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UNITED NATIONS JURIDICAL YEARBOOK

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

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



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

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

1. THE RIGHT OF SELF-DETERMINATION AS A BASIC PRINCIPLE OF INTERNATIONAL LAW AND THE CHARTER OF THE UNITED NATIONS AS ITS BASIC SOURCE — DEVELOPMENT OF THE PRINCIPLE IN OTHER INTERNATIONAL INSTRUMENTS, PARTICULARLY AS TO ITS DIFFERENT FORMS OF IMPLEMENTATION — INDEPENDENT STATEHOOD AS THE MOST COMMON FORM OF IMPLEMENTATION CHOSEN — THE FREE EXERCISE OF THE RIGHT OF SELF-DETERMINATION REQUIRES THAT THIS ALTERNATIVE BE AVAILABLE

Memorandum to the Secretary-General

1. The basic authoritative source for the principle of self-determination as it presently governs international relations is the Charter of the United Nations. Article 1 of the Charter lists as one of the purposes of the Organization the development of friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. The principle is further referred to in Article 55 and Articles 73 and 76 further deal with some aspects of the principle. Apart from these very general provisions, however, the Charter does not elaborate on the elements that give concrete application to the principle.

2. It has been the role of the United Nations therefore not only to ensure respect for the right of self-determination as a basic principle of international law, but also to develop the subsidiary principles that govern lawful implementation of the right of self-determination. In this connexion, attention had to be given, among other aspects, to the question as to what legitimate forms implementation of self-determination can take.

3. The General Assembly has addressed this task at two different levels: 1° at the general theoretical level by adopting authoritative more detailed restatements of the principle and 2° at the concrete level by dealing with actual individual cases of self-determination.

4. The major formal restatements of the principle of self-determination are contained in resolution 1514 (XV) of 1960 (Declaration on the Granting of Independence to Colonial Countries and Peoples), the two International Covenants on Human Rights of 1966 (Article 1) and resolution 2625 (XXV) of 1970 (Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations).

5. The Declaration of 1960 and the Covenants on International Human Rights do not elaborate on the form that self-determination can take. However, at the same session when the Declaration on the Granting of Independence was adopted, the General Assembly dealt with certain aspects of the principle of self-determination in a more detailed way in a separate resolution, namely resolution 1541 (XV) concerning "Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter". Principle VI of this resolution specifically deals with the form of self-determination by stating that:

"A Non-Self-Governing Territory can be said to have reached a full measure of self-government by:

- “(a) Emergence as a sovereign independent State;
- “(b) Free association with an independent State; or

“(c) Integration with an independent State.”

Principles VII, VIII and IX elaborate on the conditions under which free association or integration are acceptable. The Principles of this resolution have been a basic guideline for United Nations activities in the field of decolonization.

6. The most elaborate authoritative general statement on the principle of self-determination is contained in the Declaration on Principles of International Law concerning Friendly Relations and this text is also explicit on the question of form of self-determination. According to this Declaration

“The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that People.”

7. At the concrete level of individual implementation, the history of the United Nations shows an impressive record of cases in which the Organization has been involved in the process of self-determination. This practice reveals that statehood has been resorted to as the most common and thus normal form of attainment of self-determination. Thus, on a total of 74 cases of self-determination that are on record for the period between the entry into force of the Charter and the beginning of 1979, 70 cases relate to territories that achieved self-determination by obtaining independent statehood. Two cases involved the integration with an independent State (West Irian, integrated with Indonesia, and Ifni, integrated with Morocco) and two resulted in free association with an independent State (Mariana Islands, which became a free associated State of the United States, and Niue, which opted for self-government in free association with New Zealand).

8. In conclusion, it can be said that the practice of the United Nations, both at the level of elaboration of general principles and at the level of concrete implementation of those principles, has established that statehood is a legitimate mode of implementation of the right of self-determination. Statehood has even emerged as the most common and thus normal form of self-determination and the General Assembly cannot be expected to accept any other form unless the peoples choosing a status different from independent statehood do so notwithstanding that independent statehood is a clearly available alternative.

29 August 1980

2. QUESTION WHETHER THE UNITED NATIONS IS LIABLE FOR THE PAYMENT OF RENT FOR PREMISES OCCUPIED BY A UNITED NATIONS PEACE-KEEPING FORCE STATIONED IN A MEMBER STATE WITH THE LATTER'S CONSENT — RESPONSIBILITY OF THE HOST STATE, UNDER EXISTING AGREEMENTS AND CURRENT PRACTICE, TO PROVIDE A PEACE-KEEPING FORCE WITH THE NECESSARY PREMISES

*Memorandum to the Assistant Director for Peace-Keeping Matters and
Special Assignments, Office of Financial Services*

1. I refer to your memorandum of 14 and 23 January 1980 by which you sent us copies of letters from the Deputy Permanent Representative of [name of a Member State] relating to claims from certain local commercial entities for rent allegedly owed by the United Nations for the occupation by United Nations peace-keeping forces of buildings owned by these companies in the Member State concerned. You requested our opinion as to whether the United Nations is liable for the payment of rent for the occupation of these buildings.

2. This matter raises the general issue of a host State's obligations with regard to the provision of accommodation for a United Nations peace-keeping force which it accepts in its territory. The provisions of past status of forces agreements and the practice followed with regard to past and present peace-keeping operations have established the principle that it is the host State's responsibility to provide a peace-keeping force with the premises necessary for the accommodation and

the fulfilment of the functions of a force, and that such accommodation is provided at no cost to the United Nations.

3. In the present instance, it is relevant to recall that an understanding was reached between the Government concerned and the United Nations according to which, pending the conclusion of a new status of the force agreement, the provisions and principles of an earlier agreement would be applicable. Under that agreement the Government of the host State undertook to provide, in agreement with the Commander, such areas for headquarters, camps, or other premises as might be necessary for the accommodation and the fulfilment of the functions of the force.

4. From the information provided in your memoranda of 14 and 23 January and in the attachments, it would appear that the premises to which the claims relate fall in the category of premises envisaged by the provision referred to above. The payment of rent for those premises is therefore an issue between the Government of the host State and the local companies owning the buildings, and is not the responsibility of the United Nations.

5. This conclusion based on the general principles governing United Nations peace-keeping operations is of course subject to any divergent specific arrangements which may have been made with regard to any of the premises at the time of their occupation. The information which we dispose of thus far does not indicate the existence of such special arrangements and our communications with the Government concerned as well as the reports of the Secretary-General to the Security Council show that the United Nations assumed that the general principle of host country's responsibility was applicable. The question of the liability of the United Nations with regard to specific claims may have to be reviewed, however, in the light of additional information that may be brought to our attention.

15 February 1980

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3. LIABILITY OF THE UNITED NATIONS IN CASE OF ACCIDENTS INVOLVING BRITISH-OWNED AND OPERATED HELICOPTERS PUT AT THE DISPOSAL OF THE UNITED NATIONS FORCE IN CYPRUS (UNFICYP) — QUESTION WHETHER THE UNITED NATIONS OR THE GOVERNMENT OF THE CONTINGENT TO WHICH THE HELICOPTERS BELONG WOULD ULTIMATELY HAVE TO BEAR THE COST OF POSSIBLE COMPENSATION — SPECIFIC CASE OF PASSENGERS FLYING THE HELICOPTERS UNDER INSTRUCTIONS OR WITH THE AUTHORIZATION OF UNFICYP AUTHORITIES OTHER THAN THE BRITISH CONTINGENT AUTHORITIES — ADVISABILITY OF OBTAINING INSURANCE FOR SUCH RISKS AS THE UNITED KINGDOM IS NOT CLEARLY PREPARED TO ASSUME

*Memorandum to the Officer-in-Charge, Field Operations Division,
Office of General Services*

1. You requested our advice as to whether British-owned helicopters used by UNFICYP could be considered United Nations aircraft as outlined on page D-50 (para. 1(a)) of the Field Administration Handbook and whether, in case of accidents, the United Nations could be held liable by authorized visitors to UNFICYP travelling in those helicopters.

2. The helicopters used by UNFICYP belong to and are operated by either "Army aviation flight" or "Flight 84 Squadron, RAF (Whirlwind)". These two units are part of the British contingent of UNFICYP and they are identified as such in the periodic reports on UNFICYP by the Secretary-General to the Security Council. The crew members of the helicopters are members of the British contingent of UNFICYP and the helicopter flights take place in the context of the operations of UNFICYP. Through the chain of command, the operations in which the helicopters are involved take place under the ultimate authority of the UNFICYP Force Commander and are the responsibility of the United Nations. The circumstances under which the British-owned helicopters are put at the disposal of UNFICYP thus lead to the conclusion that these helicopters should be considered as United Nations aircraft.

3. As the carrier, it is the United Nations that could and normally would be held liable by third parties in case of accidents involving UNFICYP helicopters and causing damage or injuries

to these parties; therefore third-party claims should normally be expected to be addressed to the United Nations. Whether it is the United Nations or the Government of the contingent to which the helicopters belong that ultimately would have to bear the cost of possible compensation, however, is a matter which has to be considered in the light of the arrangements which exist between the United Nations and the Government with regard to the use of the latter's helicopters in UNFICYP.

4. A search of our files as well as inquiries made with your Office and the Office of Financial Services seem to indicate that there exists no formal agreement between the United Nations and the United Kingdom specifically and explicitly dealing with the provision of helicopters by the latter to UNFICYP. There seems always to have been an understanding that the helicopters attached to the British contingent are provided free of charge to UNFICYP in accordance with the general principle that the cost of the British participation in UNFICYP is borne by the United Kingdom. Relevant in this connexion is the Memorandum of Understanding between the Government of the United Kingdom and the United Nations concerning assistance to be provided by the Government of the United Kingdom in the logistic support of UNFICYP, which was signed and came into effect on 11 December 1979. Under the terms of this Memorandum of Understanding (MOU), the United Kingdom "will continue to provide for members of the British Contingent, at no cost to the United Nations, all the logistic support that it would normally provide if they were serving in field conditions under United Kingdom command" (para. 3). From this provision it can be assumed that the United Kingdom is prepared, with regard to the helicopters provided to UNFICYP, to bear the risk of cost of compensation to be paid in case of accidents to its own contingent members and probably to third parties on the ground and passengers in the helicopters who have been authorized by United Kingdom authorities to fly in the helicopters provided to UNFICYP. The MOU, however, is silent with regard to members of other UNFICYP contingents or of the UNFICYP Headquarters staff as well as visitors to UNFICYP, all of whom may be directed or authorized by UNFICYP authorities other than the British contingent authorities to fly in the helicopters of the British contingent. While the MOU lists various instances of logistic support to be provided by the United Kingdom to other UNFICYP elements, it does not refer, explicitly or implicitly, to the use of British contingent helicopters by passengers other than members of that contingent. It can be mentioned, however, that in accordance with the MOU the logistic support to other elements of UNFICYP is normally "at United Nations' expense" (para. 4), which may be an indication that it might be incorrect to presume that the United Kingdom would be prepared to assume financial liability for accident claims by, e.g., visitors to UNFICYP who have been authorized by the United Nations to fly in the UNFICYP helicopters. On the other hand, the United Nations could request the United Kingdom to pay any claims arising out of the fault or negligence of the helicopter's British crew or basic defects of the aircraft furnished by the United Kingdom. But, where the aircraft was being operated on United Nations duties at the time of accident, the United Kingdom might not be liable unless it had previously agreed with the United Nations to be so liable.

5. Although there seems to be no doubt that passengers such as authorized visitors to UNFICYP can hold the United Nations initially liable in case of accidents with the helicopters of the British contingent of UNFICYP, there appears, from the information available to us, to be uncertainty about whether the United Nations or the Government of the United Kingdom may ultimately have to bear the cost of any payment of compensation. In view of the financial risk involved and the possible need to arrange insurance coverage it is highly advisable to consult with the United Kingdom authorities on this matter. In this connexion, reference should be made to part of regulation 16 of the Regulations for UNFICYP according to which "[w]ithin the limits of available voluntary contributions [the Secretary-General] shall make provisions for the settlement of claims arising with respect to the force that are not settled by the Governments providing contingents or the Government of Cyprus". It should be ascertained to what extent the United Kingdom is prepared to assume responsibility or liability for claims arising out of accidents involving helicopters of its contingent, and insurance should be obtained for such risks as the United Kingdom is not clearly prepared to assume.

16 May 1980

4. QUESTION WHETHER A CO-OPERATION AGREEMENT BETWEEN THE ECONOMIC COMMISSION FOR LATIN AMERICA AND A MEMBER STATE COULD BE MODIFIED TO THE EFFECT OF RENDERING THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS INAPPLICABLE TO OFFICIALS OF THE NATIONALITY OF THAT STATE — PRINCIPLE OF EQUALITY OF TREATMENT OF STAFF MEMBERS

Letter to the Director of a governmental agency

You raised the question of the possible modification of the Co-operation Agreement between the Economic Commission for Latin America and [name of a Member State]. The proposed modification would exclude from the operation of article 10, which makes applicable the Convention on the Privileges and Immunities of the United Nations, all officials of the nationality of that State.

From a formal point of view, this proposal constitutes an *ex post facto* reservation to the Convention to which the State concerned acceded in 1974. It would have the effect of discriminating between United Nations officials on the ground of nationality, thereby completely undermining the principle of equality of treatment of staff members. For these reasons, the United Nations is unable to accept the proposal.

Furthermore, even if the United Nations were to accept this proposal, a staff member who is subject to national tax in addition to his United Nations staff assessment would be entitled to the reimbursement of his national income tax through the United Nations procedures for such reimbursement. From the point of view of the fiscal authorities, the end result would be the same in this case whether the staff member is taxed by the Government or by the staff assessment, as any amounts taxed by the Government would be charged against its credits or contributions made available by it.

We also wish to point out that the tax exemption provisions of the Convention only apply to "officials", that is to staff members serving on a regular staff appointment, and not to experts or consultants.

20 November 1980

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5. ADVICE ON THE LEGAL BASIS FOR A CLAIM FOR DAMAGE ARISING OUT OF A CRIMINAL ASSAULT ON A DRIVER FROM A UNHCR OFFICE IN THE TERRITORY OF A MEMBER STATE BY SOLDIERS FROM A NEIGHBOURING COUNTRY

Memorandum to the Regional Representative, New York Liaison Office of the Office of the United Nations High Commissioner for Refugees

1. Reference is made to your memorandum dated 29 January 1980 with which you transmitted a copy of a cable received from the UNHCR Branch Office in [name of a Member State]. In this connexion we understand that you have inquired whether there is a legal basis on which the High Commissioner for Refugees may present a claim for damages arising out of the assault on a UNHCR driver by soldiers from a neighbouring country, and the related compelling of the driver to transport the soldiers in a UNHCR vehicle.

2. From the facts contained in the cable, it appears that the assault and related acts were criminal in nature and that in principle they do afford a legal basis for a claim for damages such as medical and hospital expenses, physical and mental pain and suffering, loss of services and administrative costs of the United Nations. The party to whom the UNHCR would look for satisfaction would be the Government of the Member State where the incident occurred, which is responsible for the necessary protection and safety of United Nations personnel performing official functions in its territory. The obligations of the Government in this connexion are derived from its sovereignty and therefore cannot be presumed to be diminished by the fact that the criminal acts were committed by members of a foreign military force temporarily stationed in its territory at its request.

3. The question whether or not to present a claim should, we believe, be settled by the Office of the High Commissioner for Refugees in line with the practice of the Office in similar cases taking into account the situation in the Member State concerned, the relations between the High Commissioner and the Government as well as the steps taken by the Government to prevent a recurrence. In the event the High Commissioner should wish to proceed with a claim the Office of Legal Affairs is of the view that all relevant facts must first be firmly established and documented to the extent possible. Thereafter the Office of Legal Affairs would be in a position to proceed with the actual formulation and presentation of the claim.

29 February 1980

6. PROCEDURE FOR CONVENING EMERGENCY SPECIAL SESSIONS OF THE GENERAL ASSEMBLY UNDER RULES 8(b) AND 9(b) OF THE RULES OF PROCEDURE OF THE ASSEMBLY — AUTHORITY OF THE GENERAL ASSEMBLY TO DETERMINE WHETHER THE REQUIREMENT, UNDER GENERAL ASSEMBLY RESOLUTION 377 A (V), THAT THERE APPEARS TO BE A THREAT TO THE PEACE, A BREACH OF THE PEACE OR AN ACT OF AGGRESSION HAS BEEN MET

Memorandum to the Secretary-General

1. Rule 9(b) of the General Assembly's rules of procedure provides that in the event of "a request by any Member of the United Nations for an emergency special session pursuant to resolution 377 A (V) . . . the Secretary-General shall communicate with the other Members by the most expeditious means of communication available" in order to ascertain if they concur in the request. Rule 8(b) lays down that "emergency special sessions pursuant to General Assembly resolution 377 A (V) shall be convened within twenty-four hours of the receipt by the Secretary-General . . . of the concurrence of a majority of Members" in a request from a Member State for such a session. The Secretary-General under these provisions of the Rules of Procedure has no authority to exercise any discretion if: (a) he receives a request from a Member for an emergency special session, and (b) a majority of Members concur in that request.

2. By letter of 1 July 1980, circulated to all Member States on 2 July by the Secretary-General, the representative of Senegal requested the convening of an emergency special session, and by 21 July more than a majority of Member States had concurred in that request, the formal requirements of the Rules of Procedure thus being met for the convening of the seventh emergency special session of the General Assembly on 22 July 1980.

3. The procedure for convening emergency special sessions derives from General Assembly resolution 377 A (V) (Uniting for Peace). That resolution provides for such sessions in cases where there appears to be a threat to the peace, a breach of the peace or an act of aggression, and where the Security Council has failed to exercise its primary responsibility for the maintenance of international peace and security because of the lack of unanimity of its permanent members. The letter of 1 July 1980 from the Permanent Representative of Senegal refers to the negative vote of a permanent member of the Security Council in April 1980 on a draft resolution relating to the situation in the Middle East and the failure of subsequent negotiations to overcome this veto. The letter further records the view of the Government of Senegal and of other Governments members of the Committee on the Exercise of the Inalienable Rights of the Palestinian People that "the escalating tension brought about by the events that have occurred [in the Middle East] . . . further aggravate the already existing serious threat to international peace and security". The letter thus records the views of certain Governments that the requirements of General Assembly resolution 377 A (V) have been met both in respect of the use of the veto and of a threat to international peace and security. The veto is a matter of public record and as regards the requirement of a threat to the peace the Secretary-General cannot substitute his judgement for that of the Government requesting an emergency special session.

4. In the ultimate analysis, it is for the General Assembly to interpret authoritatively its own resolutions and, in this case, to decide whether a request for an emergency special session meets

the requirements of resolution 377 A (V). This has in effect been answered in the present case in the affirmative by the concurrence of a majority of Members in the request for the convening of the seventh emergency special session.

21 July 1980

7. PARTICIPATION OF THE PALESTINE LIBERATION ORGANIZATION IN THE "SESSIONS AND WORK OF THE UNITED NATIONS" UNDER GENERAL ASSEMBLY RESOLUTION 3237 (XXIX) — LIMITS TO THE PLO ENTITLEMENT TO OBSERVER STATUS IN SUBSIDIARY ORGANS OF LIMITED MEMBERSHIP — DISCRETION OF SUCH ORGANS, IN THE ABSENCE OF INSTRUCTIONS TO THE CONTRARY FROM THE ESTABLISHING AUTHORITY, TO DECIDE QUESTIONS OF PARTICIPATION BY NON-MEMBERS, INCLUDING PARTICIPATION IN CLOSED MEETINGS — EXTENT OF OBSERVER PARTICIPATION IN THE LIGHT OF THE PRACTICE OF MAIN COMMITTEES OF THE GENERAL ASSEMBLY

Memorandum to the Director, New York Liaison Office of UNRWA

1. With reference to the status of the Palestine Liberation Organization (PLO) in the United Nations with particular reference to the question of its participation in the Advisory Commission of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (ADCOM of UNRWA) it should be noted, in the first place, that the Advisory Commission, as a subsidiary organ of the General Assembly, is subject to decisions of the General Assembly and is not affected by the practice followed by the specialized agencies in regard to PLO. We know that PLO does participate in an observer capacity in meetings of a number of United Nations specialized and related agencies, including the Universal Postal Union (UPU), the World Health Organization (WHO) and the International Agency for Atomic Energy (IAEA), but we do not have comprehensive information available about the position in all the agencies. In any event, as already indicated, the practice of the agencies is not relevant to the work of the Advisory Commission.

2. With regard to PLO participation in subsidiary organs of the General Assembly, it should be noted that by its resolution 3237 (XXIX) of 22 November 1974 entitled "Observer status for the Palestine Liberation Organization", the General Assembly issued a standing invitation to the Palestine Liberation Organization (PLO) to participate, in the capacity of observer, in the sessions and the work of the General Assembly and in the work of all international conferences convened under its auspices. In the same resolution the Assembly also indicated that it considered PLO to be entitled to participate in an observer capacity in the sessions and work of all international conferences convened under the auspices of other organs of the United Nations.

3. This resolution provides the legal basis for the observer status that the Palestine Liberation Organization has in the United Nations. Since the adoption of the resolution PLO has participated on a regular basis in the work of the General Assembly at regular and special sessions, in all major United Nations conferences and in various other meetings convened under United Nations auspices. In order to be in a position to fulfil its observer role effectively PLO has established Permanent Observer Offices at Headquarters and in each of the other major United Nations centres, i.e. Geneva, Nairobi and Vienna. PLO has also been admitted as a full member of the Economic Commission for Western Asia, a regional Commission of the Economic and Social Council.

4. Resolution 3237 (XXIX) refers to "the sessions and the work of the General Assembly". This phrase would appear *prima facie* to be all inclusive and to embrace the General Assembly, its Main Committees and its subsidiary organs. However, the possibility of participation by observers in the work of particular subsidiary organs depends upon the terms of reference, structure, functions and methods of work of the organ in question. It is reasonable to assume that the Assembly did not intend the participation of PLO as observer in the sessions and the work of the Assembly under resolution 3237 (XXIX) to be more extensive than that accorded to Member States of the United Nations in respect of subsidiary organs of limited membership of which they are not members.

5. The Advisory Commission of the United Nations Relief and Works Agency for Palestine Refugees in the Middle East, as a subsidiary organ of the General Assembly, may therefore invite PLO to participate in its work in the capacity of observer. In this connexion the Advisory Commission should have regard to its terms of reference, structure, functions, and method of work — and in particular to its practice regarding the admission of observers. While the Advisory Commission does not have formal rules of procedure, at its 164th meeting on 13 October 1952 the Commission adopted a ‘‘Memorandum summarizing the present functions and practice of the ADCOM’’ which it agreed adequately reflected ‘‘the Commission’s practice’’. Efforts by a committee of the Commission to revise the provisions of this Memorandum did not succeed but, in practice, as circumstances changed, the provisions were departed from in certain respects. It is to be noted that the Memorandum does not make any specific provision for participation in the Advisory Commission’s meetings by permanent observers and that under paragraph D.7 of the Memorandum relating to the Advisory Commission’s practice all its meetings are closed. Nevertheless it is still within the competence of the Advisory Commission to permit PLO to participate in its meetings, even though they are closed, in the capacity of an observer and there is precedent for the admission in exceptional circumstances of other than members of the body concerned to closed meetings of United Nations bodies. In the light of the practice that has emerged, the Office of Legal Affairs holds the position that in the absence of instructions to the contrary from the establishing authority a subsidiary organ may itself decide questions of participation in its work by non-members, including participation in closed meetings.

6. With regard to the extent of participation by PLO, if invited to participate as an observer in meetings of the Advisory Commission, this should follow the practice of Main Committees of the General Assembly,¹ which in the light of recent developments includes the right to make oral statements, the opportunity to reply to statements made by representatives and to have written statements or documents circulated, and excludes the right to vote, to sponsor substantive proposals, amendments or procedural motions, to raise points of order or to challenge rulings made by the Chairman.

5 June 1980

8. USE OF THE TERM ‘‘NON-CITIZEN’’ IN INTERNATIONAL PRACTICE

Paper prepared for a Working Group of the Third Committee

1. During the 2nd meeting — held on 16 October 1980 — of the Working Group for the consideration of questions of the human rights of individuals who are not citizens of the country in which they live, and of the draft body of principles for the protection of all persons under any form of detention or imprisonment, the representative of Argentina raised the question of what was to be understood by the term ‘‘non-citizen’’ as contained in article 1 of the draft declaration on the human rights of individuals who are not citizens of the country in which they live.² In particular, the representative of Argentina requested the Office of Legal Affairs to prepare a working paper regarding the use of this term in international practice.

2. The request made by the representative of Argentina was supported by a number of other representatives, some of whom also raised related questions. The representatives of the Philippines and Nigeria queried what the distinction might be between a ‘‘non-citizen’’ and an ‘‘alien’’; the representative of Chile noted that some legal systems, especially in Latin America, distinguish between nationality and citizenship; the representative of the United States referred to the case of individuals who might be entitled to citizenship but who do not avail themselves of that right; and the representative of Jamaica raised the question of individuals who, for historical or other reasons, may be entitled to a residence status in a particular country without becoming a citizen.

3. Before proceeding to an examination of the international practice in this field, as reflected in international instruments, some general observations regarding ‘‘nationality’’ and ‘‘citizenship’’

and their place in municipal law and international law may be helpful. “Nationality” and “citizenship” are largely within the competence of municipal law except where the discretion of the State is restricted by its international obligations.³ Both terms refer to the status of the individual in his relationship with the State. They are sometimes used synonymously but they do not necessarily describe the same relationship towards the State.

4. “Nationality” is that quality or character which arises from a person’s belonging to a nation or State. The International Court of Justice has defined “nationality” as:

“a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State”. (The *Nottebohm* case, *I.C.J. Reports 1955*, p. 23.)

“Citizen”, on the other hand, is the term normally applied to describe an individual who under the laws of a particular State is a member of the political community, owing allegiance and being entitled to the enjoyment of full civil and political rights.

5. An “alien” is the term used to describe a foreign-born person or the subject of a foreign State who has not qualified as a citizen of the State in which he or she might be. An alien is, therefore, neither a national nor a citizen.

6. The difficulty of defining terms such as “national”, “citizen” and “alien” in international law stems from the fact that they are essentially municipal law concepts, and, therefore, subject to variations in meaning from jurisdiction to jurisdiction. The constitution, statutes, laws and regulations of individual States refer to a variety of categories of individuals whose precise legal rights and duties in a particular State vary. The degree of complexity in municipal law is a function of many factors: historical, social, legal and political. The United Nations has published two volumes entitled “Laws concerning Nationality” in the *United Nations Legislative Series* (ST/LEG/SER.B/4 and 9).

7. The foregoing observations perhaps explain why, in the many international instruments dealing with the rights of various categories of individuals, definitions of the terms used to describe these individuals are rarely to be found. There is a tacit assumption that terms such as “national” and “citizen” are terms of art and that their meaning is clear, at least within municipal legal systems. This does not, however, quite resolve the problem from the point of view of international law, where the scope of a particular international instrument *ratione personae* should have a uniform meaning for all States.

8. In response to the request by the representative of Argentina, the Office of Legal Affairs has examined the international instruments which formed the basis of the study by the Special Rapporteur with a view to determining whether the term “non-citizen” is in international usage and, if so, whether it has been defined. In the course of this examination, a number of related terms have also been noted. It has been deemed useful, therefore, to draw up a systematic tabulation of all the terms used to establish the scope *ratione personae* of the international instruments in question.

9. By far the most frequently used terms in the international instruments examined are those which apply to all persons without distinction of any kind. The preamble of the Charter of the United Nations refers to “*the peoples of the United Nations*”. Similarly, the Universal Declaration of Human Rights recognizes the equal rights of “*all peoples*”, “*all nations*”, “*all human beings*”, or “*everyone*”. The substantive articles of the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights⁴ also apply to “*everyone*”, “*all peoples*”, or “*all individuals*” except where otherwise specifically provided (see para. 11 below). The United Nations Declaration on the Elimination of All Forms of Racial Discrimination⁵ refers to “*persons*”,

or “*groups of persons*”. The International Convention on the Suppression and Punishment of the Crime of Apartheid⁶ uses the term “*all human beings*”. For the most part, the instruments cited above are intended to have general application and, therefore, make no distinction between nationals and aliens or between citizens and non-citizens.

10. Exceptions are provided for, however, even in instruments of general application. Thus, under article 2, paragraph 3, of the International Covenant on Economic, Social and Cultural Rights, developing countries may determine to what extent the economic rights recognized in the Covenant will be guaranteed to “*non-nationals*”. Article 1, paragraph 2, of the International Convention on the Elimination of All Forms of Racial Discrimination⁷ provides for the possibility of a distinction between citizens and non-citizens by stating that: “This Convention shall not apply to distinctions, exclusions, restrictions, or preferences made by a State Party to this Convention between citizens and non-citizens”. The Convention does not, however, define the term “*non-citizen*”.

11. The International Covenant on Civil and Political Rights, which is of general application, does contain one provision specifically devoted to the rights of a citizen. Article 25 deals with the rights of “every citizen” and while not a definitional clause as such, this provision goes some way to providing the elements of such a definition. According to this article, a citizen shall have the right:

“(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

“(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

“(c) To have access, on general terms of equality, to public service in his country”.

It may be inferred from this that a “*non-citizen*” would be a person who is not entitled to the enjoyment of the rights set out in article 25.

12. A number of international instruments refer to “*aliens*” but without providing a definition of the term. Examples are to be found in article 13 of the International Covenant on Civil and Political Rights, article 4, paragraph 2, of the Convention on the Recovery Abroad of Maintenance⁸ and articles 9, 18 and 19 of the Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others.⁹

13. In conclusion, it may be noted that a precedent for the use of the term “*non-citizen*” is to be found in one instrument, namely, the Convention on the Elimination of All Forms of Racial Discrimination. The drafters of this Convention did not find it necessary to define the term. However, as pointed out in paragraph 11 above, some understanding of the meaning of the term may be derived from an *a contrario* interpretation of article 25 of the Covenant on Civil and Political Rights. Viewed in this sense, a “*non-citizen*” may be distinguished not only from a citizen but also, in those systems which distinguish between nationals and citizens, from an alien. In such systems, a “*non-citizen*” would be an individual who has been divested of the civil and political attributes of citizenship by operation of the relevant municipal laws but who nevertheless would remain a national and a resident. A “*non-citizen*” is not, therefore, necessarily synonymous with an alien, but would appear to be a term of somewhat broader scope.

24 October 1980

9. REQUEST BY THE EUROPEAN ECONOMIC COMMUNITY THAT THE REPRESENTATIVE OF THE COMMISSION OF THE EUROPEAN COMMUNITIES BE RECOGNIZED AS A SPOKESMAN OF EEC AND ITS MEMBERS WITHIN A PARTICULAR WORKING GROUP OF THE ECONOMIC AND SOCIAL COUNCIL — WAYS OPEN TO MEMBER STATES OF EEC TO ENSURE CO-ORDINATION OF POSITIONS WITHIN THE WORKING GROUP

*Memorandum to the Executive Director, United Nations Centre
on Transnational Corporations*

1. You have asked for an opinion on the question of the participation of the European Economic Community (EEC) in the *Ad Hoc* Intergovernmental Working Group of Experts on Accounting and Reporting.

2. The above-mentioned Working Group was established by the Economic and Social Council by resolution 1979/44, paras. (a) to (c) of which provide that the Group is to be composed of 34 experts each appointed by a State elected by the Council, of which nine are to be chosen from Western Europe and other States. The States elected in that category by Council decision 1979/94, taken at its 42nd plenary meeting, included five members of EEC.

3. On 30 October 1979 the Council of Ministers of the European Communities adopted a decision confirming that, as the subject matter of the Working Group's consideration was one that had, under the treaties establishing EEC, been assigned to the latter by its member States, the Commission of the Communities should represent the latter's point of view in the Working Group. Consequently EEC is requesting that the representative of the Commission be recognized as the spokesman for EEC and its members, rather than the five experts appointed by the States elected by the Economic and Social Council.

4. The constitutional relations between EEC and its member States are matters internal to that entity, and cannot directly affect the rights and obligations of those States vis-à-vis the United Nations, of which they are all Members; this follows, *inter alia*, from Article 103 of the Charter. On the other hand, there can be no objection on the part of the United Nations as to any method that the members of EEC use to co-ordinate their positions or to represent those prescribed by a given organ of EEC; for example, States elected by the Economic and Social Council could appoint, as their representatives, persons nominated to them by EEC.

5. Furthermore, if the member States of EEC had made it known to the Economic and Social Council that their competence in the field of work of the Working Group had been entirely transferred to EEC, the Council might have reflected this in determining the composition of the Group; a proposal that the Council should do so could still be addressed to it at any suitable session. However, in the absence of a decision of the Council to accord EEC a special status in the Working Group, it is not for the latter or for the Secretariat to do so.

6. By resolution 3708 (XXIX) of 11 October 1974, the General Assembly has granted permanent observer status to EEC, within the meaning of rule 79 of the rules of procedure of the Economic and Social Council (E/5715) and of rule 74 of the rules of procedure of its functional commissions (E/5975). Consequently, under those rules (read together with rule 27(1) of the Council and rule 24 of the functional commissions), EEC may participate, without the right to vote, in the deliberations of the Working Group on any question within the competence of EEC. As indicated in para. 4 above, the experts appointed by the five members of EEC elected to the Working Group could declare that they would not speak and request the Working Group to hear the EEC representative in their stead; the Working Group could then grant a somewhat freer right to speak to the EEC observer, since such an extension of rights is not inconsistent with the rules of procedure. Naturally, any votes would have to be cast by the representatives of States elected to the Group.

4 February 1980

10. QUESTION OF THE PARTICIPATION OF NON-GOVERNMENTAL ORGANIZATIONS IN THE WORK OF THE ECONOMIC COMMISSION FOR LATIN AMERICA — RELEVANT PROVISIONS OF THE COMMISSION'S TERMS OF REFERENCE AND RULES OF PROCEDURE — POSSIBILITIES FOR CO-OPERATION WITH THE COMMISSION OPEN TO NON-GOVERNMENTAL ORGANIZATIONS WHICH DO NOT HAVE CONSULTATIVE STATUS WITH THE ECONOMIC AND SOCIAL COUNCIL

Memorandum to the Assistant Secretary of the Economic Commission for Latin America

...

2. . . . Our comments regarding the question of non-governmental organizations' participation in the work of the Economic Commission for Latin America (ECLA) appear hereunder.

...

4. The legal basis for the establishment of a relationship between the Economic Commission for Latin America and non-governmental organizations is provided in paragraph 7(b) of the Commission's terms of reference. This paragraph reads as follows:

"The Commission shall make arrangements for consultation with non-governmental organizations which have been granted consultative status by the Council, in accordance with the principles approved by the Council for this purpose."

5. The procedure for implementation of this provision is set out in chapter XII of the Commission's rules of procedure (rules 50 and 51).

6. These provisions make it clear that the non-governmental organizations with which the Commission is to have relations are limited to those organizations which have been granted consultative status by the Economic and Social Council in accordance with Council resolution 1296 (XLIV). Any decision by the Commission or by its subsidiary bodies that exceeds the authority granted to the Commission in its terms of reference would be *ultra vires*.

7. In these circumstances there are only two possibilities for co-operation with international and national non-governmental organizations which do not have consultative status with the Economic and Social Council in accordance with Council resolution 1296 (XLIV) and other relevant resolutions of the Council. Thus, the Commission may invite a person from a particular non-governmental organization to provide it with information which in the opinion of the Commission will be useful in connexion with its work. This possibility is also available to subsidiary bodies of the Commission unless the Commission has specifically precluded such action. The other possibility is that consultation be made at the secretariat level. Under this arrangement the Commission secretariat could exchange information relating to the work of the Commission with the secretariat of the non-governmental organizations concerned, bringing to the attention of the Commission or its subsidiary bodies, when necessary, any particular matters of interest to the organ concerned in connexion with its work.

8. It is relevant to mention that in recent years the question of relations of non-governmental organizations with the Economic and Social Council has become a very sensitive political issue and the Council has adopted a number of resolutions¹⁰ and decisions on this subject to ensure that only those organizations that satisfy the requirements for consultative status outlined in resolution 1296 (XLIV) be granted or permitted to maintain that status. It would therefore be inappropriate to extend invitations to non-governmental organizations which have not yet applied for consultative status or satisfied the Council that they can meet its strict requirements for such status.

9. In conclusion, therefore, any decision by the Commission or its subsidiary bodies to invite non-governmental organizations which do not have consultative status with the Economic and Social Council to attend meetings of the organ concerned would require prior approval of the Council. The resolution [396 (XVIII)] adopted by the Commission at its eighteenth session requesting the Executive Secretary *inter alia*, "subject to the prior approval of the Member States to invite . . . regional or sub-regional non-governmental organizations which, even if they do not at present have consultative status, have special competence in areas of interest to the Commission's programme" does not, on its own, provide a proper legal basis for participation of such non-

governmental organizations in the work of the Commission and its subsidiary bodies since the Commission's terms of reference do not authorize it to take such action. The Commission's resolution, which at this stage can only be regarded as a recommendation submitted to the Economic and Social Council for approval, will be before the Council at the session it will hold this summer when the Council will have before it the report of the Executive Secretaries of the various regional commissions. Recommendations and decisions of the Commissions which require action by the Council will be included in that report. It is suggested that at that time the Council's attention be drawn specifically to the question of relations of ECLA with non-governmental organizations with a view to obtaining a clear decision of the Council on the matter. In the meantime the non-governmental organizations interested in the work of the Commission and its subsidiary bodies should be encouraged to apply for consultative status with the Council in accordance with the relevant resolutions adopted by the Council to govern its relations with non-governmental organizations.

5 May 1980

11. QUESTION WHETHER IT IS PERMISSIBLE UNDER UNITED NATIONS REGULATIONS AND RULES FOR UNDP-FUNDED CONTRACTS TO BE DIRECTED, TO AN APPROPRIATE DEGREE, TO DONOR COUNTRIES

Memorandum to the Deputy Controller, Office of Financial Services

The question has been raised whether it is permissible under the Financial Regulations and Rules of the United Nations, or if not presently permissible whether it should be made so by amendment of the Financial Rules, for UNDP-funded contracts to be directed, to an appropriate degree, to donor countries which do not now receive contracts to an extent commensurate with the level of their UNDP contributions.

We appreciate the reasons underlying the proposal that contracts be so placed and the considerable importance of encouraging donor countries to maintain contributions. We see difficulties, however, in the proposal which, as you know, has been raised in one context or another over several years.

As you well know, a principle that is fundamental and central to the United Nations contracting system (financial regulation 10.5 and the rules thereunder) is that for the money expended the United Nations ought to obtain the "best buy". Such exceptions as are permissible are all related to effectuating the purpose of the expenditure and not to the *source* of the funds. There is, in our opinion, no basis at present in the United Nations financial procedures for purposefully placing contracts within donor countries when such placement is not otherwise justifiable under the criteria of the Financial Regulations and Rules. A "short list" limited to suppliers in particular countries would have to be justified under these same criteria. The Committee on Contracts must be satisfied as to the propriety of any particular "short list" no less than the award from among the bids or proposals received. Accordingly the Committee on Contracts could not properly recommend such placement and in the event of queries by auditors or others, a persuasive justification could not be given.

There have been a few occasions in the past, associated with United Nations relief operations, when United Nations purchases have been made in contributing countries. So far as we can recall, however, the circumstances of such cases are distinguishable from the type of case with which you are presently concerned and they cannot be regarded as precedent-creating.

Any revision of the United Nations financial procedures in this regard should be limited to UNDP-funded projects and be co-ordinated with the proposed revision of UNDP Financial Regulations and Rules, and thus receive, if not the General Assembly's concurrence, at least that of the Advisory Committee.

16 April 1980

12. REPRESENTATION, IN A UNDP DOCUMENT, OF MAYOTTE AS AN INTEGRAL PART OF THE COMOROS — BINDING CHARACTER, FOR THE SECRETARIAT, OF THE POSITION TAKEN BY THE GENERAL ASSEMBLY IN A SERIES OF RELEVANT RESOLUTIONS — WAYS OF CONVEYING TO THE GOVERNING COUNCIL OBJECTIONS RAISED IN RELATION TO THE REPRESENTATION IN QUESTION

Memorandum to the Chief, Executive Office of the Administrator of UNDP

You have requested the advice of the Office of Legal Affairs in connexion with an objection raised to the representation of Mayotte as an integral part of the Comoros in the UNDP Country Programme document¹¹ relating to that country already in circulation.

It is relevant to recall that at its thirtieth session, the General Assembly, in its resolution 3385 (XXX) admitting the Comoros to membership of the United Nations, reaffirmed “the necessity of respecting the unity, and territorial integrity of the Comoro Archipelago composed of the islands of Anouan, Grande Comore, Mayotte and Mohéli, as emphasized in resolution 3291 (XXIX) of 13 December 1974 and other resolutions of the General Assembly”.

It is also significant to mention that at its thirty-first session the General Assembly included in its agenda an additional item entitled “Question of the Comorian island of Mayotte”. Under this item the Assembly adopted its resolution 31/4 which leaves no doubt as to its position with regard to the status of Mayotte. Attention is drawn in particular to operative paragraphs 2 and 3 of that resolution which read as follows:

[The General Assembly]

“2. *Strongly condemns* the presence of France in Mayotte, which constitutes a violation of the national unity, territorial integrity and sovereignty of the independent Republic of the Comoros;

“3. *Calls upon* the Government of France to withdraw immediately from the Comorian island of Mayotte, an integral part of the independent Republic of the Comoros, and to respect its sovereignty;”.

At its thirty-second session the General Assembly had on its agenda an item entitled “Assistance to the Comoros”. In connexion with this item the General Assembly had before it a report of the United Nations Mission to the Comoros (A/32/208/Add.1-2) containing a review of the economic situation in the Comoros. In paragraph 35 of that report it is stated that:

“The General Assembly has recognized that the new State of the Comoros comprises the four islands of Grande Comore, Anouan, Mayotte and Mohéli. It has not been possible for the Government of the Comoros to bring the island of Mayotte within the jurisdiction and the economy of the new State because of a continuing dispute with France over Mayotte’s physical status . . .”.

Annex II of the report contains a map of the Comoros which shows Mayotte as an integral part of the Republic of the Comoros. The General Assembly endorsed this report and its findings and recommendations by its resolution 32/92 of 13 December 1977.

The sovereignty of the Federal Republic of the Comoros over the island of Mayotte was reaffirmed by the Assembly at its thirty-second and thirty-fourth sessions in its resolutions 32/4 and 34/69, respectively, again under the item “Question of the Comorian island of Mayotte”, which has been included each year on the Assembly’s agenda since the thirty-first session.

The General Assembly has therefore expressed clear views on the status of Mayotte as illustrated above. In these circumstances, the Secretariat must necessarily take these views into account and act in conformity with the relevant resolutions of the principal deliberative organ of the Organization.

It could be suggested that the objections raised to the representation of Mayotte as an integral part of the Comoros be communicated to UNDP in writing and conveyed to the Governing Council in an official document. In this way when the Governing Council considers the Country Programme document relating to the Comoros it will also have before it an official document reflecting the objections in question.

The document prepared by the UNDP secretariat is unobjectionable from a legal standpoint and needs no correction or change.

5 May 1980

13. FILLING OF OCCASIONAL VACANCIES IN THE INTERNATIONAL COURT OF JUSTICE — RELEVANT PROVISIONS OF THE STATUTE OF THE COURT — PRACTICE FOLLOWED BY THE SECRETARY-GENERAL IN IMPLEMENTING THOSE PROVISIONS

Internal note

Introduction

1. Article 14 of the Statute of the International Court of Justice provides as follows:

“Vacancies shall be filled by the same method as that laid down for the first election, subject to the following provision: the Secretary-General shall, within one month of the occurrence of the vacancy, proceed to issue the invitations provided for in Article 5, and the date of the election shall be fixed by the Security Council.”

Article 5, paragraph 1, reads:

“1. At least three months before the date of the election, the Secretary-General of the United Nations shall address a written request to the members of the Permanent Court of Arbitration belonging to the States which are parties to the present Statute, and to the members of the national groups appointed under Article 4, paragraph 2, inviting them to undertake, within a given time, by national groups, the nomination of persons in a position to accept the duties of a Member of the Court.”

Under the foregoing provisions it is the duty of the Secretary-General to send out invitations calling for nominations. In this respect, it has always been the understanding of the Secretariat that the three months' period provided for in Article 5 of the Statute between the despatch of invitations and the earliest possible date for elections applies not only to regular elections, but also to the filling of occasional vacancies. This understanding has been based on the legislative history of the relevant Article of the Statute, namely Article 14, as well as on past practice.

Legislative history of Article 14 of the Statute of the Court

2. In the original Statute, which came into force in 1921, Article 14 provided only that “vacancies shall be filled by the same method as that laid down for the original election.” In the revised Statute, which came into force in 1936, Article 14 contained provisions requiring the Secretary-General to issue invitations within one month of the occurrence of the vacancy, and requiring the Council to fix the date of the election. Save for the drafting changes necessitated by substitution of United Nations organs for League organs the above text is substantially the present text. The minutes of the Committee of Jurists which drafted the revised text in 1929, reveal that the amendments to Article 14 were intended to lessen unduly extended delays, by requiring the Secretary-General to send out invitations promptly and by envisaging the possibility that the Council, in the appropriate case, might also convene an extraordinary session of the Assembly for the purpose of the election. However, the minutes also clearly show that the three-month period stipulated for in Article 5 between despatch of invitations and the earliest possible date for the election was intended to apply. Mr. Fromageot, the sponsor of the amendments to Article 14, is recorded¹² as saying that “the Secretary-General might . . . proceed to the notification provided for in Article 5, and the date of the election might be fixed to coincide with the sessions of the Council following the expiry of the period of three months during which the national groups selected their candidates.” Mr. Fromageot, therefore, expressly referred to the three-month period in relation to the filling of an occasional vacancy.

Past practice of the League of Nations and of the United Nations in filling casual vacancies

3. The above interpretation of Article 14 has been confirmed by reference to actual practice. Two special elections were arranged for and carried out by the League after the amended version of Article 14 came into force in 1936. In both cases, considerably more than three months elapsed between the date of the vacancy and the date of election.¹³ Seven occasional vacancies, prior to the present one, occasioned by the death of Judge Richard R. Baxter, have occurred¹⁴ in the International Court of Justice since its establishment, and, again, more than three months have, in each case, elapsed between the despatch of invitations and the holding of the election in the Security Council and in the General Assembly. One judge, Sir Benegal Rau, died in November 1953 during the eighth regular session of the General Assembly, but the election to fill the vacancy was not held until October of the following year during the next session of the Assembly. Judge Guerrero, likewise, died in October 1958, during the thirteenth regular session of the General Assembly. On 25 November 1958 the Security Council adopted a resolution, at its 840th meeting, providing that the election to fill this vacancy "shall take place during the fourteenth session of the General Assembly or during a special session before the fourteenth session". From the terms of this resolution, it may be inferred that the Council was giving effect to the minimum three-month limit, as it would otherwise have been open for it to decide that the election should be held during the then current thirteenth session of the General Assembly. The election to fill this vacancy was in fact held in September 1959. Judge Abdel Hamid Badawi died on 4 August 1965, just before the opening of the twentieth regular session of the General Assembly in September 1965. On 10 August 1965, the Council adopted a resolution, at its 1236th meeting, providing that "an election to fill the vacancy shall take place during the twentieth session of the General Assembly." The note by the Secretary-General submitted to the Security Council on this occasion (S/6599) provided that the Council

"may wish to decide that the election to fill the vacancy shall take place during the twentieth session of the General Assembly. This would be done on the understanding that the actual election would be held on a date subsequent to the expiry of the three-month time-limit specified in Article 5, paragraph 1, of the Statute."

No disagreement was voiced either in the Council or in the General Assembly regarding this interpretation of the application of the minimum three-month time-limit, and the election was in fact held on 16 November 1965, more than three months after the despatch of the invitations for nominations (12 August 1965).

4. Obviously the three-months' rule was inserted in Article 5 to give sufficient time for the completion of the nomination procedures provided for in the Statute. These procedures may be lengthy in certain instances. This consideration applies not only to nominations for regular elections, but also to nominations for casual vacancies. The Security Council should, therefore, in line with all previous precedents, apply the three-months' rule as a minimum statutory requirement.

30 September 1980

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14. REQUEST FOR EXTRADITION OF AN INDIVIDUAL CHARGED WITH MURDER AND CAUSING BODILY HARM WITH AGGRAVATING INTENT — DECISION GRANTING THE REQUEST — FILING OF AN HABEAS CORPUS PETITION — SCOPE OF THE HABEAS CORPUS REVIEW — PROVISION OF THE APPLICABLE EXTRADITION TREATY CONCERNING THE POLITICAL OFFENCE EXCEPTION — QUESTION WHETHER THE CASE COULD BE SUBMITTED TO THE CONTENTIOUS OR ADVISORY JURISDICTION OF THE COMPETENT COURT OF THE REQUIRED STATE

*Memorandum to the Secretary, Committee on the Exercise of the
Inalienable Rights of the Palestinian People*

[*Editorial note:* This memorandum deals with the case of an individual who was arrested on the territory of a State on charges of murder and causing bodily harm with aggravating intent, and

whose extradition was requested by another State in accordance with an extradition convention binding the two States in question. The hearing on the extradition request resulted in the issuance of a warrant for his commitment until surrender to the requesting State. The individual concerned then filed a petition for a writ of habeas corpus in the competent court of the requested State, asking it to order either that the individual concerned could not be extradited or that the Court itself conduct or order conducted a rehearing of the case.]

. . .

4. With respect to the possibility of reversing the decision to extradite, it is crucial that in the practice of the requested State it is well-established that the decision of a magistrate in a proceeding on a request for international extradition is not subject to appeal. It is, however, relevant to note that while the magistrate's decision authorizes the executive to order the extraditee delivered to a representative of the requesting Government, the executive is not necessarily bound to do so. Rather, there are precedents establishing that the executive has the power to review the opinion of the extradition magistrate, for example on the ground that the case is not within the treaty, or that the evidence is insufficient to establish the charge under the treaty; it has been held that the executive may exercise this power of review even after a court has declined to discharge the accused in habeas corpus proceedings.

5. Because the decision of the extradition magistrate is not directly appealable or reviewable by the courts, it is considered that the writ of habeas corpus is a proper remedy to secure the release of someone illegally detained in extradition proceedings. Habeas corpus proceedings may be defined as the process of testing the authority of the one who is detaining another, and the proceedings are designed to bring about an immediate hearing to inquire into the legality of the detention and to result in an order for the release of the detainee whenever detention is unwarranted. The writ of habeas corpus must be filed in the competent court of the requested State . . . whose final — as distinguished from an interlocutory — decision normally is appealable to the appropriate Court of Appeals and in principle to the Supreme Court. Pending the outcome of habeas corpus proceedings the court may refuse or grant bail for the extraditee; however, the decision is within the Court's discretion and is granted only under special circumstances.

6. The scope of the habeas corpus review is limited to the broad issues of whether the magistrate had jurisdiction, whether the offense charged is within the extradition treaty, and whether there was any competent evidence warranting the finding that there was reasonable ground to believe the accused is guilty. The weight and sufficiency of the evidence before the magistrate is not reviewable in the habeas corpus proceedings. However, questions concerning whether conditions under the treaty are met, including the question whether the offense was political, have been reviewed in recent habeas corpus proceedings.

9. With regard to the political offense exception, the applicable extradition treaty provides that extradition shall not be granted "when the offense is regarded by the requested Party as one of a political character or if the person sought proves that the request for his extradition has, in fact, been made with a view to trying or punishing him for an offense of a political character". In the post-trial brief submitted by the requested State's Attorney a clear distinction was made between the first and second parts of the provision quoted above. With respect to the *first part*, reading "when the offense is regarded by the requested Party as one of political character", the brief stressed that this provision was concerned only with the attitude of the requested Government towards the offense . . . , [adding that in the view of the Government the crimes of which the person concerned was charged were common crimes].

10. As far as the *second part* of paragraph 4 of Article VI is concerned, the requested State's Attorney argued in the extradition proceedings that the motives of the requesting governments are not for the courts to determine but rather for the executive branch . . .

11. The defendant on the other hand challenged the magistrate's finding that the nature of the offenses charged and the circumstances of their commission were not within the exception from

extradition provided for offenses political in character, a finding arrived at by reference to the three following tests:

- (i) the offender's past participation and involvement with a political movement and his political beliefs as tied to a political motive;
- (ii) existence of a connexion or link between the crime and a political objective;
- (iii) relation or proportions between the crime and its method of commission and the political objective.

In the Magistrate's view, the first of these tests was met but the other two were not, because the exception for political offenses or crimes exists only where the acts are directed against the political organization of the State in question and in the present case the political objective was not linked to the means used and the target chosen; rather, the selection of the location was random, the victims were civilians, not military personnel, and the offenses represented an isolated act of violence.

12. The defendant's arguments in this connexion may be summarized as follows:

(a) that he had proved, *prima facie*, that the request for extradition had been made with a view to trying him on an offense of a political character and that it was established that when the evidence offered tends to prove that the offense charged is of a political character, the burden of proof shifts to the prosecution to prove the opposite, something which had not been done in the present instance;

(b) that the concept of political offenses was not limited to offenses against the political organization of the State in question, but also encompassed offenses against the civil rights of its citizens . . .

(c) that the relevant extradition treaty did not exclude violence against civilians from the political offense exception.

. . .

(f) that the extradition treaty did not exclude offenses with randomly selected targets . . .

13. The petition also urged that the defendant had not received a fair hearing on the issue of probable cause, as the Magistrate had accepted the authenticated documents submitted by the Government of the requesting State as sufficient evidence, and excluded evidence offered by the defense with a view to explaining and clarifying the means by which the Government had obtained that evidence, including the confession of an alleged accomplice. [13 *bis*. The question has been raised whether the case could be submitted to the contentious or advisory jurisdiction of the International Court of Justice.]

14. Regarding the first alternative, the International Court of Justice is only competent to render a binding judgement or order in a contentious proceeding, to which only States may be parties. The State of which the individual concerned is a citizen might, in principle, bring a suit against the requested State for an offense committed against one of its citizens. However, although the requested State has filed a declaration accepting (subject to limitations) the compulsory jurisdiction of the International Court of Justice on a reciprocal basis, the State of which the individual concerned is a national has not filed a similar declaration; nor is there any bilateral treaty between the two States providing for the submission of this type of a dispute to the Court, nor are the two States parties to any multilateral convention under which submission would be possible. Of course, the latter State could approach the requested State, either directly or through the Court, to propose submission on an *ad hoc* basis — but the requested State would not be under any legal obligation to respond affirmatively.

15. Even if the two States were to agree to submit the dispute to the Court, in the present position of the case the Court would almost surely hold that before it can consider the case the domestic remedies in the requested State must be exhausted . . .

16. As to the second alternative, the Court may, according to Article 96 of the United Nations Charter and Article 65 of its Statute, give an advisory opinion on legal questions at the request of

certain bodies authorized by or in accordance with the Charter to make such a request. Article 96, paragraph 1, of the Charter provides that advisory opinions may be requested by the General Assembly or by the Security Council, and paragraph 2 of the same Article provides that an advisory opinion may also be requested by other organs of the United Nations and by specialized agencies thereto authorized by the General Assembly. Although the General Assembly has granted such authority, *inter alia*, to several organs of the United Nations, these do not include the Committee on the Exercise of the Inalienable Rights of the Palestinian People; consequently, that body cannot address a request for an advisory opinion directly to the Court.

17. Under the established jurisprudence of the Court, the latter is not obliged to respond to every question addressed to it by an authorized organ, and from time to time it has declined to do so. In particular, the Court and its predecessor — the Permanent Court of International Justice — has indicated reluctance to give an advisory opinion on questions that could form the subject of a contentious proceeding between two or more States, i.e. if the advisory proceeding is used to evade the normal requirement that all States concerned must agree to submit a dispute to the Court. The Court might therefore decline to respond to any questions by United Nations organs about the treatment of the individual concerned by the requested State, in so far as these questions could, in principle, be raised by the country of which the individual concerned is a national.

18. Finally, even in an advisory proceeding the Court is likely to insist on the requirement of the prior exhaustion of domestic remedies (see para. 15 above).

28 March 1980

15. QUESTION WHETHER THE SALARIES OR PENSIONS OF UNITED NATIONS OFFICIALS MAY BE ATTACHED FOR THE PURPOSE OF ENFORCING NATIONAL COURTS DECISIONS — IMMUNITY FROM LEGAL PROCESS ENJOYED BY THE UNITED NATIONS BY VIRTUE OF SECTION 2 OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS — IMMUNITY FROM SEIZURE OF ASSETS OF THE ORGANIZATION UNDER SECTION 3 OF THE ABOVE-MENTIONED CONVENTION

Letter to a private lawyer

Your letter of 17 November 1980 addressed to this Office requested information in respect of the enforcement of English Court Orders with regard to employees of the United Nations, particularly the attachment of salaries and pensions.

As far as the attachment of salary is concerned, the attempted service of a court order on the United Nations would fail for two reasons. First, service of a court order is a legal process from which the United Nations is immune by virtue of Section 2 of the Convention on the Privileges and Immunities of the United Nations. Secondly, the proceeding would be tantamount to a seizure of the assets of the Organization from which it is exempt under section 3 of the Convention. It should be noted that any such court order would be directed to the United Nations and the salary to be seized is, before it is actually paid to the staff member, a part of the assets of the United Nations.

The same situation prevails with regard to pensions of United Nations officials whether in the form of lump-sum payments or annuities. The United Nations Joint Staff Pension Fund is an organ of the United Nations, and its assets are the property of the Organization. The Fund is immune from legal process and its assets are immune from any form of interference whether by executive, administrative, judicial or legislative action. Thus, an order by an English Court may not be enforced directly against the Fund. As in the case of salaries, pensions, whether lump sum or annuities, before they are paid to the staff member concerned, form part of the assets of the Organization.

The foregoing is the legal situation from the point of view of the immunities of the Organization. However, these immunities are granted in the interests of the Organization and not for the personal

benefit of the individual staff member. They afford no justification for a staff member's failure to meet his legal obligations and it is the Organization's policy to take measures to prevent such abuse. If court orders are received, they will be returned with an explanation of the Organization's immunity. The staff member will be requested to settle the matter by whatever legal steps may be necessary as a matter of proper conduct and to avoid embarrassment to the United Nations.

3 December 1980

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16. INSISTENCE BY A MEMBER STATE THAT UNITED NATIONS STAFF MEMBERS ENTERING OR LEAVING ITS TERRITORY USE THEIR NATIONAL TRAVEL DOCUMENTS OR A TRAVEL DOCUMENT ISSUED BY THE MEMBER STATE CONCERNED — PROVISION OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS UNDER WHICH LAISSEZ-PASSERS ISSUED BY THE UNITED NATIONS SHALL BE RECOGNIZED BY MEMBER STATES AS VALID TRAVEL DOCUMENTS

Memorandum to the Director, UNRWA Liaison Office in New York

1. I wish to refer to your request for the views of the Office of Legal Affairs on the position apparently advanced by the Ministry of Foreign Affairs of a Member State to the effect that locally recruited staff members who are citizens of neighbouring States must use either their national travel document (passport) or a travel document issued by the Member State concerned when entering or leaving its territory on official United Nations business. In this connexion the Foreign Ministry reportedly maintained that "the general practice all over the world is that any United Nations staff member travelling from or to his own country would do so on his national passport".

2. In the considered view of the Office of Legal Affairs the "general practice" to which the Ministry of Foreign Affairs has referred does not exist and could not exist as a general practice on account of the applicable provisions of the Convention on the Privileges and Immunities of the United Nations. Attention is drawn in particular to article VII, section 24, of the Convention which provides that laissez-passers issued by the United Nations shall be recognized by the authorities of Member States as valid travel documents.

The provisions of the Convention do not distinguish between United Nations officials on account of whether the official is locally or internationally recruited, nor on the basis of the official's nationality and residence. The clear intention of the Convention is to facilitate the work of the Organization by enabling its officials to travel on laissez-passers rather than on national passports. This purpose would be frustrated if Member States were to arbitrarily withhold recognition of the laissez-passers in respect of a certain group of officials who otherwise meet all the conditions of the Convention. It is a fact that, in a number of cases, staff members on home leave have used their laissez-passers to enter countries of their nationality.

...

18 March 1980

17. DENIAL BY THE AUTHORITIES OF A MEMBER STATE OF AN ENTRY VISA TO A NATIONAL OF THAT STATE EMPLOYED BY THE UNITED NATIONS ON THE BASIS OF A DECREE-LAW AUTHORIZING SUCH A DENIAL ON GROUNDS OF STATE SECURITY — RELEVANT PROVISIONS OF THE CHARTER, THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS AND THE APPLICABLE HEADQUARTERS AGREEMENT — QUESTION WHETHER THE DECREE LAW MAY OVERRIDE THE INTERNATIONAL OBLIGATIONS OF THE STATE CONCERNED

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

1. Reference is made to your memorandum of 5 May 1980 regarding the refusal by the authorities of a Member State of an entry visa to a staff member of the United Nations. This case raises some difficult questions of law and policy. The purpose of this memorandum is to set out as clearly as possible the legal rights of the United Nations in this case in the light of the known facts.

2. According to the information available to this office, the staff member in question is regarded by the present authorities of the Member State concerned as a person who is subject to the terms of a Decree-Law providing that persons in certain defined categories (persons who: left the country by seeking asylum; left the country without following the normal procedures; have been expelled or obliged to leave the country; are serving a sentence of banishment; have disobeyed the order to present themselves to the Government for reasons of State security) may not re-enter the country without prior permission from the Minister of the Interior. The Minister may refuse permission on grounds of State security. While the Decree-Law requires the Minister to substantiate his decision it does not specify criteria for deciding what is meant by "State security". The decision is, therefore, left entirely to the executive branch of the Government. The courts have taken the position that decisions under the Decree-Law are not subject to judicial review.

4. As a United Nations official the status of the person concerned under international law is, of course, broader than that of an ordinary citizen. Specifically, under Article 105 of the Charter, sections 18 and 24 of the Convention on the Privileges and Immunities of the United Nations and sections 12 and 13 of the relevant Headquarters Agreement, the United Nations maintains that when travelling on official business (which would include home leave travel) officials should be granted freedom of movement by all Member States. This principle applies regardless of nationality unless such a distinction is expressly provided for in the instruments themselves.

5. As a matter of law, the question is whether the Decree-Law referred to above may override the international obligations of the Member State concerned as set out in paragraph 4 above. In this connexion, it must be noted that with regard to transit and residence, section 12, paragraph (b) of the ECLA Headquarters Agreement provides that it "shall not impair the enforcement of the law in force".

6. Thus, while a legal argument to support the staff member's request for a visa can certainly be made as a matter of international immunities, the legal position is not by any means unequivocal. The conclusion reached by this Office when the case was first raised with us in December 1979 was summarized as follows:

"In our view any intervention should be based on Charter and Convention which established general principle of freedom of movement and insistence that any denial must be motivated in order that Secretary-General may be made aware of all circumstances surrounding individual case. The latter is necessary since privileges and immunities attach to the Organization rather than the individual. Arguments could also be based on human rights covenants but we believe it better to place the question firmly in the field of the law of international immunities."

8 May 1980

18. QUESTION WHETHER, UNDER THE RULES GOVERNING THE SYSTEM OF INTERNATIONAL IMMUNITY, NATIONAL SERVICE OBLIGATIONS MAY BE IMPOSED ON A DEPENDANT OF AN OFFICIAL OF THE UNITED NATIONS DEVELOPMENT PROGRAMME

Memorandum to the Chief, Executive Office of the Administrator of UNDP

1. We have been asked, by your memorandum of 14 August 1980, to state our opinion as to the compatibility of the local law of [name of a Member State], imposing national service obligations upon the daughter of a UNDP official serving in that country, with the rules governing the system of international immunity. I regret the delay in this reply, but the point appears to be a novel one, on which some considerable research into general principles of international law was required.

2. As regards members of the staff of the United Nations Development Programme in the country concerned, their status is governed by article IX of the relevant Standard Basic Assistance Agreement. By virtue of article IX, paragraph 1, of the Standard Basic Assistance Agreement, article V of the Convention on Privileges and Immunities of the United Nations applies.

3. Section 18(c) of article V provides that officials of the United Nations are "immune from national service obligations". The rationale behind this provision is clear. Privileges and immunities are granted to officials, as stated in section 20 of the Convention, "in the interests of the United Nations". It is obviously in those interests that officials are free from interference by national authorities and free to perform their duties. Both these considerations mandate exemption from "national service", which the United Nations has understood to extend beyond military service to other forms of extended compulsory service;

4. Under article V of the Convention, certain privileges and immunities granted to officials are extended to members of their families: e.g. exemption is granted from immigration restrictions and alien registration. However, with respect to exemption from national service obligations, section 18(c) only covers the United Nations official himself.

5. The absence of an explicit provision regarding national service obligations of family members of United Nations officials does not mean that this particular question cannot be solved within the framework of the system of international immunity.

6. The Convention on the Privileges and Immunities of the United Nations is not a conclusive compilation of all the privileges and immunities accorded to international functionaries. At the time the Convention was drafted, it was designed to meet the immediate needs of the Organization and its personnel and to spell out the principal privileges and immunities required. The problem here addressed — namely whether the State in which the United Nations official performs his official functions (the host State) can call upon him and his family, being non-nationals, for compulsory national service — was surely not immediately apparent when the Convention was drafted, particularly as there is strong evidence of a rule of general international law which prevents a State from imposing an obligation to do compulsory military or other service upon aliens temporarily resident within its territory. In the light of such a rule, an express mention of the exemption of family members may not have been considered necessary.

7. If aliens temporarily resident enjoy an exemption, this should be all the more true of United Nations officials and their families who are temporarily present in the territory of the host State for the performance by the official of functions for the benefit of the host State.

8. Quite apart from the rules of general international law, it should be recalled that Articles 104 and 105 of the Charter stipulate the obligations of all members to recognize the legal capacity of the United Nations and to accord to the United Nations all privileges and immunities necessary for the accomplishment of its purposes. These provisions stand on their own, independently from the Convention on the Privileges and Immunities of the United Nations. Whether any particular immunity is necessary at a particular stage in the development of the Organization in order to guarantee its freedom and independence from unilateral interference is a question of fact and judgement. There is no question that free and unhampered exercise of the United Nations official's functions requires that he is exempted from any form of national service obligations in the host

State. Free and unhampered exercise of his functions, furthermore, requires that some privileges and immunities have to be afforded to family members accompanying the United Nations official, as otherwise United Nations officials would not be willing to serve in a foreign country.

9. When the Member State concerned seeks to apply national service provisions to the daughter of a United Nations official it put the official in a situation where he might find it impossible to continue to serve in that country, thus leading to a request for transfer or repatriation, with consequent disruption of the UNDP assistance programme. This point should be made strongly to the Government, and it should be pointed out that exemption from national service obligations would not be a favour to an individual but would rather be for the purpose of assuring the Organization that its work could be carried out by its official without disruption. It should also be mentioned that to subject a family member of a United Nations official to compulsory service in the country concerned could be grossly unfair, as the person concerned could still be liable for such service in the country of which he is a national.

10. I would suggest that you transmit a copy of this memorandum to the Resident Representative in the country concerned, with the suggestion that he have further discussions with the Government in order to secure the exemption of the family member concerned from compulsory service. If this proves to be unsuccessful, we are prepared to raise the matter at Headquarters with the Permanent Mission of the Member State in question.

8 October 1980

19. IMPORT PRIVILEGES, UNDER THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS, OF OFFICIALS OF SPECIALIZED AGENCIES SERVING ON PROJECTS OF THE UNITED NATIONS DEVELOPMENT PROGRAMME — UNITED NATIONS POLICY IN THIS RESPECT — INADMISSIBILITY OF DIFFERENTIAL TREATMENT BASED ON NATIONALITY

*Memorandum to the Chief, Division for Administrative and Management Services,
Bureau for Finance and Administration, United Nations Development Programme*

1. Reference is made to your memorandum dated 9 April 1980 by which you requested advice on certain questions raised in a letter dated 24 March 1980 from the UNDP Resident Representative in [name of a Member State] with respect to the enjoyment of import privileges by specialized agency officials assigned to UNDP-financed projects in that country.

2. We understand the issue on which legal advice is sought to be the provisional decision by the Resident Representative to suspend previous approval of a request, by an ITU technical assistance expert, to import an automobile duty-free. The ground for the suspension is indicated to be the governmental authorities' position that the approval was valid only for the expert in question but did not extend to nationals of the country concerned serving as technical assistance experts.

3. To the extent the issue is affected by the legal relationship between the United Nations and the Government, the applicable instrument is the Convention on the Privileges and Immunities of the United Nations, to which the Government concerned has acceded, and which is made applicable also to officials of the specialized agencies serving on UNDP projects by the Agreement between the United Nations Special Fund and that same Government concerning assistance from the Special Fund. As you are aware, the detailed application of this provision has varied to a certain extent with local requirements and conditions, although it seems safe to say that automobiles have invariably been included among the effects falling under the provision. It appears that this general observation also applies to the country concerned which according to the UNDP legal files has promulgated internal regulations on the custom-free importation of foreign cars or purchase of locally purchased cars at a discount. It is noted further that neither the Convention nor United Nations policy contemplate nor permit discriminatory treatment of officials based solely on distinctions between the nationality of the officials concerned. It therefore follows that the United Nations, including UNDP, should claim from the governmental authorities the privileges granted

to officials under the Convention irrespective of the nationality of the official in question. To make such claims only for officials who are not nationals of the concerned country would — if done consistently for a certain period — detract from, and eventually undermine, the United Nations legal position that nationality discrimination is unacceptable.

4. We appreciate the internal administrative difficulties which insistence on a consistent implementation of the importation privileges may entail. We are however inclined to feel that this problem should be resolved by impressing on the governmental authorities the seriousness of the unequal treatment of staff to which the Government's practice gives rise, and by pointing out that the Convention makes no distinction based on nationality.

5. In conclusion, it follows from the foregoing that the Resident Representative should be instructed no longer to withhold the approval given to the above-mentioned expert for importation of a personal automobile. This step should not be interpreted as an endorsement of the Government's wish to apply different treatment to officials of that country's nationality; rather it would seem that the Resident Representative should prepare to raise at an early date with the appropriate governmental authorities the general question of equal import privileges to all officials regardless of nationality.

13 June 1980

20. CONVENTION ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS WHICH MAY BE DEEMED TO BE EXCESSIVELY INJURIOUS OR TO HAVE INDISCRIMINATE EFFECTS — PROHIBITIONS OF THE CONVENTION DESIGNED TO PROTECT UNITED NATIONS PEACE-KEEPING FORCES AND FACT-FINDING MISSIONS — SPECIAL FUNCTIONS OF THE SECRETARY-GENERAL UNDER THE CONVENTION AND PROTOCOL II THERETO¹⁵

Memorandum to the Secretary-General

1. The Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects and its Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) (A/CONF.95/15, annex I, appendices A and C),¹⁵ which have been adopted by the United Nations Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects, contain several provisions of particular institutional interest to the Organization.

A. *United Nations forces and missions*

2. Article 7 (3) (b), and in particular article 8, of Protocol II contain provisions designed to protect United Nations peace-keeping forces from minefields laid before their arrival in an area of operation. In effect, in case of a mission other than merely a fact-finding one, all parties must, as far as they are able, do everything to protect the mission by removing or de-activating all mines and booby-traps in the area, making available information about such devices to the force commander and taking other necessary measures. In case of a fact-finding mission, removal of mines and booby-traps is not required, but the force must be either protected from or fully informed about the location of such devices.

3. These provisions are based on a proposal originally tabled, at the Preparatory Conference for the Conference on Specific Conventional Weapons, by the delegations of several troop-supplying countries, and was included in the Preparatory Conference's report (A/CONF.95/3, annex II, appendix B, article 3 (3) (a) (iv)). At the 1979 session of the Conference, the Secretary-General responded to an invitation to comment on the draft provision, and proposed a restructuring and extension (A/CONF.95/CW/WG.1/1),¹⁶ which was largely accepted though with somewhat diminished obligations for the parties to the hostilities. After consulting the Commanders of all United Nations forces, the Secretariat, in a note reproduced as A/CONF.95/CW/4, raised two questions about the draft provisions.

The first question was whether the recording obligations of the parties to a conflict (on which they would later base their protective measures) should not be detailed in the Protocol. At first the Working Group on Mines and Booby-Traps merely adopted a statement of understanding (A/CONF.95/CW/WG.1/L.9; A/CONF.95/CW/7, para. 16), to the effect that it was expected that all parties would interpret their obligations with a view to accomplishing the humanitarian purposes to be served by the Protocol — i.e. that they would not through any restrictive interpretation of their recording obligations seek to hamper their ability subsequently to protect any United Nations forces. However, later, as a result of proposals from other delegations, a special Technical Annex on Recording was added to Protocol II.

The second question was whether it should not be specified that, if necessary, United Nations forces would themselves have the right to remove mines. No agreement could be reached on according such a right in general, and therefore the above-mentioned understanding merely records that the Protocol is not meant to deal with this question — i.e. that the recitation of certain protective measures in the Protocol is not to be interpreted as excluding the right of United Nations forces to remove mines if so agreed with the parties or mandated by the Security Council.

4. In order to prevent a State Party to the Protocol from escaping its obligations vis-à-vis the United Nations with regard to a current conflict by denouncing the Protocol or the general Convention, it is specifically provided in article 9 (2) of the latter that although a denunciation becomes effective one year after it is notified to the Secretary-General (as Depositary), obligations under any Protocol containing provisions concerning United Nations forces or missions (e.g., the above-described provisions of Protocol II) are to remain in force, in respect of any conflict that was current at the time the denunciation became effective, until the end of any United Nations operations relating to that conflict.

B. Special functions of the Secretary-General under the Convention and Protocol II

5. Aside from normal depositary functions in respect of the Convention and its Protocols (i.e. the three adopted at the Conference and any others that might be adopted later by use of the machinery created by article 8 of the Convention), the Secretary-General has a number of special functions under various provisions of the Convention and the Protocols. As indicated below, some of these too have been subject to various interpretative statements at the Conference.

6. Under article 7 (2) of the Convention, a State that is not a party to the Convention or to a given Protocol and is engaged in a conflict with a State that is a party, may notify the Secretary-General that it will accept and apply such provisions in that conflict. Article 7 (3) of the Convention requires the Secretary-General immediately to inform the States concerned of any such notification; however, he is not required by article 10 (2) to communicate such notifications to all States. It should also be noted that article 7 (4) provides that under certain circumstances “other authorities” referred to in article 96 (3) of Additional Protocol I to the 1949 Geneva Conventions (e.g., a national liberation movement) may “undertake to apply” or “accept and apply” the obligations of the Geneva Conventions and Additional Protocol I, as well as of the present Conventions and its Protocols; although it was deliberately not specified what form such an undertaking or acceptance is to take, and whether it would involve the Secretary-General, it may be expected that in certain instances relevant communications might be addressed to him, leaving him to decide whether, under the given circumstances, he should transmit these officially to the States concerned.

7. Article 8 (1) (a), (2) (a) and (3) (a) of the Convention requires the Secretary-General, if requested by a specified number of Parties, to convene a conference of such Parties, or of all States, to amend, extend or review the Convention and the Protocols. Just before that provision was approved by the Conference, the Executive Secretary made a statement in the plenary on behalf of the Secretary-General, indicating that he could only carry out that function in a given case if the necessary finances therefore are either authorized by the General Assembly, or provided by the States that are to participate in the Conference (see A/CONF.95/SR.11).

8. Under Article 7 (3) (a) (ii) and (iii) of the above-mentioned Protocol II, the parties to a conflict during which mines were laid in the territory of an adverse party must, at the end of active hostilities and of any territorial occupation, exchange information with each other and also inform

the Secretary-General about the "location of minefields, mines and booby-traps in the territory of the adverse party"; however, no indication is given as to the Secretary-General's responsibilities with respect of such information. Consequently, the Executive Secretary of the Conference, at its 1979 session, made a statement on behalf of the Secretary-General indicating that the latter considered that he would be free to use such information as he deems fit and that he would naturally exercise this right at his discretion in the interest of the restoration and maintenance of peaceful conditions, as well as the facilitation of the functioning of any United Nations or other humanitarian missions or operations (A/CONF.95/8, annex I, appendix B, attachment 3).

21 November 1980

21. DETERMINATION OF THE EFFECTIVE DATE OF AN ACTION RELATING TO A MULTI-DEPOSITARY CONVENTION — DIFFICULTIES ENCOUNTERED BY DEPOSITARIES IN THAT RESPECT — PRACTICE OF THE SECRETARIAT IN REGISTERING ACTIONS RELATING TO SUCH MULTI-DEPOSITARY CONVENTIONS

Note verbale to the Permanent Representative of a Member State

Reference is made to the second paragraph of the Permanent Representative's note concerning the difficulties experienced by depositaries in the case of multi-depositary agreements, with respect to the determination of the effective dates of ratifications, accessions, etc., that may be effected in various places at different times. In this regard, the Secretary-General has the following observations.

First it should be emphasized that the Secretariat's main concern in this context has been the correct application of the General Assembly regulations to give effect to Article 102 of the Charter. Article 5 of the said regulations provides, *inter alia*, that the certified copy of an international agreement submitted for registration should be accompanied by a statement setting forth, in respect of each party, the date on which that agreement has come into force. The Secretariat's understanding, on the basis of the discussion of article 5 in Sub-Committee 1 of the Sixth Committee (second part of the first session of the General Assembly) has been that, although this is not specifically provided for in the regulations, the same requirements are applicable when registering a certified statement under article 2 thereof (see *Repertory of Practice of the United Nations Organs*, vol. V, Article 102 of the Charter, annex to para. 17).

It is true that, as pointed out by the Permanent Representative, the General Assembly regulations were adopted before the multi-depositary procedure was conceived and the Secretariat is of course well aware of the intent of that procedure, which is to allow entities not universally recognized to participate in important agreements of general interest. One of the difficulties resulting from the multi-depositary procedure is that the various depositaries may not be certain that an instrument has been deposited earlier in another place when they register the deposit of instrument effected in their own capital. It should be noted, however, that the standard registration format used by the Secretariat allows for just such situations (see for instance the February 1976 Statement of Treaties, p. 57: document ST/LEG/SER.A/348) since the effective date of deposit of a given instrument indicated in the register of treaties is given exclusively in the context of the particular formality that is being registered, and no cross-references are provided to the deposit of instruments effected in other places or on other dates by the same entity: thus the indication of an effective date relating to the deposit of an instrument in a given capital does not preclude the possibility that the agreement has already been in force for some time in respect of the entity concerned as the result of a prior formality in another capital. Furthermore, not only would it be impossible, under the existing General Assembly regulations, to omit the indication of the effective date in the case of multi-depositary agreements, but such an omission would cast a serious doubt as to whether the agreement is in force at all for the State concerned and would thereby defeat the very purpose of the multi-depositary procedure.

It should be added that the recent computerization of treaty data has led the Secretariat to streamline its methods and practices in the field of registration. Thus, because the indication of the date of entry into force is one of the requirements of the General Assembly regulations to give effect to Article 102 of the Charter, the computer programming has been devised so as to require the inclusion of the effective date of an agreement or subsequent action among the data entered and will automatically include this in the text destined to the register of treaties. Before computerization was introduced it had been the practice of the Secretariat, mainly to economize space, not to indicate in the monthly statement and in the *Treaty Series* itself the effective date of an action when under the provisions of the agreement that date coincided with the date of deposit of the given instrument: in such cases the reader was to assume, on the basis of the pertinent provisions of the treaty, that the instrument took effect immediately upon deposit, an assumption that the Secretariat itself made when the certified statement submitted by the registrant did not specify the effective date as was the situation for earlier multi-depositary conventions such as the 1963 Test Ban Treaty. The Convention on the prevention of marine pollution, which is the subject of the Permanent Representative's note, provides, however, for entry into force 30 days after the deposit of the instrument of ratification or accession, and because the practice of depositaries may vary in the computation of the limits, the Secretariat finds it necessary to seek confirmation of any assumption it might make with regard to effective dates.

The Permanent Representative has suggested that the Secretariat would be in the best position to determine the effective date of an action relating to a multi-depositary convention. In this connexion, it should be pointed out that, because of the time lag between the completion of a formality and the submission of that formality for registration by the depositary, the Secretariat may not necessarily receive such information in chronological order, and could not therefore ascertain if any previous actions have been effected by a party in another capital. In any event, the Secretariat, which already struggles with a considerable backlog in the field of registration and publication of international agreements, is reluctant to shoulder such an additional burden with the complications that it involves (and which are well illustrated by the case of the Convention on the international liability for damage caused by space objects: see the October 1975 Statement of Treaties (ST/LEG/SER.A/344, p. 536)).

In these circumstances, one solution to the problem which has already been accepted by one depositary Government, is for the depositary, when registering, to indicate in its certified statement the effective date as computed on the basis of the formality executed in its own capital, with the following proviso: "Provided that the deposit in . . . was the effective deposit for the purposes of article . . . of the Convention". Such a formulation has the advantage of satisfying the General Assembly regulations, while circumventing the precise problems that the use of multi-depositaries was designed to avoid. Nevertheless, the preference of the Secretariat would be of course for a procedure of consultation between the depositaries, which would avoid (at least in the vast majority of cases) any uncertainty.

5 March 1980

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22. QUESTION OF THE TERRITORIAL SCOPE OF THE RATIFICATION BY A STATE OF A MULTILATERAL CONVENTION — POSSIBILITY FOR A STATE HAVING SUCCEEDED TO ANOTHER STATE BEFORE THE ENTRY INTO FORCE OF A MULTILATERAL CONVENTION OF BECOMING PARTY TO THAT CONVENTION THROUGH THE PROCEDURE OF SUCCESSION IF AT THE DATE OF THE SUCCESSION THE PREDECESSOR STATE WAS A CONTRACTING STATE TO THE TREATY IN QUESTION

Letter to the Ministry of Foreign Affairs of a Member State

You ask in your letter of 5 June 1980 whether the Gilbert and Ellice Islands were covered by the ratification by the United Kingdom, on 25 June 1971, of the Vienna Convention on the Law of Treaties.¹⁷ In other words, as we understand it, you are inquiring whether or not the Government of the Republic of Kiribati is eligible to participate in the Vienna Convention on the Law of Treaties through the procedure of succession of States.

Your question raises two problems: first, the determination of the territorial scope of the United Kingdom ratification and, second, the question of a succession by Kiribati to a multilateral treaty which was not yet in force at the time of the succession of States (the Gilbert Islands, now known as the State of Kiribati, became independent on 12 July 1979 and the Vienna Convention on the Law of Treaties entered into force on 27 January 1980).

A. Although certain types of treaties such as the Vienna Convention on the Law of Treaties, are hardly susceptible of territorial application in the ordinary sense by reason of their very subject matter, the territorial scope of a treaty depends on the intention of the parties. In this respect, the United Kingdom's instrument of ratification does not contain any indication, and the well established practice followed by the Secretary-General as depositary of international agreements is the following: a treaty is presumed to apply to the entire territory of each party unless it appears otherwise from the treaty (see *Summary of the practice of the Secretary-General as depositary of multilateral agreements* [ST/LEG/7, para. 103]). This practice was later codified in article 29 of the Vienna Convention on the Law of Treaties (see the International Law Commission commentaries under article 25 in its draft articles adopted at its eighteenth session, *Yearbook of the International Law Commission*, 1966, vol. II, pp. 134, 135 and 140).

B. As to the question of succession, attention is drawn to the general declaration made by the Government of Kiribati upon independence, according to which questions of succession to multilateral agreements will be governed "by accepted rules of international law and by the relevant principles contained in the Convention on Succession of States in respect of Treaties, concluded at Vienna on 23 August 1978".¹⁸

In this respect, the practice followed by the Secretary-General as depositary was codified in article 18 (2) of the above-mentioned Convention under which a newly independent State may establish its status as a party to a multilateral treaty which enters into force after the date of the succession of States, if at the date of the succession of States the predecessor State was a contracting State to the treaty in question.

In view of the above, should the Government of Kiribati decide on its participation in the Vienna Convention on the Law of Treaties through the procedure of succession, it may send to the Secretary-General a notification to this effect under the signature of the Minister of Foreign Affairs. Thereupon, Kiribati will be listed as a party to the Convention with retroactive effect as from the date of entry into force of the Convention. You will, however, realize the rather limited rationale in using this procedure instead of succession, since in the present case there is no question of continuity of application before and after the date of independence.

9 July 1980

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

1. INTERNATIONAL LABOUR ORGANISATION

The following memorandum, dealing with the interpretation of an international labour Convention, was drawn up by the International Labour Office at the request of a Government:

"Memorandum on the Labour Relations (Public Service) Convention, 1978 (No. 151), drawn up at the request of the Government of Switzerland, 29 January 1980. Document GB.213/15/4, 213th session of the Governing Body, May-June 1980."

2. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

(a) REGISTRATION OF EXPERTS FOR RESIDENCE PURPOSES

Memorandum to the Director of the Field Programme Development Division

1. I should like to refer to your memorandum of 23 June 1980 in which you ask for guidance in connexion with the difficulties that FAO staff in [name of a State] are encountering with respect to what appears to be, in effect, residence permits.

2. From a legal point of view, all FAO officials are immune, together with their spouses and relatives dependent on them, from immigration restrictions and alien registration, as provided in section 19 (c) of the Convention on the Privileges and Immunities of the Specialized Agencies. Although the State concerned is not a party to the Convention itself, the Convention is incorporated by reference in a number of agreements which are binding on it and which cover FAO activities in that country. Thus, the provisions of the Convention are included in article IX.2 of the basic Agreement between UNDP and the country concerned, signed on 15 September 1976; in paragraph 5 of the exchange of letters relating to the FAO Representative's office; and are, in general, included in standard agreements concluded between FAO and governments relating to projects and programmes financed by FAO from extra-budgetary resources or the Technical Co-operation Programme. Even FAOPAS officers, their spouses and dependants enjoy the same immunity from immigration restrictions and alien registration under article IV.4 (d) of the Agreement concluded between FAO and the State in question.

3. The residence cards or permits required by the governmental authorities clearly constitute "alien registration" within the meaning of section 19 (c) of the Convention on the Privileges and Immunities of Specialized Agencies. It follows, therefore, that FAO officials should be granted immunity from such residence permit formalities as may normally be applicable to aliens working in the State concerned.

4. Accordingly, FAO officials and their families should, in particular, decline to pay any fines that the governmental authorities may seek to impose if they are not in possession of a valid residence permit, on the grounds that such a requirement is not applicable to them.

5. From a practical point of view, it would seem that the FAO Representative and the UNDP Resident Representative should pursue their efforts to take the matter up with the Government at an appropriate level, with a view to arriving at a mutually acceptable *modus vivendi*. In this connexion, the Government's attention should be drawn to the fact that the FAO officials are on its territory pursuant to a request from, and after appropriate clearance by, the Government. In these circumstances, these officials and their families should not be subjected to bureaucratic harassment.

6. Arrangements might be envisaged whereby on arrival in the country FAO officials and their families would automatically be issued by the Government with a special card identifying them as international civil servants (or members of their families) and entitling them to reside and travel in the country for the duration of their mission. A simple procedure could also be devised for their automatic renewal where the holder's mission is extended. If the governmental authorities are insistent about photographs, and it continues to be difficult to have them made locally, UNDP might buy some simple equipment — like that used to make identity tags at the FAO Conference — to facilitate and expedite the procedure.

30 June 1980

(b) SEPARATION PAYMENTS SCHEME FUND

Memorandum to the Chief of the Headquarters Programmes Section

1. . . .
2. [The question has been raised] whether the Separation Payments Scheme Fund should be regarded as a "Reserve Fund", which could have been established only with Conference approval, or whether it was part and parcel of the salary scale introduced in 1975, which the Council had authority to approve. In our opinion, the answer depends on the nature of the Separation Payments Scheme and of the payments made under that Scheme, and also on the nature of the Fund created for that purpose.
3. As regards the nature of payments made under the Separation Payments Scheme, it seems clear that they represent deferred salary. The Scheme was introduced in 1975 as part of the new salary "package", replacing the past practice of making an addition to base scales of 8.33 per cent, and reflecting the separation payments made under Italian labour legislation by other employers and termed "*indennità di anzianità*". The General Service Salaries Survey Board noted in this connexion in its report of May 1975 (ref. FC 34/16(b)) that "in Italian practice the *indennità di anzianità* is regarded as deferred salary . . .".
4. It is also pertinent to observe, as a further illustration of the "deferred salary" nature of the separation payments scheme, that when a General Service staff member is promoted to the Professional category, he is paid the separation payment accrued up to the date of his promotion. Moreover, in calculating the step in the new grade of a General Service staff member promoted to the Professional category, the net remuneration in the previous grade, on the basis of which the calculation is made, is increased by 8.33 per cent.
5. As regards the question whether the Separation Payments Scheme Fund should be considered a reserve fund falling within the scope of rule XXIV.3(g) of the General Rules of the Organization and financial regulation 6.8, it should be borne in mind that this Fund is, in effect, a mechanism whereby the Organization invests monies which have been earned by staff members and which may, at any time, have to be paid to them (e.g., upon separation or promotion to the Professional category). The obligation to pay benefits under the Scheme is not a contingent one and it is only the precise time at which the payment has to be made that depends upon given circumstances. Accordingly, the nature of the Separation Payments Scheme Fund differs, at least in one essential aspect, from that of a normal reserve fund set up to meet contingencies which may or may not materialize and to which rule XXIV.3(g) of the General Rules of the Organization and financial regulation 6.8 would be applicable.
6. We would therefore concur with the conclusion that, since the Separation Payments Scheme was approved by the Council as part of an overall pay package, the establishment of the Fund falls within the scope of paragraph 3(j) of rule XXIV of the General Rules of the Organization, which gives the Council authority to approve both salary scales and conditions of service of the staff.

17 November 1980

Notes

¹ In this connexion see "Guidelines for implementation of General Assembly resolutions granting observer status on a regular basis to certain regional intergovernmental organizations, the Palestine Liberation Organization and the national liberation movements in Africa", reproduced in the *Juridical Yearbook*, 1975, pp. 164-167.

² A/35/363, annex.

³ Article 1 of the Convention on Certain Questions relating to the Conflict of Nationality Laws, 1930, expressed this principle as follows: "It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality". (League of Nations, *Treaty Series*, vol. 179, p. 89).

⁴ General Assembly resolution 2200 A (XXI), annex. Also reproduced in the *Juridical Yearbook*, 1966, p. 170.

⁵ General Assembly resolution 1904 (XVIII).

⁶ General Assembly resolution 3068 (XXVIII), annex. Also reproduced in the *Juridical Yearbook*, 1973, p. 70.

⁷ General Assembly resolution 2106 (XX), annex. Also reproduced in the *Juridical Yearbook*, 1965, p. 63.

⁸ United Nations, *Treaty Series*, vol. 268, p. 32.

⁹ *Ibid.*, vol. 96, p. 271.

¹⁰ See, in particular, Council resolutions 227 (LXII) and 278 (LXIII) adopted by the Council at its sixty-second and sixty-third sessions, respectively, in 1977.

¹¹ DP/GC/CO/R.1.

¹² Minutes of the Committee of Jurists on the Statute of the Permanent Court of International Justice, March 11th–19th, 1929, doc. C.166.M.66.1929, V., p. 37.

¹³ Baron Rolin-Jacquemyns died on 11 July 1936 and his successor was elected on 27 May 1937. Judge Hammarskjöld died on 7 July 1937 and his successor was elected on 26 September 1938. (See Hudson: *The Permanent Court of International Justice*, 1943, pp. 256–257, paras. 243 and 244).

¹⁴ Judge Azevedo died on 7 May 1951 and his successor was elected on 6 December 1951. Judge Golunsky resigned on 27 July 1953 and his successor was elected on 27 November 1953. Sir Benegal Rau died on 30 November 1953, and his successor was elected on 7 October 1954. Judge Hau Ho died on 28 June 1956 and his successor was elected on 11 January 1957. Judge Cuerrero died on 25 October 1958 and his successor was elected on 29 September 1959. Judge Sir Horsch Lauterpacht died on 8 May 1960 and his successor was elected on 16 November 1960. Judge Abdel Hamid Badawi died on 4 August 1965 and his successor was elected on 16 November 1965.

¹⁵ Reproduced on pp. 113–122 of the present *Yearbook*.

¹⁶ As suggested by the Secretary-General, the provision, which subsequently became article 7 (3) (b) of Protocol II, read as follows:

[All such records shall be retained by the parties, who shall]:

“when United Nations forces or missions are established to perform functions in any area, make available to the Secretary-General of the United Nations such information as is required by article [8].”

As suggested by the Secretary-General, the provisions which subsequently became article 8 of Protocol II read as follows:

“1. When a United Nations force or mission is established to perform peace-keeping, observation, fact-finding or similar functions in any area, each party to the conflict shall, as far as it is able, remove or render harmless all mines or booby-traps in the area, shall take such measures as may be necessary to protect the force or mission from the effects of minefields, mines and booby-traps while carrying out its duties and, subject to paragraph 2, make available to the Secretary-General of the United Nations all information in the party's possession concerning the location of minefields, mines and booby-traps in that area.

“2. When a small United Nations fact-finding mission is on a temporary visit to an area, a party to the conflict may decide not to make available the information in its possession concerning the location of minefields, mines and booby-traps in the area, provided that other measures taken by that party are sufficient to protect the mission while carrying out its duties.”

¹⁷ *United Nations Conference on the Law of Treaties, Official Records*, documents of the Conference (A/CONF.39/11/Add.2 — United Nations publication, Sales No. E.70.V.5), p. 287.

¹⁸ *United Nations Conference on Succession of States in respect of Treaties, Official Records*, documents of the Conference (A/CONF.80/16/Add.2 — United Nations publication, Sales No. E.79.V.10), p. 186.