDENTIAL PROCEDURES TO COMMUNICATIONS CONCERNING HUMAN RIGHTS: AN ANALYSIS

(a) *Practice relating to the implementation of resolution 8 (XXIII) of the Commission on Human Rights*

8. From the reports of the Sub-Commission on Prevention of Discrimination and Protection of Minorities from 1971 to 1976, it would appear that the Sub-Commission dealt with the implementation of its mandate under paragraph 2 of Commission resolution 8 (XXIII) [i.e., preparation, for the use of the Commission in its examination of the "Question of violations of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of *apartheid*, in all countries, with particular reference to colonial and other dependent countries and territories," of a report containing information on violations of human rights and fundamental freedoms from all available sources] by means of a general debate, but resorted to confidential procedures prescribed in Economic and Social Council resolution 1503 (XLVIII) in dealing with its mandate under paragraph 6 of the same resolution [i.e., to bring to the attention of the Commission any situation which it has reasonable cause to believe reveals a consistent pattern of violations of human rights and fundamental freedoms in any country].[66]

9. Thus, in 1971, in connexion with consideration of its report under Commission on Human Rights resolution 8 (XXIII), the Sub-Commission had before it document E/CN.4/Sub.2/NGO.46 which contained a statement on behalf of twenty-two international non-governmental organizations in consultative status with the Economic and Social Council on events in East Pakistan. The Sub-Commission also agreed to hear the representative of a non-governmental organization.[67] In 1974, under agenda item 11 entitled "Question of violations of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of *apartheid*, in all countries, with particular reference to colonial and other dependent countries and territories: Report of the Sub-Commission under Commission on Human Rights resolution 8 (XXIII)," the Sub-Commission heard the representatives of three non-governmental organizations.[68]

10. In 1976, under agenda item 8 (which had the same title as agenda item 11 referred to in the preceding paragraph), the Sub-Commission following a general debate adopted resolution 2 (XXIX) on "Question of violations of human rights and fundamental freedoms" which consists of four resolutions relating respectively to Southern Rhodesia, Uganda, Argentina,[69] and Western Sahara. These resolutions were included in the report of the Sub-Commission to the Commission on Human Rights at its thirty-third session.[70]

11. It was apparently this background which led to the issuance of document E/CN.4/NGO.202 at the thirty-third session of the Commission. It may also be noted that this document was listed in the report of the Commission on that session as one of

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[66] The discussion in the Sub-Commission on the meaning and scope of Commission resolution 8 (XXIII) and on the Sub-Commission's role in its implementation was summarized in the report of the Sub-Commission on its twenty-seventh (1974) session (E/CN.4/1160).

[67] E/CN.4/1070-E/CN.4/Sub.2/323, para. 107.

[68] See document E/CN.4/1160, paras. 119–121.

[69] It may be noted that before adoption of the resolution on Argentina, the representative of Argentina made a statement which was subsequently issued as document A/CN.4/Sub.2/L.664.

[70] E/CN.4/1218-E/CN.4/Sub.2/378, Chapters V and XVII.

five documents submitted by non-governmental organizations that were before the Commission.[71]

12. It may further be noted that of the five NGO documents before the Commission mentioned in the preceding paragraph, two documents dealt with Uganda (E/CN.4/NGO/193 and 203) which was the subject of Sub-Commission resolution 2B (XXIX).

(b) *Practice relating to agenda items concerning the question of violation of human rights in specific countries*

13. In 1974 when dealing with "the question of the human rights of persons subject to any form of detention or imprisonment," the Sub-Commission adopted two resolutions (7 (XXVII) and 8 (XXVII)). In the first resolution, the Sub-Commission, noting that torture and other forms of cruel, inhuman or degrading treatment and punishment were flagrant violations of human rights, decided to review annually developments in this field and, in such review, to take into account any reliably attested information from, *inter alia,* NGOs in consultative status with the Economic and Social Council, provided that such NGOs "act in good faith and that their information is not politically motivated, contrary to the principles of the Charter of the United Nations". In the second resolution, under the same title but dealing specifically with Chile, the Sub-Commission recommended to the Commission to study the reported violations of human rights in Chile and requested, among others, concerned NGOs in consultative status "to submit to the Secretary-General for reference to the Commission on Human Rights recent and reliable information on torture and other cruel, inhuman or degrading treatment or punishment in Chile."[72]

14. At its thirty-first session in 1975, the Commission, in accordance with the recommendation in the Sub-Commission's resolution 8 (XXVII), included item 7 in its agenda entitled "Study of reported violations of human rights in Chile, with particular reference to torture and other cruel, inhuman or degrading treatment or punishment." Under this item, the Commission had before it a number of documents including those containing information submitted respectively by thirteen non-governmental organizations.[73] At the following session of the Commission in 1976, under the same agenda item, a written statement submitted by a non-governmental organization in Category I was issued as document E/CN.4/NGO.190.[74]

15. Under other agenda items relating to the question of violation of human rights in specific countries, the following documents containing written statements from non-governmental organizations were issued: those relating to countries of southern Africa — E/CN.4/NGO.194, 197, 198, 200, 204 and those relating to occupied Arab territories — E/CN.4/NGO.196.

(c) *Conclusions*

16. Although Economic and Social Council resolutions 728 F (XXVIII) and 1503 (XLVIII) referred to all communications concerning human rights in the application of confidential procedure and did not provide for any exceptions, the foregoing survey shows that both the Commission and its Sub-Commission had made exceptions in the issuance and circulation of documents containing communications from NGOs in consultative status. The circulation of NGO documents either under agenda items pertaining to particular countries or under general items in situations referred to in paragraphs 9-12 above

[71] See *Official Records of the Economic and Social Council, Sixty-second Session, Supplement No. 6* (E/5927-E/CN.4/1257), para. 73.

[72] For the texts of these resolutions, see E/CN.4/1160–E/CN.4/Sub.2/354, pp. 52–54.

[73] These documents were issued in the general series. See *Official Records of the Economic and Social Council, Fifty-eighth Session, Supplement No. 4* (E/5635–E/CN.4/1179), para. 93.

[74] *Official Records of the Economic and Social Council, Sixtieth Session, Supplement No. 3* (E/5768–E/CN.4/1213), para. 66.

has not been objected to by any organ of the United Nations. The issuance of such documents would therefore appear to come within the established practice.

C. THE QUESTION OF WITHDRAWAL OF CONSULTATIVE STATUS OF NON-GOVERNMENTAL ORGANIZATIONS

17. Under Part VIII of Economic and Social Council resolution 1296 (XLIV), the Council Committee on Non-Governmental Organizations, in periodically reviewing the activities of NGOs on the basis of their reports and other relevant information, should determine the extent to which the organizations have complied with the principles governing consultative status and have contributed to the work of the Council, and may recommend to the Council suspension or exclusion from consultative status of organizations which have not met the requirements for consultative status. While the Secretariat will transmit such reports and information it has received to the NGO Committee, any "arrangements . . . for withdrawing the consultative status of non-governmental organizations" can only be made by the Committee itself for recommendation to the Economic and Social Council.[75]

28 April 1977

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[75] The following letters relating to the subject matter of the memorandum reproduced above were exchanged between the Chargé d'affaires a.i. of the Permanent Mission of Argentina to the United Nations and the Under-Secretary-General for Political and General Assembly Affairs:

I

Letter dated 11 July 1977 from the Chargé d'affaires a.i. of the Permanent Mission of Argentina to the United Nations addressed to the Under-Secretary-General for Political and General Assembly Affairs.

I have the honour to address you for the purpose of expressing the concern of the Argentine authorities about some of the practices applied by the Division of Human Rights with regard to the confidential procedures established by the Economic and Social Council.

As you state in your note dated 11 May 1977, the Council and the Committee have had a very active discussion on the abuse of consultative status and the violation of the consultative procedures which "benefits none and should be discouraged". I will, therefore, not repeat the views expressed by representatives in those bodies, which coincide with that statement and indicate increasing concern, which we share. This concern is not in concordance with the apparent insouciance with which the Division of Human Rights refers to the circulation of document E/CN.4/NGO.202 in paragraphs 6 and 7 of its opinion, which the Office of Legal Affairs follows in recognizing that it has become usual practice. This is in spite of the objections of the various intergovernmental organs of the United Nations, as can be seen from a perusal from a report of the most recent meeting of the Committee on Non-Governmental Organizations or the report of the thirty-first session of the Commission on Human Rights and the discussion in the Economic and Social Council which gave rise to the adoption of resolution 1919 (LVIII), which leaves no doubt concerning the requirement of confidentiality, the validity of which is reaffirmed "without exception".

Nevertheless, the Division of Human Rights apparently infers that the adoption of resolution 2 C (XXIX) of the Sub-Commission on Prevention of Discrimination and Protection of Minorities means that Economic and Social Council resolution 1503 (XLVIII) no longer applies to Argentina. Such elasticity of interpretation disregards the intention expressed by the sponsors of that resolution when introducing it "not to criticize the Argentine Government. . .", etc. It likewise disregards the fact that the "reports" referred to in the first preambular paragraph of that resolution and in the public debate which arose concerning it, are not the "communications" to which the circulation of the above-mentioned document purported to give publicity, thereby bypassing the decision of the Working Group on Communications, which did not submit to the Sub-Commission any allegations concerning Argentina.

The rule of confidentiality remains in force, even after its breach by some non-governmental organizations which have attacked the Argentine Government on the pretext of referring to Sub-Commission resolution 2 C (XXIX) and after the Member States which were attacked in this way found themselves obliged to respond. It would, moreover, be inadmissible to deduce the contrary, because that would mean recognizing that one breach of confidentiality justified the others. The Commission on Human Rights itself endorsed that view by suspending its public meetings and deciding in the end to take note of the report of the Sub-Commission without adopting any text.

The exercise of the responsibility for deciding upon the withdrawal of consultative status, which, under paragraph 36 of resolution 1296 (XLIV), lies with the Economic and Social Council, has been made extremely difficult by the dilatoriness of the Committee on Non-Governmental

15. 1961 Convention on Narcotic Drugs[76] — Question of international shipments of small quantities of drugs seized in the illicit drug traffic for the purpose of examination in foreign laboratories or of evidence to be provided in the course of court proceedings

Opinion given at the request of the International Narcotics Control Board[77]

It is understood that the International Narcotics Control Board has requested a legal opinion of the United Nations Office of Legal Affairs regarding the movement between countries of small quantities of drugs for the purposes of laboratory examination to determine the exact nature of such substances or for the purposes of evidence in judicial proceedings. After a thorough analysis of this question the Office of Legal Affairs has concluded that the international movement of small quantities of drugs for such purposes

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Organizations in carrying out the review which was envisaged in 1968 and which has so far not been effected. Such a review would be facilitated if the Secretariat authorities could lend the Committee their active collaboration.

It is necessary to draw attention also to the fact that the members of the Committee do not necessarily have information concerning the activities of the NGOs in the different forums of the United Nations, although that information is accessible to the Secretariat officials in view of the coordination which is presumed to exist between the various United Nations offices. Thus, the NGOs' violations of resolutions 1296 (XLIV) and 1919 (LVIII) can be transmitted to the members of the Committee for consideration, without that prejudging the measures which the Committee may recommend to the Council. In that connexion, the Office of Legal Affairs recognizes in paragraph 17 of its opinion that "The Secretariat will transmit such reports and information it has received to the NGO Committee...".

It cannot escape your notice that only an alarming indifference to the principles of the Charter allows such procedures, which usually serve inadmissible political motives. Accordingly, I will conclude by reaffirming the confidence of the Argentine Government, as expressed in my note dated 30 March 1977, in the effective fulfilment by the Secretariat of the principles of the Charter and the resolutions adopted for their implementation and my Government's intention to collaborate with you in the common effort to promote international justice and co-operation.

I take this opportunity to express the desire that this exchange of notes be reproduced in the *United Nations Juridical Yearbook,* on the understanding that it may help to improve the practices of the Organization.

Angel María Olivieri Lopez
Chargé d'Affaires

II

Letter dated 9 January 1978 from the Under-Secretary-General for Political and General Assembly Affairs addressed to the Permanent Representative of Argentina to the United Nations

I have the honour to refer to the letter dated 11 July 1977 addressed to me by Mr. Olivieri López in his capacity as Chargé d'Affaires, concerning the Argentine Government's position regarding the circulation of the statements by certain non-governmental organizations. As in the case of our previous correspondence on this matter, I have held lengthy consultations with the Office of Legal Affairs and the Division of Human Rights. The Secretariat is always guided by the Charter of the United Nations and the relevant resolutions and practices of United Nations organs. After examining this case, I am convinced that the Secretariat acted in good faith in interpreting the various relevant texts and practices. It is also clear to me that there are various possible interpretations, in view of the large number of resolutions and guidelines approved by the members of the competent United Nations organs.

As you are perhaps aware, the Commission on Human Rights, at its thirty-third session, considered the question of the coexistence of public and confidential procedures for examining allegations of violations of human rights and fundamental freedoms, with a view to determining how the procedural difficulties that might arise in the simultaneous application of both procedures could be avoided (report of the Commission on its thirty-third session, document E/5927, para. 77).

The Secretary-General was requested to submit to the Commission at its thirty-fourth session a report including, *inter-alia,* an analysis of the views expressed on this question at the thirty-third session of the Commission. Accordingly, we firmly hope that some clarification may be obtained when the Commission reconsiders this question at its thirty-fourth session. That would give us guidance and interpretations of the various resolutions, which would avoid a recurrence of the difficult problem to which attention has been drawn. Meanwhile, the Secretariat will continue to apply the customary practice in those cases where the intention of the legislative organs has not yet been made clear.

should be exempt from the provisions of article 31 of the Single Convention on Narcotic Drugs.

We believe this conclusion is the only one which can logically be arrived at after a careful examination of the Convention as well as a review of the *Commentary* thereon prepared by the Secretary-General in accordance with paragraph 1 of Economic and Social Council resolution 914D (XXXIV) of 3 August 1962.[78] Article 31 outlines "special provisions relating to international trade". The term "international trade" however is not defined in the text of the Convention nor does the *Commentary* contain a definition. However, within its contexts it is clear that the term is meant to refer to commercial activity or "enterprise", as referred to in article 31 (3) (*a*) and (*b*). While article 31 does refer to "import" and "export", which are defined in article 1 (1) (*m*), a reasonable interpretation of the article would restrict the application of the control mechanism to instances of im-

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With regard to the statement in the third paragraph of the letter that "the Division of Human Rights apparently infers that the adoption of Sub-Commission resolution 2 C (XXIX) means that Economic and Social Council resolution 1503 (XLVIII) no longer applies to Argentina", I would refer to the memorandum of the Division of Human Rights dated 20 April 1977, which was transmitted to you on 11 May of the same year. As stated in paragraph 8 of the Division's memorandum "the Secretariat has adhered strictly to the concept of confidentiality provided for, *inter alia,* in Council resolution 1503 (XLVIII) with regard to allegations of violations of human rights and fundamental freedoms which are not the subject of public debate and have not been the subject of public decisions or resolutions of the various United Nations organs concerned with human rights".

With regard to the question of the review of the consultative status of non-governmental organizations, I would refer to paragraph 17 of the opinion of the Office of Legal Affairs dated 28 April 1977, which was transmitted to you on 11 May of the same year.

Since the task of determining whether a governmental organization has or has not observed the provisions of Economic and Social Council resolution 1296 (XLIV) lies with the Council Committee on Non-Governmental Organizations, the Secretariat is not competent to make such a decision or to refer to the Committee "violations by non-governmental organizations of resolutions 1296 (XLIV) and 1919 (LVIII), as suggested in the letter. The Secretariat should transmit to the Council Committee such reports and information as they are submitted, for consideration by the Committee under the pertinent provisions of resolution 1296 (XLIV).

As you know, the Economic and Social Council recently adopted a resolution sponsored by Argentina, in which, *inter alia,* Member States were requested to "provide any relevant information concerning compliance by non-governmental organizations with the principles governing their consultative status". Accordingly, if a Member State, such as yours, considers that a non-governmental organization has abused its consultative status, its Government may submit the particulars relating to the question to the Economic and Social Council Committee on Non-Governmental Organizations.

I have taken note and informed the Office of Legal Affairs of the request that the exchange of notes on this question be reproduced in the *United Nations Juridical Yearbook*. We welcome any opportunity to clarify and improve the practices of the United Nations.

William B. BUFFUM
Under-Secretary-General for Political and General Assembly Affairs

[76] United Nations, *Treaty Series,* vol. 520, p. 151, vol. 557, p. 280, vol. 570, p. 346 and vol. 590, p. 325.

[77] The attention of the Commission on Narcotic Drugs at its fifth special session was drawn to the report of the International Narcotics Control Board from which it appeared that governments and the International Criminal Police Organization (ICPO/Interpol) had approached the Board with regard to simplifying and accelerating the procedures relating to the control of international shipments of small quantities of drugs seized in the illicit drug traffic for the purpose of their examination in foreign laboratories or of evidence to be provided in the course of court proceedings.

The main difficulties which were pointed out in that respect consist of delays constantly encountered in such international shipments of samples seized in the illicit drug traffic for the purposes mentoned above due to the application of the system of import certificates and export authorizations as provided for in article 31 of the 1961 Single Convention dealing with "special provisions relating to international trade". For its consideration of the matter, the INCB had requested an opinion of the Office of Legal Affairs at the United Nations Headquarters. (See document E/CN.7/609, paras. 15–22.)

[78] United Nations publication, Sales No. E.73.XI.1.

port and export for commercial purposes or where such control would be consistent with the general and specific obligations of the Convention.

The movement of small quantities of drugs for the purposes stated above would not appear to be inconsistent with such obligations. On the contrary, these movements appear to be specifically aimed at carrying out the provisions of articles 35 and 36 of the Convention, by implementing and ensuring international co-operation in the campaign against illicit traffic in narcotic drugs.

The imposition of article 31 controls on such movements might impede the speedy implementation of these provisions and in the event would not be considered consistent with the general obligations of the Convention, as expressed in article 4 thereof. Verifications by ICPO/Interpol of the nature of drugs seized in illicit traffic must be seen as a fulfilment by States parties of the general obligations of article 4 (1) (*a*), i.e. taking such administrative measures as to give effect to the Convention in their own territories. In the same spirit, the movement of drugs from one State to another for purposes of evidence in judicial proceedings of a criminal nature must be seen as a logical measure aimed at fulfilment of the obligations of States parties to co-operate in the execution of the provisions of the Convention, as set out in article 4 (1) (*b*) thereof.[79]

16. 1971 CONVENTION ON PSYCHOTROPIC SUBSTANCES[80] — QUESTION WHETHER, IN VIEW OF THE AMENDING PROCEDURE PROVIDED FOR IN ARTICLES 2 AND 17, PARAGRAPH 2 OF THE CONVENTION, THE COMMISSION ON NARCOTIC DRUGS COULD TAKE A DECISION TO INCLUDE IN SCHEDULES I-IV OF THE CONVENTION THE SALTS OF THE SUBSTANCES LISTED IN THOSE SCHEDULES BEFORE HAVING RECEIVED A CORRESPONDING RECOMMENDATION FROM THE WORLD HEALTH ORGANIZATION, ON THE UNDERSTANDING THAT SUCH A DECISION WOULD BECOME EFFECTIVE ONLY AFTER RECEIPT OF THE RECOMMENDATION IN QUESTION — QUESTION WHETHER, ALTERNATIVELY, THE COMMISSION COULD TAKE A VOTE BY CORRESPONDENCE ON AN APPROPRIATE RECOMMENDATION FROM WHO

Opinion given further to a request from a representative in the Commission on Narcotic Drugs[81]

After having reviewed the questions referred to it, the Office of Legal Affairs stated that it was of the following opinion: Article 2 of the 1971 Convention provided that the Commission could determine to place substances under the control régime provided for

[79] For the action taken by the Commission on Narcotic Drugs at its fifth special session on the basis of the above opinion, see *Official Records of the Economic and Social Council, 1978, Supplement No. 5* (E/1978/35), paras. 177–183 and chapter XIII, A, resolution 4 (S-V).

[80] E/CONF.58/6.

[81] At the twenty-seventh session of the Commission on Narcotic Drugs, it was observed with regret that WHO was not yet in a position to make an appropriate recommendation to the Commission in respect of the salts, esters, isomers and ethers of substances listed in Schedules I-IV annexed to the Convention on Psychotropic Substances, adopted in 1971 with the active co-operation of WHO. The Commission agreed that the amending of those Schedules with regard to the esters, isomers and ethers of the substances listed therein should be studied and decided upon by the Commission at its next session, at which time it was hoped that the relevant recommendations would have been made by WHO, in accordance with article 2 of the 1971 Convention. With regard to the salts of those substances, however, the Commission decided, by 24 votes to none, with 2 abstentions, that the inclusion of the salts in question in the four Schedules was of the greatest importance and of the utmost urgency for the meaningful and effective implementation of the aims of the 1971 Convention and that the promptest possible measures should be taken to that effect. In line with this decision of the Commission, the representative of France asked the Secretariat for a legal opinion, to be obtained from the Office of Legal Affairs at United Nations Headquarters, on the above-mentioned questions (see *Official Records of the Economic and Social Council, Sixty-second Session, Supplement No. 7* (E/5933) (paras. 442–445)).

in that Convention only after WHO had previously made and communicated its findings and recommendations to the Commission, as those findings and recommendations were determinative with regard to medical and scientific matters. Therefore, a decision by the Commission at its present [twenty-seventh] session to include salts in Schedules I to IV of the 1971 Convention, on the understanding that such a decision would become effective only after receipt by the Commission of the relevant findings and recommendations of WHO, would be a reversal of the normal procedure for placing substances under international control, as provided for by article 2 of the 1971 Convention. Consequently, such a procedure would not be appropriate within the terms of that Convention. With regard to vote by correspondence, the Office of Legal Affairs pointed out that the Commission, by virtue of articles 2 and 17 of the 1971 Convention, could change Schedules by postal or telegraphic vote, once the members of the Commission had received the assessment by WHO pursuant to article 2, paragraph 4, of that Convention. The Secretary-General could then conduct a postal or telegraphic vote if authorized by the Commission at its present session and under conditions determined by the Commission. While explicit opposition by any member at the present session would disqualify this procedure and require postponement of the consideration of that issue to the next session of the Commission, it appeared to the Office of Legal Affairs that no serious opposition existed within the Commission at its present session to placing salts of psychotropic substances in Schedules I to IV of the 1971 Convention. Consequently, the Office of Legal Affairs concluded that the Commission could vote on the issue by correspondence, once the necessary recommendation by WHO had been duly communicated, and that the decision to include the salts in Schedules I to IV of the 1971 Convention had to be adopted by a two-thirds majority of the members of the Commission. The Office of Legal Affairs added that the Commission would be within its authority in requesting WHO to communicate an appropriate recommendation immediately after it had been determined by WHO.[82]

23 February 1977

17. COMMENTS ON WHETHER, UNDER THE INTERNATIONAL COCOA AGREEMENT, 1975, THE INTERNATIONAL COCOA COUNCIL COULD LEGALLY RAISE THE MINIMUM AND MAXIMUM PRICES IN ARTICLE 29 (1) SEPARATELY SO AS TO INCREASE THE RANGE OF 16 UNITED STATES CENTS PER POUND AND, IF SO, WHETHER, HAVING REGARD TO ARTICLE 29 (5), THE COUNCIL COULD ADJUST OTHER ARTICLES IN THE AGREEMENT WHICH WOULD BE AFFECTED BY THE INCREASE IN THE RANGE WITHOUT RESORTING TO THE AMENDMENT PROCEDURES IN ARTICLE 76

Letter to the Executive Director, International Cocoa Agreement Organization

You have requested the opinion of the Office of Legal Affairs of the United Nations in respect of the following matters arising under the International Cocoa Agreement, 1975:

> "... whether the [International Cocoa Council] could legally raise the minimum and maximum prices in Article 29(1) separately so as to increase the range of 16 US cents per pound and if so, whether, having regard to Article 29(5), the Council could adjust other Articles in the Agreement which would be affected by the increase in the range without resorting to the amendment procedures in Article 76."

We understand that this request was noted by the Executive Committee at its eighteenth series of meetings (9-14 June 1977), and that you have asked for our advice to reach you in time for the next series of meetings of the Committee which begins on 18 July 1977.

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[82] For the action taken by the Commission on Narcotic Drugs at its twenty-seventh session on the basis on the above opinion, see *ibid.*, paras. 447 and 448, as well as chapter XVI, A, resolution 4 (XXVII) and chapter XVI, B, decision 6 (XXVII).

Article 29 of the International Cocoa Agreement, 1975, provides, in part as follows:

"1. For the purpose of this Agreement, a minimum price of cocoa beans shall be established at 39 United States cents per pound and a maximum price at 55 United States cents per pound.

"2. Before the end of the first quota year, and again, if it is decided to extend this Agreement for a further period of two years under Article 75, before the end of the third quota year, the Council shall review the minimum price and the maximum price and may, by special vote, revise them.

"3. In exceptional circumstances resulting from upheavals in the international economic or monetary situation, the Council shall review the minimum price and the maximum price and may, by special vote, revise them.

". . .

"5. The provisions of Article 76 shall not be applicable to the revision of prices under this Article."

This article represents a very considerable revision in a number of respects[83] of the corresponding Article 29 of the International Cocoa Agreement, 1972, this latter article providing in its paragraph 2 that:

"(2) Before the end of the second quota year the Council shall review these prices and may, by special vote, revise them, except that the range between the minimum and the maximum prices shall remain the same. The provisions of Article 75 shall not be applicable to the revision of prices under the present paragraph."

The fact that the 1972 Agreement expressly prohibits any change of the range between minimum and maximum prices when the Council acts to alter those prices under Article 29, while no such express prohibition appears in the 1975 Agreement, might *prima facie* give rise to the assumption that, acting under Article 29 of the latter Agreement, the Council could not only alter the minimum and maximum prices, but also the range between these prices. However, before confirming such an interpretation it is necessary to ascertain that it is compatible with the clear intentions of the Parties and the provisions of the Agreement as a whole.

We are informed that there is nothing in the *travaux preparatoires* leading up to the conclusion of the 1975 Agreement which establishes one way or the other whether it was the intention of the Parties, in omitting the phrase in question appearing in the 1972 Agreement, that the Council could or could not alter the range between the minimum and maximum prices. Consequently, on the basis of the information at our disposal, any interpretation has to proceed on the basis of the text of the Agreement alone and as a whole.

Since the operation of the export quota system and the buffer stock arrangements are calculated on the basis of and within the fixed range, it would follow that a revision of the minimum and maximum prices, while maintaining the existing range, affects only Article 29 of the Agreement. However, if that revision were to alter the range, certain other essential Articles of the Agreement, such as Article 34 on the operation and adjustment of annual export quotas and other articles on buffer stocks, would become impossible to implement unless they are amended to reflect the change in range. Given the importance of these other Articles to the regime established under the Agreement as a whole, any changes of the character here concerned in them would amount to more than mere "consequential adjustments", and it cannot therefore be presumed that the Parties would have considered that such changes could be made under the Article 29 procedures, without express authorization to this effect.

[83] For example, it considerably widens the range between the minimum and maximum price, it contains new provisions for review in exceptional circumstances and it lists factors to be considered by the Council in reviewing prices.

The general provisions of the 1975 Agreement for amendments are to be found in Article 76. Article 29, paragraph 5, only exempts from those general provisions "the revision of prices under this Article". The Article 29 procedure cannot be used to circumvent the clear stipulations of its paragraph 5, which are to be strictly interpreted as they bear upon modifications of the Agreement originally arrived at by the Parties. It would follow that a "revision of prices" under Article 29, should be a revision within the limits of that Article only — which, as already pointed out, is perfectly possible while the existing range is maintained — and should not be a revision of such a nature that it would fundamentally affect other basic provisions of the Agreement. A revision of the latter character would require recourse to Article 76 procedures for amending the other provisions concerned.

We would therefore conclude, in the absence of any clear indication of an intention of the Parties to the contrary, that the reasonable interpretation of Article 29 of the 1975 Agreement is to the effect that a revision of prices thereunder should not alter the existing range between minimum and maximum prices, such an alteration requiring recourse to the amendment procedures under Article 76.

8 July 1977

18. Practice followed within the United Nations system regarding the choice of the depositary of a treaty establishing an international organization — Specific case of the Charter of the United Nations — Choice of New York as the Headquarters of the United Nations

Letter to a private individual

Your letter of 30 January 1977, concerning the Charter of the United Nations and the Headquarters of the Organization, has been referred to us. Please excuse the delay in replying, which is due to pressure of work.

With respect to your first question, I wish to confirm that the original of the Charter is deposited with the Government of the United States of America, as provided for by Article 111 of the Charter itself. You will note that it is standard procedure for the original of the constituent instrument of an international organization to remain deposited with the Government of the country where the constitutional conference took place, or with the international organization under whose auspices that constituent instrument was adopted: thus, the UNESCO Constitution,[84] adopted by a Conference that met in London is deposited with the Government of the United Kingdom of Great Britain and Northern Ireland, while the Secretary-General of the United Nations serves as the depositary in respect of the Convention on the Inter-Governmental Maritime Consultative Organization,[85] which was adopted by an international conference held in Geneva within the framework of the United Nations. You will appreciate of course that, when such a constituent instrument is adopted, the organization which it purports to create is not yet in existence and could not, consequently, be entrusted the functions of depositary in respect of its own Constitution: still, a depositary has to be designated and it seems normal that the relevant functions should be assigned to that Government or organization which played a special role in the holding of the constitutional conference. It should also be pointed out that, under a rule of general international law that has been codified by article 76, paragraph 2 of the Vienna Convention on the Law of Treaties,[86] done at Vienna on 23 May 1969, the functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance: this

[84] United Nations, *Treaty Series,* vol. 4, p. 275.

[85] *Ibid.,* vol. 289, p. 3.

[86] *Official Records of the United Nations Conference on the Law of Treaties,* Documents of the Conference (A/CONF.39/11/Add.2-Sales No. E.70.V.5), p. 287.

guarantees that no inconvenience should result from an international organization not being the depositary for its constituent instrument, and in fact I am not aware of any such inconvenience in the case of the Charter of the United Nations.

Concerning your second question, namely, who has the power to decide where the headquarters of the United Nations may be located, you correctly mention that there is no provision on the subject in the Charter. The selection of New York as the headquarters of the Organization results from the acceptance on 14 February 1946 by the General Assembly of the United Nations (which is the competent organ in such matters) of the resolution of the United States Congress adopted on 10 December 1945 by which the Congress unanimously invited the United Nations to establish its permanent home in the United States of America. Subsequently, on 14 December 1946, the General Assembly accepted an offer by John D. Rockefeller for the purchase of the present site between 42nd and 48th Streets, on Manhattan's East Side, and a Headquarters Agreement regarding the privileges and immunities and other arrangements relating to that site was concluded on 26 June 1947 between the Organization and the United States of America.[87]

24 March 1977

19. PRACTICE OF THE SECRETARY-GENERAL AS THE DEPOSITARY OF AMENDMENTS TO TREATIES ESTABLISHING INTERGOVERNMENTAL ORGANIZATIONS — CASE WHERE SUCH AMENDMENTS GIVE RISE TO THE DEPOSIT OF INSTRUMENTS OF RATIFICATION OR ACCEPTANCE AFTER THE ENTRY INTO FORCE OF SUCH AMENDMENTS FOR ALL THE MEMBERS OF THE ORGANIZATION ESTABLISHED BY THE TREATY — OBLIGATION OF THE DEPOSITARY TO RECEIVE AND TO BRING TO THE ATTENTION OF THE PARTIES ANY INSTRUMENT IN GOOD AND DUE FORM PROVIDED FOR BY THE FINAL CLAUSES

Letter addressed to the Permanent Mission of a Member State

I am replying to your letter of 29 March 1977 concerning the practice of the Secretary-General as the depositary of treaties establishing international organizations, in which you envisage, in particular, the case where an instrument of ratification or acceptance of an amendment to such a treaty is deposited after the amendment has entered into force for all the members of the international organization established by the treaty under consideration.

1. The Secretary-General is the depositary of amendments to the Charter, and the case to which you refer is not unique. Many instruments of ratification of amendments to the Charter have been received for deposit after the entry into force of such amendments.

. . .

The same is true with regard to amendments to the Constitution of the World Health Organization,[88] which, under article 73 thereof, come into force for all members of the Organization when accepted by two-thirds of the member States.

2. The practice followed by the Secretary-General is based primarily on the obligations of the depositary as described in article 77 of the Vienna Convention on the Law of Treaties. The depositary of a multilateral treaty has an obligation to receive for deposit any instrument in good and due form provided for by the final clauses of the treaty in question; he must also inform promptly the parties to the treaty and all other States entitled to become parties to the treaty of all acts or instruments, notifications, communications, etc. relating to the treaty, wihout restricting himself to communications creating rights and obligations. At all events, and without prejudice to the express provisions of the final clauses of a treaty, determination of the legal effects of instruments, statements, reservations or other communications does not come within the competence of the de-

[87] United Nations, *Treaty Series*, vol. 11, p. 11; vol. 554, p. 308; vol. 581, p. 362 and vol. 687, p. 408.

[88] United Nations, *Treaty Series*, vol. 14, p. 185.

positary. In the case of an instrument of ratification or acceptance of an amendment to the constitution of an international organization, the depositary receives it for deposit and, when bringing it to the attention of all the States concerned, confines himself to indicating that the amendment in question is already in force for all the members of the Organization. It is self-evident that, in such a case, the instrument of ratification or acceptance received cannot give rise to any legal effect. It will be noted, however, that there are instances where the constituent instruments of international organizations, in the case of amendments of particular importance, provide for a time-limit for acceptance which runs from the entry into force of the amendment and upon the expiry of which exclusion is automatic.

3. Lastly, since the practice of certain international organizations (ILO, IAEA) which are the depositaries of their own constituent instruments is to transmit to the Secretariat for registration certified statements relating to ratification or acceptance deposited after the entry into force of amendments and thus devoid of effect because the amendments are in force for all the members of the organization in question, it would have been illogical not to accord the same treatment to ratifications or acceptances relating to amendments to multilateral treaties establishing international organizations and deposited with the Secretary-General. Moreover, this practice meets a need for information, because it makes it possible to publish the instruments in question in the United Nations *Treaty Series*.

5 April 1977

20. PRACTICE OF THE SECRETARY-GENERAL AS THE DEPOSITARY OF MULTILATERAL TREATIES REGARDING ANY COMMUNICATION FROM A NEWLY INDEPENDENT STATE ANNOUNCING IN GENERAL TERMS ITS INTENTION TO SUCCEED TO TREATIES RENDERED APPLICABLE TO ITS TERRITORY PRIOR TO ITS ATTAINMENT OF INDEPENDENCE BY THE STATE THEN RESPONSIBLE FOR ITS INTERNATIONAL RELATIONS

Letter addressed to the Permanent Observer of a non-member State

I have the honour to refer to your letter of 13 September 1976 concerning the succession of a newly independent State to treaties rendered applicable to its territory prior to its attainment of independence by the State which had until then assumed responsibility for its international relations.

You will recall that the Secretariat brought to the attention of interested States two communications from the Governments [of the two States concerned] dated 26 August and 18 September 1974, respectively, and that in the above-mentioned communication of 26 August 1974 the Government [of the newly independent State] expressed the wish for recognition that it had legally succeeded to each of those treaties. Having noted that the Secretariat's annual publication entitled *Multilateral Treaties in respect of which the Secretary-General Performs Depositary Functions* (ST/LEG/SER.D/9) does not include the State in question among the States parties to the treaties concerned, you ask how the Secretary-General interprets the above-mentioned communication of 26 August 1974.

In this connexion, I wish to inform you that, in accordance with the international practice to which the Secretary-General feels he should conform, general statements of intent are regarded as essentially provisional in nature and as establishing a mere presumption of succession, which is unilaterally reversible, on the part of the State concerned. Consequently, the Secretary-General does not mention such a State as a party to a given treaty unless the participation of that State has been formally established by the deposit of a notification of succession; such notification of succession, issued on the same terms as an instrument of ratification, accession, etc. (i.e. emanating from a Head of State, Head of Government or Minister for Foreign Affairs) should specify the treaties to which it applies.

In the case under consideration, the statement to which you refer does not specify the treaties to which it applies, and it is clear from the very wording of paragraph 2 thereof

that it is reversible at any moment. That is why the Secretary-General did not feel it possible, on that basis alone, to add the State in question to the list of States parties to the multilateral treaties concerned.

19 January 1977

21. PRACTICE OF THE SECRETARY-GENERAL AS THE DEPOSITARY OF MULTILATERAL TREATIES ESTABLISHING INTERGOVERNMENTAL ORGANIZATIONS — STATUS IN REGARD TO SUCH A TREATY OF A NEWLY INDEPENDENT STATE TO WHOSE TERRITORY THE TREATY WAS RENDERED APPLICABLE, PRIOR TO INDEPENDENCE, BY THE STATE THEN RESPONSIBLE FOR ITS INTERNATIONAL RELATIONS — ACCORDING TO THE PRACTICE OF THE SECRETARY-GENERAL, SUCH A STATE IS AUTOMATICALLY INVITED TO GIVE NOTIFICATION, IF IT SO WISHES, OF ITS SUCCESSION TO THE TREATY IN QUESTION, WITHOUT THERE BEING ANY NEED FOR PRIOR CONSULTATION OF THE INTERNATIONAL ORGANIZATION CONCERNED, WITHOUT PREJUDICE TO THE EXPRESS PROVISIONS OF THE TREATY AND THE ADMISSION PROCEDURES IN FORCE IN RESPECT OF SUCH ORGANIZATION

Letter addressed to the Legal Counsel of the United Nations Food and Agriculture Organization

1. I have the honour to refer to your letter of 1 July 1977 concerning the practice of the Secretary-General as the depositary of multilateral agreements in the context of succession of States. I regret that the abundance of the files has prevented us from replying to you earlier.

2. We have noted with interest that your organization this year instituted the practice of including in its standard letters to newly independent States which become members of FAO a paragraph requesting the Government concerned to state whether it considers itself a party to the agreements rendered applicable to its territory prior to independence by the Power then responsible for its international relations. We have noted also that similar communications were sent in 1977 to the Governments of newly independent States which have become members of FAO over the past 10 years.

3. You recall in your letter that FAO performs depositary functions in respect of a number of agreements, including two which have established for the purpose of their implementation independent intergovernmental organizations having their own secretariats and linked with FAO only by an agreement on co-operation or by informal working relations. You ask in this connexion whether, in the case of agreements of the same kind of which he is the depositary, the Secretary-General takes the initiative of establishing contact with newly independent States with a view to possible succession without prior consultation of the intergovernmental organizations established by the agreements in question.

4. As you know, the Secretary-General performs depositary functions in respect of a considerable number of agreements which have established intergovernmental organizations similar to those to which you refer. The most noteworthy examples of this are the commodity agreements, which have established the International Coffee Organization, the International Sugar Organization, etc. You will find in our annual publication entitled *Multilateral Treaties in respect of which the Secretary-General Performs Depositary Functions* (ST/LEG/SER.D/11) and the annex thereto entitled *Final clauses* (ST/LEG/SER.D/1, Annex and Supplements 1 to 8) all the pertinent information concerning, *inter alia*, the agreements in question.

5. In this regard, it should be noted that the Secretary-General, as the depositary of multilateral agreements, does not consider himself — without prejudice to what is stated below in paragraphs 7 and 8 — obliged to consult the intergovernmental organization established by a multilateral agreement before making inquiries concerning the intentions of a newly independent State regarding possible succession. A first reason is that

the formality of succession, when not explicitly provided for by an agreement, arises out of a well-established international custom, which is, moreover, in the process of being codified by the United Nations Conference on Succession of States in respect of Treaties, on the basis of a set of draft articles prepared by the International Law Commission. (The draft articles and the Commission's commentary are reproduced in the *Yearbook of the International Law Commission, 1974*, vol. II, Part One, pp. 162 to 269).[89]

A second reason is that, in accordance with another well-established international custom, codified since 1969 in article 76, paragraph 2, of the Vienna Convention on the Law of Treaties, the functions of the depositary are international in character — whence it results that the depositary is responsible primarily to the contracting parties and the signatories.

6. Accordingly, the practice of the Secretary-General, without prejudice to the cases referred to in paragraph 7 below, consists of automatically inviting newly independent States to notify him, if they so wish, of their succession in respect of multilateral agreements rendered applicable to their territory prior to independence. Upon receipt of a notification of succession (which, in accordance with the rules of customary succession, may be effected by the Government concerned without any time-limit), the successor State is included as a party in its own right to the agreement in question, it being understood that normally succession takes effect retroactively as from the date of the attainment of independence.

7. Since the specific provisions of an agreement must take precedence over conflicting rules which might be deducible from international customary law, it may be that a State is not able to establish its status as a party by a mere notification of succession. In this regard, cases of inapplicability of the customary succession procedure may be divided into three categories. Firstly, there are agreements which make the exercise of the right of succession subject to restrictive conditions. Thus, the International Cocoa Agreement 1975 provides, in substance, in article 71, paragraph 4, that notification of succession must be effected within 90 days after the attainment of independence and that it shall take effect as from the date of the Secretary-General's receipt thereof. Secondly, some agreements which have established an intergovernmental organization contain express rules concerning admission to that organization, and these rules often have the effect of restricting, or even excluding, the possibility of succession (such is the case with regard to the IMCO Convention[90] and the WHO Constitution).[91] Thirdly, the explicit provisions of an agreement or the very circumstances of its adoption may rule out succession or make it possible only with the consent of all the parties (see the International Law Commission's commentary on articles 4 and 16, in particular, of the above-mentioned set of draft articles).

8. In the case of agreements falling within the first and second categories, the situation of the depositary is clear, because he must confine himself to executing the express provisions of the agreement. In the case of agreements falling within the third category, namely those where — in the absence of express provisions — it is necessary to evaluate the purpose for which and the circumstances in which they were adopted, it is probably advisable for the depositary to consult the intergovernmental organization concerned before raising the question of possible succession with the newly independent State; this procedure will, of course, be particularly appropriate in cases where all the parties to the agreement are represented in the intergovernmental organization in question. However, no difficulties of any significance seem ever to have arisen for the Secretary-General in that regard.

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[89] This Conference, which was held at Vienna from 4 April to 6 May 1977 and from 31 July to 23 August 1978, adopted on 22 August 1978 the Vienna Convention on Succession of States in respect of Treaties (A/CONF.80/31 and Corr.1 (French only) and Corr.2 (English only)).

[90] United Nations, *Treaty Series*, vol. 289, p. 3.

[91] *Ibid.*, vol. 14, p. 185.

9. We have considered the two agreements which prompted your letter, and we have arrived at the following conclusions:

I. *International Convention of 14 May 1966 for the Conservation of Atlantic Tunas* (registration No. 9587; United Nations, *Treaty Series*, vol. 673, p. 63)

This Convention does not fall within any of the three categories of agreements mentioned in paragraph 7 of the present letter. Because none of its provisions and no external consideration appear to restrict the possibility of customary succession, our opinion is that FAO, in its capacity as depositary, may ascertain directly the intention of a newly independent State on this point without prior consultation of the International Commission for the Conservation of Atlantic Tunas — a solution which you envisage under head (i) in the third paragraph of your letter of 1 July 1977.

II. *Convention of 23 October 1969 on the conservation of the living resources of the South-east Atlantic* (registration No. 11408; United Nations, *Treaty Series*, vol. 801, p. 101)

The situation here is different. Article XVII, paragraph 3, of the Convention provides that, once the Convention has entered into force, "any State referred to in paragraph 1 of this Article which has not signed the Convention *or any other State unanimously invited by the Commission to become a party to the Convention may adhere to it*" (our italics). This provision makes adherence by a State not represented at the Conference which adopted the Convention and not a Member of the United Nations or a member of one of the specialized agencies subject to the unanimous approval of the International Commission for the South-east Atlantic Fisheries; consequently, the Convention may be classified in the third category of agreements referred to in paragraph 7 of the present letter in the case of possible successor States which are not yet Members of the United Nations or members of a specialized agency.

In the case of this Convention, therefore, we think that, in accordance with solution (ii) mentioned in the third paragraph of your letter, it might be advisable to consult the International Commission for the South-east Atlantic Fisheries before approaching the newly independent State regarding possible succession. However, it seems that the question should hardly ever arise in practice, because, firstly, the interval between the attainment of independence and admission to the United Nations or a specialized agency is generally very short and, secondly, and more important, we understand that your current procedure is not to take any steps until after the admission to FAO of the States concerned.

9 September 1977

22. QUESTION OF RECOGNITION OF THE COMPETENT AUTHORITIES OF THE HOST COUNTRY OF THE EXEMPTION OF THE UNITED NATIONS FROM THE STOCK TRANSFER TAX LEVIED IN ONE OF THE STATES OF THE HOST COUNTRY IN RELEVANT TRANSFERS EXECUTED ON BEHALF OF ALL UNITED NATIONS ASSETS, IN PARTICULAR THE UNITED NATIONS JOINT STAFF PENSION FUND

Letter to the Permanent Representative of a Member State

I wish to call to your attention a matter of very serious concern both to the Secretary-General of the United Nations and to the United Nations Joint Staff Pension Fund and its participants. These participants are in the employ of nearly all of the intergovernmental organizations which make up the United Nations family of organizations. This matter relates to the recognition by the competent authorities of your country of the exemption of the United Nations under, *inter alia*, the Convention on the Privileges and Immunities of the United Nations, from the Stock Transfer Tax levied in one of the States of your country in relevant transfers executed on behalf of all United Nations assets, in particular the United Nations Joint Staff Pension Fund.

It is our position that the exemption from taxation of the United Nations extends to all Funds of the Organization whatever their form or purpose. This position derives from Article 105 of the Charter of the United Nations and is supported by and is a logical interpretation of Section 7(*a*) of the Convention on the Privileges and Immunities of the United Nations, to which your country is a party. It is further supported by practice in other Member States where similar taxes are levied on non-United Nations institutions or individuals. While in 1967 the State legislature amended the Stock Transfer Tax law to exempt international organizations from the provisions of that law, we have, unfortunately, not been able to obtain from the State authorities effective recognition of this exemption as applied to stock transfers executed by or on behalf of the United Nations Joint Staff Pension Fund. A considerable portion of the assets of the Fund have been and are being invested through the Stock Exchange, and the imposition of the Stock Transfer Tax in regard to such transactions imposes an unwarranted and very heavy burden on the Fund, and thus on the contributors to the Fund, including States Members of the United Nations.

Consequently, the Organization attaches the greatest importance to the recognition of its rights in the present matter, rights which derive from international law and the treaty obligations of your country. It is the position of the United Nations that the practice of the State concerned must be conformed to the international obligations of your country and that the Stock Transfer Tax law must be interpreted in this light.

Before considering recourse to the other remedies available to us under international law, we are seeking your assistance and that of the Department of State in intervening with the appropriate State tax authorities in an effort to seek an effective and full recognition of the exemption granted to the Organization under Section 7(*a*) of the Convention and under the law of the State concerned.

We enclose herewith an Aide-Mémoire [reproduced in Annex to this opinion] setting out in detail information which we believe to be fully adequate in establishing our position as set out above. This Aide-Mémoire is for use by the Department of State and the State tax authorities in reviewing the matter. We shall be happy at any time, to provide any such additional information as may be required. Furthermore, we stand ready to meet with you or any of the competent authorities in an effort to work out the details for giving full effect to the exemption of the assets of the United Nations from the State Stock Transfer Tax.

11 July 1977

Annex

AIDE-MEMOIRE CONCERNING THE EXEMPTION OF THE ASSETS OF THE UNITED NATIONS FROM TAXATION: QUESTION CONCERNING THE INVESTMENTS OF THE UNITED NATIONS JOINT STAFF PENSION FUND AND THE STOCK TRANSFER TAX [LEVIED IN ONE OF THE STATES OF THE HOST STATE]

INTRODUCTION

Position of the State authorities concerned

The State authorities have recognized that the transfers of stock held by the United Nations are exempt from the payment of the State Stock Transfer Tax. In order to ensure the effectiveness of this exemption, the State legislature, at the request of the Governor, amended the law in 1967 to provide for such an exemption. The purpose of that amendment was to prevent the burden of such tax from being imposed in stock transactions either upon the United Nations as seller or upon the purchaser of the stock. However, the State authorities reserved their position on the question of the applicability of the exemption to transfers entered into by the United Nations Joint Staff Pension Fund, (hereinafter the "United Nations Pension Fund" or the "Pension Fund"), arguing that the Pension Fund was in some respects a separate entity from the United Nations. Thus Pension Fund assets have not to date benefited from the exemption.

Apparently, the Tax Commission has been reluctant to recognize an exemption in the case of the United Nations Pension Fund, anticipating that any such recognition could give

rise to claims for similar exemptions by other pension funds. It has been suggested that the recognition of such an exemption might be construed as a legal precedent in requests by charitable organizations for an exemption of similar pension funds maintained by them. It has further been suggested that pension funds such as the State Employees' Retirement System and the State Teacher's Retirement System are made subject to the provisions of the State Stock Transfer law, although the State itself is exempt from the provisions of the law.

In addition to taking the position that the United Nations Pension Fund is a separate and distinct entity from that of the Organization itself, the Tax Commission apparently felt that the purposes of the Pension Fund were not such as to be construed as among the basic purposes of the Organization. As such, it has argued, the Pension Fund would not be entitled to an exemption similar to that otherwise granted to the assets of the United Nations.

Position of the United Nations

The United Nations cannot accept the reasoning of the State authorities in this matter and considers the concerns expressed by the Tax Commission regarding other pension funds to be baseless and essentially unrelated to the case of the United Nations Pension Fund, which is in a special category to be treated in compliance with the international obligations of the country concerned. The Organization questions the assertion of an unqualified right by the State authorities to characterize the various Funds of the United Nations, or their compatibility with the basic purposes of the Organization.

It is the position of the United Nations that no distinction can be made in the context of the exemption here concerned between the other assets of the United Nations and those of the Pension Fund. Neither the argument distinguishing the United Nations Pension Fund as a separate entity of the Organzation nor that denying its basic purpose within the United Nations is sustainable. The facts set out below conclusively establish that an exemption from the tax for the benefit of the Pension Fund must be recognized and that any failure to extend equal treatment to the Pension Fund constitutes a violation of the provisions of Sections 7(*a*) and 8 of the Convention on Privileges and Immunities of the United Nations (hereinafter the "Convention") as well as of the terms of the State Stock Transfer Act, as amended.

THE BASIC PRINCIPLE: ALL ASSETS OF THE UNITED NATIONS ARE EXEMPT FROM TAXATION UNDER THE CHARTER AND UNDER THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

Article 105 of the Charter

Under Article 105 of the Charter of the United Nations, the Organization enjoys "in the territory of each of its members such privileges and immunities as are necessary for the fulfilment of its purposes". Among these privileges and immunities is one from taxation of the assets, income and property of the Organization. All other considerations apart, it clearly would not be equitable to permit one Member State to levy taxes on assets, income and property to which all Member States contribute.

It may be noted in this connexion that Committee IV/2 of the San Francisco Conference, which prepared Article 105 of the Charter, after noting that this article set forth "a rule obligatory for all Members as soon as the Charter becomes effective", stated:

> "The draft article proposed by the Committee does not specify the privileges and immunities respect for which it imposes on the member states. This has been thought superfluous. The terms *privileges* and *immunities* indicate in a general way all that could be considered necessary to the realization of the purposes of the Organization, to the free functioning of its organs and to the independent exercise of the functions and duties of their officials: *exemption from tax,* immunity from jurisdiction, facilities for communication, inviolability of buildings, properties, and archives, etc. It would moreover have been impossible to establish a list valid for all the member states and taking account of the special situation in which some of them might find themselves by reason of the activities of the Organization or of its organs in their territory. *But if there is one certain principle it is that no member state may hinder in any way the working of the Organization or take any measures the effect of which might be to increase its burdens, financial or other.*" (Emphasis added. United Nations Conference on International Organization, Documents, Vol. 13, page 705.)

The Convention on the Privileges and Immunities of the United Nations

Article 105 of the Charter is given detailed effect in the Convention on the Privileges and Immunities of the United Nations, to which the country concerned is a party. The Convention's provisions include the following:

> "SECTION 7. The United Nations, its assets, income and other property shall be:
>
> "(*a*) exempt from all direct taxes; it is understood, however, that the United Nations will not claim exemption from taxes which are, in fact, no more than charges for public utility services; . . . ."

The assets of the United Nations, under decisions of the General Assembly of the United Nations, include the assets of the United Nations Pension Fund. The Stock Transfer Tax being a direct tax, the Organization is clearly exempt from it under the above provision.[92]

State Practice

A recognition of the necessary extension of privileges and immunities of the Organization to the United Nations Pension Fund has occurred with respect to a number of Member States in matters relating to questions of taxation. The Governments of Canada, the United Kingdom, Switzerland and others have recognized the exemption from taxation of Pension Fund transactions on an equal basis with those of other transactions of the United Nations in fulfilment of their obligation both under the Charter of the United Nations and the Convention.

In 1955, the Ministry of National Revenue of Canada agreed that, as the assets of the United Nations Pension Fund were held in the name of the United Nations, the income of the Pension Fund would not be subject to Canadian income tax. Similarly, in 1961 the Government of the United Kingdom agreed that dividends derived from investments of the United Nations Pension Fund should not be subject to taxes otherwise imposed by that Government's Inland Revenue Department.

The fact that the nature of the tax with which this Aide-Mémoire is concerned in some way differs from those for which other Member States have recognized an exemption should be of no material importance in the present case. It must be clear that the form of taxation can have no bearing on the construction of an applicable exemption of a general character. Whatever the form of the actual tax imposed, the underlying purpose of the exemption established by Section 7(*a*) of the Convention must be recognized as binding upon all Member States equally. Imposition of the tax in question wrongfully imposes a heavy financial burden on the Organization and diverts funds contributed by Member States from the express purposes for which they were given.

THE UNITED NATIONS JOINT STAFF PENSION FUND WAS CREATED BY THE GENERAL ASSEMBLY IN PURSUANCE OF THE BASIC PURPOSES OF THE ORGANIZATION AS SET OUT IN ITS CHARTER

Character of the Secretariat of the United Nations

The importance of the staff to the effective operation of the United Nations Secretariat and the Organization as a whole must necessarily be considered in the light of its unique nature

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[92] *Arguendo* that the imposition of the tax on the purchaser of securities transferred in a Pension Fund transaction could be construed as an incident of indirect taxation, then Section 8 of the Convention would apply. That provision of the Convention states:

> "SECTION 8. While the United Nations will not, as a general rule, claim exemption from excise duties and from taxes on the sale of movable and immovable property which form part of the price to be paid, nevertheless when the United Nations is making important purchases for official use of property on which such duties and taxes have been charged or are chargeable, Members will, whenever possible, make appropriate administrative arrangements for the remission or return of the amount of duty or tax."

Should Section 8 of the Convention be determined to be a more appropriate basis for dealing with any aspect of the question, the United Nations is sure that the Host Country authorities would agree that a reasonable interpretation of that Section of the Convention would provide a fully adequate basis for an exemption from any such tax burden, whether it be in the nature of purchase or sale of such property. Also it must be noted that the invocation of Section 8 of the Convention would in no way detract from a claim for exemption under Section 7(*a*) thereof.

as an international Secretariat. This fact is reflected in the care with which the Charter itself provides for the Secretariat as a Principal Organ of the United Nations,[93] based on requirements of the highest standards of integrity, competence and impartiality, as well as the principle of broad geographic distribution.

Establishment of the Pension Fund

The entire question of a pension scheme for the staff was considered by the General Assembly in 1946. During the course of consultations on that subject, the premise that a retirement system was a necessary and integral part of the implementation of the provisions of the Charter was generally accepted. In particular, attention was called to paragraph 1 of Article 100 and paragraph 3 of Article 101 of the Charter.[94] It was considered that in implementing these provisions of the Charter that a pension scheme for the staff of the Organization would be considered an essential element in the establishment of a Secretariat meeting the standards and requirements of those provisions. It should be noted here that it is within the exclusive power and authority of the General Assembly to make such a determination in the implementation of the mandate of the Charter.[95]

The General Assembly made a careful review on the basis of the Report of an Advisory Group of Experts which conducted an exhaustive study of the working arrangements to be established in connexion with the formation of the Secretariat and the provision of retirement and related benefits of its staff. The Report of the Working Group reflected its conviction that a retirement and benefit system for the United Nations Secretariat must necessarily take into account that service as a staff member of the United Nations Secretariat would generally imply exclusion from the provisions of social security protection otherwise available to staff members in their own countries. Furthermore, it considered that the implementation of such a system would necessarily be required in order to give effect to Article 100 of the Charter and to immunize staff members to the extent possible from the influence of outside pecuniary interest in relation to their service in the United Nations Secretariat.

After careful scrutiny, the General Assembly interpreted the relevant provisions of the Charter as requiring an adequate retirement system. In its resolution 82(I) of 15 December 1946, it set out a provisional pension scheme and noted that the purpose of such scheme was to provide "conditions of employment which will attract qualified candidates from any part of the world . . .".

As already noted, it is within the power of the General Assembly to make such determinations and to construe the Charter as it affects the Organization and work of the Secretariat. This function of the General Assembly has consistently been carried out by it and recognized by Member States as binding upon the Organization as a whole. Actions by the General Assembly, in establishing Staff and Pension Fund Regulations relating to conditions of service of the staff of the Secretariat, exemplifies its consistent performance of this mandate.

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[93] Article 7 of the Charter provides in relevant part:

"1. There are established as the principal organs of the United Nations: . . . a Secretariat."

Article 97 of the Charter provides in relevant part:

"The Secretariat shall comprise a Secretary-General and such staff as the Organization may require . . ."

[94] These provide in relevant part as follows:

Paragraph 1 of Article 100:

"1. In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization."

Paragraph 3 of Article 101:

"3. The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible."

[95] In this respect, Article 101 of the Charter provides in relevant part:

"1. The staff shall be appointed by the Secretary-General under regulations established by the General Assembly."

THE UNITED NATIONS JOINT STAFF PENSION FUND IS AN ENTITY CONSTITUTED WITHIN THE UNITED NATIONS AND ITS ASSETS ARE AN INTEGRAL PART OF THE ASSETS OF THE ORGANIZATION AND CAN IN NO WAY BE CONSIDERED AS SEPARATE AND DISTINCT THEREFROM

Establishment of United Nations Funds: Role of the General Assembly

Under Article 17 of the Charter, the General Assembly is entrusted with the responsibilities related to the consideration and approval of the budget of the United Nations. In this function, it decides upon both the form and the substance of the budget. On several occasions, it has set up separate funds and accounts which are nevertheless integral parts of the United Nations in all respects. Whether or not a separate fund or account is established for any particular programme or project is a matter of administrative and management convenience, sometimes reflecting the particular sources of funding or destinations of expenditures. Nonetheless, such separate accounting procedures, or administration and management of a Fund (such as the United Nations Pension Fund) separate from the General Account of the United Nations, are matters internal to the Organization and in no way imply or can imply any juridical distinction between such separate account or fund and the general assets of the United Nations. Examples of such separate funds or accounts are too numerous to mention exhaustively. However, these include the United Nations Children's Fund (UNICEF), United Nations Development Programme (UNDP), United Nations Emergency Force (UNEF), United Nations Environment Programme (UNEP), United Nations Institute for Training and Research (UNITAR), and United Nations Fund for Population Activities (UNFPA), as well as the United Nations Pension Fund.

The fact is that these Funds must be seen as integral parts of the United Nations and their assets as integral parts of the global assets of the Organization. United Nations Pension Fund assets are subject to the scrutiny and control of the General Assembly in a manner dictated by the Charter, through a process similar in all respects to the scrutiny and control required of all other Funds of the Organization, whether forming a part of the General Accounts or an account more specific in nature.

Control of United Nations Funds: Role of the Secretary-General

A further indication of the integrity of the United Nations Pension Fund within the general assets of the Organization is manifested by the nature and extent of control which the Secretary-General exercises over the Fund. Under Article 97 of the Charter, the Secretary-General is designated as Chief Administrative Officer of the Organization. In that capacity the Secretary-General exercises all of the administrative functions delegated to him by the General Assembly. This authority is regularly exercised by the Secretary-General in both the investment, budgeting and expenditure of all assets of the Organization. The assets of the United Nations Pension Fund are subject to the same administration and control of the Secretary-General in all respects.

The authority of the Secretary-General over investments of the assets of the United Nations Pension Fund is reflected in Article 19 of the Regulations of the Fund.[96] That Article provides that the Secretary-General shall have control over all decisions relating to investments of the United Nations Pension Fund.[97] The authority thus exercised by the Secretary-General to de-

[96] "Article 19—*Investment of the assets*

"(*a*) The investment of the assets of the Fund shall be decided upon by the Secretary-General after consultation with an Investment Committee and in the light of observations and suggestions made from time to time by the Board on the investments policy.

"(*b*) The Secretary-General shall arrange for the maintenance of detailed accounts of all investments and other transactions relating to the Fund, which shall be open to examination by the Board."

[97] While these decisions by the Secretary-General may be taken only after consultation with the Investments Committee of the United Nations Pension Fund, under Article 20 of the Regulations of the United Nations Pension Fund, the Secretary-General is not required to follow the Committee's advice. Moreover, that Committee is in fact appointed by the Secretary-General, subject to the confirmation by the General Assembly. The provisions of Article 20 for the creation of the Investments Committee is an example of the joint sharing, in certain respects, of the responsibilities of the United Nations Pension Fund by the General Assembly and by the Secretary-General. That procedure in no way derogates from the authority of the Secretary-General in such matters but is a procedure similar to that employed in the naming and confirmation of executive bodies of other specialized projects and programmes within the United Nations.

termine the investment and use of assets of the United Nations Pension Fund is a clear indication of the essentially administrative nature of the separation of the United Nations Pension Fund's assets from the United Nations General Account.

Details regarding the United Nations Pension Fund

The fact that the purpose of the United Nations Pension Fund is to provide certain benefits to participants and beneficiaries thereof and that its assets consist of contributions both by the Organization and by the participants does not derogate from its essential juridical quality as a United Nations Fund within the context of the Charter provisions. The Pension Fund, like any other programme or project of the Organization administered on a separate basis by appropriate General Assembly resolutions, must necessarily have its own unique characteristics both in terms of funding and expenditure as well as in terms of its essential purpose.

Article 18 of the Regulations of the United Nations Pension Fund specifically provides that all assets of the Fund be held in the name of the United Nations.[98] Those assets must indeed be held separately from the general assets of the United Nations and on behalf of the participants and beneficiaries of the Pension Fund, in order to insure that they will be available when needed to pay the authorized pensions. The prudence of this mechanism is, of course, clear from the very nature and purpose of the Pension Fund itself. That purpose is to carry out a basic and universally accepted social principle that participants and beneficiaries thereof be protected to the highest degree possible, *inter alia*, in matters relating to investments and administration of assets. Since these funds are essentially held in trust for such participants and beneficiaries, the standard of care to be exercised in all respects must necessarily exceed reasonable standards otherwise appropriate to United Nations assets and requires administration of a higher degree of care and prudence. The General Assembly has seen fit to provide for this higher standard and, thereby, has provided for the segregation and separate administration of these assets. This action cannot be interpreted as allowing Member States to penalize such separate and prudent administration and *per se* requires the full extension of privileges and immunities which have been granted to the Organization. It would, in fact, be unconscionable for the United Nations to be penalized for providing a scheme of special protection for the Pension Fund of its Secretariat staff through the denial of the equal protection of such specially designated assets by a Member State or any political subdivision thereof.

As has been set out above, the Pension Fund was established in fulfilment of a specific purpose related to the establishment and basic functioning of the Secretariat under the Charter. Once this premise of essential purpose is accepted, the precise configuration and nature of transactions conducted in fulfilment of its purpose can in no way be argued as providing a valid distinction in terms of the exemption recognized under either the Charter or the Convention. No construction of either the unique purposes of the Pension Fund or the intended breadth of the exemption can in any way derogate from the conclusion that assets of the Pension Fund must be recognized as exempt from taxation in a manner co-extensive with those of all other assets of the Organization.

THE RECOGNITION OF THE EXEMPTION OF UNITED NATIONS JOINT STAFF PENSION FUND TRANSACTIONS SHOULD BE CONSTRUED IN SUCH A WAY AS TO GIVE THAT EXEMPTION FULL EFFECT

The United Nations considers that a full exemption from the State Stock Transfer Tax on all transactions of the Organization, in whatever form, entails, *inter alia*, an unequivocal recognition that such exemption must extend to the assets of the Pension Fund.

A suitable framework must be provided in which the exemption from the tax in question may be effectively recognized. This would entail lifting the burden of the tax upon the United Nations whether such tax be imposed directly upon it as seller or indirectly upon it through taxation of the purchaser of the stock. Either incident of taxation causes a diminution in the revenue from the stock transaction and must be provided against. Where the burden of the tax falls upon the purchaser, it must be construed to be as fully an incident of direct taxation as if the tax were collected directly from the United Nations Pension Fund in the transaction. There-

[98] "Article 18—*Property in the assets*

"The assets shall be the property of the Fund and shall be acquired, deposited and held in the name of the United Nations, separately from the assets of the United Nations, on behalf of the participants and beneficiaries of the Fund."

fore, whatever the mechanism of collection of the tax, the provision of Section 7(*a*) of the Convention must likewise be recognized as applicable.

The exact procedure to be carried out in providing for an effective exemption from the levying of taxes on transactions entered into by the United Nations Pension Fund will, of course, necessarily require an accommodation between the United Nations and the appropriate authorities. For example, an adequate formula could be arrived at in order to provide for appropriate certification of exemption. Such certification might be provided in anticipation of the envisioned stock transactions. The most appropriate mechanism for normalizing the situation is a matter on which the United Nations stands ready to negotiate.

In the assertion of the right of the Pension Fund to an exemption from the State Stock Transfer Tax, the question of refunding the taxes already paid by the Organization in respect of Pension Fund stock transfers must be considered. Accordingly, the United Nations reserves its position and right to claim with retroactive effect taxes already paid which should not have been required to be paid because of the exemption of the United Nations from taxes.

23. Notices issued by the tax authorities in a Member State to the United Nations Children's Fund (UNICEF) for payment of a value-added tax on sums collected by UNICEF

Letter to the Permanent Representative of a Member State to the United Nations

I would very much appreciate your assistance in a matter involving two notices for "value-added tax" which have been issued by the Revenue Office for Corporations in [name of a city in the Member State concerned] to the United Nations Children's Fund (UNICEF).

The first of these notices is for tax said to be due from UNICEF as the result of UNICEF issuing a license for a certain amount to a radio station in your country for the broadcast of five episodes of the UNICEF film series "Children of the World". The second of these assessments is for tax said to be due from UNICEF as the result of UNICEF receiving payments from another radio station for reimbursement of the expenses of artists participating in a fund-raising "Spectaculum".

The Revenue Office, while disputing UNICEF's exemption from these taxes, did not question the applicability of the Convention on the Privileges and Immunities of the United Nations[99] to UNICEF, a subsidiary organ of the General Assembly, within your country; for although not party to that Convention, your country is party to the Convention on the Privileges and Immunities of the Specialized Agencies[100] and the provisions of the latter Convention, which are substantially the same as those of the former, have been extended by statutory order to the United Nations.

Rather, the Revenue Office has concluded that UNICEF is liable to the Government for the tax notwithstanding its exemption from direct taxes under the Convention, because the value-added tax is by nature an indirect charge on the ultimate purchaser and therefore UNICEF, as seller, should have collected the amount from the two radio stations concerned and should pay the tax to the Government.

This position has no basis in the two above-mentioned conventions which provide for immunity from legal process of every kind (Sections 2 and 4, respectively), for exemption from all direct taxes except those which are no more than charges for public utility services (Sections 7 and 9, respectively) and for reimbursement by governments of taxes paid by the United Nations as part of the purchase price (and not separately stated or directly charged) (Sections 8 and 10, respectively). Whatever may be the obligations of governments to reimburse value-added tax paid by the United Nations as purchaser, it is clear that the United Nations' exemption and immunity preclude any charge on UNICEF directly by the tax authorities.

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

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

It may further be observed that such an obligation on UNICEF's part as is asserted by the Revenue Office could equally well be asserted in many countries having sales or value-added taxes where UNICEF might be conducting public information or fund raising activities. Such worldwide liability to account to governments for taxes would constitute a substantial burden of the type which the relevant provisions of the Conventions on the Privileges and Immunities of the United Nations and of the Specialized Agencies were intended to avoid. The United Nations' exemption from the obligation to account for taxes on its sales has been unexceptionally recognized.

It is my hope that, through your good offices, the Revenue Office will understand that in declining to pay the value-added tax, UNICEF is properly relying on United Nations privileges and immunities which the General Assembly has deemed necessary to the proper functioning of the Organization and which your country has undertaken to apply.

27 April 1977

24. EXEMPTION OF UNITED NATIONS PUBLICATIONS FROM CUSTOMS DUTIES AND OTHER CHARGES — INTERPRETATION OF THE TERM "PUBLICATION" — REVIEW OF RELEVANT TREATY PROVISIONS

Letter to the Executive Secretary, Economic Commission for Latin America

This is in reply to your letter of 19 July 1977 concerning the sale of United Nations publications through local book stores in the ECLA region.

Under Section 7(*c*) of the Convention on the Privileges and Immunities of the United Nations, the United Nations is "Exempt from customs duties and prohibitions and restrictions on imports and exports in respect of its publications". A similarly worded provision is to be found in section 10(*c*) of the ECLA Headquarters Agreement.[101] The term "publication" as used in these agreements has been interpreted in a broad sense to include films and recordings as well as printed materials.

As regards the importation for re-sale of United Nations publications, the Legal Counsel gave an opinion in an internal memorandum in 1959 in a case involving the sale of the printed records of a United Nations Conference in which it was stated *inter alia* that "the question of re-sale in the case of publications has no legal significance. It was assumed from the beginning that the normal channels of distribution of the printed publications of the United Nations would be through re-sale by sales agents". After referring to Section 7, paragraphs (*a*) and (*b*) of the Convention, the opinion continued "I do not consider that the mere fact that the sales agent may sell at a mark-up, or that our sales price may in some way take into account the agent's commission or profit in any way affects the assumption on which the exemption was based". The 1959 opinion also referred to the fact that in addition to the United Nations Convention on the Privileges and Immunities, United Nations publications are also protected from customs duties or other charges by the UNESCO Agreement of 22 November 1950 on the importation of educational, scientific and cultural materials in those States Parties to the Agreement.[102]

2 August 1977

25. IMMUNITY FROM LEGAL PROCESS OF UNITED NATIONS OFFICIALS IN CONNEXION WITH TRAFFIC VIOLATIONS OR TRAFFIC ACCIDENTS — DISTINCTION BETWEEN ACTS TO BE CONSIDERED AS SERVICE-RELATED FOR THE PURPOSE OF STAFF REGULATIONS AND RULES AND ACTS PERFORMED BY OFFICIALS "IN THEIR OFFICIAL CAPACITY"

[101] United Nations, *Treaty Series*, vol. 314, p. 49;
[102] *Ibid.*, vol. 131, p. 25.

WITHIN THE MEANING OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

Letter to the Legal Liaison Officer, United Nations Industrial Development Organization

This is in reply to your letter of 25 November 1977 on the question of the status of staff members when travelling directly from their home to the Organization and vice versa. Your inquiry and this reply relate solely to the question of immunity from legal process in connexion with traffic violations or traffic accidents involving staff members travelling directly between their homes and the Organization. This reply also assumes that the staff member does not have diplomatic immunities by virtue either of his rank or under the particular host country agreement.

As indicated in my letter of 29 September, travel between home and office is not in itself considered to be an official act within the meaning of Section 18(*a*) of the Convention on the Privileges and Immunities of the United Nations which provides for immunity from legal process in respect of acts performed by officials "in their official capacity".

To avoid confusion stemming from the phrase "on-duty", I would emphasize the difference between the basis for the immunity for official acts under the Convention and the basis for various entitlements under the Staff Regulations and Rules.

The immunity of an official from legal process in respect of acts performed in his official capacity (i.e. on behalf of the United Nations) must be distinguished from service-related benefits under the Staff Regulations and Rules such as compensation for injuries attributable to United Nations service or travel entitlements for service-related trips including home leave travel. An injury may be compensable as service-related under Appendix D to the Staff Rules without having been incurred by the staff member acting in his official capacity; the fact that a staff member's travel expenses are paid by the United Nations does not render his journey or his actions on the journey "official actions". Driving is, of course, official action by United Nations chauffeurs and such staff members may engage the United Nations' liability as well as their own, and hence they are covered by the United Nations automobile liability insurance. Their (and the United Nations') immunity is frequently waived for the purpose of litigating damages, but the practice with respect to their immunity from charges of traffic violation is highly flexible.

As far as the General Assembly is concerned, one of its very first actions in the field of privileges and immunities was directed towards the prevention of abuse of privileges and immunities in connection with traffic accidents. Resolution 22 (I) E instructed the Secretary-General to ensure that staff members be properly insured against third-party risks, an instruction which finds its implementation in Staff Rule 112.4.

The functional and non-personal nature of the privileges and immunities of United Nations officials is made clear by the language of the Convention on the Privileges and Immunities of the United Nations and Staff Regulation 1.8[103]. The Secretary-General's position with respect to suggestions of immunity has always been that he and he alone may decide what constitutes an official act, when to invoke immunity and when to waive immunity.

There is no precise definition of the expressions "official capacity", "official duties", or "official business". These are functional expressions and must be related to a particular context. Indeed, it is doubtful whether a definition would be desirable since it would not

[103] Reading as follows:

"The immunities and privileges attached to the United Nations by virtue of Article 105 of the Charter are conferred in the interests of the Organization. These privileges and immunities furnish no excuse to the staff members who enjoy them for non-performance of their private obligations or failure to observe laws and police regulations. In any case, where these privileges and immunities arise, the staff member shall immediately report to the Secretary-General, with whom alone it rests to decide whether they shall be waived."

be in the interest of the Organization to be bound by a definition which may fail to take into account the many and varied activities of United Nations officials.

Finally, there are certain pragmatic considerations which must be taken into account. While Headquarters practice does not exclude invoking immunity in certain traffic cases, a reverse practice in which immunity is automatically raised would give rise to considerable difficulties with the police and in the courts, not to mention the political consequences at a time when the general public and legislative bodies are opposed to privileges and immunities.

The practical handling of this question at Headquarters has not given rise to any difficulties, probably because of the firm position taken by the Secretary-General from the very beginning. Staff members are expected to obey local laws and regulations and as the Secretary-General stated in a 1949 press release: "If there is any infringement of any laws, traffic violations for example, a Secretariat member is in the same group — unless on official business — as the average citizen who may pass a red light.... He just pays his fine, and many already have".

12 December 1977

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

1. INTERNATIONAL LABOUR ORGANISATION

(*a*) MEMORANDA DEALING WITH THE INTERPRETATION OF INTERNATIONAL LABOUR CONVENTIONS

The following memoranda, dealing with the interpretation of international labour Conventions, were drawn up by the International Labour Office at the request of Governments:

(*a*) Memorandum on the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144), drawn up at the request of the Government of Sweden, 28 October 1977. Document GB.206/13/3; 206th Session of the Governing Body, May-June 1978.

(*b*) Memorandum on the Human Resources Development Convention, 1975 (No. 142), drawn up at the request of the Government of the Federal Republic of Germany, 31 March 1978. Document GB.206/13/3; 206th Session of the Governing Body, May-June 1978.

(*b*) NOTICE OF WITHDRAWAL REQUIRED UNDER ARTICLE 1, PARAGRAPH 5 OF THE CONSTITUTION OF THE INTERNATIONAL LABOUR ORGANISATION FROM ANY STATE MEMBER INTENDING TO WITHDRAW FROM THE ORGANISATION — QUESTION WHETHER AN EXTENSION OF THE NOTICE IS LEGALLY PERMISSIBLE

Opinion of the Legal Adviser of the International Labour Office

1. Article 1, paragraph 5 of the Constitution of the ILO provides as follows:

"5. No Member of the International Labour Organisation may withdraw from the Organisation without giving notice of its intention so to do to the Director-General of the International Labour Office. Such notice shall take effect two years after the date of its reception by the Director-General, subject to the Member having at that time fulfilled all financial obligations arising out of its membership. When a Member has ratified any international labour Convention, such withdrawal shall not

affect the continued validity for the period provided for in the Convention of all obligations arising thereunder or relating thereto."[104]

2. That provision was adopted by the International Labour Conference in 1945. There was no discussion of it at the Conference, but the Office report which proposed it[105] indicated that it represented, generally speaking, the carry-over of the (pre-war) system which had previously been indirectly applicable to the Organisation by virtue of the corresponding provision of the Covenant of the League of Nations. That provision read as follows:

> "Any member of the League may, after two years' notice of its intention so to do, withdraw from the League, provided that all its international obligations and all its obligations under this Covenant shall have been fulfilled at the time of its withdrawal." (Article 1, third paragraph.)

3. Both the Covenant of the League and the Constitution of the ILO are international treaties subject to the general rules of international law concerning the interpretation of treaties. As stated in article 31 of the Vienna Convention on the Law of Treaties,[106] the general rule of interpretation is that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." That article further indicates that there shall be taken into account, *inter alia,* "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." And Article 32 provides that recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty, in order to confirm the meaning resulting from the application of article 31 or to determine the meaning when the interpretation according to article 31 leaves the meaning ambiguous or leads to a manifestly unreasonable result.

4. Moreover article 37 of the Constitution of the ILO provides that any question or dispute relating to the interpretation of the Constitution shall be referred for decision to the International Court of Justice. This means that, where there is found to be possible ambiguity in the terms of the Constitution, and the States Members of the Organisation do not agree on the interpretation, only the Court can give an authoritative answer. It is, of course, possible that there is no "question or dispute" between States Members of the Organization on the interpretation. The role of the Legal Adviser in the process is to tender advice, on request, to the Member States in that connection.

5. As indicated above, Article 1, paragraph 5 of the Constitution provides that a notice of intention to withdraw "shall take effect two years after the date of its reception by the Director-General . . . . ("portera effet deux ans après . . ."). The question which arises is whether the "ordinary meaning" of that provision is that it is a constitutional requirement that membership cease at precisely that date — neither before nor after.

6. Textually the language of the Constitution lends itself both to the meaning that, as from the date on which the notice "takes effect", the State concerned ceases to be a Member, and to the meaning that, as from that date, the State concerned is entitled to cease to be a Member (but may, if it so wishes, prolong its membership). That being so, recourse to other relevant elements is necessary.

7. There is no "subsequent practice" which can be said to "establish the agreement of the parties" regarding the interpretation of the relevant terms of the Constitution. Admittedly, in the case of all States which have given notice of withdrawal and have not withdrawn that notice before the expiry of two years, membership was considered to have ceased on the date on which the notice "took effect". However, in all these cases, it was

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[104] Constitution of the International Labour Organization and Standing Orders of the International Labour Conference, International Labour Office, Geneva, 1969.

[105] International Labour Conference, Twenty-seventh Session, Paris, 1945, Report IV (1), pp. 86–89.

[106] *Official Records of the United Nations Conference on the Law of Treaties,* Documents of the Conference (Sales No. E.70.V.5), p. 287.

the decision of the State concerned (normally expressly stated in the notice) to withdraw by that date. The question of a possible extension of notice not having arisen, an *opinio juris* of the other Member States could not have come into being.

8. Such preparatory work as there is (as indicated, there is only an Office report to the 1945 session of the Conference) contains two elements suggesting that an extension of notice is possible. First, the two-year period is described as a "minimum" period of notice (p. 87 of the English text). Second, as recalled above, it is made clear that paragraph 5 of Article 1 is based on the relevant provision of the Covenant of the League; that provision was differently drafted, to read that "any member . . . may, after two years' notice of its intention so to do, withdraw . . ."; the drafting change made in the ILO Constitution is not indicated as being a change of substance.

9. It is, however, the context of the phrase at issue, in the light of the object and purpose of the Constitution, which is most illuminating:

(*a*) The essence of paragraph 5 of Article 1 of the Constitution is that no State may withdraw without having given two years' notice of its intention so to do. The purpose of the notice period is to give the Organisation time to adjust to the consequences of withdrawal, particularly the financial consequences. This is adequately confirmed in the "preparatory work" (which expressly rejects a possible one year notice period). The considerations which make impossible withdrawal after less than two years do not apply to a longer notice period. A State which, say, gave three years' notice from the beginning, would give the Organisation greater time to adjust, while an extension of notice would permit relaxation of any conservatory measures already taken or planned to the extent consistent with the extension.

(*b*) The aim of the membership provisions of the Constitution in their entirety is to achieve universality; this is made amply clear by the records of the 1945 session of the Conference, as well as various provisions in the Preamble to the Constitution and the Declaration of Philadelphia annexed thereto. In that light, it would not make sense to require that membership cease at a time when the State concerned is prepared to continue membership at least for a specified further period.

10. An extension of notice of withdrawal would thus seem to be legally permissible.

11. It would appear, at the same time, that the Organisation as a whole and the other parties to its constituent instrument are entitled to be clear as to the terms of such extension as from the moment that it begins to run; in particular they have an interest in certainty as to the period of time on which the extension bears.

12. Finally, it is clear that, during any extension of notice, the State concerned has all the rights and obligations (including the financial obligations) pertaining to membership.

17 August 1977

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2. UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION

PROCEDURES OPEN TO STATES FOR ESTABLISHING ON THE INTERNATIONAL PLANE THEIR CONSENT TO BE BOUND BY A TREATY — PRACTICE USUALLY FOLLOWED IN UNESCO WITH REGARD TO CONVENTIONS ADOPTED BY THE GENERAL CONFERENCE OR BY INTERNATIONAL CONFERENCES CONVENED UNDER THE AUSPICES OF UNESCO

Letter, prepared by the Office of International Standards and Legal Affairs, to the Permanent Delegation of a Member State to UNESCO

I have the honour to acknowledge receipt of your letter of 11 August 1977 by which you asked for information with regard to the differences in meaning of the concepts of

ratification, acceptance ("acceptation" in French) and accession. You also asked about what makes one Member State "choose between ratification, acceptance and accession to be bound by stipulations of treaties".

In reply to your request, I wish to inform you that in accordance with the terms of paragraph 1 (*b*) of article 2 of the 1969 Vienna Convention on the Law of Treaties, "ratification", "acceptance" and "accession" mean in each case "the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty".

This Convention has, as far as I am aware, not yet entered into force.[107] However, the provision referred to in the preceding paragraph is generally seen as reflecting the view recognized under customary rules of international law and to that extent it may be considered to be currently applicable.

As regards the conventions adopted by the General Conference in particular, they are usually open to ratification or acceptance by Member States, and to accession by non-Member States with or without prior invitation by the Executive Board of the General Conference, as the case may be.

Thus, while non-Member States may be limited to the procedure of accession as the only means open to them under the provisions of these conventions for expressing on the international plane their consent to be bound by the conventions concerned, such Member State may, in accordance with its own constitutional system and practice, choose between "ratification" and "acceptance" of these conventions but cannot opt for accession.

It may be recalled in this connection that at the 10th session of the General Conference (1958) when the Legal Committee first made the proposal relating to the offer of the "ratification" and "acceptance" alternatives to Member States, it stated in its second report that in "making such a proposal, the Committee kept in mind that the deposit of an instrument of acceptance would have the *same effect* (emphasis added) as the deposit of an instrument of ratification, the deposit of either type of instruments having a final binding effect on States and no further step being required".

With respect to conventions adopted not by the General Conference but by international conferences of States convened under the auspices of UNESCO, one may say in a very general way that the practice has been to leave the procedure of ratification or acceptance open to States on whose behalf the conventions are signed and the procedure of accession to non-signatory States.

In addition to the foregoing general indications, I should perhaps add that in the case of each specific convention, whether adopted by the General Conference or by an international conference of States convened under the auspices of the Organization, the question of which States may become parties to it and by what procedure (ratification, acceptance, accession, etc.) and under what conditions they may do so, is governed by the provisions of the particular convention concerned. The Secretariat, on behalf of the Director-General as depositary of such conventions, is always available to provide information in that respect.

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[107] The Convention shall enter into force, in accordance with article 84, on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession. As of 3 November 1978, it had been ratified or acceded to by 52 States. For the list of those States see *Multilateral Treaties in respect of which the Secretary-General Performs Depositary Functions* (ST/LEG/SER.D/11—Sales No. E.78.V.6), p. 553.