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

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

CONTENTS (*continued*)

Chapter VI

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

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

1. USE OF THE TERMS "REPRESENTATIVE" AND "OBSERVER" IN UNITED NATIONS PRACTICE

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

We confirm that it is established United Nations practice to use the term "representative" in United Nations records and reports exclusively for persons representing States participating in the United Nations meetings with full rights including the right to vote. Except as indicated below, persons representing all other participants, including States and intergovernmental organizations, participating without the right to vote are referred to as "observers" in reports and other official records of meetings. A special exception to this practice has been made for persons representing the specialized agencies and the International Atomic Energy Agency. These persons are referred to as "representatives" even though they obviously participate in an observer capacity in order to take into account the relevant provisions of relationship agreements between the United Nations on the one hand and specialized agencies and IAEA on the other. In the light of the foregoing, we see no reason for any change in the practice that has been followed up to now by UNIDO, in reports of the Trade and Development Board and in invitations to sessions of the Board, which is consistent with the practice followed by the United Nations generally.

23 February 1982

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2. STATUS OF THE PALESTINE LIBERATION ORGANIZATION IN THE UNITED NATIONS—SUMMARY OF THE PRINCIPAL DEVELOPMENTS IN THE EVOLUTION OF THE STATUS OF THE PLO WITH THE GENERAL ASSEMBLY, THE SECURITY COUNCIL, THE ECONOMIC AND SOCIAL COUNCIL, OTHER UNITED NATIONS AGENCIES AND INTERGOVERNMENTAL ORGANIZATIONS

Letter to a private counsellor-at-law

I refer to your inquiry on the status of the Palestine Liberation Organization (hereafter referred to as "the PLO") in the United Nations.

As you are doubtless aware, membership in the United Nations is governed by Articles 3 and 4 of the United Nations Charter. Pursuant to these provisions the Members of the Organization are those States which signed and ratified the United Nations Charter and those States which were subsequently admitted to membership in the Organization by the General Assembly on the recommendation of the Security Council.

The Charter makes no provision for full participation except in respect of sovereign States. However, degrees of participation in the Organization short of membership have been evolved

over the years for certain recognized entities which for one reason or another were not in a position to seek or attain full membership at a particular time. This has been the case, for instance, for representatives of dependent and trust or mandated Territories evolving towards independence, which have been described as "proto-States".[1]

The status of the PLO has generally evolved within the framework described in the preceding paragraph to the point where it has been granted a unique position in the United Nations. Without attempting in any way to summarize the long history of the Palestine question as such in the United Nations, the paragraphs which follow list the principal developments in the evolution of that unique status.

I. GENERAL ASSEMBLY

The General Assembly of the United Nations in 1969[2] recognized and reaffirmed "the inalienable rights of the people of Palestine" and a 1970 resolution[3] declared that the Assembly:

> "*Recognizes* that the people of Palestine are entitled to equal rights and self-determination, in accordance with the Charter of the United Nations"

In 1973, the PLO requested and was granted a hearing as a petitioner in the Special Political Committee when the Committee took up agenda item 43 (United Nations Relief and Works Agency for Palestine Refugees in the Near East).[4] The PLO was subsequently invited to and participated in a number of major United Nations conferences such as the World Population Conference and the Third United Nations Conference on the Law of the Sea as a national liberation movement recognized by the League of Arab States. For instance, the resolution adopted by the Economic and Social Council on the basis of which the invitation to the World Population Conference was issued, requested the Secretary-General "to invite representatives of liberation movements now recognized by the Organization of African Unity and/or by the League of Arab States, to participate in the Conference without the right to vote".[5]

In October 1974, the Summit Meeting of Arab Heads of State recognized the PLO as the sole legitimate representative of the Palestinian people. Immediately thereafter, on 14 October 1974, the General Assembly, by resolution 3210 (XXIX), similarly recognized the PLO as the representative of the Palestinian people and invited it to participate in the deliberations of the General Assembly on the question of Palestine in plenary meetings. Subsequently, by resolution 3237 (XXIX) of 22 November 1974, the General Assembly granted observer status to the PLO. In that resolution the General Assembly, *inter alia:*

> "1. *Invites* the Palestine Liberation Organization to participate in the sessions and the work of the General Assembly in the capacity of observer;
>
> "2. *Invites* the Palestine Liberation Organization to participate in the sessions and the work of all international conferences convened under the auspices of the General Assembly in the capacity of observer;
>
> "3. *Considers* that the Palestine Liberation Organization is entitled to participate as an observer in the sessions and the work of all international conferences convened under the auspices of other organs of the United Nations."

Generally, observers in the General Assembly have the right to attend meetings and to make oral statements on matters within their competence. However, over the years, the PLO has been accorded more extensive rights of participation than other entities participating in an observer capacity. Thus, for instance, the PLO enjoys the right to participate in the plenary meetings of the General Assembly, where its observer can make statements on any matter which is considered to have a bearing upon the situation in the Middle East and speak in exercise of the right of reply. In Main Committees of the Assembly, the observer may speak on any matter of concern to the PLO. Further, by virtue of the *sui generis* terms of resolution 3237 (XXIX), the PLO has a standing invitation to participate in all United Nations conferences and meetings whereas most organizations and entities require a specific invitation by the competent intergovernmental organ for each conference or meeting which they are to attend in

an observer capacity. The PLO has also established a Permanent Observer Office at United Nations Headquarters in New York and one in Geneva.

II. SECURITY COUNCIL

The Security Council of the United Nations, at its 2041st meeting, on 27 October 1977, decided by a vote that an invitation should be accorded to the PLO to participate in the debate on the situation in the Middle East and that that invitation would confer upon it the same rights of participation as those conferred on a Member State when it was invited to participate under rule 37 of the provisional rules of procedure. This invitation has been repeated on numerous occasions since that time.

Rule 37 of the provisional rules of procedure of the Security Council reads as follows:

> "Any Member of the United Nations which is not a member of the Security Council may be invited, as the result of a decision of the Security Council, to participate, without a vote, in the discussion of any question brought before the Security Council when the Security Council considers that the interests of that Member are specially affected, or when a Member brings a matter to the attention of the Security Council in accordance with Article 35 (1) of the Charter."

In all other cases, invitations to representatives of entities other than States have been issued under rule 39, which reads:

> "The Security Council may invite members of the Secretariat or other persons, whom it considers competent for the purpose, to supply it with information or to give other assistance in remaining matters within its competence."

III. ECONOMIC AND SOCIAL COUNCIL

Purusant to a 1975 Economic and Social Council decision,[6] the PLO participates in an observer capacity in the deliberations of the Council where it has rights of participation similar to those it enjoys in the General Assembly and its subsidiary organs.

In the Economic Commission for Western Asia, a regional intergovernmental organ of the Council, it is a full member on an equal footing with Member States. Paragraph 2 of the terms of reference of the Commission reads as amended[7] as follows:

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

As a full member, the PLO votes and makes proposals—rights not exercised by entities other than States anywhere within the United Nations.

IV. UNITED NATIONS AGENCIES AND INTERGOVERNMENTAL ORGANIZATIONS

Most United Nations specialized agencies, such as the United Nations Educational, Scientific and Cultural Organization, the World Health Organization and the Food and Agriculture Organization of the United Nations, have granted the PLO observer status. Other international bodies, such as the Conference of Heads of State or Government of the Non-aligned Countries, the Group of 77, the Islamic Conference and the League of Arab States, have admitted the PLO as a full member.

* * *

While initially, the PLO was invited to United Nations meetings as a petitioner, it then participated as a liberation movement until it won United Nations recognition as the sole legiti-

mate representative of the Palestinian people. As indicated above, a review of the procedural practice of the United Nations shows that the PLO now has a unique status in the United Nations with extensive and continuing rights of participation. Even outside the United Nations framework, the overwhelming majority of States formally recognize the PLO as the representative of the Palestinian people and have established direct links with it on a bilateral basis, sometimes even granting it full diplomatic status.

. . .

23 September 1982

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3. MAJORITY REQUIRED FOR ADOPTION BY THE GENERAL ASSEMBLY OF A DRAFT RESOLUTION BEFORE IT

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

1. You have requested legal advice on the question of the majority required for adoption by the General Assembly, at the current ninth emergency special session, of a draft resolution before it. Our comments on this question appear below.

2. The current session of the General Assembly is an emergency special session convened pursuant to rule 8 (*b*) of the General Assembly's rules of procedure which is based on General Assembly resolution 377 (V) of 3 November 1950, entitled "Uniting for peace". Operative paragraph 1 of that resolution reads as follows:

> "1. *Resolves* that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefor. Such emergency special session shall be called if requested by the Security Council on the vote of any seven members, or by a majority of the Members of the United Nations."

3. The foregoing provisions establish clearly that emergency special sessions are convened for the purpose of consideration by the General Assembly of important questions relating to the maintenance of international peace and security.

4. The ninth emergency special session was convened at the request of the Security Council, which in its resolution 500 (1982) clearly indicated that the basis for its decision to call for an emergency session was the fact that the lack of unanimity of its permanent members prevented it from exercising its primary responsibility for the maintenance of international peace and security. The substantive item on the agenda of the ninth emergency special session of the General Assembly is identical with that on the agenda of the Security Council and it must therefore be considered as having the same character, i.e., a matter relating to the maintenance of international peace and security.

5. The draft resolution to which you refer is the only one before the Assembly on the substantive item for which the emergency special session was convened. By operative paragraph 2 of the draft resolution the General Assembly would determine the existence of "an act of aggression under the provisions of Article 39 of the Charter of the United Nations". Article 39 of the United Nations Charter is the first article in Chapter VII of the Charter which relates to action with respect to threats to the peace, breaches of the peace and acts of aggression. Paragraph 6 of the draft resolution determines the existence of "a continuing threat to interna-

tional peace and security" and paragraph 12 contains provisions analogous to the measures which the Security Council may decide upon under Article 41 of the Charter, including interruption or severance of economic and diplomatic relations, both of which are measures enumerated in Article 41. The draft resolution thus falls clearly and unequivocally within the category of questions relating to the maintenance of international peace and security within the terms of Article 18, paragraph 2, of the Charter, and thus requires a two-thirds majority for adoption.

6. Article 18, paragraph 3, of the Charter provides that decisions on questions other than those enumerated in paragraph 2 of the same article including determinations of additional categories of important questions shall be made by a majority of the members present and voting. On occasion the General Assembly has used this procedure where a genuine doubt appeared to exist to determine whether a draft resolution was to be considered as coming within the ambit of paragraph 2 of Article 18. However, in a case as clear as the present one application of this procedure would not be proper.

5 February 1982

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4. Practice of the General Assembly and its Main Committees regarding statements by observers

Opinion prepared at the request of the Chairman of the Sixth Committee

As a rule, in the practice of the General Assembly and its Main Committees, as well as that of other United Nations organs and conferences, observers are given the floor to make statements *after* representatives of Member States that have indicated a desire to speak have made their statements. This practice is based on the principle that Member States, as full participants, are entitled to priority over observers who have only limited rights of participation and are normally permitted to make statements upon invitation of the Chairman and with the consent of the body concerned. Occasionally, however, there have been cases where the representative of a State spoke after a statement was made by an observer. This does not necessarily mean that the general rule was not observed. It could be that the representatives that spoke after the observer requested the floor during or after the observer's statement. It could also be that the representatives of the States that had requested the floor were not in the meeting room when called upon to make their statement but returned later and made their statement after the observer had spoken. It is also possible that an observer was permitted to make a statement before the representatives of Member States with the consent of the Member States concerned.

9 December 1982

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5. Practice of the General Assembly relating to statements made in the exercise of the right of reply

Opinion prepared at the request of the Chairman of the Fifth Committee

1. In response to your request, we have investigated further the practice of the General Assembly in respect of statements made in the exercise of the right of reply.

2. As you know, the General Assembly has approved two recommendations submitted to it in connection with the exercise of the right of reply. These recommendations are contained in annex V and annex VI to the rules of procedure of the General Assembly.

3. The first of these recommendations states:

"Statements made in the exercise of the rights of reply should be delivered, as a general rule, at the end of meetings."

The practice followed by the Fifth Committee at its recent meetings is consistent with that recommendation.

4. The second recommendation referred to above states:

"Delegations should exercise their right of reply at the end of the day whenever two meetings have been scheduled for that day and whenever such meetings are devoted to the consideration of the same item."

This recommendation was approved by the General Assembly at a later date than the recommendation reproduced in annex V to the rules of procedure already referred to above. This second recommendation appears to be limited to situations in which only a single item is before the body concerned on a particular day, in which case rights of reply are to be deferred to the end of the day rather than the end of a particular meeting. It does not expressly address itself to the situation where a number of items may be on the agenda of the body concerned on a particular day. The second recommendation could therefore be argued to be supplementary to the first one, and not incompatible with it, both recommendations being designed to enable the body concerned to perform its substantive work without undue interruptions in the manner best suited to it.

5. Whatever the correct legal interpretation of the two recommendations is, the practice of the General Assembly in implementing them is obviously an important factor to be taken into account. An examination of the practice that has been followed since the approval of these recommendations by the General Assembly has revealed that when more than one item is considered by the Assembly in the course of a particular day, statements in the exercise of the right of reply have been made at the conclusion of the consideration of the relevant agenda item before the next agenda item is considered rather than at the end of the day. Although the practice that has been followed in recent days by the Fifth Committee is not an unreasonable one in the light of the particular procedure followed in that Committee where several items are considered on a recurring basis many times during a session of the General Assembly, it is not strictly consistent with the practice of the plenary for statements in the exercise of the right of reply. The Chairman may thus wish to consult the Committee whether it prefers to conform to Assembly practice or to proceed as it has so far this session on this matter.

19 October 1982

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6. Competence of Main Committees of the General Assembly to make recommendations concerning the venue of meetings which they recommend to the Assembly to convene

Opinion prepared at the request of the Chairman of the Sixth Committee

1. The question has been raised whether the Sixth Committee is competent to make a recommendation to the General Assembly concerning the venue of a committee or conference, as proposed for instance in paragraph 6 of the draft resolution on the report of the *Ad Hoc* Committee on the Drafting of an International Convention Against the Recruitment, Use, Financing and Training of Mercenaries,[8] in view of the decision of the General Assembly to entrust the Committee on Conferences with the task of reviewing all proposals affecting the schedule of conferences and meetings made at sessions of the General Assembly.[9]

2. The Committee on Conferences itself agreed on the following procedure in implementing this assignment by the Assembly:

"(*a*) Draft resolutions and draft decisions affecting the schedule of conferences and meetings will be reviewed in such a manner that the recommendations by the Committee on Conferences may reach a Main Committee other than the Fifth Committee prior to its adopting a particular draft resolution or draft decision, affecting the schedule of conferences and meetings."[10]

3. Consequently, it is clear that the role of the Committee on Conferences is understood to be a purely advisory one, in the first instance to the Main Committee concerned. Thus, when a Main Committee (other than the Fifth) considers a draft resolution calling for the session of an organ or of a conference, or affecting the venue of such a session, it should await the comments of the Committee on Conferences on such a draft, in the same way as it must, under rule 153 of the rules of procedure, await a financial implications statement from the Secretary-General. And, in the same way as it takes into account such a financial implications statement, it also must take into account the views of the Committee on Conferences—without of course being bound thereby. In any event, whatever the subsequent decision of the substantive Main Committee may be, both the Fifth Committee and the Assembly itself can take account of the recommendation of the Committee on the Conferences and the plenary may ultimately treat such a recommendation otherwise than did the substantive Main Committee. This procedure enables the competent Main Committee to formulate a recommendation as to the venue of a meeting on the basis of considerations with which it is most familiar (e.g., the schedule and venue of other meetings in which the same persons might participate), while allowing the Committee on Conferences and the Fifth Committee to examine the issue from other points of view. It is, of course, ultimately for the plenary to reconcile any differences between the various points of view, but it can only do so if each of the competent organs (substantive Main Committee, Committee on Conferences, Fifth Committee) is given an opportunity to examine the question from its own vantage.

4. It is in this sense that other substantive Main Committees and the Committee on Conferences itself have considered, at the current session of the General Assembly, venue-related and other proposals affecting the calendar of conferences. For example, in connection with the venue of the Second World Conference to Combat Racism and Racial Discrimination, the Third Committee approved a draft resolution containing a recommendation concerning venue.[11] That recommendation, on which the Committee on Conferences has submitted its negative views,[12] is at present being considered in the Fifth Committee, which will make an appropriate recommendation to the plenary.

24 November 1982

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7. Question whether Main Committees of the General Assembly, other than the Fifth Committee, have any competence to consider the financial implications of the draft resolutions they recommend for adoption by the Assembly

Opinions prepared at the request of the Chairman of the Sixth Committee

I

1. You requested a legal opinion of whether Main Committees of the General Assembly, aside from the Administrative and Budgetary one (Fifth Committee), have any competence to consider the financial implications of the draft resolutions they recommend for adoption by the General Assembly and, in particular, to include in such drafts any specifically financial provisions.

2. The constant practice in implementing rules 153 and 154 of the rules of procedure of the General Assembly has been that when a substantive Main Committee is considering a draft resolution to be proposed for adoption to the plenary, the Secretary-General submits a financial

implications statement to the Committee; the latter then takes its action in the light of that statement, and might even make some consequential changes in the draft. Thereupon the Secretary-General prepares another financial implications statement (which is substantially identical to the first, but is generally more detailed and includes modalities of budgetary arrangements) for use of the Fifth Committee; that Committee considers the statement and the recommendations thereon of ACABQ, and thereupon formulates its own report to the plenary. The plenary then acts on the resolution in the light of the Fifth Committee's report, generally adopting the draft proposed by the substantive Main Committee without any change. Consequently the actual financial implications of the definitive resolution are usually those flowing from the draft prepared by the substantive Main Committee, normally without any subsequent modification reflecting the consideration in the Fifth Committee.

3. It follows from the above description of prevailing procedures that substantive Main Committees are expected to and do consider the financial implications of the resolution they recommend to the plenary, and indeed are deliberately given an opportunity to modify these drafts in the light of the Secretary-General's statement of the financial implications of the proposed draft. It is, however, not expected and would indeed not be proper for such a Committee to consider the budgetary implication of resolutions, or the budgetary arrangements that should be made in connection therewith.

18 November 1982

II

Further to our opinion on the subject set out in our memorandum of 18 November 1982 and with specific reference to an amendment to a draft resolution before the Sixth Committee which seeks to authorize the Secretary-General to implement the activities approved under the present resolution "only to the extent that they can be financed without exceeding the level of resources approved in the programme budget for the biennium 1982 1983", it should be clarified that that amendment is not one that requires the consideration of budgetary implications within the meaning of the last sentence of the previous memorandum. Rather, the proposed amendment is one essentially addressed to the priority to be assigned to the proposed activity—a matter to which the Sixth Committee may of course address itself. The fact that, in practice, the proposed amendment could only be implemented by taking certain budgetary measures does not, however, make that proposal itself a budgetary one; rather, as indicated in the previous memorandum, if the Sixth Committee should incorporate the proposed amendment in the resolution it proposes to the General Assembly, the Fifth Committee would have to consider what the budgetary implications of the proposed authorization would be, or what budgetary measures would have to be taken to enable the Secretary-General to implement it.

24 November 1982

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8. QUESTION OF THE PARTICIPATION OF NON-GOVERNMENTAL ORGANIZATIONS IN THE WORK OF THE GENERAL ASSEMBLY IN THE FIELD OF DISARMAMENT

Memorandum to the Principal Officer, Office of the Under-Secretary-General for Political and General Assembly Affairs

You have requested our views and comments on a proposal which calls for granting non-governmental organizations the same rights and facilities in participating in the work of the General Assembly on disarmament as are accorded to them in the economic and social field. In this connection, it should be noted that elaborate arrangements for participation of such organizations in the work of the Economic and Social Council have been established by the Council

pursuant to Article 71 of the Charter. These arrangements are set out in Council resolution 1296 (XLIV) of 23 May 1968 and specific provisions on the scope of participation of the organizations in question are also contained in the rules of procedure of the Council. Under these arrangements, a committee on non-governmental organizations has been established by the Council to select and classify the organizations that are entitled to have consultative status with the Council. These organizations have the right to have statements circulated as documents of the Council, to make oral or written statements on matters before the Council in which they have a special competence and to propose items for inclusion in the agenda of the Council. Should the General Assembly decide to grant non-governmental organizations the right to participate in its work related to disarmanent in the same way as they participate in the work of the Economic and Social Council in the economic and social field, it would in the first instance be necessary for the Assembly to establish procedures for the screening and selection of the non-governmental organizations concerned. This would require the establishment of an intergovernmental Committee by the General Assembly. Moreover, if non-governmental organizations participate in the Assembly's work on disarmament with rights similar to those they are entitled to in the economic and social field, the Assembly will have to consider changes that would be required in its rules of procedure. Although attendance by representatives of non-governmental organizations in meetings of the General Assembly and its subsidiary bodies would present no particular difficulties if the General Assembly provided the necessary guidelines for the selection, classification and invitation of the organizations concerned, granting such organizations the right to have statements circulated as documents of the General Assembly, a right hitherto limited exclusively to Member States, and the right to include items in the Assembly's provisional agenda would have major implications going far beyond the scope of the present memorandum, which is limited to a general indication of what the procedural consequences would be should the proposal under consideration be adopted.

9 July 1982

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9. Legal status of the United Nations Council for Namibia—Question of its legal personality for purposes of private law and/or international law

Memorandum to the Representative of the Director General of the International Atomic Energy Agency to the United Nations

1. Reference is made to the cable from IAEA Vienna in which inquiry is made regarding the legal personality for purposes of private law and/or international law of the United Nations Council for Namibia, specifically its capacity to contract and its capacity to negotiate and conclude agreements.

2. The Council for Namibia was established as a subsidiary organ of the General Assembly by resolution 2248 (S-V) of 19 May 1967. As a subsidiary organ, it is responsible to, and under the authority of, the General Assembly in the same way as any other subsidiary organ. Unlike other subsidiary organs, however, the Council functions in a dual capacity: as a policy-making organ of the General Assembly and as the legal Administering Authority of a Territory. This latter characteristic of the Council distinguishes it from other United Nations subsidiary organs and it may, therefore, be considered an organ *sui generis* for certain purposes.

3. As regards the capacity to contract with private entities, the Council for Namibia, as a subsidiary organ of the General Assembly, derives its juridical personality from the United Nations which itself has the capacity to contract, to acquire and dispose of immovable and movable property and to institute legal proceedings in accordance with Article 104 of the Charter and article I of the Convention on the Privileges and Immunities of the United Nations. From the point of view of the United Nations, the question of whether the Council may contract in its own name, as distinct from the United Nations, is immaterial since the Council is a

subsidiary organ of the latter. From a practical point of view, however, private contracts would normally be entered into by the United Nations and are subject to the contract procedures of the Organization.

4. The foregoing considerations apply generally to the capacity of the Council to negotiate and conclude agreements. It is here, however, that the dual capacity of the Council for Namibia becomes relevant. When the Council functions as a subsidiary organ properly speaking, that is to say as a policy-making organ of the General Assembly, its treaty-making power derives from and is exercised by the United Nations. Thus, conference and seminar agreements are routinely entered into by the United Nations on behalf of the Council for Namibia.

5. As the legal Administering Authority over Namibia, however, the Council has been expressly endowed by the General Assembly with certain competencies and functions of a representational character which are exercised by the Council on behalf of Namibia. It is in this representational capacity that the Council must be considered as possessing the capacity to negotiate and conclude agreements on behalf of Namibia. This has been widely recognized *inter alia* through full membership of the Council in a number of specialized agencies, including ILO, and participation in such major legislative conferences as the Third United Nations Conference on the Law of the Sea.

14 April 1982

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10. Legal status of the United Nations Council for Namibia in regard to the United Nations Convention on the Law of the Sea

Memorandum to the Under-Secretary-General, Special Representative of the Secretary-General to the Third United Nations Conference on the Law of the Sea

I wish to refer to your memorandum dated 14 April 1982 transmitting to me an informal request by the President of the Third United Nations Conference on the Law of the Sea for an opinion on the legal status of the United Nations Council for Namibia. The opinions of this office on the three principal issues raised by the President of the Conference are set out below.

I. Whether the United Nations Council for Namibia can, like the government of a sovereign State, sign and ratify or otherwise adhere to the United Nations Convention on the Law of the Sea

(a) *The United Nations Council for Namibia is a subsidiary organ of the General Assembly responsible for the administration of Namibia, a Territory having international status and coming under the direct responsibility of the United Nations.*

By resolution 2145 (XXI) of 27 October 1966 the General Assembly decided that South West Africa (Namibia) "henceforth . . . comes under the direct responsibility of the United Nations" and resolved "that in these circumstances the United Nations must discharge those responsibilities". Subsequently, by resolution 2248 (S-V) of 19 May 1967, the Assembly established a United Nations Council for South West Africa (subsequently renamed United Nations Council for Namibia) entrusted *inter alia* with the following powers and functions:

"(*a*) To administer South West Africa until independence, with the maximum possible participation of the people of the Territory;

"(*b*) To promulgate such laws, decrees and administrative regulations as are necessary for the administration of the Territory until a legislative assembly is established following elections conducted on the basis of universal adult suffrage".

In the exercise of its powers and in the discharge of its functions the Council is responsible to the General Assembly. From the point of view of the constitutional law of the United

Nations, the United Nations Council for Namibia, is, therefore, a subsidiary organ of the Assembly.

It is distinguishable from other subsidiary organs, however, because by virtue of resolutions 2145 (XXI) and 2248 (S-V) it functions in a dual capacity: as a policy-making organ of the General Assembly and as the legal administering authority of a Territory. In this latter capacity the United Nations Council for Namibia is unique and it is this character which serves to set it apart from all other United Nations organs.

(b) *The United Nations Council for Namibia is not a Government of a sovereign State but an organ of the United Nations responsible for the administration of a Territory having international status and entrusted with certain powers and functions of a governmental character.*

It is clear from both the language and intent of resolutions 2145 (XXI) and 2248 (S-V) that the General Assembly has placed the United Nations Council for Namibia substantially in the position of the Administering Authority of Namibia with full powers of legislation and administration until the Territory achieves independence. Operative paragraphs 4 and 5 of resolution 2145 (XXI) substitute United Nations direct responsibility for that of South Africa, the former Mandatory Power, while part II of resolution 2248 (S-V) defines the powers and functions of the United Nations Council for Namibia, the organ through which the direct responsibility shall be carried out, in terms comparable to that of a Government including, specifically, the power to promulgate laws, decrees and administrative regulations (resolution 2248 (S-V), sect. II, para. 1 (*b*)). The powers and functions of the United Nations Council for Namibia are thus indistinguishable from those of the former Mandatory Power which in accordance with article 2 of the Mandate for German South-West Africa of 17 December 1920 had "full power of administration and legislation over the territory."

(c) *In exercising its authority on behalf of Namibia the United Nations Council for Namibia is exercising a function previously engaged in by the former Mandatory Power.*

The former Mandatory Power, South Africa, entered into a number of treaties which were made applicable to the Territory of Namibia either by virtue of express reference in their texts or by extension to the Territory pursuant to their territorial clauses. A number of other treaties to which South Africa became a party might also be considered to apply to the Territory.[13] Since, as already indicated, the United Nations Council for Namibia has been placed substantially in the position of the former Mandatory Power for purposes of administration of the Territory of Namibia, the Council must be deemed to have both the competence and the capacity to enter into agreements on behalf of Namibia previously enjoyed by the Mandatory Power.

(d) *There is no entity other than the United Nations Council for Namibia which is competent to represent the interests of Namibia in the international community.*

By operative paragraph 4 of resolution 2145 (XXI) the General Assembly decided that the Mandate exercised by South Africa over Namibia was terminated. In its advisory opinion of 21 June 1971, the International Court of Justice declared *inter alia* that the continued presence of South Africa in Namibia was illegal and that States Members of the United Nations were under an obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia.[14] The Court specifically stated that "Member States are under obligation to abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia".[15] Since South Africa's Mandate had been terminated and its continued presence in Namibia has been declared illegal by the International Court of Justice, it follows that the United Nations Council for Namibia is the sole entity recognized by the international community with the competence to administer the territory and represent it internationally until

independence is achieved. If the United Nations Council for Namibia were denied the right to represent the interests of Namibia internationally, the Territory would be deprived of any representation in the international community, which would run counter to the expressed intentions of the international community over a period of more than 60 years. It is inconceivable that the interests of the people of a Territory placed under the sacred trust of civilization by the League of Nations, over which the General Assembly exercised a supervisory role for 21 years and which has ultimately been brought under the direct responsibility of the United Nations, should now be delivered into a juridical vacuum.

(e) *The United Nations Council for Namibia's competence to represent Namibia internationally has been widely recognized and accepted.*

The United Nations Council for Namibia represents Namibia as a full member in FAO, ILO and UNESCO and as an associate member in WHO. For purposes of the present opinion, admission to full membership in ILO is particularly relevant in the light of that organization's constitutional requirements for admission. Article I of the ILO Constitution provides that the members of ILO "shall be the States which were members of the Organization on 1 November 1945, and such other States as may become members". Furthermore, as in the case of many of the specialized agencies, the ILO Constitution contains a number of provisions which presuppose the ability of a member to perform certain acts as representation (article 3, para. 1) and to implement treaties and international agreements within its territory (article 19). The practice of ILO in this regard has always been to require that members should have the full capacity to exercise the rights and discharge the obligations of membership as laid down in the Constitution. After examining the application of Namibia for membership, the Selection Committee of the ILO Conference recommended the admission of Namibia, as represented by the Council, which, until the illegal occupation of Namibia was terminated, was to "be regarded as the Government of Namibia for the purpose of the application of the Constitution of the Organization".[16] The ILO Conference voted by 368 to 0 with 50 abstentions to admit Namibia as a full member of ILO. Since the establishment of the United Nations Council for Namibia in 1967 there has been a growing recognition of the special characteristics of the Council and of the unique status of Namibia as a territory under international administration. This has been reflected not only in the admission to full membership in certain specialized agencies but also in the participation of Namibia in international conferences of a plenipotentiary nature. The Third United Nations Conference on the Law of the Sea itself is no exception. The United Nations Council for Namibia originally participated as an observer under rule 62 of the rules of procedure. Since 1979, however, pursuant to operative paragraph 5 of General Assembly resolution 34/92 C of 12 December 1979, Namibia, represented by the United Nations Council for Namibia as the legal Administering Authority for Namibia, has participated as a full member in the Conference. As such, Namibia is to be regarded in the same way as any other full member in the Conference for purposes of signing and ratifying or otherwise adhering to the Convention even though it is not yet a fully independent sovereign State.

(f) *The United Nations Council for Namibia has legal and administrative competence over the matters falling within the scope of the Convention and sufficient legal personality to enter into international agreements, on behalf of Namibia, with respect to such matters.*

It is clear from the foregoing and from the language of resolutions 2145 (XXI) and 2248 (S-V) that the legal and administrative competence of the United Nations Council for Namibia extends to the territory formerly known as South West Africa, now Namibia. The concept of territory in international law comprises all land areas, including subterranean areas, waters, including national rivers, lakes and the territorial sea. To the extent that the Convention on the Law of the Sea extends and delimits areas of State territory over the sea, the United Nations Council for Namibia as the legal Administering Authority of the territory of Namibia is competent both legally and administratively to exercise its functions with respect to the matters

dealt with in the Convention. Furthermore, as the legal Administering Authority over Namibia, the United Nations Council for Namibia has been expressing endowed by the General Assembly with certain competences and functions of a representational character which are exercised by the Council on behalf of Namibia. When acting in this representational capacity, the Council must be deemed to possess the capacity to negotiate and conclude agreements on behalf of Namibia.

II. WHAT EFFECT WOULD ADHERENCE TO THE CONVENTION BY THE COUNCIL FOR NAMIBIA, ACTING ON BEHALF OF NAMIBIA, HAVE ON THE RIGHTS AND CORRESPONDING OBLIGATIONS IMPOSED BY SUCH ADHERENCE?

As the legal Administering Authority of Namibia, the United Nations Council for Namibia is empowered by resolution 2248 (S-V) to promulgate such laws, decrees and administrative regulations as are necessary for the administration of the Territory. The Council, therefore, has the competence to give effect *de jure* to the rights and obligations which would stem from Namibia's adherence to the Convention. As is well known, however, South Africa's refusal to vacate the Territory and the perpetuation of its illegal presence in Namibia despite decisions of the General Assembly and the advisory opinion of the International Court of Justice have prevented the United Nations Council for Namibia from exercising *de facto* control and administration of the Territory. Consequently, although the United Nations Council for Namibia may enact the necessary laws, decrees and administrative regulations, it does not, at the present time, possess the means of enforcing these measures. The inability of the United Nations Council for Namibia to enforce the measures taken by it to implement the Convention is not, however, a bar to its adherence. The essential element is that the United Nations Council for Namibia has the *de jure* competence to enact the necessary laws and regulations. As pointed out above, the United Nations Council for Namibia is the sole authority which is recognized and competent to do so. There is no other authority, South Africa's Mandate having been terminated and its continued presence in Namibia having been declared illegal.

III. WHAT WOULD BE THE STATUS OF THE SOUTH WEST AFRICA PEOPLE'S ORGANIZATION WHICH IS PERMITTED TO SIGN THE FINAL ACT AS REPRESENTING THE NAMIBIAN PEOPLE?

In operative paragraph 3 of resolution 31/146 of 20 December 1976 the General Assembly recognized "that the national liberation movement of Namibia, the South West Africa People's Organization, is the sole and authentic representative of the Namibian people". By resolution 31/152 of 20 December 1976 the General Assembly accorded observer status to SWAPO, inviting it to participate in the sessions and the work of the General Assembly and all international conferences convened under the auspices of the General Assembly or other organs of the United Nations in the capacity of observer. From the point of view of the constitutional law and practice of the United Nations, SWAPO is a national liberation movement having observer status. The signature of the Final Act of the Third United Nations Conference on the Law of the Sea by SWAPO would not, in any way, modify the status of SWAPO as a national liberation movement and would signify nothing more than that it had participated in the Conference as an observer.

CONCLUSION

For the foregoing reasons, it is the opinion of the Office of Legal Affairs that the United Nations Council for Namibia can, in its capacity as the internationally recognized legal Administering Authority of Namibia, sign and ratify or otherwise adhere to the United Nations Convention on the Law of the Sea. In expressing this opinion the Office of Legal Affairs wishes to underline the unique status of Namibia as the only Territory under the direct responsibility of the United Nations and the *sui generis* character of the United Nations Council for Namibia as

a subsidiary organ of the General Assembly endowed with powers and functions of a governmental nature.

20 April 1982

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11. QUESTION OF THE RIGHT TO VOTE OF NAMIBIA, AS REPRESENTED BY THE UNITED NATIONS COUNCIL FOR NAMIBIA, AT THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA

Memorandum to the Under-Secretary-General, Special Representative of the Secretary-General to the Third United Nations Conference on the Law of the Sea

By operative paragraph 5 of resolution 34/92 C of 12 December 1979, the General Assembly decided to "grant full membership in the Conference to Namibia, represented by the United Nations Council for Namibia as the legal Administering Authority for Namibia". This decision is without any qualification whatsoever. As a full member in the Third United Nations Conference on the Law of the Sea, Namibia, as represented by the Council, is therefore entitled to all the rights of a member of the Conference including the right to vote.

22 April 1982

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12. IMPLICATIONS AND CONSEQUENCES FOR THE UNITED NATIONS OF THE INSTITUTION OF LEGAL PROCEEDINGS IN DOMESTIC COURTS BY THE UNITED NATIONS COUNCIL FOR NAMIBIA OR THE COMMISSIONER ACTING ON BEHALF OF THE COUNCIL

Memorandum to the Secretary of the United Nations Council for Namibia

1. I wish to refer to your memorandum of 16 August 1982 and paragraph 3 of document A/AC.131/L.254 of 2 August 1982 which requests the opinion of the Legal Counsel regarding the implications and consequences for the United Nations of the institution of legal proceedings in domestic courts by the United Nations Council for Namibia, or the Commissioner acting on behalf of the Council, particularly with a view to determining their legal standing and responsibilities.

2. To institute the type of proceedings contemplated by the Council for Namibia, it will be necessary to establish that the Council has the necessary legal capacity and that its action relates to the enforcement of a juridical right within the particular jurisdiction. Since the objective of the Council is to bring an action for the enforcement of Decree No. 1 for the Protection of the Natural Resources of Namibia,[17] the question of legal standing requires the consideration of two inseparable elements: legal capacity; and the status, in domestic law, of Decree No. 1.

3. In my memorandum on the legal status of the United Nations Council for Namibia which was addressed to the Special Representative of the Secretary-General to the Third United Nations Conference on the Law of the Sea on 20 April 1982,[18] it was pointed out that the Council is not a Government of a sovereign State but an organ of the United Nations responsible for the administration of a Territory having international status and entrusted with certain powers and functions of a governmental character. There is no question that, in international law, the Council is a properly constituted organ of the United Nations and that as such it falls within the purview of Article 104 of the United Nations Charter. Article 104 provides that "the Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes".

Article I, section 1, of the Convention on the Privileges and Immunities of the United Nations of 1946[19] elaborates further on the meaning of Article 104 of the Charter, as follows:

"The United Nations shall possess juridical personality. It shall have the capacity:

"(*a*) To contract;

"(*b*) To acquire and dispose of immovable and movable property;

"(*c*) *To institute legal proceedings.*"

All the countries referred to in paragraph 6 of document A/AC.131/L.254 are parties to that Convention.

4. The capacity of the United Nations and its organs to institute legal proceedings in domestic courts has been widely recognized although in practice it has been limited to the enforcement of commercial and non-commercial contracts. It is important to point out, however, that the United Nations does not have an absolute or unlimited capacity but only *such* capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes. It would, therefore, be open to a domestic tribunal to distinguish precedents on the ground that the United Nations has a limited capacity and one which does not extend beyond contractual relations. In the view of this office, however, an action to enforce Decree No. 1 would, as far as the question of capacity is concerned, be consistent with the meaning of Article 104 of the Charter and section 1 of the Convention on the Privileges and Immunities of the United Nations.

5. As pointed out in paragraph 2 above, however, for purposes of a determination of legal standing, it would not be sufficient merely to show that the Council for Namibia possesses legal capacity. It would also be necessary to show that its action related to the enforcement of a right under the laws of the country in which the suit was filed, in other words that Decree No. 1 was recognized and had the force of law within that jurisdiction. In enacting Decree No. 1, the Council declared that it was acting in accordance with the powers conferred upon it by the General Assembly under resolution 2248(S-V), specifically operative paragraph II.1(*b*), which entrusted to the Council the power to promulgate laws, decrees and administrative regulations necessary for the administration of the Territory. It may be recalled that the vote on that resolution was 85 in favour, 2 against and 30 abstentions. All of the countries referred to in paragraph 6 of document A/AC.131/L.254, except one which was not at that time a Member of the United Nations, abstained. The views expressed by Member States in the course of the adoption of resolution 2248 (S-V) and the reports of the numerous missions of the Council for Namibia indicate considerable divergencies of views among States regarding the nature and scope of the authority of the Council and, by extension, Decree No. 1. A systematic analysis of the views of Member States is not necessary for present purposes. Suffice it to say that it would appear that the countries referred to above are among those Member States which have expressed the strongest reservations regarding resolution 2248 (S-V), have expressly or implicitly withheld recognition of the Council for Namibia as either the *de jure* or *de facto* Administering Authority or do not recognize the Council's authority to create direct duties or obligations for Member States.

6. It may be seen, therefore, that the recognition by domestic courts of Decree No. 1, which for the reasons set out above is an integral element of legal standing, will depend largely on the position adopted by individual Member States regarding the Council. National courts will invariably seek and follow the advice of the executive branch of government since this is a matter which falls under the conduct of foreign relations. The proposed country studies will be extremely useful in clarifying the legal issues that arise in domestic law and in the light of these studies it will then be possible for the Council to make a final determination as to whether to go forward with the institution of legal proceedings. At such a time careful consideration will have to be given to the administrative policy and financial implications of such a decision.

28 September 1982

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13. ESTABLISHMENT, FINANCING AND SERVICING OF THE PREPARATORY COMMISSION FOR THE INTERNATIONAL SEA-BED AUTHORITY AND FOR THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

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

In response to your memorandum of 25 May 1982, which concerns the issues raised in the aide-mémoire of the Ministry of Foreign Affairs of Jamaica of 24 May 1982, we would like to make the following comments.

1. The provisions of the establishment of the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea are contained in resolution I adopted by the Third United Nations Conference on the Law of the Sea on 30 April 1982. The resolution envisages that the Commission shall establish two special sub-commissions (paras. 8 and 9) and will have the right to establish such subsidiary bodies as are necessary for the exercise of its functions (para. 7). These functions are set out in paragraph 5. As pointed out in paragraph 12 of the resolution, the Commission "shall meet as often as necessary for the expeditious exercise of its functions" and, according to paragraph 13, it "shall remain in existence until the conclusion of the first session of the Assembly [of the International Sea-bed Authority] at which time its property and records shall be transferred to the Authority."

2. It is clear from the above-mentioned provisions of resolution I that implementation of it will require substantial financial resources, conference facilities and secretariat services.

3. It appears from paragraph 14 of the resolution that the Preparatory Commission is not to have its own separate budget, financed by States signatories to the Convention, but that its expenses "shall be met from the regular budget of the United Nations, subject to the approval of the General Assembly of the United Nations". Moreover, according to paragraph 15 of the resolution, the secretariat services as may be required for the Commission shall also be provided by the United Nations.

4. The Conference, being a plenipotentiary one, had the authority to establish a Preparatory Commission entirely outside the United Nations framework as a separate treaty organ, serviced and financed from resources provided by States participating in the Conference. However, the Conference, while setting up a Preparatory Commission which is not itself a United Nations subsidiary organ, chose to maintain a link with the United Nations by requesting the General Assembly to provide for the financing and servicing of the Commission and, in this respect, asking the Secretary-General, in paragraph 16 of resolution I, to bring it, in particular paragraphs 14 and 15, to the attention of the Assembly for necessary action.

5. As the resources to finance and service the Preparatory Commission are to be provided by the United Nations, such financing and servicing is subject to the usual United Nations regulations and rules, except to the extent that the General Assembly may direct otherwise. The Assembly thus has the discretion to determine what conditions are to be met in order for it to finance and service meetings of the Commission at a particular place.

6. As resolution I was adopted by the Law of the Sea Conference by an overwhelming majority of the nations participating in the Conference, it would seem to be certain that the General Assembly will give the greatest weight to the provisions of the resolution, including paragraph 12, in which it is provided that the Commission shall meet at the seat of the International Sea-Bed Authority, namely Jamaica, if facilities are available. Nevertheless, the Assembly may make its own independent assessment on whether the scale and level of facilities (e.g., meeting rooms, document reproduction facilities, interpretation and communications facilities, etc.) available at any given time in Jamaica are such that the Assembly is prepared to vote the funds and staffing for holding meetings in Jamaica. It is also for the Assembly to determine

where the secretariat services for the Commission should be located, taking into account the various financial and technical considerations involved. The General Assembly thus has considerable latitude in these respects.

7. There is another issue raised in the aide-mémoire of Jamaica. That is whether paragraph 5 of General Assembly resolution 31/140 of 17 December 1976, "Pattern of conferences", which provides that a Government issuing an invitation for a session of a United Nations body to be held within its territory must agree to defray additional costs directly or indirectly involved, is applicable to the concrete situation of convening a meeting of the Preparatory Commission in Jamaica. We share the view expressed in the aide-mémoire that in the present case that resolution is not applicable because the Third Law of the Sea Conference decided to hold the meetings of the Preparatory Commission at the seat of the International Sea-Bed Authority, if facilities were available, and the Assembly itself will in fact so decide if it votes the financing and servicing of the Commission in Jamaica. That is clearly why Jamaica has not issued and is not required to issue any invitation to the Preparatory Commission within the meaning of resolution 31/140 (para. 5).

10 June 1982

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14. QUESTIONS ARISING FROM THE PROPOSED INCLUSION IN DRAFT RESOLUTION II OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA IN THE DEFINITION OF "PIONEER INVESTORS" OF PRIVATE ENTERPRISES WHICH HAVE BEEN INVESTING FUNDS IN THE DEVELOPMENT OF SEA-BED MINING TECHNOLOGY

Memoranda to the Under-Secretary-General, Special Representative of the Secretary-General to the Third United Nations Conference on the Law of the Sea[20]

I

I have received the request for a legal opinion contained in your memorandum of 20 April 1982. The request relates to draft resolution II governing preparatory investment in pioneer activities relating to polymetallic nodules, in particular to paragraph 1 (*a*) (ii) thereof, which contains a definition of a "pioneer investor". As presently drafted, that term is defined to cover, *inter alia,* State enterprises and private enterprises. These latter enterprises are said to be entities "comprising natural or juridical persons which possess the nationality of, or are effectively controlled by," certain specified States. While the definition does not list the "juridical persons" comprising the private enterprises concerned, it contains a footnote reference, directing attention to document ST/ESA/107 "for their identity and composition."[21] The request for an opinion concerns the competence of the Conference on the Law of the Sea to include the private enterprises involved in its definition of pioneer investors.

In response to the question you have put, it would seem useful to take into account the following points:

1. The Third United Nations Conference on the Law of the Sea is a plenipotentiary conference and, as such, it is competent to make decisions and to adopt resolutions in accordance with the rules of procedure of the Conference.

2. The rationale for making provisions for investments made by States and other entities is expressed by the co-ordinators of the working group of 21 in paragraph 15 of their report recommending draft resolution II:

> "It is a demonstrable reality that six consortia and one State have been investing funds in the development of sea-bed mining technology, equipment and expertise. The programme of their research and development has arrived at a point when they must invest substantial amounts of funds in site-specific activities. The industrialized countries

representing these consortia have been demanding that the Conference and the convention on the law of the sea should recognize these preparatory investments. We feel that this is a legitimate request provided that the preparatory investments of these pioneers will be brought within the framework of the convention and provided that the interim arrangement is transitory in character."[22]

3. Article 153 and annex III, article 4, of the draft convention on the law of the sea envisage the carrying out of "activities in the Area" by, *inter alia,* private entities. It is therefore not inconsistent with the convention to make provisions for the participation of private entities or groupings thereof.

4. We understand that various methods have been tried with a view to finding a satisfactory way to define the term "pioneer investor" so as to meet the divergent policy objectives of the different interest groups. The present approach appears to enjoy substantial support.

5. The draft resolution does not seek to confer any immediate rights or benefits on a private enterprise without State action and consent, such rights and benefits only arising after certification of that enterprise by a State or States signatory to the convention, an application on behalf of that entity by a State to the Preparatory Commission for the International Sea-Bed Authority and registration by the Commission after it is satisfied that the enterprise meets certain conditions. Consequently, the action and responsibility of the States directly concerned is involved. In this connection, the certifying State or States stand in the same relation to a pioneer investor as would be a sponsoring State to an applicant pursuant to annex III, article 4, of the convention (see para. 1 (*c*), "certifying State").

6. In the circumstances just described, which engage State responsibility and consent throughout, the status of an entity or its components under the national law of the State or States in which it is established (i.e., whether it or its components are State- or privately owned) is in our view irrelevant to the competence of the Conference to define the term "pioneer investor".[23]

7. It is not uncommon for agreements or arrangements between States to confer rights and benefits on both State and private commercial enterprises, one entire category being comprised of airline agreements which permit a State party to designate the enterprises to operate air routes specified in the agreement (the purpose of such designation is achieved in the draft resolution under consideration by certification by a signatory State and application by a State to the Preparatory Commission). World Bank Loan Agreements constitute another category of a similar nature.

On the basis of the above reasoning, I am of the opinion that the approach adopted in paragraph 1 (*a*) (ii) of draft resolution II is legally permissible and consistent with the practice of the United Nations. Consequently, the question which was put to us should be answered in the affirmative.

21 April 1982

II

1. In a memorandum dated 20 April 1982, you had requested the Legal Counsel to provide a legal opinion concerning the competence of the Third United Nations Conference on the Law of the Sea to include the private enterprises referred to in its definition of pioneer investors in paragraph 1 (*a*) (ii) of draft resolution II governing preparatory investment in pioneer activities relating to polymetallic nodules.[24] On the basis of the reasons given in a memorandum dated 21 April 1982,[25] we concluded that the approach adopted in draft resolution II was legally permissible and consistent with the practice of the United Nations

2. In a letter from a delegation, it is stated that it did not agree with the conclusion of the 21 April 1982 memorandum and considered that the inclusion in the resolution of the provisions had no legal basis. That letter raises several questions and invites the Secretariat to respond to them.

3. As will be seen, the questions raised are far broader in scope and in substance than the technical question posed and addressed in the previous opinion. The present questions in addition involve many policy issues which only the Conference itself is competent to decide. This reply is therefore based on the relevant documents of the Conference and on the discussions that took place during the consideration of the subject. The opinion of the Office of Legal Affairs on the questions posed are set out below.

A. WHETHER THE CONFERENCE WOULD GO TOO FAR IN DESIGNATING PRIVATE COMPANIES, GRANTING THEM THE STATUS OF PIONEER INVESTOR AND PLACING THEM ON THE SAME FOOTING AS STATES. THESE ISSUES INVOLVE SUBSTANTIVE QUESTIONS ABOUT THE APPLICATION OF THE PROPOSED CONVENTION, WHICH WILL BE MATTERS PRIMARILY OF CONCERN TO THE STATES PARTIES TO THE FUTURE CONVENTION.

4. It may be noted that during the past eight years the Conference has been engaged in the preparation of a comprehensive, generally acceptable convention on the law of the sea. It has now reached the final, decision-making stage. Since the Conference has competence to draft provisions for the convention, it is also competent to propose how certain provisions should be applied, as well as the form and manner in which such competence is to be exercised.

5. It may be recalled that the decision to use resolutions of the Conference to establish the Preparatory Commission and to make provisions for the preparatory investment enjoy wide support. All the draft proposals on the first subject and two of the three draft proposals on the latter subject (TPIC/3 and TPIC/5) favoured the use of resolutions. Most members rejected the protocol approach proposed on preparatory investment by the four-Power draft (TPIC/2). It should also be noted that during the discussions on the subject no other form was suggested.

6. The proposed approach, of incorporating in a Conference resolution the decision regarding preparatory investment in pioneer activities, is legally acceptable and is consistent with past practice. However, since it is important that the consequences of the proposed resolution should also bind the future Authority, it is necessary that provision be made in the convention to recognize such consequences. In this connection, it may be noted that, in proposing draft resolutions I and II, respectively establishing the Preparatory Commission and providing for the treatment of preparatory investments, the co-ordinators of the working group of 21, and subsequently the Collegium, recommended that consequential provisions should be made in article 308, in order to ensure that the registration of pioneers, the allocation of pioneer areas and the priority given to them should be binding on the Authority upon entry into force of the convention.[26] Paragraph 13 of draft resolution II further makes the intention clear that the Authority and its organs are to recognize and honour the rights and obligations arising from this resolution and the decisions of the Preparatory Commission taken pursuant to it.[27] Consequently, it would seem that the combination of a Conference resolution, together with the inclusion of a provision in the convention recognizing decisions taken thereunder, would represent a valid and effective approach to this question.

7. As already mentioned in the previous opinion, the rationale for making provisions to deal with investments made by States and other entities was expressed by the co-ordinators of the working group of 21 in their report recommending draft resolution II.[28] That rationale appears to have wide support in the Conference. It is also relevant to point out that article 153 and annex III, article 4, of the draft convention envisage the carrying out of "activities in the Area" by, *inter alia*, States Parties or State entities as well as by private companies. It is, therefore, not inconsistent with the convention to make provisions in draft resolution II for the participation of private entities or groupings thereof.

B. WHAT WOULD BE THE LEGAL EFFECT OF SUCH A DECISION IF EXPLICIT OBJECTIONS WERE RAISED OR OPPOSING VOTES WERE CAST?

8. This question must be viewed in the light of the relevant rules of procedure of the Conference.[29] Thereunder, such a decision will have the legal effect normally attributed to a Conference resolution adopted in accordance with its rules of procedure. In so far as draft resolution II is concerned, it is to be noted that, according to the decision of the Collegium, this resolution together with the other draft resolutions and the draft convention "form an integral whole" to be adopted by the Conference at the same time with the understanding that the resolutions will be embodied in the final act.[30] In this connection, the decisions of the Conference taken at its 175th plenary meeting should be borne in mind. It is understood, however, that the Conference would prefer to adopt the convention and the relevant resolutions by consensus.

C. SHOULD THOSE PRIVATE COMPANIES BE ALLOWED TO CONTINUE TO ENJOY SUCH STATUS IF THE STATES OF WHICH THEY ARE NATIONALS SHOULD FAIL TO RATIFY THE CONVENTION? IS NOT THE WHOLE PURPOSE OF ENUMERATING THE COMPANIES IN A DECISION OF THE CONFERENCE TO MAKE IT POSSIBLE FOR THE STATES CONCERNED TO REFUSE TO RATIFY THE CONVENTION AS SOON AS THE COMPANIES RECEIVE THE BENEFITS?

9. These questions involve basically political issues. According to paragraph 8 (*a*) of draft resolution II, the pioneer investors are to be required to apply to the Authority, within six months of the entry into force of the convention, for a plan of work for exploration and exploitation. A certifying State is to be deemed to be a sponsoring State for the purposes of annex III, article 4, of the convention, and must, upon the entry into force of the convention, assume the obligations as such. No plan of work for exploration and exploitation may be approved unless the certifying State is a party to the convention. It is further specified that, in respect of the entities referred to in paragraph 1 (*a*) (ii) of the draft resolution (i.e., the four consortia), the plan of work for exploration and exploitation "shall not be approved" unless all the States at present whose natural or juridical persons comprise those entities are parties to the convention (draft resolution II, para. 8 (*c*)). If any such State fails to ratify the convention within a period of six months after it has been notified that an application is pending, its status as a pioneer investor or certifying State, as the case may be, "shall terminate", unless the Council, by a majority of three fourths of its members, decides to postpone the termination date (draft resolution II, para. 8 (*c*)). The termination of the status as a certifying State will in turn terminate any right acquired by any pioneer investors it had certified (draft resolution II, para. 10 (*a*)).

10. Explicit provisions are also made in subparagraph 10 (*b*) and (*c*) of draft resolution II, permitting the pioneer investors to change their nationalities. This reflects another political decision that the Conference has made. A registered pioneer investor may alter its nationality and sponsorship from that prevailing at the time of its registration to that of any State Party to the convention which has "effective control" over it. Such change in nationality is not to affect any right or priority conferred on a pioneer investor. Thus, even though changing nationality and sponsorship is permitted, the requirement of "effective control" must be maintained. So long as there is a requirement of "effective control", "flag of convenience" abuses cannot occur.

11. It is understood that these consequences were presented as political compromises between the proposals of the different interest groups. Certain States had insisted earlier that, in the case of the entities referred to in paragraph 1 (*a*) (ii) of draft resolution II, all the States whose natural or juridical persons comprise these entities must be signatories to the convention at the time the entities apply for pioneer investor status; other States strongly objected to this. The present compromise is to require all those States to become parties to the convention when the entities apply for a plan of work.

D. WHY MUST A DECISION OF THE CONFERENCE ESTABLISH AN INEQUITABLE SYSTEM FOR THE GRANTING OF THE STATUS OF "PIONEER INVESTOR" TO JURIDICAL PERSONS OF STATES ENUMERATED IN PARAGRAPH 1 (*a*) (i) AND TO JURIDICAL PERSONS OF STATES ENUMERATED IN PARAGRAPH 1 (*a*) (ii) IN DRAFT RESOLUTION II? WHY SHOULD THE COMPANIES OF THE LATTER STATES BE ACCORDED AN ESSENTIALLY PRIVILEGED POSITION?

12. These also are political questions on which the Conference will have to make a decision. It is true that under subparagraph 1 (*a*) (i) of draft resolution II, as presently drafted, the States therein must sign the Convention from the outset, while not all the States referred to in subparagraph 1 (*a*) (ii) must do so. There is also the third category, subparagraph 1 (*a*) (iii), where the States referred to must also be signatories at the outset. The requirement is therefore somewhat different from the three categories of pioneer investors. It may be relevant to point out that, if paragraph 5 of the draft resolution is interpreted to mean that only certifying States which are also signatory States may participate in the conflict resolution envisaged therein, the States mentioned in paragraph 1 (*a*) (ii) may need to become signatories in order to participate effectively in resolving conflicting claims.

27 April 1982

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15. IMPLICATION OF A PROVISION IN A DRAFT RESOLUTION URGING THE SECRETARY-GENERAL TO ASSUME UNDER THE 1949 GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR RESPONSIBILITY FOR ENSURING HUMAN AND OTHER RIGHTS WITHIN OCCUPIED TERRITORIES ATTACHED TO THE OCCUPYING POWER.

Statement by the Legal Counsel at the 44th meeting of the Special Political Committee

I should like to say a few words about paragraph 1 of draft resolution A/SPC/37/L.24 on the "Protection of Palestinian refugees". That paragraph would urge the Secretary-General, in consultation with UNRWA, "to undertake effective measures to guarantee the safety and security and legal and human rights of the Palestinian refugees" in the territories occupied by a Member State.

In this connection, I feel it important to draw the attention of the Committee to the provisions and spirit of the fourth of the 1949 Geneva Conventions, which governs the protection of civilian persons in time of war.[31] In numerous resolutions, such as 2727 (XXV) of 15 December 1970 and 36/147A of 16 December 1981, the General Assembly has specifically held that Convention to be applicable to the situation in the territories in question. That Convention, *inter alia,* reiterates a general principle of international law, that responsibility for ensuring human and other rights within such territories attaches to the occupying Power. Any attempt by another authority, or by an international organization, to assume part of that responsibility would seem to weaken or at least obscure this duty of the occupying Power.

Further, it is difficult to see how the Secretary-General could "undertake effective measures to guarantee the safety and security and legal and human rights of the Palestinian refugees" without in effect exercising certain sovereign powers, including police power, in the occupied territories, or else exerting authority and control over the occupying Power itself. When international organizations carry out any activity within a given territory, they must do so with the consent and, as necessary, the co-operation of the authorities in effective control of such territory. If such consent and/or co-operation were not forthcoming, the Secretary-General would be unable to undertake the measures required to give effect to the objectives set out in this draft resolution.

3 December 1982

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16. QUESTION WHETHER WITHIN THE TRADE AND DEVELOPMENT BOARD A DELEGATION CAN INTRODUCE RESERVATIONS TO A CONSENSUS RESOLUTION AFTER THE CLOSURE OF THE SESSION DURING WHICH THAT RESOLUTION WAS ADOPTED

Memorandum to the Senior Legal Liaison Officer, United Nations Conference on Trade and Development

You have requested a legal opinion on the question "whether a delegation can introduce reservations to a consensus resolution after the closure of the session during which that resolution was adopted". The legal opinion was requested after a statement was made by the representative of a Member State at the twenty-fourth session of the Trade and Development Board notifying the Board that the Member State in question had formally reserved its position on part B of resolution 222 (XXI) adopted by the Board at its twenty-first session by consensus.

From a legal standpoint it is clear that a delegation can only effectively register a reservation to a consensus resolution at the time of adoption of the resolution in question. Consensus is generally understood to mean the adoption of a resolution or a decision without a vote in the absence of any formal objection or opposition, and therefore even a reservation made formally at the time of adoption of the text, while indicative of a qualified assent, does not prevent the adoption of the consensus text in question. In our view the statement made by the representative of the Member State concerned in respect of resolution 222 (XXI) during the twenty-first session of the Board cannot be characterized as a reservation to a resolution adopted by consensus at a previous session of the Board. The statement must be regarded as reflecting the position of the State concerned with regard to the consensus resolution at the time that the statement was made in the light of its interpretation of relevant developments in the period subsequent to the adoption of the resolution. While it is the sovereign right of every State to make its position known and even to change its position on a particular subject at any time, such an act cannot affect the validity of the earlier adoption by consensus of a resolution on that same subject. It should be borne in mind that while resolutions of General Assembly and its organs are of a recommendatory character, there may be situations where a State enters into a commitment to carry out the provisions of a resolution in good faith. If it is argued that such commitments have been made in the case under review, it would appear to be the position of the State concerned that such commitments are no longer binding in view of a breach of undertakings of sufficient gravity by certain parties which releases other parties from their earlier commitments. Underlying this argument is a general principle of law, its application in the circumstances of this case not being a matter on which the Secretariat is competent to give an opinion.

4 May 1982

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17. PROCEDURE TO FOLLOW IN SECURING PATENT PROTECTION FOR SOME EQUIPMENT AND SOFTWARE DEVELOPED IN THE FRAMEWORK OF A PROJECT SPONSORED BY THE UNITED NATIONS DEVELOPMENT PROGRAMME

Memorandum to the Senior Director, Office for Projects Execution, United Nations Development Programme

1. I refer to your memorandum of 3 February 1982 requesting our advice on the proper procedure to follow in security patent protection for some equipment and software relating to geophysics exploration developed in the project under reference, as well as on the question of royalties which might derive therefrom.

2. It appears that UNDP has proprietary rights in those inventions, which have been developed as part of and arising from a UNDP-sponsored project.

3. The general policy of UNDP regarding patent rights and copyright rights to any discoveries, inventions or works resulting from UNDP-sponsored projects is to claim the rights for itself, giving at the same time the recipient Government a royalty-free licence to exploit the invention or reproduce the work within the country without charges. This policy is reflected in article III, paragraph 8, of the UNDP Standard Basic Assistance Agreement (SBAA)[32] and has been generally accepted by Governments. The rationale behind this policy is to secure the widest possible dissemination and use of the inventions or works resulting from projects financed by UNDP for the common interest of developing countries and with a view to preventing possible pre-emption of those inventions by individuals or entities to the detriment of the public sector. The policy, therefore, is not primarily directed towards acquiring a source of revenue in the form of royalties deriving from the use of patent rights although this is not precluded for UNDP or for the developing country within whose project the invention was made.

4. There are instances in which the public interest in wide dissemination is better protected by making those inventions available to science and industry throughout the world by publication or disclosure. This method of publishing or disclosing an invention, rather than patenting it, generally provides adequate protection of the public interest and avoids the complicated and onerous procedure involved in a patent application.

5. Patent, unlike copyright, must be taken out in each country where patent protection is sought, whereas copyright, under the Universal Copyright Convention,[33] is acquired simultaneously in all the States which are parties to the Convention. No similar provision exists in the Convention for the Protection of Industrial Property,[34] which deals with patents. Under the latter Convention, the filing of an application for a patent in one country party to the Convention affords no more than a right of priority to apply within a certain period for the same patent in another Convention country. The priority period is 12 months for patents and utility models and six months for industrial designs and models and for trade marks.

6. We note that the State where the UNDP-sponsored project is being executed is not a party to the Convention for the Protection of Industrial Property and that, consequently, the filing of a patent application in that State would not entitle UNDP to claim priority for a further application in another country.

7. In the light of the importance and potential market of the patentable equipment, and taking into consideration the aforementioned UNDP policy in this matter, we believe that you should determine whether the public interest, particularly of developing countries, would be better protected if the inventions in question were to be published and disclosed.

8. However, if you are of the view that it is in the general interest to seek patent protection of the equipment of geophysics exploration, there are several alternative courses open to UNDP: (1) UNDP may file the application in its name in the State concerned. UNDP would then grant the competent national entity royalty-free licence to exploit and market the instruments and software in the State concerned; (2) UNDP may transfer its patent rights to the Government or the competent national entity which could themselves file the application, should this be found necessary and appropriate in encouraging development and exploitation of the work; (3) UNDP may file the application jointly with the Government concerned. We would have no legal objection to any of the above alternatives. However, should UNDP choose alternative two or three, it should retain and reserve the rights outside of [name of Member State].

26 April 1987

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18. STATUS OF THE INTERNATIONAL CRIMINAL POLICE ORGANIZATION (INTERPOL) WITH THE UNITED NATIONS

Letter to the Secretary-General of the International Criminal Police Organization (INTERPOL)

The Office of Legal Affairs has carried out an in-depth analysis of the status of the International Criminal Police Organization with the United Nations, a copy of which is annexed to this letter.

ANNEX

Status of INTERPOL with the United Nations

1. The present status of INTERPOL for the purpose of its relations with the United Nations, in particular with the Economic and Social Council, is governed by decision 109 (LIX) of the Council, entitled "Participation of intergovernmental organizations in the work of the Council". The Council thereby decided, among other things, "to designate the International Criminal Police Organization, which had been participating in the work of the Council in accordance with Council resolution 1579 (L), to participate, on a continuing basis, in the work of the Council, under rule 79 of the rules of procedure". Rule 79, adopted by the Council by resolution 1949 (LVIII) of 8 May 1975, sets out the conditions for participation in the work of the Economic and Social Council by intergovernmental organizations other than the specialized agencies. Under this arrangement it is clear that at present, in its relations with the Economic and Social Council (and consequently with any other organs or subsidiary organs of the United Nations), INTERPOL is considered to be an intergovernmental organization. The report of the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, convened by the General Assembly at Caracas from 25 August to 5 September 1980,[35] e.g., lists INTERPOL among the intergovernmental organizations which attended as observers, together with such other intergovernmental organizations as the Council of Europe, the League of Arab States, the Organization of African Unity and the Organization of American States.

2. In the early days of its relationship with the Economic and Social Council, INTERPOL was classified, first in category B, and subsequently in category II of the non-governmental organizations which, under Article 71 of the Charter, have a consultative status with the Council. The change in status at the United Nations was consequential upon the amendment in 1956 of the constitution of INTERPOL which evidenced the intergovernmental character of the organization. The change in the relationship of INTERPOL with the United Nations took several years to materialize, partly, it would seem, as a result of the somewhat *ad hoc* character, prior to 1975, of the arrangements for relations between the Economic and Social Council and intergovernmental organizations other than the specialized agencies, and partly because of the uncertainties which seem to have persisted with regard to INTERPOL's intergovernmental character in the absence of a formal international agreement establishing the organization.

3. In 1969, the Economic and Social Council requested its Committee on Non-Governmental Organizations to study a special arrangement to govern the relations between the Council and INTERPOL. The draft special arrangement which was subsequently prepared, at the request of the Council, by the Secretariat, in consultation with INTERPOL, was described by the Secretary-General as "based on the rights and privileges granted to a non-governmental organization in category I under [Council] resolution 1296 (XLIV)", and as taking into account "the other special arrangements in existence between the Council and other governmental organizations".[36] The approval of the special arrangement by the Economic and Social Council in resolution 1579 (L) was generally considered as officially upgrading INTERPOL in its relationship with the Council from the level of non-governmental to that of intergovernmental organization.[37] When the Council, further to the adoption of rule 79 of the rules of procedure, formalized its relations with intergovernmental organizations other than specialized agencies, its Bureau logically recommended that INTERPOL be invited to participate on a continuing basis in the work of the Council, as an intergovernmental organization, under the new rule 79.[38] This resulted in the above-mentioned Council decision 109 (LIX).

4. The available official records documenting the history of INTERPOL's relationship with the United Nations do not indicate on what basis the Council eventually had come to the conclusion that INTERPOL qualified as an intergovernmental organization. From the beginning, the United Nations seems to have relied

very heavily on the existence of a formal intergovernmental agreement as the main criterion for a determination as to the intergovernmental character of an international organization. This view was supported by the provision in Economic and Social Council resolution no. 2/3 of 21 June 1946 (reiterated in Council resolution 1296 (XLIV) of 23 May 1968) according to which "any international organization which is not established by intergovernmental agreement shall be considered as a non-governmental international organization." This negative definition was derived from Article 57 of the Charter, which in turn was formulated on the basis of the opinion of the Advisory Committee of Jurists at the San Francisco Conference according to which "the term intergovernmental should be interpreted to mean agencies which have been set up by agreement between Governments". There is thus far, however, no authoritative definition in international law of the term "intergovernmental organization". Indeed, the definition proposed by the Rapporteur of the International Law Commission during the elaboration of the Vienna Convention on the Law of Treaties, which included, among others, the requirement of a constituting treaty, was not retained because this criterion was not always met in practice. It had gradually been recognized that the substance of the constitution or statute of an organization may be more relevant to the determination of the intergovernmental character of the organization than the form in which it is cast. Even if its constitution does not qualify as a formal international treaty, an international organization may well be called intergovernmental as a result of the role which that constitution ascribes to Governments with regard to such matters as membership, representation, financing, etc. A non-governmental organization may thus change its status to intergovernmental without a change to the non-treaty form of its statute, but as a result of appropriate amendments to the relevant provisions of the statute. This possibility of conversion to intergovernmental status has been pointed out and elaborated upon by the Secretary-General of the United Nations in a report on the constitutional, organizational and financial implications of the establishment of an intergovernmental tourism organization, submitted to the Economic and Social Council in 1969.[39] The acceptance of this possibility also seems to be implied in a letter, dated 8 August 1955, through which the Secretariat of the United Nations informed the Secretary-General of the International Criminal Police Commission (as INTERPOL was named before 1956) that "if participation in the Commission [INTERPOL] becomes exclusively governmental, as envisaged in article 3 of the draft statute, it will obviously no longer be possible for the new organization to be included in the list of non-governmental organizations recognized by the Economic and Social Council".

5. In the light of this possibility of an international organization acquiring intergovernmental status through changes to its existing constitution (which, incidentally, may be considered an international agreement in simplified form), it may be considered that the present constitutional provisions of INTERPOL fully justify the decisions of the Economic and Social Council to consider INTERPOL as an intergovernmental, rather than a non-governmental, organization. It may also be noted that, prior to the Council's decision, the Government of France explicitly recognized the intergovernmental character of INTERPOL by concluding a headquarters Agreement with that organization (now superseded by a new Agreement of 3 November 1982).

14 December 1982

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19. Question whether the Executive Committee of the programme of the High Commissioner for Refugees has the competence to expel or suspend a member of the Executive Committee

Memorandum to the Regional Representative a.i. of the United Nations High Commissioner for Refugees

. . .

2. You indicated in your memorandum that the question of expulsion or suspension of a member of the UNHCR Executive Committee might be raised at the Committee's forthcoming session. Should such a situation arise, the Committee should be advised that it does not have the competence to expel or suspend any of its members. The Executive Committee was established by the Economic and Social Council,[40] which also elects its members. Consequently, it is exclusively within the competence of the Council to determine any questions relating to membership of the Executive Committee. The Executive Committee may, if it so wishes, submit recommendations on such questions to the Economic and Social Council but in this case any such recommendation would only become effective if and when it is approved by the Council.

3. Rule 8 of the rules of procedure of the Executive Committee[41] requires that credentials of representatives of members of the Committee and names of alternate representatives and advisers be submitted to the Chairman who must report thereon to the Committee. It is possible that on the basis of this provision a proposal may be made for the Committee to reject the credentials of a particular member's representative with a view to preventing that member from participating further in the work of the Committee. In that event the Chairman should inform the Committee of the General Assembly's attitude (as expressed in the latest action it has taken on credentials) regarding the credentials of the State concerned. Furthermore, the Chairman should advise the Committee that its competence in regard to credentials is limited to examining whether the technical requirements associated with the issuance of credentials (i.e., whether the credentials have been issued by a competent governmental authority) have been met and that where questions regarding the representation of a State are concerned all United Nations organs are required to follow the relevant decisions of the General Assembly, the principal deliberative organ in which all Members are represented. In this connection, the Committee's attention could be drawn to General Assembly resolution 396 (V) which applies expressly to questions of representation where more than one authority claims to be the government entitled to represent a Member State in the United Nations but which established practice has applied by analogy also to other questions involving the representation of States.

28 September 1982

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20. PRESENTATION OF STATISTICAL INFORMATION FOR WESTERN SAHARA AND ITS CLASSIFICATION AS A "DEVELOPING COUNTRY OR TERRITORY" IN REPORTS OF THE UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT—GENERAL ASSEMBLY RESOLUTION 36/46 OF 24 NOVEMBER 1981

Cable to the Legal Liaison Officer, United Nations Conference on Trade and Development

Your cable concerning presentation of statistical information for Western Sahara and its classification as a "developing country or Territory" in UNCTAD reports.

As we understand its objections have been raised to classification and presentation of statistics for Western Sahara as a separate Territory rather than as an integral part of a specific State.

1. Statistical office on basis of our legal advice lists Western Sahara under heading "country or area" and presents separate statistical information for the Territory.

2. Basis for above practice is that the General Assembly has not taken any decision to date which recognizes partition of Western Sahara or its absorption by any State. Territory therefore remains on list of Territories to which Declaration on granting of independence to colonial countries and peoples applies.

3. Latest General Assembly resolution, which takes into account organization of African Unity position, regarding question of Western Sahara is resolution 36/46 of 24 November 1981. In first three operative paragraphs of that resolution General Assembly:

"1. *Reaffirms* the inalienable right of the people of Western Sahara to self-determination and independence in accordance with the Charter of the United Nations, the Charter of the Organization of African Unity and the objectives of General Assembly resolution 1514 (XV), as well as the relevant resolutions of the General Assembly and the Organization of African Unity;

"2. *Welcomes* the efforts made by the Organization of African Unity and its Implementation Committee on Western Sahara with a view to promoting a just and definitive solution to the question of Western Sahara;

"3. *Takes note* of the decision of the Assembly of Heads of State and Government of the Organization of African Unity at its eighteenth ordinary session to organize

throughout the Territory of Western Sahara a general and free referendum of the people of Western Sahara on self-determination."

4. In light of above it is clear that the objections are not legally justified and that treatment of Western Sahara in UNCTAD reports in question is consistent with current United Nations practice based on decisions of the General Assembly and the Organization of African Unity Governing Body.

12 January 1982

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21. INTERPRETATION OF GENERAL ASSEMBLY RESOLUTION 36/231 A OF 18 DECEMBER 1981 ON THE SCALE OF ASSESSMENTS—QUESTION WHETHER THE COMMITTEE ON CONTRIBUTIONS MUST CONSIDER ITSELF BOUND BY THE FOUR CRITERIA SET OUT IN SUBPARAGRAPHS 4 (*a*)-(*d*) OF THE RESOLUTION

Memorandum to the Secretary of the Committee on Contributions

The following is a written summary of the legal advice we gave to the Committee on Contributions in two statements this morning, as to whether it must consider itself bound by the four criteria set out in subparagraphs 4 (*a*)-(*d*) of General Assembly resolution 36/231 A of 18 December 1981.

1. The Committee, as a subsidiary organ of the General Assembly (established and assigned functions by rules 158-160 of the rules of procedure of the General Assembly)[42] required to assist the Assembly in carrying out functions assigned to the latter by Articles 17 (2) and 19 of the Charter, is bound to carry out its tasks in accordance with any directives addressed to it by the Assembly.

2. Although such directives as the General Assembly has from time to time addressed to the Committee (those preceding the thirty-sixth session being listed in document A/36/11, annex I) have often been formulated by the Assembly on the advice of the Committee, there is no requirement that this be so, and the Assembly is consequently entirely free to promulgate directives without first receiving the comments of the Committee thereon.

3. The four criteria in question appear to have been intended as temporary (subject to the conditions set out in the introductory sentence of paragraph 4) but binding directives for the Committee. This appears from the following:

(*a*) The use of the term "will be observed" ("seront utilisés" in French) indicates that the criteria set out in the following subparagraphs are meant to be binding. While the use of the word "shall" in English ("devront être" in French) would have been even more imperative, the word "will" sufficiently conveys the same meaning and certainly does not suggest any flexibility for the Committee as to whether or not to apply the criteria.

(*b*) The fact that three of the four subparagraphs in which the criteria are set out use the word "should" ("devrait") does not change the conclusion following from the above subparagraph, since it is the introductory part of paragraph 4 that indicates the extent to which the following criteria are to be binding. While again it might have been preferable to use more imperative expressions in the subparagraphs, experience indicates that General Assembly resolutions are not drafted with such degree of care and uniformity that is applied, for instance, to the formulation of treaty instruments. However, it should be noted that while subparagraphs (*a*), (*b*) and (*d*) appear to state absolute criteria, subparagraph (*c*) is, of necessity, formulated more flexibly in terms of "efforts to be made" and "special measures to be taken", so that, even if binding, this subparagraph is certainly not rigid.

(*c*) The debate on the draft resolution in the Fifth Committee, which is summarized in the report of the latter to the General Assembly,[43] suggests that the participants therein, who for the most part concentrated on paragraph 4, were interested in influencing their colleagues in the Fifth Committee and the plenary as to the desirability of adopting the criteria rather than seeking to influence the Committee on Contributions as to whether or not to apply these criteria. In

other words, it seems to have been assumed by the participants in the Fifth Committee debate that whatever criteria were to be included in paragraph 4 of the resolution would be binding on the Committee on Contributions.

9 June 1982

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22. QUESTION WHETHER UNDER THE FINANCIAL REGULATIONS AND RULES OF THE UNITED NATIONS A VOLUNTARY CONTRIBUTION MAY BE ACCEPTED WITH A CONDITION THAT PURCHASES FUNDED FROM THE CONTRIBUTION BE MADE IN THE DONOR COUNTRY

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

. . .

The matter you raise in your letter of 31 August 1982 concerns the question whether under the Financial Regulations and Rules of the United Nations a voluntary contribution may be accepted if it is a condition of the contribution that purchases funded from the contribution be made in the donor country.

This is a subject that has arisen from time to time over the years and, most recently, in the context of UNDP examination of how its resources might be augmented; and, in that connection, whether UNDP contracts could be placed in donor countries to a degree more commensurate with contributions to UNDP.

In the light of the Financial Regulations and Rules of the United Nations, it would not be correct for those bodies to which those Regulations and Rules apply, and this includes UNIDO and UNIDF, to do otherwise than continue the usual practice of international competitive bidding for procurement, the scope of which is supposed to be established solely in the Organization's interest and in accordance with its policies.

As to your inquiry on the use of rule 114.2 of the Financial Regulations and Rules of the United Nations, it has been our view that rule 114.2 enables the United Nations to perform a "service" for a Government and to be reimbursed for the "service" performed. It is necessary to remember, however, when that rule is being applied that there is a distinction between monies which the United Nations may receive as *payment* for the rendering of the "service", and monies which are in fact "channelled" through the United Nations for supplies or services which the United Nations may procure from third parties. Even reimbursable procurement is done consistently with United Nations rules on competitive bidding; a service fee is also typically charged. Accordingly, rule 114.2 ought *not* to be used to circumvent the international competitive bidding requirement for United Nations contracts.

18 October 1982

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23. IMPLEMENTATION OF ARTICLE 43 OF THE CHARTER OF THE UNITED NATIONS REGARDING THE PROVISION OF ARMED FORCES, ASSISTANCE AND FACILITIES TO THE SECURITY COUNCIL FOR THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY

Memorandum to the Under-Secretary-General for Political Affairs

With reference to your memorandum to the Legal Counsel on the above-mentioned subject, dated 24 September, please find annexed a note on Article 43 of the Charter of the United Nations prepared by our Office.

21 October 1982

ANNEX

Note on Article 43 of the Charter

OUTLINE OF ARTICLE 43

1. Paragraph 1 states the general obligation of Member States to make available to the Security Council, on its call, armed forces, assistance and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security. It provides that such forces, assistance and facilities shall be made available "in accordance with a special agreement or agreements".

2. Paragraph 2 specifies the contents of the special agreement or agreements: such instruments shall govern the numbers and types of forces, their degree of readiness and general location and the nature of the facilities and assistance to be provided.

3. Paragraph 3 describes the procedure for the conclusion of the agreement or agreements: they shall be negotiated as soon a possible on the initiative of the Security Council and shall be concluded between the Council and Members or groups of Members, subject to ratification by the signatory States.

PURPOSE OF THE FORCES ENVISAGED IN ARTICLE 43

4. The purpose explicitly stated in Article 43 is "maintaining international peace and security". The legislative history of the Charter and the location of Article 43 in Chapter VII indicate that the forces made available under Article 43 are intended to assist the Council in any military enforcement action it may decide upon. This intent is confirmed in Article 44, which provides Members not represented on the Council with the possibility of participating in certain decisions of the Council when the latter has decided to use force and intends to call upon those Members to provide armed forces in fulfilment of the obligations assumed under Article 43. It also follows from Article 106, which provides for transitional security arrangements "pending the coming into force of such special agreements referred to in Article 43 as, in the opinion of the Security Council, enable it to begin the exercise of its responsibilities under Article 42". Also worth mentioning is the fact that articles 1 and 18 of the "General Principles" proposed by the Military Staff Committee in 1947 in an attempt to implement Article 43, reiterated that the forces made available under this Article are intended to assist the Council in the tasks envisaged in Article 42 of the Charter.[44]

5. The fact that the forces envisaged by Article 43 are limited to enforcement action by the Security Council has been confirmed by the International Court of Justice in its Advisory Opinion of 20 July 1962 on Certain Expenses of the United Nations as follows: ". . . the Court will state at the outset that . . . the operations known as UNEF and ONUC [United Nations operations in the Congo and the United Nations Emergency Force in the Middle East] were not enforcement actions within the compass of Chapter VII of the Charter and that, therefore, Article 43 could not have any applicability to the cases with which the Court is here concerned".[45] The Court thus excluded the peace-keeping operations of the United Nations from the applicability of Article 43. It further confirmed that the United Nations is not precluded from the use of military forces through procedures other than those envisaged in Article 43 of the Charter for purposes other than enforcement action. It could also be argued, however, as some Member States have done, that, although implementation of Article 43 is not a prerequisite for the establishment of peace-keeping operations, nothing in the text of Article 43 prevents the Security Council from including references to the possible use of forces in peace-keeping operations in the agreements to be concluded under that Article.

IMPLEMENTATION OF ARTICLE 43

6. The use of the forces envisaged by Article 43 presupposes the conclusion of a "special agreement or agreements" between the Security Council and Members or groups of Members of the United Nations. Article 43 thus provides for the possibility of concluding one all-inclusive agreement, a series of limited agreements, or some combination of the two, the contracting parties being the Council and individual Member States or the Council and groups of States which, for example, have entered into mutual agreements on joint security and defence arrangements. The drafters of the Charter also wanted to cover the possibility of an agreement with the permanent members of the Council, which, at that time, were expected to provide the bulk of the forces. Under Article 43, the Security Council is to take the initiative to start the necessary negotiations. Although that Article 43 provides that this should be done "as soon as possible", it does not set any time limit for its implementation.

7. The implementation of Article 43 implies a role for the Military Staff Committee at the stage of the negotiation of the agreements as well as of their implementation in view of the Staff Committee's mandate "to advise and assist the Security Council on all questions relating to the Security Council's military

requirements for the maintenance of international peace and security", as well as to "the employment and command of forces placed at its disposal" (Article 47). The Staff Committee's role under Article 43 is also elaborated upon in Article 45. The Security Council accordingly directed the Military Staff Committee in 1946 to examine Article 43 from a military point of view and report on the Council thereon. In 1947, the Committee submitted a report on the basic principles which should govern the organization of the United Nations' forces (referred to above). The report and subsequent discussions reflected major disagreements on certain of the principles and the efforts of the Staff Committee and the Council in this respect were discontinued in 1948.

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24. MODALITIES TO BE FOLLOWED BY THE ECONOMIC AND SOCIAL COUNCIL IN CONNECTION WITH THE REQUEST BY THE GENERAL ASSEMBLY THAT THE COUNCIL CONSIDER GRANTING MEMBERSHIP IN ONE OF ITS SUBSIDIARY BODIES TO NAMIBIA, REPRESENTED BY THE UNITED NATIONS COUNCIL FOR NAMIBIA

Memorandum to the Secretary of the Economic and Social Council

1. You have asked for advice on the modalities to be followed by the Economic and Social Council in connection with the request addressed to it by the General Assembly in paragraph 7 of its resolution 36/121 D of 10 December 1981:

> "to consider granting membership in the Executive Committee of the Programme of the United Nations High Commissioner for Refugees to Namibia, represented by the United Nations Council for Namibia."

2. We have reviewed the relevant resolutions of the General Assembly and the Economic and Social Council relating to the establishment of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees, its original composition and changes subsequently made thereto. We have noted that the Committee was established by the Economic and Social Council with an original membership of 25 States pursuant to a request to that effect by the General Assembly in its resolution 1166 (XII), and that the General Assembly provided for subsequent increases in the membership of the Executive Committee in its resolutions 1958 (XVIII) of 12 December 1963, 2294 (XXII) of 11 December 1967 and 33/25 of 29 November 1978. By resolution 1958 (XVIII) the General Assembly itself decided to enlarge the membership of the Executive Committee from 25 to 30 members and requested the Economic and Social Council to elect the 5 additional members. By its resolution 2294 (XXII) the General Assembly requested the Council "to consider as soon as possible the advisability of enlarging the membership of the Executive Committee of the High Commissioner's Programme, in order to give at least one additional country the possibility of participating in the work of the Committee". Acting in response to that request the Council by its resolution 1288 (XLIII) of 18 December 1967, "mindful of the exhortation to the Council included in paragraph 7 of General Assembly resolution 2294 (XXII) of 11 December 1967", decided to enlarge the membership of the Executive Committee by one African State. By its resolution 33/25 the General Assembly again decided to enlarge the membership of the Executive Committee by up to nine additional members and requested the Economic and Social Council to elect the additional members in consultation with the regional groups.

3. In our view the request contained in General Assembly resolution 36/121 D is to some extent analogous to the one contained in resolution 2294 (XXII). As indicated above, the Council responded to that request by itself deciding to enlarge the membership of the Executive Committee by adding one African State. There would be no legal obstacle to the Council following the same procedure in the current situation.

27 January 1982

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25. Question of the signature by the Trust Territory of the Pacific Islands of the Final Act of the Third Conference on the Law of the Sea and of the United Nations Convention on the Law of the Sea

Memorandum to the Under-Secretary-General, Special Representative of the Secretary-General to the Third United Nations Conference on the Law of the Sea

1. This is in response to your memorandum of 30 November 1982 on this subject, with particular reference to the letter of the Federated States of Micronesia of 22 October 1982. Our opinion also takes into account the views expressed by representatives of the United States Government in informal consultations held at their request as well as the note verbale on this subject delivered to you by the United States Mission on 2 December.

2. It should be noted at the outset that the Trust Territory of the Pacific Islands currently consists of four separate constitutional components: the Federated States of Micronesia, the Marshall Islands, Palau and the Northern Marianas Islands. The question raised in the Micronesia letter mentioned above concerns the first three of these components.

A. SIGNATURE OF THE FINAL ACT

3. Normally, the final act of a diplomatic conference is in the nature of a procès-verbal and is signed by those concerned according to the capacity in which they participated in the conference. However, in the case of the Third Conference on the Law of the Sea, signature of the Final Act also entitles those signatories that have not signed or acceded to the Convention itself to participate in the work of the Preparatory Commission as observers (resolution I of the Conference, para. 2). This right is therefore of great importance to those entities mentioned in article 305, paragraph 1, of the Convention, particularly to those which are not qualified at the present time to sign the Convention (see part B below). Otherwise, signature of the Final Act is not, as implied in the second paragraph of the Micronesian letter, legally related to article 305, paragraph 1, of the Convention.

4. The Trust Territory of the Pacific Islands was invited, as a single entity, to attend the sessions of the Conference as an observer (General Assembly resolution 3334 (XXIX), para. 3 (*c*)). On that basis and taking into account the position of the Conference as reflected in the approved draft Final Act, as well as the expressed interest of three component parts of the Territory in becoming parties to the Convention and in participating in the work of the Preparatory Commission, the Trust Territory is, in our view, entitled to sign the Final Act of the Conference under the heading of "observers".

5. As the Territory was invited as a single entity, there should be only one signature block for that entity on the relevant signature page. However, the question arises of how to take into account the fact that the Territory now comprises four component entities. Strictly speaking, it is for the Administering Authority to designate representatives to sign on behalf of the Territory. In this respect, the United States note verbale indicates that the United States would have no objection if each representative of the Territory were to indicate after his signature the component entity whose authorities have authorized the signature.

6. This raises the question of which authorities of the component territories should be recognized for the purpose of signing or authorizing a signature. There appears to be no international custom or established practice in this regard, because territories are seldom permitted to act on the international plane. In the circumstances, it is necessary to proceed by analogy taking into account the relevant constitutional provisions; thus, in the case of the Federated States of Micronesia, the President or a representative designated by him could sign the Final Act. In any event, the secretariat of the Conference may have to act with flexibility.

7. In this connection, we understand from the United States note verbale that delegations of both the Marshall Islands and the Federated States of Micronesia will be in Montego Bay for the signing of the Final Act.

B. SIGNATURE OF THE CONVENTION

8. The question here is whether, under article 305, paragraph 1, of the Convention, the Trust Territory of the Pacific Islands (or any of its component entities) is entitled to sign that instrument.

9. Clearly, for the time being, neither the Trust Territory nor any of its component parts, including the Federated States of Micronesia, qualify under either subparagraph 1 (*c*) or subparagraph 1 (*d*) of article 305, because they are not associated States having the required competence. We recognize, nevertheless, that three of the component parts may attain that status in the near future, although such a development will certainly not occur by 10 December 1982.

10. Article 305, subparagraph 1 (*e*), refers to "all territories which enjoy full internal self-government, recognized as such by the United Nations, but have not attained full independence in accordance with General Assembly resolution 1514 (XV) and which have competence over the matters governed by this Convention, including the competence to enter into treaties in respect of those matters". Whether the Territory or any of its component entities, such as the Federated States of Micronesia, could sign the Convention on the basis of subparagraph (*e*) depends on whether all its conditions are fulfilled. The following observations are called for in this respect:

(*a*) The current status of the Pacific Islands is governed by a trusteeship agreement between the United Nations and the United States, as the Administering Authority. Under that agreement, the Administering Authority is given, *inter alia*, "full powers of administration, legislation and jurisdiction" over the Territory (article 3). The official view of the Trusteeship Council is that each of the political components of the Territory has achieved "full functional self-government" under the Trusteeship Agreement.[46] The Council recognized that Secretariat Order 3039, issued by the Administering Authority on 30 April 1979, applying to the Marshall Islands, the Federated States of Micronesia and the Republic of Palau, does stop short of self-government and that the Administering Authority still holds reserve powers;[47] the High Commissioner of the Trust Territory still maintains power to suspend certain legislation.[48]

(*b*) Additionally, we have been officially notified by the United States note verbale that the Administering Authority does not consider that any component of the Territory has competence to sign at this time.

In the light of the above, we are of the opinion that neither the Territory nor any of its component entities can be regarded at present as having met the requirements of article 305, subparagraph 1 (*e*).

C. CONCLUSIONS

11. On the basis of the foregoing our conclusions may be summarized as follows:

(i) The Trust Territory of the Pacific Islands should be allowed to sign the Final Act in its capacity as an observer, and it would be acceptable for the signatories to add next to their names an indication such as "(Federated States of Micronesia)";

(ii) The Trust Territory should not at present be permitted to sign the Convention.

12. As the Conference will be reconvened in Jamaica from 6 to 10 December 1982, any questions that lie within the power of the Conference to resolve (e.g., as to the signature of the Final Act) or on which it can give an authoritative interpretation (e.g., the meaning of article 305, paragraph 1, of the Convention) could be decided at that session. In such event, the United States note verbale might be published as a Conference document, though only after consulting the United States delegation (as has been informally requested).

6 December 1982

26. Observation by the United Nations of elections to be held in a Member State

Memorandum to the Under-Secretary-General for Special Political Affairs

1. During our meeting in your office, you mentioned the possibility of the Secretary-General being requested to send representatives to observe the elections to be held shortly in the territory of a Member State. The views of the Office of Legal Affairs on the matter are contained in the present memorandum.

2. The question of the United Nations observing the elections in question will of course only arise if the Secretary-General receives an official request to that effect from the Government concerned.

3. Since its establishment, the United Nations has on numerous occasions sent visiting missions to observe or supervise plebiscites or elections in Trust and Non-Self-Governing Territories. A list compiled by the Dag Hammarskjöld Library in September 1981 contains useful information and references concerning those missions.[49] In reviewing the practice of the United Nations in this regard, you will note that on each occasion the United Nations involvement was in the context of a self-determination process and invariably with the specific authorization of the competent principal deliberation organ of the Organization. The terms of reference of those missions were either to "observe", "supervise", or "control" the election or plebiscite in question. A recent prominent example relates to the elections preceding the independence of Zimbabwe where, in response to an invitation by the United Kingdom, the Secretary-General sent a team to observe the elections. Before doing so he informed the members of the Security Council at an informal meeting; the Council acquiesced in a United Nations team being sent. In no instance were such functions undertaken in connection with elections in an independent State Member of the United Nations.

4. There has been, in addition, one recent instance where the Secretary-General sent representatives to witness a referendum in the territory of a sovereign Member State. That was in response to an invitation to the Secretary-General from the Government of Panama to the effect that he or his representatives "see the people of Panama freely decide on 23 December 1977 whether or not to approve the Panama Canal Treaties between Panama and the United States of America". On that occasion what was involved was a referendum regarding a bilateral international instrument and it is important to mention that the other interested party, the United States of America, was consulted and appeared to welcome the invitation. There were no obstacles either of a legal or of a political nature to prevent the Secretary-General from sending a personal representative to Panama to witness the referendum. The role of the United Nations mission that visited Panama was limited to watching the polling activities in designated areas of the country as an independent and objective "spectator".

5. The forthcoming elections to which you refer bear no similarity to any of the situations referred to above. The elections are a matter which is essentially within the domestic jurisdiction of a Member State within the terms of Article 2, paragraph 7, of the United Nations Charter. Moreover, the elections are a controversial political issue internally and internationally which has been at the centre of world attention for the past several years. Member States have held strongly opposing views on the matter.

6. In a situation where the United Nations is not in a position to control the polling activities, the registration of voters, the electoral boundaries, etc., it would, in our view, be extremely dangerous for it to become involved even as a witness to the voting process. Any such involvement could be interpreted in various ways by the different factions concerned and this would certainly not be in the interests of the United Nations. Furthermore, if the Secretary-General were to accede to a request of this nature it would set a precedent which could encourage States to request the United Nations to participate in an observer capacity in all types of electoral processes held in their territories. The Secretary-General would not wish to place himself in a situation where, entirely on his own initiative, he either endorses or repudiates election procedures in a Member State.

7. It is our considered opinion that, in the case of an election or a plebiscite in a Member State, or in any other sovereign independent State, which concerns only that State, the United Nations should only become involved as a witness to the voting process if authority for such involvement is granted by the competent principal deliberative organ of the United Nations. In our view, therefore, if the Secretary-General receives an invitation from the Government concerned to send representatives of the United Nations to observe the elections he should decline, indicating that he is not in a position to do so without prior authorization of the General Assembly or the Security Council.

10 February 1982

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27. THE ROLE OF THE SECRETARY-GENERAL AS CHIEF ADMINISTRATIVE OFFICER OF THE UNITED NATIONS

Study prepared for the Secretary-General

I. INTRODUCTION—GENERAL CONSIDERATIONS

A. *Summary*

1. There are few legal signposts in the Charter, or in general constitutional theory, indicating with any precision what functions the Secretary-General is to exercise as chief executive officer under Article 97 of the United Nations Charter and as the head of one of the principal organs of the Organization, or how these functions are to be delimited against those of the other principal organs, particularly the General Assembly. Substantially the only guide that can be found is the actual practice of the Organization, which on the one hand constitutes a valid basis for interpreting the Charter[50] and on the other must constitute the point of departure for any change in the relationship between the organs.

2. The present paper will therefore examine the principal clearly administrative functions of the Secretary-General, leaving out those that are substantially political (i.e., those under Article 99 of the Charter), those that merely involve the carrying out of specially entrusted functions (under Article 98) or purely technical ones, so that principally the personnel, budgetary and co-ordination functions will be considered. Attention will be concentrated on the extent to which those functions are impinged on by decisions of the General Assembly, with special reference to the history and legality of any encroachments. Only peripheral consideration will be given to delimitation *vis-à-vis* the other principal organs such as the Security Council in connection with peace-keeping operations, with respect to which a *modus vivendi* involving extensive consultations before the introduction of any substantive initiative by the Secretary-General appears to have evolved).

B. *Definition*

3. Article 97 of the Charter specifies, *inter alia*, that "[The Secretary-General] shall be the chief administrative officer of the Organization".[51]

4. In addition, functions are specified for the Secretary-General in other provisions of the Charter: in Articles 98 and 101 in rather general terms and in Articles 12 (2), 20, 73 (*e*) and 99, as well as in several provisions of the Statute of the International Court of Justice, for very specific transactions. This raises the question whether all these functions can be subsumed under those of a "chief administrative officer" (CAO) or whether the Secretary-General is CAO plus also something else; for example, Goodrich, Hambro and Simons classify the functions and powers of the Secretary-General as those of "chief executive", "chief administrator" and "chief co-ordinator".[52] On analysing the various functions, either as explicitly specified in the Charter or as exercised in practice, and taking into account all powers that might be implied in the office, it becomes apparent that it is not possible to specify that certain functions are purely those of a CAO and others are not, but still less that all functions are those of a CAO and must be interpreted in that light.

5. Finally, it is also useful to note that neither of two significant listings of the functions of the Secretary-General specify "administrator" or "CAO" as a distinct category. Thus the Preparatory Commission listed[53] six functions:

(*a*) General administrative and executive;

(*b*) Technical;

(*c*) Financial;

(*d*) Organization and administration of the international Secretariat;

(*e*) Political;

(*f*) Representational.

The *Repertory of Practice of United Nations Organs* and its *Supplements* deliberately follows essentially the same scheme in the analytical summary of practice under Article 97, except that function (*d*) is treated under Article 101. Incidentally, function (*a*) is subdivided into seven sub-categories:

(i) In connection with meetings of United Nations organs;

(ii) Transmission of documents;

(iii) Integration of activities;

(iv) Co-ordination with specialized agencies and other intergovernmental organizations;

(v) Preparation of work and implementation of decisions;

(vi) In connection with international treaties, conventions and agreements;

(vii) Submission of an annual report.

C. *Delimitation of functions* vis-à-vis *the General Assembly*

6. The delimitation of the respective powers of the General Assembly and of the Secretary-General obviously has analogies in the delimitation (or separation of powers) in any democratic governmental system between the legislative and the executive. Although these analogies should not be pressed too far, since the United Nations is not a government and its principal organs do not perform governmental functions *strictu sensu*, the basic considerations that define the relationship between certain types of national organs would also seem to apply to intergovernmental ones; these considerations are summarized in paragraphs 7-9 below. Before reaching them it should, however, be noted that both the General Assembly and the Secretariat are defined as "principal organs" by Article 7 (1) of the Charter, and that the Secretary-General is, under Articles 97 and 98, in effect the personification of the Secretariat.[54] On the other hand, the pre-eminence of the General Assembly as the most significant of the principal organs flows from its power of the purse (Article 17) and its power to discuss "any matters . . . relating to the powers and functions of any organ" (Article 10), and specifically *vis-à-vis* the Secretary-General from its power of election (Article 97), its power to entrust functions to him (Article 98) and its power to establish regulations for one of his main functions, the governance of the Secretariat (Article 101 (1)).

7. A functional approach to defining the respective roles of any legislative and executive organ (or even quasi-legislative and quasi-executive) would take account of the following interplay:

(*a*) The legislature decides on programmes, whether or not on a proposal of the executive;

(*b*) The executive indicates the specific resources (funds, personnel, legal régimes) required to carry out those programmes;

(*c*) The legislature authorizes resources, not necessarily precisely as requested, and perhaps after reconsidering the programme in the light of the resource requirements;

(*d*) The executive carries out the authorized programmes with the resources made available to him.

8. A descriptive distinction would, on the other hand, emphasize that a legislature lays down general rules while the executive applies them to specific cases. The problem is that there is no absolute border between general and specific, and thus between the domain of the two types of organs.

9. Finally, it should be recognized that in practice the boundary between the functions of several organs is constantly shifting in any living system, and that the dynamics of this movement depend on factors such as the relative interest, at any given time, of the organs concerned in asserting their respective competences (e.g., the extent to which the executive organ expresses an interest in administration); the extent to which the executive organ has the confidence of the legislative in carrying out that tasks assigned to the former without detailed directions; and the extent to which the executive may invite political direction, and thus also secure backing, in respect to administrative matters.

II. PERSONNEL FUNCTIONS

A. *General*

10. Article 101 (1) of the Charter provides that "the staff shall be appointed by the Secretary-General under regulations established by the General Assembly". It is understood that the reference to appointment does not mean that the regulations relate only to that aspect of the personnel process, but to the entire régime under which staff serve.

11. The general distinction between the functions here stated is that the General Assembly lays down regulations that govern the staff as a whole or significant components thereof, while the Secretary-General takes decisions in respect of the appointment, assignment, promotion, disciplining and termination of individual staff members. To the extent that the General Assembly takes or attempts to take decisions in respect of individual staff members, it is violating this Charter-mandated distribution of functions.[55] Similarly, it would appear to have been a violation of the Charter for the Assembly to have assigned the power to appoint (or to govern) part of the staff directly to some other person (whether or not himself a staff member) or authority. On the other hand, there would appear to be no constitutional objection to the Assembly either delegating some of its rule-making power to the Secretary-General or, having once done so, to later withdrawing or reducing his assigned normative powers.

B. *Appointment of staff members*

12. With respect to the making of individual appointments of staff members, the Staff Regulations (4.1) ostensibly preserve the Charter power of the Secretary-General, and with respect to most staff members he indeed exercises (directly or through delegation) this function. However, there is a steadily increasing number of exceptions, which are discussed in paragraphs 13-15.

13. With respect to certain special organs, such as those listed in part A of the annex to the present paper (e.g., joint inter-organizational units like the United Nations Joint Staff Pension Fund (UNJSPF), the Joint Inspection Unit (JIU) and ICSC, the Secretary-General's power to appoint has been completely eliminated or substantially circumscribed. However, these exceptions all relate to special organs of quite limited size that are either not subsidiary to the General Assembly or as to which some special treaty provision, or agreements with other intergovernmental organizations, made or make a special arrangement necessary.

14. More serious is that the General Assembly has, almost from the beginning of the Organization but with somewhat increasing frequency, provided that the appointment of the executive heads of certain organs, such as those listed in part B of the annex to the present paper, be subject to special conditions (e.g., election of the Executive Director of UNEP by the General Assembly on nomination by the Secretary-General, or the requirement that the appointment of the UNIDO Executive Director be confirmed by the General Assembly), detracting

from the sole power that the Secretary-General would seem to enjoy under Article 101 (l) of the Charter to make appointments to the staff. A point that never seems to have been tested yet in this connection is whether the Secretary-General may dismiss, on his sole authority, any of the officials so appointed; certainly as to those "elected" by the General Assembly (e.g., the UNEP Executive Director) this would seem to be doubtful; in that case it may, however, also be doubted whether he can discipline or effectively control such an official, except by the threat to refuse renomination.

15. In several instances in relation to some of the semi-autonomous organs referred to in the previous paragraph (see examples in part C of the annex to the present paper), the appointing authority of the Secretary-General is even more markedly restricted, in that the General Assembly provided that the staff of the organ should be appointed by the executive head thereof, or that the Secretary-General would have to make appointments in consultation or in association with such executive head.

16. In an opinion by the Legal Counsel, delivered on 14 August 1953, the Legal Counsel found the power of appointment conferred on the United Nations High Commissioner for Refugees difficult to reconcile with Article 101 (1) of the Charter, the same view would presumably also apply to the other situations described in paragraphs 14 and 15 above, in particular where the Secretary-General has been entirely deprived of his appointing authority.[56] However, after the General Assembly had on several further occasions strained this principle, the Legal Counsel, in an opinion delivered to the Economic and Social Council in 1975, merely stated that the General Assembly not having placed any restrictions on the Secretary-General's power to appoint at the level of Assistant Secretary-General an Executive Director of the proposed Information and Research Centre for Transnational Corporations, it was not for the Economic and Social Council to establish a requirement of consultation with the Commission for Transnational Corporations.[57] In any event, in the view of the Office of Legal Affairs these various encroachments on the Secretary-General's appointing authority are at best of doubtful legality (aside from the policy considerations that can be advanced for and against such procedures), and each further encroachment should be resisted, in particular to the extent it may not be said to be covered precisely by one of the precedents cited above. This view was shared by the previous Secretary-General, when he succeeded in persuading the General Assembly not to authorize still greater autonomy for UNIDO (which, unlike the organs referred to in paragraph 15 above, is financed from the regular budget),[58] by arguing that:

> "To relieve the Secretary-General totally of his responsibilities for the appointment and promotion of UNIDO personnel, as well as for other aspects of UNIDO's personnel administration, would in effect result in UNIDO personnel ceasing to be an integral part of the United Nations Secretariat."[59]

C. *Recruitment procedures*

17. A quite different question is raised by the increasingly detailed directives issued by the General Assembly during the past years concerning various aspects of the recruitment procedures, culminating in the adoption of the "Recruitment procedures for posts subject to geographical distribution in the United Nations Secretariat" (set out in the annex to General Assembly resolution 35/210 of 17 December 1980, by section III of which the Secretary-General was requested to apply them). These directives resulted from the increasing frustration of the General Assembly at the failure to achieve the goals set in its earlier, more general guidelines of the staff, guidelines which the responsible Secretariat officials on the one hand neither rejected as being impractical or undesirable, and on the other did not implement at a speed the Assembly considered satisfactory.

18. From a legal vantage these directives can be viewed in two different ways:

(*a*) As exercises by the General Assembly of its undisputed regulatory power under Article 101 (1) of the Charter;

(*b*) As mere recommendations (the operative paragraphs of the relevant Assembly resolutions and decisions usually "*Request* the Secretary-General . . .") made under Article 10 of the

Charter, and therefore not legally binding on him (unlike, for example, a budget resolution made under Article 17 of the Charter and the Financial Regulations).

Whether viewed in one way or another, it is difficult to raise any constitutional legal objections against these detailed directives, though from a political or administrative point of view it might be pointed out that hampering the CAO by rigid rules is apt to be counter-productive and not conducive to the smooth functioning of the Organization or to its efficient administration.

D. *Administration of the staff*

19. Aside from the field of staff recruitment, which appears to have recently preoccupied the Fifth Committee to an inordinate degree, there are other areas relating to the management of the staff as to which the proper delimitations of the functions of the General Assembly and the Secretary-General have been or might be raised.

20. As to the Secretary-General's otherwise unrestrained right to decide questions relating to the individual staff members, subject to the Staff Regulations adopted by the General Assembly, the latter has over the years established or called for various types of recourse mechanisms which have the effect of circumscribing the powers of the executive head:

(*a*) The establishment of the Administrative Tribunal—which the International Court of Justice explicitly held did not constitude an improper interference with the powers of the Secretary-General;[60]

(*b*) The devising of a procedure whereby, in addition to the Secretary-General and the Applicant, a Member State can request the Committee on Applications for Review of Administrative Tribunal Judgements to refer a judgement to the International Court of Justice for an advisory opinion;[61]

(*c*) The request to the Secretary-General to establish a Discriminat on Panel;[62] it would seem difficult to find any legal objection to this proposal, either because i merely constitutes a recommendation (see para. 18 (*b*) above), or because it could be upheld o n the same ground as the establishment of the United Nations Administrative Tribunal (see (*a*) at ove).

The Office of Legal Affairs agrees that, as these recourse mechanisms correspond to those existing in many countries, no fundamental legal objection can be raised against them.

21. As pointed out above (para. 11), the General Assembly has from time to time, especially in the Staff Regulations (12.2), delegated to the Secretary-General some of its own normative powers under Article 101 (1) of the Charter, by authorizing him to promulgate Staff Rules; occasionally it has also modified or reduced such delegation, either by deciding certain questions itself (e.g., General Assembly resolution 34/165, sect. II, para. 3, relating to the repatriation grant) or by assigning it to some other body, such as the International Civil Service Commission (e.g., ICSC statute, art. 11). Whether these steps were undertaken because of some perceived dissatisfaction by the Assembly with the way in which he Secretary-General has been executing a part of his mandate or, more frequently, because of the desire to make possible coherent inter-organizational decisions in furtherance of the "common system", no legal (as distinct from policy or practical) objection can be raised against the diminution of a voluntary delegation of powers by the General Assembly. The same would be true if the Assembly were to adopt a decision specifying General Service salary scales at a given point, in spite of its general delegation to the Secretary-General of the power to set such scales,[63] except to the extent such a decision might diminish any contractual or acquired rights of the staff concerned.

22. On the other hand, the direct assignment by the General Assembly of the power to administer the staffs of certain subsidiary organs financed from voluntary contributions (e.g., UNDP, UNITAR, UNU) rather than from the regular budget, to the executive heads of these organs, does raise serious administrative and even legal problems. The Office of Legal Affairs (in an opinion of 10 April 1978) has therefore taken the view that:

> "[W]hatever may be the subsidiary organ heads' responsibility and authority for the administration of their respective staffs, the Secretary-General, as chief administrative officer of the United Nations, retains his Charter responsibility for overall compliance with

General Assembly directives and for a consistent interpretation of the Staff Regulations and Rules. It is his task to seek to minimize differences in staff members' rights arising from distinct appointing and administering and even rule-making authority."

III. FINANCIAL AND RELATED FUNCTIONS

A. *General budgetary*

23. Unlike in respect of personnel administration, as to which the Charter specifically assigns a function to the Secretary-General, the Charter is silent as to any explicit financial or budgetary functions—except to the extent implied by his designation as CAO. Nevertheless, under the Financial Regulations and by other decisions (in particular the periodic budget and related resolutions), the General Assembly (whose competence derives primarily from Article 17 of the Charter), has assigned substantial functions in this area to the Secretary-General: he collects, holds in custody and disburses or commits the funds of the Organization, and similarly administers numerous trust funds according to procedures he establishes (subject to any decisions by the General Assembly; financial regulations 6.6 and 6.7).

24. Possibly the most important of these functions is the Secretary-General's task of preparing the proposed programme budget for each financial period (financial regulation 3.1), and while it is for the General Assembly to decide on his proposals, there can be no doubt that these proposals largely shape the approved budget. The last Secretary-General's appreciation of the importance of this function is indicated by the following reaction to a proposal that UNIDO prepare and submit its own budget to the General Assembly:

> "Under the Charter and the Financial and Staff Regulations approved by the General Assembly, it is the Secretary-General who is responsible and accountable for all aspects of the work of the Organization, including its financial and personnel management. So long as the Secretary-General continues to be held responsible and accountable he needs to retain that degree of authority which is necessary to maintain the financial integrity of the Organization and to safeguard the concept of a single unified United Nations Secretariat."[64]

He added:

> ". . . that the Secretary-General must determine, within his constitutional prerogatives as chief administrative officer of the Organization, not only the overall size of the budget that he intends to submit but the amounts which he considers that he is justified in asking the General Assembly to appropriate for each of the numerous organizational units included in the Organization's regular budget."[65]

25. Except for the above-mentioned attempt to achieve fiscal (and other) autonomy for a subsidiary organ financed primarily from the regular budget, there have been relatively few major inroads made or even attempted in respect of the central core of the Secretary-General's fiscal and budgetary functions. However, it should be mentioned, and this is a significant factor, that the Secretary-General's control over a number of trust and special funds, through which are financed more and more significant operations carried out by semi-autonomous organs, is often slight and at most indirect, and his control of the Organization as a whole is to that extent diminished. Only if a centralized control over the collection and use of such funds is maintained can be the significant centrifugal forces acting on the United Nations be contained.

26. As already mentioned, the Secretary-General's authority to originate the proposed regular budget is clear and undisputed. However, two aspects of the budget-adoption process, which tend to diminish the effectiveness of that authority, deserve attention:

(*a*) The formal action that the Fifth Committee takes on the first reading of the budget is not on the Secretary-General's proposals, but on those proposals as modified by any recommendations of the Advisory Committee on Administrative and Budgetary Questions (ACABQ). Consequently, if the Advisory Committee has suggested the reduction of an item, its restoration to the amount requested by the Secretary-General requires the adoption (by general consent or by a vote) of an amendment. In other words, while the Secretary-General's estimates are the

starting point of the budgetary process, they are not the starting point for the Fifth Committee, to the extent that ACABQ has advised otherwise. This aspect of the Fifth Committee's procedure is not embodied in any rule, but represents well-established practice, which it may be difficult to change;

(*b*) In recent years it has from time to time been asserted in the Fifth Committee that it is improper for the Secretariat, that is, for the Secretary-General's representatives, to intervene in the debate for the purpose of urging the restoration of any items whose deletion or reduction has been recommended by ACABQ. Though the Secretariat has sometimes resisted these suggestions, it appears that it is still considered somewhat improper for the Secretary-General to mount too vigorous a defence of his budget proposals. It would, however, seem entirely proper for the Secretary-General to indicate, clearly, to what extent any proposed diminution of the resources he has requested is likely to result in a corresponding diminution in the programmes he has been asked to carry out.

B. *Structure of the Secretariat*

27. The structure of the Secretariat is in effect determined by the budget, which is, as discussed in the previous section, proposed by the Secretary-General but adopted by the General Assembly. Thus any significant changes in that structure in effect require the approval of the Assembly.

28. In connection with the above, several qualifications are useful:

(*a*) The Preparatory Commission stated that:

> "Paragraph 2 of Article 101 of the Charter is interpreted to mean that the Secretary-General has full authority to move staff at his discretion within the Secretariat but must always provide the Economic and Social Council, the Trusteeship Council and other organs with adequate permanent specialized staffs forming part of the Secretariat."[66]

(*b*) For many years the budget resolutions have restricted the Secretary-General's power to transfer credits (and thus presumably posts) to those within budget sections (of which at present there are 32), while inter-sectional transfers require the concurrence of ACABQ.[67]

(*c*) In an opinion to the Controller on 30 September 1975 on whether the General Assembly, in approving the regular budget, thereby approves the number of established posts at the various levels or only the global sums expressed in the resolutions, the Legal Counsel pointed out that:

> "3. . . . the Advisory Committee on Administrative and Budgetary Questions examines proposals for an increased number of posts or for changes in the level of the posts, and its recommendations as to expenditures are based on decisions in this respect. The distribution of posts at various levels affects the growth rate of the Secretariat and thus the financial requirements for future budgets. It is thus a policy matter of concern to the General Assembly in its approval of the budget.
>
> "4. In the light of these factors and the practice of the Assembly in this regard, it must be concluded that the General Assembly does in fact approve the number of established posts at the various levels as indicated in the reports of the Fifth Committee."

From the above it follows that, while the Secretary-General has a certain degree of freedom in moving posts horizontally (intra-sectionally on his own authority, inter-sectionally with the concurrence of ACABQ), from one office or department to another, he can only do so within the total number of posts indicated in the budget document whose totals were approved by the General Assembly; he cannot on his own authority create or upgrade posts.

29. At its thirty-fifth session, the General Assembly established a Committee of Governmental Experts to Evaluate the Present Structure of the Secretariat in the Administrative, Finance and Personnel Areas.[68] While this action might be considered as an intrusion by the Assembly on the administrative functions of the Secretary-General, it should be recalled that the latter had in effect invited the Assembly to take action.[69] The first report of that Committee[70]

having been inconclusive, the Assembly has directed it to continue and conclude its work in time for the thirty-seventh session of the Assembly.[71]

C. *Overall structure of the Organization*

30. In connection with the increasing tendency to establish more or less autonomous organs to carry out certain functions of the Organization, i.e., organs over whose executive heads or staffs the Secretary-General does not have complete control (see paras. 14-16 above), which are completely or largely financed outside of the regular budget and thus can evade some of the normal administrative controls of the Secretary-General (see para. 25 above) and even the legislative control of the General Assembly, and which, incidentally, are also increasingly dispersed geographically, the Secretary-General cautioned the General Assembly as follows in his foreword to the budget estimate submitted to the twenty-first session:

> "Finally, I would like to refer to the more recent phenomenon of creating autonomous organizational units within the Secretariat. While I am aware of the considerations which prompt Member States to adopt this course, I feel obliged to draw attention to the administrative consequences which are likely to follow. The creation of autonomous units within the Secretariat, and therefore under my jurisdiction as Chief Administrative Officer, raises serious questions of organizational authority and responsibility. Moreover, such a trend is not altogether consistent with the concept of a unified secretariat working as a team towards the accomplishment of the main goals of the Organization."[72]

31. From a legal point of view it might merely be added that the creation of semi-autonomous units with distinct staffs would seem to run counter at least to the spirit of Article 101 (2) of the Charter, which appears to foresee only a single Secretariat for the Organization.

D. *Trustee of funds*

32. In his capacity as CAO, the Secretary-General has been entrusted with custody of the funds and other resources of the Organization, including those it holds in trust for others. In connection with at least one such arrangement an area of potential conflict with the General Assembly has been apparent for some years, as a result of the latter's urgent requests that resources of the Pension Fund no longer be invested in shares of transnational corporations, but be reinvested in developing countries to the greatest extent practicable. In a legal opinion of 6 May 1977,[73] which was issued in part to allay the concern of participants in the Pension Fund, it was pointed out that under article 19 (*a*) of the UNJSPF regulations (which, though adopted by the General Assembly, in effect also constitute an agreement with the other participating organizations, as well as a contractual instrument on which the individual staff members of all these organizations can rely) it was the Secretary-General who made the investment decisions after consultation with an Investments Committee and in the light of comments from the UNJSP Board, and that while he could follow suggestions made by the Assembly he could only do so, as trustee, if he considered them to be in the best interest of the Fund. Though the opinion pointed out that the Assembly's resolutions so far had not "failed to respect the ultimate authority of the Secretary-General over the investments of the Pension Fund", there is always a risk of confrontation should the Assembly decide to take stronger measures as a result of impatience with the Secretariat's progress in this area (cf. para. 17 above).

IV. CO-ORDINATION AND MISCELLANEOUS FUNCTIONS

A. *Schedule of conferences*

33. The structuring of the calendar of conferences reflects how, over the years, as the activities of the Organization grew, a particular function became established, was eventually recognized as such, was then assigned to the Secretary-General and later, in effect, removed from him. Originally, with relatively few meetings of organs and conferences, there was no

genuine scheduling problem or function: meetings could largely take place when convenient to the participants; consequently, the function of scheduling was not explicitly assigned to any organ, though in effect whatever scheduling took place was accomplished through the Secretariat. As the number of meetings increased, this work became more formalized, and at the twenty-first session of the General Assembly the situation was summarized as follows in the fifth preambular paragraph of resolution 2239 (XXI) of 22 December 1966:

> "*Noting* that, under the Charter of the United Nations, the Financial Regulations of the Organization and the rules of procedure of the General Assembly, final approval of the annual calendar of meetings and conferences rests with the General Assembly, and responsibility for the organization of the calendar rests with the Secretary-General in his capacity as chief administrative officer of the Organization."

34. However, by that resolution, the General Assembly first created a Committee on Conferences, with substantial functions to monitor the work of the Secretary-General in proposing a schedule of United Nations meetings and in co-ordinating, through the Administrative Committee on Co-ordination, meetings throughout the United Nations system. Though that Committee [on Conferences] was later temporarily abolished, it was revived some years later with more substantial powers, both to advise the Assembly on the calendar of conferences and to approve inter-sessional departures from the approved calendar.[74] Though of course it is still the Secretary-General who prepares the ground for the work of the Committee on Conferences by proposing schedules of meetings to it, it is the Committee on Conferences that decides on the draft calendar to be forwarded to the General Assembly.

35. Although it might appear that the Secretary-General was thereby deprived of a significant function, or rather that a significant function of his was noticeably reduced, it is likely that this was a not quite unwelcome development, by shifting to a political organ the increasingly serious conflicts resulting from the steadily rising demand for meetings imposed on conferences resources (premises, staff, funds) that were not growing nearly as rapidly.

B. *Representation of the United Nations at meetings of other organizations*

36. The *Repertory*, which reflects the practice of the initial eight years of the Organization, records that it is "The Secretary-General, or a member of the Secretariat authorized by him, [who] represents the United Nations at international conferences and at meetings of other [organizations]" and that it was generally the Secretary-General who decided at what conferences and meetings the Organization should be represented.[75] The first four *Supplements*, covering the period until 1969, were unable to add anything to this account.

37. However, during the past decade, a significant change has occurred in this state of affairs. Several subsidiary organs of the General Assembly, in particular the United Nations Council for Namibia, the Special Committee against *Apartheid* and the Committee on the Exercise of the Inalienable Rights of the Palestinian People, routinely send their officers or members to attend meetings of intergovernmental or non-governmental organizations; though usually accompanied by members of the Secretariat, these are generally not official members of, and certainly not leaders of, such delegations. Presumably the justification for these arrangements is that the very purpose of sending the representatives of these United Nations organs is political, and that the task of these delegations can thus better be performed by the representatives of committed States than by neutral Secretariat officials. This argument should not, however, hold for the Council for Namibia, which in effect represents that quasi-State in those organizations or meetings in which it may participate as a member or observer; the representatives of States participating in such meetings are not members of the national legislatures but rather officials of the Foreign or some other Ministry; by analogy, the representative for Namibia should be the Commissioner or a member of his staff, i.e., a Secretariat official.

38. It would appear that relatively little thought has been given to this question, because rarely has much of an issue been made of it by anyone concerned. On one occasion when the matter was explicitly considered, in a working group of the Special Political Committee at the

thirty-fourth session of the General Assembly, both the Secretary-General and the UNESCO Director-General resisted a proposal that members of the Committee on Information of the United Nations be sent to UNESCO's 1980 Intergovernmental Planning Conference on Communication Development, resulting in a resolution merely calling for "consultations concerning the participation of the Committee on Information in the work of that Conference"[76]—which was understood to mean that members of the Committee might participate in a delegation to be headed by a Secretariat official. It would appear worthwhile to continue monitoring proposals and practices of this sort carefully, so that the Secretary-General might maintain a consistent and defensible attitude as to his primacy as the official representative of the Organization.

C. *Conclusion of agreements*

39. Although not explicitly spelt out in the Charter, it is implicit in the designation "CAO" that the Secretary-General has the function and authority to enter into agreements with Governments, with organizations and with individuals. Except in respect of contracts and certain operational agreements with Governments that the General Assembly has authorized some of its subsidiary organs to conclude (e.g., the UNU Charter, article XI.3, approved by General Assembly resolution 3081 (XXVIII) of 6 December 1973), the General Assembly has not significantly diluted this authority of the Secretary-General. Nevertheless, it is becoming increasingly frequent for the executive heads of both Assembly and Economic and Social Council subsidiary organs (such as the regional economic commissions) to execute agreements with Governments—purportedly merely on behalf of their particular organs but actually committing the Organization as a whole—without specific authorization from the General Assembly or delegation from the Secretary-General.

D. *Annual report on the work of the Organization*

40. Article 98 of the Charter requires the Secretary-General to make an annual report to the General Assembly on the work of the Organization. Until 1976, that Report had consisted of a reasonably detailed narrative account of all the principal activities of the Organization, supplemented by an introduction setting out the Secretary-General's personal reflections on a year in the life of the Organization.[77] Thereupon, after a year of transition during which the former main report was replaced by a mere list of documents,[78] that part of the report was abandoned entirely, leaving solely the former introduction as constituting the entire Article 98 "report".[79] Aside from whether the present diminished report complies with the spirit of Article 98 of the Charter, it certainly does not constitute the timely and therefore especially valuable legal research and reference tool that the former reports did, which have not been replaced by any comparably useful and timely documentation.

V. CONCLUSION

41. It is not feasible to define precisely, from a legal point of view, what the functions of a chief executive officer should be in general or those of the Secretary-General in particular. In any event, such functions include numerous responsibilities relating to the personnel, finances and co-ordination of the Organization, some of which flow from the Charter, some from specific dispositions of the General Assembly or of agreements to which the United Nations is a party. While it may be said that the functions of the Secretary-General, whether as CAO or flowing from any other source, are to implement through particular actions the general decisions of the political organs and in particular those of the General Assembly, there is in most areas no specific boundary that would define the responsibility *vis-à-vis* the executive heads and the staffs of the semi-autonomous subsidiary organs clearly or consistently defined. Thus the Secretary-General's functions and boundaries between his authority and that of other principal and of subsidiary organs have not been susceptible of codification, but rather have been estab-

lished dynamically in response to political and financial pressures, as moderated by tradition and precedent.

26 February 1982

ANNEX

Restrictions on the Appointing Authority of the Secretary-General in Respect of Certain Organs*

A. *Certain miscellaneous organs*

1. Though the International Court of Justice is a principal organ of the United Nations, its staff, i.e., the Registry, is appointed under the authority of the Court pursuant to Article 2 (2) of its Statute, which in effect constitutes an exception to Article 101 (1) of the Charter.

2. The secretariat of the Military Staff Committee was originally subject entirely to the five Secretaries designated respectively by the members of the Security Council. Only after extensive efforts by the Secretary-General[80] did the General Assembly decide in 1957 to request him 'subject to any objection which may be received from the Security Council, to take appropriate steps to effect the integration of the civilian staff of the Military Staff Committee with the Secretariat of the United Nations".[81] (NB: This is an instance in which a unit of the Secretariat not originally subject to the full control of the Secretary-General was later placed under his authority.)

3. Under article 20 of the International Opium Convention of 1925, as amended by the 1946 Protocol (both now superseded by the 1961 Single Convention on Narcotic Drugs), the Secretary and staff (who were members of the United Nations Secretariat) of the former Permanent Central Opium Board were to be appointed on the nomination of the Board and subject to the approval of the Economic and Social Council.

4. Various requirements to consult particular bodies apply to certain appointments to the secretariats of certain interorganizational bodies established by the General Assembly:

(*a*) The Secretary of UNJSPF, his Deputy and "other officers empowered to act in the absence of the Secretary" are appointed by the Secretary-General "on the recommendation of the UNJSP Board";[82]

(*b*) The staff of ICSC is to be appointed by the Secretary-General "after consultation with the Chairman of the Commission and, as regards senior staff, with the Administrative Committee on Co-ordination";[83]

(*c*) The staff of JIU is to be appointed by the Secretary-General "after consultation with the Unit and, as regards the appointment of the Executive Secretary, after consultation with the Unit and the Administrative Committee on Co-ordination".[84]

B. *Executive heads of semi-autonomous organs and other senior officials*

1. The Commissioner (formerly Director) of UNRWA is appointed by the Secretary-General in consultation with the Governments represented on the Advisory Commission of the Agency;[85]

2. The High Commissioner for Refugees is elected by the General Assembly, on the nomination of the Secretary-General;[86]

3. The Executive Director of UNITAR is appointed by the Secretary-General after consultation with the Board of Trustees[87] (NB: This might be considered as an instance of self-limitation by the Secretary-General);

4. The Secretary-General of UNCTAD is appointed by the Secretary-General and confirmed by the General Assembly;[88]

5. The Executive Director of UNIDO is appointed by the Secretary-General subject to confirmation by the General Assembly;[89]

* The following lists are meant to be illustrative rather than exhaustive.

6. The Executive Director of UNEP is elected by the General Assembly on the nomination of the Secretary-General;[90]

7. The chief executive officer of the United Nations Special Fund was appointed by the Secretary-General, subject to confirmation by the General Assembly;[91]

8. The Rector of UNU is appointed by the Secretary-General, after consultation with the Director-General of UNESCO and following an elaborate nominating procedure specified in detail in article V (1) of the Charter of the University;[92]

9. The Executive Director of the World Food Council is appointed by the Secretary-General, in consultation with the members of the Council and with the Director-General of FAO;[93]

10. The Director-General for Development and International Economic Co-operation should be appointed "in full consultation with Member States".[94]

C. *Staff of certain semi-autonomous organs*

1. The Commissioner of UNRWA (who is responsible to the General Assembly for the operation of his programme) selects and appoints his staff "in accordance with general arrangements made in agreement with the Secretary-General";[95]

2. The Agent General selected and appointed the staff of the United Nations Korean Reconstruction Agency "in accordance with general arrangements made in agreement with the Secretary-General";[96]

3. The High Commissioner for Refugees appoints his deputy and other staff;[97]

4. The staff of the former Technical Assistance Board was appointed by the Executive Chairman of the Board, who had to have the agreement of the Board to appoint resident representatives (resolution No. 3 of the Technical Assistance Committee of the Economic and Social Council); the staff of the former United Nations Special Fund was appointed by the Managing Director of the Fund. This power is now vested in the UNDP Administrator.[98]

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28. QUESTION OF FINANCIAL LIABILITY OF THE UNITED NATIONS IN A CLAIM FOR COMPENSATION IN RESPECT OF A DECEASED HOLDER OF A SPECIAL SERVICE AGREEMENT

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

1. Please refer to your memorandum of 31 August 1982 in which our advice was requested as to the existence of financial liability in the case of a special service agreement holder and our views as to the method by which the amount of compensation would be determined if the United Nations was legally liable. After a review of the facts and an analysis of the issues, as described in the following paragraphs, we have concluded that the United Nations is legally liable to pay compensation for the death of the above-mentioned person and we would recommend that compensation be paid to his mother in an amount to be determined in consultation with the Secretary of the Advisory Board on Compensation Claims.

2. It appears from the documentation which you have provided that the person in question was killed instantly by a mortar shell between 1500 and 1530 hours on 17 September 1980 while he was on his way home from work. It further appears that he had left his place of work approximately 30 minutes before the normal quitting time (1530 hours), but he proceeded homeward on his normal route and was in his own village when he was killed.

3. It also appears that the person in question held an appointment which provided, *inter alia*, as follows:

"10. *Service-incurred death, injury and disability*

"A service-incurred death, injury or disability within the meaning of these conditions of service shall include the death, injury or disability of an employee which is determined

to be directly attributable to the performance of official duties as assigned to him. Any death, injury or illness occasioned by the wilful misconduct of an employee or by his wilful intent to bring about the death, injury or illness to himself or another shall not be deemed to be attributable to service.

"Reasonable medical, hospital and directly related expenses arising out of the service-incurred injury will be reimbursed.

"Compensation for the death, incapacity or permanent partia incapacity resulting from service will be determined by the United Nations, New York based on scales and conditions of compensation as provided for in the area of employment and in force at the time of such death, incapacity or permanent partial disability."

The letter of appointment of the person in question did not make provision for the payment of dependency allowance and therefore he did not have an opportunity to claim his mother as a dependant.

4. It further appears that the local Board of Inquiry found that:

(1) The person in question died as a result of shelling at a time between 1515 and 1525 hrs on 17 September 1980 on his way home from work at UNIFIL headquarters;

(2) He left his place of employment at headquarters before the completion of his working day at 1530 hrs;

(3) This may have constituted "wilful misconduct" on his part. There is no evidence that he left his place of employment without permission, but it appears to be a reasonable supposition, as he left in the company of others. It is doubtful if all had permission to leave early.

The Board drew no conclusions "as the question of compensation was not for it to decide" and made no recommendations in the matter.

5. It finally appears that the case was presented to the Advisory Board on Compensation Claims, but the Board did not consider the question of attributability. Although the deceased had a mother (whom he was unable to claim as a dependant), the Board rejected the case because he had no dependants within the meaning of article 2, paragraph (*d*), of appendix D. However, the Board authorized its Secretary to prepare a notional calculation of the death benefits payable to a dependent parent under article 10.2 (*d*) (i) of appendix D.

6. The following issues emerged from our review of the foregoing facts:

(*a*) Is death of the person concerned "directly attributable to the performance of official duties as assigned to him" under paragraph 10 of the special service agreement?

(i) What effect is to be given to the findings of the Board of Inquiry, especially with regard to the sub-issue of "wilful misconduct"?

(*b*) If death is "directly attributable to the performance of official duties", what procedure is to be followed to provide the compensation which is to be "determined by the United Nations, New York, based on scales and conditions of compensation as provided for in the area of employment and in force at the time of such death, incapacity or permanent partial disability" under paragraph 10 of the special service agreement?

(i) What effect is to be given to rejection of the case by the Advisory Board on Compensation Claims on the issue of dependants?

(ii) What effect is to be given to the Board's agreement to a notional calculation of the benefits payable to a dependent parent under article 10.2 (*d*) (i of appendix D?

7. With respect to issue (*a*), we are of the opinion that the victim's death is "directly attributable to the performance of official duties as assigned to him". We base our opinion on the fact that he was in attendance at his place of work until he left for home via his normal route, and that he was killed en route to his home from his place of work. With respect to the Board of Inquiry's finding on sub-issue (*a*) (i), we do not consider that a 15- to 30-minute absence from work constitutes "wilful misconduct" as that term is normally used in compensation practice. Our view is supported by paragraph 12 of the victim's letter of appointment which clearly indicates that an absence from work of less than two days without notification to

the head of the office is not regarded as wilful misconduct. In the circumstances we conclude that the United Nations is legally liable to pay compensation in accordance with paragraph 10 of the special service agreement.

8. With respect to issue (*b*), a determination of the "scales and conditions of compensation as provided for in the area" would normally require consultation with local authorities. However, such consultation would be difficult, if not impossible, given the conditions in the area at this time; it would therefore seem preferable to substitute a determination based on the information at hand. Although the victim's letter of appointment made no provision at all for his claiming or even identifying his dependants, it seems reasonable to conclude from the documentation which you provided that his mother would be regarded as his dependant under local law and that she would be the rightful recipient of death benefits in this case. We appreciate the willingness of the Advisory Board on Compensation Claims to make a notional calculation (though we find it difficult to accept the basis for the Advisory Board's rejection of the case on the dependency issue) and we believe that such a calculation would produce a result which could be assumed to be consonant with local scales and conditions. In our view, the Organization would discharge its legal liability by paying a sum measured against article 10.2 (*d*) (i) of appendix D to the victim's mother, on the assumption that such payment would equal or exceed the scales and conditions of compensation in the area.

14 September 1982

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29. Question of whether staff members of the United Nations may accept any honour, decoration, favour, gift or remuneration accorded by a Government

Memorandum to the Executive Assistant to the Secretary-General

1. You have requested the views of the Office of Legal Affairs in connection with a request from a staff member for authorization to accept a decoration from the Government of a Member State.

2. Regulation 1.6 of the Staff Regulations of the United Nations[99] lays down a categorical injunction against acceptance by a staff member of any honour, decoration, favour, gift or remuneration accorded by a Government. It leaves absolutely no discretion on the part of the Secretary-General for approval of such acceptance.

3. It is well established that staff members, as international civil servants, are called upon to work not in their own name but anonymously. As a consequence, any honours or decorations should be conferred on the Organization and not upon individual members of the staff. Staff members may therefore be authorized to accept honours or decorations in the name of the Organization, in which case the articles concerned (e.g., medals, certificates) will be transferred to the custody of the Organization. Such authorization and acceptance is not possible, however, where the decoration concerned is clearly of a personal nature and is habitually bestowed on an individual in recognition of services rendered.

4. You will find annexed a paper prepared by the Office of Legal Affairs containing commentaries on regulation 1.6 of the United Nations Staff Regulations. The views expressed above are based on those commentaries which reflect the clear United Nations policy and rules on the matter under consideration.

5. In conclusion, it should be mentioned that there have been cases where awards, honours or decorations have been accepted by former staff members after leaving the United Nations and the Organization has apparently not interposed any formal objection to such acceptance.

ANNEX

Commentaries on regulation 1.6 of the United Nations Staff Regulations

1. Staff regulation 1.6 was adopted by General Assembly resolution 882 (IX) of 14 December 1954 and came into effect on 1 January 1955. It superseded the previous text, which read as follows:

> "No member of the Secretariat shall accept any honour, decoration, favour, gift or fee from any Government or from any other source external to the Organization during the period of his appointment, except for war service."

2. Regulation 1.6 lays down a categorical injunction against acceptance by a staff member of any honour, decoration, favour, gift or remuneration accorded by a Government. It leaves no discretion on the part of the Secretary-General for approval of such acceptance. The General Assembly has on two occasions refrained from endorsing a recommendation made by the Advisory Committee on Administrative and Budgetary Questions that the Secretary-General be authorized, in the application of regulation 1.6, to be guided by an interpretative comment offered by the Committee, according to which the Secretary-General would concur in any derogation from its provisions only in very exceptional cases [100] Instead, the General Assembly at its ninth session decided to adopt separate provisions concerning honours, decorations, favours, gifts and remuneration accorded by a Government and those accorded by some other source external to the Organization, and took the position that, in the first case, the prohibition should be absolute and, in the second case, acceptance should be made subject to the Secretary-General's consent.[101]

3. With regard to any governmental rewards, the only exceptions permitted are:

(i) As provided for in regulation 1.6 itself, acceptance of decorations for war service earned before the appointment to the Secretariat;

(ii) In accordance with regulation 3.4 (*c*), acceptance of dependency benefits to which a staff member may be entitled under the applicable laws of his country, provided the amount of such benefits is deducted from the dependency allowances payable to him by the United Nations; and

(iii) In the case of a staff member serving on a technical co-operation project in a particular country, acceptance of accommodation provided by the Government of that country free of charge or at a reduced rent for the duration of his assignment. In accordance with inter-agency practice, such accommodation is taken into account through an appropriate deduction in the staff member's emoluments.

4. Staff members who are on secondment from their national civil service may not accept any remuneration from their Government, whether for services performed or otherwise, during the period of their secondment to the United Nations. This does not preclude the seconded officials from retaining certain rights in the national administrations, notably the right to revert to employment in them, the right to retirement benefits and rights accrued on the basis of seniority, such as higher increments in the grade and credits towards promotion. Any other rights they may have as government officials are suspended for the duration of their secondment to the United Nations, where they are subject to the Staff Regulations and Staff Rules.

5. *As staff members are called upon to work not in their own name but anonymously, any honours* or decorations should be conferred upon the Organization and not upon individual members of the staff. Staff members are obliged to decline any governmental awards in recognition of their individual services. They may, however, be authorized to accept such awards in the name of the Organization, in which case the articles will be transferred to the custody of the Organization.

6. The hope has been expressed by the International Civil Service Advisory Board that member Governments will respect the principle laid down in regulation 1.6 and refrain from placing staff members in the embarrassment of refusing the offers of any honour, decoration, gift or other marks of favour.[102]

7. As distinguished from the categorical injunction in respect of rewards by Governments, regulation 1.6 lays down the conditional requirements that staff members may not accept any honour, decoration, favour, gift or remuneration from other external sources without first obtaining the approval of the Secretary-General. Such approval may be granted only in exceptional cases and where such acceptance is not incompatible with the terms of regulation 1.2 and with the individual's status as an international civil servant.

8. The provisions of regulation 1.6, whether in respect of a Government or any other source external to the Organization, do not preclude a staff member from accepting: (*a*) academic awards; (*b*) reimburse-

ment of travel and subsistence expenses for activities otherwise authorized; (*c*) tokens of commemorative or honorary character, such as scrolls, trophies or other like articles; (*d*) courtesies which constitute part of normal social functions.

7 June 1982

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30. NATIONALITY STATUS OF A STAFF MEMBER CLAIMING *DE FACTO* STATELESSNESS

Memorandum to the Chief, Staff Service, Office of Personnel Services

1. Please refer to your memorandum of 14 July 1982 in which you requested us to "determine whether, for the purposes of the Staff Rules and Regulations of the United Nations, the staff member is to be considered as a national of the country he comes from or whether he has to be considered as stateless".

2. We have noted that the staff member takes the position that he "lost" his nationality and that he does not consider himself a national of the country from which he comes. In effect, he claims statelessness *de facto* on the basis of his repudiation of the assistance and protection of the country in question. However, the Convention relating to the Status of Stateless Persons of 28 September 1954[103] only defines statelessness *de jure* in terms of persons who are not considered as nationals of any State "under the operation of its laws". The drafters of this and other conventions dealing with the question of statelessness limit the scope of the conventions in question to the solution of problems relating to *de jure* stateless persons mainly because of the difficulty in providing objective criteria for the definition of *de facto* stateless persons.

3. Although a sympathetic reaction to the staff member's case would be entirely understandable, it should be borne in mind that Governments sometimes use similar arguments with respect to persons whom they regard as stateless *de facto*. In such cases Governments attempt to avoid the operation of their own laws on nationality by arguing that a person has placed himself outside the Government's protection and assistance and thus has rendered himself stateless *de facto*. Such arguments whether from a Government or from an individual are difficult to accept from a legal point of view and even more untenable from a moral point of view. The best course, and the only consistently justifiable one, is to adhere to the definition of statelessness *de jure*.

4. We have also noted that the Immigration and Naturalization Service of the host country has issued a re-entry permit to the staff member which contains the word "STATELESS" in the box entitled "Country of *Claimed* Nationality". We would point out that this mention does not constitute a finding of statelessness but rather reflects the staff member's own position in the matter. Even if there had in fact been such a finding, it could not have the effect of superseding the applicable law on nationality under the Convention relating to the Status of Stateless Persons.

5. In view of the foregoing, we are of the opinion that the Office of Personnel Services should treat the staff member concerned as a national of his country of origin.

9 August 1982

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31. SCOPE OF THE EXPRESSION "ACCREDITED STAFF OF PERMANENT MISSIONS" AS CONTAINED IN GENERAL ASSEMBLY RESOLUTION 36/235 OF 18 DECEMBER 1981

Memorandum to the Chief of Protocol, Protocol and Liaison Service

1. I wish to refer to your memorandum of 9 February 1982, in which you requested the Office of Legal Affairs to provide you with a definition of the term "accredited" as used in General Assembly resolution 36/235, section XVII.

2. The expression "accredited staff of permanent missions" is not one which is used as a particular term of art in international law. The Vienna Convention on Diplomatic Relations[104] and the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character[105] employ a number of other expressions which are defined in those treaties. These include "members of the mission" and "members of the staff". Members of the staff of a mission are divided into three categories: members of the diplomatic staff; members of the administrative and technical staff; and members of the service staff.

3. In the absence of an existing definition of the term "accredited staff", we have endeavoured to seek guidance as to the intent of the Fifth Committee from the background documentation and from the summary records of the discussion. The main background documentation appears to be a note by the Budget Division[106] setting out the financial implications of the proposals. Unfortunately, although the term "accredited staff" is used in this paper, no definition is provided. Similarly, no definition is to be found in the summary records. However, the remarks of a number of delegations appear to lead to the conclusion that what was intended by the term "accredited staff" was the diplomatic staff as distinct from the administrative and technical staff and the service staff.

4. It is the view of this Office that this narrow definition of the term "accredited staff" would be in keeping with both the ordinary meaning of the term "accredited" in diplomatic parlance and the intent of the Fifth Committee.

18 February 1982

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32. Scope of privileges and immunities of a permanent observer mission to the United Nations

Statement made by the Legal Counsel at the 92nd meeting of the Committee on Relations with the Host Country

1. *The institution of permanent observer missions.* Although the Charter of the United Nations makes no provision for observers of non-member States, the institution of permanent observers of non-member States in United Nations practice may be traced to the designation of Switzerland in 1946 as a permanent observer. This practice, which from a formal point of view is based on an exchange of letters between the non-member State and the Secretary-General, was subsequently followed by many other non-member States and the institution of permanent observer missions has developed correspondingly. The need to codify this practice led to a study of the matter by the International Law Commission, the outcome of which is reflected in the 1975 United Nations Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.[105]

2. *The evolution of the legal basis of the institution of permanent observer missions.* Because the institution of permanent observer missions is one which has developed essentially through practice, the legal status, privileges and immunities of such missions has evolved gradually. Despite the fact that there are no specific provisions relating to permanent observer missions in the Charter, the Headquarters Agreement[107] or the Convention on the Privileges and Immunities of the United Nations,[108] as long as the non-member States concerned enjoyed bilateral diplomatic or consular relations with the host country no particular problems arose. The permanent observer missions and their individual members were accorded diplomatic or consular privileges and immunities on a reciprocal basis. As early as 1962 the Office of Legal Affairs stated in a legal opinion that, while permanent observers are not entitled to diplomatic privileges in the host State, those among them who form part of the diplomatic missions of their Governments to the Government of the United States might enjoy immunities in the United States for that reason.[109]

The development and broadening of the institution, which by the early 1970s included a number of intergovernmental organizations such as the European Economic Community (EEC)

and the Council for Mutual Economic Assistance (CMEA), led the Office of Legal Affairs to elaborate further on the legal status of such missions, resulting in the conclusion that permanent observer missions were entitled to functional privileges and immunities.

3. *The basis for the functional privileges and immunities of permanent observer missions.* In January 1975 the Legal Counsel was requested to set out his view concerning the privileges and immunities to which representatives of CMEA would be entitled in the United States, as host State to the Headquarters of the United Nations, in the light of General Assembly resolution 3209 (XXIX) of 11 October 1974, which requested the Secretary-General to invite CMEA to participate in the sessions and work of the General Assembly in the capacity of observer. After pointing out that the representatives of CMEA would benefit from certain provisions of the Headquarters Agreement, namely, sections 11, 12 and 13, the Legal Counsel went on to say:

> "In addition to the foregoing privileges and immunities, it is my belief that it necessarily follows from the obligations imposed by Article 105 of the Charter of the United Nations that a CMEA delegation would enjoy immunity from legal process in respect of words spoken or written and all acts performed by members of the delegation in their official capacity before relevant United Nations organs."[110]

In 1976 the Legal Counsel was called upon once again to state his position with regard to the privileges and immunities of a permanent observer of an intergovernmental organization. In this case the Legal Counsel stated that:

> "The permanent observer, as an invitee to meetings of certain United Nations organs, enjoys in this capacity, in the Secretary-General's view, functional immunities necessary for the performanance of his functions. While these immunities are not spelt out in detail in the Headquarters Agreement, or the Convention on the Privileges and Immunities of the United Nations, they flow by necessary intendment from Article 105 of the Charter. It can be argued with considerable cogency that such functional immunities, to have any real substance, should include inviolability for official papers and documents relating to an observer's relations with the United Nations."[111]

The foregoing legal opinions represented the views held by the Office of Legal Affairs in the light of the practice which had developed since 1946 and taking into account the provisions of the Charter of the United Nations and the Headquarters Agreement. In the meantime, however, the United Nations Conference on the Representation of States in Their Relations with International Organizations had considered and adopted a convention codifying the law regarding the representation of States in their relations with international organizations. The Vienna Convention of 1975 contains provisions dealing with missions to international organizations, delegations to organs and to conferences and observer delegations to organs and to conferences. Part II of the Convention incorporates provisions dealing with permanent missions of both Member States and non-member States. Article 5, paragraph 2, provides that non-member States may, if the rules of the organization so permit, establish permanent observer missions for the performance of the functions of the permanent observer mission. For all practical purposes the status, privileges and immunities of permanent observer missions, as well as their diplomatic staff, are assimilated to that of permanent missions of Member States, including the inviolability of the premises of the mission and the personal inviolability of the members of the diplomatic staff of the mission. The 1975 Convention is not yet in force and in view of the fact that a number of States, mainly host countries of international organizations, either abstained or voted against the Convention, it would not be correct to rely on the Convention as a statement of the accepted customary international law in the matter. Nevertheless, it may be pointed out that a very large number of States voted in favour of the Convention, which goes well beyond the functional view which has been espoused by the Office of Legal Affairs.

4. *The necessity for and scope of the functional immunity of permanent observer missions.* The foundation of the functional view consistently advanced by the Office of Legal Affairs is Article 105 of the United Nations Charter. This provision establishes in general terms the principle that the representatives of Members shall enjoy the privileges and immunities

necessary for the independent exercise of their functions. The Charter as a constituent instrument did not, of course, spell out these privileges and immunities but left it to the General Assembly to determine the specific details of the application of the principle. The principle is clear and, as emphasized in the legal opinions cited above, it flows by necessary intendment from Article 105 that regardless of the detailed application of Article 105 by the General Assembly, certain minimum privileges and immunities are inherent to the Organization and its Members without which it would be unable to function independently. Such functional privileges and immunities clearly extend to the institution of permanent observer missions which, as we have seen, has developed in practice and which has been codified in the 1975 Vienna Convention. The Charter of the United Nations, while making no express reference to permanent observer missions of non-member States, nevertheless contains a number of provisions creating rights or obligations for non-member States. It was, therefore, contemplated that such States might be brought into relationship with the Organization and that appropriate legal arrangements governing such relationship would be made.

Furthermore, non-member States of the United Nations are sovereign States and they generally are members of other intergovernmental organizations within the United Nations system. In their capacity as members of these agencies, they enjoy *de lege lata* in the corresponding host countries the privileges and immunities which are set out in the relevant constituent instruments as well as the relevant host country agreements.

If, as has been argued in the 1975 and 1976 legal opinions, intergovernmental observers enjoy functional immunity, then *a fortiori* such immunity must also be enjoyed by the States. Such immunity must extend to immunity from legal process in respect of words spoken or written and all acts performed by members of the mission in their official capacity before relevant United Nations organs as well as inviolability for official papers and documents relating to an observer's relations with the United Nations. If such inviolability is to have any meaning, it necessarily extends to the premises of the mission and the residences of its diplomatic staff.

14 October 1982

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33. PRIVILEGES AND IMMUNITIES ACCORDED TO THE REPRESENTATIVES OF INTERGOVERNMENTAL ORGANIZATIONS WHICH HAVE ACQUIRED OBSERVER STATUS AT THE UNITED NATIONS ON THE BASIS OF A STANDARD INVITATION ISSUED TO THEM BY THE GENERAL ASSEMBLY

Note verbale to the Permanent Observer of an intergovernmental organization

Information has been requested with respect to the privileges and immunities accorded to the representatives of intergovernmental organizations which have acquired observer status at the United Nations on the basis of a standing invitation issued to them by the General Assembly.

In the view of the Legal Counsel, it necessarily follows from the obligations imposed by Article 105 of the Charter of the United Nations that a permanent observer delegation, being an invitee of the General Assembly, enjoys immunity from legal process in respect of words spoken or written and all acts performed by members of the delegation in their official capacity before relevant United Nations organs.

In addition, a permanent observer delegation benefits from the following provisions of the Headquarters Agreement:

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

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

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

The above-mentioned provisions represent, in the view of the Legal Counsel, the scope of privileges and immunities which the host State is obliged under existing international instruments to accord to a permanent observer delegation.

Permanent observers of intergovernmental organizations are not entitled to diplomatic privileges and immunities under the Headquarters Agreement between the United Nations and the United States or under statutory provisions of the host State. At the same time, those permanent observers who form a part of the diplomatic missions of their Governments to the United Nations may enjoy immunities provided by the host State for such missions.

The host State may, of course, as a matter of courtesy, extend a wider variety of privileges and immunities to the delegation. However, this is a matter for negotiation between the host State and the intergovernmental organization concerned. It may be noted, in this connection, that the same privileges and immunities as are enjoyed by diplomatic missions in the United States were extended to the Mission of the Commission of European Communities. The Senate and House of Representatives of the United States enacted on 18 October 1972 Public Law 92-499, which provides that:

> "Under such terms and conditions as he shall determine and consonant with the purposes of this Act, the President is authorized to extend, or to enter into an agreement extending, to the Mission to the United States of America of the Commission on the European Communities, and to members thereof, the same privileges and immunities subject to corresponding conditions and obligations as are enjoyed by diplomatic missions accredited to the United States and by members thereof."

Pursuant to this Act, the President of the United States, on 5 December 1972, issued Executive Order No. 11689, which provides that:

> "By virtue of the authority vested in me by the Act of October 18, 1972 (Public Law 92-499) [this section], and as President of the United States, I hereby extend to the Mission to the United States of America of the Commission of the European Communities, and to the officers of that Mission assigned to Washington to represent the Commission to the Government of the United States and duly notified to and accepted by the Secretary of State, and to their families, the same privileges and immunities, subject to corresponding conditions and obligations, as are enjoyed by diplomatic missions accredited to the United States and by members of the diplomatic staffs thereof."

The Organization of African Unity was granted on the territory of the United States the same privileges and immunities as are accorded to a public international organization to which the United States is a party. The Senate and House of Representatives of the United States, by their decision of 27 November 1973 (Public Law 93-161), approved an amendment to the International Organizations Immunities Act (Public Law 79-291, 29 December 1945)[112] by adding at the end thereof the following new section:

> "Sec. 12. The provisions of this title may be extended to the Organization of African Unity in the same manner, to the same extent, and subject to the same conditions, as they may be extended to a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation."

By executive order of the President of the United States, the Organization of African Unity was then designated as a public international organization entitled to enjoy the privileges, exemptions and immunities conferred by the International Immunities Act.

As to the privileges and immunities enjoyed in the United States by the Organization of American States, it should be noted that the United States is a member of that organization and

that by virtue of Executive Order No. 10533 of 3 June 1954, issued by the President of the United States, the Organization of American States was also designated as a public international organization entitled to enjoy the privileges, exemptions and immunities provided by the International Immunities Act.

5 August 1982

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34. QUESTION OF WHAT CONSTITUTES UNDER THE AGREEMENT BETWEEN THE UNITED NATIONS AND THE UNITED STATES OF AMERICA REGARDING THE HEADQUARTERS OF THE UNITED NATIONS, AN INVITATION TO THE HEADQUARTERS OF THE UNITED NATIONS REQUIRING THE HOST STATE TO GRANT ADMISSION TO THE INVITEES

Statement submitted at a press briefing

The Office of Legal Affairs has never had the occasion to seek a general definition of what constitutes under the Headquarters Agreement[107] an invitation to the Headquarters of the United Nations requiring the host State to grant admission to the invitee. Nor is this a matter which has been considered by the General Assembly, although immigration procedures are on the agenda of the Committee on Relations with the Host Country and it is open to any member of that Committee to raise at any time with the Committee a particular case or cases or the question of a general definition. No member of the Committee has asked for a meeting in connection with admission to the United States for the present special session on disarmament.

This is a matter which it has been found best to deal with on a pragmatic basis in the context of the particular meeting concerned, and there would appear to be no reason to believe that a general definition would necessarily obviate difficulties. In the past, since the conclusion of the Headquarters Agreement in 1947, there have been very few occasions where differences over admission between the United Nations and the United States have arisen which could not be resolved. Such occasions have in the past not turned on the issue of what constitutes an invitation but on assertions by the host State that the invitee would abuse or had previously abused the privilege of admission by engaging in activities other than those for which admission was ostensibly sought.

Without seeking to be comprehensive in any way, and in the present context relating to non-governmental organizations, the Office of Legal Affairs considers that an invitation under the Headquarters Agreement to the special session on disarmament is clearly involved where a non-governmental organization has been invited by name by the General Assembly. This applies to the organizations listed in annex III to the Report of the Preparatory Committee. The Preparatory Committee further refers in paragraph 28 of its report in a general way to other "non-governmental organizations concerned with diarmament" without naming them. Obviously, interpretations of this phrase can differ. In the view of the Office of Legal Affairs, to qualify for an invitation in terms of the Headquarters Agreement, these other organizations would have to be recognized by the United Nations, for instance under the procedures for consultative status with the Economic and Social Council, or with the Centre for Disarmament and the Department of Public Information.

When an organization is entitled to participate in a United Nations meeting, its participation is necessarily through a reasonable number of representatives of the organization concerned, and not all of its members. It is manifestly unreasonable to expect the host State to accept that it was under an obligation to grant admission to the entire populations of States because the Assembly has asked "all States" to attend a meeting, or that all members of organizations and liberation movements having invitations to participate in the Assembly have a right of admission to the host State. It is within the discretion of the host State to what extent it is prepared to grant visas to large numbers of members of an invited group, although the United Nations would insist that a reasonable number of representatives of the group should be admit-

ted to follow the proceedings and, if so invited, to address the meetings concerned. So far, in connection with the present special session, there have been no instances of which the Office of Legal Affairs is aware where a particular representative of a non-governmental organization whose name has been communicated by the Secretariat as invited has been denied a visa, although there have been delays in granting visas.

11 June 1982

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35. QUESTION OF THE TAXATION, UNDER THE LEGISLATION OF A MEMBER STATE, OF THE SALARIES AND EMOLUMENTS RECEIVED FROM THE UNITED NATIONS BY NATIONALS OF THAT STATE WORKING ABROAD FOR THE UNITED NATIONS OR LOCALLY RECRUITED BY THE ORGANIZATION IN THE TERRITORY OF THAT SAME STATE

Note verbale to the permanent representative of a Member State

The Legal Counsel's attention has been drawn to the fact that the nationals of [name of Member State] who work abroad for the United Nations or are locally recruited by the Organization on the territory of that State are obliged to pay taxes on their United Nations salaries and emoluments, notwithstanding the provisions of the Convention on the Privileges and Immunities of the United Nations[108] to which the State concerned is a party. In this respect, the Legal Counsel wishes to take the opportunity to clarify that, according to the provisions of section 18 (*b*), article V, of the above-mentioned Convention, "officials of the United Nations shall be exempt from taxation on salaries and emoluments paid to them by the United Nations".

The definition of the term "officials", for the purpose of section 18 (*b*) of the Convention, was established by the General Assembly in resolution 76 (I) of 7 December 1946. In that resolution, the General Assembly approved "the granting of the privileges and immunities referred to in articles V and VII of the Convention . . . 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". This definition allows for no distinction among staff members of the United Nations on the basis of nationality or residence, or according to whether they are internationally or locally recruited.

The rationale for the exemption of United Nations officials from taxation on salaries and emoluments paid to them by the United Nations is that equality in conditions of service, irrespective of nationality, is essential in the international civil service. In place of national taxation, the General Assembly, in 1948, adopted a Staff Assessment Plan designed "to impose a direct assessment on United Nations staff members which is comparable to national income taxes". The assessment made under this Plan is credited to the staff member's country and offset against that country's contribution to the regular budget of the United Nations.

Since the Member State concerned has consented to the provisions contained in section 18 (*b*), article V, by adhering to the Convention on the Privileges and Immunities of the United Nations, it is the view of the United Nations that the taxation of the salaries and emoluments of nationals of that State employed as United Nations officials both locally and abroad is wrong in law and would not be compatible with the said Convention.

The Legal Counsel would be most grateful if this matter could be brought to the attention of the Government of [name of Member State] and if, in the light of the foregoing explanations, the necessary measures were taken with a view to exempting staff members, whether internationally or locally recruited, from income tax and refunding those staff members from whom such tax has already been collected.

8 March 1982

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36. CONDITIONS UNDER WHICH MOTOR VEHICLES BELONGING TO OFFIC ALS OF THE UNITED NATIONS MAY BE ADMITTED FREE OF DUTY IN THE TERRITORY OF T IE HOST STATE

Memorandum to the Chief of the Transportation Section, Pu chase and Transportation Service, Office of General Services

. . .

2. According to the provisions of section 148.87 (*a*) of subpart I, title 19, of the United States Code of Federal Regulations, baggage and effects of United Nati ns employees shall be admitted to the United States free of duty. It has always been an unde standing supported by the actions of the United States Government that motor vehicles are reg rded as a part of personal effects. Section 148.81 (*b*) of the same title provides that the tern "effects" includes all articles which *were in the possession of* a person abroad, and are being mported in connection with his arrival, and which are intended for his *bona fide* personal use. It would appear from this paragraph that "possession" of a motor vehicle abroad before it transportation to the United States is one of the crucial conditions in the determination wh ether or not a United Nations employee is entitled in a concrete case to exemption from Jnited States customs duties.

3. "Possession" is a term of ambiguous meaning. Its legal sens does not necessarily require physical possession or effective control. The above-mentioned t tle does not contain a definition of this term applicable to an importation of motor vehicles. Therefore the Office of Legal Affairs requested the United States Mission to the United Nations to provide elucidation of how the term "possession", appearing in paragraph 148.81 (*b*) of t ie said Title, is interpreted and applied by the competent authorities of the United States and what procedures a United Nations employee should follow to avail himself of the right t duty-free entry of a motor vehicle under the pertinent regulations. Noting that at the present time it is very difficult to purchase, for example in Europe, a motor vehicle which would immediately be available for delivery to the United States, as European manufacturers do not produce in advance vehicles complying with United States safety and emission regulations, the Office of Legal Affairs expressed the desire to receive clear answers to the following questions:

(*a*) Whether a down payment or full payment for a motor vehicle not ready for immediate delivery can be considered as "possession" of a car and can serve as a sufficient ground for duty-free importation to the United States;

(*b*) Whether actual possession of a motor vehicle, in the sense of having received physical delivery, is an obligatory condition for duty-free importation to the U ited States.

4. To this request the United States Mission to the United Nations on 29 October 1982 gave a self-explanatory reply, a copy of which is annexed.

10 November 1982

ANNEX

Note dated 29 October 1982 from the United States Mission to the U nited Nations

The United States Mission to the United Nations presents its compliments and has the honour to communicate, on behalf of its Government, the following information requested by the United Nations Legal Counsel concerning the customs-free entry of automobiles.

As the United Nations Legal Counsel noted, under the International Orgar izations Immunities Act, P.L. 291, the "baggage and effects of alien officers and employees of internationa organizations . . . or of the families, suites, and servants of such officers, (or) employees . . . shall be admitted (when imported in connection with the arrival of the owner) free of customs duties and free of Internal Revenue taxes imposed upon or by reason of importation".

Section 148.81 (*b*) of title 19 of the United States Code of Federal Regulatic ns explains that the term "includes all articles which were in the possession of (an entitled) person abroad and are being imported in connection with his arrival and are intended for his bonafide personal or household use".

Pursuant to these provisions, the United States Customs Service has, in practice, maintained that in order to satisfy this "possession" requirement the entitled person must have been able to take actual possession abroad. This means that the article must in fact be in existence or ready for immediate delivery abroad to the purchaser; accordingly, the purchaser must have been physically present abroad, and the item must not be one which is ordered to be made for the purchaser and therefore not ready for foreign delivery. So long as the item could have been brought back to the United States with the purchaser, the United States Customs Service has not required that actual delivery be taken abroad or that the shipment accompany the returning purchaser, but has required that the shipment be in close conjunction with an arrival in the United States.

Responding to the United Nations Legal Counsel's specific questions, the United States Mission to the United Nations notes that, in view of the above, partial or full payment for a vehicle not ready for immediate delivery will not be considered to qualify the transaction for duty-free importation benefits. Further, as noted above, actual physical delivery abroad is not required so long as it is possible.

While sympathetic to the potential difficulties of purchasing abroad and taking foreign delivery of a vehicle meeting United States specifications, the United States Mission notes that such transactions are nevertheless possible.

. . .

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

1. 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 the Government of the United States:

(*a*) Memorandum on Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144). Document GB. 223/14/3, 223rd session of the Government Body, May 1983.

(*b*) Memorandum on the Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147). Document GB. 223/14/3, 223rd session of the Governing Body, May 1983.

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2. INTERNATIONAL MONETARY FUND

BORROWING AGREEMENTS BETWEEN INTERNATIONAL MONETARY FUND AND ITS MEMBERS

Memorandum attached to the International Monetary Fund's loan agreement with the Saudi Arabian Monetary Agency[113]

1. Like any other subject of international law, be it a State or an international organization, the Fund is legally bound to perform in good faith the obligations it has assumed under agreements that it has concluded in accordance with its constitutional requirements, and it may not invoke actions or omissions by any of its organs in order to avoid the performance of such obligations. This statement is elaborated below.

2. The Fund is an international, intergovernmental organization which, in accordance with applicable principles of general international law and express provisions of its Articles of Agreement, possesses full juridical personality and the capacity to contract. With regard to bor-

rowing, the Articles of Agreement specifically provide that the Fund may borrow, on such terms and conditions as may be agreed with the lender, the currencies of members, if it finds it appropriate to replenish its holdings of such currencies.

3. Under the provisions of the Fund's Articles and decisions of its Board of Governors, the authority and responsibility to enter into borrowing agreements for the replenishment of the Fund's holdings of currencies lies with the Executive Board. Therefore, a borrowing agreement concluded under or pursuant to the authority of the Executive Board is a legally binding agreement of the Fund.

4. It is a fundamental principle of international, as well as of domestic, law that an agreement in force is binding upon the parties to it and must be performed by them in good faith. All parties to the agreement are entitled to expect that the contractual undertakings under the agreement will be fully carried out in accordance with the terms of the agreement. It has been recognized that this basic rule of law applies with equal force to international organizations.[114] Thus the Fund, having duly concluded an agreement with another party, be it one of its members or another entity, is legally obliged to perform in good faith its undertakings under the agreement.

5. Another basic principle of domestic and international law that flows from the one already referred to is that, once the terms of an agreement have been fixed and the agreement has been brought into force, it is not open to either of the parties to amend, transform or terminate the agreement unilaterally, i.e., without the consent of the other party. In the case of a party which is a State, this means that the party may not invoke its internal law or decisions of its national authorities or institutions in order to modify or abrogate its obligations under an agreement to which it is a party. In the case of a party which is an international organization, it means that a party to the agreement may not invoke its internal rules and procedures, or the actions or omissions of its organs, in order to change, nullify or evade its obligations under the agreement. This basic principle has been formulated as follows in the codification of the law on the subject of treaties among international organizations, or between them and States, that was prepared by the International Law Commission of the United Nations.[114]

> "An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty, unless performance of the treaty, according to the intention of the parties, is subject to the exercise of the functions and powers of the organization."[46]

The Commission made it clear that "rules of the organization" means, in particular, "the constituent instruments, relevant decisions and resolutions, and established practice of the organization.[114] Thus, the Fund would be prevented from varying its contractual commitments under an agreement to which it is a party by relying on decisions taken, or practices developed, after the conclusion of the agreement. Changes in the Fund's law and practice would be taken into account in the interpretation and application of terms of an agreement to which the Fund is a party only to the extent that their applicability was expressly stated in, or implied from, the provisions of the agreement. It is clear therefore that neither the Board of Governors nor the Executive Board of the Fund may change, nullify or evade the obligations of the Fund under bilateral agreements.

6. Questions of interpretation of the provisions of an agreement between the Fund and another party must be resolved in accordance with the rules and procedures prescribed for this purpose by that agreement. The organs of the Fund have no authority to resolve any questions of interpretation of such an agreement even if the other party to the agreement is a member of the Fund. The Executive Board and the Board of Governors have the responsibility to resolve questions of interpretation of the provisions of the Fund's Articles and the resolutions and decisions adopted under them, but that authority does not extend to questions of interpretation of the provisions of contractual arrangements of the Fund. As already explained, interpretations or other decisions adopted by the Board of Governors or the Executive Board would affect the interpretation or application of the provisions of an agreement between the Fund and another party only if this was expressly stated in, or implied by, the provisions of that agreement.

3. INTERNATIONAL TELECOMMUNICATION UNION

EXCLUSION OF A MEMBER FROM THE PLENIPOTENTIARY CONFERENCE AND FROM ALL OTHER CONFERENCES AND MEETINGS OF THE INTERNATIONAL TELECOMMUNICATION UNION

Opinion given by the Legal Adviser to the Plenipotentiary Conference of the International Telecommunication Union on 18 October 1982

[The International Telecommunication Union (hereinafter referred to as "the Union") held its Plenipotentiary Conference (hereinafter referred to as "the Conference")[115] from 28 September to 6 November 1982 in Nairobi, Kenya. During the Conference, a draft resolution seeking the exclusion of a Member State from the Plenipotentiary Conference and from all other conferences and meetings of the Union[116] and sponsored by a number of delegations,[117] was submitted. Thereafter, some other delegations[118] submitted "Amendments to document No. 120".

The Conference started its deliberations on the subject in question on the basis of the aforementioned documents[119] on 18 October 1982, at its fifteenth plenary meeting.[120] During that meeting, the delegates of the Netherlands[121] and of Norway,[122] questioning the legality of the exclusion of a member of the Union, sought the opinion of the Union's Legal Adviser.[123] The Chairman invited the Legal Adviser to present his legal opinion to the Conference,[124] which he did as follows:[125]]

Permit me to start off with a quick consideration of document 120 (Rev.2) itself, in order to reply to the request for legal advice, which will be limited to strictly legal issues.

With regard to that document, which, during the preceding discussions, has been considered as "illegal" by one delegation,[126] I should like to point out that certainly, from a strictly formal point of view, document 120 (Rev.2) itself is not "illegal" in the sense that it has been properly presented and sponsored during the present Conference. The question of the formal legality of the document itself is thus not at stake. On the other hand—and I turn now to the contents of document 120 (Rev.2)—the question arises whether its *adoption* by this Conference could be considered as legal or illegal.

I do not intend to go through the whole document 120 (Rev.2). I shall only present you my legal opinion thereon with regard to two legal issues involved therein. The first one concerns the second preambular paragraph of the draft resolution, which reads:

> "*Considering* that the fundamental principles of the International Telecommunication Convention are designed to strengthen peace and security in the world by developing international co-operation and better understanding among peoples".

In this respect, I submit to this august Conference that "the fundamental principles", in the wording referred to in the above preambular paragraph, can be found neither in any of the provisions nor in the preamble[127] to the Convention. This is in particular true for the part stating that those principles "are designed to strengthen peace and security in the world".

Having given this clarification, I shall now take up the second and, in my opinion, fundamental legal issue involved in the draft resolution under consideration. It concerns the third and last operative paragraph "resolves" thereof. I note that it has been pointed out during the preceding debate that this operative paragraph indeed does not provide for the exclusion of the Member State in question from the Union.[128] I submit, however, that its contents aim at suspension from the exercise of the rights and privileges of membership in the Union and thus touch the fundamental rights of a member in respect of its participation in the conferences, meetings and consultations of the Union, as they are stipulated in paragraph 2 (Nos. 8 to 10) of article 2 of the Convention.[129] It is precisely on the latter aspect that I shall have to make legal comments and give to the Conference my legal opinion, as requested.

Before going into the details of the Convention in this respect, I simply need to come back to what has been quoted before,[130] namely, the here-applicable, pertinent principles of international law. They have been summed up—in very short words, actually in two sentences—by the International Court of Justice in its advisory opinion, given in 1948, in a case concerning the admission of a State to membership in the United Nations. In the case brought before it, the Court was asked whether a Member of the United Nations, which is called upon to pronounce itself by its vote either in the Security Council or in the General Assembly on the admission of a State to membership in the United Nations, juridically is entitled to make its consent to the admission dependent on conditions not expressly provided for in the pertinent provisions of the United Nations Charter. By a majority of 9 votes to 6, the Court answered this question in the negative. The Court, with regard to the highest political organs of the United Nations, i.e., the General Assembly and the Security Council, stated in that advisory opinion:

> "The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment. To ascertain whether an organ has freedom of choice for its decisions, reference must be made to the terms of its constitution."[131]

Why do I insist on these principles of international law? It is because of two schools of thought, which, as I have observed by listening to the debates during the preceding three weeks of this Conference, exist, with almost equal strength, within this Conference. One school of thought apparently considers this Conference, the supreme organ of the Union,[115] as a political organ. For those doing so, the above principles pronounced by the International Court of Justice certainly apply in the sense that even an organ of a political character can only act within the framework of its Constitution, i.e., the Convention in the case of the Union, and the provisions thereof. The other school of thought claims and stresses that this Conference is not a political organ. For this school of thought the above principles apply equally and, one may argue, even more in the sense that a non-political organ is even more bound to stay within the provisions of its Constitution or Convention in respect of what it is authorized to do. This is the first reason why I cited this advisory opinion of the International Court of Justice. The second reason is that, during the preceding debates, some delegates stated rather frequently that they consider this Conference as sovereign to the extent that it can go beyond what the Contracting States in the basic instrument of the Union, namely the Convention, have agreed upon and provided for. I submit to this Conference, with my utmost respect, that this is simply not the case. The Contracting States, by ratifying, or acceding to, the Convention and depositing the respective instrument with the Secretary-General of the Union, have agreed upon, and stipulated, the complete framework within which and under which alone even a plenipotentiary conference of the Union, as the latter's supreme organ, is allowed to act.

In the light of the foregoing principles of international law, I now return to the draft resolution in document 120 (Rev.2). Its last operative paragraph provides, as I said, for suspension from the exercise of the rights and privileges of membership to the extent that, if adopted, it will not allow the member State in question any more to participate in future in the conference and meetings of the Union, including the present Conference, and thus touches one of the fundamental rights provided for in No. 8 (i.e., para. 2 (*a*)) of article 2 of the Convention.[129]

It is clearly the intention of the draft resolution to sanction one member of the Union. The legal question thus arises: does the Convention provide for sanctions against members of the Union, and, if so, for what types of sanction?

Looking at the Convention, everyone in this august Conference realizes that there are sanctions provided for in the Convention, namely, in its Nos. 97 and 156.

I shall deal first with No. 156.[132] This is an automatic sanction, without any action needed by any of the organs of the Union, imposed upon any "signatory Government", which, "from the end of a period of two years from the date of entry into force of the Convention", has not "deposited an instrument of ratification" of the Convention. Such member of the Union will automatically lose its right to vote at any of the conferences and meetings of the Union in

which it participates. Such loss of the right to vote in case of non-ratification of the Convention is not to be found in the Atlantic City Convention of 1947.[133] It was for the first time incorporated into the Buenos Aires Convention of 1952,[134] and was maintained in the Geneva Convention of 1959,[135] but without the last sentence figuring now in No. 156 of the Convention, where it is expressly stated that "its rights, other than voting rights, shall not be affected".[132] This last sentence was introduced only in the Montreux Convention, 1965,[136] and was taken over in the Malaga-Torremolinos Convention of 1973, currently in force.[137]

The second, equally automatic sanction is the loss of the right to vote, as provided for in No. 97 of the Convention.[138] This provision and the sanction stipulated therein are well known to all delegates, as you have dealt with that matter during the second week of the Conference. I therefore refer to an earlier reply, which I gave to the distinguished delegate of Mexico, when he asked whether the countries deprived of their right to vote, e.g., because of non-payment of arrears, were eligible for posts of responsibility in the Union.[139] I quoted on that occasion the pertinent document of the last Plenipotentiary Conference (Malaga-Torremolinos, 1973), which had rejected the idea of temporary suspension of any member's eligibility to the permanent organs of the Union.[140] I submit to the Conference the conclusion that its predecessor, the Malaga-Torremolinos Conference of 1973, thus considered indeed the possibility of introducing sanctions other than only the loss of the right to vote, but that it rejected this idea when it adopted the text of the Convention at present in force, which, consequently, provides only for one sanction against a member of the Union, i.e., the loss of the right to vote, as stipulated in Nos. 97 and 156 of the Convention.

Taking fully into account the legal background and the development with regard to sanctions through the legal history of the Union, as outlined immediately above, as well as the present legal situation by virtue of the provisions of the Convention in force, the following questions have to be put and replied to, from the legal point of view: What does it mean, in legal terms, that the Convention does not contain any other provisions foreseeing any other sanction against a member? Does it mean that the Convention—or in other, perhaps better, words, the predecessor Plenipotentiary Conferences and, after them and even more important, the Contracting States—remained deliberately silent, because it was intended to leave free way for the imposition upon a member of the Union of any other, further sanctions? Or does it mean that it was not intended to provide a possibility for the imposition of any such other sanctions, e.g., like the one now envisaged in the last operative paragraph of the draft resolution in document 120 (Rev.2)?

The last sentence I quoted from No. 156 of the Convention, i.e., that all other rights shall not be affected,[132] is in my opinion already a clear indication and a convincing argument in favour of the second interpretation. In addition, I also submit for consideration by the present Conference the argument that the Malaga-Torremolinos Conference of 1973, which adopted the Convention at present in force, was very well aware of other possible sanctions against members of the Union, such as suspension from the exercise of certain rights and privileges of membership or expulsion. Both types of sanction have existed since 1946 in Articles 5 and 6 respectively of the Charter of the United Nations,[141] with very specified and strict conditions, requiring even a two-thirds majority for any adoption of such measures, because of their being considered as "important questions".[142] It is difficult, or, more correctly, impossible, to pretend that the last Plenipotentiary Conference of 1973 was not aware of the existence of those sanctions within the United Nations itself, as expressly provided for in the two aforementioned articles of the Charter of the United Nations. During the debates on the "exclusion" or "temporary exclusion" of two other members "from the Plenipotentiary Conference and from all other conferences and meetings" of the Union, which led to the adoption by that Conference of its resolutions Nos. 30[143] and 31,[144] articles 5 and 6 of the United Nations Charter have been expressly referred to.[145] Nevertheless, that Conference did not change the Convention at all in this respect, as it could have done by inserting therein provisions similar to those contained in Articles 5 and 6 of the United Nations Charter. Therefore, the absence of other sanctions in the provisions of the Convention in force can, in legal analysis and according to my opinion, only mean that the Contracting States, first through their Plenipotentiaries in 1973, and thereafter

through the deposit of their instruments of ratification of, or accession to, the Convention, did not intend to give the power to any of the organs of the Union, including the latter's supreme organ itself, i.e., the Plenipotentiary Conference, to impose upon a member of the Union any other additional sanction not expressly provided for in the Convention.

The preceding arguments which, following the request for legal advice, I had to submit to this Conference for its consideration and appreciation, are, with regard to their results, reinforced and strengthened by the fact that for the first time the Malaga-Torremolinos Conference of 1973 included "the principle of universality"—already so frequently invoked during the present Conference—in paragraph 1 of article 1 of the Convention, dealing with the composition of the Union. This principle has always, during the Union's long history, been a fundamental and guiding principle, without ever having been spelt out in precise words in any Conventions prior to 1973. It is now explicitly contained in No. 2 of the Convention in the following terms: "The International Telecommunication Union shall comprise members which, having regard to the principle of universality and the desirability of universal participation in the Union, shall be: . . .". Consequently, the adoption by this Conference of the last operative paragraph "resolves" of the draft resolution contained in document 120 (Rev.2) would, in my legal opinion, also run counter to this principle now enshrined in the Convention.

I hereby submit to the Conference my final conclusion that, in the light of all the preceding arguments I presented, I cannot see, from a strictly legal point of view, how that last operative paragraph "resolves" of the draft resolution contained in document 120 (Rev.2) could, in conformity with the Convention, be adopted by this august Conference. The adoption of this very paragraph would, in my considered opinion, not be in conformity with the Convention and could, with good justification, be considered as illegal by any Contracting State Party to the Convention.

[After further debate on the issue during the 16th and 17th plenary meetings,[146] the Conference, at its 18th plenary meeting,[147] decided, by a secret ballot, with 62 votes in favour, 58 votes against and 9 abstentions, that document No. 205[118] "be considered as a single package amending" the draft resolution contained in document 120 (Rev.2).[118] By a further secret ballot, the Conference decided, with 61 votes in favour, 57 votes against and 9 abstentions, that document No. 205 be "incorporated as a single package" in the draft resolution contained in document 120 (Rev.2).[149] In a final secret ballot, the Conference approved, with 85 votes in favour, 41 votes against and 13 abstentions, the draft resolution contained in document 120 (Rev.2) as amended by document No. 205,[150] which thus became Resolution No. 74 of the Union's Plenipotentiary Conference, Nairobi, 1982, entitled "Resolution adopted by the Plenipotentiary Conference regarding Israel and assistance to Lebanon".[151]]

NOTES

[1] See E. Suy, "Status of Observers in International Organizations", *Recueil des cours*, 1978, II, pp. 79-160.

[2] General Assembly resolution 2535 B (XXIV).

[3] General Assembly resolution 2672 C (XXV).

[4] *Official Records of the General Assembly, Twenty-eighth Session, Special Political Committee*, 882nd meeting, 12 November 1973.

[5] Economic and Social Council resolution 1835 (LVI).

[6] Economic and Social Council decision 129 (LIX).

[7] The original terms of reference of the Commission are contained in Economic and Social Council resolution 1818 (LV). Subsequently they were amended by Council resolution 2089 (LXIII).

[8] A/C.6/37/L.9.

[9] General Assembly resolution 35/10 A, para. 6.

[10] *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 32* (A/36/32), para. 36 (*a*).

[11] A/C.3/37/L.4.

[12] A/C.5/37/32/Add.1.

[13] See Review of multilateral treaties to which South Africa became a party and which either by direct reference or on the basis of relevant provisions of international law might be considered to apply to Namibia, Report of the Secretary-General, part II. Multilateral treaties registered with the Secretariat of the League of Nations, document S/10288.

[14] *Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970), Advisory Opinion of 21 June 1971: I.C.J. Reports 1971*, p. 58.

[15] *Ibid.*, p. 55.

[16] *Official Records of the General Assembly, Thirty-third Session, Supplement No. 24* (A/33/24), p. 101.

[17] United Nations, *Namibia Gazette* No. 1 (ST PSCA(05)N21).

[18] See above, p. 165.

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

[20] Subsequently reproduced in *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVI (United Nations publication, Sales No. E.84.V.2), documents A/CONF.62/L.133, annex, and A/CONF.62/L.139.

[21] See *Sea-Bed Mineral Resource Development: Recent Activities of the International Consortia* (United Nations publication, Sales No. E.80.II.A.9 and Corr.1) and addenda. This document was issued in 1980 for the purpose of public information. On the basis of available information, this document reported on activities conducted by, *inter alia*, "four commercially-oriented consortia": the Kennecott Group, Ocean Mining Associates, Ocean Management Inc. and the Ocean Minerals Company.

[22] *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVI (United Nations publication, Sales No. E.84.V.2), document A/CONF.62/C.1/L.30.

[23] To avoid misunderstanding, in view of the complex procedures contemplated, it might be more logical to refer to the entities listed in paragraph 1 (*a*) as "prospective pioneer investor".

[24] *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVI (United Nations publication, Sales No. E.84.V.2), document A/CONF.62/L.132/Add.1, annex IV.

[25] *Ibid.*, document A/CONF.62/L.133, annex.

[26] *Ibid.*, documents A/CONF.62/L.30, para. 30, and A/CONF.62/L.93, para. 5 (*c*) (iv).

[27] *Ibid.*, document A/CONF.62/L.132, annex IV.

[28] *Ibid.*, document A/CONF.62/C.1/L.30.

[29] A/CONF.62/C.1/L.30 (United Nations publication, Sales No. E.81.I.5).

[30] See *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVI (United Nations publication, Sales No. E.84.V.2), document A/CONF.62/L.93, para. 6.

[31] United Nations, *Treaty Series*, vol. 75, p. 287.

[32] See *Juridical Yearbook, 1973*, p. 24.

[33] United Nations, *Treaty Series*, vol. 216, p. 133.

[34] *Nouveau recueil général de traités*, deuxième série, tome X, p. 133.

[35] United Nations publication, Sales No. E.81.IV.4.

[36] E/4945, para. 7.

[37] See, e.g., E/4961, para. 7.

[38] See E/5719, para. 4.

[39] E/4750.

[40] General Assembly resolution 672 (XXV).

[41] A/AC.96/187/Rev.1.

[42] United Nations publication, Sales No. E.79.I.11.

[43] A/36/833, chap. III.A.

[44] *Official Records of the Security Council, Second Year, Special Supplement No. 1*, Report of the Military Staff Committee, pp. 1 and 3.

[45] *ICJ Reports 1962*, p. 166.

[46] T/L.1229, annex, para. 95.

[47] T/PV.1539.

[48] See Secretariat Order 3039, sect. 4.

[49] RBS/BIBL/SER.A/3.

[50] Article 31 (3) (*b*) of the 1969 Vienna Convention on the Law of Treaties specifies that in interpreting a treaty there shall, *inter alia*, be taken into account "any subsequent practice in the application of the treaty which establishes the agreement of the parties [i.e., of the Member States] regarding its interpretation".

[51] No similar expression appears in the Covenant of the League of Nations, Article 6 of which otherwise substantially covered the same ground as Articles 97, 98 and 101 (1) of the United Nations Charter.

However, in imitation of the latter, the constitutional instruments of a number of specialized and related agencies incorporate the above-quoted phrase (e.g., UNESCO, article IV.2; IMO, article 43; IAEA, article VII.4; UNIDO, article 11.3); on the other hand, some such instruments use similar but possibly deliberately different phrases: IBRD, "The President shall be chief of the operating staff of the Bank . . ."; WIPO, "The Director General shall be the chief executive of the Organization."

[52] *Charter of the United Nations* 3rd rev. ed. (New York and London, Columbia University Press, 1969), pp. 574-579.

[53] PC/20, chap. VIII, sect. 2, para. 8.

[54] Indeed, Kelsen argues that it really is the Secretary-General who is the principal organ; *The Law of the United Nations* (London, Stevens, 1950), pp. 136 and 137.

[55] This view was upheld by the International Court of Justice, which in its advisory opinion on *Effects of Awards of Compensation made by the United Nations Administrative Tribunal* (*I.C.J. Reports 1954*, p. 47, at p. 61) held that "In regard to the Secretariat, the General Assembly is given by the Charter a power to make regulations, but not a power to adjudicate upon, *or otherwise deal with particular instances*". (Emphasis added.)

[56] This view appears to be shared by T. Meron, in "The Staff of the United Nations Secretariat", *American Journal of International Law*, vol. 70, No. 4, p. 660 (1976).

[57] E/SR.744.

[58] This distinction between the Secretary-General's authority in respect to organs financed from the regular budget and those financed from voluntary contributions or other sources has no constitutional basis, but is becoming more and more established in practice.

[59] A/C.5/1616, para. 28.

[60] *Effect of Awards of Compensation made by the United Nations Administrative Tribunal* (*I.C.J. Reports 1954*, p. 47, at p. 60).

[61] Statute of the United Nations Administrative Tribunal (as amended in 1955), article 11 (1); the propriety of this aspect of the procedure is at present being challenged, *inter alia* on the ground that this constitutes improper interference with the prerogatives of the Secretary-General in the *Mortished* case now pending before the International Court of Justice *(Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal).*

[62] General Assembly resolution 31/26, para. 7.

[63] Staff Regulations of the United Nations, annex I, para. 7.

[64] A/C.5/1616, para. 15.

[65] A/C.5/1616, para. 19.

[66] PC/20, chap. VIII, sect. 2, para. 30.

[67] E.g., General Assembly resolution 36/240 A, para. 2.

[68] Resolution 35/211, para. 1.

[69] A/C.5/35/48.

[70] A/36/44.

[71] Resolution 36/238.

[72] *Official Records of the General Assembly, Twenty-first Session, Supplement No. 5* (A/6305), Foreword by the Secretary-General, para. 20.

[73] See *Juridical Yearbook, 1977*, p. 200.

[74] General Assembly resolution 32/72, paras. 3 (*a*) and (*b*).

[75] *Repertory of Practice of United Nations Organs* (United Nations publication, Sales No. 55.V.2(I)), Article 98, para. 142.

[76] General Assembly resolution 34/182, sect. I, para. 7.

[77] E.g., *Official Records of the General Assembly, Thirty-first Session, Supplement Nos. 1 and 1A* (A/31/1 and Add.1).

[78] *Official Records of the General Assembly, Thirty-second Session, Supplement No. 1* (A/32/1/Add.1).

[79] E.g., *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 1* (A/36/1).

[80] See, in particular, his report as contained in document A/C.5/705.

[81] General Assembly resolution 1235 (XII).

[82] UNJSPF regulations, article 7 (*a*).

[83] ICSC statute, General Assembly resolution 3357 (XXIX), annex, article 20 (2).

[84] JIU statute, General Assembly resolution 31/192, annex, article 19 (2).

[85] General Assembly resolution 302 (IV), para. 9.

[86] General Assembly resolution 428 (V), annex, para. 13, reproducing a provision in resolution 319 (IV) A, annex, para. 9.

[87] UNITAR statute, article IV.1, promulgated by the Secretary-General pursuant to General Assembly resolution 1934 (XVIII).

[88] General Assembly resolution 1995 (XIX), sect. II, para. 27.

[89] General Assembly resolution 2152 (XXI), sect. II, para. 18.

[90] General Assembly resolution 2297 (XXVII), sect. II, para. 2.

[91] General Assembly resolution 3356 (XXIX), article V (1).

[92] Approved by General Assembly resolution 3081 (XXVIII).

[93] General Assembly resolution 31/120, para. 1.

[94] General Assembly resolution 32/197, annex, para. 64.

[95] General Assembly resolution 302 (IV), para. 9 (*b*).

[96] General Assembly resolution 410 A (V), para. A (5) (*e*) (1).

[97] General Assembly resolution 428 (V), annex, paras. 14 and 15 (*a*).

[98] General Assembly resolution 2688 (XXV), annex, para. 61.

[99] The regulation reads as follows: "No staff member shall accept any honour, decoration, favour, gift or remuneration from any Government excepting for war service; nor shall a staff member accept any honour, decoration, favour, gift or remuneration from any source external to the Organization, without first obtaining the approval of the Secretary-General. Approval shall be granted only in exceptional cases and where such acceptance is not incompatible with the terms of regulation 1.2 of the Staff Regulations and with the individual's status as an international civil servant."

[100] *Official Records of the General Assembly, Sixth Session, Annexes*, agenda item 45, documents A/1855 and A/2108, para. 12; *ibid., Ninth Session, Annexes*, agenda item 54, documents A/2788 and A/2862.

[101] *Ibid.*, document A/2862, paras. 3-11.

[102] United Nations Civil Service Advisory Report, Coord/Civil service/5, para. 43.

[103] United Nations, *Treaty Series*, vol. 360, p. 130.

[104] *Ibid.*, vol. 500, p. 95.

[105] *The Work of the International Law Commission*, 4th ed. (United Nations publication, Sales No. E.88.V.1).

[106] A/C.5/36/109.

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

[108] *Ibid.*, vol. 1, p. 15.

[109] Memorandum to the Acting Secretary-General from the Office of Legal Affairs of 22 August 1962; reproduced in *Juridical Yearbook, 1962*, chap. VI, sect. A.1, p. 236.

[110] *Juridical Yearbook, 1975*, p. 157.

[111] *Juridical Yearbook, 1976*, p. 229.

[112] United Nations Legislative Series, Legislative texts and treaty provisions concerning the legal status, privileges and immunities of international organizations (ST/LEG/SER.B/10) (United Nations publication, Sales No. 60.V.2), p. 128.

[113] Annex D to letter of the Managing Director authorized by Decision No. 6843 (81/75), adopted May 6, 1981; *Selected Decisions of the International Monetary Fund and Selected Documents*, Ninth Issue, pp. 169-171.

[114] *Yearbook of the International Law Commission 1977*, vol. II (Part Two) (United Nations publication, Sales No. E.78.V.2 (Part II), p. 118.

[115] In accordance with No. 22 (i.e., paragraph 1 of article 5) of the International Telecommunication Convention, Malaga-Torremolinos, 1973 (hereinafter referred to as "the Convention", which, in accordance with its No. 1 (i.e., preamble), is "the basic instrument" of the Union), the Plenipotentiary Conference "is the supreme organ of the Union".

[116] See document No. 120 (Rev.2), of 4 October 1982, of the Conference.

[117] *Ibid.* and corrigendum No. 1, of 15 October 1982, to document No. 120 (Rev.2) of the Conference.

[118] See document No. 205, of 18 October 1982, of the Conference.

[119] See notes 50 to 52 above and document No. 123 of the Conference.

[120] See the minutes thereof in document No. 456 of the Conference, contained in "Minutes of the Plenipotentiary Conference of the International Telecommunication Union, Nairobi, 1982", published by the General Secretariat of the Union, Geneva, 1983.

[121] *Ibid.*, para. 1.5.

[122] *Ibid.*, para. 1.9.

[123] The Union's Legal Adviser, in that capacity, formed part of the Conference secretariat (see document No. 75 of the Conference), as approved by the Conference at its first plenary meeting (see the minutes thereof in document No. 193 of the Conference, para. 7, subpara. 7(1), contained in the publication referred to in note 54 above.

[124] See document No. 456 of the Conference (see note 54 above), para. 1.13.

[125] The opinion of the Legal Adviser, given orally at the Conference, is presented in direct speech. The text has been transcribed from the tape and edited; explanatory footnotes have been added for clarification.

[126] See document No. 456 of the Conference (see note 54 above), para. 1.2.

[127] The text of the preamble to the Convention reads as follows:

"While fully recognizing the sovereign right of each country to regulate its telecommunication, the plenipotentiaries of the Contracting Governments, with the object of facilitating relations and co-operation between the peoples by means of efficient telecommunication services have agreed to establish this Convention which is the basic instrument of the International Telecommunication Union."

[128] See document No. 456 of the Conference (see note 54 above), para. 1.8.

[129] Paragraph 2 of article 2 of the Convention reads as follows:

"8 2. Rights of Members in respect of their participation in the conferences, meetings and consultations of the Union are:

"(*a*) all Members shall be entitled to participate in conferences of the Union, shall be eligible for election to the Administrative Council and shall have the right to nominate candidates for election to any of the permanent organs of the Union;

"9 (*b*) each Member shall have one vote at all conferences of the Union, at all meetings of the International Consultative Committees and, if it is a Member of the Administrative Council, at all sessions of that Council;

"10 (*c*) each Member shall also have one vote in all consultations carried out by correspondence."

[130] See document No. 456 of the Conference (see note 54 above), para. 1.3.

[131] *I.C.J. Reports 1948*, pp. 57-66, esp. p. 64.

[132] The text of No. 156 (i.e., subpara. (2) of para. 2 of art. 45) of the Convention reads as follows:

"156 (2) From the end of a period of two years from the date of entry into force of this Convention, a signatory Government which has not deposited an instrument of ratification in accordance with 154 shall not be entitled to vote at any conference of the Union, or at any session of the Administrative Council, or at any meeting of any of the permanent organs of the Union, or during consultation by correspondence conducted in accordance with the provisions of the Convention until it has so deposited such an instrument. *Its rights, other than voting rights, shall not be affected.*" (Emphasis added.)

[133] The International Telecommunication Convention, Atlantic City, 1947, was the first Convention of the Union after the Second World War.

[134] See subparagraph (2) of paragraph 2 of article 15 of the International Telecommunication Convention, Buenos Aires, 1952, which replaced the Atlantic City Convention of 1947.

[135] See No. 233 (i.e., subpara. (2) of para. 2 of art. 17) of the International Telecommunication Convention, Geneva, 1959, which replaced the Buenos Aires Convention of 1952.

[136] See No. 251 (i.e., subpara. (2) of para. 2 of art. 18) of the International Telecommunication Convention, Montreux, 1965, which replaced the Geneva Convention of 1959.

[137] Replacing the Montreux Convention of 1965.

[138] The text of No. 97 (i.e., para. 7 of art. 15) of the Convention reads as follows:

"97. 7. A Member which is in arrears in its payments to the Union shall lose its right to vote as defined in 9 and 10 for so long as the amount of its arrears equals or exceeds the amount of the contribution due from it for the preceding two years."

With regard to Nos. 9 and 10 referred to therein, see note 63 above.

[139] See document No. 228 of the Conference (containing the minutes of the seventh plenary meeting), paragraph 3.6, contained in the publication referred to in note 54 above.

[140] *Ibid.*, paragraph 3.7, which reads as follows:

"At the *Chairman's* request, the *Legal Adviser*, in responding to the question put by the delegate of Mexico, referred to document No. 236 of the Malaga-Torremolinos Conference. From paragraph 3.24 of that document it was clear that in Committee 4 (Budgetary Questions) several administrative measures of a 'sanction' character had been considered and that the Committee, after extensive debate, had come to the following conclusion: Members in arrears in the payments of their contributions due to the Union should temporarily lose their voting rights; temporary suspension of their eligibility to the permanent organs of the Union was, however, regarded as inadvisable. In the light of those conclusions and in the absence of any provision in the Convention to the contrary, the Legal Adviser was of the opinion that members, though deprived of their right to vote, in accordance with Nos. 97 and 156 of the Convention remained eligible for posts within the Union's organs."

[141] The texts of those Articles read as follows:

"*Article 5*

"A Member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of member-

ship by the General Assembly upon the recommendation of the Security Council. The exercise of these rights and privileges may be restored by the Security Council.

"Article 6

"A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council."

[142] See paragraph 2 of Article 18 of the Charter of the United Nations.

[143] See resolution No. 30 of the Union's Plenipotentiary Conference, Malaga-Torremolinos, 1973, entitled "Exclusion of the Government of Portugal from the Plenipotentiary Conference and from all other conferences and meetings of the Union".

[144] See resolution No. 31 of the Union's Plenipotentiary Conference, Malaga-Torremolinos, 1973, entitled "Exclusion of the Government of the Republic of South Africa from the Plenipotentiary Conference and from all other conferences and meetings of the Union".

[145] See "Minutes of the Plenipotentiary Conference of the International Telecommunication Union, Malaga-Torremolinos, 1973", published by the General Secretariat of the Union, Geneva, 1974, p. 207; document No. 158 of the Conference, para. 1.23, at p. 25.

[146] See documents Nos. 457 and 458, contained in the publication referred to in note 54 above.

[147] See document No. 459, contained in the publication referred to in note 54 above.

[148] See document No. 459 (see note 85), paras. 1.16 and 1.17 above.

[149] See document No. 459 (see note 85), paras. 1.22 and 1.23.

[150] See document No. 459 (see note 85), paras. 1.25 and 1.26.

[151] See "International Telecommunication Convention—Final Protocol, Additional Protocols, Optional Additional Protocol, Resolutions, Recommendation and Opinions, Nairobi, 1982", published by the General Secretariat of the Union, Geneva, pp. 338 and 339.