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UNITED NATIONS JURIDICAL YEARBOOK

1981

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. CREDENTIALS ARRANGEMENTS FOR AN EMERGENCY SPECIAL SESSION — EXTENT TO WHICH THE ARRANGEMENTS MADE FOR THE PRECEDING REGULAR SESSION MAY BE RETAINED

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

1. Due to the emergency nature of an emergency special session of the General Assembly there is a tendency to simplify the rules and practices of the Assembly by applying certain arrangements for the most recent regular session of the Assembly to the emergency session. Thus rule 63 of the rules of procedure provides that the President and Vice-President of an emergency special session shall be, respectively, the chairmen of those delegations from which the President and Vice-Presidents of the previous session were elected. Similarly, the practice has developed whereby the Credentials Committee for an emergency special session has the same composition, and a chairman from the same delegations, as during the preceding regular session.

2. Notwithstanding this assimilation of certain arrangements for purposes of convenience, an emergency special session is different from the preceding regular session and representatives to the emergency session are required to submit credentials empowering them to represent their respective States at that session in accordance with rule 27 of the rules of procedure of the Assembly. Permanent Representatives whose credentials entitle them to represent their respective States at all sessions of the General Assembly are not required, of course, to submit special credentials for a special emergency special session.

31 August 1981

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2. QUESTION WHETHER A REDUCTION, DUE TO FINANCIAL STRINGENCY, OF THE SERVICES OF THE UNITED NATIONS RELIEF AND WORKS AGENCY FOR PALESTINE REFUGEES IN THE NEAR EAST (UNRWA) WOULD REQUIRE PRIOR CONSIDERATION BY THE GENERAL ASSEMBLY

Memorandum to the Commissioner-General of UNRWA

1. This is in response to a request for a legal opinion concerning the suggestion that certain drastic reductions in the Agency's program that might be necessitated by the non-availability of funds may only be undertaken after the matter had been referred to the General Assembly.

2. You will recall that the question of the authority, indeed the obligation of the Commissioner-General, to reduce the Agency's program if the funds for continued operations were not available, constituted the subject of a legal opinion on 26 June 1975 (A/10013, Annex IV). That opinion held, *inter alia*, that the Commissioner-General is "responsible to the General Assembly for the prudent conduct of UNRWA operations. Such conduct would necessarily involve a planned reduction of services if maintenance of such services at current levels would, in the Commissioner-General's view, lead to the bankruptcy and consequent collapse of UNRWA". The legal circumstances on which that opinion was based have not changed in any essential respect, and thus the conclusions then stated are still applicable in the present situation.

3. Article 9.5 of the Financial Regulations of UNRWA, adopted pursuant to paragraph 9(*c*) of General Assembly resolution 302 (IV) by which the Agency was established, provides since 1967 that:

> "After consideration by the General Assembly the budget shall constitute authority to the Commissioner-General to incur commitments and to make disbursements for the purposes provided, to the extent that contributions are actually received or other funds are actually available, provided that the Commissioner-General may additionally incur commitments against contributions pledged by governments but not yet received where the contributing governments have confirmed that their contributions will apply to the budget of the current or a prior fiscal year and will be paid in a currency which the Agency can use to meet commitments incurred against such contributions."

It is thus clear that, within the limits of the budget considered by the General Assembly,[1] the Commissioner-General's authority to incur commitments and make disbursements is absolutely limited to funds actually available and to certain confirmed governmental pledges. As the Commissioner-General may not incur commitments in excess of these specified amounts, he has no choice but to conduct the Agency's operations in such a way that he does not incur such excess commitments. Even aside from the Financial Regulations, it must be recognized that he has no authority either to borrow funds or to commit the United Nations to obligations, *vis à vis* either staff or suppliers, that might have to be paid from funds other than those available for the Agency, so that he must conduct the Agency's operations within the limits of those funds.

4. The General Assembly was given full opportunity at its thirty-fifth session to consider the question of the possible forced reduction of services, as the Commissioner-General called its attention to this likelihood repeatedly, both in his formal report[2] and in his oral statements;[3] nevertheless, the Assembly gave no special directive to the Commissioner-General, but merely addressed an appeal to Governments to increase their contributions (resolution 35/13A, para. 7). If the funds available to UNRWA are insufficient to permit full operations until the Assembly can again be consulted, the Commissioner-General must take the necessary actions to protect the Agency's financial situation in good time. He has no authority to propose the convening of a special session of the General Assembly; however, through his several warnings, including those addressed to the Advisory Committee of UNRWA, he has enabled any Member State concerned to propose convening a special session of the Assembly pursuant to rule 9(*a*) of the rules of procedure.

16 March 1981

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3. Treaties concluded by South Africa which "explicitly or implicitly include Namibia" under the terms of paragraph 9(*i*) of General Assembly resolution 3031 (XXVII) — Scope of applicability of the principle that treaties of this type concluded subsequent to the termination of South Africa's mandate have no legal application to Namibia

Memorandum to the Director, Office of the Commissioner for Namibia

1. I wish to refer to your memorandum of 17 March 1981 on the above subject and, specifically, to the request of Standing Committee I of the United Nations Council for Namibia for advice on the question of the "replacement" of South Africa as the party representing Namibia in all relevant bilateral and multilateral treaties.

2. Before responding to the specific questions raised, it may be useful to state the view of this Office that resolution 3031 (XXVII) does not postulate *de jure* succession. The Council for Namibia is not a State but a subsidiary organ of the General Assembly charged with the responsibility for administering the territory until independence. As was pointed out in the Secretary-General's Written Statement to the International Court of Justice" . . . it will be for the future lawful Government of Namibia to determine the extent of its continuing treaty relationships, arising from past as well as current treaties, in accordance with the relevant principles of international law".[4]

These principles are now codified in the Vienna Convention on Succession of States in Respect of Treaties of 1978.[5]

3. The foregoing clarification is necessary in order to avoid any misconception or confusion as to the legal nature and scope of the role of the Council for Namibia with respect to bilateral and multilateral treaties affecting Namibia, pursuant to relevant General Assembly and Security Council resolutions. The "replacement" of South Africa as the party representing Namibia in bilateral and multilateral treaties is, strictly speaking, a function of the Council's administering authority, as defined by the General Assembly, pending the achievement of independence by Namibia.

4. With regard to treaties concluded by South Africa purporting to apply to Namibia subsequent to the General Assembly's termination of South Africa's mandate, this Office, as was stated in the Secretary-General's Written Statement referred to above, is of the view that they have no legal application to Namibia by operation of law. This results from the fact that upon termination of the Mandate, South Africa had no right or authority to act for Namibia. Such treaties would be void *ab initio* in respect of Namibia and the question of "replacing" South Africa in such treaties does not arise. Consequently, no decision of the Council is necessary in respect of this class of treaties. The question whether the Council for Namibia might accede to such treaties or become an original signatory to a particular treaty will depend on the terms of the treaty.

5. The exception referred to in paragraph 122 of the Advisory Opinion[6] relates to *existing* multilateral treaties of a humanitarian character, i.e., treaties entered into prior to revocation of the mandate and not to treaties entered into post-revocation. This is clear from a careful reading of paragraph 122. Obviously, if the position is taken that all treaties entered into by South Africa on behalf of Namibia post-revocation are inapplicable by operation of law, no exception is possible. One may, however, conceive of other ways in which this class of treaties may nevertheless be regarded as applicable to Namibia.

6. Turning first to existing multilateral treaties of a humanitarian character, how are these to be identified and which organ is competent to take the necessary measures? While the Court does not define what is meant by the term "general conventions of a humanitarian character", it would certainly include the 1949 Geneva Conventions and international human rights instruments. In regard to this class of treaties, the competent organ and the measures to be taken must be determined by reference to the terms of the particular treaty.

7. With regard to such treaties entered into post-revocation, while they may not be made applicable to Namibia in the same manner as existing treaties, in the view of this Office, to the extent that such treaties may be characterized as *jus cogens*, or as representing a rule of customary international law they are applicable to Namibia.

8. Paragraph 125 of the Advisory Opinion refers to the continuing in force for the people of Namibia of the advantages deriving from international cooperation. This would include treaties which are the constituent instruments of international organizations. With regard to this class of treaties, the competent organ would normally be the governing body of the organization (Assembly, Council, etc.) and the measures to be taken would be determined by the terms of the constituent instrument itself. This had been the case with respect to such agencies as the ILO, FAO, UNESCO and WHO.

9. With regard to bilateral treaties extended to Namibia prior to revocation of the Mandate the obligation, correctly stated by the Court in our view, is that Member States must abstain from invoking or applying treaties or provisions of treaties concerning Namibia which would involve active intergovernmental cooperation. Paragraph 124 of the Written Statement cites an example of such a treaty.

10. As regards the possible termination or suspension of existing bilateral treaties, this Office is of the view of that the Vienna Convention on the Law of Treaties[7] establishes the necessary rules to be invoked as between the parties to such a treaty.

11. Finally, you have asked for the advice of this Office on the action to be taken in relation to the Agreement between the Minister of Finance of the Union and the Administrator of the Territory of South West Africa for the avoidance of double taxation. This document is not and

cannot be regarded as an international agreement. At the time of its conclusion in 1959, South West Africa was a territory under Mandate in accordance with the 1950 Advisory Opinion of the International Court of Justice.[8] As such, South Africa's rights and obligations *vis-à-vis* South West Africa were governed by the Mandate instrument of 17 December 1920, Article 2 of which provided that the Mandatory (South Africa) shall have full power of administration and legislation over the territory. The Agreement in question was, therefore, merely an internal administrative act and not an international agreement. As such it does not call for any action by the Council pursuant to paragraph 9(*i*) of General Assembly resolution 3031 (XXVII).

8 April 1981

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4. PROVISIONS OF THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE CONCERNING THE FILLING OF CASUAL VACANCIES ON THE COURT — QUESTION WHETHER, NOTWITHSTANDING THOSE PROVISIONS, A SPECIAL ELECTION FOR THE FILLING OF A CASUAL VACANCY COULD BE DISPENSED WITH IN CASE REGULAR ELECTIONS ARE SCHEDULED TO BE HELD WITHIN A BRIEF PERIOD FROM THE EARLIEST POSSIBLE DATE AT WHICH THE SPECIAL ELECTION COULD TAKE PLACE

Memorandum to the President of the Security Council

1. By a communication of 17 August 1981, the Registry of the International Court of Justice informed the Secretary-General of the death, on 15 August 1981, of the President of the Court, Sir Humphrey Waldock (United Kingdom of Great Britain and Northern Ireland). Sir Humphrey Waldock had been elected to the Court on 30 October 1972, for a term of office to expire on 5 February 1982. His seat is one of the five seats to be filled for a regular nine-year term, commencing on 6 February 1982, during the elections to the Court to be held in the Security Council and in the General Assembly during the forthcoming thirty-sixth session of the General Assembly.

2. Sir Humphrey Waldock's death has occasioned a casual vacancy on the Court. The Statute contains a number of provisions for filling such vacancies.

Article 14 of the Statute provides:

> "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, of the Statute provides:

> "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 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."

Article 15 provides:

> "A member of the Court elected to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term."

3. The foregoing provisions lay down a procedure for filling casual vacancies whereby the Council fixes the date of the election at least three months after the request for nominations to fill the vacancy has been sent out by the Secretary-General. This statutory three-month minimum time-limit has always been observed,[9] even in cases where this has resulted in a lapse of almost a year between the occurrence of a vacancy and the election to fill it.

4. Sir Humphrey has died closer to the end of his term of office than any other judge in the history of the present court. Were the provisions of Article 14 of the Statute to be deemed to apply

in the circumstances, a situation would result where a regular election to fill the seat concerned for a nine-year term of office, commencing on 6 February 1982, would in all probability be held before a casual election to fill the same seat for a brief period of a number of weeks ending on 5 February 1982. Because of the three-month time-limit between the dispatch of invitations for nomination of candidates and the election to fill the casual vacancy, as well as the preparation of the necessary documentation, that election could not take place at the earliest before the very end of November 1981 and a date in the middle of or late December would be more realistic. Regular elections are normally held in October of the year in which they take place.

5. Having in mind its responsibilities under Article 14 of the Statute of the Court to fix the date of an election to fill a casual vacancy, the Security Council may wish to consider whether that article necessarily applies in the circumstances described above. The legislative history of the article indicates that its purpose was to obviate extensive delays in the filling of casual vacancies and there is no indication it was meant to apply where only very brief periods are involved. In the present case no extensive delay would be occasioned by leaving the casual vacancy open, as the seat concerned would be filled during the regular elections for a term of office commencing on 6 February 1982. Having regard to the fact that periods of almost a year have in a number of cases elapsed between the occurrence of a casual vacancy and the election to fill it, the practice of the Security Council and of the General Assembly would also support a conclusion that, in the circumstances, the intention underlying Article 14 would equally well be served by leaving the casual vacancy open and filling the seat at the regular election.

6. Were the Security Council to endorse the suggestion just made, it would be unnecessary for a special election to be held at the very end of November or in December 1981 to fill the casual vacancy, and the Secretary-General would not be required to invite nominations for such an election. The dispatch of such invitations has been delayed, pending an indication of the Council's decision.

7. The President of the Council may wish to raise the matter referred to in this memorandum with the members of the Council at any early date in order that a timely decision may be made.

19 August 1981

ANNEX

NOTE ON THE PRACTICE OF THE UNITED NATIONS AND THE LEAGUE OF NATIONS IN FILLING CASUAL VACANCIES ON THE INTERNATIONAL COURT OF JUSTICE — QUESTION OF THE APPLICATION OF THE THREE MONTHS' LIMIT PROVIDED FOR IN ARTICLE 5 OF THE STATUTE OF THE COURT

Introduction

1. Article 14 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 dispatch 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 dispatch 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 recorded[10] 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. Formageot, 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 the election.[11] Nine occasional vacancies, prior to the present one occasioned by the death of Sir Humphrey Waldock, have occurred[12] in the International Court of Justice since its establishment, and, again, more than three months have, in each case, elapsed between the dispatch 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 prior to 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). Judges Richard R. Baxter and Salah El Dine Tarazi died on 25 September and 4 October 1980 respectively, after the opening of the thirty-fifth regular session of the General Assembly. In the note submitted by the Secretary-General to the Security Council concerning the date of the elections to fill these two vacancies (S/14246), reference was made to the dates of dispatch of invitations for nominations to fill the vacancies and it was stated that "the three-month time-limit will expire on 8 January 1981". The Secretary-General then proposed that the Council might "wish to decide that the elections to fill the vacancies shall take place during a resumed thirty-fifth session of the General Assembly in January 1981". By its resolution 480 (1980) of 12 November 1980 the Council decided "that elections to fill the vacancies shall take place on 15 January 1981 at a meeting of the Security Council and at a meeting of the resumed thirty-fifth session of the General Assembly".

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 and the General Assembly have clearly recognized that the three months' rule is a minimum statutory requirement.

18 August 1981

5. FILLING OF A CASUAL VACANCY ON THE INTERNATIONAL COURT OF JUSTICE — REQUIREMENT UNDER THE STATUTE OF THE COURT THAT ELECTIONS BE HELD CONCURRENTLY IN THE SECURITY COUNCIL AND IN THE GENERAL ASSEMBLY — ALTERNATIVES OPEN TO THE SECURITY COUNCIL IN FIXING THE DATE OF THE ELECTION

Memorandum to the President of the Security Council

1. The President of the International Court of Justice, by a communication dated 12 December 1981, has informed the Secretary-General of the death, on 12 December, of Judge Abdullah El-Erian (Egypt). It will be recalled that Judge El-Erian was elected to the International Court of Justice by the Security Council and the General Assembly on 31 October 1978 for a term to expire on 5 February 1988. Thus a vacancy in the Court has occured and it must be filled in accordance with the terms of the Statute of the International Court of Justice.[13]

2. Article 14 of the Statute provides:

"Vacancies shall be filled by the same method as that laid down for the first election, subject to the following provisions: 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, of the Statute provides:

"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."

3. Since, under Article 14 of the Statute, the Security Council has to fix the date of the election, it is suggested that the Council might consider this question at an early meeting. It will be noted that Article 5 of the Statute provided for a three month delay between the dispatch of invitations for nominations and the date of the election. The invitations are being dispatched within the next few days. As the three month delay is considered to be mandatory, the election could take place any time after late March 1982.

4. Elections to the Court are, under its Statute, held concurrently in the Security Council and the General Assembly, which meet simultaneously to conduct the balloting. In fixing the date for election, the Security Council could either decide that:

(*a*) The election should be held at a resumed meeting of the thirty-sixth session held any time after late March 1982. It is my understanding that the thirty-sixth session will not be closed, but will recess towards the end of this week, with one or two items being carried over to a resumed session next year. There is already an item on the agenda of the current session on elections to the International Court of Justice, which could also be carried over by the Assembly if the Security Council were to act before the end of this week to decide that the election be held at a meeting of the resumed thirty-sixth session.

(*b*) The election should be held at the thirty-seventh regular session of the General Assembly or at any special session prior to that date.

5. The first alternative set out above has the clear advantage of filling the vacancy on the Court as expeditiously as the Statute permits, and thus allowing the Court to function with a full complement of judges at a time when several important cases may be considered. It would also follow the most recent precedents, where vacancies on the Court arising as the result of the deaths of two judges late in 1980 were filled at elections held at a resumed thirty-fifth session early in 1981. To postpone the election until the thirty-seventh session would leave a vacancy on the Court for a long period.

14 December 1981

6. QUESTION WHETHER THERE WOULD BE ANY LEGAL IMPEDIMENT TO THE ADOPTION OF A DECLARATION BY A UNITED NATIONS BODY OTHER THAN THE GENERAL ASSEMBLY OR A SPECIAL CONFERENCE — STATUS OF DECLARATIONS AND RECOMMENDATIONS IN UNITED NATIONS PRACTICE

Cable to the Legal Liaison Officer, United Nations Environment Programme

We refer to your query concerning the proposed adoption of a declaration by the Governing Council of UNEP at its forthcoming special session. From the legal standpoint there would be no impediment to the adoption of a declaration by the Governing Council. In the practice of the United Nations a Declaration is a formal and solemn instrument suitable for those occasions when principles considered to be of special importance are being enunciated. Apart from the solemnity and formality associated with a declaration there is legally no distinction between a declaration and a recommendation which is less formal. In the practice of the United Nations all declarations of major importance have been adopted by resolution of the General Assembly or by special United Nations conferences. At its sixty-first session the Economic and Social Council exceptionally adopted the Declaration of Abidjan by resolution 2009 (LXI) of 9 July 1976 but because of its general nature this is probably not a useful example. We are not aware of any significant declarations having been adopted by other United Nations bodies.

16 November 1981

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7. QUESTION WHETHER A FORMAL AGREEMENT OF CO-OPERATION CAN BE CONCLUDED BETWEEN THE UNITED NATIONS SECRETARIAT AND AN INTERGOVERNMENTAL ORGANIZATION IN THE ABSENCE OF AN EXPRESS AUTHORIZATION OF THE GENERAL ASSEMBLY TO THAT EFFECT

Memorandum to the Chief, Executive Office of the Administrator, United Nations Development Programme

1. This is in reply to your memorandum of 2 April 1981 requesting our views regarding the formalization of co-operation between UNDP and the Organization of the Islamic Conference (OIC).

2. The question whether a formal agreement on co-operation can be concluded between the United Nations Secretariat and intergovernmental organizations has been considered on several occasions and for legal and other considerations a negative reply was given in nearly every case. As a matter of general policy it was usually decided not to conclude such formal agreements without express authorization from the General Assembly or other competent deliberative organs. Hence, except in the case of an agreement on co-operation between the Secretariats of ECA and the OAU, there are no precedents where the United Nations formally concluded general agreements on co-operation with intergovernmental organizations such as OAU, OAS and the League of Arab States. In light of this policy and since there is no compelling legal reason to the contrary, we recommend that, unless the appropriate authority specifically authorizes the formal conclusion of agreements on co-operation, these relationships be based on an informal memorandum of understanding and not on a formal agreement. We draw your attention in this connection to the memorandum of understanding with the League of Arab States which has served as the basis for co-operation between the Secretariats of the two organizations for many years.

27 April 1981

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8. ARTICLES 20 AND 4 OF THE VIENNA CONVENTION ON THE LAW OF TREATIES — PRACTICE OF THE SECRETARY-GENERAL AS DEPOSITARY OF MULTILATERAL TREATIES WHEN MAKING NOTIFICATION OF THE ENTRY INTO FORCE OF A TREATY TO WHICH RESERVATIONS HAVE BEEN MADE

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

With reference to your letter please find below the Secretariat comments on the queries from the Ministry of Foreign Affairs of your country concerning certain points of the Vienna Convention on the Law of Treaties.

I. *Article 20*

1. Sub-paragraph 4(*c*) of article 20 determines the moment at which a reserving State may be considered as a State which has ratified or otherwise become bound by a treaty. Paragraph 5 provides for the conditions under which, in the absence of objections, reservations are to be considered as tacitly accepted.

2. In this regard attention is directed to the comments made by the Secretary-General on the corresponding provisions of the ILC draft articles on the law of treaties (namely paragraphs 4(*c*) and 5 of article 17), provisions which were incorporated without change into the Vienna Convention.[14]

> "The relation between this article [article 17] and the practice of the Secretary-General regarding entry into force of treaties is not quite clear. The Secretary-General, in accordance with General Assembly resolutions 598 (VI) and 1452 B (XIV), is precluded from passing upon the legal effects of instruments containing reservations or of objections to them. The situation, for depositaries as well as States, will be somewhat clarified by paragraph 4(*c*) of draft article 17, which provides that an act expressing a State's consent to be bound is effective as soon as at least one other contracting State has accepted the reservation, but it may be anticipated that, in the future as in the past, express acceptance of reservations will be rare, and that much will continue to depend upon tacit acceptance. In the situation that has thus far existed, the practice of the Secretary-General, when required to make notification of the entry into force of a convention to which reservations have been made, has been as follows. When he has received the number of instruments specified in the treaty as required for entry into force (whether or not reservations in those instruments have been objected to or expressly accepted), the Secretary-General makes a notification referring to the entry into force clause of the treaty, to the receipt of the number of instruments specified therein, and to any objections that have been made to the reservations. Ninety days after such notification, if no objection to entry into force has been received, the Secretary-General proceeds with the registration of the treaty as having entered into force on the date of receipt of the necessary number of instruments. No objection has ever been received either to entry into force or to the ninety-day period allowed for States to express their views.
>
> "Article 17, paragraph 5, states that a State is not considered to have tacitly accepted a reservation until the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later. Is the effect of this time-limit, in the absence of any express acceptance of a reservation, to prevent an instrument containing that reservation from being counted towards entry into force until twelve months after notification has been given of the reservation? If so, there may be considerably more delay in the entry into force of treaties than under the present practice of the Secretary-General. Should this be considered undesirable, a remedy could be found by shortening the period of twelve months specified in paragraph 5."

3. The relevant practice of the Secretary-General since 1967 has developed on the basis of the same principles:

— When a treaty is in force and a State deposits an instrument of ratification, acceptance, approval or accession that contains a reservation, the Secretary-General indicates the date of entry into force for that State under the provisions of the treaty, subject to the legal effects that each party might wish to draw from the reservation as regards the application of the treaty.

— For the purpose of determining the general entry into force of the treaty, the Secretary-General takes into account instruments accompanied by reservations that have not given rise to objections within a period of 90 days from their circulation,[15] thereby presuming that States that have not objected to a reservation within the 90-day time limit are likewise not objecting to counting the instruments in question for the purpose of the entry into force of the treaty. This does not imply specific acceptance of the reservation and it is understood that each State remains free to notify the Secretary-General, through an objection, of the legal consequences it attaches to the reservation in its treaty relations with the reserving State. The Secretary-General's practice in this regard is compatible with the provisions of the Vienna Convention.

II. *Article 4*

4. The Vienna Convention on the Law of Treaties, as all other codification conventions, poses the problem of determining the applicability of its provisions following entry into force in relations between contracting and non-contracting States. Article 4 of the Convention, concerning its non-retroactivity, relates to this problem. The Secretary-General, however, is not authorized to offer any interpretation. The right to interpret the Convention belongs to the parties and prospective parties thereto, and was exercised by the Swedish delegation in its statement at the thirtieth plenary meeting of the Vienna Conference on 19 May 1969,[16] as well as by Ecuador in the declaration it made upon signature of the Convention.[17] It may nevertheless be noted that this question seems to be of a more theoretical than practical nature. Although only thirty-nine States have ratified or acceded to the Convention,[18] a great majority, if not the whole of the international community, in practice appears to follow the rules of international law codified by the Convention.

7 May 1981

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9. INTERNATIONAL COCOA AGREEMENT, 1980 — PROVISION UNDER WHICH THE AGREEMENT MAY BE PUT IN FORCE "IN WHOLE OR IN PART" — LEGAL MEANING AND INTENT OF THIS PHRASE — LIMITS TO THE FREEDOM OF ACTION OF GOVERNMENTS IN DECIDING TO PUT THE AGREEMENT IN FORCE PARTIALLY

Cable to the Deputy Secretary-General, United Nations Conference on Trade and Development

1. You have asked for our views on the meaning of the phrase "in whole or in part" appearing in article 66, paragraph 3[19] of the International Cocoa Agreement, 1980. Our comments on this question and related questions arising from article 66 (3) are as follows.

2. It should first of all be pointed out that the United Nations has no special authority to interpret commodity agreements or proposed agreements, except insofar as depositary functions are concerned. Therefore, in spite of any opinions expressed herein, the States concerned remain free in their interpretations of the text of the International Cocoa Agreement, 1980.

3. Although the concept of putting an agreement into force in whole or in part, as provided in article 66, paragraph 3 of the International Cocoa Agreement, 1980, has appeared in earlier commodity agreements, it has never actually been tested or resorted to in the past. Therefore, any attempt to ascertain the legal meaning of the concept cannot be based on practice. It may, however, be noted that the International Sugar Agreement, 1973, which contains no economic provisions, provides in article 36, paragraph 3 that the International Sugar Agreement may be put into force in whole or in part, which suggests that even the merely administrative provisions might be put into force in part.

4. The concept of putting an agreement into force "in part" seems intended to permit the entry into force of a "modified" agreement so as to ensure the continued existence of an existing commodity organization established by an earlier but expiring commodity agreement. It permits the countries concerned, subject to what is said below, to determine the provisions which they wish to put into force, whether these are the economic provisions or the administrative provisions, or some combination of both.

5. Article 66, paragraph 3 of the International Cocoa Agreement, 1980 does not explicitly state that the agreement can be put into force by stages over a period of time, e.g. first the administrative provisions and later the economic provisions. Although the last sentence of the article foresees the possibility of meetings subsequent to the one convened by the Secretary-General, no mention is made that at such future meetings additional parts of the agreement may be put into force.

6. If the countries concerned decide to put the agreement into force partially, either provisionally or definitively, (i) they should not negotiate a new agreement in the context of the existing Agreement; (ii) they should not indiscriminately select the provisions to be put into force, because

doing so could amount to circumventing the basic purpose and objective of the new agreement; and (iii) they should not make basic changes to individual provisions, except for adaptations, where required, to permit the proper functioning of the agreement among a limited number of countries and to ensure consistency among the provisions that are put into force.

7. As article 66, paragraph 3 does not contain a time-limit for putting the agreement into force, the countries concerned may decide to postpone that decision and take it at a later date.

8. Article 66, paragraph 3 does not require a minimum number of countries to participate in the meeting convened pursuant to that article, nor does it require a particular majority of the countries convened in order to put the agreement into force among themselves. In other words one or more countries that have deposited a ratification, notification or similar instrument cannot block a decision by other such countries, either by staying away from the meeting or by "voting" against a decision to put the agreement into force, but, of course, any objecting or non-participating country would not be bound by the agreement.

9. In any event, if the countries do not decide to put the agreement into force, any obligations they might have in respect of the agreement, by virtue of articles 18 and 30 of the Vienna Convention on the Law of Treaties, would be cancelled. Therefore an entirely new agreement could then be negotiated, which could take the form of a text largely based on the 1980 text, with any departures therefrom that are considered desirable.

10. The meeting convened pursuant to article 66, paragraph 3 could decide to be guided by the rules of procedure of the 1980 United Nations Cocoa Conference, *mutatis mutandis*.

11. In view of this uncertainty with respect to putting a commodity agreement into force "in part", it appears desirable to state in future agreements whether they can be put into force stage by stage.

12 June 1981

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10. Convention on the Prevention and Punishment of the Crime of Genocide — Submission by a State Party of an instrument withdrawing reservations made at the time of ratification and formulating new reservations — Practice of the Secretary-General as depositary of multilateral treaties with respect to reservations

Internal memorandum

1. By a letter dated on 9 September 1981, addressed to the Legal Counsel, the Permanent Representative of [name of a Member State] to the United Nations transmitted a formal instrument under the signature of the Acting Minister for External Relations of his country withdrawing the Declarations to articles IX and XII of the Convention on the Prevention and Punishment of the Crime of Genocide made by the State in question at the time of deposit of the instrument of ratification of the said Convention, and making new declarations in their place.

2. It appears that in substance the above action can be analyzed as follows:

(i) Withdrawal of objections made by the Member State concerned, at the time of ratification, in respect of reservations effected by certain States concerning articles IX and XII of the Convention, and

(ii) Formulation of new reservations by the said Member State in respect of articles IX and XII of the said Convention.

3. Under the international practice to which the Secretary-General, in his capacity as the depositary of multilateral agreements, has consistently adhered, the withdrawal of reservations and of objections to reservations may be effected at any moment, and the action referred to under paragraph 2(i) above does not, consequently, present any difficulty.

4. Under the same practice, on the other hand, the formulation of reservations may be effected only upon signature, ratification, acceptance, approval or accession, or with the unanimous consent of the parties concerned.

5. In this light, one alternative might be for the Government concerned to denounce the Convention and accede thereto with the new reservations that it wishes to formulate. Attention is drawn, however, to article XIV of the Convention (relating to denunciation), which reads as follows:

"The present Convention shall remain in effect for a period of ten years as from the date of its coming into force.

"It shall thereafter remain in force for successive periods of five years for such Contracting Parties as have not denounced it at least six months before the expiration of the current period.

"Denunciation shall be effected by a written notification addressed to the Secretary-General of the United Nations."

The Convention having entered into force on 12 January 1951, the first period provided for under the above article expired on 11 January 1961, and the following ones on 11 January 1966, 11 January 1971, 11 January 1976 and 11 January 1981, respectively. The current period will expire on 11 January 1986 and, consequently, denunciation of the Convention will have to be effected by 11 July 1985 for the Convention to cease to have effect in respect of the Member State concerned on 12 January 1986.

6. Under the circumstances, the Government of the Member State concerned may wish to effect immediate withdrawal of the objections referred to in paragraph 2(i) above and, simultaneously or at a later stage (in any case by 11 July 1985 at the latest), denounce the Convention as ratified on behalf of the Member State in question on 4 March 1953 and accede thereto with the reservations included in the letter from the Acting Minister for External Relations dated 25 August 1981, the said denunciation and accession to take effect on 12 January 1986.

7. Alternatively, the Government might want to consider circulation by the Secretary-General, in his capacity as the depositary, to all parties concerned, of the proposal contained in the Acting Minister's letter. In the absence of objections by any of those States within 90 days from the date of circulation, the new reservations would be deemed to have been accepted and would be deposited as part of the Member State's ratification of the Genocide Convention, it being understood that the withdrawal of the original objections would take effect as at 15 September 1981, the date of receipt of the Acting Minister's letter of 25 August 1981.

13 November 1981

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11. CONVENTION SUR LA PRÉVENTION ET LA RÉPRESSION DES INFRACTIONS CONTRE LES PERSONNES JOUISSANT D'UNE PROTECTION INTERNATIONALE, Y COMPRIS LES AGENTS DIPLOMATIQUES — QUESTION DE SAVOIR SI LES COMMUNICATIONS QUE LES ETATS PARTIES SONT TENUS D'ADRESSER AU SECRÉTAIRE GÉNÉRAL EN VERTU DE L'ARTICLE 11 CONCERNANT LE RÉSULTAT DE PROCÉDURES PÉNALES ENTRENT DANS LE CADRE DES FONCTIONS DÉPOSITAIRES

Memorandum intérieur

1. L'article 11 de la Convention sur la prévention et la répression des infractions contre les personnes jouissant d'une protection internationale, y compris les agents diplomatiques[20] se lit ainsi :

"L'Etat partie dans lequel une action pénale a été engagée contre l'auteur présumé de l'infraction en communique le résultat définitif au Secrétaire général de l'Organisation des Nations Unies, qui en informe les autres Etats parties."

En exécution de cet article, un Etat partie a communiqué au Secrétaire général par note n° 501/80 du 7 janvier 1981 un rapport sur une procédure pénale intervenue sur son territoire.

2. Cette communication est la première de ce genre, et la question qui se pose à cet égard est de déterminer quel est le service du Secrétariat auquel incombera la responsabilité de diffuser aux Etats parties cette catégorie d'information. Il est au surplus probable que dans l'avenir le Secrétaire général recevra d'autres communications semblables, en vertu soit de l'article 11 soit des paragraphes 1 des articles 5 et 6 de la Convention.

3. La circulation de ce genre de communications ne paraît pas être du ressort des fonctions dépositaires, comme le sont par exemple les notifications relatives aux signatures, aux ratifications ou à l'entrée en vigueur ou celles qui visent la désignation d'autorités. Ces communications "d'information" ne modifient pas le statut ou la portée de la Convention; elles se rapportent davantage à des fonctions administratives qui, en général, incombent au service administratif chargé du contrôle de l'exécution d'une convention. Ainsi en va-t-il, par exemple, de la communication des rapports sur les droits de l'homme en vertu des Pactes internationaux relatifs aux droits de l'homme[21], de la communication de renseignements sur les objets spatiaux lancés sur orbite en vertu de la Convention sur l'immatriculation des objets lancés dans l'espace extra-atmosphérique[22] et de la diffusion des renseignements relatifs à la Convention internationale sur l'élimination et la répression du crime d'*apartheid*[23].

19 janvier 1981

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12. Imposition by a Member State of clearance procedures regarding United Nations materials — Immunity of the United Nations from censorship

Memorandum to the Director, External Relations Division, Department of Public Information

1. You have requested a legal opinion on the imposition by a Member State of clearance procedures regarding United Nations materials emanating from a United Nations Information Centre.

2. The position of the United Nations with regard to the "clearance" of its publications or any official materials is firmly rooted in the provisions of the Charter and the Convention on the Privileges and Immunities of the United Nations to which the Member State concerned is a party.

3. In general terms, Article 100 of the Charter provides that in the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization, while Member States, for their part, undertake to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities.

4. A number of provisions of the Convention on the Privileges and Immunities of the United Nations directly or indirectly support the position that United Nations materials cannot be submitted to any form of prior censorship. Section 3 provides that the property and assets of the organization shall be immune from any form of interference by executive, administrative, judicial or legislative action and Section 4 provides that all documents belonging to or held by the United Nations shall be inviolable.

5. It is clear from the foregoing that, as a matter of law, the United Nations cannot be subjected to censorship by a Member State. Furthermore, it may be remarked that in practice the United Nations has rarely, if at all, been confronted with the problem of censorship.

29 October 1981

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13. Rules governing the use and display of distinctive emblems by United Nations organs — Practice of the United Nations Children's Fund (UNICEF) in this regard

Memorandum to the Special Assistant to the Executive Director, United Nations Children's Fund

1. The present emblem of the United Nations was adopted by the General Assembly in its resolution 92 (I) of 7 December 1946. By that resolution the Assembly recognized "that it is desirable to approve a distinctive emblem of the United Nations and to authorize its use for the

official seal of the Organization", which emblem was to be "the emblem and distinctive sign of the United Nations". This resolution, by its wording, appears to preclude other emblems or "distinctive signs" from replacing, in official use, the existing United Nations emblem.

2. In order to assist United Nations organs (UNICEF is a subsidiary organ of the General Assembly and is an integral part of the United Nations) and those concerned with the issuance of documents and publications, an Administrative Instruction has been issued which regulates the use of the United Nations emblem on documents and publications (see document ST/AI/189/Add.21). Part II of this Administrative Instruction contains detailed rules governing the use of emblems by United Nations bodies and organs such as UNICEF. The Administrative Instruction specifically recognizes and permits the use of distinctive emblems by United Nations bodies as follows:

> "Such bodies may also use distinctive emblems of their own, subject to the following considerations:
>
> "(*a*) On official documents, which must bear the United Nations emblem, the distinctive emblem of the United Nations body may be used in conjunction with the United Nations emblem, provided that the latter is given greater typographical prominence;
>
> "(*b*) On non-official documents, the distinctive emblem may be used alone; it should not be combined with the United Nations emblem."

The Instruction thus permits current UNICEF practice, in particular, use of the UNICEF emblem alone on promotional material.

3. The Administrative Instruction does not deal with the use of emblems on official correspondence but since the Instruction is an elaboration of the general principles contained in resolution 92 (I), the principles it contains apply equally well to official correspondence. Thus UNICEF could continue its present practice of using only the United Nations emblem on its letterhead or it could use the United Nations emblem in conjunction with its own distinctive emblem, provided that the former emblem is given greater typographical prominence.

4. Insofar as UNICEF is concerned about regional variations in the use of its emblem, the Executive Director has, of course, the authority to direct that UNICEF offices comply with the principles contained in General Assembly resolution 92 (I), conveniently elaborated in the Administrative Instruction. The Executive Director could direct that UNICEF use only one emblem or he could conceivably permit regional variations, provided that in each region the use of the distinctive emblem complies with resolution 92 (I).

5. Insofar as use of emblems by UNICEF National Committees — which are not United Nations bodies — is concerned, the question is a little more complex in that National Committees are not part of UNICEF and thus not directly subject to General Assembly resolution 92 (I) and the Administrative Instruction. However, under the basic Recognition Agreement with the National Committees, each Committee agrees to conduct its operations in harmony with UNICEF's policies as established by the Executive Board and administered by the Executive Director (article 5). This would enable UNICEF to require uniformity in the use of its emblem by National Committees. We would imagine that it might be useful to establish a set of guidelines for the use of the UNICEF emblem along the lines of the guidelines of the International Year of the Child (IYC) emblem.

11 November 1981

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14. Bidding for a United Nations construction project in the territory of a Member State — Position to be taken by the Organization in respect of companies whose practice is to bring their work force from their home country

Memorandum to the Assistant Secretary-General for General Services

1. Your memorandum of 28 October asks advice on the position to be taken by the United Nations in respect of companies invited to bid on a United Nations construction project in the

territory of a Member State and whose practice is to bring their entire work force from their home country.

2. Neither the Headquarters Agreement between the United Nations and the Member State concerned nor the Convention on the Privileges and Immunities of the United Nations obligates the State in question to issue entry permits or to accord any other special status or immunities to non-local employees outside the usual categories of United Nations officials, experts on mission and persons otherwise on business connected with the United Nations or other related organizations. It is relevant to note that, in the drafting stage of the relevant Headquarters Agreement, suggestions were made by the United Nations to include a provision covering contractors and their employees, but none appears in the actual text (Such a provision is included in UNDP agreements for technical assistance, but not in most host country agreements).

3. With regard to local law — which is therefore applicable — it appears that the entry of non-local persons intending to work there is restricted to specified business and professional categories not covering all envisaged construction personnel but only architects or quantity surveyors, engineers and accountants.

4. In the circumstances, apart from the fact that the use of a local work force would be more beneficial to the State concerned, and that the presence of a foreign work force for the United Nations building project might cause friction disadvantageous to United Nations' relations with the host country, it is reasonable to anticipate that a contractor would encounter delays and difficulties in securing permits for many of its workers and also to bear in mind that the United Nations would have no legal basis for requesting the Government to facilitate their entry. This is certainly relevant to an asessment of the contractor's ability to perform.

5. In our view, problems incidental to a bidder's proposed importation into the host country of a substantial number of non-local workers in probable competition with local personnel are factors properly to be weighed with price, financial standing and professional competition in deciding on the award.

5 November 1981

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15. INVITATION TO BID ISSUED BY A UNITED NATIONS ORGAN — DEMAND FOR ARBITRATION SUBMITTED BY A CORPORATION WHOSE OFFERS WERE NOT ACCEPTED — FAILING WRITTEN ACCEPTANCE OF THE BID, THERE IS NO CONTRACT AND THEREFORE NO AGREEMENT TO ARBITRATE AND NO BASIS FOR A DEMAND FOR ARBITRATION

Extracts from letters addressed to the Administrator of a commercial arbitration tribunal

I

I refer to your Notice of Filing dates 25 August 1981 concerning the Demand for Arbitration of 14 August 1981 made to [name of a subsidiary organ of the United Nations] by [name of a corporation] for arbitration of a disappointed bidder's claim under the name of [a commercial arbitration tribunal]. The Demand for Arbitration and the Notice of Filing concerning the appointment of three arbitrators were received by the organ concerned on 17 August 1981 and 28 August 1981, respectively.

The matter has been referred to the Office of Legal Affairs of the United Nations for representation.

. . .

The Demand for Arbitration submitted is based on invitations to Bid which constitute mere "offers" by the corporation concerned as is indicated by the following phrase which appears at the bottom of the Invitation to Bid form:

> "BID . . . In compliance with the above Invitation to Bid, and subject to all the conditions thereof, the undersigned *offers* and agrees, *if this bid be accepted* within 10 calendar days from the date of the opening, to furnish *any* or all of the items upon which prices are quoted,

at the prices set opposite each item, within the time and at the place indicated." (Emphasis added).

The "offers" of the corporation concerned were not accepted. Thus, a fundamental defect in the Demand for Arbitration appears on the face of the documents presently before you. It may be noted that the claimant cites in its Demand for Arbitration the two *bid opening* dates of 6 July 1979 and 2 June 1980, respectively, as the dates of a "written contract" supporting its allegation that it is "(a) party to an arbitration agreement contained in a written contract . . . providing for arbitration . . .".

The written agreements alleged in the claimant's Demand for Arbitration are non-existent since the bid offers were never accepted. Moreover, in terms of the Demand for Arbitration, the corportion concerned claims not as a contractor but as a disappointed bidder by protesting awards to another (lower) bidder.

It is the United Nations policy to make provision in its contracts for arbitration of disputes arising thereunder. In addition, certain disputes other than disputes covered by such arbitration clauses in contracts may be submitted for arbitration on an *ad hoc* basis. Such submission is intended as an alternative to voluntary submission by the United Nations to judicial process in a particular case.

In the present case the Demand for Arbitration is made by a disappointed bidder whose alleged contract right to arbitration is not based on any written contracts and whose standing to contest the contract awards to another (and lower) bidder is not conceded. Nonetheless, in order to accord the corporation concerned the opportunity to present its claim before an impartial body, the United Nations is prepared to submit to final and binding arbitration without prejudice, however, to any legal position — either preliminary or on the merits — which either party may wish to maintain in the arbitration. . . .

4 September 1981

II

. . .

Our present letter is intended to reiterate the position we expressed in our letter of 4 September 1981 and to request appropriate consideration by your respective offices of the question whether the claimant's Amended Demand of 17 September 1981 is property before the [commercial arbitral tribunal] absent an agreement to arbitrate this particular claim.

There was a fundamental defect in the original Demand, namely, the assumption that a bid can give rise to a contractual right to arbitration. The Amended Demand of 17 September 1981 does not cure that fundamental defect. The Amended Demand, in fact, now emphasizes that defect because the claimant has substituted the word "bid" for the word "contract" in the first line of the Amended Demand. Accordingly, you will see that the claimant's allegation of a "written *bid* dated 2 June 1980, providing for arbitration" does not comply with your Rules. A bid can not give rise to a contractual right to arbitration.

The claimant also refers in its letter of 15 September 1981 to Condition 8 on the reverse of the Invitation to Bid form. Condition 8 provides, *inter alia,* that "Any claim or controversy arising out of or relating to *this* or any *contract* resulting herefrom, or the breach thereof, shall be settled by arbitration . . .". (Emphasis added). The claimant contends in the third paragraph of its letter of 15 September that the demonstrative adjective "this" underlined above means "(*i.e.*, the bid itself)". But, we would point out that the demonstrative adjective "this" modified the word "contract" and a "contract" does not result until the bid (*i.e.*, the offer) is accepted.

We wish to emphasize that the standard form document describes three successive stages in the contracting process which is to be completed only by (3) the acceptance of (2) the bid offered by the would-be contractor in response to (1) the Invitation to Bid. The contract comes into effect only after written acceptance of the bid. (As you will note it is the Bid which contains the arbitration provision as one of the Conditions printed on the reverse side of the Invitation. However, the arbitration provision remains a part of the offer until the offer is accepted.)

Thus, absent a submission agreement as proposed in our letter of 4 September 1981, there is no basis on which the [commercial arbitral tribunal] can proceed with an arbitration.

Contract law precludes the claimant's position that its offer gives rise to a contractual obligation to arbitrate. Moreover, such a position on the part of the claimant is obviously inconsistent with the statement contained in the Invitation to Bid that [the United Nations organ concerned] may "reject any and all bids" when it is in its interest to do so. The Instructions to Bidders which stipulates the procedure for the award of contracts on the reverse of the Invitation to Bid form do not contain any reference to arbitration but do emphasize right of the organ concerned to reject any and all bids as follows:

> "8. Award or rejection of bids. The contract will be awarded to the lowest responsible bidder complying with the conditions and specifications of the invitation for bids provided his bid is reasonable and it is to the interest of [the organ concerned] to accept it. The Bidder to whom the award is made will be notified at the earliest possible date. *[The organ concerned], however, reserves the right to reject any and all bids and to waive any informality in the bid received whenever such rejection or waiver is in [its] interest* . . . It also reserves the right to reject the bid of a bidder who has previously failed to perform properly or complete on time contracts of a similar nature, or a bid of a bidder who in [its] opinion is not in a position to perform the contract."

There is, for these reasons, no basis, in the absence of a submission agreement, for the [commercial arbitral tribunal] to find even a colorable contractual basis for the claimant's present Demand for Arbitration.

Accordingly, [the organ concerned] must continue to maintain its position that, in the absence of a submission agreement there is no agreement to arbitrate and thus there is no valid basis for the claimant's request that the [commercial arbitral tribunal] should initiate administration of an arbitration. It, of course, reserves its other grounds for denial, including the claimant's lack of standing to contest the award of contracts by [the organ concerned].

30 September 1981

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16. UNITED NATIONS PEACE-KEEPING FORCE IN CYPRUS — LIABILITY INSURANCE FOR CONTINGENT-OWNED VEHICLES

Memorandum to the Director, Field Operations Division, Office of General Services

1. I refer to your memorandum of 3 August 1981 by which you requested our views as to the obligation of the United Nations to insure against third party liability Austrian contingent-owned vehicles in UNFICYP.

2. Vehicles assigned for service in a peace-keeping force, whether owned by the United Nations or by a Government, are operated on behalf and under the control of the United Nations. All vehicles carry a distinctive United Nations identification mark and license (paragraph 21 of the Agreement concerning the status of the Force).[24] Relevant also is paragraph 32 of the Regulations of UNFICYP[25] according to which "orders concerning driving of service vehicles and permits or licenses for such operation shall be issued by the Commander. Any damage or injuries caused by those vehicles to third parties therefore engage the responsibility of the United Nations and third parties may claim compensation from the United Nations. The United Nations thus has an insurance interest in vehicles of its peace-keeping fleet which are contingent-owned.

3. The actual decision of whether, and up to what limit, to carry third party liability insurance for contingent-owned vehciles in UNFICYP is to a large extent an administrative and financial one, which depends on the extent to which the United Nations wishes to be self-insured, as well as on possible arrangements which may have been agreed upon between the United Nations and specific contributing States by which the vehicles are owned. In the past, this Office has always advised in favour of having: (*a*) third-party liability insurance for United Nations-operated vehicles

in view of the high financial risk involved in self-insurance and (*b*) appropriate United Nations settlement procedures to replace the void stemming from national legal process of the United Nations and its drivers.

4. Reference should also be made to General Assembly resolution XII.6 E of 13 February 1946 by which the Secretary-General was instructed "to ensure that the drivers of all official motor-cars of the United Nations . . . shall be properly insured against third party risks".

5. From the documentation available to us there also seem to be no special arrangements between the United Nations and Austria with regard to the participation in UNFICYP which would render unnecessary the placing of insurance against third party risks of contingent-owned vehicles. Indeed, paragraph 16 of the Regulations of UNFICYP provides that "within the limits of available voluntary contributions [the Secretary-General] shall make provisions for the settlement of any claims arising with respect to the Force that are not settled by the Governments providing contingents or the Government of Cyprus"; such "settlement" could include settlement by an insurer pursuant to a contract with the United Nations.

6. In summary, although we see no legal obligation on the United Nations to ensure contingent-owned vehicles against third party liability, we see no legal objection to the United Nations doing so, and, given the Organization's liability for third party claims arising out of the operation of such vehicles, you may consider it advisable to ensure them.

12 August 1981

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17. CHARGE LEVIED BY A MEMBER STATE IN CONNECTION WITH CERTAIN TRANSACTIONS BY UNITED NATIONS OFFICES AND STAFF — APPLICABLE TREATY PROVISIONS — EXEMPTION OF THE UNITED NATIONS FROM ALL DIRECT TAXES UNDER DECISION 7 (*a*) OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS — MEANING OF THE TERM "PUBLIC UTILITY" AS CONTAINED IN THAT SECTION — QUESTION WHETHER THE IMPOSITION BY A MEMBER STATE OF A SPECIAL TAX ON THE TRANSACTIONS OF UNITED NATIONS OFFICIALS IS CONSONANT WITH RELEVANT INTERNATIONAL INSTRUMENTS

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

1. I wish to refer to your memorandum dated 9 April 1981 requesting the comments of the Office of Legal Affairs on the decision of the Ministry of Foreign Affairs of [name of a Member State] to levy a 10 per cent charge on services rendered in connexion with certain transactions by United Nations offices or staff. Your request has been referred to the Office of the Legal Counsel for reply.

2. As far as the legal aspects of this question are concerned I wish to refer to the Agreement between the country concerned and the United Nations Development Programme concerning assistance by the UNDP to the Government, signed on 8 November 1976 (the "Standard Basic Assistance Agreement"[26] hereinafter referred to as "the Agreement"). I also wish to refer to the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946 (hereinafter referred to as "the Convention").

3. The Agreement which entered into force on 21 October 1978 provides in its Article IX, paragraph 1, that the Government shall apply the Convention "to the United Nations, and its organs, including the UNDP and United Nations subsidiary organs acting as UNDP executing agencies, their property, funds and assets, and to their officials, including the resident representatives and other members of the UNDP mission in the country", and paragraph 3 of Article IX further provides that "Members of the UNDP mission in the country shall be granted such additional privileges and immunities as may be necessary for the effective exercise by the mission of its functions."

4. As far as transactions by the United Nations, including the UNDP, are concerned, the applicable provision is contained in Section 7 (*a*) of the Convention. This provision reads:

"The United Nations, its assets, income and other property shall be:

"(*a*) Exempt from all direct taxes; it is understood, however, that the United Nations will not claim exemption from taxes which are, in fact, no more than charges for public utility services".

In this connexion it is clear from the description of the "service fee" contained in the Foreign Ministry's circular No. 4/100/56/2/42, of 7 March 1981, and in the letter dated 24 March 1981 from the Resident Representative that the Diplomatic Services Office is not a public utility as this expression is used in the Convention. The term "public utility" in Section 7 (*a*) ordinarily is understood to mean public corporation or agencies providing such services as water, gas or electricity for consumption by the United Nations. The Diplomatic Services Office, however, appears to be a unit of the Foreign Ministry, established to serve the policies and purposes of the Government. Accordingly, the amount of the "service fee" is not calculated on the basis of the actual services rendered, but is levied directly on the United Nations as a tax for the purpose of defraying the administrative expenses incurred by the Government in connexion with its Diplomatic Services Office. Moreover, since it appears to be mandatory under local regulations that the United Nations conduct its transactions through the Diplomatic Services Office, it becomes even more clear that the "service fee" constitutes a direct tax on the United Nations. For the foregoing reasons, it is the position of the Office of Legal Affairs that exemption should be claimed under Section 7 (*a*) of the Convention in respect of all transactions by the United Nations, whether sale, purchase or lease of goods or services.

5. Turning now to transactions by United Nations officials acting in a non-official or private capacity, it is not possible to base a claim to exemption from the "service fee" on any explicit provision of the Convention which grants exemption to officials (except those with diplomatic status referred to in Section 19) merely "from taxation on the salaries and emoluments paid to them by the United Nations". Nevertheless, it is at least arguable that the drafters of the Convention did not foresee — in 1946 — that a Member State might take steps to levy a special charge or tax on transactions by international civil servants serving in the Member State in question, and that if the possibility had been foreseen, an explicit exemption would have been included in the Convention. Thus it may be said with considerable justification that imposition of a special fee or tax on United Nations officials is contrary to the intent of the Convention which is to give effect, *inter alia,* to the provision in Article 105 of the United Nations Charter that officials of the United Nations shall enjoy in the territory of each Member State such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization. In respect, in particular, of United Nations officials attached to UNDP activities it further appears that levying of the special "service fee" is at variance with the provision, in Article IX, paragraph 3 of the Agreement, referred to in paragraph 2 above, which requires the Government to grant such privileges and immunities — in addition to those provided by the Convention — as may be necessary for the effective exercise by the UNDP mission of its functions. Consequently, the Office of Legal Affairs is of the view that exemption should be claimed also in respect of transactions by United Nations officials on the grounds that the "service fee" interferes with the effective exercise by the officials of their functions in the country concerned.

8 June 1981

18. Privileges and immunities of officials of the United Nations and the specialized agencies — Concept of functional immunity — Right of the Secretary-General under the international instruments in force to independently determine, in case a staff member is being subjected to legal process, whether an official act is involved — Meaning of the term "officer" in the Conventions on the Privileges and Immunities of the United Nations and of the Specialized Agencies

Statement made by the Legal Counsel at the 59th meeting of the Fifth Committee of the General Assembly on 1 December 1981

1. The Legal Counsel, referring to the report of the Secretary-General on respect for the privileges and immunities of officials of the United Nations and the specialized agencies (A/C.5/36/31), said he would like to thank the members of the Committee for the expressions of concern regarding respect for the privileges and immunities of international officials and the affirmation that the international instruments dealing with the status, privileges and immunities of such officials must be strictly respected in order to ensure the independence and integrity of the international civil service. The increase in membership in international organizations and the corresponding increase in the number of States which were hosts to international organizations and their subsidiary bodies gave added importance to the question of immunities. Conditions in any one duty station had an impact on all the staff of the international organizations, wherever they might serve, and directly affected the morale and efficiency of the international civil service.

2. The law of international immunities, which was based principally on the United Nations Charter, the Conventions on the Privileges and Immunities of the United Nations and of the Specialized Agencies and other instruments referred to in paragraph 3 of the Secretary-General's report, distinguished between diplomatic and functional immunities. The very great majority of officials of the United Nations and specialized agencies were accorded functional rather than diplomatic immunities. That distinction was significant both from the point of view of the scope and content of the immunity and because of the fundamentally different character of the two types of immunity. While diplomatic immunity attached to the person, the functional immunity of international officials was organizational. Thus, section 20 of the Convention on the Privileges and Immunities of the United Nations provided that "Privileges and immunities are granted to officials of the United Nations in the interests of the United Nations and not for the personal benefit of the individuals themselves". An identical provision was contained in the Convention on the Privileges and Immunities of the Specialized Agencies.

3. That distinction was essential to an understanding of the nature of the violation of immunities reported by the Secretary-General in document A/C.5/36/31. The various cases referred to in the report involved a breach of the organizations' rights. For example, where violations involving immunity from legal process — the type of case most frequently cited — were concerned, the substance of the Secretary-General's protest in such cases was not that a particular staff member had been subjected to legal process but that he had been prevented from exercising his right under the international instruments in force to independently determine whether or not an official act had been involved. Where a determination was made that no official act was involved, the Secretary-General had, by the terms of the Convention on Privileges and Immunities of the United Nations, both the right and the duty to waive the immunity of any official.

4. As the Secretary-General stated in his report, Member States had on the whole respected the Organization's right to functional protection, which had been clearly enunciated by the International Court of Justice in its advisory opinion of 1949 in the Bernadotte[27] case and which now formed part of generally accepted international law. It was not the intent of the provisions regarding immunity from legal process or the principle of functional protection to place officials above the law but to ensure, before any action was taken against them, that no official act was involved and that no interest of the Organization was prejudiced.

5. A second question concerned who was entitled to privileges and immunities. It had been suggested by some delegations that locally recruited staff members were not officials of the United Nations and specialized agencies for the purpose of privileges and immunities and that they were

first and foremost nationals of the country concerned and, as such, were subject to its laws. On that point, he would like to clarify the meaning of the term "officials" as it was used in the Conventions. Section 17 of the Convention on the Privileges and Immunities of the United Nations stated that the Secretary-General would specify the categories of officials to which articles V and VII of the Convention should apply. The Convention on the Privileges and Immunities of the Specialized Agencies and the IAEA Agreement contained similar provisions. In 1946, the General Assembly had adopted resolution 76 (I), in which it had approved the granting of the privileges and immunities referred to in articles V and VII of the Convention on the Privileges and Immunities of the United Nations to all members of the staff of the United Nations, with the exception of those who were recruited locally and were assigned to hourly rates. The specialized agencies and IAEA had taken similar actions. Consequently, all staff members regardless of rank, nationality or place of recruitment, whether Professional or General Service, were considered as officials of the organizations for the purposes of privileges and immunities except for those who were both locally recruited and employed at hourly rates. United Nations locally recruited staff such as clerks, secretaries and drivers were in nearly every case paid according to established salary or wage scales and not at hourly rates and they were, therefore, covered by the terms of General Assembly resolution 76 (I).

6. With regard to the discrepancy which existed between the régime applicable at United Nations Headquarters in New York and that which was applicable in virtually all other duty stations, including the headquarters seats in Geneva, Nairobi, Vienna and the seats of the regional economic commissions, it was perfectly true, as one delegation had pointed out, that in New York the range of staff members to whom diplomatic privileges and immunities were accorded was narrower than the range in other duty stations. The more restrictive régime, which was patterned exclusively on the provisions of the Conventions on Privileges and Immunities adopted in 1946 and 1947, had been made applicable at United Nations Headquarters in New York at a time when it had been anticipated that the staff of the United Nations would be largely concentrated in New York and a more liberal régime would have resulted in very large numbers of staff members being assimilated to diplomatic personnel. Although that discrepancy in treatment was undesirable and it would have been preferable to obtain equality of treatment for staff members regardless of their duty station, it should be noted that in absolute terms the number of staff members having diplomatic privileges and immunities in New York and the other major duty stations was roughly comparable.

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19. LEGAL PROVISIONS GOVERNING THE QUESTION OF IMPORTATION OF HOUSEHOLD EFFECTS AND AUTOMOBILES OF UNITED NATIONS OFFICIALS ASSIGNED TO A REGIONAL ECONOMIC COMMISSION — QUESTION WHETHER FIELD SERVICE OFFICERS ARE OFFICIALS WITHIN THE MEANING OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS AND OF THE RELEVANT HEADQUARTERS AGREEMENT — MEANING OF THE TERM "FURNITURE AND EFFECTS" UNDER THE ABOVE-MENTIONED INSTRUMENTS

Note verbale to the Permanent Representative of a Member State

The Legal Counsel of the United Nations presents his compliments to the Permanent Representative of [name of a Member State] to the United Nations and has the honour to refer to the status, privileges and immunities of United Nations Field Service Officers assigned to the Economic and Social Commission for Asia and the Pacific in Bangkok. By letters dated 20 November 1980 and 20 January 1981 the Director of the Office of the Legal Counsel brought to the attention of the Permanent Representative certain problems encountered by Field Service personnel regarding, in particular, the importation of their household effects including automobiles. The Legal Counsel is dismayed to learn that despite these earlier interventions these problems have not been resolved and that discussions between the ESCAP Secretariat and the Ministry of Foreign Affairs have reached an impasse. The Legal Counsel wishes, therefore, to take the opportunity to set out comprehensively the legal issues in the hope that the authorities concerned will be able to resolve

this matter in accordance with the law and practice of United Nations privileges and immunities.

The relevant international legal provisions governing the question of importation of household effects and automobiles of United Nations officials in [the Member State concerned] are contained in Section 18 (*g*) of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946[28] and Section 17 (*i*) of the ECAFE Headquarters Agreement of 26 May 1954.[29] Section 18 (*g*) provides that "Officials of the United Nations shall: . . . Have the right to import free of duty their furniture and effects at the time of first taking up their post in the country in question"; Section 17 (*i*) provides that "officials of the ECAFE shall enjoy . . . the following privileges and immunities: The right to import, free of duty and other levies, prohibitions and restrictions on imports, their furniture and effects within six months after first taking up their post . . . ; the same regulations shall apply in the case of importation, transfer and replacement of automobiles as are in force for the resident members of diplomatic missions of comparable rank."

In relation to the applicability of these provisions to the Field Service Officers in question, the following questions would appear to be legally relevant:

(i) Are Field Service Officers "officials" within the meaning of Sections 18 (*g*) and 17 (*i*) of the agreements cited above?

(ii) What is the meaning of the expression "furniture and effects" in Section 18 (*g*) of the Convention and Section 17 (*i*) of the Headquarters Agreement?

(iii) Do Section 18 (*g*) of the Convention and Section 17 (*i*) of the Headquarters Agreement relate to the same subject matter and if so are they complementary or in absolute conflict?

(iv) If there is a difference of interpretation or application of these agreements between the United Nations and the host country concerned how shall this difference be resolved

In regard to the first of these questions, in view of the Legal Counsel there is no doubt in law or in practice that Field Service Officers are "officials" within the meaning of Section 18 (*g*) and Section 17 (*i*). The term "officials" was not defined in the Convention itself but by the General Assembly which in resolution 76 (I) of 7 December 1946 approved "the granting of the privileges and immunities referred to in articles V and VII of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946, to all members of the staff of the United Nations, with the exception of those who are recruited locally and are assigned to hourly rates". The key expression here is "all members of the staff of the United Nations". Field Service Officers are staff members of the United Nations, recruited in the same way as all other staff members and paid from the regular budget of the United Nations. The definition contained in resolution 76 (I) is confirmed by the ECAFE Headquarters Agreement which provides the following definition in Article 1 (*h*): "The expression 'Officials of the ECAFE' means all staff members of the United Nations Secretariat, other than manual workers locally recruited, who are at any time working with the ECAFE, and whose names are communicated from time to time to the appropriate . . . authorities". In the light of the foregoing, the Legal Counsel is of the opinion that Sections 18 (*g*) and 17 (*i*) of the agreements apply in full to Field Service Officers wherever they are assigned.

The next question to arise is the meaning of the expression "furniture and effects" which, it is to be noted, is used in both Section 18 (*g*) and Section 17 (*i*). The expression is not expressly defined in either instrument but the United Nations has consistently taken the position that the term "effects" included automobiles and that a United Nations official, therefore, has the right to import his automobile free of customs duty at the time of first taking up his post whether at United Nations Headquarters or at any other duty station. This position is based upon logic and practical necessity and has been accepted without exception by Member States. This is confirmed by the fact that more recent Economic Commission Headquarters Agreements such as the Agreement between the United Nations and Iraq relating to the Headquarters of the Economic Commission for Western Asia (ECWA) have expressly incorporated such a provision. Article 8, 1 (*j*) of the ECWA agreement accords to officials of the Commission the personal right to import a car free of duty once every three years. Furthermore, Section 17 (*i*) of the ECAFE Agreement is clear in authorizing the importation of automobiles and, it should be noted, it does so in a provision dealing with furniture and effects. The clear and unambiguous meaning of this provision is that ECAFE officials shall

have the right to import automobiles free of duty. The only distinction between automobiles and furniture and other effects is that in the case of automobiles the regulations in force for the resident members of diplomatic missions of comparable rank shall apply. Thus, the second part of Section 17 (*i*) of the ECAFE Agreement does not modify the *substance* of the rule which is contained in the first part of Section 17 (*i*) and in Section 18 (*g*) of the Convention but only relates to the *procedures* to be followed in implementing the rule.

In the opinion of the Legal Counsel, Sections 18 (*g*) and 17 (*i*) unequivocally relate to the same subject matter, that is the importation of furniture and effects including automobiles, and consequently should be treated as complementary in accordance with Section 25 (*b*) of the ECAFE Agreement. There is no basis in law or in practice for treating these provisions as being in absolute conflict. But even if, for the sake of argument, the provisions are deemed to be in absolute conflict, this would merely mean that Section 17 (*i*) would prevail and as has already been explained, all that this provision states is that the procedural aspects of importation of an automobile shall be governed by the regulations in force for diplomatic personnel of comparable rank. It is to be noted that the expression used is "comparable", not "equivalent", rank which is explained by the fact that United Nations officials, including Field Service Officers, are, by definition, not diplomats but international officials.

The Legal Counsel trusts that this comprehensive analysis will enable the appropriate authorities to promptly resolve this problem which has caused considerable inconvenience and expense to the Organization and to the officials concerned. If no resolution of the problem is forthcoming, the Legal Counsel would be of the opinion that there exists a difference of interpretation or application of the instruments in question which would have to be settled in accordance with the procedures foreseen in Section 30 of the Convention on the Privileges and Immunities of the United Nations. Since the matter is also one which falls within the scope of operative paragraph 3 of General Assembly resolution 35/212, the Legal Counsel would be obliged if he could receive an early response.

3 June 1981

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20. Question whether the establishment of a reporting link between the Secretariat of the International Narcotics Control Board and the Secretariat of the United Nations on substantive matters would be in conformity with the character and status of the INCB secretariat

Memorandum to the Director, Administrative Management Service, Department of Administration, Finance and Management

1. I wish to refer to your memorandum of 30 October 1981 requesting the comments of the Office of Legal Affairs on the status of the International Narcotics Control Board Secretariat of the United Nations in particular as it relates to the draft recommendation of the Administrative Management Service that a reporting link be established between the secretariat of the INCB and Headquarters for substantive and administrative matters. The INCB secretariat has questioned the legal basis for this recommendation insofar as it relates to substantive matters.

2. The status of the secretariat of the INCB within the United Nations may be defined in the light of the status of the INCB itself, the body which that secretariat services. The INCB is an organ established by the Single Convention on Narcotic Drugs of 1961,[30] that is to say that legislatively, it is a treaty organ distinct from the United Nations. Historically the INCB is the successor of the Permanent Central Board and the Drug Supervisory Body which were independent League of Nations-related treaty organs. In establishing the INCB, the parties to the 1961 Convention were, therefore, constrained, partly for historical reasons and partly for substantive reasons, to create an independent body even though for certain administrative purposes it was desirable to establish links with the United Nations.

3. The status of the secretariat of the INCB within the United Nations is, therefore, directly related to the character and status of the Board. In addition to being a treaty organ distinct from the United Nations (States parties to the Convention are not necessarily members of the United Nations), the INCB is considered to be a quasi-judicial body and the Economic and Social Council is expressly enjoined by Article 9, paragraph 2, of the 1961 Convention "to ensure the full technical independence of the Board in carrying out its functions". The importance of this independence is fully recognized by the Administrative Management Service draft report which cites the conclusions reached by an internal management survey conducted in 1965 to the effect that integration of the secretariats of the Commission and the Board should take place "subject to such special measures as would be deemed advisable to secure the full technical independence of INCB" and which, after reviewing the legislative history, particularly Economic and Social Council resolutions 1196 (XLII) of 16 May 1967, concludes that "the non-management considerations which justified the establishment of a separate secretariat for the INCB still prevail" and "recommends that the INCB secretariat should be retained in its present form".

4. The factors cited by Administrative Management Service regarding the independence of the Board and a separate secretariat apply *a fortiori* to substantive reporting procedures.

5. In conclusion, the Office of Legal Affairs shares the opinion expressed by the secretariat of the INCB that the Administrative Management Service recommendation to establish a reporting link between it and Headquarters on substantive matters would not be in conformity with the character and status of that Secretariat as provided for by the 1961 Single Convention on Narcotic Drugs and that, consequently, the Secretary-General would not be in a position to legally implement the recommendation.

23 November 1981

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21. "GROSS NEGLIGENCE" ON THE PART OF A STAFF MEMBER, RESULTING IN DAMAGE TO UNITED NATIONS PROPERTY — CRITERIA TO BE APPLIED IN DETERMINING WHETHER GROSS NEGLIGENCE IS INVOLVED

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

1. I refer to our correspondence concerning the question of the basis on which United Nations Property Survey Boards could conclude that damage to United Nations property is attributable to "gross negligence" rather than to "ordinary" negligence or to circumstances involving no fault.

. . .

3. As you know, the question of "gross negligence" arises in cases where a staff member, or a member of a peace-keeping contingent, has caused damage to United Nations property. (The greater percentage of such cases involves vehicles.) If the damage is found attributable to "gross negligence", a payment is required of the staff member or of the government providing the peacekeeping contingent. If "gross negligence" is not found, no payment is required of the staff member or of the government providing the peacekeeping contingent for the reason that the damage is then properly regarded as a normal operating cost to be covered by insurance or absorbed by the United Nations if self-insurance be the economical course.

4. It is relatively easy to find the presence or absence of "gross negligence" in a clear case. There would be "gross negligence", for example, where a vehicle is driven at an extremely high speed because of the drunkenness of its driver. There would be no "gross negligence" where a vehicle is driven at an extremely high speed because of real emergency.

5. More frequently, the conduct and circumstances which the Property Survey board has to evaluate are less clear cut inasmuch as most accidents are the result of "negligence" but not "gross negligence" which is, by definition, extraordinary.

6. After much thought and comparative law research, we have concluded that it would be appropriate and feasible to offer only general advice to assist the Property Survey Board in performing its function and reaching its determination in particular cases:

(*a*) "Gross negligence" is negligence of a very high degree involving wilfulness, recklessness or drunkenness and, in consequence, manifest disregard for the safety of life and property.[31]

(*b*) It is necessary that all the facts of a case, including all mitigating circumstances, be considered.

(*c*) "Necessity" may excuse conduct that might otherwise be regarded as "gross negligence".

(*d*) Gross negligence should not be inferred *solely* from:

(i) a failure to take a precautionary measures; or

(ii) a violation of a rule of the road or traffic regulation or other directive although either of the above should be taken into account in reaching a determination.

A Property Survey Board should, in the course of time, develop and record its own body of precedents which would then be of guidance.

7. Some examples of conduct and cases of what we consider to be gross negligence and also of cases of what we consider to be lesser negligence are set out in the Attachment to this memorandum.

30 June 1981

ATTACHMENT

Examples of grossly negligent conduct

(*a*) Racing of vehicles,

(*b*) Purposely using a vehicle to frighten a person (be it a passenger, passer-by, or other driver) or an animal,

(*c*) Drunken driving.

Examples of gross negligence cases

(*a*) The driver of a United Nations vehicle, in a non-emergency situation, intentionally drove it off the road and across the adjoining terrain. The vehicle overturned, resulting in injuries to the driver and passengers and damage to the vehicle.

(*b*) The driver of a United Nations vehicle, driving at night on a poorly lit highway, in poor visibility, pulled out, in a non-emergency situation, from behind a line of vehicles moving in the same direction as he was and, when passing them at an excessive speed, collided with a stationary vehicle in the passing lane.

Examples of negligence cases

(*a*) A United Nations vehicle was travelling at 25 m.p.h. in light rain on a main thoroughfare too close to the automobile ahead, in light of the road condition, when the automobile ahead suddenly stopped. The driver applied his brakes but was unable to prevent his vehicle from colliding with the other automobile. Although the driver was negligent in following too close for the road condition, nonetheless since he was not driving recklessly and was not speeding, and since the other automobile driver had stopped suddenly, the negligence of the United Nations driver was not "gross".

(*b*) A United Nations vehicle was being driven through an intersection at a moderate speed when an automobile coming from the right crossed in front of it. The United Nations driver applied his brakes and swerved but could not avoid a collision. Although he was negligent in failing to ensure that his vehicle could enter the intersection safely, nonetheless, in view of the moderate speed of his vehicle, and his prompt action to attempt to avoid a collision, his negligence was not "gross".

(*c*) A United Nations vehicle swerved to avoid striking a cow and overturned in circumstances under which the accident might have been avoided by sharper attention. However, because the driver was driving within the speed limit and the accident was caused as a result of his swerving to avoid another accident, his negligence was not "gross".

22. Question whether United Nations officers should be charged for damage to vehicles arising out of ordinary negligence

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

. . . this Office maintains the view that United Nations drivers should not be charged for damage to motor vehicles occurring in the course of official use and attributable to ordinary negligence. This would comport with modern employment policy which recognises that results of ordinary negligence are natural incidents of employment. Of course, frequent and recurring acts of negligence might well be inconsistent with satisfactory performance, but would not give rise to financial liability. Indeed, it is established policy and practice under Appendix D to the Staff Rules — as it is in workmen's compensation law generally — to compensate "as a natural incident of the performance of official duty" personal injuries of drivers of United Nations cars even if "negligence" was attributable to them. It would seem anomalous to afford a staff member compensation for personal injury resulting from a motor vehicle accident and then to deduct therefrom the cost of repairing the damage to the United Nations car involved in the same accident.

Should you so agree, we see no need for any amendment to Staff Rule 112.3 which simply authorizes such assessments but leaves the matter to administrative discretion by saying that "Any staff member *may* be required to reimburse the United Nations . . .". Moreover, we would advise against amending the Staff Rule to refer to "gross negligence" in view of the difficulties in marginal cases and the undesirability of introducing express limits to the existing administrative discretion in this regard.

3 September 1981

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23. Applicability of the jurisdiction of the United Nations Administrative Tribunal to the International Centre for the Study of the Preservation and the Restoration of Cultural Property (ICCROM) in cases relating to United Nations Staff Pension Board

Memorandum to the Secretary, United Nations Joint Staff Pension Fund

1. The question has been raised whether and how article 49 of the Regulations of the United Nations Joint Staff Pension Fund is applicable to the International Centre for the Study of the Preservation and the Restoration of Cultural Property (ICCROM) whose admission to the Pension Fund the General Assembly approved as of 1 January 1981 (resolution 35/215 A, Part III).

2. The cited article is applicable to any "member organization [of the Pension Fund] which has accepted the jurisdiction of the [United Nations Administrative] Tribunal in Joint Staff Pension Fund cases"; the Regulations of the Joint Staff Pension Fund define the member organizations in article 3, paragraph (*b*) of which provides for the membership of "specialized agencies" as well as of "any other international, intergovernmental organization which participates in the common system of salaries, allowances and other conditions of service of the United Nations and the specialized agencies". Thus there is no reason to restrict article 49 to specialized agencies, and indeed the two other member organizations of the Pension Fund that are not specialized agencies, namely the IAEA and ICITO/GATT, have already concluded agreements with the Secretary-General accepting the jurisdiction of the Tribunal pursuant to that article;[32] though there has been no occasion to test, in any case before UNAT, the validity of either of these acceptances, the agreement with the IAEA was reported to the General Assembly (A/5801, pt IX.16) and no doubt was expressed there or anywhere else as to its effectiveness.[33] Only such a broad interpretation of article 49 is consistent with the evident desire of the General Assembly to make available to all Pension Fund participants, subject to the agreement of their employing organizations, access to UNAT in cases involving decisions of the United Nations Joint Staff Pension Board.

3. Two objections might be considered:

(*a*) The General Assembly's specific appeals to organizations to accept the jurisdiction of UNAT in respect of cases involving the Joint Staff Pension Fund were only addressed to specialized agencies (resolutions 678 (VII), para. 3; 771 (VIII), para. 2; 956 (X), para. 1). However, these resolutions were all adopted at a time when, aside from the United Nations, only specialized agencies were member organizations of the Pension Fund.

(*b*) Article 14 of the UNAT Statute, which permits the extension of the jurisdiction of the Tribunal, refers only to specialized agencies. However, it has long been accepted that article 49 of the UNJSPF Regulations (and its predecessor, Article XLI adopted by resolution 955 (X)) constitutes an independent source for the jurisdiction of the Tribunal, not based on any provision of its Statute. It is, incidentally, on that basis that the President of the International Court of Justice concluded, in his letter of 26 February 1981, that members of the staff of the ICJ Registry, who are not considered to be members of the staff of the United Nations Secretariat for the purposes of article 2 of the UNAT Statute, but are covered by the Pension Fund as members of the staff of a member organization (i.e. the United Nations) within the meaning of article 21(*a*) of the UNJSPF Regulations, should therefore automatically be considered as covered by article 49 of those Regulations.

4. Consequently, ICCROM should be invited to conclude an agreement with the United Nations pursuant to article 49 of the UNJSPF Regulations along the lines of that concluded with ITU.[34]

26 March 1981

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24. Time-limit for the submission of applications for review of judgements of the United Nations Administrative Tribunal—Practice of the secretariat of the Tribunal with respect to the sending of copies of the judgements

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

You have requested information concerning the procedure applicable to the submission of applications for review of Administrative Tribunal judgements by the Committee established by the General Assembly for that purpose. Specifically you have asked:

(*a*) What is the time-limit for the submission of such applications and what is the practice of the Committee on Applications for Review of Administrative Judgements in this regard.

(*b*) Whether it is the practice of the Tribunal secretariat to send copies of judgements delivered by the Tribunal to all Member States.

With regard to the time-limit for the submission of applications for review of Administrative Tribunal judgements, Article 11 (1) of the Statute of the Tribunal provides:

> "If a Member State, the Secretary-General or the person in respect of whom a judgement has been rendered by the Tribunal (including any one who has succeeded to that person's rights on his death) objects to the judgement on the ground that the Tribunal has exceeded its jurisdiction or competence or that the Tribunal has failed to exercise jurisdiction vested in it, or has erred on a question of law relating to the provisions of the Charter of the United Nations, or has committed a fundamental error in procedure which has occasioned a failure of justice, such Member State, the Secretary-General or the person concerned may, within thirty days from the date of the judgement, make a written application to the Committee established by paragraph 4 of this article asking the Committee to request an advisory opinion of the International Court of Justice on the matter."

The Provisional Rules of Procedure adopted by the Committee provide further guidance with regard to the time-limit for applications. Article II of the Provisional Rules of Procedure provides *inter alia* that "for the purposes of paragraph 1 of Article 11 of the Statute of the Administrative Tribunal, the date of the judgement is the date when a copy of the judgement is received by the

applicant, which shall be deemed to be, in the case of an applicant residing in the country in which the Tribunal has its seat, one week after the dispatch of that copy by the Secretary of the Tribunal and, in any other case, two weeks after such dispatch".

Under the relevant provisions of the Tribunal's Statute the Secretary is required to communicate copies of the Tribunal's judgements to the parties concerned and on request to other interested persons. It is our understanding that it is not the practice of the Secretary of the Tribunal to communicate copies of the judgements to Member States at the same time.

In the light of the provisions referred to above it is not clear what time-limit applies to applications submitted by Member States but in any event it is our view that they would be entitled to the same periods that are available to individual applications i.e. 30 days after the receipt of the copy of the judgements by the applicants, the date of receipt being one week or two weeks as the case may be depending on the place of residence of the applicants after the copies of the judgement have been communicated to the parties by the Secretary of the Tribunal. The judgement you enquired about *Mortished against the Secretary-General of the United Nations* (Case No. 257) Judgement No. 273[35] was delivered by the Tribunal in Geneva on 15 May 1981 and communicated to the parties on the same date by the Secretary of the Tribunal.

With respect to the payment of compensation, pursuant to the Tribunal's judgement in the event that an application for review of the Tribunal's judgement is submitted and an advisory opinion is requested of the International Court of Justice, the provisions of Article 11 paragraph 5 of the Tribunal's Statute will apply. This paragraph reads as follows:

> "In any case in which award of compensation has been made by the Tribunal in favour of the person concerned and the Committee has requested an advisory opinion under paragraph 2 of this article, the Secretary-General, if satisfied that such person will otherwise be handicapped in protecting his interests, shall within fifteen days of the decision to request an advisory opinion make an advance payment to him of one-third of the total amount of compensation awarded by the Tribunal less such termination benefits, if any, as have already been paid. Such advance payments shall be made on condition that, within thirty days of the action of the Tribunal under paragraph 3 of this article, such person shall pay back to the United Nations the amount, if any, by which the advance payment exceeds any sum to which he is entitled in accordance with the opinion of the Court."

In view of the interest that this case is likely to generate among Member States and given the fact that any Member State is entitled to request review of the judgement, you might wish to consider communicating copies of the judgement to all Member States under cover of a note verbale from the Secretary-General.

22 May 1981

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

INTERNATIONAL LABOUR ORGANISATION

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

(*a*) Memorandum on the Working Environment (Air Pollution, Noise and Vibrations) Convention, 1977 (No. 148), drawn up at the request of the Government of the Federal Republic of Germany, 23 May 1981. Document GB.220/16/4, 220th Session of the Governing Body, May-June 1982.

(*b*) Memorandum on the Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147), drawn up at the request of the Government of the United States, 1 October 1981. Document GB.220/16/4, 220th Session of the Governing Body, May-June 1982.

NOTES

[1] For 1981, see *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 13* and Chapter II.

[2] *Ibid.*, paras. 6 and 9 and Chapter II.

[3] SPC/35/SR.6, paras. 7 to 11.

[4] *I.C.J., Proceedings, Oral Arguments, Documents. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, vol. 1, p. 106, para. 122.

[5] See *Official Records of the United Nations Conference on Succession of States in Respect of Treaties*, vol. III, p. 185.

[6] *I.C.J. Reports*, 1971, p. 16.

[7] *Official Records of the United Nations Conference on the Law of Treaties*, Documents of the Conference, p. 286.

[8] *I.C.J. Reports*, 1950.

[9] See Annex, entitled "Note on the practice of the United Nations and the League of Nations in filling casual vacancies on the International Court of Justice: Question of the application of the three-months' limit provided for in Article 5 of the Statute of the Court".

[10] 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.

[11] Baron Rolin-Jacquemyns died on 11 July 1936 and his successor was elected on 27 May 1937. Judge Hammarskjold 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).

[12] 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 Hsu Mo died on 28 June 1956 and his successor was elected on 11 January 1957. Judge Guerrero died on 25 October 1958, and his successor was elected on 29 September 1959. Judge Sir Hersch 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. Judge Richard R. Baxter died on 25 September 1980 and Judge Salah El Dine Tarazi on 4 October 1980, their successors being elected on 15 January 1981.

[13] See *I.C.J. Acts and Documents No. 4*, p. 59.

[14] See *Official Records of the General Assembly, Twenty-second Session, Annexes*, agenda item 86, document A/6827/Add.1.

[15] For a more detailed description of this practice, see *Juridical Yearbook*, 1976, p. 220.

[16] *Official Records of the United Nations Conference on the Law of Treaties*, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, Second Session, Thirtieth plenary meeting, para. 23.

[17] See *Multilateral Treaties Deposited with the Secretary-General* (ST/LEG/SER.F/2), pp. 652-653.

[18] As of 15 February 1984, this figure had raised to 44.

[19] Reading as follows:

"3. If the requirements for entry infor force under paragraph 1 or paragraph 2 of this article have not been met by 31 May 1981, the Secretary-General of the United Nations shall, at the earliest time practicable, convene a meeting of those Governments which have deposited instruments of ratification, acceptance, approval or accession, or have notified the depositary that they will apply this Agreement into force provisionally or definitively among themselves in whole or in part. While this Agreement is in force provisionally under this paragraph, those Governments which have decided to put this Agreement into force provisionally among themselves in whole or in part shall be provisional members. Such Governments may meet to review the situation and decide whether this Agreement shall enter into force definitively among themselves, or continue in force provisionally, or terminate."

[20] Résolution 3166 (XXVIII) de l'Assemblée générale, Annexe. Document reproduit dans l'*Annuaire juridique*, 1983, p. 81.

[21] Résolution 2200 (XXI) de l'Assemblée générale, Annexe. Egalement reproduite dans l'*Annuaire juridique*, 1966, p. 182.

[22] Résolution 3235 (XXIX) de l'Assemblée générale. Egalement reproduite dans l'*Annuaire juridique*, 1974, p. 95.

[23] Résolution 3068 (XXVIII) de l'Assemblée générale. Egalement reproduite dans l'*Annuaire juridique*, 1973, p. 76.

[24] Reproduced in the *Juridical Yearbook*, 1964, p. 40.

[25] Document ST/SGB/UNFICYP/1.

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

[27] *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion, I.C.J. Reports*, 1949, p. 174.

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

[29] *Ibid.*, vol. 260, p. 35.

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

[31] We have examined the concept of "gross negligence" and the equivalent concepts as they appear in various legal systems. The various legal systems concur in this description of "gross negligence". Few legal systems go into much more detail in the definition, and the determination in each case is reached by the "fact finder", i.e. jury or judge (analogous to the Property Survey Board in the United Nations administrative context).

[32] Subsequently renumbered 48 and reading as follows:

"*Jurisdiction of the United Nations Administrative Tribunal*

"(*a*) Applications alleging non-observance of these Regulations arising out of the decisions of the Board may be submitted directly to the United Nations Administrative Tribunal by:

"(i) Any staff member of a member organization which has accepted the jurisdiction of the Tribunal in Joint Staff Pension Fund cases who is eligible under article 21 of these Regulations as a participant in the Fund, even after his employment has ceased, and any person who has succeeded to such staff member's rights upon his death;

"(ii) Any other person who can show that he is entitled to rights under these Regulations by virtue of the participation in the Fund of a staff member of such member organization.

"(*b*) In the event of a dispute as to whether the Tribunal has competence, the matter shall be settled by a decision of the Tribunal.

"(*c*) The decision of the Tribunal shall be final and without appeal.

"(*d*) The time-limits in article 7 of the Statute of the Tribunal are reckoned from the date of the communication of the contested decision of the Board."

[33] For the agreement in respect of the IAEA see United Nations, *Treaty Series*, vol. 480, p. 484. The agreement in respect of ICITO/GATT has only recently been concluded and has not yet appeared in the *Treaty Series*.

[34] See United Nations, *Treaty Series*, vol. 670, p. 368.

[35] For a summary of the judgement, see p. 115 above.