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Part Two. Legal activities of the United Nations and related inter-governmental organizations

Chapter VI. Selected legal opinions of the Secretariats of the United Nations and related inter-governmental organizations

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Chapter VI

SELECTED LEGAL OPINIONS OF THE SECRETARIAT OF THE UNITED NATIONS AND RELATED INTER-GOVERNMENTAL ORGANIZATIONS

A. Legal opinions of the Secretariat of the United Nations

(Issued or prepared by the Office of Legal Affairs)

1. TRANSIT, TO AND FROM THE UNITED NATIONS HEADQUARTERS OR MAJOR OFFICES, OF PERSONS INVITED BY THE UNITED NATIONS—EFFECT OF EXTRADITION TREATIES BETWEEN HOST STATES AND OTHER STATES

Note verbale to the Permanent Representatives of all Member States and to the Permanent Observer of Switzerland

1. The Secretary-General of the United Nations presents his compliments to the Permanent Representative [the Permanent Observer]... and has the honour to refer to the general question of transit of petitioners to and from the United Nations Headquarters which was raised during the consideration, on 13 and 14 November 1963, of the request for a hearing by Mr. Henrique Galvão [1]. In particular, attention was drawn to the problems which might arise in this respect by the invoking of treaties of extradition which the United States has concluded with other States. The Secretary-General was requested by the Fourth Committee of the General Assembly to take the necessary action with the United States Government with a view to ensuring that petitioners coming to the United States for the purpose of testifying before a United Nations Committee should enjoy the necessary protection during their transit to and from the United Nations Headquarters district and also during their stay in New York for the purpose of appearing before the United Nations.

2. Consultations between the United States Government and the Secretary-General were initiated on 21 November 1963 and have been proceeding with the full collaboration of the Government. The Secretary-General will inform the Permanent Representative [the Permanent Observer] of the progress of these consultations.

3. In connexion with these discussions, the idea has occurred that problems resulting from the existence of extradition treaties may arise in any State in which the United Nations has a major office or regional headquarters. It might be considered whether the States in which such headquarters are located should write to all States with which they have extradition treaties pointing out their obligations, as a host to the United Nations, to facilitate the effective functioning of the Organization. Since the possibility of the initiation of extradition proceedings would be a factor in the willingness of persons to respond to invitations of the United Nations, such possibility might operate to impede the United Nations in the performance of its functions. The host State might therefore wish to ask the States with which it has extradition treaties for assurances that they will not request or take steps to effect the

[1] See *Juridical Yearbook*, 1963, p. 164.

extradition of persons who are in the host State in response to a United Nations invitation, during a period of time reasonably related to the invitation. The Secretary-General understands that the United States is already seeking such assurances from States with which it has extradition treaties. In due course the Secretary-General would be pleased to be informed of the attitude and measures which host States and States having extradition treaties with host States would be prepared to take in this regard.[2]

27 February 1964

2. EXEMPTION OF THE UNITED NATIONS FROM STAMP TAXES—INTERPRETATION OF ARTICLE 105 OF THE CHARTER AND OF SECTIONS 7 AND 8 OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS[3]

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

1. ...The question of stamp taxes has in fact been a controversial one. The Legal Counsel pointed out this problem to the Fifth Committee in a statement made at the 982nd meeting on 19 December 1962 as follows:

> "On occasion, there might arise a difference of opinion as to the meaning of scope of the Convention. For instance, the United Nations had been required in a certain State to pay for and affix documentary stamps on such documents as bills of lading in respect of goods shipped by it for its official use. The Secretariat has felt that such documentary stamp tax partakes of the nature of a direct tax from which the Organization should be exempt; but the Government which imposed the tax maintained a contrary view.[4]"

2. In the legislation of certain States it is true that stamp taxes are classified as indirect taxes. However, the interpretation of the term "direct taxes" in the Convention on the Privileges and Immunities of the United Nations cannot depend on the terminology used in the various national, legal or fiscal systems, but should be given a uniform interpretation for all Member States. It is our understanding that direct taxes are those paid directly by the United Nations and under this definition stamp taxes are direct taxes. This conclusion is based in part on the fact that the records of the San Francisco Conference indicate that Article 105 of the Charter was intended to preclude any Member State from increasing the financial burdens of the Organization. In implementation of this Article, the Convention on the Privileges and Immunities of the United Nations excluded by section 7 those taxes paid directly by the United Nations and provided in section 8 for the refund or remission of indirect taxes included in the price of goods. Thus, sections 7 and 8 taken together were intended to cover the entire field of taxes to which the United Nations might otherwise have been subjected.

3. Where the amount involved in stamp taxes has been small, we have not considered it administratively feasible to press for recognition of the exemption, However, in the present case the amount involved would appear to be important enough to warrant a re-examination of the question.

2 April 1964

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[2] It is expected that information summarizing the replies of the States concerned will be available for publication in a future issue of the *Juridical Yearbook*.

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

[4] Document A/C.5/972. The Legal Counsel's statement is summarized in *Official Records of the General Assembly, Seventeenth Session, Fifth Committee*, 982nd meeting.

3. EXEMPTION OF UNITED NATIONS OFFICIAL VEHICLES FROM A TAX ON CIRCULATION—QUESTION WHETHER THIS TAX IS A DIRECT OR AN INDIRECT TAX FOR THE PURPOSES OF SECTION 7 (*a*) OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS[5]

Letter to the Permanent Representative of a Member State

1. We have the honour to bring to your urgent attention a question concerning the exemption of the United Nations from the tax on circulation with respect to the official vehicles operated by the United Nations, in connexion with operations of a United Nations organ in your country.

2. Under section 7 of the Convention on the Privileges and Immunities of the United Nations, it is provided that "The United Nations, its assets, income and other property shall be: (*a*) exempt from all direct taxes". The afore-mentioned tax on circulation, in so far at it is directly imposed on the United Nations, is, within the meaning of the above-quoted provision of the Convention, a direct tax. This view, we are gratified to learn, has also been supported by your Ministry of Foreign Affairs.

3. The United Nations organ has, however, been advised by the Customs District Office that the Head Office of Taxes and Indirect Taxation maintains that the tax on circulation (which applies to the circulation of vehicles on roads and public areas) was an indirect tax and that the United Nations could not therefore be exempt from it. In view of this, the Customs Office has informed the United Nations organ that it should make payment of the tax as soon as possible and should notify customs of the details of payment, and has indicated that the import licenses would not be renewed and the vehicles would be considered as operating illegally until the taxes are paid.

4. We are deeply grateful for the intervention of the Ministry of Foreign Affairs in behalf of the United Nations in this matter. We should like to take this opportunity to present in more detail the view of the Organization and to request your assistance in obtaining a further consideration of the question by all competent authorities of your Government so as to accord exemption to the United Nations from the tax on circulation with respect to the official vehicles of the United Nations.

5. The difference of opinion in this matter appears to hinge on the meaning of the expression "direct taxes" as used in section 7 (*a*) of the Convention on the Privileges and Immunities of the United Nations. It is true that the terms "direct" and "indirect" taxes, etc., are interpreted differently in the various national legal systems of Member States, varying according to tradition, usage or tax system or administration. It should be pointed out to the tax authorities, however, that the above-mentioned Convention was drawn up for application in all Member States of the United Nations and its terms were conceived and have to be applied uniformly in all countries in accordance with their generally-understood meaning. Whether a tax is direct or indirect has to be determined by reference to its nature and to its incidence, that is to say, according to upon whom the burden of payment directly falls. You will understand that in respect to a Convention intended for application in all Member States, its interpretation cannot be made to depend upon the technical meaning of a term in varying tax systems of each Member. Since the tax on circulation is levied directly upon the United Nations, it is, within the meaning of the Convention, a "direct tax" and the United Nations should be accorded exemption from it. This is the consistent position and practice of the United Nations in asserting its immunity in all States to which the provisions of the Convention apply.

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

6. Moreover, in interpreting the Convention, the United Nations and its Members must be guided by the overlying principle of the United Nations Charter, and in particular Article 105, which provides that the Organization shall enjoy such privileges and immunities as are necessary for the fulfillment of its purposes. The report of the Committee of the San Francisco Conference responsible for the drafting of Article 105 pointed out that "if there is one principle certain it is that no Member State may hinder in any way the working of the Organization or *take any measure the effect of which might be to increase its burdens, financial or otherwise*" [6] (italics added). With this principle in view, the economy of the Convention, which was adopted by the General Assembly in implementation of Article 105 of the Charter, is quite clear. The Organization was to be relieved of the burden of all taxes—article 7 providing an exemption for those taxes to be paid directly by the United Nations and article 8 providing for remission or return of indirect taxes where the amount involved is important enough to make it administratively possible.

7. Apart from the application of the Convention, we should like to refer to the fact that a specialized agency is granted exemption by your Government from the same tax on circulation with respect to that agency's official automobiles. This exemption is expressly provided for in an agreement between your Government and the specialized agency. As this was an agreement with your Government alone, it was of course possible to take notice of the particular terminology of the tax system employed in your country. Obviously this was not possible in the general Convention applicable to all Member States.

8. Since a United Nations specialized agency has been granted exemption from the tax on circulation, it is hoped that your Government will also find it possible to accord a similar exemption to the United Nations itself.

9. We shall therefore be very grateful if you would be good enough to request the Ministry of Foreign Affairs to intercede again with the competent authorities to authorize the exemption of United Nations official vehicles operating in your country from the tax on circulation.

10. Should there be any delay involved in obtaining the agreement of the tax authorities, we are confident that no unilateral steps will be taken by any Government authority which would in any way impede or interfere with the operation of the United Nations vehicles and we are certain that the Ministry of Foreign Affairs will, if it deems it necessary, call this to the attention of the appropriate officials concerned. May we again express our appreciation for your assistance and that of the Ministry of Foreign Affairs in this matter.

5 February 1964

4. Legal capacity of the United Nations and authority for purchase of premises in New York City

Letter to a savings and loan association of New York City

1. ...You have requested our opinion, first, with respect to the legal capacity of the United Nations to purchase the above lease and leasehold estate and to execute the various papers incidental to the purchase, and secondly, with respect to the United Nations officials authorized to execute on behalf of the United Nations the assumption of the lease and the other papers.

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[6] Documents of the United Nations Conference on International Organization, San Francisco, 1945, vol. XIII, p. 780.

2. The United Nations, under Article 104 of its Charter, enjoys in the territory of each of its Member States "such legal capacity as may be necessary for the exercise of its functions...". This provision has in the United States been implemented through the International Organizations Immunities Act, which provides that "International organizations shall, to the extent consistent with the instrument creating them, possess the capacity—(*i*) to contract; (*ii*) to acquire and dispose of real and personal property; ....." (22 USCA, section 288a, (*a*)); and the United Nations has been designated in Executive Order No. 8698 as a public international organization for the purpose of this Act. New York State Legislation provides that the United Nations may acquire by gift, devise or purchase any land or interest in land within the State useful in carrying on the functions of the Organization (McKinney's New York *States Law*, section 59—*i* and *j*).

3. The property in question is to be used for office space for the United Nations Training and Research Institute which the United Nations General Assembly has, by resolution 1934 (XVIII) of 11 December 1963, requested the Secretary-General to establish. The purchase of the lease and leasehold estate and the execution of the papers required for that purpose are, therefore, valid exercises of the Organization's powers under the Charter and within its legal capacity recognized under United States Federal and New York State Legislation.

4. The Secretary-General of the United Nations is, under Article 97 of the Charter, the chief administrative officer of the Organization. Unless the Secretary-General directs otherwise, the Under-Secretary, Director of General Services, or his authorized delegate is the contracting officer; this is provided in the United Nations Financial Rules which were formulated by the Secretary-General pursuant to the Financial Regulations adopted by the General Assembly at its fifth session (General Assembly resolution 456 (V) as amended by resolutions 950 (X) and 973 B (X)). With respect to the acquisition of the leasehold, the Under-Secretary, Director of General Services, is, *ex officio*, the official authorized to execute all the necessary papers.

5. It is, therefore, our opinion that all action required under the United Nations Charter, the applicable General Assembly resolutions, and the Regulations and Rules of the Organization in order to authorize the Organization's purchase of the lease and leasehold estate and the execution of the various papers required in that connection will have been taken by virtue of the execution by the Under-Secretary, Director of General Services, of the assumption of lease and leasehold and other agreements.

23 October 1964

5. Place of arbitration of disputes arising out of United Nations contracts

Memorandum to the Chief of the Purchase and Standards Section, Office of General Services

1. This is in reply to your memorandum of 24 September 1964 on the question whether the United Nations standard bid form and United Nations contracts should specify that the place of arbitration would be New York.

2. As you are aware the clause on arbitration included in the standard bid form and in United Nations contracts as presently worded provides for arbitration in accordance with the rules of the American Arbitration Association (AAA) where the other party is resident within the United States, and in other cases for arbitration in accordance with the rules of the International Chamber of Commerce (ICC) or, where appropriate, the rules of the Inter-American Commercial Arbitration Commission. In terms of these provisions, should the parties be unable to agree on the place of arbitration once a dispute has arisen, the place would be determined by the AAA or the ICC or the Inter-American Commercial Arbitration Commission, as the case may be.

3. There would naturally be practical advantages from our point of view should arbitrations be held in New York. On the other hand, there is the consideration that a requirement to this effect might dissuade parties either not resident or not represented in New York from bidding for United Nations contracts, and such a possibility should be avoided. To provide therefore in the standard bid form that arbitration should be in New York would not seem to us to be entirely advisable.

4. On the other hand, when it is apparent at the time of contracting that a strong conflict of interest would exist between the United Nations and the contracting party in respect to the place of arbitration, it would be advisable to include agreement on the place of arbitration in the disputes clause. In such cases, should the United Nations consider it advisable that arbitration in the particular case should be in New York, it would be advisable to try to reach agreement on the inclusion of the words "Any arbitration hereunder shall take place in New York unless otherwise agreed by the parties" in the arbitration clause of the contract.

9 October 1964

6. PROTECTION OF UNITED NATIONS CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT—APPLICABILITY TO THE UNITED NATIONS OF THE CONVENTION OF 14 MAY 1954 FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT[7]

Memorandum to the Under-Secretary for Conference Services

1. You asked for our comments and advice on the subject of protection of United Nations cultural property in the event of armed conflict, in particular as it related to the United Nations Office at Geneva.

The question of the applicability to the United Nations of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict appeared, upon examination, to be one of considerable complexity.

In order to clarify the various matters involved, we decided to seek the advice of UNESCO, under whose auspices the 1954 Convention was concluded and which under the Convention has certain special responsibilities in regard to its application.

2. Our observations would be as follows:

(*i*) Because under the Convention "cultural property" covers property "irrespective of origin or ownership", United Nations cultural property is already protected, under Chapter I of the Convention, in those States which are parties to the Convention. In particular, United Nations cultural property is covered by the provisions concerning protection, safeguarding and respect; it can bear the distinctive emblem provided by the Convention, etc.

(*ii*) Article 3 of the Convention states that "The High Contracting Parties undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate". There may be advantage for the United Nations Office at Geneva to retain contacts in this connexion with the Swiss authorities, in order to be informed of the measures of protection envisaged or adopted by Switzerland.

It would appear however to us that the United Nations itself should take the precautionary measures which it may deem fit while keeping the Swiss authorities informed in appropriate circumstances.

[7] United Nations, *Treaty Series*, vol. 249, p. 215.

(*iii*) The question then arises whether the United Nations should also seek the "special protection" which may be provided by the Convention as regards "refuges intended to shelter movable cultural property in the event of armed conflict, ...centres containing monuments and other immovable cultural property of very great importance" referred to in article 8, paragraph 1, of the Convention (see also article 1 thereof).

Not only special collections of documents and archives, but certain United Nations buildings as a whole, such as those in Geneva, could legitimately be considered as of "historical or artistic interest" or as "centres containing a large amount of cultural property" and presumably qualify for the "special protection" envisaged in chapter II of the Convention. You will have noticed that the Holy See has requested "special protection" for the whole of the Vatican City and obtained assurances from the Government of Italy as to the use of certain areas surrounding the City.

However, in the case of the United Nations, the special protection envisaged by the Convention could only be obtained through the intermediary of the host State party to the Convention. Conditions are attached under article 8 of the Convention to obtaining such protection with which the United Nations may not at all times be able to comply and, under article 16, paragraph 1 (*a*), of the Regulations for the execution of the Convention, host States would be entitled to cancel the registration for special protection which they previously effected.

3. In the light of all relevant factors, our opinion would be that while we should remain in contact with Switzerland and possibly other host States parties to the Convention as to the measures they are taking under the Convention and make them aware, at appropriate times, of the problem which the utilization for military purposes of areas surrounding United Nations buildings may present for the Organization, we should not, in the present circumstances, seek "special protection" under the Convention.

Our position in this respect is motivated by the general attitude the United Nations has to preserve as regards the admissibility of armed conflicts, the responsibilities it has with respect to the maintenance of international peace and security, and the fact that we may assume that the Organization's buildings and belongings would presumably be respected to the extent possible in case of armed conflict, because of their very nature and purposes.

It may also be recalled that article 11 of the Regulations for the execution of the Convention provides for the establishment of "improvised refuges" *during* an armed conflict. In all likelihood, we could resort to that provision, should the need arise.

27 May 1964

7. Question of issuance of credentials by Permanent Representatives to the United Nations—Rule 27 of the rules of procedure of the General Assembly

Memorandum to the Assistant Director in charge of the International Trade Relations Branch, Department of Economic and Social Affairs

1. A few days ago you mentioned to us that some members of the Preparatory Committee of the United Nations Conference on Trade and Development thought that the United Nations had in practice permitted the Permanent Representative of a Member State to issue credentials to the delegates of his country to attend the General Assembly or a conference convened by the United Nations. We have looked into the matter and found that it has always been the policy of the Credentials Committee of the General Assembly to observe strictly the provisions of rule 27 under which the credentials can only be issued by the Head of the State or Government or by the Minister for Foreign Affairs. Consequently

the Credentials Committee considers that any credentials issued in the form of a letter signed by the Permanent Representative are not in order. The only exception was made at the fifteenth session of the General Assembly when, in accordance with a proposal by the Chairman, the Credentials Committee decided, as an exceptional measure, to find certain credentials signed by the Permanent Representatives of the Member States concerned to be in order. At the same time, however, the Committee recommended that the General Assembly should call the attention of the Member States to the necessity of complying with the requirement of rule 27 to ensure orderly procedure in the future. This recommendation was endorsed by the General Assembly in its resolution 1618 (XV) of 21 April 1961.

2. In so fas as we can ascertain, international conferences convened under the auspices of the United Nations which have adopted in their rules of procedure a provision on credentials equivalent to rule 27 of the rules of procedure of the General Assembly have also limited the authority to issue credentials to the Head of the State or Government or the Minister for Foreign Affairs. Exceptions to this rule were made only in cases of absolute necessity.

25 February 1964

8. Members of a Permanent Mission to an international organization not having the nationality of the sending State and practising a commercial activity—Nature of credentials of Permanent Missions

Letter to the Legal Counsel of an inter-governmental organization related to the United Nations

1. We wish to refer to your letter of 26 May 1964 in which you inform us concerning a problem which has recently arisen in your Organization as to whether you could or should refuse to accept as "resident representatives" to the Organization persons who are neither nationals, nor officials, of the State they are intended to represent, and who do not reside in the host country. We have read with interest your detailed account of this problem, and fully share your concern for the reasons which you have enumerated in your letter.

2. The practice of the United Nations has not developed to the point where we can offer you definitive answers to your questions. With reference to the first question, there are in fact no statutory limitations laid down in any document such as a resolution of the General Assembly or an agreement concerning Permanent Missions. In the interest of the Organization, however, one must conclude that there should be certain limitations which would protect the prestige of the Organization and of the Permanent Missions as a whole. It is not easy to define what these limitations are. At this stage, the most that can be said is that the appointment should have a genuine character and not be merely a complimentary title. In other words the appointee must be a *bona fide* member of the Mission able to perform his functions and not someone whose activities continue to be unrelated to the work of the Mission. The appointment also should not be prejudicial to the Organization in the sense that it should not be of a person who is in difficulties with the justice of the host country and may be seeking a diplomatic cover. On the other hand we would not consider the fact that the representative did not have the nationality of the State appointing him to be in itself a factor which would preclude acceptance. On this point the provisions of the Vienna Convention on Diplomatic Relations[8] are not in our view relevant. On the contrary, as far as the United Nations is concerned, we have argued that a host country is required to afford diplomatic privileges and immunities to a representative possessing the nationality of a third State.

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

3. With respect to your second question, there is of course no *agrément* which the Secretary-General can give or deny. On the other hand, we believe that there is an inherent right of the Secretary-General to approach a government and make representations against an appointment which would be seriously prejudicial to the interests of the Organization. Should persuasion fail to induce a government to withdraw an unsuitable appointment, the question remains as to what the Secretary-General could do. In less serious cases he may have to accept the decision of the government. An alternative might be for him to refer the matter to the General Assembly. While it would seem difficult to take a specific case to the General Assembly, the Secretary-General might consider presenting the problem to the Assembly as a question of principle and requesting its guidance. He could do this in the spirit of the Assembly's request in resolution 257 B (III) of 3 December 1948 that he study "all questions which may arise from the institution of permanent missions". If the Assembly should establish principles, it might be possible for the Secretary-General to refuse to accept credentials. While credentials of Permanent Missions have primary informative value and are presently examined only from the point of view of formal requirements, they might furnish an appropriate avenue for a refusal on substantive grounds should the General Assembly establish the principles on which such refusal might be given. If on the other hand the Assembly did not respond, the matter would be out of the hands of the Secretary-General.

4. We might also point out that the United States Government has circulated to the Permanent Missions in New York a note in which it has pointed out that "the acceptance of regular employment in the United States by a resident member of a Permanent Mission to the United Nations, or his spouse, entitled to diplomatic privileges and immunities pursuant to section 15 of the Headquarters Agreement between the United States and the United Nations, [9] is considered generally incompatible with the diplomatic status of such persons in this country". It does not appear that this position was contested, and in fact it seems consistent with article 42 of the Vienna Convention on Diplomatic Relations to which you refer.

5. We would also agree with you that while article 42 refers only to commercial activity in a receiving State, from the point of view of the international organization concerned, the principle may be equally applicable to a person who is a full-time business man, no matter where that commercial activity takes place, if the genuineness of his appointment is thereby brought into question.

9. EXEMPTION FROM TAXATION OF REAL PROPERTY LEASED BY A PERMANENT MISSION TO THE UNITED NATIONS—EFFECT OF A PROVISION IN THE LEASE BY WHICH THE TENANT UNDERTAKES TO PAY PART OF THE TAX ASSESSED AGAINST THE OWNER—ARTICLE 23, PARAGRAPH 2, OF THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS [10]

Letter to the Permanent Representative of a Member State

1. ...As you may be aware, New York State has provided by law, which we consider to be in implementation of section 15 of the Headquarters Agreement, [11] for the exemption from taxation of real property of Members of the United Nations when it is owned by the Governments or the Resident Representatives and is used exclusively for the purposes of maintaining offices or quarters for such representatives, or offices for the staff of such representatives (Section 418 of the New York Real Property Tax Law). The Secretary-General has supported claims for exemption of premises owned by Members of the United Nations.

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

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

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

2. We would understand from your letter, however, that in the case of your office the building is privately owned and the tax assessed against the owner. Your Mission, like other tenants in the building, has assumed under the terms of its lease the obligation to pay a portion of any increase in the New York City real estate tax which may be assessed against the owner. In these circumstances the tax exemption to which the Mission would be entitled as an owner under New York law would not appear to be relevant. There is, we understand, no tax assessed directly against the tenant. It would appear that a provision in the lease for the tenant to pay the tax for the landlord would not change the taxable status of the property under New York law.

3. The problem raised in this situation, so far as international law is concerned, was considered by the International Law Commission during its preparation of the text which became article 23 of the Vienna Convention on Diplomatic Relations. The International Law Commission recognized an exemption from "...national, regional or municipal dues or taxes in respect of the premises of the mission, whether owned or leased...". However, in its commentary to the article, the Commission stated:

> "The provision does not apply to the case where the owner of leased premises specifies in the lease that such taxes are to be defrayed by the mission. This liability becomes part of the consideration given for the use of the premises and usually involves, in effect, not the payment of taxes as such, but an increase in the rental payable." [12]

4. This question was again considered at the Vienna Conference on Diplomatic Relations in 1961. While there was some difference of opinion on this point, the Conference added a second paragraph to article 23 as follows:

> "2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the receiving State by persons contracting with the sending State or the head of the mission."

5. We regret that in the light of the foregoing considerations we are not in a position to make representations with respect to taxes assessed against the lessor and not directly against the Mission.

11 August 1964

10. Practice of the United Nations as regards the consideration of the same questions by the Security Council and the General Assembly

Note to the Deputy Chef de Cabinet

(A) Relevant provisions of the Charter

1. The following provisions of the Charter are relevant to the question of simultaneous consideration by the General Assembly and the Security Council of the same agenda item:

"Article 12

"1. While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.

"2. The Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each session of any matters relative to the maintenance of international peace and security which are being dealt with by the Security Council and shall similarly notify the General Assembly, or the Members of the United Nations if the General Assembly is not in session, immediately the Security Council ceases to deal with such matters."

[12] *Yearbook of the International Law Commission*, 1958, vol. II, p. 96 (article 21).

"Article 10

"The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters."

"Article 11

"2. The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion."

"Article 35

"1. Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly.

...

"3. The proceedings of the General Assembly in respect of matters brought to its attention under this Article will be subject to the provisions of Articles 11 and 12."

(B) Practice of the United Nations

2. Since the inception of the United Nations, there have been many occasions on which a question was considered both by the General Assembly and by the Security Council. These instances may be grouped for the purpose of presentation into two general categories: questions which were first considered by the Security Council and then by the General Assembly and questions which were first considered by the General Assembly and then by the Security Council.

(*i*) *Items originally submitted to the Security Council and later considered by the General Assembly*

(1) *Consideration by the General Assembly at the request of the Security Council*

3. The Security Council had requested the convening of *emergency special sessions* of the General Assembly in accordance with rule 8 (*b*) of the rules of procedure of the Assembly pursuant to Assembly resolution 377 A (V) ("Uniting for Peace") in the following cases: (1) the question of the invasion of Egypt; (2) the question of Hungary; (3) the question of Lebanon and Jordan and (4) the situation in the Congo. In each of these cases, the request was made in the form of a resolution adopted by the Security Council on the ground that the Security Council was unable to exercise its primary responsibility for the maintenance of international peace and security because of the lack of unanimity among its permanent members.

4. The Security Council has also requested the convening of a *special session* of the General Assembly in accordance with rule 8 (*a*) of the Assembly's rules of procedure. Thus, on 1 April 1948, the Council adopted a resolution requesting the Secretary-General to con-

voke a special session of the General Assembly "to consider further the question of the future government of Palestine ". [13]

5. The Security Council had also sent to the General Assembly questions which were considered at *regular sessions* of the Assembly. This was done by removal of the question from the list of matters of which the Security Council was seized. For example, on 4 November 1946, the Security Council resolved "that the situation in Spain is to be taken off the list of matters of which the Council is seized, and that all records and documents of the case be put at the disposal of the General Assembly". The Council requested "the Secretary-General to notify the General Assembly of this decision." In the case of the Greek frontier incidents question, the Security Council, on 15 September 1947, "(*a*) [*resolved*] that the dispute between Greece, on the one hand, and Albania, Yugoslavia and Bulgaria, on the other, be taken off the list of matters of which the Council is seized; and (*b*) [*requested*] that the Secretary-General be instructed to place all records and documents in the case at the disposal of the Assembly General." In another case, a proposal to defer consideration of an item (Complaint of armed invasion of Taiwan (Formosa), 1950) before the Council when a similar item was to be discussed by the General Assembly was adopted by the Council.

6. Although no decision had been taken by the Security Council to request the General Assembly to make recommendations in respect of a matter of which the Council remained seized, the possibility for the Council to make such a request is clearly set forth in Article 12, paragraph 1, of the Charter. On several occasions, a request of this nature had been formulated in draft resolutions submitted to the Security Council. Thus, in connection with the Greek frontier incidents question considered by the Council in September 1947, a draft resolution was proposed by the United States which read as follows:

> "*The Security Council*, pursuant to Article 12 of the Charter,
>
> "(*a*) *Requests* the General Assembly to consider the dispute between Greece on the one hand and Albania, Yugoslavia and Bulgaria on the other, and to make any recommendations with regard to that dispute which it deems appropriate under the circumstances;
>
> "(*b*) *Instructs* the Secretary-General to place all records and documents in the case at the disposal of the General Assembly."

In connexion with the question of Southern Rhodesia, considered by the Council in September 1963, a three-power draft resolution was submitted which, after inviting the United Kingdom Government to take certain actions, would request "the General Assembly to continue its examination of the question... with a view to securing a just and lasting settlement." Both draft resolutions referred to above failed of adoption owing to the negative vote of a permanent member. In the first case, the objection was made on the ground that a request to the Assembly for recommendation would mean an abdication by the Council of its primary responsibility for the maintenance of international peace and security under the Charter. In the second case, the objection was made to the effect that the question was one of domestic jurisdiction and neither the Security Council nor the General Assembly was competent to deal with it. The rejection of the draft resolutions is, therefore, not to be construed as a denial of the power of the Security Council to request the General Assembly for recommendations as provided for in Article 12, paragraph 1, of the Charter.

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[13] It may be noted that the Palestine question was first submitted to the General Assembly which referred certain aspects falling within the scope of Chapter VII of the Charter to the Security Council for consideration. It may also be noted that in the course of the discussion which led to the adoption of the above-mentioned resolution, the representative of Belgium expressed the following opinion: "...the convoking of the General Assembly would not prevent the Council from considering, in the meantime, any substantive proposals which it might be in a position to submit to the General Assembly."

(2) *Consideration by the General Assembly at the request of Member States*

The Indonesian question

7. The Indonesian question as submitted by Australia in July 1947 was considered by the Security Council in the years 1947, 1948 and 1949. By a letter dated 30 and 31 March 1949, the delegations of India and Australia requested that the Indonesian question be placed on the agenda of the second part of the third regular session of the General Assembly. On 12 April, during the consideration by the General Assembly of adoption of this agenda item, the representative of the Netherlands, supported by the representatives of Norway and Belgium, invoked Article 12, paragraph 1 of the Charter as a ground for objecting to the inclusion of the item in the agenda. They stated that the General Assembly could not make recommendations on the subject unless it was so requested by the Security Council and that a discussion in the General Assembly could in no way lead to any conclusion. On the other hand, the representative of Iraq, while recognizing the existence of procedural difficulties, considered that as long as paragraph 2 of Article 11 of the Charter remained in effect, the General Assembly had a right to discuss any question and any dispute which was before the Security Council. [14] After the General Assembly had voted in favour of inclusion of the item on its agenda, a resolution was adopted to defer further consideration of the item to the fourth regular session of the Assembly (resolution 274 (III)).

8. At the Assembly's fourth session, two draft resolutions were submitted in the *ad hoc* Political Committee. The first draft resolution provided that the General Assembly should "welcome" the announcement that an agreement had been reached at the Round-Table Conference, "commend" the parties concerned and the United Nations Commission for Indonesia for their contributions thereto and "welcome" the forthcoming establishment of the Republic of the United States of Indonesia as an independent sovereign State. The second draft resolution contained provisions for the withdrawal of the Netherlands forces, the establishment of a United Nations commission to observe the implementation of such measures and to investigate the activities of the Netherlands authorities, as well as instructions to the commission regarding its work. During the discussion, the Chairman drew the attention of the Committee to the provisions of Article 12, paragraph 1, of the Charter. Pointing out that the Security Council was still seized of the question, he stated that, before putting each of the draft resolutions to the vote, he would ask the Committee to pronounce itself on whether its terms constituted a recommandation within the meaning of Article 12, paragraph 1. The *ad hoc* Political Committee decided by 42 votes to one with 6 abstentions, that the first draft resolution did not constitute a recommendation within the meaning of Article 12, paragraph 1, and by 42 votes to 5 with 4 abstentions, that the second draft resolution did constitute a recommendation. The first draft resolution was then adopted and the second rejected. [15]

[14] In this connexion, the representative of Iraq stated at the 190th plenary meeting that "The right of the General Assembly to discuss any situation or dispute already before the Security Council had been thoroughly considered at the San Francisco Conference. Some delegations had thought that the General Assembly should have the right to discuss questions of any kind, even if they were before the Security Council, and to make recommendations with regard to them. Other delegations had opposed the granting of such a right to the General Assembly. A compromise had finally been reached whereby the General Assembly could consider a question which was on the agenda of the Security Council but could not make recommendations upon it".

[15] A similar situation arose at the first emergency special session of the General Assembly in connexion with two draft resolutions submitted by the United States. Objection to those draft resolutions were raised on the ground that the first draft resolution which dealt with the Palestine question in general and the second which dealt with the Suez Canal question were matters of which the Security Council was actually seized. The emergency session had been convened to consider the situation arisen from the invasion of Egypt and not another question. The two draft resolutions were subsequently withdrawn.

The Tunisian question

9. On 20 July 1961, Tunisia requested a meeting of the Security Council as a matter of extreme urgency to consider its complaint against France "for acts of aggression infringing the sovereignty and security of Tunisia and threatening international peace and security." On 22 July, the Council adopted a resolution which (1) called for an immediate cease-fire and a return of all armed forces to their original position and (2) decided to continue the debate. On 29 July, three draft resolutions dealing with implementation of the earlier resolution were rejected by the Council.

10. On 7 August, a number of delegations requested the convening of a special session of the General Assembly "to consider the grave situation in Tunisia obtaining since 19 July 1961, in view of the failure of the Security Council to take appropriate action". On the receipt of the concurrence of a majority of the Members on 10 August, the Secretary-General summoned, in accordance with rule 8 (*a*) of the Assembly's rules of procedure, the third special session of the General Assembly to meet on 21 August. In its resolution 1622 (S-III) adopted on 25 August, the Assembly, while noting that the Security Council had failed to take further appropriate action, re-affirmed the Security Council's interim resolution, urged the Government of France to implement fully the provisions of the operative paragraph 1 of that resolution, recognized the sovereign right of Tunisia to call for the withdrawal of all French armed forces present on its territory without its consent, and called upon the Governments of France and Tunisia to enter into immediate negotiations to devise peaceful and agreed measures for the withdrawal of French armed forces from Tunisian territory.

The situation in Angola

11. The question of Angola was first submitted to the Security Council in February 1961. On 15 March, the Council failed to adopt a draft resolution which would call upon Portugal to implement General Assembly resolution 1514 (XV) (containing the declaration on ending colonialism) and propose to establish a sub-committee to examine the question and report to the Council. On 20 March, 39 delegations requested the inclusion of the question in the Assembly's agenda. Opposition to consideration of the question by the Assembly was based on Article 2, paragraph 7, of the Charter. During the discussion, a number of delegations proposing the item stated that because of the failure of the Security Council to take action, it had become necessary to refer the question to the General Assembly, which should take immediate measures to bring about a solution of the problem. A draft resolution identical in terms with that submitted to the Security Council, except that the proposed sub-committee would examine statements before the Assembly (rather than the Council) and report to the Assembly, was adopted as resolution 1603 (XV) on 20 April 1961.

(ii) Items submitted to the General Assembly and later also considered by the Security Council

(1) *By decision of the General Assembly*

12. The Palestine question was originally submitted to the General Assembly. In its resolution 181 (II), the Assembly recommended to Members the adoption and implementation of a plan of partition with economic union and *requested the Security Council* to take the necessary measures provided for in the plan and to consider, if circumstances during the transitional period required such consideration, whether the situation in Palestine constituted a threat to the peace. Since then the Palestine question had continued to be on the agenda of both the General Assembly and the Security Council, with the latter dealing generally with security and military aspects of the question and the former with political, economic and social aspects.

(2) *At the request of Member States*

13. Only in one case had the Security Council rejected the request by a Member State for inclusion in its agenda of an item which was before the General Assembly and in respect of which arguments based on Article 12, paragraph 1, of the Charter were advanced. This was the case of a USSR request dated 5 November 1956 for consideration by the Council of an item entitled "Non-compliance by the United Kingdom, France and Israel with the decision of the emergency special session of the General Assembly of the United Nations of 2 November 1956 and immediate steps to halt the aggression of the aforesaid States against Egypt." On the one hand it was argued that just as the General Assembly could not consider a question of which the Security Council was seized, so the Security Council could not logically consider a question pending before the General Assembly, particularly one referred to the Assembly by the Council itself. On the other hand it was contended that the fact that the General Assembly was taking action on a question did not relieve the Security Council of the obligation to act if the circumstances demanded it. The USSR request was rejected by 3 votes in favour, 4 against with 4 abstentions.

14. In the more recent cases dealt with below, whether the questions were originally submitted to the General Assembly or the Security Council, concurrent consideration by the two organs of those questions took place and in most cases both organs adopted substantive resolutions without reference to Article 12, paragraph 1, of the Charter.

The situation in the Congo, 1960-1961

15. At its fourth emergency special session convened at the request of the Security Council (resolution adopted on 16/17 September 1960) to consider the situation in the Congo, the General Assembly adopted, on 20 September 1960, resolution 1474 (ES-IV) which took note of the resolutions previously adopted by the Security Council and requested Member States to take certain actions. By a letter dated 16 September 1960, the USSR requested the inclusion of the Congo question as an additional item in the agenda of the fifteenth regular session of the General Assembly. On 28 September, the General Committee decided to include the item in the agenda of the Assembly. On 6 December 1960, the USSR proposed that the question of the situation in the Congo and the steps to be taken on the matter should be examined at the earliest possible date by the Security Council and the General Assembly. The Council met from 7 to 14 December but failed to adopt three draft resolutions before it. On 16 December, the General Assembly resumed consideration of the situation in the Congo and had before it two draft resolutions (one submitted by 7 Afro-Asian States and Yugoslavia, and the other by the United States and the United Kingdom), both containing provisions requiring specific action. The two draft resolutions were rejected by vote, but Article 12, paragraph 1, of the Charter was not referred to during the discussion. On 20 December, the Assembly adopted resolution 1592 (XV) to keep the item on the agenda of its resumed fifteenth session.

16. The Security Council met again from 12 to 14 January and from 1 to 21 February 1961 to consider the Congo question at the request of the USSR. These meetings resulted in the adoption by the Council, on 21 February, of a resolution dealing with the situation. Consideration of the Congo question by the General Assembly at its resumed fifteenth session resulted in the adoption, on 15 April 1961, of resolutions 1599 (XV) calling upon States to take certain action and "deciding" on the complete withdrawal and evacuation of military personnel and political advisers not under the United Nations Command, 1600 (XV) establishing a Commission of Conciliation and 1601 (XV) establishing a Commission of Investigation. At no time was Article 12, paragraph 1, of the Charter invoked as a limitation of the competence of the Assembly to make recommendations.

The situation in Angola, 1961-1962

17. After the General Assembly adopted on 20 April 1961 resolution 1603 (XV) to establish a sub-committee (*see* paragraph 11 above), a group of States, by a letter dated 26 May 1961, requested consideration by the Security Council of the Angolan question. On 9 June, the Council adopted a resolution reaffirming the Assembly resolution, calling upon Portugal to desist from repressive measures and requesting the sub-committee to report both to the Security Council and to the Assembly.

18. By a letter dated 19 July 1961 addressed to the Secretary-General, a group of States considered the situation in Angola as endangering international peace and security and reserved the right to ask for "effective remedial action to be taken either by the Security Council or by the General Assembly." The item entitled "The situation in Angola: report of the Sub-committee established by General Assembly resolution 1603 (XV)" was placed on the provisional agenda of the sixteenth session of the Assembly. Portugal objected to the inclusion of this agenda item on ground of Article 2, paragraph 7, of the Charter. On 30 January 1962, the Assembly adopted resolution 1742 (XVI) by which it decided to continue the Sub-Committee, requested Member States to take certain actions and recommended "the Security Council, in the light of the Council's resolution of 9 June 1961 and of the present resolution, to keep the matter under constant review."

The apartheid *question, 1960-1963*

19. Beginning with its twelfth session, the General Assembly has adopted at each regular session a resolution on the question of race conflict in South Africa resulting from the policies of *apartheid* of the Government of South Africa. Resolution 1375 (XIV) on this question was adopted by the Assembly on 17 November 1959. On 25 March 1960, 29 Asian-African States requested an urgent meeting of the Security Council to consider the situation arising out of the large-scale killings of unarmed and peaceful demonstrators against racial discrimination and segregation in the Union of South Africa. They considered that the situation endangered international peace and security. The question was taken up by the Council on 30 March. On 1 April, the Council adopted a resolution calling upon the Union Government to initiate measures to bring about racial harmony and to abandon its policies of *apartheid* and racial discrimination. Subsequently, the Assembly adopted the following resolutions on the *apartheid* question: 1598 (XV) of 13 April 1961, 1663 (XVI) of 28 November 1961, and 1761 (XVII) of 6 November 1962. In the last-mentioned resolution, the Assembly decided to establish a Special Committee on *apartheid*, invited Member States to inform the General Assembly at its eighteenth session regarding actions taken, separately or collectively, in dissuading the Government of South Africa from pursuing its policies of *apartheid*, and requested "the Security Council to take appropriate measures, including sanctions, to secure South Africa's compliance with the resolutions of the General Assembly and of the Security Council on this subject and, if necessary, to consider action under Article 6 of the Charter."

20. On 11 July 1963, 32 African States requested a meeting of the Security Council to consider the explosive situation in South Africa which constitued a serious threat to international peace and security. Meanwhile, the Special Committee on *apartheid* had submitted its reports both to the General Assembly and to the Security Council. On 7 August, the Council adopted a resolution calling upon the Government of South Africa to abandon its policies of *apartheid* and to liberate prisoners, calling upon all States to cease forthwith the sale and shipment of arms and ammunition of all types and requesting the Secretary-General to keep the situation in South Africa under observation and to report to the Security Council by 30 October 1963.

21. In accordance with Assembly resolution 1761 (XVII) (*see* paragraph 19 above), the item "The policies of *apartheid* of the Government of the Republic of South Africa: reports of the Special Committee... and replies by Member States under General Assembly resolution 1761 (XVII)" was included in the agenda of the Assembly's eighteenth session. On 11 October 1963, the Assembly adopted resolution 1881 (XVIII) requesting once more the Government of South Africa to release political prisoners, requesting all Member States to make all necessary efforts to ensure compliance by the Government of South Africa with the Assembly's request, and requesting the Secretary-General "to report to the General Assembly and the Security Council, as soon as possible during the eighteenth session", on the implementation of the resolution.

22. On 23 October, 32 States requested a meeting of the Security Council to consider the report submitted by the Secretary-General pursuant to Council resolution of 7 August. On 4 December, the Council adopted a resolution which reaffirmed in essence the provisions of its previous resolution and requested the Secretary-General to establish a group of experts to examine methods of resolving the situation.

23. Meanwhile, a report of the Secretary-General pursuant to Assembly resolution 1881 (XVIII) of 11 October (*see* paragraph 21 above) was circulated to the General Assembly on 19 November. After consideration, the Assembly adopted, on 16 December 1963, resolution 1978 (XVIII) appealing again to all States to take appropriate measures and requesting the Special Committee to continue its work and submit reports to the General Assembly and to the Security Council whenever appropriate. In the same resolution the Assembly further requested the Secretary-General to provide relief and assistance, through appropriate international agencies, to the families of all persons persecuted by the Government of South Africa and to report thereon to the Assembly at its nineteenth session.

24. In the course of the practically simultaneous consideration of the *apartheid* question in the Security Council and in the General Assembly, no reference was made to Article 12, paragraph 1 of the Charter.

The question relating to Territories under Portuguese Administration, 1962-1963

25. By resolution 1699 (XVI) of 19 December 1961, the General Assembly established a Special Committee on Territories under Portuguese Administration to report on the question. In its resolution 1807 (XVII) of 14 December 1962, the Assembly, noting the opinion of the Special Committee concerning the implications of the supply of military equipment to the Portuguese Government, urged Portugal to give effect to the recommendations of the Special Committee, requested the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples to examine the situation, called upon Member States to use their influence to induce Portugal to carry out its obligations under Chapter XI of the Charter, requested all States to refrain from offering Portugal assistance and to prevent the sale and supply of arms and military equipment to the Portuguese Government, and requested "the Security Council, in case the Portuguese Government should refuse to comply with the present resolution and previous General Assembly resolutions on this question, to take all appropriate measures to secure the compliance of Portugal with its obligations as a Member State."

26. On 4 April 1963, the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples adopted a resolution drawing the immediate attention of the Security Council to the situation in the Territories under Portuguese administration, with a view to the Council taking appropriate measures, including sanctions, to secure the compliance by Portugal of the relevant resolutions of the General Assembly and of the Security Council. The text of this resolution and the report of the Special Committee were transmitted to the Council.

27. On 11 July 1963, the President of the Security Council received a request from 32 African States to convene a meeting of the Council. On 31 July, the Council adopted a resolution by which it called upon Portugal to take certain action, requested all States to prevent sale and supply of arms and military equipment to the Portuguese Government and requested the Secretary-Genrael to report to the Council by 31 October 1963.

28. On 3 December, the General Assembly adopted resolution 1913 (XVIII) by which the Assembly, recalling the resolutions previously adopted by the Assembly and the Council on the question and in particular the provisions of Council resolution of 31 July, and noting with regret and concern the continued refusal of the Portuguese Government to implement those resolutions, requested "the Security Council to consider immediately the question of Territories under Portuguese administration and to adopt necessary measures to give effect to its own decisions, particularly those contained in the resolution of 31 July 1963" and decided to maintain the question on the agenda of its eighteenth session.

29. Prior to the adoption by the General Assembly of resolution 1913 (XVIII), 29 African States requested the convening of the Security Council to consider the report of the Secretary-General submitted in pursuance of Council resolution of 31 July 1963. The Council began consideration of the question on 6 December. On 11 December, the Council adopted a resolution which, *inter alia*, called upon all States to comply with Council resolution of 31 July and requested the Secretary-General to continue his efforts and report to the Council not later than 1 June 1964.

30. During the discussion of the question in the Assembly and the Council, the provisions of Article 12, paragraph 1, of the Charter were not mentioned. Objection to the competence of the two organs to deal with the question was raised by Portugal on ground of Article 2, paragraph 7.

The question of Southern Rhodesia, 1962-1963

31. By resolution 1755 (XVII) of 12 October 1962, the General Assembly urged the Government of the United Kingdom to take measures to secure the release of political prisoners and to lift the ban on the Zimbabwe African Peoples Union. In its resolution 1760 (XVII) of 31 October, the Assembly, *inter alia*, requested the Government of the United Kingdom to take certain measures including the convening of a constitutional conference on Southern Rhodesia, requested the Acting Secretary-General to lend his good offices to promote conciliation and decided to keep the question on the agenda of its seventeenth session.

32. On 2 and 30 August 1963, requests were made by a number of African States for a meeting of the Security Council to consider the question of Southern Rhodesia. The Council met from 9 to 13 September but failed to adopt a draft resolution submitted by Ghana, Morocco and the Philippines, owing to the negative vote of a permanent member.

33. On 18 July 1963, a group of States requested the inclusion of the question of Southern Rhodesia in the agenda of the eighteenth session of the General Assembly. After consideration of the question, the Assembly adopted two resolutions. By resolution 1883 (XVIII) of 14 October, the Assembly invited the Government of the United Kingdom not to take certain actions relating to the status of Southern Rhodesia, on the one hand, and to put into effect the previous Assembly resolutions concerning the question, on the other. By resolution 1889 (XVIII) of 6 November, the Assembly, *inter alia*, invited once more the United Kingdom to hold a constitutional conference, urged all Member States to use their influence with a view to ensuring the realization of the legitimate aspirations of the people of Southern Rhodesia, requested the Secretary-General to continue to use his good offices and decided to keep the question on the agenda of its eighteenth session.

(C) Conclusions

34. Without a detailed legal analysis being undertaken, the following brief observations may be made on the basis of the text of the Charter provisions and of the survey of the past practice of the General Assembly and the Security Council as summarized in this note.

(*i*) A request by the Government of a Member State to have a question of which the Security Council is seized placed on the provisional agenda or the supplementary list of items for a regular session of the General Assembly would have to be complied with by the Secretary-General. The General Assembly itself, acting on the basis of a recommendation by the General Committee, would decide whether it wishes to include the item in the agenda of the session.

(*ii*) In the event the Security Council removes the question from the list of matters of which it is seized or in the event the Security Council specifically requests the General Assembly to consider the question, the Assembly could perform in regard to that question its functions under the Charter without any special limitations as to the nature and scope of its recommendations.

(*iii*) Even if the Security Council remains seized of the question, Article 12 of the Charter would not bar the General Assembly from considering and discussing the question as it is only "recommendations" which are prohibited by the Article.

(*iv*) The above summary of the practice contains instances in which the General Assembly recognized the distinction for purposes of Article 12 between "recommendations" and resolutions which were not recommendatory. In the latter category, for example, were resolutions welcoming steps taken by the parties to the dispute and commending Member States or United Nations organs for their contributions to the settlement.

(*v*) The most interesting feature of the practice is that the General Assembly, beginning in 1960, adopted several resolutions clearly containing recommendations in cases of which the Security Council was then seized and could reasonably be regarded as exercising its functions in regard to that question. Six such cases have been found in which the General Assembly appears to have departed from the actual text of Article 12. In none of these cases, however, did a Member object to the recommendation on the ground of Article 12.

(*vi*) Although Article 12 has not been invoked in these cases, it would be difficult to maintain that it is legally no longer in effect. A Member may therefore argue in the General Assembly that Article 12 forbids the adoption of a recommendation in the case, and the point, if pressed, may have to be decided by the General Assembly.

(*vii*) Finally, it is to be noted that Governments may argue that the phrase "recommendation with regard to that dispute or situation", used in Article 12, is not applicable to certain types of resolutions, such as a confirmation by the General Assembly of a Security Council resolution, or a resolution reminding Member States to comply with certain Charter principles. There may, of course, be disagreement as to whether such resolutions contain implied recommendations and, if raised, this issue would have to be determined by the General Assembly, either by explicit decision or implicity in its action on the proposed resolution.

10 September 1964

11. United Nations Conference on Trade and Development—Question of participation by States which are not Members of the United Nations or members of the specialized agencies or of the International Atomic Energy Agency

Note to the Deputy Chef de Cabinet

1. In its resolution 1785 (XVII) of 8 December 1962, the General Assembly endorsed the decision of the Economic and Social Council to convene a United Nations Conference

on Trade and Development and requested the Secretary-General "to invite all States Members of the United Nations and members of the specialized agencies and of the International Atomic Energy Agency to take part in the Conference". This means, of course, that only those States designated in the resolution can be invited as participants to the Conference. Neither the Conference itself nor the Secretariat is in a position to change the composition of the Conference which has been decided upon by the General Assembly. This is a point which has been well settled in practice.

2. The question then appears to be whether "States" other than those designated in the resolution may be invited or permitted to take part in the Conference in some other capacity. The practice shows that specialized agencies and non-governmental organizations have been invited to send observers to attend international conferences convened by the United Nations. The status of observers in the official sense is governed by the rules of procedure of the conference concerned. The draft rules of procedure of the United Nations Conference on Trade and Development provide for the participation of observers for specialized agencies, inter-governmental bodies and non-governmental organizations. These rules, like the rules of other international conferences under the auspices of the United Nations, have not accorded observer status to non-invited "States", countries or territories.

3. There are, of course, facilities for the public to attend open meetings of the Conference and representatives of non-invited "States" can no doubt avail themselves of such facilities. In the absence of a clear designation by the competent organ of the United Nations as to which non-invited "States" may participate in some capacity in the work of the Conference, the Secretary-General cannot make a decision to that effect without being involved in a political controversy. Such controversy arises from the fact that there exists sharp differences of opinion on whether or not some entities are sovereign States. Thus, when the question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations was discussed at the eighteenth session of the General Assembly, an amendment submitted by Czechoslovakia would request the Secretary-General to invite "any State" to become a party to the treaties in question. In reply to an inquiry from the representative of Guatemala, the Secretary-General made the following statement:

> "...There are certain areas in the world the status of which is not clear. If I were to invite or to receive an instrument of accession from any such area, I would be in a position of considerable difficulty, unless the Assembly gave me explicit directives on the areas coming within the "any State" formula. I would not wish to determine on my own initiative the highly political and controversial question whether or not the areas, the status of which was unclear, were States within the meaning of the amendment to the draft resolution now being considered. Such a determination, I believe, falls outside my competence.
>
> "101. In conclusion, I must therefore state that if the 'any State' formula were to be adopted, I would be able to implement it only if the General Assembly provided me with the complete list of the States coming within that formula, other than those which are Members of the United Nations or the specialized agencies, or parties to the Statute of the International Court of Justice." [16]

4. In view of the foregoing analysis, the Secretariat of the Conference should be informed that it is not in a position to invite "States" not designated in General Assembly resolution 1785 (XVII) to attend the Conference. Nor should the Secretariat arrange for their participation in some limited capacity or enter into consultation with them for this purpose.

4 February 1964

[16] *Official Records of the General Assembly, Eighteenth Session, Plenary Meetings*, 1258th meeting, paras. 100-101.

12. United Nations Conference on Trade and Development—Question whether the Conference would be competent to invite an inter-governmental organization not invited by the Economic and Social Council

Memorandum to the Secretary of the United Nations Conference on Trade and Development

1. This is with reference to the question whether the United Nations Conference on Trade and Development would be competent to invite to the Conference an inter-governmental organization not invited by the Economic and Social Council.

2. The Conference was called by the Council and would thus derive its competence from the Council. Whether therefore the Conference would have the competence to issue an invitation of this kind would depend on whether the Council had in fact conferred such a competence upon the Conference.

3. In its resolution calling the Conference, resolution 963 (XXXVI) of 18 July 1963, the Council referred to the subject of invitations to inter-governmental economic organizations. Paragraphs 8 and 9 of Part I of its resolution are in these terms:

> "8. *Further approves* the recommendation of the Preparatory Committee contained in paragraph 208 of its report [17] as regards the invitation to the inter-governmental economic organizations;
>
> "9. *Requests* the Secretary-General to submit to the Council at its resumed thirty-sixth session proposals regarding the inter-governmental economic organizations which would be chiefly interested in the work of the Conference, and regarding the practical rules to be observed for the participation of those organizations in the Conference as observers".

Paragraph 208 of the Preparatory Committee's report was as follows:

> "The Preparatory Committee discussed the question of participation of inter-governmental regional economic organizations in the work of the Conference. In this connexion it considered a submission of the delegation of Czechoslovakia (E/CONF.46/PC/L.26) on co-operation with the secretariat of the Council of Mutual Economic Assistance (CMEA). Some suggestions were made as to regional economic organizations which might be invited but it was agreed to leave the matter for consideration by the Economic and Social Council. The Preparatory Committee decided to recommend to the Economic and Social Council that inter-governmental regional economic organizations interested in the United Nations Conference on Trade and Development be invited to send observers to the third session of the Preparatory Committee as well as to the Conference itself."

4. As requested by the Council, the Secretary-General submitted to the Council at its resumed thirty-sixth session a note (E/3843 and Corr.1) containing a list of inter-governmental economic organizations which in his view should be invited to participate in the Conference.

5. The Council, at its resumed thirty-sixth session, considered, as item 39, the subject of the participation of inter-governmental economic organizations as observers at the United Nations Conference on Trade and Development and the Secretary-General's note, and adopted at its 1306th meeting, on 16 December 1963, the suggestion made by its President that the Council should approve the recommendations made by the Secretary-General regarding the list of inter-governmental organizations to be invited to participate in the Conference with the addition to that list of a further name that had been submitted in the course of the Council's discussions.

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[17] *Official Records of the Economic and Social Council, Thirty-sixth Session, Annexes*, agenda item 5, document E/3799.

6. These were the relevant decisions of the Council, and they do not in our view provide evidence of a grant by the Council to the Conference of the competence to invite an inter-governmental organization which was not included in the list adopted by the Council. The fact that the Council did not specifically declare that the list was exhaustive does not in our opinion constitute evidence of an intention on its part to confer on another body the competence to invite inter-governmental organizations not included in such a list.

7. We would add moreover that the draft rules of procedure proposed for the Conference by the Preparatory Committee and approved by the Council in its resolution convening the Conference do not reflect the possibility of inter-governmental organizations not invited by the Council being invited to the Conference. The relevant provisions of the draft rules of procedure are as follows:

"*Rule 59*

"1. Observers for specialized agencies and inter-governmental bodies invited to the Conference may participate, without the right to vote, in the deliberations of the Conference and its Main Committees and Sub-Committees, upon the invitation of the President or Chairman, as the case may be, on questions within the scope of their activities.

"2. Written statements of such specialized agencies and inter-governmental bodies shall be distributed by the secretariat to the delegations at the Conference." [18]

8. We would in conclusion draw attention to the fact that while inter-governmental organizations invited to the Conference by the Council would be entitled to participate in the Conference, the exercise of the right to participate is made dependent upon the invitation of the President of the Conference or of the Chairmen of the Committees and Sub-Committees.

13 February 1964

13. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT—QUESTION WHETHER THE CONFERENCE WOULD BE COMPETENT TO INVITE NON-GOVERNMENTAL ORGANIZATIONS NOT IN CONSULTATIVE STATUS WITH THE ECONOMIC AND SOCIAL COUNCIL

Memorandum to the Secretary of the United Nations Conference on Trade and Development

1. This is with reference to the question whether the United Nations Conference on Trade and Development would be competent to invite non-governmental organizations which are not in category A or B or on the register and thus not in consultative status with the Economic and Social Council to participate in the Conference.

2. The Economic and Social Council did not specifically refer in its resolution convening the Conference, resolution 963 (XXXVI) of 18 July 1963, to the participation of non-governmental organizations in the Conference.

3. There was, however, some discussions on the subject at the Council's resumed thirty-sixth session, [19] where the representative of the USSR, in the course of a discussion on the participation of inter-governmental economic organizations at the Conference, said that, in his view, an invitation should also be extended to the International Organization for Standardization and that the "Secretary-General would also be well advised to invite to the Conference observers from such non-governmental organizations as the World Federation of Trade Unions and the International Co-operative Alliance, which had consultative status with the Economic and Social Council". The representative of France stated that the "participation of non-governmental organizations seemed to him a matter which the Council should not take up at the present time, but which should be left to the Preparatory Com-

[18] *Ibid.*, para. 203.

[19] *Official Records of the Economic and Social Council, Resumed Thirty-sixth Session,* 1306th meeting, paras. 61-67.

mittee to decide". The representative of the USSR "wished to know, however, whether the Preparatory Committee's terms of reference authorized it to extend an invitation to participate in the Conference to any organization as it saw fit. If so, his delegation saw no objection to making the Preparatory Committee responsible for considering the question of non-governmental organizations". The United States representative pointed out "that item 39 of the Council's agenda covered only the participation of inter-governmental economic organizations. A decision had already been taken regarding non-governmental organizations in consultative status with the Economic and Social Council". The representative of Italy stated that "it was difficult for him to give an opinion on the USSR proposal straight away, but he considered that the United States representative had clearly stated the Council's position". The representative of the USSR said then "that he was satisfied with the United States representative's explanation. The International Organization for Standardization was, in fact, among the organizations in consultative status with the Council". There was no further discussion of the subject, and accordingly no decision was made on the invitation of non-governmental organizations not in consultative status, in particular as to whether any organization of this kind would be entitled to participate or as to whether only some would be so entitled and if so which or how they were to be selected for participation and invited. Nor did the Council reach any such decision at its thirty-sixth session, although the Council approved in its resolution convening the Conference, without discussion on the matter, the draft rules of procedure that had been proposed for the Conference by the Preparatory Committee, rule 60 of which was in these terms:

> "Non-governmental organizations in category A or B or on the register or who may be invited may designate authorized representatives to sit an observers at public meetings of the Conference and its Committees and Sub-Committees." [20]

4. While the draft rules of procedure thus provide for the procedure to be followed in the Conference by non-governmental organizations not in consultative status if they should be invited, the draft rules do not in our view purport to confer upon any such organization the right as such to participate in the Conference. The Council's approval of the draft rules of procedure for the Conference should not therefore be construed as involving a grant by the Council of the right to participate to any such organization or as enabling the Conference, which would have competence over its rules of procedure, to make such a grant.

5. In these circumstances, the Council should, in our opinion, be regarded as having neither invited a non-governmental organization not in consultative status to participate in the Conference nor as having delegated competence with respect to such invitations, in particular as not having delegated such competence to the Conference. Accordingly the Conference would not, in our opinion, be competent to invite a non-governmental organization not in consultative status to participate in the Conference.

13 February 1964

14. Position of Luxembourg in relation to the 1962 International Coffee Agreement [21] —Accession by Belgium extending to Luxembourg by virtue of article 5 of the Convention of 25 July 1921 for the Establishment of an Economic Union between Belgium and Luxembourg [22]

Letters to the Executive Director of the International Coffee Organization

I

1. We have received a letter dated 27 July 1964 from the Permanent Representative of Luxembourg to the United Nations declaring that the Grand Duchy of Luxembourg

[20] *Ibid, Thirty-sixth Session, Annexes*, agenda item 5, document E/3799, para. 203.

[21] United Nations, *Treaty Series*, vol. 469, p. 169.

[22] League of Nations, *Treaty Series*, vol. IX, p. 223.

considers itself bound by the accession of Belgium to the 1962 International Coffee Agreement by virtue of article 5 of the Convention between Belgium and Luxembourg for the establishment of an Economic Union, signed at Brussels on 25 July 1921. A copy of this letter [23] is enclosed for your information.

2. We have been in contact with the Belgium Mission in order to obtain confirmation that Belgium considers its accession to be binding on Luxembourg. We have also requested the Permanent Representative of Luxembourg to furnish us with his full powers for making the declaration. We understand that the Permanent Representatives of Belgium and Luxembourg are consulting together and hope to advise us very soon as to their position. Meanwhile, the question has been raised whether the date of Luxembourg's becoming a party to the Coffee Agreement should be (1) the date of Belgium's accession, (2) the date of the letter from the Permanent Representative of Luxembourg, or (3) the date that confirmation is received from Belgium that its accession extends to Luxembourg. We would have thought that the latter date would be the more appropriate but it may be that Luxembourg would desire one of the earlier dates. We would appreciate your views as to whether any problem would be created by accepting one of the earlier dates.

3. We had also suggested to the Permanent Representative of Luxembourg that since Luxembourg had signed the Agreement separately, it would be more satisfactory from the point of view of the depositary if they were to make a separate accession. This, however, appears to present some internal difficulties and we are of the opinion that, if Belgium confirms that its accession is extended to Luxembourg, this can be accepted.

26 August 1964

II

1. You will know by now from our cable that a letter was received on 28 September 1964 from the Permanent Representative of Belgium to the United Nations in which he notified the Secretary-General that the accession by Belgium to the above-mentioned Agreement equally binds Luxembourg by virtue of article 5 of the Convention between Belgium and Luxembourg for the establishment of an Economic Union, signed at Brussels on 25 July 1921. Attached to the letter was a cabled authorization from the Minister for Foreign Affairs for the Permanent Representative to make the notification, which we have provisionally accepted, requesting the Permanent Representative to furnish us formal full powers. A copy of this letter [24] is enclosed for your information.

2. A copy of a similar notification from the Permanent Representative of Luxembourg was sent to you in our letter of 26 August 1964. We have since received the requested full powers authorizing him to make the notification.

3. We are now proceeding to inform all interested States of the receipt of both communications. Neither one contains a direct reference to the effective date of Luxembourg's becoming a party to the Coffee Agreement, nor will our notification specify that date. However, the text of their communications implies that both Governments consider the date of Belgium's accession as equally effective for Luxembourg and we assume it will be up to the Coffee Council to deal with any question that may arise in this connexion under article 12, paragraph 4, and article 24, paragraph 2, of the Agreement.

29 September 1964

[23] Not reproduced.

[24] Not reproduced.

15. Position of Luxembourg in relation to the 1963 International Olive Oil Agreement [25] —Signature by Belgium on behalf of the Belgo-Luxembourg Economic Union

Memorandum to the Assistant Director in charge of the International Trade Relations Branch, Department of Economic and Social Affairs

1. It results from the documentation transmitted by the Director of the International Olive Oil Council and the text of the 1963 International Olive Oil Agreement that:

(*i*) The Government of Luxembourg has participated independently of the Government of Belgium in the Olive Oil Conference of 1963. You may recall that at that time the Government of Luxembourg wished at first to give credentials to the Belgian delegation to enable the latter to represent Luxembourg at the Conference. It was, however, our view based on United Nations practice that it would not be appropriate for one delegation to the Conference to represent more than one participating State.

(*ii*) Annex C to the Agreement refers to Luxembourg separately from Belgium and attributes to each of these two countries three votes in the Olive Oil Council (*see* article 28 of the Agreement). In accordance with article 33, paragraph 1, "The contribution of each Participating Government to the administrative budget, for each olive crop year, shall be proportionate to the number of votes it has when the budget for that year is adopted."

(*iii*) The Government of Luxembourg did not sign the 1963 International Olive Oil Agreement. The Agreement was signed, however, in the name of Belgium by the Belgian Ambassador in Madrid with the accompanying indication that the signature was given on behalf of the Belgo-Luxembourg Economic Union.

(*iv*) While neither Belgium nor Luxembourg have ratified, accepted, approved or acceded to the Agreement, a notification was made by the Belgian Embassy on behalf of the Governments of Belgium and Luxembourg, of the undertaking by these two Governments to seek ratification of the Agreement (under paragraph 6 of article 36) as well as of their undertaking to apply provisionally the Agreement pending such ratification (under paragraph 8 of article 36).

(*v*) In a memorandum transmitted through the Belgian Embassy in Madrid to the Director of the International Olive Oil Council, the Government of Luxembourg has stated that in accordance with article 5 of the Convention of 25 July 1921 for the establishment of an Economic Union between Belgium and Luxembourg, [26] "commercial treaties" are to "be concluded by Belgium on behalf of the customs union." Because of the existence of the Union, Luxembourg does not constitute a "separate market" for olive oil and could not comply as a separate entity with several of the provisions of the Agreement such as those relating to the furnishing of information or statistics on imports, consumption, etc. Belgium maintains such statistics and information for the whole of the Union.

2. An examination of the available data concerning other commodity agreements (wheat, tin, sugar, coffee) shows that while there is no complete consistency as to the manner in which these agreements have been signed on behalf of Belgium and Luxembourg respectively, Luxembourg has been normally considered as becoming a party by virtue of the Belgian signature and ratification. None of the agreements provides for separate participation by Luxembourg.

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[25] United Nations, *Treaty Series*, vol. 495, p. 3.

[26] League of Nations, *Treaty Series*, vol. IX, p. 223.

3. As to the 1963 International Olive Oil Agreement, it may be noted that in accordance with the provisions of the last sentence of paragraph 8 of article 36 a government which has undertaken provisionally to apply the Agreement but which does not deposit by 1 October 1964 an instrument of ratification, acceptance or approval ceases to be provisionally considered as a party to the Agreement "unless the [Olive Oil] Council decides to the contrary." This would be the situation of Belgium and Luxembourg if the relevant instruments are not deposited on their behalf before 1 October 1964.

4. In the light of the existing practice as regards other commodity agreements and the internationally recognized existence of the Belgo-Luxembourg Economic Union, there would be in our opinion no obstacle for Belgium to be accepted as a party to the 1963 International Olive Oil Agreement assuming the obligations under the Agreement on behalf of itself as well as of Luxembourg.

5. As to voting rights in the Olive Oil Council, the special reference to Luxembourg in annex C to the Agreement is of course embarrassing and not consistent with the international status of that country with regard to commercial agreements, as now signified by the Luxembourg Government. The question of the situation of Luxembourg might therefore appropriately be submitted to the Council under the provisions of paragraph 6 of article 23, in accordance with which "The Council shall exercise such... functions as are necessary for the execution of the provisions of this Agreement."

6. The deliberations of the Council on this matter might possibly lead to a solution under which Belgium would be allowed to exercise the voting rights now attributed separately to Belgium and Luxembourg, subject of course to Belgium paying the corresponding contributions to the administrative budget.

7. If such a solution meets with opposition, another way out of the present difficulty would be to resort to one of the procedures provided in article 38 for amending the Agreement on the initiative of the Council. Such an amendment could consist in deleting the reference to Luxembourg in annex C while possibly providing for a slight increase in the number of votes to be attributed to Belgium.

29 September 1964

16. Extension of the 1962 International Wheat Agreement [27]—Question whether the amending procedure or a separate protocol should be used

Letter to the Secretary of the United Nations Conference on Trade and Development

1. The present case of the contemplated renewal of the 1962 International Wheat Agreement is identical to that in 1956 when the renewal of the 1953 International Wheat Agreement [28] was contemplated. Our opinion on that occasion was that the amending procedure was intended for modifications rather than extension of the entire Agreement, and we think there are reasons to maintain this view.

2. The use of the amending procedure to effect an extension of the Agreement would have to be in accordance with the provisions of paragraphs (3) and (4) of article 36 and by the majorities required therein. A curious position is likely to arise here by the provision of paragraph (5) which permits a party not accepting the amendment to withdraw from the Agreement. Since such a party is not thereby released from its obligations for the current crop year, the result is that its obligations are not only carried over beyond the date of expiry but may possibly continue through the period of the extension, which seems incon-

[27] United Nations, *Treaty Series*, vol. 444, p. 3.

[28] *Ibid.*, vol. 203, p. 179.

sistent with the last clause of paragraph (5), which provides that a withdrawing country shall not be bound by the provisions of the amendment which occasioned its withdrawal. This is also contrary to the intention in relation to the duration of the Agreement. The use of a separate protocol for prolongation would avoid this problem since non-acceding States would not be bound.

3. For these reasons we feel that the most suitable course would be to conclude a protocol to be left open for signature for a specified period, which will be operative during the period from the expiry of the present Agreement to the adoption of a new Agreement. [29]

27 May 1964

17. QUESTION OF ACCESSION OF SOUTHERN RHODESIA TO THE 1963 PROTOCOL [30] FOR THE PROLONGATION OF THE INTERNATIONAL SUGAR AGREEMENT OF 1958 [31]

Memorandum to the Assistant Director in charge of the International Trade Relations Branch, Department of Economic and Social Affairs

1. We wish to refer to the request for advice from the Secretary to the International Sugar Council concerning certain questions raised in the Sugar Council in connexion with the application by the Government of Southern Rhodesia to accede to the 1963 Protocol for the Prolongation of the International Sugar Agreement of 1958.

2. Article 5, paragraph (4), of the 1963 Protocol states:

"This Protocol shall also be open for accession by the Government of any Member of the United Nations or any Government invited to the United Nations Sugar Conference, 1963, but not referred to in Article 33 or 34 of the Agreement, provided that the number of votes to be exercised in the Council by the Government desiring to accede shall first be agreed upon by the Council with that Government."

3. As Southern Rhodesia is not a Member of the United Nations, the question raised is whether Southern Rhodesia's application for accession may be accepted as emanating from a "Government invited to the United Nations Sugar Conference, 1963". The legality of such an acceptance was questioned at the seventeenth session of the International Sugar Council (1) on the ground that Southern Rhodesia is not an independent sovereign State and (2) because Southern Rhodesia's claim to be "a successor State" to the Federation of Rhodesia and Nyasaland (which had been invited to participate in the Sugar Conference of 1963) may not be a valid one.

4. As to the first of these contentions, there can be no doubt as to the fact that Southern Rhodesia is not an independent State. The international status of Southern Rhodesia, as a Non-Self-Governing Territory within the meaning of Chapter XI of the United Nations Charter, was specifically confirmed by the General Assembly at its last three sessions. [32]

However, in considering the question raised in the Sugar Council, account must also be taken of the fact that on several past occasions contracting States to commodity agree-

[29] In the course of its forty-first session, the International Wheat Council adopted, on 4 February 1965, the text of a Protocol for the Extension of the 1962 International Wheat Agreement. Article I of this Protocol provides that the Agreement shall continue in force between the parties to the Protocol until 31 July 1966.

[30] Document E/CONF. 48/2.

[31] United Nations, *Treaty Series*, vol. 385, p. 137.

[32] See resolutions 1747 (XVI) of 28 June 1962, 1760 (XVII) of 31 October 1962 and 1883 (XVIII) of 14 October 1963.

ments which were concluded under the auspices of the United Nations have accepted that governments of areas which were not fully independent sovereign States should be accepted as parties. Such was the case of the Federation of Rhodesia and Nyasaland, which was invited to several commodity conferences (e. g., the Olive Oil Conference of 1955, the Wheat Conference of 1956 and the Sugar Conference of 1956) and which was a party in its own name to the International Wheat Agreements of 1959 and 1962.

Prior to the establishment of the Federation of Rhodesia and Nyasaland, the then Southern Rhodesia had been invited to the Sugar Conference of 1953; this invitation had been extended to Southern Rhodesia in view of its membership in the Interim Commission for the International Trade Organization (ICITO) and because it was a contracting party to GATT.

5. The question as to whether Southern Rhodesia is to be considered as a successor to the Federation for the purpose of the 1963 Protocol appears to be one which can only be determined internationally on a governmental level.

The members of the Sugar Council will have noted that the Government of the United Kingdom, which had international responsibility for the conduct of the foreign relations of the Federation as well as the internal responsibility for the constitutional structure of the territories concerned, and which assumes the same responsibilities as regards the present Southern Rhodesia, has formally stated that it was its view that

> "vis-à-vis the International Sugar Agreement, the three territories of Southern Rhodesia, Northern Rhodesia and Nyasaland should be regarded as taking the place of the Federation and could accede individually to the Protocol",

and further that

> "on 1 January 1964 Southern Rhodesia resumed direct control on its external commercial relations and from that date resumed its former status as a contracting party to GATT. The responsible authority for Southern Rhodesia's rights and responsibilities under the Protocol for the prolongation of the International Sugar Agreement of 1958 would be the Government of Southern Rhodesia."

6. While it is not for the United Nations Office of Legal Affairs to express a definite point of view as to whether the parties to the 1963 Protocol should accept the international position of Southern Rhodesia as defined by the United Kingdom, it is the view of our Office that the Sugar Council would have the competence under the existing instruments to determine the manner in which the participation of Southern Rhodesia in the above-mentioned international arrangements concerning sugar might be appropriately ensured.

The 1963 Protocol extends the duration of the Agreement and specifically entrusts the Sugar Council with the responsibility of determining in agreement with the acceding "Governments" the number of the latter's votes in the Council. Under the Agreement itself the Council has received broad functions "as are necessary to carry out the terms of the Agreement" (Article 28, paragraph (7)).

In the light of these provisions, it would appear that the Sugar Council has sufficient authority to make the necessary determination as to whether a government belongs to one of the categories of governments which are entitled to accede to the 1963 Protocol under article 5, paragraph (4), of the latter.

1 October 1964

18. Replacement of the Convention of 27 November 1925 regarding the Measurement of Vessels employed in Inland Navigation [33] by a new Convention

Memorandum to the Director of the Transport Division, Economic Commission for Europe

1. This is in reply to your memorandum of 13 February 1964 informing me that the Inland Transport Committee of the Economic Commission for Europe has decided to prepare a new convention of the measurement of vessels employed in inland navigation with a view to replacing the League of Nations Convention on the same subject of 27 November 1925, the technical provisions of which have become obsolete and are no longer respected. We share your view that the alternative of modifying the latter Convention would pose a difficult problem inasmuch as the Convention contains no provisions for the amendment procedure and the agreement of all contracting parties would be needed for its modification. Nevertheless, as it is of importance to provide for the new Convention to supersede the old one, you consider, in your memorandum, three possible procedures in this regard.

2. You first mention the possibility of inserting in the new Convention a provision to the effect that, as between contracting parties thereto, it shall abrogate and replace the 1925 Convention, a procedure similar to that used in the Convention of 19 September 1949 on Road Traffic [34] vis-à-vis the League of Nations Conventions of 24 April 1926 relating to motor traffic [35] and to road traffic, [36] respectively, and the Convention of 15 December 1943 on the Regulation of Inter-American Automotive Traffic. Under this procedure, the old Conventions remain in force as between States parties to both the new and old Conventions and those States which are parties only to the old Conventions. It was used purposely in the 1949 Convention on Road Traffic, but we agree with you that it would not be suitable in the present case where the provisions of the old Convention have become obsolete.

3. You then mention in sub-paragraph (*b*) of your memorandum another possible procedure, under which the responsibility of denouncing the old Convention would rest with each State becoming a party to the new one and you refer in this connexion to the disappointing precedent of the European Conventions replacing the Agreement of 16 June 1949 [37] providing for the provisional application of the Draft International Customs Conventions, pointing out that although the obligation to denounce the 1949 Agreement is expressly provided in the new Conventions and in spite of numerous reminders, several States have still neglected to take action. It seems likely, however, that the delay or lack of action on the part of some States at least may have resulted from their reluctance to terminate their relationship under the 1949 Agreement with those States which have not yet become parties to the new Conventions. You will recall that some of the contracting parties even at the time of denunciation attached to their notification a statement to the effect that they would consider themselves no longer bound by the 1949 Agreement in their relations with only those parties for whom the corresponding new Conventions had already come into force. The situation appears to be different in so far as concerns the 1925 Convention in question. Since its provisions are obsolete and no longer observed, the contracting States becoming parties to the new Convention will have no interest in continuing their relationship under the old Convention. It may also be mentioned that a similar procedure was applied in the Protocol of 19 September 1949 on Road Signs and Signals [38] vis-à-vis the League of

[33] League of Nations, *Treaty Series*, vol. LXVII, p. 63.

[34] United Nations, *Treaty Series*, vol. 125, p. 22.

[35] League of Nations, *Treaty Series*, vol. CVIII, p. 123.

[36] *Ibid.*, vol. XCVII, p. 83.

[37] United Nations, *Treaty Series*, vol. 45, p. 149.

[38] *Ibid.*, vol. 182, p. 228.

Nations Convention of 30 March 1931 concerning the Unification of Road Signals,[39] and with one exception, the old Convention was denounced by all contracting parties which became parties to the 1949 Protocol. Although in several instances the notices of denunciation were not given within the prescribed period of three months after the deposit of the instrument of ratification or accession, nevertheless, as a result of successive denunciations the number of States bound by the Convention was finally reduced to less than five and the Convention ceased to be in force. However, to further ensure, under this procedure, compliance with the obligation to denounce the old Convention, a provision may be inserted in the new Convention specifying that the notification of denunciation must be communicated to the Secretary-General at the same time as the instrument of ratification or accession, thus offering the ground on which the Secretary-General could decline to accept in definitive deposit an instrument of ratification or accession which is not accompanied by a notification of denunciation of the old Convention. Such provision may read as follows:

> In ratifying this Convention or in acceding to it, each State Party to the Convention regarding the Measurement of Vessels employed in Inland Navigation signed at Paris on 27 November 1925 shall denounce that Convention. The notification of denunciation shall be communicated to the Secretary-General of the United Nations at the time of deposit of the instrument of ratification of or accession to this Convention.

This procedure, which we hope will bring about the desired effect, seems preferable to that described in sub-paragraph (*c*) of your memorandum, inasmuch as the inclusion in the new Convention of a provision under which the instrument of ratification or accession would be considered as the equivalent of a notification of denunciation, may give rise to a question as to whether, actually, an amendment of the 1925 Convention is not involved in so far as concerns the procedure for denunciation laid down in article 14 of that Convention.

4. You also refer to the question of the effective date of denunciation for those States on behalf of which the notification of denunciation will be communicated to the Secretary-General before the required number of ratifications or accessions to bring into force the Convention has been deposited. Since the 1925 Convention, as you say, is obsolete and its provisions no longer observed, there seems to be little purpose in making special arrangements for witholding the effect of such denunciations until the new Convention comes into force. In fact, for reasons given in the preceding paragraph, it would be preferable to leave the procedure of denunciation to be governed by the provisions of article 14 of the old Convention. It may be noted that under a similar procedure used in the 1949 Protocol on Road Signs and Signals no exception was made as to the effective date of denunciations notified by the ratifying or acceding States prior to the date on which the required number of instruments to bring into force the Protocol was deposited. However, should you think that it is of importance to make such exception, a provision could be made in the new Convention to the effect that the Secretary-General would proceed with the formal deposit of the denunciations concerned on the date of receipt of the last instrument of ratification or accession required to bring into force the Convention.

5. Finally, in so far as concerns the provisions of articles 11 and 14 of the 1925 Convention which allow States non-members of the League of Nations to address their instruments of ratification or accession as well as the notifications of denunciation to the French Government, we checked the list of States parties to the Convention and found that all had been members of the League at the time of deposit of their instruments of ratification or accession. Therefore, no problem can arise in this connexion, since all of them would have to give their notification of denunciation to the Secretary-General.

8 May 1964

[39] League of Nations, *Treaty Series*, vol. CL, p. 247.

19. QUESTION WHETHER THE INSTRUMENTS OF RATIFICATION OF THE AMENDMENTS TO THE CHARTER PROVIDED IN ARTICLES 108 AND 109 THEREOF SHOULD BE DEPOSITED WITH THE SECRETARY-GENERAL OR WITH THE GOVERNMENT OF THE UNITED STATES OF AMERICA AS THE DEPOSITORY OF THE ORIGINAL TEXT OF THE CHARTER [40]

Note verbale to the Ministers for Foreign Affairs of all Member States

1. The Secretary-General of the United Nations presents his compliments to the Minister for Foreign Affairs... and has the honour to refer to General Assembly resolutions 1991 A and B (XVIII) of 17 December 1963 on the question of equitable representation on the Security Council and the Economic and Social Council. In these resolutions, the General Assembly decided to adopt, in accordance with Article 108 of the Charter of the United Nations, amendments to Articles 23, 27 and 61 of the Charter and to submit them for ratification by the States Members of the United Nations. It also called upon all Member States to ratify the amendments in accordance with their respective constitutional processes by 1 September 1965.

2. Neither the above-mentioned resolutions nor the Charter of the United Nations designate the authority with which the instruments of ratification of the amendments should be deposited. The Charter in its Article 110, paragraph 2, provides that the ratifications of the Charter shall be deposited with the Government of the United States of America and that this Government shall notify all the signatory States and the Secretary-General of each deposit. But there is no analogous provision relating to the ratifications of the amendments.

3. As a general rule it can be said that, unless a treaty provides otherwise, it is the responsibility of the depositary of the authentic text of the treaty to receive and communicate all instruments and notifications relating to that treaty. However, in respect of the Charter of the United Nations, precedents have been established under which certain functions of a depositary nature, for which no express provision was made in the Charter, have been performed by the Secretary-General. In particular, the Secretary-General acts as depositary of the instruments by which new Members accept the obligations contained in the Charter under its Article 4. He also acts as depositary of the declarations by which non-member States accept under Article 93 of the Charter the conditions to become parties to the Statute of the International Court of Justice.

4. In the circumstances, the Secretary-General considered that it might be appropriate for him to undertake the depositary functions in respect of the instruments of ratification of the amendments to the Charter provided in Articles 108 and 109. The Government of the United States of America, whom the Secretary-General consulted in its capacity as depositary of the Charter of the United Nations, concurred with that view.

5. Accordingly, the Secretary-General invites Member States to transmit to him for deposit the instruments of ratification of the amendments adopted by General Assembly resolutions 1991 A and B (XVIII) of 17 December 1963. The Secretary-General will notify all Member States of the deposit of each instrument of ratification.

13 April 1964

20. CERTAIN ASPECTS OF THE DEPOSITARY PRACTICE OF THE SECRETARY-GENERAL IN RESPECT OF CONSTITUENT INSTRUMENTS OF INTERNATIONAL ORGANIZATIONS [41]

Letter to the Legal Adviser to the Ministry for Foreign Affairs of a Member State

1. We are replying to your letter of 22 December 1963 in which, in connexion with your studying of the problem of the application of the law of treaties to the constituent

[40] For a survey of the depositary functions of the Secretary-General, see *Summary of the practice of the Secretary-General as depositary of multilateral agreements* (ST/LEG/7).

[41] *See* footnote 40 above.

instruments of international organizations, you ask us for certain information on the depositary practice of the Secretariat in respect of such instruments.

2. As regards the form of the declarations accepting the obligations of the Charter of the United Nations, the requirements under the practice of the Secretary-General are the same as in regard to the instruments of ratification of or accession to multilateral treaties in respect of which he acts as depositary. They have to be made in the form of a written document executed directly by the Head of State or Government or by the Minister for Foreign Affairs and if, in some instances, their execution is entrusted to the Permanent Representative to the United Nations, he is required to produce full powers emanating from one of these authorities specifically authorizing him to draw up the instrument and deposit it with the Secretary-General. The fact that the dates of deposit and registration of the declarations of some new Members, as given in the publication ST/LEG/3, Rev. 1, are posterior to the dates of decisions on their admission by the General Assembly—seemingly inconsistent with rule 135 of the rules of procedure of the General Assembly— is due to the insistence on the part of the Secretary-General that the declarations be presented in the proper form. In most of those instances, the declarations, while emanating from the proper authority, were addressed to the Secretary-General by cable, together with the application for membership, and although the General Assembly acted on the cabled application, the Secretary-General considered it necessary to request the governments concerned to transmit the declaration in the form of a written document bearing the signature of the competent authority and did not proceed with the registration until the requested declaration had been received. In a few other instances, the delay in registration was caused by the fact that certain governments wished to have the declarations they had submitted several years before their admission replaced by new declarations. Nevertheless, the effective date of membership in all these instances is the date of the decision of the General Assembly, in accordance with rule 139 of its rules of procedure.

3. As for the constitutions of specialized agencies, we have not yet had occasion to develop any special procedures. Full powers are required in the same circumstances as with other treaties for the formal acts (signature, acceptance or accession) by which States become parties. No difference is made between States with permanent missions and States without them. Our practice in regard to State succession in respect of constitutions of organizations is described in paragraphs 145-149 of document A/CN.4/150; it may be added to what is stated there that inquiries about succession have been made in regard to the 1962 International Coffee Agreement, whose relevant clause is cited in that document.

4. We have not been confronted by any declarations constituting possible reservations to constitutions since the Indian declaration with regard to the IMCO Convention and the adoption of General Assembly resolution 1452 (XIV) of 7 December 1959 on reservations to multilateral conventions.

5. We cannot recall any United Nations materials relating to invalidity, termination, severability, or suspension of constitutions of international organizations. As for revision, you may recall that the Constitution of the World Health Organization, in respect of which the Secretary-General acts as depositary, was amended by the Twelfth World Health Assembly on 28 May 1959. [42] In the resolution adopting the amendments, the World Health Assembly decided that "acceptance of the amendments to the Constitution set forth in this Resolution under Article 73 of the Constitution, shall be effected by the deposit of a formal instrument with the Secretary-General of the United Nations". Acting under the said resolution, the Secretary-General has followed the same practice as in regard to other instruments of ratification or accession.

24 March 1964

[42] United Nations, *Treaty Series*, vol. 377, p. 380.

21. Procedure for the correction of errors in one of the authentic texts of the 1962 International Coffee Agreement [43, 44]

Aide-mémoire to the Permanent Representative of a Member State

1. By a communication of 14 August 1963, the Deputy Permanent Representative of the Union of Soviet Socialist Republics to the United Nations informed the Secretary-General that the Ministry of Foreign Trade of the USSR, having found a number of errors in the authentic Russian text of the 1962 International Coffee Agreement, considered it necessary that these errors be rectified. He requested that appropriate measures be taken to that effect, in accordance with an enclosed list of corrections, and added that it was indispensable that the Russian text of the Agreement, which was to be presented for ratification, conform to the authentic English text. The list of corrections was thoroughly examined by the competent services of the Secretariat and all requested corrections, most of which were stylistic, were found to be justified, with the exception of two corrections which were found to depart somewhat in meaning from the other authentic texts. As a result of further correspondence with the Permanent Mission of the USSR, those two corrections were withdrawn from the list of corrections requested by the Government of the USSR.

2. Following the established practice, a circular letter C.N.2.1964. TREATIES-1 was addressed on 31 January 1964 to all the Governments which were represented at the United Nations Coffee Conference of 1962 and to all other Governments which had signed the Agreement or acceded thereto, informing them of the errors found in the authentic Russian text and of the Secretary-General's proposal to correct that text in the original copy of the Agreement, at the same time specifying the usual ninety-day time limit for the States to inform him of their attitude towards the suggested procedure. This period expired on 30 April 1964, by which time replies had been received from seven Governments. The first five Governments informed the Secretary-General that they accepted the suggested procedure or that they had no objection thereto. The sixth Government informed the Secretary-General on 20 February 1964 that the matter had been referred for consideration to the Ministry of Economy. The seventh Government informed the Secretary-General that it had found the suggested procedure unacceptable. The latter information was conveyed to the Secretary-General by its Permanent Representative to the United Nations in a letter dated 23 April 1964 and received on 27 April 1964.

3. It is stated in the Permanent Representative's letter that his Government finds the suggested procedure unacceptable on the ground that a legal procedure for amendment already exists under article 73 of the Agreement itself. In his Government's view, the changes in wording requested by the Government of the USSR would, in fact, represent an amendment of the Agreement and since article 73 establishes the only procedure for approving any amendment to the Agreement, no other procedure, such as that requested by the Government of the USSR, is valid. It is further stated in the said letter: (*a*) that even if the correction procedure were legally possible, it would not be simply a question of bringing the Russian text into accord with the English but also with the Spanish and Portuguese texts which, under the provisions of the final paragraph of the Agreement, are equally authentic; (*b*) that the Government of the USSR deposited its instrument of ratification by 31 December 1963, the time-limit specified in the Agreement, which gave it sufficient time to examine its text carefully and that had it been dissatisfied with the Russian text after such examination it could have refrained from ratifying the Agreement or from depositing the instrument of ratification. Finally, reference is made to article 72 of the Agreement, providing for the review of the Agreement by the International Coffee Council at a special session to

[43] United Nations, *Treaty Series*, vol. 469, p. 169.

[44] See footnote 40 above.

be held during the last six months of the coffee year ending 30 September 1965, presumably as an alternative method for correcting the Russian text of the Agreement.

4. In proposing, at the request of the Government of the USSR, the correction of the authentic Russian text of the 1962 International Coffee Agreement, the Secretary-General was following the long-established depositary practice in the matter. The correction procedure suggested in the circular letter concerned has been employed in the past, without any objection, either on the Secretary-General's own initiative or at the request of the interested Governments, when errors or inconsistencies between the authentic texts were discovered in multilateral treaties in respect of which he acts as depositary. [45] It will be relevant to note in this connexion that the International Law Commission, basing itself on the evidence of the practice in the matter, considered it desirable to include in the draft articles on the law of treaties, adopted at its fourteenth session, [46] the provisions dealing with the correction of errors in the texts of treaties (articles 26 and 27). In particular, in so far as concerns the correction of errors in the texts of treaties for which there is a depositary, the procedure provided in article 27 follows closely the Secretary-General's practice in the matter. In the commentary to that article, it is stated that in formulating the provisions set out in the article, the Commission has based itself upon the information contained in the *Summary of the practice of the Secretary-General as depositary of multilateral agreements* (ST/LEG/7). Thus, paragraph 1 of article 27 reads as follows:

> "1. (*a*) Where an error is discovered in the text of a treaty for which there is a depositary, after the text has been authenticated, the depositary shall bring the error to the attention of all the States which participated in the adoption of the text and to the attention of any other States which may subsequently have signed or accepted the treaty, and shall inform them that it is proposed to correct the error if within a specified time limit no objection shall have been raised to the making of the correction.
>
> (*b*) If on the expiry of the specified time limit no objection has been raised to the correction of the text, the depositary shall make the correction in the text of the treaty, initialling the correction in the margin, and shall draw up and execute a *procès-verbal* of the rectification of the text and transmit a copy of the *procès-verbal* to each of the States which are or may become parties to the treaty."

It is further provided in paragraph 3 of article 27 that the provisions of paragraph 1 shall likewise apply where two or more authentic texts of a treaty are not concordant and a proposal is made that the wording of one of the texts should be corrected.

5. The position of the Government that the existing amendment procedure in article 73 of the Agreement in question is the only valid one for effecting any amendments to the Agreement is of course indisputable. The correction procedure described in the preceding paragraph obviously cannot be used for the purpose of amending a treaty. Its application is limited to a situation where merely the correction of an error or rectification of discordant texts are involved, without in any way altering the substance or the meaning of a treaty as already accepted by the contracting parties. Thus, when an error in the text of a treaty is brought to the attention of the Secretary-General, the relevant text is carefully examined, the records of the Conference, if required, are thoroughly checked, and the other authentic texts of the treaty are verified. Only when the Secretary-General, on the basis of such a study, is entirely satisfied that the matter is simply one of correction of errors falling under the said procedure does he notify all interested States of the errors and propose, subject to

[45] A recent example is the correction of the Portuguese and French authentic texts of the 1962 International Coffee Agreement, where the identical procedure was followed without any objection (circular letters C.N.250.1962.TREATIES-1 of 23 October 1962 and C.N.20.1963.TREATIES-1 of 28 January 1963).

[46] *Official Records of the General Assembly, Seventeenth Session, Supplement No. 9* (A/5209 and Corr. 1 [English only]).

their consent, to make the necessary correction in the original copy of the treaty. The Government seems to take the view, however, that any change proposed in the text of a treaty, presumably after its entry into force, even a correction of an obvious typographical error, should be treated as an amendment which could only be made in accordance with the amendment procedure provided in the treaty. This view does not appear to find support either in practice or in the opinion of the International Law Commission. Neither of the two articles dealing with the correction of errors as formulated by the Commission contains any provisions to that effect. In fact, it appears from paragraph (4) of the commentary to article 26 of the said draft articles, which by reference applies also to article 27, that the use of the correction procedure after the entry into force of a treaty has been clearly envisaged by the Commission. The relevant comment reads as follows:

> "Since what is involved is merely the correction or rectification of an already accepted text, it seems clear that, unless the parties otherwise agree, the corrected or rectified text should be deemed to operate from the date when the original text came into force. Whether such a correction or rectification falls under the terms of article 2 of the General Assembly's regulations concerning the registration and publication of treaties and international agreements, when it takes the form merely of an alteration made to the text itself, is perhaps open to question. But it would clearly be in accordance with the spirit of that article that a correction to a treaty should be registered with the Secretary-General and this has therefore been provided for in paragraph 4 of the present article."

Article 2 of the regulations referred to in the above-mentioned comment provides for the registration of certified statements relating to a subsequent action in respect of a treaty already registered. It will be recalled in this connexion that under article 1 of the same regulations the registration of a treaty cannot be effected until it has come into force between two or more of the parties thereto.

6. In so far as the corrections themselves are concerned in the present instance, as mentioned earlier, before they were proposed by the Secretary-General they all had been found to be justified and by their nature falling under the correction procedure. Nevertheless, upon receipt of the communication from the Government, the competent services of the Secretariat were instructed to undertake once again the most careful study of the proposed corrections. Moreover, taking into consideration the well taken observation of the Permanent Representative referred to in paragraph 3 above under (*a*), the instructions were given that particular attention should be paid in that study to the verification of those corrections with all the authentic texts of the Agreement. [47] The outcome of this study has fully confirmed the previous finding. All the proposed corrections are stylistic changes, with one exception where the existing Russian text actually contains an error of substance altering the meaning of the relevant provision of the Agreement as adopted by the Conference and as expressed in all other authentic texts. It concerns paragraph (2) of article 38, which in the English and correspondingly in the French, Portuguese and Spanish versions reads as follows:

> "(2) The trade in coffee between a Member and any of its dependent territories which, in accordance with Article 4 or 5, is a separate Member of the Organization or a party to a Member group, shall however be treated, for the purposes of the Agreement, as the export of coffee",

[47] In referring to the necessity of bringing the Russian text fully into accord with the English text, the circular letter concerned merely followed the language used in the letter of the Government of the USSR requesting the correction. It may be noted that circular letter C.N.250.1962. TREATIES-1 of 23 October 1962 relating to the correction of the Portuguese text of the same Agreement requested by the Brazilian Government, similarly referred, in accordance with the request, to the necessity of bringing the Portuguese text fully into accord with the English, without mentioning other authentic texts.

whereas the existing Russian text of that paragraph in English translation reads as follows:

"(2) The trade in coffee between a Member and any of its dependent territories which, in accordance with Article 4 or 5, is a separate Member of the Organization or a party to a Member group, shall *not* however be treated, for the purposes of the Agreement, as the export of coffee."

7. As evidenced by the above-mentioned study, all changes proposed in the authentic Russian text are of the nature of corrections or rectifications, not in any sense altering the terms of the Agreement. Neither do they affect any of the other authentic texts. In fact, the correction of the Russian text is required in order exactly to bring it fully into accord with all the other authentic texts and thus with the terms of the Agreement itself, as adopted by the Conference. Consequently, bearing in mind the observations made in paragraphs 4 and 5 above, the correction procedure proposed in the present instance appears to be entirely justified. Although in view of the above, no further comment on the time element of proposing the correction appears to be necessary, it may be noted, with reference to the Permanent Representative's observation mentioned in paragraph 3 above under (*b*), that the USSR Government's request was made less than four months after the distribution of certified true copies of the Agreement incorporating extensive corrections made in the authentic Portuguese and French texts, a time limit that does not seem unreasonably long for examining the text of a document of this nature.

8. The requested corrections could equally be made, of course, through the use of the normal amendment procedure set forth in article 73 of the Agreement. It is also conceivable, as suggested in the Permanent Representative's letter, that article 72 providing for the review of the Agreement might serve this purpose. The choice of any of the available methods seems to be a matter mainly of practical convenience and in the present instance, the correction procedure already proposed would appear to be the most expeditious one. It seems doubtful whether the nature of the proposed corrections would justify the time and effort-consuming process involved in instituting the amendment procedure provided in the Agreement.

9. In conclusion, it is hoped that in the light of the considerations set out in this *aide-mémoire*, the Government may be agreeable to reconsider its position in the matter and wish to withdraw its objection to the procedure for the correction of the authentic Russian text of the 1962 International Coffee Agreement. [48]

3 July 1964

22. PLANT PROTECTION AGREEMENT OF 27 FEBRUARY 1956 FOR THE SOUTH EAST ASIA AND PACIFIC REGION [49]—PARTICIPATION OF THE NETHERLANDS WITH RESPECT TO WEST NEW GUINEA—PROCEDURE FOR THE TERMINATION OF THE AGREEMENT IN RESPECT OF THE NETHERLANDS [50]

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

1. We are writing in reply to your letter of 25 September 1964 relating to the position of the Netherlands in regard to the Plant Protection Agreement for the South East Asia and Pacific Region, done at Rome on 27 February 1956, to which the Netherlands became a party with respect to the Netherlands New Guinea (West New Guinea), in accordance with article X of the Agreement. We have noted that participation in the Agreement, in accord-

[48] By a letter of 29 October 1964, the Government informed the Secretary-General that it withdrew its objections to the procedure suggested by the Secretary-General for the correction of certain errors in the Russian text of the 1962 International Coffee Agreement.

[49] United Nations, *Treaty Series*, vol. 247, p. 400.

[50] See footnote 40 above.

ance with article II, carries with it membership in the Plant Protection Committee for the South East Asia and Pacific Region and that the Netherlands Government, having relinquished its rights to the Netherlands New Guinea and having thus ceased to be responsible for its international relations, does no longer fulfil the requirements for such membership. In the light of these developments you inquire what would be the proper procedure to follow in regard to the termination of the Agreement in respect of the Netherlands and, in particular, whether a formal denunciation or any other form of notification would be required on the part of the Government of the Netherlands.

2. Reference may be made in this regard to two precedents in our depositary practice, one relating to the 1956 International Agreement on Olive Oil, as amended, [51] where the change in the status of Algeria was involved, the other relating to the Convention of 6 March 1948 on the Inter-Governmental Maritime Consultative Organization, [52] where the associate membership of Sarawak and North Borneo in that Organization was involved after those territories had federated with the Federation of Malaya. In the first instance, the Government of France, by a communication of 16 January 1963, requested the Secretary-General to take note, in his capacity of depositary of the International Agreement on Olive Oil, of the fact that France had recognized the independence of Algeria by the declaration of 3 July 1962 and that the obligations which it assumed under the said Agreement were accordingly modified. In the second instance, the Government of the United Kingdom, in a communication of 6 August 1964, similarly requested the Secretary-General, in his capacity of depositary of the Convention concerned, to take note that, as a result of the Agreement relating to Malaysia signed at London on 9 July 1963, [53] and legislation enacted in accordance with that Agreement, Sarawak and North Borneo federated with the existing States of the Federation of Malaya, and that, therefore, the Government of the United Kingdom was no longer responsible for the international relations of Sarawak and North Borneo. Both communications were notified by the Secretary-General to all interested States and were registered *ex officio* by the Secretariat. Inasmuch as there are no provisions, either in the Agreement or in the Convention, applicable to communications of this nature, the Secretary-General refrained from specifying any effective date in his notifications.

3. It seems that the procedure described above could also be followed in the case referred to in your letter, considering that the circumstances in which a change occurred in the obligations assumed by the Governments concerned under the respective instruments appear to be essentially similar. The letter from the Netherlands Embassy, [54] a copy of which is enclosed in your letter, could be used for that purpose, though perhaps a more formal communication might be preferable, giving a specific reference to the agreements providing for the transfer of the administration of West New Guinea, namely, the Agreement between Indonesia and the Netherlands concerning West New Guinea [55] and the Understandings between the United Nations and Indonesia and the Netherlands relating to the said Agreement, [56] all signed at the Headquarters of the United Nations, New York, on 15 August 1962.

23 November 1964

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[51] United Nations, *Treaty Series*, vol. 336, p. 177.

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

[53] Cmnd. 2094 (1963).

[54] Not reproduced.

[55] United Nations, *Treaty Series*, vol. 437, p. 273.

[56] *Ibid.*, p. 292.

23. Principles governing recruitment to the Secretariat of the United Nations—Interpretation of Article 100 and Article 101, paragraph 1, of the Charter

Note to the Director of Personnel
Articles 100 and 101(1) of the Charter

1. Articles 100 and 101(1) of the Charter are the primary texts which govern recruitment to the Secretariat of the United Nations. Article 101(1) provides that:

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

This Article thus vests the power of appointment to the Secretariat exclusively in the Secretary-General.

2. Article 100 establishes the independence of the Secretary-General and the staff, and the concomitant obligations this places upon Member Governments, in the following terms:

> "1. In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.
>
> "2. Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities."

The provisions of this Article *inter alia* reinforce the Secretary-General's independence under Article 101(1) in appointing the staff. Were such appointments, for instance, to be necessarily subject to governmental approval, it could well be argued that provisions of Article 100 have been violated, in the sense that the Secretary-General has received instructions from authorities external to the Organization. Furthermore, by attempting to exercise a veto over the appointment of certain of its nationals to the Secretariat, a Member State might well be considered to be in violation of its duty not to influence the Secretary-General in the discharge of his responsibilities. There are many examples in practice, extending over the whole history of the Organization, which support, either directly or by strong implication, the exclusive responsibility of the Secretary-General in appointing the staff. Those that follow are only a selection of such examples, and should not be considered as exclusive.

Proceedings of the Preparatory Commission of the United Nations

3. The first full-scale discussion of Articles 100 and 101(1) of the Charter after their adoption, and with specific reference to recruitment to the Secretariat, took place in the Preparatory Commission of the United Nations. Yugoslavia proposed (PC/AB/54) to the Commission that the appointment of the members of the Secretariat should be subject to the consent of the government of the Member State of which the candidate was a national.

4. The representative of Yugoslavia explained that his amendment was designed to assist the Secretary-General in building up a staff which was "adequately representative" of all the governments comprising the United Nations and, at the same time, acceptable to them. However, he supported his proposal by the argument that the governments, in many cases, were in the best position to assess the qualifications and capacities of prospective candidates. The United Nations, he said, was an inter-governmental organization and the persons appointed to the Secretariat must command the confidence of their governments if they were to be of real value. Once the officials were appointed, the exclusively international character of their responsibilities would naturally be respected and no government would seek to influence them in the discharge of those responsibilities.

5. A majority of the members of the Preparatory Commission considered that the Yugoslav proposal would threaten the independence of the Secretariat. While recognizing that the Secretary-General would often require information regarding candidates from government or private bodies, they believed that "it would be extremely undesirable to write into the text anything which would give national governments particular rights in this respect, or permit political pressure on the Secretary-General." The proposal was opposed on the grounds "that it impinged on the exclusive responsibility of the Secretary-General under Article 101 of the Charter for the appointment of his staff, that it would threaten the freedom, independence and truly international character of the Secretariat and that it would defeat the spirit as well as infringe the letter of Article 100 of the Charter." The proposal by Yugoslavia was defeated by a large majority. [57]

6. The recommendation of the Preparatory Commission affirming the exclusive responsibility of the Secretary-General for appointment and removal of staff members was later adopted by the General Assembly at the first part of its first session in resolution 13(1) of 13 February 1946.

Proceedings of the seventh session of the General Assembly

7. The question of the exclusive responsibility of the Secretary-General for the appointment of staff appears to have next arisen, in a crucial form, in connexion with charges and investigations by United States authorities relating to the loyalty of United Nations staff members in the early part of the last decade. To advise him on the action he should take to meet the situation, the Secretary-General, on 22 October 1952, appointed an international commission of jurists. The Commission handed down an opinion on 29 November 1952, which deals *inter alia* with responsibility for the appointment of the staff. In section III of the opinion, the Commission referred to Article 100, paragraphs 1 and 2, of the Charter, and expressed the view that:

> "it would be contrary to the spirit, and indeed the letter, of these two Articles if the Secretary-General were to abrogate his responsibility in the selection or retention of staff by submitting to the dictation or pressure of any individual Member State or any outside body."

On this particular point the Commission formulated the following conclusion:

> "The independence of the Secretary-General and his sole responsibility to the General Assembly of the United Nations for the selection and retention of staff should be recognized by all Member nations and if necessary asserted, should it ever be challenged. If the position of the Secretary-General in this respect were to be weakened, the whole conception of the responsibility of the staff of the United Nations would be impaired and the essential task of building up and maintaining an international civil service frustrated to the lasting detriment of the work of the United Nations." [58]

8. That the Secretary-General shared the opinion of the Commission of Jurists on the point just outlined is clear from a report of 30 January 1953, on personnel policy, which he submitted to the General Assembly at its seventh session. [59] The opinion of the Commission is annexed to this report. In his report the Secretary-General outlined the decision of the Preparatory Commission, mentioned in paragraph 5 above, as regards his exclusive responsibility for the appointment of the staff. He continued:

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[57] United Nations Preparatory Commission, Committee 6: Administrative and Budgetary, 22nd and 23rd meetings, 19 and 20 December 1945, Summary Record of Meetings, pp. 50-51.

[58] *Official Records of the General Assembly, Seventh Session, Annexes*, agenda item 75, document A/2364, Annex III, p. 27.

[59] *Ibid.*, document A/2364.

"6. The principle then approved has been followed from the beginning amid growing tensions which have arisen between Members of the United Nations —tensions which have resulted in increasing concern for security on the part of the Member States. This concern has been particularly manifest in the United States of America, the principal host country. In these circumstances, the Secretary-General has endeavoured to provide reasonable assurance with regard to the security of host countries and other Members of the United Nations, while safeguarding the basic requirements of an independent international secretariat pursuant to Articles 100 and 101 of the Charter.

"7. Accordingly, it has always been the policy of the Secretary-General to uphold the international character of the Secretariat, and to resist all pressures from whatever source which could have the effect of undermining its independence as defined in the Charter...

"8. The United Nations does not—and obviously cannot—have an investigation agency comparable to those at the disposal of national governments. Therefore, the United Nations must depend upon the governments of members for assistance in checking the character and record of staff members. The Secretary-General has had this assistance from many governments, but he has always reserved, and must always reserve, to himself the final decision on the basis of all the facts."

9. In paragraph 20 of the same report, the Secretary-General declared that:

"...Within the guiding lines fixed by the General Assembly, the Secretary-General alone selects Secretariat staff... This principle of independent authority and responsibility was recommended after extended debate in the Preparatory Commission, was reaffirmed by the General Assembly during the first session and has been repeatedly recognized in later discussions of the Fifth Committee."

10. By its resolution 708(VII) of 1 April 1953, the General Assembly endorsed the views of the Secretary-General as set out above. The preamble to the resolution recalls Article 100, paragraphs 1 and 2, and Article 101, paragraphs 1 and 3, of the Charter, and refers to the Secretary-General's report. Operative paragraph 1 provides that the Assembly:

"*Expresses its confidence* that the Secretary-General will conduct personnel policy with these considerations in mind."

Proceedings of the eighth session of the General Assembly

11. Operative paragraph 2 of the General Assembly resolution 708(VII) requested the Secretary-General to report to the eighth session on the progress made in the conduct and development of personnel policy. In this report, the Secretary-General once more affirmed his independence of governments in matters relating to the administration of the staff. He stated that:

"The principles of the Charter relating to the Secretariat form the foundation for personnel policy... these principles require recognition of the independent authority and responsibility of the Secretary-General for the administration of the staff, in accordance with the Charter and the Regulations adopted by the General Assembly." [60]

Proceedings of the twelfth session of the General Assembly

12. A further example of a reaffirmation by the Secretary-General of his right to appoint staff members free of dictation by governments appears in a report he submitted to the General Assembly at its twelfth session containing a review of the Staff Regulations and of the principles and standards progressively applied thereto. In this report he enunciates the following two principles:

[60] *Official Records of the General Assembly, Eighth Session, Annexes*, agenda item 51, documen A/2533, para. 15.

"(*a*) The Secretary-General, in deciding whether to employ or terminate a staff member, must have sufficient information on which to make an independent decision; he cannot act on charges unsupported by satisfactory evidence. This principle derives directly from the Secretary-General's responsibilities and prerogatives under the Charter with respect to the appointment and termination of the staff, and has been recognized by the General Assembly;

"(*b*) The standards to be applied by the United Nations are those of the Charter, and the tests to be applied in regard to these standards are not necessarily the same as those which might be applied by a Member State in passing on questions of suitability for government employment. This principle is also based on the Charter and decisions of the General Assembly." [61]

Proceedings of the sixteenth session of the General Assembly

13. The consistent policy outlined in the foregoing sections of this note regarding the Secretary-General's independence in the matter of recruitment and administration of the staff received further confirmation, at least by strong implication, at the sixteenth session of the General Assembly. At that session the Assembly had before it the report of the Committee of Experts on the Review of the Activities and Organization of the Secretariat. This Committee had been appointed by the Secretary-General pursuant to General Assembly resolution 1446 (XIV). In its report, the Committee reaffirmed the Charter principles regarding the independence of the Secretariat, a necessary pre-condition of which is the right of the Secretary-General to appoint the staff independently of governments. In chapter I of the report, for example, the Committee states that it has:

"proceeded throughout on the assumption that its recommendations must be in harmony with the provisions of the Charter which envisage a Secretariat organized and employed in such a way as to achieve independence, efficiency and wide geographical distribution." [62]

In chapter II of its report, the Committee refers to Article 101(1) of the Charter and further states that:

"The Charter provides for an international Secretariat. Article 100 explicitly states that 'in the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization' and that they 'shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.' Their obligations are reaffirmed in the Staff Rules and Regulations. The Charter, the report of the Preparatory Commission and the Staff Rules and Regulations emphasize the principle that for the duration of their appointments, the Secretary-General and his staff are not the servants of the States of which they are nationals, but the servants only of the United Nations." [63]

14. In his observations on the above report and various proposals for the reorganization of the Secretariat, the Secretary-General stated as follows:

"7. These comments are made on the basis of the present Charter provisions governing the Secretariat. It may be recalled that Article 100 of the Charter provide, for an international civil service with one chief administrative officer (Article 97). Thus, the Secretary-General does not take up for consideration proposals which would eithers

[61] *Ibid., Twelfth Session, Annexes*, agenda item 51, document A/C.5/726, para. 15.

[62] *Ibid., Sixteenth Session, Annexes*, agenda item 61, document A/4776, para. 6.

[63] *Ibid.*, para. 15.

directly or indirectly, infringe upon the responsibilities of the Secretary-General, as established in the Charter, or, contrary to the Charter, introduce the notion that members of the Secretariat are representatives, in the work of the Organization, of the Governments of their home countries or of the ideologies or policies to which these countries may be considered to adhere. Such proposals would assume a fundamental change in the character of the Organization, requiring a Charter revision." [64]

Summary of conclusions regarding the principles governing recruitment to the United Nations

15. From the foregoing account of Articles 100 and 101(1) of the Charter, and their application in practice, it clearly emerges that the right of appointment to the Secretariat rests exclusively in the Secretary-General and that governments may not exercise a veto over employment by the Organization of candidates of their nationality. This, however, does not preclude governments from submitting information on candidates of their nationality to the Secretary-General, provided that it is clearly understood that it is left to the Secretary-General to assess the weight to be attached to such information and to arrive at an independent decision on whether or not to appoint the candidate concerned. Furthermore, the Secretary-General is under no legal obligation to seek information from governments on candidates, and it is a matter purely for his discretion to determine when such information should be requested as a matter of policy.

13 January 1964

24. Oath of secrecy required from United Nations technical assistance experts by the Government of a Member State

Note verbale to the Permanent Representative of a Member State

1. ...The Permanent Representative intimates in his note that his Government was contemplating to request, in the near future, that all technical assistance personnel in the country whose duties involve access to classified materials subscribe to an oath of secrecy along the lines currently taken by national and foreign officials occupying senior positions in the Government service. According to a specimen transmitted with the note, each technical assistance expert would undertake not to communicate or reveal, either directly or indirectly, except to a person to whom he is authorized in the course of his duties to communicate it, any code word, sketch, plan, model, article, note, document, or information which has been entrusted to him in the course of his assignment under a technical assistance programme or which he may obtain by virtue of his assignment. The expert would also undertake to comply with the provisions of the Official Secrets Act.

2. The Secretary-General of the United Nations appreciates the courtesy of the Permanent Representative in asking for his comments on the matter and should like to avail himself of the opportunity to present certain observations for the consideration of the Permanent Representative and his Government. After careful study, the Secretary-General has come to the conclusion that, in view of their international status under Article 100 of the Charter of the United Nations and similar provisions in the constitutional instruments of the specialized agencies, the oath is unsuitable for officials, including technical assistance experts, of the United Nations or of the specialized agencies. The oath would intrude on the relationship between the expert and his organization which must direct and supervise his work as an international official.

[64] *Ibid.*, document A/4794, para. 7.

3. Moreover, the reference to the Official Secrets Act might be treated as an advance waiver of the privileges and immunities accorded by the Convention on the Privileges and Immunities of the United Nations,[65] particularly the immunity from legal process under section 18 (*a*) thereof. While the Convention, to which the Permanent Representative's country is a party, envisages in its section 20 that the Secretary-General would waive the immunity of any official "in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations", there is no legal basis to make such a waiver in advance. The Secretary-General would no more wish to do so than a Minister of Foreign Affairs would wish to waive immunities in advance with respect to his diplomatic officers stationed broad.

4. The Secretary-General wishes, however, to assure the Permanent Representative that the technical assistance experts, as staff members of the Organization, are already under an obligation not to divulge information known to them by reason of their official position, except in the course of their duties or by authorization of the Secretary-General. The Staff Regulations of the United Nations provide in regulation 1.5 as follows:

> "Staff members shall exercise the utmost discretion in regard to all matters of official business. They shall not communicate to any person any information known to them by reason of their official position which has not been made public, except in the course of their duties or by authorization of the Secretary-General. Nor shall they at any time use such information to private advantage. These obligations do not cease upon separation from the Secretariat." (The specialized agencies have a similar regulation.)

If the Government desires, the Secretary-General will draw the special attention of the United Nations technical assistance experts serving in the Permanent Representative's country to this regulation with particular reference to the subject matter of the Official Secrets Act.

5. In the light of the foregoing, the Secretary-General feels bound to maintain the position that the technical assistance experts of the United Nations and of the specialized agencies working in the Permanent Representative's country be not required to sign an oath of secrecy such as that under reference. The Secretary-General trusts that the Government will find that the existing obligations of officials under the Charter and the Staff Regulations satisfactorily meet the situation with which the Government is concerned.

30 December 1964

25. Status of military observers serving with a United Nations mission

I

Aide-Mémoire to the Permanent Representatives of various Member States

1. ...the Secretary-General considers that it may be useful to take this opportunity briefly to review the status of United Nations military observers and the principles which must guide his conduct.

2. The principle of *persona non grata* which applies with respect to diplomats accredited to a government has no application with respect to United Nations staff or military observers who are not accredited to a government but must serve as independent and impartial international officials responsible to the United Nations. The United Nations military observers are recruited by the Secretary-General from member countries of the United Nations. They

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

are officers who are seconded by their governments for service with the United Nations. They are responsible directly to the Head of the United Nations mission and through him to the Secretary-General, who is in turn responsible to their governments for them.

3. These observers are carefully selected. At times their work is hazardous; indeed, some have given their lives in this service. As military men they would expect to be held strictly to account for any disobedience, disloyalty or dereliction of duty, and the Secretary-General would certainly insist that any observer guilty of such action should be severely dealt with. However, if some States were in a position to bring about the automatic recall of a military observer, the other governments concerned would be placed in an invidious position and the functioning of the mission would be rendered ineffectual. Therefore, in order to fulfil the obligations and responsibilities of the Secretary-General in such matters, and particularly to ensure the independence of action of United Nations military observers, the Head of the mission and the Secretary-General must have the right of decision in these cases following careful investigation of all relevant facts. Since they must themselves make the decision, any information which is supplied to them by governments must be in sufficient detail to enable them to make their own judgement in the matter. Any other course would be contrary to the principles of the Charter of the United Nations and would seriously interfere with the performance of the functions of the Organization. The Secretary-General is certain that the governments repose confidence in the Head of the mission and in himself to act impartially in this regard. He would appreciate assurances that procedures consistent with the foregoing principles will be followed and that the competence of the Head of the mission and of himself in matters of this kind will be respected.

23 January 1964

II

Letter to the Permanent Representative of a Member State

1. We have the honour to refer to your letter of 10 June 1964 to the Secretary-General and to the attached aide-mémoire from your Government concerning the status of United Nations observers.

2. In the light of your Government's aide-mémoire we would like to present further comments in addition to those contained in the Secretary-General's aide-mémoire of 23 January 1964.[66] The Government refers to the right of a State to expel aliens from its territory. Without entering into a discussion of the principles of international law generally applicable to aliens having a private status, it is necessary to point out that United Nations officials and military observers serving on a United Nations mission are not in a position comparable to that of such private individuals. Your country, by becoming a Member of the United Nations, assumed certain obligations under the Charter vis-à-vis the Organization. Among these is the undertaking to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and the obligation to accord to the Organization such privileges and immunities as are necessary for the fulfilment of its purposes and to officials such privileges and immunities as are necessary for the independent exercise of their functions.

3. It of course is not denied that a United Nations official or military observer, by abusing his privileges, may place himself in a position where a government may demand his withdrawal. But such demand can only be made for sufficient cause and the facts must be placed at the disposal of the Secretary-General and of the Head of the mission, in order that an independent decision can be made by the Organization.

[66] See I above.

4. We must therefore reiterate the principles set forth in the Secretary-General's aide-mémoire of 23 January 1964. We are certain that you will appreciate that any other course would impair the international status of the military observers which is essential for the independent exercise of their functions in connexion with the Organization.

We would appreciate your bringing these comments to the attention of your Government.

21 October 1964

26. IMMUNITY FROM LEGAL PROCESS OF UNITED NATIONS OFFICIALS ACTING IN THEIR OFFICIAL CAPACITY—SECTIONS 18 (*a*), 20 AND 29 (*b*) OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS [67]

Internal memorandum

With reference to the inquiry concerning section 18 (*a*) of the Convention of the Privileges and Immunities of the United Nations, we should like to make the following comment:

1. The immunity from legal process in respect to official acts provided under section 18 (*a*) of the Convention applies vis-à-vis the home country of an official as well as vis-à-vis the country in which he is serving. Therefore, a question prior to the determination of what jurisdiction may try the case is whether the Secretary-General should waive the immunity of an official in a particular case.

2. Section 20 of the Convention provides that privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General has the right and duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. If the Secretary-General, in a particular case, decides that immunity would impede the course of justice and could be waived without prejudice to the interests of the Organization, then he will waive under this section.

3. Normally, in the case of automobile accidents, where a satisfactory settlement is not negotiated, a waiver will be made with respect to the civil claim and a civil action can be tried in the country where the accident occurred or where the staff member may be located. As an alternative, arrangements could be made for arbitration under section 29 (*b*). Such arrangements under section 29 (*b*) are usually made on an *ad hoc* basis permitting the choice of the most appropriate method for each case. In the past, there have been few criminal cases in which the question of waiver arose and the Secretary-General's decision under section 20 has been taken in each case in the light of the particular circumstances.

4. Generally speaking, the same provisions apply to the specialized agencies, but we are not in a position to furnish detailed information with respect to their practice.

3 November 1964

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

27. PRIVILEGES AND IMMUNITIES OF UNITED NATIONS OFFICIALS WHO ARE NATIONALS OR RESIDENTS OF THE LOCAL STATE—PRIVILEGES AND IMMUNITIES OF CLERICAL STAFF—INTERPRETATION OF SECTION 17 OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS [68]

Letter to the Permanent Representative of a Member State

1. We have the honour to refer to the status of certain staff members of the United Nations serving in the office of the Representative of the United Nations Technical Assistance Board in your country and to request your assistance in the matter.

2. According to information from the Representative of the United Nations Technical Assistance Board, the tax authorities of your country have taken the position that members of the staff in the office of the Representative who are nationals or residents of your country are not entitled to exemption from taxation in your country on their United Nations salaries. They have also taken the position that the immunity does not extend to clerical staff, regardless of nationality. The tax authorities recognize that under section 18 (*b*) of the Convention on the Privileges and Immunities of the United Nations, officials of the United Nations shall "be exempt from taxation on the salaries and emoluments paid to them by the United Nations". They, however, expressed doubts that nationals and residents of the country, or clerical staff, could be considered as "officials of the United Nations".

3. The Convention on the Privileges and Immunities of the United Nations provides for a procedure for the definition of the term "officials of the United Nations", and, by the definition established by that procedure, no distinction is maintained among the staff members of the United Nations as to nationality or residence. All members of the staff of the United Nations, with the exception of those who are recruited locally *and* are assigned to hourly rates, are officials of the United Nations and enjoy the same privileges and immunities provided in the Convention, including the right to exemption from income taxation. We shall explain the genesis of this legal position in greater detail as follows:

(*i*) The Convention, in section 17 (article V), provides:

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

(*ii*) In accordance with this provision, the Secretary-General submitted a proposal to the General Assembly, at its first session in 1946, that

> "In accordance with section 17 of article V of the Convention on the Privileges and Immunities of the United Nations, ...the categories of officials to which the provisions of articles V and VII shall apply should include all members of the staff with the exception of those who are recruited locally and who are assigned to hourly rates." [69]

(*iii*) After consideration of this proposal of the Secretary-General, the General Assembly adopted resolution 76 (I) of 7 December 1946. Entitled "Privileges and Immunities of the Staff of the Secretariat of the United Nations", the resolution

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

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

[69] Documents A/116 and A/116/Add. 1.

(*iv*) In pursuance of the provision in section 17 of the Convention that "The names of the officials included in these categories shall from time to time be made known to the Governments of Members", the Secretary-General transmits once a year a "List of Officials of the United Nations" to all Member Governments through their permanent representative at the United Nations. While omissions may on occasion be found in these annual lists, they are intended to include all staff members who fall within the purview of the definition established by the General Assembly.

4. From the above, it will be seen that, under the decision of the General Assembly taken in pursuance of the Convention on the Privileges and Immunities of the United Nations, all staff members in the office of the Representative of the United Nations Technical Assistance Board in your country, irrespective of nationality or residence, are in the status of "officials of the United Nations" and, as such, are entitled to all privileges and immunities appertaining to such officials. The only exception to this rule is in the case of staff members "who are recruited locally and are assigned to hourly rates." None of the staff members in the said office of the Representative fulfil these conditions, the clerical staff not being assigned to hourly rates. All of them, therefore, are entitled to income tax exemption, including those who are nationals or residents of your country.

5. We hope that the foregoing clearly explains the legal position and that you might be good enough to urge your Government to accord all staff members of the office of the Representative of the United Nations Technical Assistance Board, including those who are nationals or residents of your country, exemption from income taxation on the salaries and emoluments paid to them by the United Nations, in accordance with the terms of the Convention and the resolution of the General Assembly referred to above.

3 July 1964

28. Sale on the local market of goods originally imported duty-free by United Nations officials

Letter to the Legal Adviser of a United Nations mission

1. We refer to your detailed letter of 1 October 1964 concerning the duty-free importation and sale on the local market of personal effects belonging to international staff members.

2. Questions involving the sale of goods originally imported duty-free have always presented one of the more difficult problems, since, even for property of the United Nations itself, the Convention on the Privileges and Immunities of the United Nations [70] gives no special privilege in this connexion. Sale of such goods can only be made under conditions agreed with the Government of the country concerned.

3. However, it can never have been the intention of the Convention on the Privileges and Immunities of the United Nations or of the Status Agreement with the host country that conditions should be more severe than those for a private person in the country. Of course, a staff member should not place himself in a position of appearing to deal in imported articles even where he pays the customs, but where as in the present case there was a legitimate explanation for the importation of the article, it seems to us that you were perfectly correct in supporting the staff member's case with the host Government.

4. The new procedure requested by the host Government, under which individual authorization of each sale would be required without reference to any objective standards,

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

is not the type of condition which was envisaged. Such condition has not been imposed in any other country. The conditions which have been agreed are those necessary to ensure that taxes are paid and otherwise that relevant laws and regulations are applied. Such conditions should not put the staff member in a position less favourable than that of a private person, nor should they be such as to negate the privilege of importing personal effects which is accorded by the Convention on the Privileges and Immunities of the United Nations and by the Status Agreement.

5. While conditions for sale must be agreed with the host country, it was not intended that such conditions should be unilaterally and arbitrarily established but that they should be negotiated with the purpose of protecting the legitimate interests of both parties, that is, to ensure the host country against the abuse of import privileges and to ensure the United Nations and its staff effective use of such privileges for the purposes that they were intended.

4 November 1964

29. JURIDICAL STANDING OF THE SPECIALIZED AGENCIES WITH REGARD TO RESERVATIONS TO THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE SPECIALIZED AGENCIES [71]—REQUIREMENT OF THEIR CONSENT TO SUCH RESERVATIONS

Aide-Mémoire to the Permanent Representative of a Member State

1. A brief survey of the form and structure of the Convention on the Privileges and Immunities of the Specialized Agencies leaves little doubt that (*i*) the specialized agencies themselves have the necessary juridical standing to object to reservations, (*ii*) their consent is necessary before a reservation altering their own privileges and immunities under the Convention could become effective, and (*iii*) it has been the policy of the agencies not to accept reservations which would have the effect of introducing elements of difference in the treatment accorded by States to the specialized agencies under the Convention in matters of general concern.

2. The Convention on the Privileges and Immunities of the Specialized Agencies combines the characteristics both of a multilateral as well as a bilateral convention. It is multilateral as the States in acceding to the Convention exchange with each other their undertakings to accord specific privileges and immunities to the specialized agencies in return for each other party's having accepted a similar obligation. At the same time, the legal relationships set up by the Convention also comprise sets of bilateral undertakings exchanged between States and specialized agencies. This is evident from the methods by which (*a*) States accede to the Convention, and (*b*) agencies accept the Convention's provisions.

3. To illustrate, accession by a State is effected by deposit with the Secretary-General of the United Nations of an instrument of accession (section 41). Furthermore, to create the link between the two sets of parties—member States and specialized agencies—each State party to the Convention indicates in its instrument of accession "the ... agencies in respect of which it undertakes to apply the provisions of this Convention" (section 43).

4. In connexion with the point (*b*), it is worth noting that specialized agencies are by no means the mere passive beneficiaries of the Convention. It was precisely to further their functions that this Convention was adopted. Firstly, by its resolution 179 (II) of 21 November 1947 the General Assembly of the United Nations submitted the text of the Convention "to the specialized agencies for acceptance and to every Member of the United Nations and to every other State member of one or more of the specialized agencies for ac-

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

cession". Second, to accomplish this acceptance by the agencies, the Convention provided that its terms could be adapted to the requirements of each individual agency by means of an annex, the final text of which was left to each agency to approve, in accordance with its constitutional procedure (sections 1 (*iii*), 36). Third, each specialized agency was, in addition, required to transmit to the Secretary-General of the United Nations a notification accepting the standard clauses as modified by its annex and expressly undertaking to give effect to all those sections placing obligations on the agencies (section 37).

5. The legal effect of this procedure is evident from the Convention itself. It states, in section 44, that it enters into force in respect of each State party thereto and any given agency when the dual undertakings have been submitted by each side. (It might be noted, in this connexion, that the French text states: "La présente Convention entrera en vigueur *entre* tout Etat partie... et une institution spécialisée..."). Accordingly, each specialized agency enjoys the same degree of legal interest in the terms and operation of the Convention as does a State party thereto, irrespective of the question whether or not each agency may be described as a "party" to the Convention in the strict legal sense.

6. It follows that each specialized agency has a direct interest in any proposal by an acceding State to alter in any way the terms of the Convention. Practice, as outlined in the remainder of this aide-mémoire, has established that States parties have recognized that this interest gives rise to the right of each agency to require that a reservation conflicting with the purposes of the Convention and which can result in unilaterally modifying that agency's own privileges and immunities, be not made effective unless and until it consents thereto.

7. The general policy of the agencies towards reservations to the Convention has been dictated by their understanding of the basic purposes of the Convention. In view of the nature and relationships of the specialized agencies as part of the United Nations family, the General Assembly of the United Nations recognized at an early stage the need for the unification of their privileges and immunities (*see* General Assembly resolution 22 D (I) of 13 February 1946) and instructed the Secretary-General to open negotiations for this purpose. Subsequently, on 21 November 1947 the General Assembly adopted the Convention on the Privileges and Immunities of the Specialized Agencies (*see* resolution 179 (II)). This latter resolution explicitly stated the dual purpose for the adoption of this Convention, on the one hand of effecting the "unification as far as possible of the privileges and immunities enjoyed by the United Nations and by the specialized agencies" and on the other hand of establishing in a single instrument the privileges and immunities which had been recognized as "essential for an efficient exercise of their respective functions".

8. Based on this premise, it is not surprising to note that the history of the Convention has consistently demonstrated a strong opposition of the specialized agencies to reservations in general. As a consequence of this attitude, the first World Meteorological Congress (Paris, 1951) provided in the General Regulations of WMO that:

Regulation 15

"Whenever a proposal is made for holding a session of any constituent body elsewhere than at the location of the Secretariat, such proposal shall be considered only if the member on whose territory it is proposed to hold such session:

(*a*) Has ratified *without reservation* the Convention on the Privileges and Immunities of the Specialized Agencies including the annex relating to the Organization; ..." (Italics added)

9. A brief review of the prior cases wherein member States' instruments of accession to the Convention in question contained reservations would be helpful in understanding the position taken by specialized agencies in this matter so far. The cases in point are those concerning Egypt, Austria, Belgium and the Federal Republic of Germany. In each case, on the representation made by the Secretery-General of the United Nations, the member State concerned withdrew the reservation.

10. On 7 December 1951, Egypt's instrument of accession was accompanied by reservations to section 7 concerning the transfer of gold and section 12 concerning the use of code and diplomatic pouches. Following notification of these reservations by the Secretary-General of the United Nations to the Executive Heads of the specialized agencies and to all interested States, several specialized agencies objected to the reservation and the question was examined by the Preparatory Committee of the Administrative Committee on Co-ordination, which requested the Secretary-General, in his role of co-ordinator of the activities of the United Nations and of the specialized agencies, to communicate with the Government of Egypt for the purpose of arriving at a position mutually agreeable and acceptable to both the Government concerned and the specialized agencies with regard to the reservations. Consequently, a joint representation on behalf of the specialized agencies was made to the Egyptian Government. Following the aide-mémoire sent to the Egyptian Government and the consultations between the Secretary-General and the Government concerned, the reservations were withdrawn on 27 September 1954.

11. The same procedure was followed in respect of Austria which, at the time of the deposit of its instrument of accession to the Convention on 20 July 1950, made a reservation to the effect that :

> "The Austrian Government declares that the privileges and immunities envisaged in the Convention of November 21st, 1947, will be accorded in Austria to the extent to which privileges and immunities are granted in Austria to members of diplomatc missions in conformity with general principles of international law."

This reservation was withdrawn on 21 January 1955.

12. Objections to the statement made by the Government of Belgium on 1 May 1953 that its instrument of accession applied solely to the metropolitan territory of Belgium were raised by several specialized agencies. A joint representation was made to the Belgian Government requesting it to withdraw the reservation, and consultations were held between the Secretary-General and the Belgian Government. This reservation was withdrawn on 14 March 1962.

13. The same procedure was adopted in the case of the Federal Republic of Germany which at the time of its deposit of its instrument of accession on 17 November 1954 made a reservation excluding section 7 (*b*) of the Convention concerning the free transference of funds, gold or currency. This reservation was withdrawn on 10 October 1957.

10 July 1964

B. Legal opinions of the secretariat of inter-governmental organizations related to the United Nations

1. *International Labour Office*

The following memoranda concerning the interpretation of international labour Conventions were prepared by the International Labour Office at the request of Governments:

(*a*) *Memorandum concerning the Discrimination (Employment and Occupation) Convention*, 1958 (No. 111), prepared at the request of the Government of the Republic of Cyprus, 23 March 1964. *Official Bulletin*, vol. XLVII, No. 4, October 1964, pp. 391-393. English, French, Spanish.

(*b*) *Memorandum concerning the Equality of Treatment (Social Security) Convention*, 1962 (No. 118), prepared at the request of the Government of the Republic of Ghana, 29 October 1963. *Official Bulletin*, vol. XLVII, No. 4, October 1964, pp. 394-395. English, French, Spanish.

2. *International Bureau of the Universal Postal Union*

Legal aspects of the Acts of the XVth Universal Postal Congress (Vienna, 1964)—Reservations to the Acts—Form of powers of representatives to Congresses

(A) Reservations to the Acts of the Universal Postal Union

1. Doctrine defines a reservation as a unilateral act by a State at the time of signature, ratification or adherence to a treaty with a view to excluding or altering the effect of certain provisions of this treaty in regard to the said State.

2. Doctrine is divided on the question of the legal significance of reservations, and more especially on their acceptance by the other States who are parties to a treaty, in cases where the treaty is itself silent on the matter.

3. These theories are not of great interest to the UPU, precisely because the Vienna Constitution [72] settles the problem, by providing, in article 22, paragraph 6, that any Final Protocols annexed to the Acts of the Union shall contain the reservations to these Acts.

4. This provision will make it necessary for countries that wish to avail themselves of a reservation to submit it in the form of a proposal and have it confirmed by Congress for insertion in the Final Protocol of the Act to which it relates. The Constitution thus officially confirms the practice that has been in force since the London Congress in 1929 and arose out of a resolution of that Congress (*Documents of the London Congress*, Tome II, p. 155).

5. This being so, it must be admitted that it is not possible for a Member country to make new reservations after signature of the Acts of Congress, unless it subjects the reservation to the procedure for amendment of the Acts in the interval between Congresses, to complete the Final Protocol of the Act concerned.

6. We are inclined to believe, however, that at the time of admission of a new Member country, or of adherence to an unsigned Act, the Member country concerned may avail itself of an *existing* reservation. It would, in fact, be an arbitrary act to refuse a country the benefit of a reservation enjoyed by some other Member country, although the grounds may be different. Let us say rather that the approval of a reservation by Congress is aimed more at the admissibility of the text of the reservation than the beneficiary country.

7. The unilateral declaration by which a Member country renounces the benefit of an existing reservation in its favour does not need to be submitted to the Union for approval (see *Annotated Code*, Part 1, 1959, p. 216, note 2).

8. With regard to the unilateral declarations by which Member countries react to a given political situation or handle their relations with some other State, they are not, properly speaking, reservations. They do not relate to the application of a provision of our Acts, and arise out of political considerations which fall outside the scope of the UPU. Consequently, they are not subject to any particular procedure, and may be submitted at any time.

9. In Vienna, several countries submitted declarations of a political nature at the time of signature of the Acts. Congress decided that these would be published at the same time as the Acts of the Vienna Congress and notified to the Member countries of the Union through diplomatic channels.

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[72] Text reproduced in this *Yearbook*, p. 195.

(B) Effects of the condition of approval of the acts of the UPU on the powers of the representatives of Member countries

10. The new provisions allow Member countries several possibilities of commitment in relation to the Acts concluded by a Congress.

11. It would therefore be useful if the powers accorded to the plenipotentiaries attending future Congresses specified the precise significance of the signature (definitive, subject to ratification, etc.), in order to avoid misunderstandings. If the necessary specifications are not made, the Acts will be assumed to be subject to ratification, because this form of approval is still the conventional method of approval of treaties.

12. Finally, it should also be pointed out that the Vienna Congress took certain decisions regarding the admissibility of the powers of plenipotentiaries. In spite of the formalities that usually go with the verification of powers, Congress thought that their interpretation should be very flexible, and that one should adhere more to the spirit than the letter of these powers. According to Congress, powers will in future be considered in due form if they are only signed by the Head of State, Head of Government or Minister for Foreign Affairs, even if authority to sign is lacking. In order to avoid any difficulty in the future, the Vienna Congress charged the International Bureau to prepare a formula showing the conditions which full powers must satisfy in order to be considered in due form.