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UNITED NATIONS JURIDICAL YEARBOOK

1968

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. QUESTION OF THE EXTENT TO WHICH UNRWA CAN BE EXPECTED TO CONFORM TO THE LAW OF A HOST STATE IN THE IMPLEMENTATION OF ITS EDUCATIONAL PROGRAMME

Opinion of the General Counsel of UNRWA

1. The question was raised as to what is the position of the Agency in respect to the education law of a host State and its relation to the Agency's educational programme.

2. The Agency is a subsidiary organ of the General Assembly, with a mandate established by that body, and must at all times act as a United Nations agency. A paramount principle, common to all United Nations operations—whether they be educational, economic, peacekeeping or political in character—is that they must remain under the control of the United Nations as such, representing the totality of the Member States, and must *not* fall under the control of any one Member State. The “exclusiveness” of United Nations control is thus a safeguard for the general membership, and international officials serving these various United Nations operations are accordingly under the express injunction of Article 100, paragraph 1, of the United Nations Charter:

“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”.

It may be noted that there is a corresponding obligation on all Member States in paragraph 2 of Article 100:

“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”.

3. In the result, therefore, no United Nations organ ever falls under the jurisdiction of a Member State in the sense of being literally bound by the provisions of its law or subject to its “sovereignty”. The relationship is one of co-operation and co-ordination, not of subordination. With regard to the Agency, the General Assembly has, by resolution 212 (III) of 19 November 1948, placed responsibility for the planning and implementation of the Agency's programmes on the Commissioner-General, as appointed by the Secretary-General, and his responsibility is “to the General Assembly”, as resolution 302 (IV) of 8 December 1949 makes expressly clear; it is to this organ that the Commissioner-General must report. Successive resolutions have emphasized that the Agency's relationship with

host governments is one of consultation and co-ordination, never subordination: resolutions 513 (VI) of 26 January 1952, 818 (IX) of 4 December 1954, 916 (X) of 3 December 1955, 1018 (XI) of 28 February 1957, 1191 (XII) of 12 December 1957, 1315 (XIII) of 12 December 1958, 1456 (XIV) of 9 December 1959, 2154 (XXI) of 17 November 1966 make this relationship abundantly clear.

4. Particularly with the Agency, the need for closest co-operation and co-ordination with a host Government is vital to the successful execution of its mandate. It is a matter of record that, for many years, the Agency's educational programmes have been designed to harmonize with those of the host State, and, to this end, it has been customary for the Agency to conform to the established pattern of textbooks, curricula, examination standards and so forth. This degree of co-ordination has been achieved not because of any duty imposed on the Agency by local law but because co-ordination is a necessary condition for the success of the educational activities of the Agency and because co-operation with host Governments has been required by the General Assembly. However, it is clear that there are limits beyond which, as a United Nations organ, the Agency cannot go. These are, essentially:

(i) Where a host State, whether by legislation or otherwise, requires from the Agency action which is *ultra vires* its mandate or incompatible with its mandate; such action would be tantamount to defiance of the authority of the General Assembly;

(ii) Where a host State, whether by legislation or otherwise, requires action which is beyond the financial capacity of the Agency: such action would be irresponsible and subject to criticism by the United Nations external auditors as well as by the General Assembly;

(iii) Where a host State, whether by legislation or otherwise, assumes power to dictate or control the activities of United Nations officials, or the operations entrusted to them; this would constitute a breach of Article 100 and, in effect, the operation could not continue to be a United Nations operation at that point.

5. It may be observed that these limitations in no way affect the general conformity of United Nations officials, and the activities and operations with which they are charged, with the law of host States. Compliance with criminal law, with road traffic regulations, with legislation on matters of health and with legal rules and procedures affecting transactions carried on within the State is the normal rule and raises no problems. Any special privileges and immunities are based upon the Charter and the Convention on the Privileges and Immunities of the United Nations of 1946, two treaties accepted freely by the host States. Thus, a United Nations body does not claim the right to ignore local law. It claims only that it is not subject to any law which infringes upon its status as a United Nations organ, either by deviating from the Charter and the 1946 Convention or by requiring action incompatible with the three basic limitations set out above.

6. Let it be thought that this position is in some way incompatible with the sovereignty of the host State, it must be emphasised that the special position of a United Nations organ is based upon the Charter—a treaty accepted by all Member States—so that it is a reflection of this very sovereignty and, indeed, designed to protect the interest which each and every Member State has in any United Nations operation, wherever it may be. Moreover, in final analysis, it is certainly true that a General Assembly subsidiary organ can continue to operate in a State's territory only with its consent. The host State is free to determine that, whether because of a belief that its sovereignty is prejudiced or for any other reason, the operations on its territory must cease.

30 March 1968

2. EXEMPTION OF THE UNITED NATIONS FROM CHARGES FOR MUNICIPAL SERVICES—
SECTION 7 (a) OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE
UNITED NATIONS

*Memorandum to the Assistant to the Chief of the Purchase and Transportation Service,
Office of General Services*

This refers to your memorandum on the lease of office space by the United Nations Development Programme on the territory of a Member State. I understand that the landlord has accepted all the standard clauses for UNDP lease agreement, including the one on arbitration procedures.

It is noted, however, that under the fifth clause of the proposed lease, the obligation to pay for waste removal and “any other service” falls on the tenant, i.e. the UNDP. It would appear that waste removal and the other “services” are in fact services rendered by the municipality concerned. The Office of Legal Affairs has always held the view that where services furnished by municipalities are charged not according to the value of the services but according to property evaluation or other independent criteria, the payment thus made constitutes a tax. Under Section 7 (a) of the Convention on the privileges and immunities of the United Nations, the organization and its subsidiary organs such as the UNDP are exempted from such taxes. In our opinion, the Resident Representative of UNDP should seek exemption from these charges if they are billed according to real estate evaluation and not according to the service actually rendered. No need appears to make a reservation in the lease agreement concerning this point.

Section 7 (a) of the Convention on the Privileges and Immunities of the United Nations reads as follows:

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

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

Municipal services such as street lighting, street cleaning, removal of waste, and general services are taxes distinct from the “public utility charges” which are not subject to exemption and, therefore, the United Nations is entitled to the exemption provided for in Section 7 (a), quoted above, of the Convention. The Office of Legal Affairs of the United Nations has dealt with this subject as follows:

“Water and electricity are the types *par excellence* of public utility services, precisely those envisaged by the General Assembly in adopting the Convention. As you know, a public utility is a corporation, very often privately owned, though sometimes owned or controlled by a municipality or other government unit, but in either case impressed with a public interest, which causes a close statutory supervision of the production and sale of the service or commodity in question. This supervision is ordinarily carried out by Public Utilities Commissions; I am sure it is not necessary to refer to the fact that the public utilities supervised by such governmental bodies in any of a large number of countries are principally gas and electricity, water and transport. For example, Quemner, *Dictionnaire juridique* gives the following entry:

Public utilities, public services corporation—Services publics concédés (transports, gaz, électricité, etc.)’

I think it is clear that the Convention had specifically in mind the payment by the United Nations of water and electricity charges on the grounds that the costs as billed are no more than the *quid pro quo* for commodities or services received; since these would be payable to a private corporation like the price of any other sale made, it was logical that there should not be an exemption merely because the same service happened to be rendered by a municipality or municipally owned company.

A different situation prevails when we come to examine the other municipal services listed above. Whatever may be the advantage to the individual householder of the rendering of such services, it seems clear that these represent normal functions commonly thought of as falling within the responsibilities of municipal government. They are usually carried out by the municipality itself or at least paid for by the municipality out of its own budgeted funds obtained from real property taxation and not from prices charged in respect of the specific amounts of each separate service rendered. It is important to note that water and electricity services are charged for on the basis of units of measurement, such as the kilowatt hour in the latter case. The contrary is true in the case of the various services now under examination. The authorities in international law generally seem to make a distinction as to whether the services rendered by a municipality or other public agency are special ones for which a special charge is made, with definite rates payable by the individual in his character as a consumer and not as a general taxpayer according to fixed principles of real property taxation. Thus, municipal taxation is normally by area and valuation of real property, not by the amount of street lighting furnished to a given frontage.”

27 February 1968

3. POWER OF THE GENERAL ASSEMBLY TO MAKE RECOMMENDATIONS TO THE MEMBERS OF THE UNITED NATIONS ON ANY QUESTIONS OR MATTERS WITHIN THE SCOPE OF THE CHARTER—INTERPRETATION OF ARTICLE 12 OF THE CHARTER ¹

*Statement made by the Legal Counsel at the 1637th meeting
of the Third Committee, on 12 December 1968*

The Legal Counsel replied to [a] question put by the representative of Peru who had asked whether the adoption of measures of the kind provided for in operative paragraph 7 of . . . draft resolution [A/C.3/L.1637/Rev. 2] [by which the General Assembly would call upon all States to sever all relations with South Africa, Portugal and the illegal minority régime in Southern Rhodesia and to scrupulously refrain from giving any military or economic assistance to these régimes] was within the competence of the Third Committee. Article 10 of the United Nations Charter stated that the General Assembly might discuss any question or any matters within the scope of the Charter or relating to the powers and functions of any organs provided for in the Charter, and, except as provided in Article 12, might make recommendations to the Members of the United Nations or to the Security Council. Article 12 provided that, while the Security Council was exercising in respect of any dispute or situation the functions assigned to it in the Charter, the General Assembly should not make any recommendation with regard to that dispute or situation unless the Security Council so requested. The matters relating to South Africa, Southern Rhodesia and the Territories under Portuguese rule were on the agenda of the Security Council and, in principle, the General Assembly could not make any recommendations. However, the Assembly had interpreted the words “is exercising” as meaning “is exercising at this moment”; consequently, it had made recommendations on other matters which the Security Council was also considering. Thus, in accordance with that practice followed by the General Assembly, there were no obstacles to the recommending of measures of the kind provided for in draft resolution A/C.3/L.1637/Rev. 2.

¹ See also *Juridical Yearbook*, 1964, p. 228.

4. QUESTION WHETHER THE FIRST SENTENCE OF ARTICLE 19 OF THE CHARTER CONCERNING THE LOSS OF VOTE IN THE GENERAL ASSEMBLY OF MEMBER STATES TWO YEARS IN ARREARS IN THE PAYMENT OF THEIR CONTRIBUTIONS HAS AUTOMATIC APPLICATION OR IS SUBJECT TO A PRIOR DECISION OF THE ASSEMBLY

*Opinion of the Legal Counsel*²

1. In recent correspondence reference has been made to the roll-call votes which took place at the 1582nd meeting of the First Committee, on 10 June 1968, and at the 1671st and 1672nd meetings of the General Assembly, on 12 June 1968. In the course of these roll-call votes the competent officials of the Secretariat did not call out the names of two Member States which, as previously reported by the Secretary-General to the General Assembly by letters of 24 and 27 April and 3 and 6 May 1968 (A/7086 and Add.1-3), were "in arrears in the payment of their contributions to the United Nations regular budget within the terms of Article 19 of the Charter".

2. In the absence of any specific determination by the competent organs of the United Nations it is the responsibility of Secretariat officials to discharge their duties in the light of their understanding of the relevant provisions of the Charter. It has always been the understanding of the Secretariat, based on a legal analysis of Article 19 of the Charter, that the first sentence of that article has automatic application and is a provision entirely distinct and separate from Article 18, paragraph 2, of the Charter.

3. The provision of Article 18, paragraph 2, concerning a two-thirds majority with respect to "the suspension of the rights and privileges of membership", obviously relates to Article 5 of the Charter, which provides: "A Member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council. The exercise of these rights and privileges may be restored by the Security Council." Article 18, paragraph 2, lists successively admission of new Members, suspension of rights and privileges of membership and the expulsion of Members, which are covered respectively by Articles 4, 5 and 6 of the Charter, all of which, unlike Article 19, require action both by the Security Council and the General Assembly. The wording of Article 19 does not contain the phrase "suspension of rights and privileges" and obviously does not necessitate any action by the Security Council. It provides only for a specific sanction or penalty if a Member is two years in arrears in the payment of its contributions. This sanction is that it "shall have no vote in the General Assembly" but does not affect its other rights and privileges including participation in discussions in the General Assembly and voting in organs of the United Nations other than the plenary meetings of the General Assembly and of its Main Committees.

4. The express language of the first sentence of Article 19 does not call for a decision of the General Assembly prior to the deprivation of vote, since it provides simply that a Member "shall have no vote" if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. Had the contrary been intended, Article 19 would have been drafted in a quite different way in order to provide for a decision by the General Assembly. For example, instead of saying that the Member "shall have no vote" it would have said "may have its vote suspended by the General Assembly" or "the General Assembly may decide that [such Member] shall have no vote ...", as it does in cases where it intends that the General Assembly exercise discretion such as in Article 5.

² Issued as an annex to document A/7146.

5. The position of Articles 18 and 19 in a single section is due to the fact that each relates to different aspects of voting in the General Assembly and does not therefore indicate a connexion between the requirement of a two-thirds vote in Article 18, paragraph 2, and the loss of vote in Article 19. The questions specifically enumerated in Article 18, paragraph 2, relate to decisions under articles which appear in different chapters and sections throughout the Charter.

6. The foregoing position is fully borne out by reference to the second sentence of Article 19. The first sentence provides that a Member "shall have no vote" upon the happening of a specified event—becoming two years in arrears in the payment of contributions. The second sentence provides that, nevertheless, the General Assembly "may permit" such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond its control. *Shall* is used in the first sentence, while *may* is used in the second. Likewise, only in the second sentence is reference made to action to be taken by the General Assembly. Thus, it is clear that a positive decision by the General Assembly presumably following a request by a Member which is two years in arrears, is required to permit that Member to vote—not a decision by the General Assembly to "suspend" its vote. The rule of loss of the vote as a mandatory penalty is provided in the first sentence, while the second sentence permits the General Assembly to make an exception to this rule in a specifically defined circumstance, i.e., if it is satisfied that the failure to pay is due to conditions beyond the Member's control. Thus, on the request of the Member concerned and on the basis of adequate data, the General Assembly might exercise a discretion to waive or lift the penalty, for example, in case of natural disasters, such as earthquakes, floods, revolutions or economic depressions. The only other case in which the Assembly might be required to take a decision is in exceptional circumstances in which a Member State disputes the basis of the calculation by which it is determined to be in arrears. For example, this may arise in a case where a question of State succession is involved. It is doubtless for instances such as these that rule 161 of the rules of procedure of the General Assembly provides that the Committee on Contributions, which deals with financial and economic—not political—aspects, shall "advise the General Assembly ... on the action to be taken with regard to the application of Article 19 of the Charter".

7. In the circumstances giving rise to the present reply, it should be noted that the two Member States concerned had not contested the amount of their arrears specified in the letter from the Secretary-General contained in document A/7086. They had not requested that the General Assembly permit them to vote under the second sentence of Article 19. Nor had they submitted data regarding "conditions beyond the control of the Member", which would permit the Assembly to arrive at a decision under the second sentence of that article.

8. It should also be recalled that the procedure followed at the 1982nd meeting of the First Committee, on 10 June 1968, and at the 1671st and 1672nd plenary meetings of the General Assembly, on 12 June 1968, is not without precedent and is not based solely on decisions by the Secretariat. Reference may be made, in this connexion, to a letter of 15 May 1963 from the President of the General Assembly at its fourth special session to the Secretary-General, which was communicated to all Member States under cover of a *note verbale*. In this letter the President noted that a Member State was in arrears in the payment of its financial contributions within the terms of Article 19 of the Charter and pointed out that this would have given rise to a loss of voting rights had there been an occasion to take a formal vote on any question. While a number of States subsequently indicated their disagreement with this letter, the matter was never raised in the General Assembly and the Assembly never issued instructions that the presiding officer or the Secretariat should act in a manner contrary to that indicated in the President's letter.

9. Reference should also be made to the precedent which occurred at the 1518th plenary meeting of the General Assembly, on 19 May 1967, during the fifth special session. On that occasion, the name of a Member State at that time in arrears within the terms of Article 19 of the Charter was not called out during a roll-call vote. No question was raised on that occasion.

10. In the light of the foregoing, it is apparent that if the Secretariat had during a roll-call vote called the names of those Members which were two years in arrears in the payment of their contributions, it would have been asking them how they voted, while the Charter states categorically that they "shall have no vote". Had it acted thus, the Secretariat would have disregarded Article 19 of the Charter. It is therefore clear that the Secretariat is obliged to continue to act in accordance with its understanding of the relevant provisions of the Charter and with the foregoing precedents until such time as the General Assembly should take a contrary decision. It may be added that, although Member States would have been fully within their rights in raising questions during or after the voting at the 1582nd meeting of the First Committee, on 10 June 1968, and at the 1671st and 1672nd plenary meetings of the General Assembly, on 12 June 1968, none of them did so.

26 July 1968

5. AREA OF SERVICE AND LEGAL STATUS OF REGIONAL ADVISERS APPOINTED UNDER THE REGULAR PROGRAMME OF TECHNICAL ASSISTANCE AND ASSIGNED TO THE ECAFE REGION—QUESTION WHETHER GOVERNMENTS OF NON-MEMBER STATES, NON-SELF-GOVERNING TERRITORIES OR TRUST TERRITORIES MAY REQUEST ASSISTANCE UNDER THE REGULAR PROGRAMME³

*Memorandum to the Chief of the Section for Asia and the Far East,
Office of Technical Cooperation*

1. I refer to your memorandum in which you have inquired whether there would be any legal complications which would prevent regional advisers, appointed under the regular programme of technical assistance and assigned to the ECAFE region, from serving in the South Pacific area. You have also asked for advice on the compensation entitlement of those regional advisers. These questions call for an examination of the following points: (A) whether the regional advisers assigned to the ECAFE region must serve within the geographical scope of ECAFE; (B) whether Governments of non-member States, non-self-governing territories or trust territories may request assistance under the regular programme; (C) in so far as the regional advisers are attached to the ECAFE secretariat, what are the administrative and financial responsibilities of ECAFE towards them and, in particular, towards compensation for their service-incurred injuries.

Point (A)

2. Resolutions 200 (III) [Economic development], 418 (V) [Social welfare], 723 (VIII) [Public administration], 926 (X) [Human rights], 1256 (XIII) [OPEX] and 1395 (XIV) [Narcotics], of the General Assembly, by which technical assistance under the regular programme was authorized, did not refer to any specific area or region. Regional advisers who are recruited as technical assistance project personnel are governed by a separate set of staff rules and they are paid from a budget which is separate from the budget of the re-

³ See also *Juridical Yearbook*, 1963, p. 172.

gional economic commissions. Although the regional advisers assigned to the ECAFE region are attached to the ECAFE secretariat, they are not staff members of ECAFE. It appears therefore that their assignment to the various regional economic commissions does not limit their area of service to the geographical scope of the commissions concerned, nor do the terms of reference of the commission concerned govern the scope of their activities. It would also appear that the arrangement to attach them to the secretariat of a regional economic commission is made for the sake of administrative expediency rather than on the basis of legal necessity. Consequently the area of activities of regional advisers attached to the ECAFE secretariat is not restricted by the geographical scope of ECAFE. In other words, such advisers may, from the legal point of view, even be sent to a country in the Middle East if the Office of Technical Co-operation, which is in charge of technical assistance project personnel under the regular programme, considers it expedient to do so.

Point (B)

3. In the light of the analysis in regard to point (A), the question to be considered is not whether a requesting country should be in a specific area, but whether a country is eligible for technical assistance under the pertinent resolutions of the General Assembly. In particular, it is a question of whether a State not member of the United Nations, or a non-self-governing territory or a trust territory is eligible. The answer to this question depends not only on the status of the countries concerned, but also on the types of assistance provided. The legal situation in this connexion is set out below.

a. *Non-member States*

4. While it is clear that States Members of the United Nations are, by virtue of Article 66, paragraph 2, of the Charter and subject to approval by the General Assembly, eligible for technical assistance under the regular programme, the extension of such assistance to non-member States depends on the terms of the resolutions concerned and the relevant proceedings of United Nations organs. As examples, the following resolutions are examined.

(1) *General Assembly resolution 200 (III) on technical assistance for economic development*

5. This resolution adopted by the General Assembly on 4 December 1948, refers explicitly to Member States, since it provided in operative paragraph 3 for the appropriation of funds "necessary to enable the Secretary-General to perform the following functions, where appropriate, in co-operation with the specialized agencies, *when requested to do so by Member Governments*". The intention of the Assembly to limit the eligibility to Member States was made clear by the substitution of the expression "Member Governments" for the expression "Governments participating in the work of the United Nations" in the draft resolution which became resolution 200 (III).

6. At its fifth session, ECAFE adopted, on 29 October 1949, a resolution entitled "Technical assistance for certain associate member countries", which read as follows: ⁴

⁴ It is to be noted that on the same day, ECAFE adopted another resolution entitled "Technical assistance" (see *Official Records of the Economic and Social Council, Eleventh session, Supplement No. 8*, pp. 45-46) in which the Commission

"...
" *Recommends* to the governments of the region:
"(1) That they make full use of the facilities to be made available under resolution 200 (III) with respect to the different services offered under this resolution;
"...
" *Requests* the Secretariat:
"..."

"The Economic Commission for Asia and the Far East,

"Having considered at its fifth session the position of the countries of the region in relation to the technical assistance programme of the United Nations initiated in resolution 200 (III) of the General Assembly,

"Taking note that, under paragraph 3 of the above resolution, the technical assistance programme is limited to Member Nations of the United Nations,

"Considering that this state of affairs is not in accordance with the spirit of the United Nations programme of technical assistance to under-developed countries,

"Resolves that the Economic and Social Council be requested to draw the attention of the General Assembly to the need for technical assistance in certain associate member countries of the Commission which are nations responsible for their own international relations;

"Recommends that the needs of such countries be represented to the General Assembly with a view to its considering the desirability of making an exception to the limitations set forth in resolution 200 (III), such exception to apply to those countries or regions which hold associate membership in a regional economic commission;

"Requests the Secretary-General to bring this resolution to the notice of the General Assembly with a view to having it considered, if possible, at the current session of the General Assembly."⁵

7. During the fourth session of the General Assembly (1949) the Philippine representative submitted to the Second Committee a draft resolution on this subject which was ruled out of order as the Committee had completed its work on the item dealing with economic development and technical assistance.⁶

8. At the tenth session of the Economic and Social Council (7 February-6 March 1950), the representative of Chile submitted a draft resolution⁷ recommending that the General Assembly should take account of the fact that several self-governing countries which participated as associate members in the work of regional economic commissions were not then eligible to receive technical assistance from the United Nations under Assembly resolution 200 (III). The draft resolution therefore further recommended that the Assembly should decide to amend the first clause of paragraph 3 of resolution 200 (III) by inserting after the words "Member Governments" the words "and any non-member country which is responsible for its international relations and participates as an associate member in the work of any of the regional economic commissions of the United Nations". This draft resolution, which was similar to the earlier proposal made by the Philippines, was referred to the eleventh session of the Economic and Social Council. In view of the fact, however, that the non-members concerned had meanwhile become eligible for similar technical assistance under the Expanded Programme by virtue of their membership in one or more of the specialized agencies participating in the Expanded Programme, the draft resolution was with-

"(b) to make available its facilities to assist the governments of the member and associate member countries to prepare their technical assistance projects and schemes;

"Requests the Economic and Social Council:

"(a) To consider in what ways the Commission and the secretariat may with advantage participate in the specific aspects of the technical assistance programme under the administration of the Secretary-General of the United Nations, in such ways as receiving and forwarding applications for assistance if governments so desire, and in being associated in any appropriate manner with such arrangements as may be made by the Secretary-General for the provision of assistance, and in any other suitable ways.

"..."

⁵ See *Official Records of the Economic and Social Council, Eleventh Session, Supplement No. 8*, pp. 43-44.

⁶ *Ibid.*, Tenth Session, Annexes, agenda item 9, document E/1576, para. 66.

⁷ E/AC.6/L.1.

drawn. Some representatives nevertheless took the opportunity to point out that they would have supported the draft resolution, and indicated that they might re-open the issue in the future should the circumstances require it.⁸

9. On the recommendation of the Economic and Social Council, as contained in its resolution 291 (XI) of 15 August 1950, the General Assembly adopted resolution 399 (V) of 20 November 1950 recommending "that the requests for technical assistance for economic development received by the Secretary-General in accordance with resolution 200 (III) which cannot be financed with funds provided on the regular budget of the United Nations, should be eligible for financing from the special account for technical assistance for economic development established in accordance with General Assembly resolution 304 (IV)⁹ and with the actions of the Technical Assistance Conference convened by the Secretary-General under the terms of Economic and Social Council resolution 222 A (IX)".

10. On 15 December 1960, the General Assembly adopted resolution 1527 (XVI) entitled "Assistance to former Trust Territories and other newly independent States". In this resolution the Assembly

"...

"2. *Notes with satisfaction* the proposals of the Secretary-General, contained in the report of 22 November 1960, for increased assistance to these States from the regular budget of the United Nations;

"...

"4. *Invites* the Economic and Social Council to encourage and facilitate the provision through the appropriate international organs—including the United Nations programmes of technical co-operation, the Expanded Programme of Technical Assistance and the Special Fund—in co-operation with and, wherever appropriate, through the Economic Commission for Africa and other regional economic commissions, of assistance requested by Governments for:

"...

"(c) The establishment, where economic development programmes do not yet exist, of advisory groups of experts to assist in the preparation of economic development programmes and the determination of investment requirements and priorities, and to render other advisory services as may be required;

"..."

11. In 1963, after Western Samoa became independent and joined ECAFE as a member but did not become a member of the United Nations, the question arose as to whether it was eligible for technical assistance under Assembly resolution 200 (III). In June 1963 the Commissioner for Technical Assistance made the following statement to the Technical Assistance Committee (E/TAC/L.302, pp. 9-10):

"As regards the operation of the programme, there is also a matter relating to the subject of eligibility for assistance under General Assembly resolution 200 (III) on technical assistance for economic development to which reference should be made. This question of eligibility does not arise in the cases of General Assembly resolutions 418 (V) on social welfare and 723 (VIII) on public administration, nor does it apply to the Expanded Programme. As the Committee is aware, the relevant provisions of General Assembly resolution 200 (III) are to the effect that assistance is to be provided by the Secretary-General at the request of Member Governments. In cases, however, where requests for assistance under the resolution are

⁸ See *Official Records of the General Assembly, Fifth Session, Supplement No. 3*, p. 21.

⁹ This resolution, entitled "Expanded programme of technical assistance for economic development of under-developed countries" and adopted by the Assembly on 16 November 1949, authorized the Secretary-General to set up a special account for technical assistance for economic development, to be available to those organizations which participated in the expanded programme of technical assistance and which accept the observations and guiding principles set out by the Economic and

Social Council and the arrangements made by the Council for the administration of the programme. received from non-member States which were formerly trust territories, but which participate in the work of the United Nations through membership in the regional economic commissions, there seem to be strong grounds for considering such States as eligible, particularly in the light of General Assembly resolution 1527 (XV), and the ECAFE resolution (E/CN.11/231), adopted at its fifth session, which *inter alia* requested the Secretariat to make available its facilities to assist the Governments of the member and associate member countries to prepare their technical assistance projects and schemes. I am presenting this proposed interpretation as a reasonable course of action with which I trust the Committee will agree, so that the Secretariat may receive and activate requests under General Assembly resolution 200 (III) when made by non-member States which were formerly trust territories and are members of a regional economic commission.”

In its report, the Committee stated that, in commenting upon the proposal of the Commissioner for Technical Assistance, a number of members of the Committee agreed that the interpretation should be made.¹⁰ Consequently the scope of application of resolution 200 (III) was extended to include non-member States which were former trust territories which participated in the work of the United Nations through membership of the regional economic commissions.¹¹

(2) *General Assembly resolution 418 (V) on advisory social welfare services*

12. By resolution 58 (X) of 14 December 1946, entitled “Transfer to the United Nations of the advisory social functions of UNRRA”, the Assembly covered both Members and

¹⁰ Document E/TAC/L.302, pp. 9-10.

¹¹ *Official Records of the Economic and Social Council, Thirty-sixth Session, Annexes*, agenda item 14, document E/3783, paragraph 49. Although it is not clear whether a former trust territory which attained independence but did not become a member either of the United Nations or of a regional economic commission is eligible for technical assistance under resolution 200 (III), the General Assembly, prior to the adoption of resolution 1527 (XV), had before it a report by the Secretary-General on the opportunities for international co-operation on behalf of newly independent countries, which referred to the distribution of additional resources among the areas governed by Assembly resolutions 200 (III), 418 (V), 723 (VIII) and 1256 (XIII). The Secretary-General, however, stated that, while it was not possible at that stage to formulate a definite and fixed programme for the rapidly evolving needs of the newly independent countries over the next budgetary year, a necessary flexibility in the apportionment of new funds among the four resolutions with transferability of the funds as among the budget sections involved should be provided (*Official Records of the General Assembly, Fifteenth Session, Annexes*, agenda items 28, 30, 31 and 32, document A/4585, paragraph 24). Before the adoption of the Assembly resolution, the Economic and Social Council had also adopted a resolution on opportunities for international co-operation on behalf of newly independent countries (resolution 768 (XXX) of 21 July 1960). In that resolution, the Council requested certain organs concerned to prepare detailed programmes to meet the additional needs of newly independent and emerging States and recommended that the General Assembly make appropriate provision for those purposes in the budget of the United Nations.

Thus the proceedings of the United Nations organs indicate that in the early period non-members were excluded from the application of Assembly resolution 200 (III), although efforts to link up membership and associate membership in regional economic commissions with eligibility under that resolution had been made, but abandoned in view of the establishment of the Expanded Programme of Technical Assistance (see paras. 5 to 8 above). Even at the time of the adoption of resolution 1527 (XV) it was not envisaged that a trust territory would not become a Member of the United Nations after its attainment of independence. It was only when the case of Western Samoa arose that it became necessary to extend the application of Assembly resolution 200 (III) by interpretation. Even then, since Western Samoa had joined ECAFE as a member, the interpretation as given by the Commissioner for Technical Assistance, had included membership in regional economic commissions as a condition for eligibility for technical assistance under the said resolution. It would seem that the possibility of a trust territory not joining the United Nations or one of the regional economic commissions after independence was not foreseen in 1963. This situation may arise at the present time in connexion with Nauru. From a strictly legal point of view, the interpretation given by the Commissioner for Technical Assistance in 1963 is not applicable to Nauru, which has not yet become a member of ECAFE. However, as a matter of policy and in the spirit of Assembly resolution 1527 (XV), a more liberal interpretation would seem desirable should the need to assist Nauru arise.

certain non-members in referring to the “continuance of the urgent and important advisory functions in the field of social welfare carried on by UNRRA”, since the countries assisted by UNRRA included some which did not subsequently become Members of the United Nations. Under the terms of this resolution, the various services might be provided to “Governments which show the need for them”, except that furnishing “Technical publications” was limited to Member Governments. This limitation was, however, deleted in the subsequent revision of the resolution by resolution 418 (V) of 1 December 1950, in which all types of social welfare advisory services were made available to “Governments which showed the need for them”. Before the adoption of the latter resolution by the General Assembly, the Economic and Social Council had also adopted a resolution on “Continuance of advisory functions carried out by UNRRA in the field of social welfare” (resolution 43 (IV) of 29 March 1947), in which it was stated that in the consideration of applications “for advisory social welfare services that are submitted by countries formerly assisted by UNRRA”, the Secretary-General was to “make no distinction between those countries other than that of their need for such services”. In view of this historical background of Assembly resolution 418 (V), it may be said that countries formerly assisted by UNRRA which have not become Members of the United Nations, if any, are eligible for assistance under that resolution, the only condition being that their need for such services is manifest.

(3) *General Assembly resolutions 398 (V) on technical assistance for Libya after achievement of independence and 410 (V) on relief and rehabilitation of Korea*

13. On two occasions the General Assembly decided to make non-member States eligible for certain services to which, according to the provisions governing these services, they would not have been otherwise entitled. Thus, the General Assembly, by resolution 398 (V), declared Libya eligible to receive, at its request, technical assistance from the Expanded Programme after its independence had been achieved and before it became a Member of the United Nations or specialized agency participating in the Expanded Programme. Similarly, Korea, although not a Member of the United Nations nor a member of ECAFE at that time, became eligible for technical assistance services otherwise reserved to Member States. The eligibility of Korea was authorized by the General Assembly in its resolution 410 (V), by which the Assembly established UNKRA and recommended that the agency “make use of the advice and technical assistance of the United Nations”.

(4) *General Assembly resolutions 723 (VIII) on technical assistance in public administration, 926 (X) on advisory services in the field of human rights, and 1256 (XIII) on OPEX*

14. The terms of resolution 723 (VIII) on technical assistance in public administration do not specifically limit the benefits thereunder to Member States. Such benefits are authorized to Government “in general” by resolution 723 (VIII), and to “under-developed countries” by resolution 518 (VI), which deals with technical assistance under the regular programme, including technical assistance in public administration. Resolution 926 (X), concerning advisory services in human rights, in this context would seem to apply only to Member States, since the Assembly requested the Secretary-General to inform Member States of this new programme and of the procedures to be followed in obtaining assistance.¹²

15. In its resolution 1256 (XIII), concerning the provision of executive or operational personnel, the Assembly authorized the Secretary-General to submit technical assistance programmes with a view to:

“(a) Assisting Governments participating in these programmes, at their request, to secure on a temporary basis the services of well-qualified persons to perform duties of an executive or operational character as may be defined by the requesting Governments...”.

¹² The proceedings leading to the adoption of this resolution have not been examined.

The proceedings of the Second Committee show that the words “assisting Member Governments” contained in the original draft resolution were changed to read “assisting Governments” on the proposal of the representative of Tunisia, who explained that some of the countries he had in mind in co-sponsoring the draft resolution were not yet Members of the United Nations.¹³ It is therefore clear that resolution 1256 (XIII) applies also to non-members participating in the technical assistance programmes.

Concluding observations

16. The foregoing survey indicates that even in the early days when technical assistance programmes were formulated, an effort was made to extend such assistance to non-member States. This is especially true in the case of Assembly resolution 200 (III). In the light of recent developments it may be said that except where the resolution concerned clearly limits the benefits of technical assistance to Member States, such benefits are extended either by the text of the resolution or by its interpretation to non-member States.

b. Trust territories and non-self-governing territories

17. Since the trust territories and non-self-governing territories are not responsible for their own international relations, technical assistance should be provided through their Administering Authorities. This is made clear in resolutions adopted by the Assembly. For instance, in its resolution 1412 (XIV) of 5 December 1959, on preparation and training of indigenous civil cadres in trust territories, the General Assembly drew the attention of the Administering Authorities to the facilities provided by the United Nations under the programmes of technical assistance and public administration for training in administration and related functions, and requested them to make fuller use of those facilities.

Point (C)

18. The attachment to the ECAFE secretariat of regional advisers under the regular programme of technical assistance does not change their legal status as technical assistance project personnel. As such their rights and obligations are governed by Staff Rules 200.1-212.7. In so far as their compensation is concerned, rule 206.4 (c) provides for the assumption by the United Nations of responsibility for the reimbursement of medical expenses incurred by project personnel either in the area of assignment or while on travel on official business, subject to certain limitations. Rule 206.4 (h) provides that “in the event of death, injury or illness attributable to the performance of official duties on behalf of the United Nations, project personnel (or their dependents in the event of the death of the project personnel) shall be entitled to compensation in accordance with the provisions of Appendix D to Staff Rules ...”. Article 2 of Appendix D to Staff Rules sets forth the principles of award of compensation for service-incurred injuries, as follows:

“(a) Compensation shall be awarded in the event of death, injury or illness of a staff member which is attributable to the performance of official duties on behalf of the United Nations, except that no compensation shall be awarded when such death, injury or illness has been occasioned by:

“(i) The wilful misconduct of any such staff member; or

“(ii) Any such staff member’s wilful intent to bring about the death, injury or illness of himself or another;

¹³ *Official Record of the General Assembly, Thirteenth Session, Second Committee, 545th meeting, para. 2.*

“(b) Without restricting the generality of paragraph (a), death, injury or illness of a staff member shall be deemed to be attributable to the performance of official duties on behalf of the United Nations in the absence of any wilful misconduct or wilful intent when:

“(i) The death, injury or illness resulted as a natural incident of performing official duties on behalf of the United Nations; or

“(ii) The death, injury or illness was directly due to the presence of the staff member, in accordance with an assignment by the United Nations, in an area involving special hazards to the staff member’s health or security, and occurred as the result of such hazards; or

“(iii) The death, injury or illness occurred as a direct result of travelling by means of transportation furnished by or at the expense or direction of the United Nations in connexion with the performance of official duties; provided that the provisions of this sub-paragraph shall not extend to private motor vehicle transportation sanctioned or authorized by the United Nations solely on the request and for the convenience of the staff member; ...”.

19. Compensation should therefore be paid to regional advisers in accordance with the foregoing provisions. There is no distinction between injuries incurred on route to the country requesting the regional adviser’s services and those incurred while performing their duties in the country, so long as such injuries are attributable to the performance of their official duties on behalf of the United Nations.

20. As pointed out in paragraph 2 above, the attachment of regional advisers to the ECAFE secretariat is for the sake of administrative expediency. In some cases their job description indicates that they are under the supervision of the Executive Secretary of ECAFE or a senior official designated by him. Since the budget of ECAFE is separate from the budget for technical assistance, it is clear that ECAFE does not bear financial responsibility for those regional advisers, but merely acts as an agent of administration.

23 May 1968

6. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT—PROCEDURES FOR THE SUSPENSION OF A MEMBER STATE FROM AN ORGAN OPEN TO GENERAL MEMBERSHIP—ARTICLE 5 OF THE CHARTER

*Statement submitted in response to a request made at the 1236th meeting of the Second Committee of the General Assembly*¹⁴

I. Introduction

(a) *Opinion requested*

1. At the 1236th meeting of the Second Committee, on 29 November 1968, the representative of Denmark stated:

“In connexion with the suspension of South Africa from UNCTAD, I had the impression, and I believed it was shared by other delegations, that legal and constitutional questions were involved, especially in relation to the articles of the Charter dealing with the rights of Member States. I would therefore ask the Secretariat if the Legal Counsel could make a statement to

¹⁴ Document A/C.2/L.1030.

advise on the problem and have it circulated in writing preferably, so that when the Second Committee takes up the question, it will have all the relevant information needed to take a decision.”

The Chairman of the Second Committee asked the Secretariat to comply with this request.

2. The present paper is submitted in response to the foregoing.

(b) *Background to the question*

3. The United Nations Conference on Trade and Development was established by the General Assembly in its resolution 1995 (XIX) of 30 December 1964, section II, paragraph 1 of which provides in respect of membership:

“1. The members of the United Nations Conference on Trade and Development (hereinafter referred to as the Conference) shall be those States which are Members of the United Nations or members of the specialized agencies or of the International Atomic Energy Agency.”

4. The United Nations Conference on Trade and Development was therefore set up by the General Assembly, under Article 22 of the Charter, as a permanent organ encompassing all Members of the United Nations.

5. During the second session of the United Nations Conference on Trade and Development held in New Delhi from 1 February to 29 March 1968, the question was raised whether the Conference could consider a proposal to exclude South Africa from the Conference. A legal opinion was furnished to the Conference in which it was concluded, on the basis of the relevant resolutions of the General Assembly, that the Conference was not empowered to suspend or exclude any member from participation in the Conference.

6. The opinion noted further that:

“... special procedures for the suspension or expulsion of a Member State from the United Nations are laid down exclusively in Articles 5 and 6 of the Charter. Those articles do not contemplate that a United Nations conference, open to the general membership, may on its own initiative exclude any such Member from its deliberations.”

It further indicated that:

“At no point has the Assembly given any indication that any State member of the Conference was to be excluded from the second session. Had the Assembly wished to initiate action for this purpose, such exclusion would necessarily have to be a matter of express reference in a resolution...”

7. After the foregoing opinion had been delivered, no steps were taken to exclude South Africa from the second session of the Conference. However, on 27 March 1968, the Conference adopted its resolution 26 (II) entitled “Suspension of South Africa”. In the operative part of that resolution the Conference recommended that the General Assembly should amend its resolution 1995 (XIV) of 30 December 1964, section II, paragraph 1, to exclude South Africa from UNCTAD.

8. The Second Committee now has before it a draft resolution¹⁵ entitled “Suspension of South Africa” which seeks to give effect to the above-mentioned recommendation. The operative paragraphs of this draft resolution read as follows:

“*The General Assembly,*

“... ”

“1. *Endorses* resolution 26 (II) of UNCTAD concerning the suspension of South Africa from UNCTAD;

¹⁵ See *Official Records of the General Assembly, Twenty-third Session, Annexes*, agenda item 34, document A/C.2/L.1022 and Corr.1, Add.1 and Add.1/Corr.1.

“2. *Decides* that section II, paragraph 1, of General Assembly resolution 1995 (XIX) of 30 December 1964 should be amended as follows: ‘The members of UNCTAD shall be those States which are Members of the United Nations or members of the specialized agencies or of the International Atomic Energy Agency, with the exception of the Republic of South Africa until it shall have terminated its policy of racial discrimination and until that fact has been duly confirmed by the General Assembly’.”

II. Examination of the question

(a) *Definition of the issue*

9. It is understood that the opinion requested relates to the suspension of a Member State from a permanent subsidiary organ of the General Assembly whose membership encompasses all Members of the United Nations. This involves examination of whether the General Assembly acting alone has the authority under the Charter to suspend a Member State from such an organ and, if not, what terms and conditions must be met to carry out such suspension.

10. The General Assembly has the uncontested right, under Article 22 of the Charter, to create subsidiary organs of limited membership. However, this right is not relevant in the present context which refers expressly to suspension from an organ already established. Creation of a subsidiary organ of all the membership of the United Nations, less one or even a few such Members excluded as a sanction, would be tantamount to suspension.

(b) *General considerations*

11. The Charter of the United Nations is a multilateral treaty, which established an organization aiming at universality. It also set up a legal order which defines, on the basis of the principle of sovereign equality (Article 2, paragraph 1), the rights and obligations of its Members. As in any other treaty, the rights and obligations of the parties may be legally varied only in accordance with the procedures laid down in the treaty. Thus, a State, on its admission to the Organization, is entitled to expect that its obligations will not be increased and its rights will not be curtailed except in the manner expressly laid down in the Charter.

12. The Charter is specific in matters relating to membership, which are dealt with in its Chapter II. Chapter II deals both with the qualifications and procedures for acquiring membership (Articles 3 and 4) and with the conditions and procedures under which rights of membership may be suspended or lost (Articles 5 and 6). Besides Articles 5 and 6, only one other article of the Charter provides for a sanction depriving a Member State of a certain right of membership. This is Article 19, under which a Member State “shall have no vote in the General Assembly” if the amount of its arrears in its financial contributions to the Organization “equals or exceeds the amount of the contributions due from it for the preceding two full years.”

13. Outside of the articles just mentioned, the Charter contains no other provision by which the benefits, rights and privileges of membership may be curtailed. For example, Article 2, paragraph 2, of the Charter contains no specific sanction. It provides that:

“All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.”

Should a Member State fail to fulfil in good faith the obligations contained in the Charter, in the absence of a special sanction in Article 2, paragraph 2, the only procedures by which

it might be denied the rights and benefits of membership are those laid down in Articles 5 and 6 of the Charter.

14. Had the drafters of the Charter intended to curtail membership rights in a manner other than those provided for in Articles 5, 6 and 19 of the Charter, they would have so specified in the Charter. It may therefore be concluded that procedures to suspend a Member State from any of the benefits, rights and privileges of membership which do not follow those laid down in Article 5 are not consonant with the legal order established by the Charter. If notwithstanding this legal position, procedures outside Article 5 were to be followed, precedent would be created by the General Assembly which would be dangerous in that its consequences would be unpredictable.

(c) *Suspension of the rights and privileges of membership
under the Charter*

15. Article 5 of the Charter lays down the following requirements for the suspension of a Member State from the rights and privileges of membership:

(a) Preventive or enforcement action has to be taken by the Security Council against the Member State concerned;

(b) The Security Council has to recommend to the General Assembly that the Member State concerned be suspended from the exercise of the rights and privileges of membership;

(c) The General Assembly has to act affirmatively on the foregoing recommendation by a two-thirds vote, in accordance with paragraph 2 of Article 18 of the Charter, which lists "the suspension of the rights and privileges of membership" as an "important question".

16. Article 5 speaks in general terms of "the rights and privileges of membership" (underlining added). It may, however, be envisaged that the Security Council could recommend that only certain, and not all, of these rights and privileges be suspended, under the principle that the greater includes the lesser.

17. Article 5 requires, *inter alia*, a recommendation of the Security Council before the Assembly may act to suspend certain rights and privileges. However, there is nothing in the Charter which would preclude the Assembly, if it so wished, from recommending to the Security Council, under Article 10 of the Charter, that it consider whether the conduct and policies of a Member State do not call for preventive or enforcement action and for the suspension of the rights and privileges of membership under Article 5. Alternatively, an amendment could be effected under Article 108 of the Charter providing new grounds and procedures for the suspension or expulsion of a Member State.

(d) *Precedents*

18. The case here under consideration is, of course, not the only occasion when the question has arisen of the suspension or exclusion of a Member State from a conference or organ of the United Nations or of the specialized agencies. It would be of interest, in the present context and on the basis of available information, to recall some of these other cases where action has been taken.

19. There appears to have been only one instance in the United Nations where Member States have been expelled or suspended from a permanent subsidiary organ. This was the Economic Commission for Africa, an organ of a regional character originally open to all States in the region concerned and to other States having non-self governing or trust

territories in the region. By its resolution 974 (XXXVI) D III of 24 July 1963, the Economic and Social Council decided:

“... ”

“(b) To expel Portugal from membership in the Economic Commission for Africa.”

By part IV of the same resolution, the Council also decided:

“... that the Republic of South Africa shall not take part in the work of the Economic Commission for Africa until the Council, on the recommendation of the Economic Commission for Africa, shall find that conditions for constructive co-operation have been restored by a change in its racial policy.”

20. Earlier, at its resumed thirty-fourth session, the Economic and Social Council had rejected proposals of the foregoing nature. At the thirty-sixth session, several new factors emerged. By that time, Portugal was the only non-African member of the Commission which had refused to accept the status of associate membership, all other non-African members having agreed to a change of their membership from full membership to associate membership; South Africa had also informed the Economic Commission for Africa, by a communication of 13 July 1963, that “... the Government has decided not to attend any ECA conferences in the future nor to participate in other activities of the Commission while the hostile attitude of the African States towards South Africa persists”. The factors just mentioned doubtless influenced the outcome and confused the constitutional issues involved. Nevertheless, it would appear that the majority of the members of the Council were of the view that, apparently under Article 68 of the Charter empowering the Council to create commissions, the Council had the authority to expel one Member State and to suspend another from one such commission. This decision does not, therefore, provide a precedent consonant with the views set forth in the present note. However, the action of the Economic and Social Council has not been followed as a precedent in certain other cases involving the specialized agencies of the United Nations.

21. In March 1964, the World Health Assembly, acting under article 7 of its Constitution, which permits the suspension of voting privileges in “exceptional circumstances”,¹⁷ decided to suspend South Africa’s voting rights. Subsequently, in 1965, the World Health Assembly adopted an amendment to its constitution which would permit the Assembly to suspend or exclude from WHO any Member State if it “ignores the humanitarian principles and objectives laid down in the constitution, by deliberately practising a policy of racial discrimination...”. In this case, therefore, the World Health Assembly considered it necessary to adopt a constitutional amendment before suspending or excluding a member from WHO.

22. Likewise, in July 1964, the International Labour Organisation adopted constitutional amendments¹⁸ empowering the International Labour Conference to expel or suspend from membership any member which had been expelled or suspended from membership in the United Nations, or to suspend from participation any member which had been found by the United Nations to be flagrantly and persistently pursuing by its legislation a declared policy of racial discrimination. In this case also, constitutional amendments were considered necessary before action to suspend or exclude a member from the International Labour Conference was taken.

23. In addition to the foregoing, there are precedents both ways in relation to Conferences convened by the specialized agencies. In 1964, at the twenty-seventh International Conference on Public Education, sponsored by UNESCO and the International Bureau of

¹⁷ United Nations, *Treaty Series*, vol. 14, p. 189.

¹⁸ International Labour Organisation, *Official Bulletin*, vol. XLVII, No. 3, Supplement I, July 1964, pp. 8-10.

Education (IBE), a resolution excluding Portugal was adopted. In view of this decision the secretariat provided by UNESCO and by IBE was withdrawn. Similarly, at the African Low Frequency/Medium Frequency Conference, sponsored by ITU in October 1964, the secretariat of ITU was withdrawn after a decision had been taken to exclude South Africa and Portugal. In other instances, the secretariats have not been withdrawn. Examples of this nature may be found in the Congress of the Universal Postal Union in 1964, where South Africa was excluded by simple majority vote, and at the ITU Plenipotentiary Conference in 1965, where South Africa was likewise excluded by majority vote. The Congresses of the UPU and Plenipotentiary Conferences of the ITU are the principal plenary organs of these two specialized agencies. The Universal Postal Convention in force at the relevant time¹⁹ provided, in article 11, that:

“1. Delegates of the Countries of the Union meet in Congress not later than five years after the date of the entry into force of the acts of the preceding Congress...

“2. Each Country arranges for its representation at Congress by one or more plenipotentiary delegates...”

The International Telecommunication Convention in force in 1965 provided, in article 2, paragraph 1, that:

“All Members shall be entitled to participate in conferences of the Union and shall be eligible for election to any of its organs.”²⁰

Neither Convention contained any provision on the suspension or expulsion of members from a UPU Congress or an ITU Plenipotentiary Conference.

24. The above-mentioned examples serve to indicate that the precedents are to some extent conflicting. No clear guidance emerges from them. It is submitted, however, that from the legal point of view the persuasive ones are those where constitutional forms have been followed, even to the extent of the adoption of constitutional amendments.

III. Conclusions

25. From the foregoing survey of the relevant legal considerations it is concluded that:

(a) Procedures for the suspension of a Member State from an organ open to the general membership are laid down exclusively in Article 5 of the Charter, which permits suspension only through joint action by both the Security Council and the General Assembly.

(b) Any other procedure to suspend a Member State from an organ open to the general membership would not be in accordance with the provisions of the Charter, not with the right of every Member State to expect that its obligations will not be increased and its rights will not be curtailed except in the manner expressly laid down in the Charter.

(c) The General Assembly, acting under Article 10 of the Charter, is free to recommend to the Security Council that it consider whether the conduct and policies of a Member State do not call for preventive or enforcement action and for the suspension of the rights and privileges of membership under Article 5 of the Charter.

(d) Alternatively, an amendment can be effected under Article 108 of the Charter, providing new grounds and procedures for the suspension or expulsion of Member States.

¹⁹ United Nations, *Treaty Series*, vol. 364, p. 3.

²⁰ International Telecommunication Convention (Geneva, 1959).

7. COMMODITY CONFERENCES—QUESTION OF THE RECONCILIATION OF UNITED NATIONS RULES CONCERNING PARTICIPATION IN SUCH CONFERENCES AND THE INSTITUTIONAL ARRANGEMENTS OF THE EUROPEAN ECONOMIC COMMUNITY GOVERNING THE NEGOTIATION OF AGREEMENTS

*Opinion prepared for the United Nations Sugar Conference, 1968*²¹

1. I understand that the 1965 Sugar Conference was convened by the United Nations Trade and Development Board acting on the advice of the Interim Co-ordinating Committee for International Commodity Arrangements and upon the recommendation of its Committee on Commodities. Invitations were extended to the States members of UNCTAD, and the European Economic Community sought and was afforded permission by the Executive Committee of the 1965 Conference to participate in the work of the Executive Committee on certain agenda items in a consultative capacity. I also understand that the 1968 Conference continues the work of the 1965 Conference convened by the Trade and Development Board.

2. Invitations to participate in the 1968 Conference were addressed by the Secretary-General of UNCTAD on behalf of the Secretary-General of the United Nations to the States Members of UNCTAD and to certain specialized agencies. The Secretary-General of UNCTAD on behalf of the Secretary-General of the United Nations also notified the European Economic Community of the convening of the 1968 Conference and, after referring to the participation of the Community in the 1965 Conference in a consultative capacity, stated: "It is for the Conference to decide to invite your organization to participate in the 1968 Conference but I am sure that such participation would be welcome. I intend to draw the attention of the Chairman of the Conference to the matter so that the Executive Committee may take a decision thereon at its first meeting." (See TDO/256/SUGAR 2 of 1 February 1968).

3. At the plenary meeting of the Conference on Saturday 27 April 1968, the representative of France proposed that "pending clarification of the legal issues involved, the members of the European Economic Community are provisionally authorized to use a common representation for the States Member and the Community to express the collective position of the Community on matters relating to sugar, it being understood that the right to vote in the Conference may only be exercised individually by the States members of the Community and that the Community itself will have no vote." Several delegations stated that the problem raised in the proposal went beyond the terms of reference of the Sugar Conference and that it was not of a procedural character, but touched upon the Charter of the United Nations; these delegations therefore opposed the proposal. The Conference adopted without objection a ruling of the President to the effect that "based on the views that have been expressed in consultations and in meetings, it is the opinion of the majority of delegations that we should provisionally accept the request of the representative of France in the interest of proceeding with the work of the Conference"

4. The 1968 Sugar Conference is faced with the problem as to the scope of the Community's participation in its work. The extent of the participation which the Conference may afford to the Community has to be decided within the framework of the Charter of the United Nations, which envisages the United Nations as an organization of States, and of the principles of UNCTAD constituent instrument—General Assembly resolution 1995 (XIX)—which in certain circumstances contemplates the participation without vote of bodies other than Member States in UNCTAD deliberations.

²¹ Document TD/SUGAR. 7/4 and Corr.1-3.

5. The particular case of the European Economic Community presents the following novel and, for the time being, unique constitutional feature which it may be in the interest of a commodity conference to recognize in order to further its purposes: the Community, which has single legal personality, functions through four institutions, one of them being the Commission. Under Article 228 of the Treaty of Rome,²² the Commission is the institution afforded the exclusive right and power to *negotiate* (italics added) certain agreements between the Community and other States. The six individual States members of the Community are obliged to recognize the exclusive right of the Commission to negotiate an agreement such as is contemplated by the 1968 Sugar Conference.

6. To enable the six States members of the Community who are required to follow a common agriculture policy to comply with their obligations under the Treaty, and to facilitate their participation in a conference in which negotiations of a commercial nature seem to be an important element, a recognition of the fact that Member States of the Community are bound by the Treaty to present a common European Economic Community view on matters relating to sugar through representatives of one of its institutions, namely the Commission, may commend itself to the Conference. If so, such recognition could be achieved if the representative of the Community were given a position, somewhat different from that of a mere observer but less than that of a State having full rights of participation, which would enable him to take part in negotiations. The Conference could invite the Community to participate in the Conference without vote, and permit the representative of its Commission to act as spokesman for the Community on matters relating to sugar. Such an arrangement would not limit in any way the functions of the States members of the Community participating in the Conference. I believe this procedure could be employed in a commodity conference without infringing upon the United Nations requirements outlined in paragraph 4 above while at the same time satisfying the Community's institutional arrangements.

7. If the Conference adopts this course, the title of Chapter X of the rules of procedure could be amended as follows: "Participation without the right to vote", and the beginning of rule 52 as follows: "Representatives of Economic Communities having obligatory institutional arrangements governing the negotiation of agreements...".

8. With regard to seating arrangements, in view of the special consultative status envisaged, representatives of the Community could be seated separately from, but adjacent to, delegations of States, and in any case not in the area allotted to observers and specialized agencies. For the same reason, with regard to the listing of participants in the Conference, the European Economic Community could be listed separately by name immediately after the States, and before other participant bodies with observer status and the specialized agencies.

24 May 1968

8. QUESTION WHETHER A STATE WHICH HAS CEASED TO BE A MEMBER OF A FUNCTIONAL COMMISSION OF THE ECONOMIC AND SOCIAL COUNCIL MAY CONTINUE TO SERVE AS MEMBER OF A COMMITTEE OF THE COMMISSION²³

Memorandum to the Director of the Division of Human Rights

1. You have asked what consequences the termination of membership in the Commission on Human Rights of Iraq and Costa Rica would have on their respective member-

²² United Nations, *Treaty Series*, vol. 298.

²³ See also *Juridical Yearbook*, 1963, p. 170.

ship in the *Ad Hoc* Study Group on Regional Commissions on Human Rights and in the *Ad Hoc* Committee on Periodic Reports.

2. An examination of the rules of procedure of the functional commissions indicates that under rule 20 membership in a committee is expected to be conterminant with membership in the Commission. Rule 20 states: "At each session, the Commission, in consultation with the Secretary-General may set up such committees as are deemed necessary and refer to them any questions on the agenda for study and report. Such committees, composed of members of the Commission may, in agreement with the Secretary-General, be authorized to sit while the Commission is not in session".

3. This seems to have been the general assumption both of the Commission on Human Rights when it decided, by resolution 6 (XXIII), "to set up an *Ad Hoc* Study Group [on Regional Commissions on Human Rights] of eleven of its members, bearing in mind equitable geographical distribution", and of the Economic and Social Council when it requested the Commission on Human Rights, by resolution 1074 C (XXXIX), "to establish an *ad hoc* committee [on periodic reports] composed of persons chosen from its members ...".

4. In the light of the above, there would seem to be no doubt that membership of committees of the Commission on Human Rights is limited to members of the Commission. This conclusion is also supported by practice. For example, when members of the Commission were elected during the twelfth session of the Commission to the Committee to study the right of everyone to be free from arbitrary arrest, detention and exile, it was expressly stated that members whose terms on the Commission expired would have to be replaced.²⁴ At the thirteenth session, the term of office of two members—Pakistan and Chile—of the Committee had expired on the Commission: the Commission elected two new members—Argentina and Ceylon—as members of the Committee to replace Chile and Pakistan on the basis that they had ceased to be members on the expiry of their term of office on the Commission.²⁵ On this occasion the advice of the Office of Legal Affairs had been sought, on what effect the expiration of the term of office of Chile and Pakistan on the Commission would have on their membership in the Committee on the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile. This Office, in an opinion dated 7 February 1957, concluded that the cessation of membership in the Commission terminated membership in the Committee.

5. In another instance, at the 889th meeting of the Commission, it was pointed out that the terms of office on the Commission of two States that were also members of the *Ad Hoc* Committee on Periodic Reports were due to expire. In conformity with the general principle that cessation of membership in the Commission had the effect of terminating membership in a Committee, the Chairman was authorized by the Commission to appoint, if necessary, two members to the *Ad Hoc* Committee so as to fill any vacancies which might arise following the election, by the Economic and Social Council, of members to the Commission.²⁶ The authorization given to the Chairman at the 889th meeting to appoint two members of the *Ad Hoc* Committee was specifically given with respect to possible vacancies at the end of 1966 and cannot be interpreted to mean that the Chairman of the Commission has authority to make appointments to the *Ad Hoc* Committee whenever a vacancy occurs. It therefore does not give authority to the Chairman to appoint a member at the end of 1967 to replace Costa Rica on the *Ad Hoc* Committee on Periodic Reports.

²⁴ *Official Records of the Economic and Social Council, Thirty-second Session, Supplement No. 3 (E/2844)*, para. 65.

²⁵ *Ibid.*, *Twenty-fourth Session, Supplement No. 4 (E/2970/Rev.1)*, para. 121.

²⁶ *Ibid.*, *Forty-first Session, Supplement No. 8 (E/4184)*, para. 466.

6. It is our conclusion, therefore, that, since the term of office of Costa Rica as a member of the Commission on Human Rights expired at the end of 1967, this cessation of membership in the Commission is followed by termination of membership in the *Ad Hoc* Committee. Similarly the membership of Iraq in the *Ad Hoc* Study Group is terminated with the termination of its membership in the parent body, i.e. the Commission. However, both the Committee and the Study Group could, if they so desired, invite the States whose membership has come to an end to participate in their work by application, *mutatis mutandis*, of rule 72 of the rules of procedure of the functional commissions as was in fact done in 1957.

8 January 1968

9. QUESTION WHETHER THE SUB-COMMISSION ON THE PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES MAY INVITE STATES NOT MEMBERS OF THE UNITED NATIONS TO PARTICIPATE IN ITS PROCEEDINGS

Memorandum to the Director of the Division of Human Rights

1. Rule 71 of the rules of procedure of the functional commissions provides that those rules shall apply to the proceedings of sub-commissions and their subsidiary bodies in so far as they are applicable. Under rule 72, which was taken from rule 76 of the rules of procedure of the Economic and Social Council, a functional commission may invite States which are Members of the United Nations but are not represented on it to participate in its deliberations on matters which are of particular concern to them. There is no provision in that rule or in any other rule for participation of States that are not members of the United Nations.

2. Although the Economic and Social Council has, on a number of occasions, invited non-member States to participate in its proceedings, such practice does not automatically apply to the functional commissions. In the first place, the powers and composition of the commissions are defined by the Council (see Council rule 71); secondly, the rules of procedure of the functional commissions and their subsidiary bodies are drawn up by the Council (Council rule 74), and amendments thereto can be made only by the Council (rule 77 of the rules of procedure of the functional commissions). Consequently, the power of the functional commission or its subsidiary bodies to deal with the procedural question of participation is limited in the context of those provisions.

3. There is no practice indicating the competence of a functional commission or its sub-commissions, in the absence of prior authorization from the Economic and Social Council, to invite non-member States to participate in their deliberations. When a non-member State has been invited, it has been only with such prior authorization by the Council. Thus the Commission on Narcotic Drugs was "authorized by the Council to appoint in a consultative capacity, and without the right to vote, representatives of bodies created under the terms of international conventions on narcotic drugs" (Economic and Social Council resolution I/9 of 16 February 1946). It is under this provision that the Commission had invited States not members of the United Nations but parties to one of the conventions on narcotic drugs to participate in its deliberations. The only other functional commission which has extended such invitations was the Commission on International Commodity Trade. In establishing this Commission, the Economic and Social Council, in resolution 557 F (XVIII), paragraph 3 (b), laid down certain principles to guide its work. One of those principles stated that "any Member State not represented

on the Commission may participate in the Commission's debates on problems in which it has a direct concern; similarly, the Commission, *subject to prior authorization by the Council*, may invite States which are not members of the United Nations to take part in its discussions when their presence appears advisable for further clarification on the problem under study" (italics added). When that Commission was subsequently reconstituted, it was the Council which invited to the first session of the reconstituted Commission "States Members of the United Nations or members of specialized agencies directly interested in commodity problems..." (Economic and Social Council resolution 691 B (XXVI)).

4. Apart from the question of participation in deliberations discussed in the preceding paragraphs, there is also the question whether a commission or sub-commission can invite any individual from whom it may wish to obtain information to make a statement on a matter under consideration by that body. While only the Security Council has a specific rule on this point, practice in other organs indicates that a decision on this question is within the competence of the organ itself.

16 October 1968

10. INTERNATIONAL CONFERENCE ON HUMAN RIGHTS—QUESTION WHETHER A STATE INVITED TO PARTICIPATE IN THE CONFERENCE BY THE GENERAL ASSEMBLY MAY BE EXCLUDED FROM PARTICIPATION BY THE CONFERENCE ITSELF ON THE BASIS OF ASSEMBLY RESOLUTIONS CALLING UPON MEMBER STATES TO TAKE VARIOUS MEASURES AGAINST THAT STATE—QUESTION WHETHER THE CONFERENCE MAY INVITE STATES OTHER THAN THOSE REFERRED TO IN THE CONVENING RESOLUTION

Memorandum to the Director, Division of Human Rights

1. Where the convening resolution adopted by the competent organ of the United Nations contains a provision designating the States or categories of States to be invited to a conference, such provision determines the composition of the conference. Neither the Secretariat nor the conference itself is competent to invite any other State to participate in the conference or to exclude from the conference any State which has been invited pursuant to the resolution. This conclusion is firmly based on the legal interpretation of the pertinent provisions of such convening resolutions and on well-established practice. Thus, a determination of the States entitled to participate in the International Conference on Human Rights is exclusively within the competence of the General Assembly.

2. In operative paragraph 3 of its resolution 2217 C (XXI) adopted on 19 December 1966, the General Assembly, which had previously decided that an International Conference on Human Rights should be convened, invited

"States Members of the United Nations, States members of the specialized Agencies, States Parties to the Statute of the International Court of Justice and States that the General Assembly decides specially to invite, to participate in the Conference and to include among their representatives eminent persons whose qualifications in the field of human rights would enable them to make a valuable contribution to the work of the Conference."

(a) *Question of the exclusion from the Conference of States referred to in the above-quoted provision of the resolution*

3. A State included in this paragraph of resolution 2217 C (XXI) is entitled to be invited to and participate in the Conference. There is no provision in that resolution, or in any other resolution, by which the Conference may act to suspend or exclude any

State from participation in the Conference. It follows, therefore, that the Conference has not been given the competence to exclude such invited States from participation.

4. In the case of South Africa or Portugal, the question remains to be considered whether the foregoing matter of principle is in any way affected by the resolutions of the General Assembly calling upon States, either individually or collectively, to take various measures to bring about the abandonment by South Africa of its policies of *apartheid* or by Portugal of its colonial policy. Many of those resolutions were adopted prior to the adoption of resolution 2217 C (XXI) and it is obvious that these did not have in mind the question of participation of South Africa or Portugal in the Conference on Human Rights. This may be confirmed by reference to the fact that when it adopted resolution 2217 C (XXI), the General Assembly, being aware of its previous resolutions on South Africa or Portugal, did not envisage the question of their exclusion from participation in the Conference. So far as resolutions regarding South Africa or Portugal subsequent to the adoption of the said resolution are concerned, for example resolution 2307 (XXII) of 13 December 1967, it should be observed that the Assembly did not link those resolutions with the participation in conferences convened by the United Nations. Nor did it take any action to exclude them in its latest resolution—resolution 2339 (XXII) of 18 December 1967—in which it dealt in some detail with modalities and procedures for the Conference.

(b) *Question of participation of States not referred to in General Assembly resolution 2217 C (XXI)*

5. In accordance with both the legal interpretation of the convening resolutions and United Nations practice as stated in paragraph 1 above, the Conference on Human Rights is not competent to invite States other than those referred to in resolution 2217 C (XXI). It may also be noted that, although the said resolution includes as an additional category “States that the General Assembly decides specially to invite”, no State other than those which are Members of the United Nations or members of the specialized agencies, or Parties to the Statute of the International Court of Justice, has in fact been so invited by the Assembly.

6. Another question to be considered is whether “States” other than those designated in the convening resolution may be invited or permitted to take part in the Conference in some other capacity. The practice shows that specialized agencies and other inter-governmental organizations, as well as non-governmental organizations, have been invited to send observers to attend international conferences convened by the United Nations. With respect to the International Conference on Human Rights, the General Assembly in resolution 2217 C (XXI) invited the competent specialized agencies to send observers. By resolution 2339 (XXII) of 18 December 1967 (paragraphs 9, 10 and 11), it invited (or provided the modalities to invite) certain other inter-governmental organizations and non-governmental organizations to send observers to the Conference. No provision was made, however, for inviting any “State” that may not have been invited “to participate” to send observers.

12 April 1968

11. QUESTION WHETHER THE SPECIAL COMMITTEE ON THE SITUATION WITH REGARD TO THE IMPLEMENTATION OF THE DECLARATION ON THE GRANTING OF INDEPENDENCE TO COLONIAL COUNTRIES AND PEOPLES COULD EXAMINE THE CONDITIONS IN A TERRITORY BEFORE THE DECISION OF THE SPECIAL COMMITTEE TO INCLUDE THAT TERRITORY IN THE LIST OF TERRITORIES TO WHICH THE DECLARATION APPLIES WAS APPROVED BY THE GENERAL ASSEMBLY

Memorandum to the Secretary of the Special Committee

1. Paragraph 5 of the Declaration on the Granting of Independence to Colonial Countries and Peoples states that:

“Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.”

2. The Special Committee established by General Assembly resolution 1654 (XVI) and 1810 (XVIII) was invited by the Assembly to submit a full report containing its suggestions and recommendations on all territories mentioned in paragraph 5 of the Declaration.

3. A preliminary list of territories to which the Declaration is applicable was established by the Special Committee in 1963 and included in its report to the Assembly. In its resolution 1956 (XVIII), the General Assembly, “taking into consideration the observations of the Special Committee regarding the list of Territories to be examined by it”, approved the report of the Special Committee. This preliminary list consisted of four categories of territories:

(a) Trust Territories;

(b) The Territory of South West Africa;

(c) Territories which have been declared by the General Assembly as Non-Self-Governing Territories within the meaning of Chapter XI of the Charter, but on which information is not transmitted under Article 73 e by the administering Powers concerned; and

(d) Non-Self-Governing Territories on which information is transmitted by the administering Powers concerned.

The third category has since then included Territories under Portuguese administration and Southern Rhodesia.

4. Since its establishment, the Special Committee has recommended only one additional territory, namely, French Somaliland (French Territory of the Afars and Issas), for inclusion in the list of territories to which the Declaration applies. In its 1965 report to the Assembly,²⁷ which contained the decision to include French Somaliland in the list, the Special Committee further stated that “subject to any directives the General Assembly at its twentieth session may wish to give for the speedy implementation of the Declaration, the Special Committee intends to continue its consideration of the question of the list of Territories to which the Declaration is applicable”. In its resolution 2105 (XX) of 20 December 1965, the General Assembly, “noting the action taken and envisaged by the Special Committee regarding the list of Territories to which the Declaration is applicable”, approved the decision taken by the Special Committee to include French Somaliland in the list of territories to which the Declaration is applicable. It was after this approval by the

²⁷ *Official Records of the General Assembly, Twentieth Session, Annexes*, addendum to agenda item 23, p. 9.

General Assembly that the Special Committee proceeded to examine conditions in French Somaliland in 1966.

5. In 1966 the Special Committee reported to the General Assembly that it would make a study of the question of the inclusion of Puerto Rico and the Comoro Archipelago in the list of territories to which the Declaration is applicable and also consider any other territories which might be included in the list of "all other territories which have not yet attained independence."²⁸ In its resolution 2189 (XXI) of 13 December 1966, the General Assembly approved "the action taken and envisaged by the Special Committee *for the year 1967* (italics added) with respect to the list of Territories to which the Declaration applies".

6. In 1967 the Special Committee reported that "subject to any directives that the General Assembly might give at its twenty-second session"²⁹ for the speedy implementation of the Declaration, consideration of the list of territories to which the Declaration is applicable should be continued during the next session of the Special Committee. In its resolution 2326 (XXII) of 16 December 1967, the General Assembly approved "the programme of work envisaged by the Special Committee *during 1968* (italics added) including ... the review of the list of Territories to which the Declaration applies."

7. The foregoing records have therefore clearly established the practice that the addition of a territory to the list of territories to which the Declaration applies is subject to the approval of the General Assembly before that territory can be examined by the Special Committee. This practice is sound from the legal point of view for the following reasons:

(1) The Assembly approves the report of the Special Committee regarding the list of territories to be examined by it, and the final decision on whether a specific additional territory should be included in this list rests with the Assembly.

(2) Neither in the initial establishment of the Special Committee nor in subsequent resolutions of the General Assembly which entrusted further functions to, or approved recommendations by, the Special Committee, was there any indication that the Assembly had delegated to the Special Committee the authority to make final decision on additional territories. On the contrary, the Assembly has retained its authority each year in referring to such territories.

8. It follows therefore that the Special Committee can examine conditions in a territory only after the Assembly has approved the inclusion that of territory in the list of territories to which the Declaration is applicable.

4 November 1968

12. PROCEDURE BY WHICH STATES MAY BECOME PARTIES TO TREATIES IN RESPECT OF WHICH THE SECRETARY-GENERAL PERFORMS DEPOSITORY FUNCTIONS—DECLARATION OF ACCEPTANCE OF THE COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE IN ACCORDANCE WITH ARTICLE 36, PARAGRAPH 2, OF THE STATUTE OF THE COURT

Letter to the Permanent Representative of a Member State

I have the honour to refer to our recent conversation in which you asked me for a list of multilateral treaties in respect of which the Secretary-General performs depository func-

²⁸ *Ibid.*, *Twenty-first Session, Annexes*, addendum to agenda item 23, p. 30.

²⁹ *Ibid.*, *Twenty-second Session, Annexes*, addendum to agenda item 23, p. 37.

tions and to which your country has not yet become a party. You also inquired about the procedure whereby it may do so.

May I call your attention, in this regard, to the United Nations publication *Multilateral treaties in respect of which the Secretary-General performs depositary functions—List of signatures, ratifications, accessions, etc., as at 31 December 1967*.³⁰ This publication covers all multilateral treaties which have been concluded under the auspices of the United Nations or its specialized agencies and the original of which have been deposited with the Secretary-General, as well as certain League of Nations treaties and pre-United Nations treaties referred to in paragraphs 5 to 7 of the introduction to the said publication and in respect of which the Secretary-General performs depositary functions. The publication gives a list of States which have taken any action in respect of any of the treaties covered by it. A list of all treaties dealt with in the publication will be found on pages iii to xii thereof.

As a Member of the United Nations, your country is entitled to become a party to most of the treaties covered by the above-mentioned publication, except for those which have ceased to be in force and those which are either regional in scope or in which participation is otherwise restricted.

The procedure by which States may become parties to any of these treaties is set forth in the final clauses of each. Most of the United Nations treaties are open for signature either indefinitely or until a certain date, to be followed by ratification or, alternatively, for accession; others are open only for accession. (There are also some treaties which provide either for signature without reservation as to acceptance [definitive signature], or signature subject to acceptance followed by acceptance, or acceptance without a prior signature.)

Ratification, accession or acceptance are all acts by which a State established, on an international plane, its consent to be bound by a treaty. Such acts are carried out by deposit with the Secretary-General of a formal instrument of ratification, accession or acceptance, as the case may be. The consent of a State to be bound by a treaty may also be expressed by a signature alone, where a treaty—as mentioned above—provides that States may become parties by definitive signature. Otherwise, signature itself has no binding effect until it is followed by the deposit of an instrument of ratifications.

Thus, to those treaties which are open for signature indefinitely and are subject to ratification, the Government of your country may become a party by first signing a treaty and then depositing with the Secretary-General an instrument of ratification thereof, or alternatively may accede to it by depositing with him an instrument of accession. The originals of those treaties remain open for signature at the Headquarters of the United Nations and may be signed on behalf of the Government by its representative, duly authorized to that effect in full powers issued by the Head of the State or the Government or by the Minister for Foreign Affairs.

To those treaties which are no longer open for signature, the Government of your country may become a party by depositing an instrument of accession thereto with the Secretary-General.

In accordance with established international practice, an instrument of ratification, accession or acceptance, should be made in a formal document emanating either from the Head of State or the Government or from the Minister for Foreign Affairs and bearing the signature of one of those authorities. It should give the exact title of the treaty concerned and express the consent of the Government, acting on behalf of the State, to be bound by the treaty.

³⁰ United Nations publication, Sales No. : E.68.V.3.

Among the treaties which are open for your country to become a party to, there is only one to which, according to its provisions, States may become parties either by signature without reservation as to acceptance or by signature subject to acceptance, followed by acceptance, or by acceptance, namely, the Convention on the Inter-Governmental Maritime Consultative Organization, signed at Geneva on 6 March 1948.³¹ Should your Government wish to become a party to this Convention by signature without reservation as to acceptance, it should so specify in the full powers authorizing its representative to sign the Convention.

Finally, I wish to call your attention to paragraph 2 of Article 36 of the Statute of the International Court of Justice under which your country may at any time declare that it recognizes as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; (d) the nature or extent of the reparation to be made for the breach of an international obligation. Such declaration may be made unconditionally or on condition of reciprocity on the part of several or certain States, or for a certain time and shall be deposited with the Secretary-General who transmits copies thereof to the parties to the Statute and to the Registrar of the Court.

I refer you in this regard to the publication mentioned in the second paragraph of this letter, where on page 9 you will find a list of States which have made such declarations, followed by the texts of the declarations.

6 March 1968

13. INDEPENDENT AND EXCLUSIVE AUTHORITY OF THE COMMISSIONER-GENERAL OF UNRWA WITH REGARD TO THE APPOINTMENT, TRANSFER AND PROMOTION OF ITS STAFF

Opinion of the General Counsel of UNRWA

1. The question was raised as to the Agency's authority with regard to the appointment, promotion and transfer of its staff under the regulations and rules of the Agency, and its relationship in this respect to the host Governments.

2. The Agency is a subsidiary organ of the General Assembly and is therefore governed by the United Nations Charter; Agency staff are United Nations officials and the competence of the Agency in matters affecting its staff is governed by the principles which are applicable to the United Nations Organization as a whole.

3. It will be recalled that the first paragraph of Article 101 of the United Nations Charter provides as follows:

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

4. It will also be recalled that the staff employed by UNRWA for the fulfilment of the tasks entrusted to it by the General Assembly are appointed under the provisions of paragraph 9 (b) of General Assembly resolution 302 (IV), adopted on 8 December 1949, as staff members of a subsidiary organ of the United Nations, and thus of the United Nations itself. The text of paragraph 9 (b) of this resolution reads as follows:

³¹ United Nations, *Treaty Series*, vol. 289, p. 3.

“(b) The Director shall select and appoint his staff in accordance with general arrangements made in agreement with the Secretary-General, including such of the staff rules and regulations of the United Nations as the Director and the Secretary-General shall agree are applicable, and to the extent possible utilize the facilities and assistance of the Secretary-General;”.

5. The independent and exclusive authority of the Commissioner-General of UNRWA to appoint his staff is thus an integral part of his constitutional role as the chief executive officer of the Agency, and is based upon a long standing and well established principle embodied in the United Nations Charter itself, designed to assure the independent and truly international character of the staff of the United Nations.

6. This principle is further complemented by the requirement contained in Article 100 of the United Nations Charter concerning the independence of the United Nations officials. Paragraph 1 of this article, concerning the obligations of the Secretary-General and the staff, reads as follows:

“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.”

7. Moreover paragraph 2 of Article 100 of the United Nations Charter, which reads as follows, provides a corresponding duty on the part of governments to respect the exclusively international character of the staff:

“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.”

8. It necessarily follows from these provisions that the Commissioner-General of UNRWA is precluded from seeking or receiving instructions from any government or external authority in regard to the performance of his duties, including the duty of appointing staff, and also that the governments of all Member States are under a clear obligation to respect the international character of these duties, and not to seek to influence the Commissioner-General or his staff in the discharge of their responsibilities.

9. It is, of course, self-evident that the Commissioner-General of UNRWA needs and desires the fullest cooperation with Member States in the discharge of his responsibilities. Moreover he naturally appreciates assistance offered by governments in making available, or providing information on candidates for appointment to the staff of UNRWA, with a view to securing for the Agency the highest standards of efficiency, competence and integrity, as required in paragraph 3 of Article 101 of the United Nations Charter. Nevertheless, while welcoming such assistance in the form of offers of help or relevant information, the Commissioner-General must always reserve to himself the final decision on the basis of all the facts available to him.

10. It has been for the purpose of establishing such cooperation and sharing such information that the Agency has, in some areas, instituted “joint selection boards”, comprising representatives of both the host government and the Agency, which consider the qualifications of available candidates for certain categories of posts, and make recommendations to the Commissioner-General or his authorised representative.

11 June 1968

14. SCOPE AND EFFECT OF THE PRIVILEGES AND IMMUNITIES REQUIRED UNDER THE 1946 CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS FOR LOCALLY RECRUITED STAFF

Memorandum from the General Counsel of UNRWA

1. The purpose of this memorandum is to explain the privileges and immunities to which locally-recruited United Nations staff are entitled within the territory of a State party to the 1946 Convention. There are three points of particular importance which require emphasis before entering into the detailed discussion of particular privileges.

2. Firstly, and most important, none of the privileges or immunities are intended for the personal benefit or advantage of the individual concerned. As Section 20 of the Convention states:

“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 shall have the right and the 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. In the case of the Secretary-General, the Security Council shall have the right to waive immunity.”

The basic purpose of these privileges and immunities is to ensure the independence of the individual *in all that concerns his official acts*, for, as Article 100 of the United Nations Charter recognizes, it is imperative that, in the performance of official duties, a staff member be not subject to instructions or control by any government or authority external to the United Nations. Thus, Article 100 embodies not only obligations on the staff, but also obligations on every Member State. It will also be noted that Article 105, paragraph 2, is mandatory in providing that

“... officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization”.

It was this provision of the United Nations Charter which, together with paragraph 1 of the same article, the 1946 Convention was intended to implement.

3. Secondly, locally-recruited personnel of the Agency no less than internationally-recruited personnel are staff within the meaning of Article 101, paragraph 1, of the Charter. In accordance with General Assembly resolution 76 (I) of 7 December 1946, privileges and immunities under Section 18 of the Convention apply to all officials of the United Nations except those who are both locally-recruited and assigned to hourly rates. This is a decision of the General Assembly and as such neither the Secretary-General nor the Commissioner-General have authority to agree to any modification of this decision.

4. Thirdly, locally-recruited staff do not enjoy the same extent of privileges and immunities as do expatriate staff, recruited abroad. Several of the privileges and immunities mentioned in Section 18, Article V, of the Convention on the Privileges and Immunities of the United Nations are only relevant in the case of staff working outside their country of normal residence. Privileges which fall into this category include the repatriation facilities mentioned in paragraph (f) of Section 18, and the right to import furniture and effects free of duty when first taking up a post in the country in question, which is conferred by paragraph (g) of Section 18. The exchange facilities mentioned in paragraph (e) will usually fall into the same category, because, if an Agency official is normally resident and working in a host State prior to employment by UNRWA, it is not likely that circumstances will arise in which the transfer of funds, into or out of the host State will be regarded as an act related to his employment by UNRWA. The immunity from immigration restrictions and alien regis-

tration, which is mentioned in paragraph (d) of Section 18, is also concerned primarily with non-residents.

5. Thus, the categories of privileges and immunities directly relevant to locally-recruited staff are the following:

(a) *Immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity (Section 18(a))*

Paragraph (a) of Section 18, which confers immunity from legal process in respect of words spoken or written and all acts performed by officials in their official capacity, is the most important provision of that section. The United Nations has never agreed to any derogation from this provision. The extreme importance of this provision lies in the fact, that, when acting in their official capacity, the acts of the official are in effect the acts of the United Nations itself, and the nationality of the official is totally irrelevant. Without this immunity, officials would be liable to be sued or prosecuted for acts done in their official capacity; they would be liable to be forced to appear as witnesses in court to give evidence on official matters; they would be liable to arrest and interrogation by State authorities on matters arising out of their official duties. Removal of such protection would place officials in a situation where they could be subjected to external pressures and influence directly contrary to Article 100 of the Charter. It will also be apparent that subjection of staff to legal process could lead to the disclosure of matters which, within any civil service, are properly regarded as internal matters of a confidential nature. It could also lead to the circumvention of Section 4 of the Convention (on the inviolability of archives and documents) in that the contents of such documents might be divulged under oral examination of Agency staff. It must also be apparent that, precisely because it is the basic principle of Article 100 which is at stake here, the notion of "legal process" has to be given a broad interpretation. Thus, where a Member State uses a system of administrative bodies or tribunals, rather than courts *stricto sensu*, for conducting enquiries or hearings, the immunity from jurisdiction applies with equal force. This has been accepted both by Member States and even by non-member States with whom the United Nations has made agreements on privileges and immunities of the Organization. It must be remembered, however, that for all staff other than the Commissioner-General himself this immunity is not the general immunity conferred on diplomatic agents but is strictly limited to the official acts of the staff member: it is a strictly "functional" immunity.

Admittedly, there can be borderline cases in which it may be disputed whether the act is "official" or "non-official" and, as the employer, the Agency must reserve the right to make this decision. But a host Government will find reassurance in the fact that any acts by a staff member which are truly part of political activities are by definition "non-official". The abstention from political activities is not only a characteristic of United Nations employment but is reinforced by specific obligations undertaken by the staff member. Thus, the immunity for official acts cannot be used by staff as a protection behind which they may shelter whilst engaging in political activities directed against the Government. Indeed, such action would lead to disciplinary action by the Agency including, where necessary, dismissal from the Agency's employment. A host Government has the further reassurance that, even where an act is official, the immunity of the official not only can but must be waived by the Secretary-General (or the Commissioner-General, acting on his behalf) "where the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations" (Section 20). The Government can always, therefore, request a waiver in a particular case where these conditions would be met. Even where the Agency is not prepared to waive the immunity of a staff member, this does not mean that no possibilities exist for the Agency to assist the administrative or judicial

authorities of the host Government. The Agency has, on frequent occasions, given information to these authorities and has transmitted to local courts information from Agency files relevant to proceedings before those courts. Moreover, the Agency has, on occasions, engaged in joint investigations with the local authorities over matters such as the theft of Agency property. In some cases the Agency has first dismissed the staff member and then actually requested the local authorities to prosecute and been joined, at its request, as a "partie civile" in the criminal action. These are all practical measures which the Agency can take, and has taken, with a view to fulfilling its obligation under Section 21 of the Convention to "cooperate at all times with the appropriate authorities of Members to facilitate the proper administration of justice, secure the observance of police regulations etc...".

(b) *Exemption from taxation on the salaries and emoluments paid by the United Nations (Section 18(b))*

This exemption is not designed to create a specially-privileged class. In fact, the levels of salaries paid tax-free to UNRWA officials are fixed by reference to the levels of salaries of governmental officials holding comparable posts *after deduction of tax*. The true purpose of the exemption is twofold. First, given the desirability of equality in salary treatment for officials of equal rank, it enables the Agency to fix comparable salary levels for comparable posts throughout the entire area of the Agency's operations, without the need for continuous adjustment which would be necessary if changes and variations in national tax legislation had to be taken into account. Second, and even more important, the exemption ensures that the funds contributed by Member States and private organizations for the support of the Agency, on a voluntary basis,³² are not diverted into the Treasuries of host States by means of national taxation of the salaries of locally-recruited officials. It is basic to all United Nations operations within the territory of a host State that it is not the purpose, direct or indirect, of these operations to constitute a profit to the national Treasury. Indeed, it must be obvious that the Agency could not expect contributing States to increase their contributions for the purpose of offsetting the increased costs which the Agency would incur if salaries had to be paid subject to tax: the increased costs would have to be met by cutting services to the refugees, and it can scarcely be imagined that the host States would wish this to occur.

(c) *Immunity from national service obligations (Section 18(c))*

This immunity is based upon the need to ensure that the efficient conduct of United Nations operations is not jeopardized by the withdrawal from United Nations service of officials of an international organization for the purpose of serving a period of national military service. The immunity also reflects an assumption, which Member States may be expected to share, that service in the United Nations is as constructive a role for the individual to play in the preservation of international peace and security as would be service in national armed forces. Obviously, the possible jeopardy to the Agency's operations is greatest in the case of senior, locally-recruited officials who could be replaced only with the greatest difficulty: heads of departments, medical officers, vocational training instructors are obvious examples. For this category of senior officials the Agency would be bound to maintain this immunity.

However, there are other lower categories of staff for whom practical arrangements might be made so as to reconcile any conflicting claims to their services by both Agency and Government. For example, a system of deferment from national service might be

³² It is the voluntary nature of these contributions which also prevents UNRWA from operating a tax equalization fund comparable to that used by the United Nations.

arranged for such period as would allow the Agency to make alternative staffing arrangements. One point must, however, be emphasized. The Agency could not undertake obligations (such as are placed on employers in some States) to continue payments of salary, either in whole or in part, or of any other emoluments or benefits during a period of military service. Obligations of this kind would in effect mean that the United Nations was subsidizing military service in a particular State—a use of funds scarcely likely to be acceptable to contributing States and private entities—and paying double salaries for one post, since a replacement staff member would also have to be paid.

There is, however, a major disadvantage to the relaxation of this immunity in that it would force the Agency to deal somewhat harshly with one or other of the individuals affected. That is to say, the Agency would either have to terminate the staff member required to do military service *or* appoint a replacement on a purely temporary basis on the condition that he would have to be terminated when the previous staff member completed his military service. There is yet a further disadvantage in the wastage and relative inefficiency of the Agency's training and re-training of staff so as to accommodate periods of absence for military service. Thus, taking all considerations into account, the justification for retaining this immunity is a very compelling one. The Agency would hope to secure a host State's acceptance of the proposition that to impose military service on Agency officials would do harm to the Agency which would far outweigh any benefit to the host State.

6. It has already been emphasized that privileges and immunities do not exist for the benefit of the individual and that, in a proper case, the Secretary-General and on his delegation the Commissioner-General can waive these privileges and immunities. Thus, any abuse of these privileges and immunities would lead to internal disciplinary action by the Agency and to the possibility that, consequent upon a waiver, the host State's own courts might assume jurisdiction over an offender.

7. The host State has ample opportunity for conveying its views about possible abuse to the Commissioner-General. In the event that the Agency should not feel able to share the host State's view that an abuse had occurred, the host State would still have open to it ample safeguards. It could convey its views directly to the Secretary-General of the United Nations who, by reason of his acquaintance with the world-wide application of the 1946 Convention, could take his decision upon the reasonableness of opposed views. And, in final analysis, it could utilize the disputes procedure provided by the Convention itself in Section 30.

15 May 1968

15. QUESTION WHETHER THE SALARY OF A STAFF MEMBER CAN BE ATTACHED
AS A RESULT OF A COURT ORDER

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

You refer to the hypothetical situation where a court of law, in the execution of a judgement against a staff member for a debt owed by him, attempts to require the UNIDO to pay a part of the salary of the staff member to his creditor. Such a proceeding is sometimes referred to as garnishment, or attachment, of salary.

There is no doubt that such a proceeding with respect to the UNIDO is null and void. In the first place, service of the court order upon UNIDO is a legal process from which the

UNIDO is immune. This is in virtue of Section 2 of the Convention on the Privileges and Immunities of the United Nations³³ and Section 9 (a) of the UNIDO Headquarters Agreement.³⁴ Secondly, the proceeding would be tantamount to a seizure of the assets of the UNIDO from which the UNIDO is exempt under Section 3 of the Convention on the Privileges and Immunities of the United Nations. It should be noted that any such court order would be directed to UNIDO and the “salary” to be seized is, before it is actually paid to the staff member, a part of the assets of UNIDO.

However, as you know, the Organization’s immunities afford no justification for a staff member’s failure to meet his legal obligations and it is the United Nations policy, in line with the dictates of the General Assembly, to take measures to prevent the immunity from legal process from defeating creditors’ rights.

Accordingly, the following practice has been followed with respect to garnishments and other court orders similarly reporting to direct the Organization, as employer, to make regular payments out of a staff member’s salary directly to a judgement creditors. The court order, if received, is returned to the creditor (or court official) with the explanation of the Organization’s immunity and also the United Nations policy concerning private legal obligations of staff members. As for the staff member, he is requested—usually by his Personnel Officer—to settle the matter in such a way, either by payment or further court action, as to avoid any further embarrassment to the United Nations. Even if he disclaims the debt or intends to appeal the judgement, he is required, as a matter of proper conduct, to take whatever legal steps would ordinarily be necessary to delay any direct action *vis-à-vis* his salary; for the Organization tries to avoid involvement in the question of the validity of court judgements concerning staff in their unofficial capacity.

With respect to deductions under Staff Rule 203.18 (b) (iii) for debts to third persons, it is against established policy to authorize deductions from regular salary checks for debts to judgement creditors; but it is not unusual to make such deductions from final salary or other terminal payments due to staff member upon separation.

6 February 1968

³³ United Nations, *Treaty Series*, vol. 1, p. 15.

³⁴ See *Juridical Yearbook*, 1967, p. 44.