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

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

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CONTENTS (*continued*)

CONTENTS (*continued*)

CONTENTS (*continued*)

Chapter VI

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

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

1. Question of the possible accession of intergovernmental organizations to the Geneva Conventions for the protection of war victims [1]

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

1. This memorandum deals with the question of the accession of the United Nations to the Geneva Conventions for the protection of war victims, [1] with particular reference to proposals made at the second session of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, recently held in Geneva. [2]

2. The question of the application of the Geneva Conventions to United Nations peace-keeping operations is one of long standing, having been raised at least since the days of the Congo operation. The question was raised again at the Conference, this time in the form of a suggestion to insert in the draft Additional Protocol to the Conventions a clause providing for accession by the United Nations. The International Committee of the Red Cross has been of the opinion that the United Nations should formally undertake by accession to apply the Conventions each time Forces of the United Nations are engaged in operations.

3. We have always maintained, however, that the United Nations is not substantively in a position to become a party to the 1949 Conventions, which contain many obligations that can only be discharged by the exercise of juridical and administrative powers which the Organization does not possess, such as the authority to exercise criminal jurisdiction over members of the Forces, or administrative competence relating to territorial sovereignty. Thus the United Nations is unable to fulfil obligations which for their execution require the exercise of powers not granted to the Organization, and therefore cannot accede to the Conventions.

4. However, the United Nations by exchanges of letters, binds governments contributing contingents to its Forces to ensure respect for the Conventions by their respective contingents, [3] and it has itself requested the Forces, in Regulations issued by the Organ-

[1] United Nations, *Treaty Series*, vol. 75.

[2] For a survey of the second session of the Conference, see document A/8781.

[3] See for example the Exchange of Notes, dated 21 February 1966, between the United Nations and the United Kingdom of Great Britain and Northern Ireland concerning the service with the United Nations Peace-Keeping Force in Cyprus of the national contingent provided by the Government of the United Kingdom, reproduced in the *Juridical Yearbook*, 1966, pp. 41-44, paras. 10 and 11.

ization, [4] to respect the humanitarian principles and spirit of the Conventions. On the basis of the foregoing, the Secretariat, in the Conference mentioned above, opposed the inclusion in the draft Protocol of a clause providing for accession to the Geneva Conventions by the United Nations or intergovernmental organizations. [5]

5. Finally, the Commission IV of the Conference decided not to include in the draft Protocol any clause providing for accession of intergovernmental organizations. The position taken by the Secretariat on this matter has been nearly unanimously supported by all the delegations.

15 June 1972

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2. Decision of the Secretary-General to withdraw the accreditation of the correspondents of the "Central News Agency of China"—Accreditation Policy of the United Nations—By deciding in resolution 2758 (XXVI) to "recognize the representatives of the People's Republic of China as the only representatives of China to the United Nations", the General Assembly ipso facto decided on recognition of a Government

Summary of a "Note to correspondents"

1. The following points are made in clarification of the decision of the Secretary-General to withdraw the accreditations of the correspondents of the "Central News Agency of China" (CNA).

I. *Issues of fact*

2. One main issue of fact involves the status of CNA. When the matter of the CNA correspondents was first raised, the Chief of Bureau of the Agency stated that "Our status as a national agency is attested to in the study 'News Agencies: Their Structure and Operation' published by UNESCO". The study in question states, *inter alia*, as follows:

"*Juridical Status*

"Ever since it was detached from the Kuomintang headquarters, CNA has been operated and subsidized by the National Government. Since its head office was moved to Formosa, CNA has been owned and wholly maintained by the Government.

"*Budget*

"At present, CNA operates with funds annually provided and voted in the Government budget.

"*Administrative Organization and Personnel*

"The CNA Administrative Committee, which is its highest authority, consists of nine members appointed by the Government."

3. It is therefore established without any doubt or qualification whatsoever that the CNA is "an official news agency" and it is an organ owned, wholly maintained, financed and controlled by the authorities on Taiwan who claim to be the Government of China.

4. Another important issue of fact relates to the accreditation policy of the United Nations. The guidelines in this respect are contained in a "Handbook for Correspondents" published by the Office of Public Information (OPI), the latest edition of which has been put out in 1970. The relevant extract reads as follows:

[4] *Ibid.*, 1964, p. 177.

[5] See document A/8781, para. 218.

"OPI must be satisfied that those applying for accreditation (*a*) represent a *bona fide* news or information outlet whether in press, radio television, films or photos; (*b*) that they themselves are *bona fide* professionals.

"As initial evidence of fulfilling the requirement of (*a*) above, OPI will accept an official communication from the head of the *organization seeking accreditation.* This should state the name of the person to be accredited...." [italics added.]

5. The extract just quoted illustrates the close and necessary connexion between an individual seeking accreditation and the agency or other media which he represents. This is borne out by practice. Free lance correspondents are given only temporary accreditation, for the period of their particular assignment to cover some aspect of United Nations work. Permanent accreditations are only granted to correspondents who are employed by, or provide coverage for, permanent "organization(s) seeking accreditation" to cover continuously the work of the United Nations. If the agency or organization whose representative is accredited ceases to exist, either in fact or in law, the accreditation also comes to an end and must be reapplied for in the name of another agency or organization.

6. Furthermore, practice also establishes a practical distinction between "official news agencies" and "international agencies" on the one hand, and other news media. While this distinction does not extend to facilities for gathering news, the former are granted private office facilities in United Nations Headquarters which are not generally available to the latter. In the period prior to 25 October 1971, the CNA was accorded such private facilities as a "government" or "national" news agency.

II. *Issues of Law and of Policy*

7. By its resolution 2758 (XXVI) of 25 October 1971, after recognizing "that the representatives of the Government of the People's Republic of China are the only lawful representatives of China to the United Nations and that the People's Republic of China is one of the five permanent Members of the Security Council", the General Assembly of the United Nations decided:

"... to restore all its rights to the People's Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations, and to expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations and in all the organizations related to it."

8. It is to be observed that when the General Assembly of the United Nations decides, for its purposes, that certain representatives are the only lawful representatives of a Member State to the United Nations, it follows automatically that the authorities accrediting those representatives constitute in the view of the General Assembly—again for its purposes—the only lawful Government of that Member State. This is the only possible conclusion which has any meaning. If the General Assembly were to determine questions of representation without reference to the status of the accrediting authority, no criteria would exist and decisions would be entirely arbitrary. The conclusion cannot therefore be escaped that a decision on recognition of a Government was taken when General Assembly resolution 2758 (XXVI) was adopted and it is irrelevant that, in their bilateral relationships, some Member States may take a different stand. By that resolution, the General Assembly determined for its own purposes that the Government of the People's Republic of China was the only legitimate Government of China and that the authorities on Taiwan had no lawful claim to that Government.

9. The law, as just indicated, must be applied to the facts of the case in question and within the general context of United Nations accreditation policies. At the outset it

may be observed that the law in a specific and definite instance such as this would necessarily override general policies to the extent that any conflict existed, although it is submitted that in reality no such conflict did exist. Furthermore, it must be noted that it is the responsibility of the Secretary-General under the Charter to give effect to the decisions of the principal deliberative organs of the United Nations.

10. It has been shown that the CNA was "an official news agency", owned, wholly maintained, financed and controlled by the authorities on Taiwan (see paragraphs 2 and 3 above). Prior to 25 October 1971, it was also accorded within the United Nations the treatment given to official news agencies (see paragraph 6 above). After the adoption of General Assembly resolution 2758 (XXVI), the Secretary-General, in discharge of his responsibilities, could no longer recognize the CNA as the *bona fide* official news agency of China, and consequently, could not continue the accreditation of the CNA correspondents if they continued to act as representatives of a Government agency. As indicated in paragraphs 4 and 5 above, there is an indissoluble link between an accredited correspondent and the agency he represents, and, if the latter ceases to exist in fact or in law, the accreditation ceases. With the adoption of General Assembly resolution 2758 (XXVI), the CNA, as a national news agency, ceased in law to exist for United Nations purposes.

1. With the above factors in mind, shortly after the adoption of General Assembly resolution 2758 (XXVI), the correspondents of the CNA were approached and were informed that, in view of the decision of the General Assembly, their accreditation could only be continued if they were to act on behalf of a private news agency, and not one claiming to be the official news agency of an authority purporting to represent China. As a first step, on the proposal of these correspondents it was agreed to drop the words "of China" from the title of their agency and to admit correspondents of other agencies to what were previously private office facilities, thus denoting they no longer claimed the facilities accorded to government news agencies. However, information was received that the CNA correspondents continued to dispatch from United Nations Headquarters news which was published as emanating from the "Central News Agency of China", namely an official organ of authorities which for United Nations purposes had ceased to exist. In such circumstances the Secretary-General had no alternative but to give effect to the decision of the General Assembly and, on 17 December 1971, to withdraw the accreditations of the correspondents concerned. Should, however, those correspondents wish to apply for accreditation as *bona fide* representatives of *bona fide* private news media on Taiwan, those applications would be treated in the same manner as any other application from any part of the world.

10 February 1972

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3. Proposal that the United Nations join with a Member State in sponsoring the award to a person or an institution of a prize in the field of human environment—Question whether there are legal objections to such a proposal [6]

Memorandum to the Special Assistant to the Secretary-General of the Conference on Human Environment

1. You have requested our views on whether there would be any legal objection to a proposal that the United Nations join with Iran in sponsoring the annual award of an

[6] See also *Juridical Yearbook*, 1965, p. 232.

"international prize" to a person or institution for outstanding achievement in the preservation and enhancement of the human environment.

2. The following questions appear to be relevant from the legal point of view:

(*a*) Is the proposal consistent with the purposes and objectives which the General Assembly sought to pursue when it took up the environment issue?

(*b*) Is the United Nations empowered to award prizes to individuals and non-governmental institutions?

(*c*) Are there precedents for such action?

3. As regards the first question, one of the purposes which the General Assembly stressed in calling the Stockholm Conference was that the Conference should serve "to focus the attention of Governments and public opinion on the importance and urgency of this question" namely the protection and enhancement of the human environment (thirteenth preambular paragraph of resolution 2398 (XXIII)). This statement followed the expression of the Assembly's conviction in the same resolution "that increased attention to the problems of the human environment is essential for sound economic and social development" and that there is a "need for intensified action at the national, regional and international level in order to limit and, where possible, eliminate the impairment of the human environment and in order to protect and improve the national surroundings in the interest of man" (fifth and eleventh preambular paragraphs).

4. In the light of the foregoing, it appears that the establishment of a prize "for outstanding achievement in the preservation and enhancement of the human environment" could reasonably be considered as one of possible measures and activities which the General Assembly might adopt in furtherance of the above stated purposes.

5. On the second question, there seems to be little doubt that the United Nations can establish international awards for achievements in fields consistent with the purposes of the Organization under the Charter. Under Article 104 of the Charter and under the Convention on the Privileges and Immunities of the United Nations, the Organization, in the exercise of its functions and the fulfilment of its purposes, may dispose of property in favour of individuals and it does so constantly.

6. As to precedents, "United Nations prizes" for the most outstanding scientific research work in the causes and control of cancerous diseases were instituted by the General Assembly in resolution 1398 (XIV). In 1962, seven outstanding scientists selected by WHO, received this prize (six awards of $10,000 each). The presentation of the awards was made by the President of the General Assembly and the Secretary-General. Another instance of United Nations awards is the medallion commemorating the International Co-operation Year and the twentieth anniversary of the United Nations which was presented in 1965 to a number of personalities by the Secretary-General. "Human Rights prizes", established pursuant to General Assembly resolution 2217A (XXI) (Annex, Recommendation C), for outstanding contributions to the promotion and protection of the human rights and fundamental freedoms, and the Nansen Medal Award, instituted in 1954 by the United Nations High Commissioner for Refugees for outstanding work on behalf of refugees are further examples of United Nations prizes. In 1968, a number of persons received United Nations "Human Rights Prizes" on the occasion of the celebration of the twentieth anniversary of the Universal Declaration on Human Rights; and the Nansen Medal is awarded each by the High Commissioner.

7. A difference between the present proposal and previous precedents is that the present proposal contemplates the United Nations joining with a particular Member State in sponsoring the award of the prize but this does not seem to give rise to any legal objection.

8. To summarize, it would seem that the proposal that the United Nations and one of its Member States co-sponsor an annual prize to be awarded for outstanding achievement in the preservation and enhancement of the environment would be

(*a*) consistent with the purposes and objectives sought by the General Assembly in the field of the environment;

(*b*) within the powers of the Organization and consistent with its purposes under the Charter; and

(*c*) in accordance with precedents. [7]

17 April 1972

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4. Question whether the United Nations may claim exemption from "production duties" levied on gasoline by a Member State [8]

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

1. You have asked for our views on a statement by the authorities of a Member State that the granting to UNTSO of exemption from "production duties" on gasoline is not legally justified.

2. Section 7 of the Convention on the Privileges and Immunities of the United Nations [9] provides that the United Nations shall be "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".

3. With regard to the definition of the term "direct" taxes, the principle is that the Convention should be uniformly applied in all Member States and therefore the characterization given to that term by municipal law or municipal officials cannot be controlling if the nature and incidence of the tax affect the United Nations and increase the financial expenses of the Organization to the advantage of a Member State. The interpretation of the term "direct" in accordance with the stated principle is intended to achieve equality in the implementation of the Convention among Member States within the spirit and the provision of Article 105 of the Charter and to relieve the Organization from undue financial burdens.

4. It is foreseen, however, that the authorities of the Member State concerned may maintain that excise duties on gasoline are indirect taxes which form part of the price of sale and from which the Convention does not accord to the United Nations automatic exemption. Even assuming for the purpose of argument that excise duties on gasoline constitute an indirect tax, the Organization is entitled to request that the Government make administrative arrangements for the remission or return of the amount of the excise duty under Section 8 of the Convention which provides:

> "While the United Nations will not as a general rule, claim exemption from excise duties and from taxes on the sale of movable and immovable property which form part of the price

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[7] By resolution 3003 (XXVII) of 15 December 1972, the General Assembly *inter alia* welcomed the initiative of the Government of Iran in establishing an annual prize by that Government for the most outstanding contribution on the field of the environment to be awarded through the United Nations.

[8] See also *Juridical Yearbook*, 1967, p. 315.

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

to be paid, nevertheless when the United Nations is making important purchases for official use of property on which such duties and taxes have been charged or are chargeable, Members will, whenever possible, make appropriate administrative arrangements for the remission or return of the amount of duty or tax."

5. Where the United Nations purchases goods or commodities on a recurring basis in the territory of a Member State, such purchases constitute "important" purchases on which the United Nations is entitled to request the remission or return of the amount of duties. Particularly in the case of purchases of gasoline, the amount of duty and the proportion that amount bears to the total purchase price is sufficient to consider the purchases as "important" and the tax as an undue burden upon the Organization. Moreover, whether characterized as "direct" or "indirect", all taxes which are important enough to make their remission return administratively possible fall within the provisions of Article 105 of the Charter, which clearly contemplates the exemption of the United Nations from the financial burden of taxation.

6. It may by mentioned, incidentally, that the United Nations is normally exempted from excise duties on gasoline required for its operations in the territories of Member States.

26 January 1972

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5. Facilities accorded to observers at United Nations conferences and meetings held away from Headquarters

Internal memorandum

1. You have asked information on the facilities accorded to observers at United Nations conferences and meetings away from Headquarters. In that respect a distinction is to be made between observers officially invited by the convening organ and observers invited by the Secretariat.

1. *Observers officially invited by the convening organ*

2. When observers are officially invited by the General Assembly or other organs competent to convene conferences or meetings to attend such conferences or meetings away from Headquarters, those observers are generally given seats on the floor of the Conference room. The exact nature of the seating arrangements necessarily depends upon the facilities available, but the seats are usually provided either on the side of the meeting room or in a bloc separate from those of full participants. The observers are provided with name-plates indicating, if they represent a country, the name of that country, or, if they represent an organization, the name of that organization.

3. Observers are provided with the official documentation of the conference or meeting concerned, and they have pigeon-holes provided for such documentation at the documents desk. These pigeon-holes are usually in a bloc separate from those of participants but they bear the name of the country or organization concerned.

4. Observers are distinguished from participants without the right to vote. The latter may take part fully in the discussions and, in some instances where the rules so provide, have been permitted to make proposals which, however, are usually only put to the vote if a full participant so requests. The function of an observer is defined by his title, that is his role is essentially to "observe." As such he may not automatically take part in the

discussion and cannot submit proposals. An observer may, nevertheless, deliver a statement from time to time after making a request to the presiding officer who consults the conference or meeting on whether the request should be granted.

II. *Observers invited by the Secretariat*

5. There have been a few instances where the Secretariat has agreed to extend certain facilities to representatives of countries not officially invited to the conference or meeting concerned. These facilities are limited to seats in the distinguished visitors gallery, without any name-plate being displayed, and to receipt of documentation. No pigeon-hole is reserved for such documentation which is instead obtained upon request from the documents officer. The representatives concerned are not entitled to take part in any way in the official proceedings of the conference or meeting concerned.

26 January 1972

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6. Requirement under Article 18, paragraph 2 of the Charter that decisions of the General Assembly on budgetary questions be made by a two-thirds majority—Questions which may be characterized as budgetary questions

Statement made by the Legal Counsel at the 2108th plenary meeting of the General Assembly held on 13 December 1972

You have requested my views on the question whether draft resolutions A, B, C and D contained in the report of the Fifth Committee on the item "Scale of assessments for the apportionment of the expenses of the United Nations" [10] require a two-thirds majority under Article 18 (2) of the Charter and rule 85 of the rules of procedure of the General Assembly.

The text of Article 18 (2) specifies that:

"Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting."

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[10] For the text of the draft resolutions see *Official Records of the General Assembly, Twenty-seventh Session, Annexes*, agenda item 77 (document A/8952, para. 27). Draft resolution A dealt with the question of the assessment of four newly admitted Member States and of Switzerland as a member of the Economic Commission for Europe. Draft resolution B proposed that the General Assembly should take the following decisions:

"(*a*) As a matter of principle, the maximum contribution of any one Member State to the ordinary expenses of the United Nations shall not exceed 25 per cent of the total;

"(*b*) In preparing scales of assessment for future years, the Committee on Contributions shall implement subparagraph (*a*) above as soon as practicable so as to reduce to 25 per cent the percentage contribution of the Member State paying the maximum contribution, utilizing for this purpose to the extent necessary:

"(i) The percentage contributions of any newly admitted Member States immediately upon their admission;

"(ii) The normal triennial increase in the percentage contributions of Member States resulting from increases in their national incomes;

"(*c*) Notwithstanding subparagraph (*b*) above the percentage contribution of Member States shall not in any case in the United Nations, the specialized agencies or the International Atomic Energy Agency be increased as a consequence of the present resolution".

Draft resolution C dealt with the rate of assessment of low *per capita* income countries and draft resolution D *inter alia* requested the Committee on Contributions, in formulating the coming scale of assessment, to lower the floor for minimum contributions from 0.04 per cent to 0.02 per cent.

It further specifies that these include certain categories, among which are "budgetary questions". It must therefore be determined whether the proposed resolutions relate to a "budgetary question".

In the first instance it is necessary to examine what are budgetary questions. It is clear that in General Assembly practive not every resolution having financial implications or otherwise involving expenditures is such a question. In general, it would seem that three types of questions come within the category. First, under Article 17 (1), there is the budget itself, which includes both income and expenditures; secondly, there is the apportionment of expenses under Article 17 (2); and thirdly, there are questions of principle which basically affect decisions as to the first and second categories.

It seems obvious that the first two—the budget itself and the actual apportionment of expenses—which are dealt with respectively in paragraphs 1 and 2 of Article 17 of the Charter, must be characterized as budgetary questions. This is so because the budgetary process has two aspects: as Financial Regulation 3.2 indicates, budget estimates cover both the expected expenditures and the expected income of the financial year to which they relate. And, of course, the largest source of income of the United Nations which predominates over all others, is the contributions assessed on Member States pursuant to Article 17 (2) of the Charter. The estimate of this income, which must be approved by the General Assembly, is thus an integral part of the budget. Since the total of the assessed contributions consists of the individual contributions of Member States, the adoption of the scale according to which these assessments are determined must be considered as part of the budgetary process.

Even if it should be argued that the assessment of contributions were technically not a "budgetary question" within the meaning of Article 18 (2) of the Charter, it cannot be denied that it is intrinsically as important a matter as the determination of the expenditure side of the budget. From the point of view of any Member State, the amount that it will have to contribute to the United Nations depends on the one hand on the total amount of expenditures approved for a given year, and on the other on the scale that determines the percentage of these expenses that that State is to contribute. Consequently, the adoption of a scale should be considered as an "important" question under that same paragraph of the Charter.

There are no Assembly precedents directly in point, largely because in the past all resolutions approving scales of contributions or instructing the Committee on Contributions have been adopted by majorities considerably in excess of two thirds. In only one instance do the records reflect an apparent determination that a two-thirds majority is required: when the Assembly at its twelfth session adopted resolution 1137 (XII)—the resolution that established the limit of 30 per cent for the largest contributor. The vote on that resolution was 39 in favour, 16 opposed and 13 abstentions, and the result was recorded, without however any ruling of the President, as: "The draft resolution was adopted, having obtained the required two-thirds majority".[11]

The draft resolutions at present before the Assembly, like resolution 1137 (XII), would not actually adopt or change the scale of contributions and thus would not entail any direct financial consequences for any State; instead, they would merely instruct the Committee on Contributions as to the formulation of a new scale, which itself would require approval by the Assembly.

They thus fall into the third category I mentioned earlier: questions that involve basic principles in relation to either the budget or the apportionment of expenditures. In my

[11] *Official Records of the General Assembly, Twelfth Session*, Plenary meetings 705th meeting, para. 8.

view, this third category into which the proposed resolution falls, should also be considered budgetary since decisions on questions of fundamental principle necessarily affect decisions on the other "budgetary questions". Otherwise, the purpose of protecting a minority against a decision by a simple majority on such questions would not be achieved. This position is not based on clear precedent. In fact, none of the precedents is directly relevant. I have already observed that with respect to certain preliminary decisions, the mere fact that a resolution has financial implications does not make it a budgetary question, and thus resolutions having only an indirect effect on the budget, such as those that called for meetings of the General Assembly in Europe (184 (II), 497 (V), 499 (V)) for the addition of Spanish and Russian to the working languages (247 (III), 2479 (XXIII)) or for the preparation of special records (1333 (XXII)) have generally been held not to require a two-thirds majority.

Of possibly greater significance was the decision taken with respect to resolution 2186 (XXI) for the establishment of the Capital Development Fund. One paragraph of the draft Statute—Article IV, paragraph 2—provided that:

> "Expenses for administrative activities shall be borne by the regular budget of the United Nations which shall include a separate budgetary provision for such expenses...".

The United States representative argued that, although a two-thirds majority was not required on all proposals involving any financial considerations, an important principle was being decided which would determine the way in which the matter should be settled in the budget: he therefore moved that this provision be regarded as an important question within the meaning of Article 18 (2) of the Charter. The representative of Lebanon, on the other hand, argued that the resolution would not put any financial burden on the Organization for the following year, and that the time to invoke the two-thirds majority rule would be at the next session of the General Assembly, when it would deal with actual expenditures. [12]

The General Assembly, voting by roll-call, rejected the United States motion, by 71 votes to 35, with 7 abstentions, thus deciding that a two-thirds majority was not required on this question of principle.

On the other hand, there are a few contrary instances where the General Assembly has decided that questions of a preliminary character required a two-thirds majority. One may note in this connexion particularly the question of a proposed instruction to the ACABQ to study the question of the amortization and payment of interest on United Nations bonds. [13]

In conclusion, there are three types of questions which may be argued as coming within the ambit of the reference to "budgetary questions" in Article 18 (2) of the Charter: first, the budget itself; secondly, the apportionment of expenses; and, thirdly, questions of principle basically affecting decisions as to the first and second.

The first two categories are clearly budgetary questions. With respect to the third, there are conflicting precedents. But it is my considered belief that, in the interests of the Organization and all its Members, such questions of principle which basically affect the financing of the Organization have to be considered as budgetary ones which require a two-thirds majority. The purpose of requiring a two-thirds majority is to protect the minority against a decision by a simple majority on certain important questions, among which, surely, are "budgetary questions". In order to accomplish this purpose, the require-

[12] *Ibid., Twenty-first Session*, Plenary meetings, 1492nd meeting, paras. 17-21 and 26.

[13] *Ibid., Twenty-third Session*, Plenary meetings, 1752nd meeting, paras. 362-373.

ment of a two-thirds majority should include questions of principle of a fundamental character which necessarily affect decisions on the apportionment of expenses.

It is therefore my conclusion that the draft resolutions at present before the General Assembly, which involve such questions of principle, do require a two-thirds majority. [14]

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7. CONVENTION ON THE ELIMINATION OF RACIAL DISCRIMINATION—QUESTION WHETHER UNDER THE CONVENTION THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION MAY SOLICIT OR USE INFORMATION FROM SOURCES OTHER THAN STATES PARTIES TO THE CONVENTION—CONDITIONS UNDER WHICH A COOPERATION COULD BE ESTABLISHED BETWEEN THE COMMITTEE AND ILO AND UNESCO BODIES DEALING WITH DISCRIMINATION

Memorandum to the Assistant Secretary-General for Inter-Agency Affairs

1. You have asked us to look into the question of the cooperation which might be envisaged between the Committee on the Elimination of Racial Discrimination (CERD) on the one hand and the International Labour Organisation and the United Nations Education, Scientific and Cultural Organization on the other, in the light of the provisions of the International Convention on the Elimination of all Forms of Racial Discrimination, [15] hereafter referred to as the Racial Discrimination Convention.

A. *Does the Racial Discrimination Convention restrict the sources of information on which CERD may rely in discharging its functions under the Convention?*

2. All the forms of co-operation that might be envisaged between CERD and the organs of ILO (Committee of Experts on the Application of Conventions and Recommendations and Conference Committee on the Application of Conventions and Recommendations) and UNESCO (Executive Board's Committee on Conventions and Recommendations in Education) performing similar functions, would result in and indeed have as a principal objective the supply of information to the members of CERD, in particular on the application of the relevant ILO and UNESCO Conventions, namely, the 1958 ILO Discrimination (Employment and Occupation) Convention [16] and the 1960 UNESCO Convention against Discrimination in Education, [17] whether through written statements, or the participation of observers in CERD meetings, or the participation of CERD representatives in ILO and UNESCO meetings. A basic question therefore is: may CERD solicit or even use information from sources other than States Parties to the Racial Discrimination Convention?

3. CERD was established and its authority and functions are defined by the Racial Discrimination Convention. Consequently the reply to the above question must first be

[14] After hearing the statement reproduced above, the President of the General Assembly ruled, under Article 18 (2) of the Charter, that the four draft resolutions in question required a two-thirds majority for adoption. The ruling was not challenged. The draft resolutions which became resolutions 2961 A (XXVII), 2961 B (XXVII), 2961 C (XXVII) and 2961 D (XXVII) were adopted respectively by 128 votes to none with no abstentions, 81 votes to 27 with 22 abstentions, 99 votes to 9 with 19 abstentions and 111 votes to none with 20 abstentions.

[15] United Nations, *Treaty Series*, vol. 660, p. 195.

[16] *Ibid.*, vol. 362, p. 31.

[17] *Ibid.*, vol. 429, p. 93.

sought in that instrument—which, however, contains no explicit indication. If the Convention is construed narrowly, recourse to sources of information not specified in the Convention would seem to be precluded; on the other hand, considered as the constitutional instrument of CERD, a more liberal interpretation of the instrument and even the discovery of implied powers in the Committee might be justified. As the Convention is silent as to the means of its interpretation (except with respect to complaints of non-observance, and disputes between States), it is for the Committee itself to decide, at least in the first instance, how it is to exercise its functions; since it reports to the General Assembly (which formulated the Convention), that organ is in a position to review the decisions of CERD—and such a review did indeed take place at the twenty-sixth session; in addition the States Parties, which meet periodically (pursuant to article 8, paragraph 4 of the Convention), might exercise some supervision as suggested at the Second Meeting of States Parties (CERD/SP/SR.6, p. 2).

4. An analysis of the structure of the Convention discloses four separate types of proceedings for which CERD is responsible:

(*a*) Administrative proceedings under *article 9*, by which CERD considers reports submitted by States Parties, may request further information from these States, reports annually to the United Nations General Assembly and may make suggestions and general recommendations "based on the examination of the reports and information received from States Parties". Question A relates primarily to this function of CERD. It is thus clear from the Convention (and from paragraph 3 of the recently adopted procedural rule 66A based thereon [18] that the suggestions and general recommendations that CERD is to make must be based on data received from the Parties to the Convention. However, it is not specified that the Committee is limited to these sources in its preliminary consideration of the reports of States and in particular in formulating requests for further information.

(*b*) Obligatory contentious proceedings under *articles 11-13*, by which CERD is to help resolve disputes among States Parties. In view of the quasi-arbitral/judicial nature of such proceedings, it would appear proper normally to limit the information on which CERD or *ad hoc* Conciliation Commissions established by it can rely to that supplied by the contending parties—not only in formulating the reports to be prepared pursuant to article 13, paragraph 1, but perhaps even in considering what other relevant information to request under article 12, paragraph 8. In any event, due to the contentious nature of these proceedings it can be assumed that one party or the other will submit any relevant information to CERD or the Commission.

(*c*) Optional quasi-contentious proceedings under article 14, by which CERD can consider communications from individuals or groups (provided the State concerned has especially subjected itself to such challenges). Again, in view of the quasi-judicial nature of these proceedings and in view of the explicit enumeration in article 14, paragraph 7 (*a*), CERD should normally restrict its consideration to the communications received and to "all information made available to it by the State Party concerned and by the petitioner".

(*d*) Proceedings under *article 15*, whereby CERD can receive and consider almost any type of information relevant to the Convention, but only in respect of non-self-governing territories of the type covered by that article.

5. The *travaux préparatoires* contain little relevant material on this point. The representative of Canada did remark that article 9, paragraph 2 "was somewhat restrictive in providing that the suggestions and recommendations of the proposed committee would have to be based on information received from States Parties to the Convention. The

[18] *Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 18* (A/8718), p. 37.

Third Committee should not be unduly concerned over that point at the present stage, however, and should rely on the committee itself to establish its own jurisdiction on a pragmatic basis." [19]

6. CERD itself has as yet had little opportunity to develop any relevant practice. However, the following might be taken into account:

(*a*) The Provisional Rules of Procedure adopted by CERD [20] contain nothing directly relevant either in the general provisions or in section XIV (rules 64-67) on "Reports and Information from States Parties under article 9 of the Convention". However, at its fifth session, the Committee debated but then deferred action on a new procedural rule that would explicitly allow its members to introduce and the Committee to use information which is known to them as experts otherwise than from documents laid before the Committee. [21,22]

(*b*) At its first session, CERD did take a somewhat restrictive view of article 15 of the Convention, in that it concluded it was only empowered to receive petitions through the channels enumerated in sub-paragraph 2 (*a*) of that article; however, the Committee indicated that it would consider what procedures to follow should a petition be addressed directly to it, so that a strict interpretation of its terms of reference should not deprive a petitioner of the opportunity to have his petition considered by an appropriate international body. [23]

(*c*) In considering, under article 9 of the Convention, a report by Panama in relation to the Panama Canal Zone, a member of the Committee argued, *inter alia*, that article 9 forbids CERD from seeking or receiving information from any source other than the States Parties concerned. [24] On the other hand, decision 4 (IV) of CERD indicates that in respect of information supplied by Syria relating to the situation in the Golan Heights, "the Committee takes note also of the resolutions adopted by competent organs of the United Nations, and of the reports of the Committees set up by the General Assembly and by the Commission on Human Rights to investigate the situation, to which the report submitted by the Syrian Government makes reference". [25] Similarly, in considering the report submitted by Greece one member of CERD argued that additional information was required because "according to information which was in the public domain" some legal provisions cited by Greece in its report had been suspended. [26]

7. Though the second report of CERD [27] specifically mentioned the question of the Committee's co-operation with ILO and UNESCO, and both the Director of the Division on Human Rights and the representative of Sierra Leone specifically invited the Third

[19] *Ibid., Twentieth Session*, Third Committee, 1352nd meeting, para. 2.

[20] *Ibid., Twenty-fifth Session, Supplement No. 27* (A/8027), p. 17 and *Twenty-seventh Session, Supplement No. 18* (A/8718), p. 37.

[21] See CERD/C/R.38 and CERD/C/SR.91, pp. 12 and 13.

[22] In the course of its sixth session held after the drafting of the present memorandum the Committee resumed consideration of the amendment. At the end of the discussion summarized in paragraphs 27 to 32 of the report of the Committee to the General Assembly (*Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 18* (A/8718), the Chairman stated that it appeared from the discussion that the Committee would continue the practice it had followed to date allowing members to use any information they might have as experts.

[23] *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 27* (A/8027), p. 38.

[24] *Ibid., Twenty-sixth Session, Supplement No. 18* (A/8418), para. 64(iii).

[25] *Ibid.*, p. 34.

[26] *Ibid.*, para. 47.

[27] *Ibid.*, paras. 111-117.

Committee's attention to this question, [28] neither the Assembly formally nor even the Third Committee informally expressed itself on this point. Solely the representative of the Libyan Arab Republic hoped that close co-operation would be established between CERD and the specialized agencies. [29]

8. *Conclusion.* The Racial Discrimination Convention to some extent defines and delimits the types of information on which CERD may rely in various types of proceedings. These limits are quite broad in respect of article 15, and relatively narrow in respect of articles 11-13 and 14 however, especially in respect of article 9 it is not clear that CERD is precluded from using extraneous information for ancillary purposes, i.e. in evaluating the completeness of the reports submitted to it and in formulating requests for supplementary data, and the early practice of the Committee indicates that it does indeed rely on such information. Thus there would not seem to be any legal bar to the utilization, within the indicated limits, of information obtained from ILO or UNESCO.

B. *Are ILO and UNESCO entitled to be represented at meetings of CERD?*

9. The Racial Discrimination Convention is silent as to the establishment of contacts between CERD and other organizations (except for the United Nations, with which an intimate nexus is foreseen). The preamble to the Convention does refer to the 1958 ILO Discrimination (Employment and Occupation) Convention and to the 1960 UNESCO Convention against Discrimination in Education; though of limited legal significance in this context, this citation could be used as an argument for limiting the precedential effect of any special relations established with ILO and UNESCO.

10. The Relationship Agreements between the United Nations and respectively ILO and UNESCO provide for the representation of these organizations at meetings of the Economic and Social Council and of its commissions and committees, in the Main Committees of the General Assembly (and to a limited extent in the plenary) and in the Trusteeship Council. Since CERD does not fall within any of these categories (even assuming that it is a United Nations organ), these agreements clearly do not entitle ILO and UNESCO to such participation. However, since CERD may be considered as a "treaty organ" of the United Nations, [30] as has already been determined in connection with the privileges and immunities of the Committee, [31] or at least as operating under the aegis of the Organization, some means of co-operation might be considered to be within the spirit of the Relationship Agreements.

11. What may be called the quasi-judicial functions of CERD and its composition of experts serving "in their personal capacity" rather than of governmental representatives, suggest that it would not be appropriate for persons not elected to CERD to participate fully in its deliberations. The only context in which the Convention explicitly foresees participation by outsiders is in a contentious proceeding under article 11, when the States concerned are each entitled to send non-voting representatives to take part in the proceedings of CERD (article 11, paragraph 5). However, the General Assembly suggested that the Committee should invite States Parties to be present at CERD meetings when their reports are examined (resolution 2783 (XXVI), operative paragraph 5), in order to permit them to furnish additional information [32] and the Committee amended its Provisional Rules

[28] See *ibid.*, *Third Committee*, 1845th meeting, para. 13 and 1852nd meeting, para. 14.

[29] *Ibid.*, 1856th meeting, para. 7.

[30] *Repertory of Practice of United Nations Organs*, Vol. I, Article 7, paras. 22 and 23 and Supplement No. 1, Vol. I, Article 7, paras. 7-11.

[31] See *Juridical Yearbook*, 1969, p. 207.

[32] *Official Records of the General Assembly, Twenty-sixth Session, Annexes*, agenda item 54, document A/8542, para. 17.

of Procedure accordingly (rule 64A). [33] In any event, the extent and modalities of such participation of the representatives of specialized agencies should be regulated in the Rules of Procedure of CERD, which at present have no applicable provisions; presumably such Rules might provide for attendance at all open, and perhaps some closed meetings, with the right to intervene by invitation of the Chairman.

C. *Is CERD entitled to be represented at meetings of the appropriate organs of ILO and UNESCO?*

12. The Relationship Agreements do provide for representatives of the United Nations to attend meetings of the general representative organs of ILO and UNESCO and their committees and of their governing bodies and their committees, as well as other general, regional or special meetings of the organizations. Thus the United Nations is entitled to be represented in the committees of ILO and UNESCO charged with the supervision of the Conventions initiated by these organizations. CERD itself has no independent right to be represented, but if considered as a United Nations organ might benefit from the rights of the Organization (as to the modalities, see paragraph 13 below); if not considered as a United Nations organ, it is of course not covered by the Relationship Agreements.

D. *Should the competent ILO and UNESCO organs and CERD be represented by members of the ILO, UNESCO and United Nations Secretariats respectively or by members of the corresponding committees?*

13. If CERD is assimilated to the status of a United Nations organ, then it should normally be represented at meetings of organs of other agencies by the Secretary-General, as is the practice of most United Nations organs, [34] though recently some exceptions have developed (e.g. the attendance of the Chairman of the International Law Commission at sessions of the Asian-African Legal Consultative Committee. [35] Presumably this question can be resolved in consultations between CERD and representatives of the Secretary-General.

14. The competent ILO and UNESCO Committees are clearly organs of these organizations. As their practice is similar to that of the United Nations, their contacts with outside groups are also normally via the respective Secretariats. In the case of the ILO however it is to be noted that there are instances in which the Director-General designates members of the ILO Governing Body and that he might designate members of the ILO's Committee of Experts on the Application of Conventions and Recommendations to attend CERD meetings. [36]

29 March 1972

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[33] *Ibid., Twenty-seventh Session, Supplement No. 18* (A/8718), p. 37.

[34] *Repertory of Practice of United Nations Organs*, Vol. 5, Article 98, paras. 142-143.

[35] *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 10* (A/8410/Rev.1), para. 135.

[36] At its 115th meeting held on 21 August 1971 in the course of its sixth session, the Committee adopted the following decision:

"2(VI). *Co-operation with the International Labour Organisation (ILO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO).*

"Without prejudice to such decisions as the Committee on the Elimination of Racial Discrimination may take in the future regarding the possibility of participation in its meetings by representatives of the International Labour Organisation and the United Nations Educational, Scientific and Cultural Organization under certain circumstances, the Committee decides that:

"1. The Committee authorizes the Secretary-General of the United Nations to invite

(Continued on next page.)

8. Ad Hoc Committee on Cooperation between UNDP and UNIDO—Participation of specialized agencies—Question whether Member States not members of the Committee may participate in its work

Memorandum to the Secretary of the Ad Hoc *Committee on Cooperation between the United Nations Development Programme and the United Nations Industrial Development Organization*

1. You have asked our advice on the question whether specialized agencies may participate in the work of the *Ad Hoc* Committee on Cooperation between the United Nations Development Programme and the United Nations Industrial Development Organization. You have also referred to us the question of the participation in the *Ad Hoc* Committee of Member States not members of the Committee.

2. Operative paragraph 11 of General Assembly resolution 2823 (XXVI) of 16 December 1971 reads as follows:

> "*The General Assembly*
> "...
> "*Decides* to set up an *Ad Hoc* Committee on Cooperation between the United Nations Development Programme and the United Nations Industrial Development Organization composed of those Member States whose representatives are serving as officers of the Governing Council of the Programme and the Industrial Development Board to examine in detail, in consultation with the Administrator of the United Nations Development Programme and the Executive Director of the United Nations Industrial Development Organization, all aspects of co-operation between the two organizations, especially those related to the formulation, appraisal and approval of industrial projects, and to submit a report thereon to the General Assembly at its twenty-seventh session, through the Economic and Social Council, together with the comments of the Governing Council of the Programme and those of the Industrial Development Board;".

The *Ad Hoc* Committee is therefore a subsidiary organ of the General Assembly to which, in accordance with rule 163 of the rules of procedure of the Assembly, the rules relating

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(Footnote 36 continued.)

representatives of the ILO and of UNESCO to attend the meetings of the Committee. The Committee shall decide at any private meeting it holds whether the observers of the ILO and UNESCO may attend the private meeting in question.

"2. In accordance with rules 34(1) and 62 of its Provisional Rules of Procedure, the Committee authorizes the Secretary-General to make the records of its public meetings and the texts of its reports, formal decisions and other official documents available to the ILO Committee of Experts and the UNESCO Executive Board's Committee on Conventions and Recommendations in Education.

"3. Written statements submitted by the ILO and UNESCO, providing information on the application of the Discrimination (Employment and Occupation) Convention and Recommendation, 1958, and the Convention and Recommendation against Discrimination in Education, 1960, in the Territories mentioned in paragraph 2 (*a*) of article 15 of the International Convention on the Elimination of All Forms of Racial Discrimination shall be transmitted by the Secretary-General of the United Nations to the Committee on the Elimination of Racial Discrimination, in accordance with paragraph 4 of article 15 of the International Convention on the Elimination of All Forms of Racial Discrimination and paragraph 3 (*b*) of the "Statement of the responsibilities of the Committee under article 15 of the Convention", adopted by the Committee on the Elimination of Racial Discrimination on 29 January 1970.

"4. Written statements submitted by the ILO and UNESCO, providing information on the application of the Discrimination (Employment and Occupation) Convention and Recommendation, 1958, and the Convention and Recommendation against Discrimination in Education, 1960, in Territories other than those mentioned in the preceding paragraph shall be distributed by the Secretary-General of the United Nations to the members of the Committee on the Elimination of Racial Discrimination."

to the procedure of committees of the General Assembly as well as rules 45 and 62 shall apply.

3. Participation of specialized agencies in the meetings of the General Assembly is governed by the agreements between the United Nations and the specialized agencies. These agreements all contain a provision on reciprocal representation, in so far as representation of agencies in the General Assembly is concerned; in the case of the Agreement between the United Nations and WMO for example, this provision reads as follows:

> "The Organization shall be invited to send representatives to attend the meetings of the General Assembly during which questions within the competence of the Organization are under discussion for purposes of consultation, and to participate, without vote, in the deliberations of the Main Committees of the General Assembly with respect to items concerning the Organization."

A specialized agency is therefore entitled to participate in the plenary meetings and the meetings of the Main Committees of the General Assembly during which questions within the competence of the agency are under discussion. However unlike the provisions concerning representation in the Economic and Social Council which cover the Council's commissions and committees, [37] the above quoted provision refers to the Main Committees but does not mention other committees or subsidiary organs of the General Assembly. Consequently should the question of participation of a specialized agency in the *Ad Hoc* Committee arise, it is for the Committee itself to take a decision.

4. Regarding the question of participation in the *Ad Hoc* Committee of Member States not members of the Committee, it is to be recalled that the Office of Legal Affairs has consistently held the view that, unless the General Assembly has specifically accorded observer status in a subsidiary organ to Member States not members of that organ (such as the Sea-Bed Committee), [38] participation in an organ of limited membership established by the General Assembly should be limited to its members. In some cases a subsidiary organ has decided to seek information from a particular Member State which was not its member or to grant the request of such a State to make a statement. This does not imply a general authorization for participation by non-members. *A fortiori*, participation in closed meetings of such an organ is limited to its membership. [39] In the past, only under exceptional circumstances has a subsidiary organ decided to permit the representatives of non-member States to attend its closed meetings. [40]

23 March 1972

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[37] The standard provision reads:

> "The Organization shall be invited to send representatives to attend meetings of the Economic and Social Council of the United Nations (hereinafter called the Council), of its commissions and committees and to participate, without vote, in the deliberations thereof with respect to items on the agenda in which the Organization may be concerned."

[38] See General Assembly resolution 2750 C (XXV), operative paragraph 10.

[39] See *Juridical Yearbook*, 1971, p. 195.

[40] For example, the Special Committee on the Rationalization of the Procedures and Organization of the General Assembly decided "that it would hold closed meetings but that the representatives of Member States which were not represented in the Committee would be allowed to attend meetings and to elaborate orally on the replies submitted by their Government." (See *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 26* (A/8426), para. 6.)

9. Question whether a State not member of the United Nations may address the Economic and Social Council or attend a session of the Council

Memorandum to the Secretary of the Economic and Social Council

You have asked for advice concerning the right of a non member State of the United Nations to address the Economic and Social Council or to attend a session of the Council.

The opinion of 9 July 1954 reproduced below indicates that it is fully within the discretion of the Council to extend to a non-member State an invitation to speak.

May the representative of a State which is not a Member of the United Nations address the Economic and Social Council on a matter of particular concern to that State?

1. There is no provision in the Charter of the United Nations or in the Rules of Procedure of the Economic and Social Council which provides for the participation or the making of statements by representatives of States not members of the United Nations.

2. The rule of procedure which concerns participation of non-members of the Council (rule 75) applies only to non-members of the Council which are Members of the United Nations.

3. This rule of procedure (the first sentence of which reproduces Articles 69 of the Charter) makes it obligatory on the Council to invite a Member of the United Nations which is not a member of the Council to participate in its deliberations on any matter which the Council considers is of particular concern to that Member.

4. It is clear that the Council is under no obligation to invite a State which is not a member of the United Nations to participate in the Council even though the item under consideration is admittedly of particular concern to that State.

5. There remains, however, the question of whether the Council may, at its own discretion, decide to invite a representative of a non-member State to address the Council on an item which concerns that State. As stated above, there is no rule of procedure on this point.

6. The Council has, however, decided on at least one occasion to hear a representative of a non-member State on a question of concern to that State. This occurred at the sixteenth session of the Council when the President invited the Observer for the Government of Libya to speak in connexion with the question of assistance to Libya which was an agenda item. [41] There have also been at least two other occasions when representatives of States not members of the United Nations have made statements before Committees of the Whole of the Council during a Council session. One such statement was made by the representative of Italy at the Social Committee during the sixteenth session in respect of the item in Prevention Discrimination and Protection of Minorities. [42] The representative of Libya was also invited at the sixteenth session to make a statement before the Technical Assistance Committee. [43]

7. In the three instances mentioned above, the representatives of the non-member States were invited to speak by the Chairman without objection from any members of the Council.

8. It may be observed in this connexion that the Council invitations to representatives of non-member States follow similar precedents in other organs of the United Nations,

[41] *Official Records of the Economic and Social Council, Sixteenth Session*, 746th meeting, para. 24.

[42] E/AC.7/SR.253.

[43] E/TAC/SR.41.

particularly the General Assembly which has on several occasions invited representatives of non-member States to speak in its Main Committees on questions of particular concern to those States. This was done in the absence of a rule of procedure on the point. It is entirely clear that in such cases the organ on the basis of its own interest and as a matter of its own discretion in extending the invitation to speak. The non-member State itself has no right to be heard, but is dependent upon the decision of the Council normally taken through its President.

7 December 1972

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10. Voting by correspondence in the Commission on Narcotic Drugs under Commission resolution 1 (XX)—Arrangements which the Secretary-General is empowered to make under the resolution [44]

Note based on a cable sent to the Director, Division on Narcotic Drugs, Department of Economic and Social Affairs

1. You have referred to us the question of the arrangements to be made for the Commission on Narcotic Drugs to take a decision by correspondence.

2. Commission resolution 1 (XX), adopted in 1965, [45] provides as follows:

"*The Commission on Narcotic Drugs,*

"*Considering* the importance of ensuring that new narcotic substances are brought under control as quickly as possible,

"...

"1. *Resolves* that if a recommendation is made by the World Health Organization for the control of a new narcotic substance, and the Commission is not, or will not within a period of three months be in session, a decision should be taken by the Commission before its next session; and

"2. *Requests* the Secretary-General, for that purpose, to arrange in these exceptional circumstances for a decision of the Commission to be taken by a vote of the Commission by mail or telegram, and for a report to be made to the Commission at its next session."

3. The Secretary-General therefore has authority to make all necessary arrangements, including setting time limit for voting, which can be justified by "the importance of ensuring that new narcotic substances are brought under control as quickly as possible". The time limit should be reasonable but in no event longer than three months since operative paragraph 1 of the resolution quoted above envisages completion of the vote by correspondence within that period.

4. The Secretary-General can also establish any other necessary arrangements for the vote; he can in particular inform members, by way of a statement in the communication transmitting the WHO recommendation, that if he receives no reply within a specified period, he will interpret such silence as abstention.

4 January 1972

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[44] See also *Juridical Yearbook*, 1970, p. 171.

[45] See *Official Records of the Economic and Social Council, Fortieth Session, Supplement No. 2* (E/4140), para. 60.

11. Procedure to be followed with respect to a possible application for associate membership in the Economic Commission for Asia and the Far East for the Trust Territory of the Pacific Islands

Memorandum to the Chief of the Regional Commissions Section, Department of Economic and Social Affairs

1. You have requested our advice on the legal implications of an eventual application for associate membership in the Economic Commission for Asia and the Far East (ECAFE) for the Trust Territory of the Pacific Islands.

2. Under article 1 of the Trusteeship Agreement for the former Japanese Mandated Islands, [46] approved by the Security Council on 2 April 1947, the Territory of the Pacific Islands, consisting of the islands formerly held by Japan under mandate in accordance with Article 22 of the Covenant of the League of Nations, was designated as a strategic area and placed under the Trusteeship System established in the Charter of the United Nations. Under article 2 of the Agreement, the United States of America was designated as the Administering Authority of the Trust Territory.

3. In accordance with article 3 of the Agreement "the Administering Authority shall have full powers of administration, legislation and jurisdiction over the Territory" subject to the provisions of the Agreement.

4. Article 10 of the Trusteeship Agreement reads thus:

> "The Administering Authority, acting under the provisions of article 3 of this Agreement, may accept membership in any regional advisory commission, regional authority, or technical organization, or other voluntary association of States, may co-operate with specialized international bodies, public or private, and may engage in other forms of international co-operation."

From the foregoing it is clear that the United States as the Administering Authority of the Pacific Islands, is competent to present a request for associate membership for the Trust Territory in ECAFE.

5. The first sentence of paragraph 5 of the terms of reference of ECAFE[47]—reads as follows:

> "Any territory, part or group of territories within the geographical scope of the Commission as defined in paragraph 2 may, on presentation of its application to the Commission by the member responsible for the international relations of such territory, part or group of territories, be admitted by the Commission as an associate member of the Commission."

In accordance with this paragraph in its terms of reference, ECAFE should receive a formal request from the Government of the United States concerning the associate membership of the Pacific Islands in order that the question might be discussed in the Commission.

6. Under paragraph 2 of the terms of reference of ECAFE, the "territories of Asia and the Far East" are enumerated which demarcate the geographical scope of the Commission. Paragraph 2 would therefore have to be amended by the Economic and Social Council to include the Pacific Islands in the geographical scope of ECAFE. This could of course be done even before the formal application for associate membership is received from the United States.

7. In accordance with paragraph 5 of the terms of reference of ECAFE, it is entirely within the competence of ECAFE to consider and decide on applications for associate

[46] United Nations, *Treaty Series*, vol. 8, p. 189.

[47] *Official Records of the Economic and Social Council, Fifty-third Session*, Supplement No. 4 (E/5134), p. 234.

membership in the Commission. If the Commission decides to admit a territory to associate membership, this decision can take effect immediately provided paragraph 2 of the terms of reference has been amended by the Economic and Social Council. If the territory concerned has not been included in paragraph 2, the admission to associate membership cannot become effective until the Council has acted under paragraph 2.

8. Paragraph 4 of the terms of reference of ECAFE enumerates the associate members of the Commission. After the decision to admit the Pacific Islands to associate membership has been reached in the Commission, this paragraph in the terms of reference of the Commission has to be amended by the Economic and Social Council merely as a matter of formality.

9. From the above it may be concluded that it would be necessary to take the following procedural steps for the Trust Territory of the Pacific Islands to be admitted to associate membership in ECAFE:

(i) The Economic and Social Council has to amend paragraph 2 of the Commission's terms of reference to include the Pacific Islands within the geographic scope of the Commission.

(ii) A formal application has to be presented by the United States in accordance with paragraph 5 of the Commission's terms of reference.

(iii) The Commission has to consider and take a decision on the application to associate membership of the Pacific Islands in accordance with paragraph 5 of its terms of reference.

(iv) As a formality, paragraph 4 of the terms of reference of the Commission has to be amended by the Economic and Social Council to include the Pacific Islands among the territories listed by associate members.

10. The Council can amend paragraph 2 of the Commission's terms of reference at the time when it amends paragraph 4 of those terms of reference but in that case, the decision of the Commission to admit the Pacific Islands in associate membership would not become effective until paragraph 2 of the terms of reference of the Commission had been amended by the Council.

1 May 1972

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12. Participation of a State not member of the United Nations as an observer in the Economic Commission for Asia and the Far East—Requirement of a specific decision of the Economic and Social Council to that effect

Memorandum to the Chief of the Regional Commissions Sections, Department of Economic and Social Affairs

1. You have asked our views on the possibility for a State not member of the United Nations to attend as an observer the twenty-eighth session of the Economic Commission for Asia and the Far East (ECAFE).

2. Neither the terms of reference of ECAFE nor its rules of procedure provide for the participation of a State not member of the United Nations as an observer at the meetings of the Commission. The terms of reference of the regional economic commissions each contain a provision relating to the participation in a consultative capacity by a Member State of the United Nations not a member of the Commission concerned.

3. Except in the case of ECE, which, in accordance with paragraph 8 of its terms of reference, may admit in consultative capacity European nations not members of the United Nations, a practice has been established whereby the participation of a non-Member State in a regional economic commission required a resolution by the Economic and Social Council (see Council resolutions 515 B (XVII), 581 (XX), 616 (XXII), 617 (XXII), 763 D (XXX), 860 (XXXII), 861 (XXXII) and 925 (XXIV). In this regard it is worth noting that a decision by the Economic and Social Council has been considered necessary even in the case of States which already had ties with the United Nations family. It may be recalled for example that when the Council, in its resolution 763 D (XXX), authorized the attendance of the Federal Republic of Germany at sessions of the Economic Commission for Africa, the Federal Republic of Germany had already attended several sessions of the Council and had acquired membership in several specialized agencies as well as the Economic Commission for Europe. Similarly, when the Council, by resolutions 860 (XXXII), 861 (XXXII) and 925 (XXIV), authorized Switzerland to attend sessions of ECAFE, ECLA and ECA respectively, Switzerland was already in consultative status with the Economic Commission for Europe and contributed to the budget of the United Nations in connexion with various activities of the Organization.

4. In each of the resolutions referred to above, the non-Member State concerned was authorized to attend the sessions of the Commission on conditions similar to those set out in the terms of reference of that Commission in respect of any Member State not a member of the Commission. In other words, a non-Member State was allowed to participate in a consultative capacity in the consideration of any matter of particular concern to it.

5. It is true that observers are distinguished from participants in consultative capacity, i.e. participants without the right to vote. [48] Nonetheless we are of the opinion that even the grant of observer status at meetings of a regional economic commission to a State which is not a Member of the United Nations requires a decision of the Economic and Social Council.

6. A non-Member State may, of course, follow the proceedings of a regional economic commission at its public meetings without having been granted observer status.

9 March 1972

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13. Question whether non-governmental organizations not in consultative status with the Economic and Social Council may be invited to send observers to second Asian Population Conference

Memorandum to the Chief of the Regional Commission Section, Department of Economic and Social Affairs

1. You have asked whether various non-governmental organizations and foundations which are not in consultative status with the Council could be invited to send observers to the second Asian Population Conference to be held in Tokyo from 1 to 13 November 1972.

2. By its resolution 74 (XXIII) of 17 April 1967, ECAFE decided to establish the Asian Population Conference as a statutory organ of the Commission, to be convened

[48] For an analysis of the distinction, see the memorandum reproduced on p. 159 of this *Yearbook*.

every ten years synchronizing with the decennial population and related censures. The Commission also requested the Executive Secretary "to initiate preparations as soon as possible for the Asian Population Conference to be convened towards 1970."[49]

3. ECAFE resolution 74 (XXIII) did not lay down any specific instructions for the guidance of the Executive Secretary; nor did it deal with the question of participation at the Conference. In the absence of any provisions in this respect in the convening resolution, the Executive Secretary should be guided by the terms of reference, rules of procedure, and general practice of ECAFE relevant to the question.

4. Paragraph 11 of ECAFE's terms of reference reads as follows:

> "The Commission shall make arrangements for consultation with non-governmental organizations which have been granted consultative status by the Economic and Social Council, in accordance with the principles approved by the Council for this purpose and contained in Council resolution 288 B (X), parts I and II." [50]

The arrangements for consultation with non-governmental organizations set out in resolution 288 B (X) have been superseded by those set out in Council resolution 1296 (XLIV) of 23 May 1968, as amended in accordance with Council resolution 1391 (XLVI) of 3 June 1969.

5. Chapter XII (rules 52-56) of the rules of procedure of ECAFE regulate the Commission's relations with non-governmental organizations in consultative status (Categories I and II and the Roster) with the Economic and Social Council. Non-governmental organizations in Categories I and II and on the Roster may have representatives present at certain meetings of the Commission (rule 52) and may also be heard by the Commission or its subsidiary bodies (rule 55). Written statements relevant to the work of the Commission or its subsidiary bodies may be submitted by non-governmental organizations in Categories I and II on subjects for which these organizations have a special competence (rule 53).

6. The provisions in the terms of reference and its rules of procedure of ECAFE relating to non-governmental organizations are applicable only to non-governmental organizations in consultative status with the Economic and Social Council. Neither its terms of reference nor its rules of procedure authorize ECAFE and its subsidiary bodies to accord observer status to non-governmental organizations not in consultative status with Economic and Social Council. Therefore, the Second Asian Population Conference convened by ECAFE is not competent to accord observer status to various organizations and foundations which are not in consultative status with the Economic and Social Council. These organizations and foundations cannot enjoy the same privileges as those organizations in consultative status with the Council.

7. Nonetheless, if it is the wish of the Asian Population Conference to have these organizations participate in its deliberations, they could participate in other capacities than that of observer and be invited as guests of the ECAFE secretariat. The final paragraph of ECAFE resolution 74 (XXIII) which reads as follows:

> "*Calls upon* all members and associate member countries of ECAFE, other members of the United Nations which are interested in the solution of population problems, and other appropriate international, regional and national institutions to extend all possible co-operation and support in implementing the expanded regional population programme"

could be used as an authority for ECAFE to establish contact at the secretariat level with

[49] *Official Records of the Economic and Social Council, Forty-third Session, Supplement No. 2* (E/4358), p. 198.

[50] *Ibid., Fifty-third Session, Supplement No. 4* (E/5134), p. 235.

national institutions interested in the solution of population problems. Representatives of these organizations could, therefore, speak as experts in their personal capacity on certain agenda items of the Conference and could make oral interventions, if it is the wish of the Conference.

8. As regards the submission of written statements, it is doubtful whether these organizations could be permitted to submit written papers formally to the Conference. However, since other non-governmental organizations in consultative status with the Council are permitted to submit written statements, the representatives of these organizations not in formal status could concur in these statements orally in the Conference.

12 May 1972

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14. Request of a non-governmental organization to participate with observer status in the United Nations Cocoa Conference—Question whether it is within the competence of the Conference to take action on such a request

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

1. You have asked whether the question of allowing a non-governmental organization to participate with observer status in the forthcoming United Nations Cocoa Conference could properly be raised at the Conference.

2. The General principles and guidelines for the calling of commodity conferences was originally spelt out in Economic and Social Council resolution 296 (XI) of 2 August 1950. This resolution provided that the list of States to be invited to commodity conferences shall be prepared by the Interim Co-ordinating Committee for International Commodity Arrangements and shall "include all Members of the United Nations, of the Interim Commission for the International Trade Organization, of the Food and Agriculture Organization of the United Nations, and of the inter-governmental study group concerned. Non-member States may also be included if they are substantially interested in the production or consumption of or trade in the commodity concerned. Specialized agencies in relationship with the United Nations may also be invited to take part. "

3. There was no mention in the resolution that non-governmental organizations were to be invited to commodity conferences.

4. The United Nations Cocoa Conference was convened in 1963 by the Secretary-General of the United Nations pursuant to a request by the FAO Cocoa Study Group and in accordance with Economic and Social Council resolution 296 (XI). This resolution was thus the "convening resolution" of the United Nations Cocoa Conference which is still holding sessions.

5. In accordance with paragraph 3 (*e*) of General Assembly resolution 1995 (XIX), the United Nations Conference on Trade and Development (UNCTAD) was given the authority to "initiate action... for the negotiation and adoption of multilateral legal instruments in the field of trade". This implied that UNCTAD was empowered to convene commodity conferences.

6. Furthermore, under paragraph 23 (*a*) of General Assembly resolution 1995 (XIX), the Committee on Commodities of the Trade and Development Board, a permanent organ

of UNCTAD, was authorized to "carry out the functions which are now performed by the Commission of International Commodity Trade and the Interim Co-ordinating Committee for International Commodity Arrangements. In this connexion, the Interim Co-ordinating Committee shall be maintained as an advisory body of the Board".

7. Under paragraph 5 (*c*) of the terms of reference of the Committee on Commodities approved by the Trade and Development Board, the Committee on Commodities was authorized "to make recommendations for the convening of international commodity conferences with the object of concluding international commodity arrangements". [51]

8. In pursuance of operative paragraph 2 of resolution 36 (V) adopted by the Trade and Development Board at its fifth session, the Secretary-General of UNCTAD was requested, "with a view to drawing up a single document concerning the purposes and principles of international commodity arrangements and the promotion and the convening of international commodity conferences, as is stipulated by the General Assembly resolution 1995 (XIX), part II, paragraph 3 (*e*), to prepare a draft general agreement on commodity arrangements in order that it may be examined by the second session of the United Nations Conference on Trade and Development or at an appropriate time in the future."

Further to that request, the Secretary-General submitted a report (TD/30) where it was specified in the Foreword "the sections dealing with procedures are based essentially on current United Nations practice (except where specifically stated), derived partly from Economic and Social Council resolution 296 (XI) and partly from decisions of the Trade and Development Board and of the Committee on Commodities".

9. The section of the report dealing with United Nations Commodity Conferences contained the following paragraphs:

> "44. All States members of UNCTAD shall be invited to attend a commodity conference if they consider themselves interested in the production or consumption of, or trade in, the commodity concerned. * Appropriate specialized agencies of the United Nations and the General Agreement on Tariffs and Trade shall also be invited to be represented at such conferences.
>
> "45. Following present practice, inter-governmental organizations having a particular interest in the commodity may be invited by the executive committee of a commodity conference to participate, on a consultative basis, in the work of the conference with regard to the specific items on the agenda concerning which such consultation may be useful".

10. The second United Nations Conference on Trade and Development, at its 77th plenary meeting, in its resolution 17 (II) [52] recommended that the Secretary-General of UNCTAD invited the Governments of member States of UNCTAD to make their comments on the above mentioned report. The resolution further urged "the Committee on Commodities to study carefully at its third session the replies of the Governments, and to suggest further steps it deems useful in order that the Trade and Development Board at its eighth session would be in a position to establish a suitable procedure for the preparation and adoption of a general meeting". However, a General Agreement on Commodity Arrangements has not been concluded.

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[51] See document TD/B/C.1/L.1.

* This is based on the decision of the Committee on Commodities of the Trade and Development Board regarding invitations to the Sugar Conference: see in this respect paragraph 86 of the report of the Committee on Commodities on its first session (TD/B/21/Rev.1), and paragraph 49 of the report of the Trade and Development Board on its second session (A/6023/Rev.1, Part Two).

[52] *United Nations Conference on Trade and Development, Second Session*, document TD/97, volume I, p. 36.

11. Neither the original convening resolution nor the practice emerging under the new UNCTAD machinery makes any provision that non-governmental organizations could participate in any capacity in commodity conferences.

12. It is a well-established practice in the United Nations that where the convening resolution adopted by the competent organ calling a conference has spelt out the States, categories of States, or organizations to be invited to the Conference, neither the Conference nor the Secretariat is competent to invite any other State or organization to participate in any capacity in the meetings of the Conference. Similarly, any State or organization invited pursuant to the convening resolution cannot be excluded by the Conference. Therefore, in the case of the United Nations Cocoa Conference, the determination of States or organizations entitled to participate in the Conference is exclusively within the competence of UNCTAD, and is outside the competence of the Conference.

13. It is my conclusion, therefore, that it would not be proper for a delegation to propose that the United Nations Cocoa Conference grant "some sort of observer status" to a non-governmental organization, as it would be outside the competence of the Conference to take any action on such a proposal.

2 May 1972

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15. United Nations Conference on Trade and Development—Various courses open to the Conference to achieve the enlargement of the Trade and Development Board

Internal memorandum

1. This memorandum deals with a proposal to enlarge the membership of the Trade and Development Board, submitted to the United Nations Conference on Trade and Development at its third session in connexion with agenda item 10: "Review of the institutional arrangements of UNCTAD".

2. It is within the competence of the Conference to recommend the enlargement of the Trade and Development Board by amending General Assembly resolution 1995 (XIX) on the establishment of UNCTAD. The Conference may also *provisionally* elect the entirety of members of the enlarged Board. To become legally effective, however, this action would be *subject to the decision by the General Assembly* on the question of the enlargement itself; these provisionally elected members would not assume office prior to the decision of the General Assembly.

3. The desired objective of the enlargement of the Board is therefore legally realizable and the methods by which this may be done are outlined in paragraph 5 below.

4. There are, however, the following legal constraints which must be borne in mind:

(*a*) The Conference must ensure that a Board with a membership of fifty-five as provided for in paragraph 5 of General Assembly resolution 1995 (XIX) exists as a legal entity until the recommendation of the Conference is adopted by the Assembly, at which time the enlarged membership would assume office.

(*b*) Consequently, there must be a clear distinction between the membership of the Board of fifty-five and the enlarged pre-elected membership of the Board, which will assume office upon action by the Assembly.

(*c*) The Conference cannot prescribe that this fifty-five member Board shall *not* meet prior to this Assembly action, since under paragraph 13 of General Assembly resolution 1995 (XIX) meetings of the Board are within its own competence.

(*d*) It must be realized that, should the Assembly *not* act on the Conference's recommendation to enlarge the Board, the membership of fifty-five, as constituted by the Conference at its third session, will be maintained until the fourth session of the Conference, unless the General Assembly suspends the provisions of General Assembly resolution 1995 (XIX) and decides itself to elect the new members of the Board.

(*e*) Any *enlarged* Board could not meet prior to the adoption by the Assembly of the Conference's recommendation on enlargement.

(*f*) Conference action must be consistent with the requirement that the Board meet and submit its report to the General Assembly through the Economic and Social Council some time prior to the end of the twenty-seventh session of the General Assembly, and prior to the end of the resumed autumn session of the Council. Should the Assembly take action early in its twenty-seventh session, the enlarged Board could then meet, adopt its report and transmit it to the Assembly through the Economic and Social Council at the latter's resumed session, as provided for in paragraph 22 of resolution 1995 (XIX). On the other hand, should the Assembly not take this early action, there would have to be a meeting of the Trade and Development Board in what might be called its "interim membership" so that *its* report could be similarly submitted.

5. In order to achieve the desired objective, while at the same time observing these legal constraints the following courses may be considered:

(*a*) The Conference could *elect* fifty-five new members of the Trade and Development Board and could provisionally elect an additional number of new members, the latter members to assume office upon Assembly action on the recommendations for enlargement;

(*b*) The Conference could formally *re-elect* the present membership of the Board to serve until the Assembly takes a decision, or could *decide* that the present membership of the Board will be deemed to continue in office until the election of its successors is completed by Assembly action on the recommended enlargement; it could then provisionally elect a new enlarged Board which, upon action by the Assembly on the recommendation on enlargement, could come into being as the new expanded Board;

(*c*) The Conference could provisionally elect an enlarged Board, and then elect fifty-five named States from among those provisionally elected which would constitute the Board pending Assembly action on enlargement, and the additional pre-elected members would assume office upon action by the Assembly. To that effect the Conference could:

(i) request each of the groups corresponding to the lists in the Annex to resolution 1995 (XIX) to indicate those members, among those which have been provisionally elected, that would serve as members in the fifty-five member Board; or

(ii) decide that those members will be designated by lot, separately for each list.

It will, however, be borne in mind that:

—individual member States from any list can put forward their candidature independently from any group's slate, and

—although the method of drawing lot would satisfy the requirements of paragraph 5 of resolution 1995 (XIX) regarding geographical distribution, it would not necessarily cover the language of paragraph 5 regarding the desirability of continuing representation for the principal trading States.

(*d*) If the Conference wishes to proceed as per (*c*) above, i.e. first by provisionally electing an enlarged Board, it could decide that the present members of the Board should

be included among the candidates. By this method, there would be a greater assurance that there would be the required representation of principal trading States than would be the case under subparagraph (*c*) above. [53]

21 June 1972

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16. Adoption of an instrument or instruments to give effect to the amendments approved by the United Nations Conference to Consider Amendments to the Single Convention on Narcotic Drugs, 1961 [54]—Form of such an instrument or instruments

Memorandum prepared at the request of the General Committee of the Conference [55]

1. *Methods of altering treaty rights and obligations.* The problem of altering existing treaty rights and obligations is a familiar one in international practice, and several different means of doing so are available. The means chosen depend upon certain legal and practical considerations, which will be set out hereafter.

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[53] Resolution 80(III) adopted by the Conference contains a section A entitled "Enlargement of the Trade and Development Board", which inter alia provides the following:

"[The United Nations Conference on Trade and Development]

"1. *Recommends* to the General Assembly of the United Nations at its twenty-seventh session to adopt the following amendments to paragraph 5 of General Assembly resolution 1995(XIX) of 30 December 1964:

(i) in the first line replace "fifty-five" by "sixty-eight";
(ii) in (*a*) replace " twenty-two" by "twenty-nine";
(iii) in (*b*) replace "eighteen" by " twenty-one";
(iv) in (*c*) replace "nine" by "eleven";
(v) in (*d*) replace "six" by "seven".

"2. *Decides* to elect provisionally, subject to decision by the General Assembly on the recommendation contained in paragraph 1 above, sixty-eight members of the Trade and Development Board, to assume office immediately after decision of the General Assembly.

"3. Decides that the present membership of the Trade and Development Board shall continue in office until the election of their successors is completed by a decision taken by the General Assembly on the recommendation contained in paragraph 1 above".

By resolution 2904 A (XXVII) of 26 September 1972, the Assembly *inter alia* decided to amend paragraph 5 of its resolution 1995 (XIX) to read:

"The Board shall consist of sixty-eight members elected by the Conference from among its membership. In electing the members of the Board, the Conference shall have full regard for both equitable geographical distribution and the desirability of continuing representation for the principal trading States, and shall accordingly observe the following distribution of seats:

"(*a*) Twenty-nine from the States listed in part A of the annex to the present resolution as revised in accordance with paragraph 6 below;

"(*a*) Twenty-nine from the States listed in part A of the annex to the present resolution as revised in accordance with paragraph 6 below;
"(*b*) Twenty-one from the States listed in part B of the annex as revised;
"(*c*) Eleven from the States listed in part C of the annex as revised;
"(*d*) Seven from States listed in part D of the annex as revised."

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

[55] Circulated under the symbol E/CONF.63/C.3/L.1.

2. *Conclusion of a new treaty relating to the same subject matter.* When all the parties to an earlier treaty become parties to a later treaty relating to the same subject matter, the earlier treaty is terminated or suspended if the later treaty so provides, and only the later treaty then applies. Thus the Single Convention on Narcotic Drugs, 1961 in its article 44 provides for the termination of certain earlier treaties in the narcotics field as between parties to the Single Convention. If the later treaty does not provide for termination or suspension of the earlier one, then the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty. If not all the parties to the earlier treaty become parties to the later one, then the earlier treaty remains in effect between those which have accepted the later treaty and those which have not done so. The method of conclusion of a new treaty is especially appropriate when a comprehensive review is made of all the rights and obligations in a particular field, or when the changes to be made are very extensive.

3. *Conclusion of a supplementary convention or protocol.* If the object is primarily to supplement existing rights and obligations rather than transforming them, then a supplementary convention or protocol is appropriate. The Protocol Bringing under International Control Drugs Outside the Scope of the Convention of 13 July 1931, as amended, signed at Paris on 19 November 1948, [56] and the Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium, opened for signature at New York on 23 June 1953, [57] are examples of agreements in this category (though the 1953 Protocol by its article 6, paragraph 4 does modify one provision of the 1925 Convention). Another example is the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, done at Geneva on 7 September 1956. [58]

4. *Conclusion of an amending protocol.* If the actual wording of an earlier treaty is to be altered in part, then the most natural method of proceeding is a protocol of amendment. In the practice of the United Nations there are ten such protocols, which are listed in the Annex to this memorandum. The first seven protocols amended treaties concluded before the United Nations came into existence; the last three amended United Nations treaties. The first example (Annex, No. 1) is the Protocol of 11 December 1946, amending prior treaties on narcotics. The practice thereafter changed somewhat as the result of certain difficulties encountered in respect to the Protocols adopted in 1946 and 1947 (Annex, Nos. 1, 2 and 3), and the Protocols concluded between 1948 and 1953 (Annex, Nos. 4, 5, 6 and 7) are in some respects technically improved. The three further protocols (Annex, Nos. 8, 9 and 10) which were concluded in order to amend treaties concluded under the auspices of the United Nations have each of them special features reflecting the particular problems in regard to the earlier treaties involved.

5. *Legal effect of amending protocols.* A party to the earlier treaty which becomes a party to the amending protocol obviously becomes a party to the treaty as amended. Only one of the ten United Nations protocols (Annex, No. 8) requires that, for the entry into force of the amending protocol, all the parties to the earlier treaty should have bound themselves by the protocol; the other nine provide that the protocols and the amendments they contain were to come into force on much less rigorous conditions. Those nine protocols therefore raise the question of the treaty relations between those parties to the earlier treaty who have, and those who have not, become parties to the protocol. The protocol cannot bind any State which has not become a party to it; therefore the treaty in its

[56] United Nations, *Treaty Series*, vol. 44, p. 277.

[57] *Ibid.*, vol. 456, p. 3.

[58] *Ibid.*, vol. 266, p. 3.

unamended form applies between those parties which have accepted the protocol and those which have not accepted it.

6. There is, however, a further principle which appears to have been accepted in practice, relating to the effect of an amendment transferring to a new organ the functions provided by the treaty, or changing the composition of an organ. When the functions conferred on organs of the League of Nations by narcotics treaties were transferred to United Nations organs by the 1946 Protocol (Annex, No. 1), no State party to the earlier treaties refused to recognize the competence of the United Nations organs, even if it did not become party to the Protocol. The same thing happened when the International Narcotics Control Board was established pursuant to the Single Convention, and took over the functions of the former Permanent Central Narcotics Board and Drug Supervisory Body. No State party to the earlier treaties contested the competence of the new Board, even if it did not become party to the Single Convention. Thus it seems to have been recognized that when pursuant to a new agreement a body responsible for the administration of the international narcotics control system is reconstituted or replaced by a new body, the new body succeeds smoothly to the competence of the old one. Naturally, however, the new body would not be entitled to exercise new powers conferred on it by the later agreement in respect of any State not party to the later agreement which objected to such exercise.

7. A question arises as to the rights of States which wish to become parties to the treaty after the amendments have come into force: can such States become parties to the unamended treaty, or are they limited to accepting the treaty in its amended form? The Vienna Convention on the Law of Treaties [59] though not yet in force, may indicate that States consider that there is a presumption on the matter, since it provides in article 40, paragraph 5:

> "Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:
>
> "(*a*) be considered as a party to the treaty as amended; and
>
> "(*b*) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement."

Some of the United Nations amending protocols (Annex, Nos. 4, 5, 6, 7, 8 and 9) go farther than a presumption, and contain express provisions to the effect that "... any State becoming a party to the Convention, after the amendments thereto have come into force, shall become a party to the Convention as so amended."

8. The question of the legal effect of amending protocols having been thus examined, it is appropriate to turn to the matters which within this legal framework remain for the choice of the Conference.

9. *States which may become parties to an amending protocol.* Nine of the ten amending protocols of the United Nations (Annex, Nos. 1-9) are open only to the parties to the treaties being amended. They are purely subsidiary, dependent agreements, having no other object than to amend the treaties, and hence it would be meaningless for any State not already bound by the treaties to become party to the protocols. The tenth instrument (Annex, No. 10), however, has a different character; it not only broadens certain obligations of the Convention relating to the Status of Refugees, but it also binds States to observe the substantive provisions of that Convention, and thus is an independent and complete international instrument. Accordingly, the Protocol relating to the Status of Refugees

[59] *United Nations Conference on the Law of Treaties, Official Records*, Documents of the Conference (A/CONF.39/11/Add.2), p. 288.

(Annex, No. 10) is open to accession "on behalf of all States Parties to the Convention and of any other State Member of the United Nations or member of any of the specialized agencies or to which an invitation to accede may have been addressed by the General Assembly of the United Nations" (Article V). That Protocol also has much more extensive final clauses than the others, since it contains articles on the settlement of disputes, on federal States, on reservations and on denunciation.

10. *Methods of becoming party to the protocols.* Most of the protocols (Annex, Nos. 1, 2, 3, 4, 5, 6, 7 and 8) contain provisions like the 1946 Narcotics Protocol (Annex, No. 1), which provides in article VI that:

"States may become Parties to the present Protocol by

"(*a*) signature without reservation as to approval,

"(*b*) signature subject to approval followed by acceptance or

"(*c*) acceptance.

"Acceptance shall be effected by the deposit of a formal instrument with the Secretary-General of the United Nations".

One protocol (Annex, No. 9) provides only for signature, and one (Annex, No. 10) only for accession. The degree of formality of the procedure required for States to become parties depends mainly upon the importance of the obligations undertaken.

11. *Entry into force.* Seven of the protocols (Annex, Nos. 1-7) have separate and differing requirements for the entry into force of the protocols themselves, and for the entry into force of the amendments they contain. These requirements will be described below. This double entry into force is not essential to the amendment procedure, and the three last protocols (Annex, Nos. 8-10) provide simply that the amendments take effect at the same time as the protocols.

12. *Entry into force of the protocols.* The earliest of the protocols (Annex, No. 1) contains an annual provision to the effect that the Protocol shall come into force in respect of each party on the date of signature without reservation as to approval or on the date of deposit of an instrument of acceptance; that is, apparently only one party would have been necessary. The other protocols which, like the first one, have separate conditions for entry into force of the amendments (Annex, Nos. 2-7) and one further Protocol (Annex, No. 9), all require two parties for the entry into force of the protocols. One protocol (Annex, No. 8) requires that all the parties to the earlier agreement should become parties to the protocol. The remaining protocol (Annex, No. 10) entered into force on the date of deposit of the sixth instrument of accession.

13. *Separate entry into force of amendments.* The earliest protocols (Annex, Nos. 1-3) provided that the amendments to each treaty would enter into force when "a majority" of the parties to that treaty had become parties to the protocol. It is, however, not always possible, because of unsettled questions of succession of States, because of non-recognition of some States by others, etc., to draw up a universally accepted list of the parties to a treaty, and consequently the calculation of how many States constitute "a majority of the parties" may be controversial. For this reason, later protocols (Annex, Nos. 4-7) specify the number of parties to the treaties which must become parties to the protocol in order to bring the amendments into force. These numbers vary considerably. One protocol (Annex, No. 4) requires 15; another (Annex, No. 5) requires 20; another (Annex, No. 6) requires 13; and another (Annex, No. 7) requires 23.

14. *Effect of entry into force of amendments.* Under the usual United Nations procedure of amendment (Annex, Nos. 1-9), the entry into force of amendments has the effect of bringing into being a new international instrument, the treaty as amended, and the

Secretary-General transmits certified true copies of it to States not already bound by it. Those States may become parties directly to the treaty as amended, in accordance with its final clauses, and do not first become parties to the original treaty and then to the amending protocol.

15. As has been said above (para. 9), one protocol (Annex, No. 10) is an independent and complete instrument, covering the full range of obligations in its field. That protocol did not bring into being a "convention as amended", and States not already bound may become so simply by becoming party to the protocol.

16. *Transitional provisions.* The amendments proposed to the Single Convention include changes in the composition and terms of office of the International Narcotics Control Board. If these amendments are accepted by the Conference, it will need to consider not only the questions of entry into force of the amending instrument and of the amendments, but also that of transitional provisions like article 45 of the Single Convention, whereby after entry into force of the amendments the Board in its old composition would perform the new functions conferred by the amendments until such time as the Economic and Social Council decides that the new composition will come into effect. The time of entry into force is rarely exactly foreseeable, and if it came unexpectedly before the Council had been able to carry out the necessary elections, then in the absence of transitional provisions the Board would not be regularly constituted from the moment that the amendments took effect.

17. *Reservations.* Only one of the United Nations protocols (Annex, No. 10) contains a reservations clause, and it would seem to be the only one of them to which reservations have in fact been made. If the Conference decides to include in the amending instrument a clause permitting reservations to particular amendments, the same clause should also be inserted by amendment in article 50 of the Single Convention in order that it may be incorporated in the Convention as amended (see para. 14 above), and thus make the same reservations available to States not already bound by the Convention.

18. *Decisions to be taken by the Conference.* It may be convenient to recapitulate the decisions which the Conference should take in order to make possible the drafting of final clauses for submission to it. It would seem, on the basis of the proceedings thus far, that the most appropriate form of instrument for amending the Single Convention would be an amending protocol (see paras. 4-9 above). If that view is accepted, should such a protocol:

i. be a simple subsidiary instrument like nine of the United Nations protocols, having no object apart from effecting the amendments (see para. 9 above), and hence open only to States parties to the Single Convention, or should it be a comprehensive independent instrument, like one United Nations protocol, which would incorporate the obligations of the Convention, would be open to a wider category of States, and would require more elaborate final clauses?

ii. provide a possibility for States to become parties by simple signature (see para. 10 above), or should ratification or accession be required?

iii. provide separate and different conditions for the entry into force of the protocol and of the amendments (see paras. 11-13 above), or the same conditions for both, and what should the conditions be?

iv. include transitional provisions regarding the composition and terms of office of the International Narcotics Control Board (see para. 16 above)?

v. include a reservations clause (see para. 17 above)?

10 March 1972

ANNEX

Amending protocols concluded under the auspices of the United Nations

1. Protocol amending the Agreements, Conventions and Protocols on Narcotic Drugs, concluded at the Hague on 23 January 1912, at Geneva on 11 February 1925 and 19 February 1925 and 13 July 1931, at Bangkok on 27 November 1931 and at Geneva on 26 June 1936. Signed at Lake Success, New York, on 11 December 1946.

Entered into force on 11 December 1946.
United Nations, *Treaty Series*, vol. 12, p. 179.

2. Protocol to amend the Convention for the Suppression of the Traffic in Women and Children, concluded at Geneva on 30 September 1921, and the Convention for the Suppression of the Traffic in Women of Full Age, concluded at Geneva on 11 October 1933. Signed at Lake Success, New York, on 12 November 1947.

Entered into force on 12 November 1947.
United Nations, *Treaty Series*, vol. 53, p. 13.

3. Protocol to amend the Convention for the Suppression of the Circulation of, and Traffic in, Obscene Publications, concluded at Geneva on 12 September 1923. Signed at Lake Success, New York, on 12 November 1947.

Entered into force on 12 November 1947.
United Nations, *Treaty Series*, vol. 46, p. 169.

4. Protocol amending the International Convention relating to Economic Statistics, signed at Geneva on 14 December 1928. Signed at Paris on 9 December 1948.

Entered into force on 9 December 1948.
United Nations, *Treaty Series*, vol. 20, p. 229.

5. Protocol amending the International Agreement for the Suppression of the White Slave Traffic, signed at Paris on 18 May 1904, and the International Convention for the Suppression of White Slave Traffic, signed at Paris on 4 May 1910. Signed at Lake Success, New York, on 4 May 1949.

Entered into force on 4 May 1949.
United Nations, *Treaty Series*, vol. 30, p. 23.

6. Protocol amending the Agreement for the Suppression of the Circulation of Obscene Publications, signed at Paris on 4 May 1910. Signed at Lake Success, New York, on 4 May 1949.

Entered into force on 4 May 1949.
United Nations, *Treaty Series*, vol. 30, p. 3.

7. Protocol amending the Slavery Convention signed at Geneva on 25 September 1926. Done at United Nations Headquarters on 7 December 1953.

Entered into force on 7 December 1953.
United Nations, *Treaty Series*, vol. 182, p. 51.

8. Additional Protocol amending certain provisions of the Agreement providing for the provisional application of the Draft International Customs Conventions on Touring, on Commercial Road Vehicles and on the International Transport of Goods by Road. Done at Geneva on 28 November 1952.

Entered into force on 7 July 1955.
United Nations, *Treaty Series*, vol. 212, p. 296.

9. Protocol amending the International Agreement on Olive Oil, 1956. Done at Geneva on 3 April 1958.

Entered into force on 11 April 1958.
United Nations, *Treaty Series*, vol. 302, p. 121.

10. Protocol relating to the Status of Refugees. Done at New York on 31 January 1967. Entered into force on 4 October 1967.
United Nations, *Treaty Series*, vol. 606, p. 267.

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17. Extent to which a diplomatic conference can impose on the Secretary-General or other organs of the United Nations duties and obligations in regard to the implementation of any instrument the conference could adopt

Memorandum to the Chief of the Transport Section, Resources and Transport Division, Department of Economic and Social Affairs

1. You have asked, in connexion with the forthcoming UN/IMCO Conference on International Container Traffic, to what extent administrative functions could be conferred on the Secretary-General or other organs of the United Nations in regard to the implementation of any instrument which could be adopted by that Conference. You draw our attention in that respect to the draft Convention on containers [60] and in particular to Variant 4 of article 23 of the draft, reading as follows:

"*Article 23*

"*VARIANT 4*

"1. Independently of the amendment procedure set out in article 22, after the present Convention has been in force for [...] year(s), its annexes may be modified by [a decision] [agreement] of the competent [administrations] [authorities] of all States Parties to the Convention. The [decision] [agreement] of the said competent [administrations] [authorities] may provide that, during a transitional period, the [existing] [unmodified] annexes shall remain in force, wholly or in part, concurrently with the [amended] [modified] annex [or annexes]. Proposals for such modifications shall be prepared by the Administrative Committee whose composition and rules of procedure are set out in annex 7. The [depositary of the Convention] shall communicate [without delay] the modifications proposed by the Administrative Committee to the competent [administrations] [authorities] of the States Parties to the Convention and inform the States, referred to in article 19, which are not Parties to the Convention.

"2. Any modification proposed by the Administrative Committee shall be deemed to have been [accepted] [agreed upon] unless:

"(*a*) in the case of amendments to annexes 1 to 5 and 7 the competent [administration] [authorities] of a State Party to the Convention [has] [have] notified the [depositary of the Convention], within a period of [three] months from the date on which the proposed modification has been communicated by the [depositary of the Convention] to the States Parties to the Convention, that [it] [they] object(s) to the proposal.

"(*b*) in the case of amendments to annex 6 the competent [administrations] [authorities] of at least [five] States Parties to the Convention have notified the [depositary of the Convention], within a period of [three] months from the date on which the proposed modification has been communicated by the [depositary of the Convention] to the States Parties to the Convention, that they object to the proposal.

"3. The [depositary of the Convention] shall notify the date of the entry into force of the amended annex[es] to the competent [administrations] [authorities] of the States Parties to the Convention and inform the States, referred to in article 19, which are not Parties to the Convention."

[60] See document E/CONF.59/22 and Corr.1 and Add.1 and 2.

The text of Annex 7 reads as follows:

"COMPOSITION AND RULES OF PROCEDURE OF THE ADMINISTRATIVE COMMITTEE, PROVIDED FOR UNDER ARTICLE 23 OF THE CONVENTION (VARIANT 4)

"*Article 1*

"1. The competent [authorities] [administrations] of States Parties to the Convention shall be members of the Administrative Committee.

"2. The Committee may decide that the competent [authorities] [administrations] of the States, referred to in article 19 of the Convention, which are not Parties to the present Convention or representatives of international organizations may, for questions which are of interest to them, attend the sessions of the Committee as observers.

"*Article 2*

"The competent [authorities] [administrations] of the States Parties to the Convention shall communicate to [the depositary of the Convention] proposed amendments to the annexes to the present Convention and the reasons therefor, together with any requests for the inclusion of items on the agenda of the meetings of the Committee. [The depositary of the Convention] shall bring these communications [without delay] to the attention of the competent [authorities] [administrations] of the States Parties to the Convention [and of the States, referred to in article 19 of the Convention, which are not Parties to the Convention].

"*Article 3*

"1. The [depositary of the Convention] shall convene the Committee whenever the necessity arises or at the request of the competent [authorities] [administrations] of at least five States Parties to the Convention. He shall circulate the draft agenda to the competent [authorities] [administrations] of the States [Parties to the Convention] [mentioned in article 2 of these rules] at least six weeks before each session.

"2. On the decision of the Committee, taken by virtue of the provisions of article 1, paragraph 2 of these rules, [the depositary of the Convention] shall invite the competent [authorities] [administrations] of the States, referred to in article 19 of the Convention, which are not Parties to the Convention and the international organization concerned to be represented by observers at the sessions of the Committee.

"*Article 4*

"[The depositary of the Conventions shall provide the Committee with secretariat services.

"*Article 5*

"The Committee shall, at its first meeting each year, elect a chairman and a vice-chairman.

"*Article 6*

"Proposals shall be put to the vote. The competent [authorities] [administration] of each State Party to the Convention represented at the meeting shall have one vote. A proposal shall be adopted by the Committee by a majority of the competent [authorities] [administrations] present and voting.

"*Article 7*

"Before the closure of its session, the Committee shall adopt a report.

"*Article 8*

"In the absence of relevant provisions in this annex, the rules of procedure of the [body to be designated] shall, where appropriate, be applicable."

2. It is obviously not possible for a diplomatic conference to impose duties and obligations upon the Secretary-General or other organs of the United Nations, particularly

if carrying out those duties has financial implications. It is, however, not uncommon for United Nations conferences to draft conventions providing that administrative functions of a wide variety of different kinds shall be performed either by the Secretary-General or by various bodies. Such provisions, at the time they are drafted, simply constitute proposals or requests to the United Nations; but when those proposals or requests are accepted by a United Nations organ having authority to do so, and the convention has entered into force, they become legally effective.

3. A rather similar case to the one involved is presented by the Vienna Convention on the Law of Treaties, [61] adopted by a United Nations conference in 1969, which provides in its Annex for a conciliation commission, to which the Secretary-General is to furnish assistance and facilities and the expenses of which are to be borne by the United Nations. The General Assembly, by resolution 2534 (XXIV) of 8 December 1969, approved the provisions in question and requested the Secretary-General to take action accordingly.

4. Another example is the United Nations Convention on Psychotropic Substances, [62] approved in 1971, which confers various functions on the Economic and Social Council, the Secretary-General, the Commission on Narcotic Drugs and the International Narcotics Control Board. Economic and Social Council resolution 1576 (L) of 20 May 1971 "*Accepts* the functions assigned by the Convention to the United Nations in regard to its execution" (the last five words having been added in order to distinguish the administrative functions in question from the depositary functions, which of course had already been accepted by the Secretary-General).

5. Therefore if the Conference should adopt something along the lines of Variant 4 of article 23 and Annex 7 on the composition and procedures of an Administrative Committee, steps should be taken to obtain the acceptance by the General Assembly or the Economic and Social Council of the functions involved.

28 September 1972

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18. Adoption by the authorities of a Member State of an Act providing for various controls over the renewal and issue of passports—Extent to which such an Act might hinder the Organization in the execution of its functions and place certain staff members or candidates to secretariat posts at a disadvantage

Letter to the Permanent Representative of Member State

The adoption by the authorities of your country of an Act concerning passports and exit permits has recently been called to our attention. Under the provisions of this Act, certain controls are as you know introduced over the issue and renewal of passports, including in particular, as regards the renewal of passports of national of your country who are abroad, the remission to the Government of up to ten per cent of the person's monthly salary. While it is not of course for me to express any opinion on this legislation in a general way, I should like to make it clear that I do understand, and have indeed sympathy

[61] *United Nations Conference on the Law of Treaties, Official Records*, Documents of the Conference (A/CONF.39/11/Add.2), p. 288.

[62] See E/CONF.58/6 and Corr.1 and 2.

for, the motives of the Government in putting forward this legislation, designed as it is (as I understand it) to help remedy the economic difficulties in which the country is presently placed. The same I am sure applies with respect to those United Nations officials who are affected by the Act.

It is nevertheless the case that the application of the new Act to existing staff members, or to persons whom the Secretariat might otherwise hire, does present certain difficulties for the Secretary-General, both from the standpoint of principle and as regards its practical implications. I am therefore writing to you at the present time to explain the situation, as it affects the Secretariat, and to ask if you could be good enough to intercede with your Government with a view to the adoption of suitable arrangements whereby exemption could be granted for the special case of nationals of your country who are officials of the United Nations or of the specialized agencies or of the International Atomic Energy Agency.

From the standpoint of principle, the exclusively international responsibilities of United Nations officials (and, similarly, of officials of other organizations forming part of the United Nations family) and the position of the Secretary-General are, at least potentially, considerably affected by the nature and extent of the controls which the Act seeks to introduce. Quite apart from the over-all situation created by the Act, the requirement that passports shall be valid only for one year would, in practical terms, restrict the ability of the Secretary-General to send the staff members concerned on mission or to different duty stations, which, in turn, would hinder both the Organization itself in the execution of its functions and place the staff members themselves at a disadvantage by comparison with their colleagues. Experience has shown that it is extremely important for United Nations staff members to be in a position to move (whether for a short period, to attend a meeting for example, or for more lengthy periods) at relatively short notice. It would be very much appreciated therefore if the competent authorities of your country could arrange to issue passports for United Nations officials valid for a longer period; it would perhaps be possible to grant persons in this category passports valid for three or five years (as in the case of diplomatic passports).

While the reasons advanced above apply to existing staff members, similar considerations would apply, *mutatis mutandis*, in the case where the Organization wished to hire someone from your country; delays might ensue and the Organization might eventually decide that it should take a candidate more readily available from another country.

In the event that a staff member concerned declined to renew or obtain a passport and chose to rely instead on his United Nations laissez-passer for entry into, and exit from the country, complications might also arise. By so doing he would, in all probability, commit a violation of the terms of the Act, thus creating a situation which might prove embarrassing for the Government as well as for the United Nations.

As regards the requirement of the remission of ten per cent of monthly income as a condition for the grant or renewal of a passport, it would be our view that, in so far as the person concerned has no choice over the disposal of this money, which is required from him by official enactment, the requirement constitutes a tax and, as such, is contrary to the general principles of law relating to the status, privileges and immunities of international agents, as set out, for example, in the Convention on the Privileges and Immunities of the United Nations. Quite apart from that, as you will know, United Nations officials already pay a form of taxation under the Tax Equalization Fund, a proportional part of the proceeds of which are credited to your country. A distinction is drawn under the United Nations Staff Rules between "gross" and "net" salary. Pension Fund contributions for example, are based on the staff member's gross salary. More immediately for present purposes, the different amounts between "gross" and "net" salary are consolidated to form the Tax

Equalization Fund. The total amount so gained is then credited to the Member States' account, in the proportion to which they contribute to the regular budget of the United Nations. Thus, in the event that a given State was assessed to contribute two per cent of the regular budget, it would receive two per cent of the Tax Equalization Fund. The amount returned to Member States in this way is, however, reduced to the extent to which the Organization has had to reimburse officials of that country for taxes they have paid. Unless this were done, staff members of different nationality working side by side would be placed in an obvioulsy unequal position. The authority for the scheme outlined is to be found in General Assembly resolution 13 (I) of 13 February 1946, resolutions 239 C and D (III) of 18 November 1948, resolution 359 (IV) of 10 December 1949, resolution 973 (X) of 15 December 1955 and resolution 1099 (XI) of 27 February 1957. An account is also to be found in *Yearbook of the International Law Commission 1967*, vol. II. pp. 270-271.

I would therefore request that the authorities of your country consider the granting of passports on a three or five year basis, and the exemption of the staff members concerned from the ten per cent remission requirement. This would, in our view, be the appropriate course of action for the Government to take, and one which would be fully justified in view of the economic benefits which the Government receives, in various ways, through the employment by the United Nations of the officials concerned.

27 April 1972

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19. PRIVILEGES AND IMMUNITIES OF LOCALLY RECRUITED STAFF MEMBERS OF THE UNITED NATIONS—OBLIGATION OF MEMBER STATES UNDER ARTICLE 105 OF THE CHARTER TO ACCORD ALL STAFF MEMBERS WHETHER INTERNATIONALLY OR LOCALLY RECRUITED SUCH PRIVILEGES AND IMMUNITIES AS ARE NECESSARY FOR THE INDEPENDENT EXERCISE OF THEIR FUNCTIONS—PRINCIPLE OF EQUITY AMONG MEMBERS AND EQUALITY AMONG PERSONNEL OF THE UNITED NATIONS, ASSERTED IN GENERAL ASSEMBLY RESOLUTION 78 (I) OF 7 DECEMBER 1946

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

1. You have asked for our advice in connexion with the stated intention of the Government of a Member State to levy an income tax on the salaries received from the United Nations by local employees of an Information Centre located on that Member State's territory.

2. The Member State in question has not acceeded to the Convention on the Privileges and Immunities of the United Nations. It has however concluded with the Special Fund an agreement which embodies the conditions under which the Special Fund (now UNDP) shall provide the Government with assistance and which stipulates in article VIII that the Government:

> "shall apply to the United Nations and its organs, including the Special Fund, its property, funds and assets, and to its officials, the provisions of the Convention on the Privileges and Immunities of the United Nations".

In this connexion, the General Assembly by resolution 76 (I) approved the granting of the privileges and immunities laid down in articles V and VII of the Convention—which includes the exemption from taxation on salaries and emoluments—to all members of the staff of the United Nations, with the exception of those who are recruited locally *and* are assigned

to hourly rates. Consequently, under the aforementioned Agreement, locally recruited staff of the UNDP who are not assigned to hourly rates are entitled, irrespective of their nationality, to exemption from income tax on the salaries paid to them by the UNDP.

3. With regard to Secretariat staff members serving in the Information Centre, it appears that the Ministry for Foreign Affairs of the Member State concerned informed the Secretary-General of the United Nations of the willingness of the Government to accord to the Information Centre and its international officials the privileges and immunities laid down in the Convention on the Privileges and Immunities of the United Nations.

4. Although the Government referred only to "international officials", the use of this term is not sufficient to reserve the Government's position with respect to immunity from taxation on salaries paid by the United Nations to local employees. The Government, pursuant to Article 105 of the Charter, is under an obligation to accord to United Nations officials, whether international or locally recruited, such privileges and immunities as are necessary for the independent exercise of their functions. Consequently, any reservation with regard to a generally recognized functional immunity or privilege has to be made in explicit form, if only to allow the Organization to decide whether or not the reservation is compatible with the provisions of Article 105 of the Charter.

5. The rationale of the immunity from taxation of salaries paid by the United Nations is to achieve equality of treatment for all officials independently of nationality and to ensure that funds contributed by all Members to the budget of the Organization are not channelled into the Treasury of a State by levying taxes on staff members' salaries. These principles were clearly enunciated by the General Assembly in resolution 78 (I) of 7 December 1946 as follows:

> "In order to achieve full application of the principle of equity among Members and equality among personnel of the United Nations, Members which have not yet completely exempted from taxation, salaries and allowances paid out of the budget of the Organization are requested to take early action in the matter."

6. In the light of the foregoing, we believe that the exemption from income tax of salaries paid by the Information Centre to its local employees, with the exception of those paid at hourly rates, should be asserted. In the event that the Member State concerned were to levy taxes on the salaries of the Information Centre local employees, the amount of the taxes so paid would need to be reimbursed to the staff members by the Organization, which in turn would charge the credit of that State in the Tax Equalization Fund.

21 April 1972

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20. Privileges and immunities of United Nations officials who are nationals or residents of the local State—any State Party to the Convention on the Privileges and Immunities of the United Nations has the obligation to resolve possible conflicts between its income tax legislation and the terms of the Convention by adapting its laws to the Convention [63]

Letter to the Minister of Foreign Affairs of a Member State

The question of the liability of officials of the UNICEF Regional Office who are of the nationality of your country, or permanently resident in that country, to pay income

[63] See also *Juridical Yearbook*, 1964, p. 264.

tax is one which has, in the past, been the subject of considerable discussion, both formally and informally between officials of the Foreign Ministry and UNICEF officials. Since a case involving this question has recently arisen, we should like to draw your attention to this issue and to request that consideration should once more be given to the matter.

The United Nations (of which UNICEF is an integral part) has always taken the position that all UNICEF staff are exempt from taxation on their salaries and emoluments received from UNICEF. The attitude of the United Nations has been based on the text of the Convention on the Privileges and Immunities of the United Nations, to which your country is a party. Section 18 (*b*) of the Convention provides that officials of the United Nations shall "be exempt from taxation on the salaries and emoluments paid to them by the United Nations". In pursuance of Section 17 of the Convention, the General Assembly adopted resolution 76 (I), which provides that all members of the staff of the United Nations, irrespective of nationality or residence, are officials of the United Nations, with the exception of those who are recruited locally and are assigned to hourly rates. None of the UNICEF staff members in question are within the latter category. Thus, by virtue of the Convention, staff members of UNICEF who are of the nationality of your country or who are permanent residents of that country should be entitled to exemption from income taxation on the salaries and emoluments paid to them by UNICEF. Article IX of the Basic Agreement between UNICEF and your country provides expressly in Article IX that

> "the Government recognizes that the Fund, as a subsidiary organ of the United Nations, and its personnel are entitled to the privileges and immunities contained in the Convention on Privileges and Immunities adopted by the General Assembly of the United Nations...".

The United Nations has regarded the texts referred to, in particular Article IX of the Basic Agreement, as over-riding provisions, entitling all UNICEF officials employed in your country, without exception, to be exempt from taxation on their salaries and emoluments. This interpretation has been supported by practice; no UNICEF officials in your country have actually been required to pay income tax.

The competent authorities, however, have sought to rely on Article VII, paragraph B, of the Basic Agreement, in asserting that UNICEF officials who are nationals of, or permanently resident in, your country, should be subject to income tax. That provision reads:

> "No tax, fee, toll or duty shall be levied by the Government or any subdivision thereof or any other public authority on or in respect of salaries or remunerations for personal services paid by the Fund to its officers, employees or other Fund personnel who are not subjects of [the country] or permanent residents thereof."

It is on the basis of this article and of the pertinent national income tax legislation that the tax authorities of your country have recently stated that a former staff member of UNICEF is liable to pay taxation on the salary and emoluments he received from UNICEF when he was a UNICEF official between 19 November 1964 and 15 November 1970.

As indicated above, in the view of the United Nations the qualification at the end of Article VII, paragraph B, was never intended to limit the terms of the accession of your country to the Convention itself, or the language of Article IX.

In so far as a conflict may exist between the income tax legislation referred to in the letter of the tax authorities and the terms of the Convention, it may be pointed out that your country, being a party to the Convention, has undertaken a legal obligation to resolve any such conflict by adapting its laws to the Convention. Section 34 of the Convention reads:

"It is understood that when an instrument of accession is deposited on behalf of any Member, the Member will be in a position under its own law to give effect to the terms of this Convention."

The obligation remains valid irrespective of subsequent agreements, such as the Basic Agreement with UNICEF.

In summary of the position of the United Nations therefore, the United Nations considers that, by virtue of the terms of the Convention and of the Basic Agreement, all UNICEF staff employed in your country are exempt from income tax. We are confident that Your Excellency will give favourable consideration to this view. It would accordingly be very much appreciated if Your Excellency would intervene with the tax authorities in order that an early solution may be found to this particular problem. In this connexion, it would seem particularly urgent to postpone any further action by the authorities in the case of the individual concerned until the general question has been settled. It may be that the Basic Agreement should now be revised, either generally or with respect to particular provisions, most notably as regards the wording of Article VII, paragraph B, which is the cause of the present conflict of views which has arisen. We should like to emphasize that the activities of UNICEF in your country, and the functions of the UNICEF Regional Office which is maintained there, are directed solely with a view to benefiting those in the area who are in need of help, and not in any sense on the basis of commercial gain.

4 July 1972

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21. Section 19 (*b*) of the Convention on the Privileges and Immunities of the Specialized Agencies [64]—The salaries and emoluments paid by specialized agencies should not be taken into account in setting the rate of tax on non-exempt income—Cooperation required from staff members in lawfully minimizing their taxes [65]

Memorandum to the Deputy Chief of the Payroll Section, Accounts Division, Office of the Controller

1. You have asked for our views on the case of a staff member whose ICAO salary was taken into account by the authorities of a State in establishing the tax rate applicable to his non-exempt income and who is claiming reimbursement of the additional tax he is thus required to pay.

2. In our view, it is not legally correct for the State concerned, which is a party to the Convention on the Privileges and Immunities of the Specialized Agencies, to take into account specialized agencies salaries in establishing tax rates on non-exempt private income under section 19 (*b*) of the Convention: such salaries and emoluments should not in any manner be taken into consideration for national taxation purposes. This is the position we have taken with respect to United Nations salaries: the exemption provided in section 18 (*b*) of the Convention on the Privileges and Immunities of the United Nations precludes any tax amendment based directly or indirectly on the exempted income.

3. On the question of reimbursement of the additional tax the staff member concerned is required to pay, we would like to point out that the faulty assessment should in the first place be contested by the staff member on the ground that it violates Section 19 (*b*) of the

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

[65] See *Juridical Yearbook*, 1969, p. 226.

Convention on the Privileges and Immunities of the Specialized Agencies. There is no evidence that he has used any appeal procedures, administrative or other, that may be available to him under the law of the State concerned, to seek the annulment of the income tax assessment. Under United Nations reimbursement procedures, the staff member is under an obligation to co-operate in lawfully minimizing his taxes, including seeking such exemptions as the government is bound by treaty provision to grant. We believe this principle applies equally to staff members of the specialized agencies.

4. In that respect we refer to a decision which upheld the appeal of a United Nations staff member against a similar assessment of his income tax by the Dutch fiscal authorities and ordered the annulment of the tax assessment on the ground that it violated Section 18 (*b*) of the Convention on the Privileges and Immunities of the United Nations. [66]

16 October 1972

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22. Question whether the provisions of Articles 39 and 41 of the United Nations Charter on sanctions which may be decided on by the Security Council are exclusive of all other collective sanctions imposed by other means

Statement presented by the United Nations Observer at the ICAO Special Subcommittee on the [ICAO] Council Resolution of 19 June 1972

With regard to the question whether the provisions of Articles 39 and 41 of the United Nations Charter on sanctions which may be decided on by the Security Council are exclusive of all other collective sanctions imposed by other means, it may be pertinent to make some remarks about the Charter and to cite certain actions of States within the framework of the United Nations.

It is evident that any decision of the Security Council which under the Charter is binding on States takes precedence over their obligations under any other international agreement; this is expressly provided in Article 103 of the Charter. One form of binding decision of the Security Council is sanctions decided on under Article 41, after the determination of the existence of a threat to the peace, breach of the peace or act of aggression under Article 39. If the Council decides upon such measures, then obviously any inconsistent sanctions imposed under any other agreement must cease to apply. But what if the Security Council has made no determination under Article 39, and has not decided on measures under Article 41? If there is no threat to the peace, breach of the peace or act of aggression, then the Security Council will presumably not impose sanctions. Have States, acting within the United Nations framework, recognized the possibility of collective action in such circumstances?

In at least one field States have recognized such a possibility, i.e., in the United Nations narcotics treaties. The system of international narcotics control, ever since a treaty concluded in 1925, [67] has envisaged the imposition of an embargo on import or export, or both, of narcotics from or to a country or territory where a situation exists which endangers the aims of the control system. The earlier treaties were taken over and amended by the United Nations, without eliminating this feature. In 1953 a United Nations conference

[66] *Ibid.*, p. 239.

[67] League of Nations, *Treaty Series*, vol. LI, p. 337.

adopted the Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium. [68] This Protocol provides, in articles 12 and 13, for a mandatory embargo which may be imposed by the Permanent Central Narcotics Board either upon a party or upon a non-party to that treaty. The conference which adopted the Protocol was called by the Economic and Social Council, which in doing so had before it a draft treaty providing for the mandatory embargo. The Opium Protocol entered into force, and has probably not yet been completely superseded by later treaties.

Other narcotics treaties, in particular the Single Convention on Narcotic Drugs, 1961, [69] and the Convention of 1971 on Psychotropic Substances, [70] also provide for an embargo by States against both parties and non-parties in respect of all substances covered by the Conventions, although, like the treaties before 1953, they authorize the international organ concerned only to recommend an embargo rather than taking a mandatory decision.

Mention may also be made of the Constitution of the International Labour Organisation, as it existed at the time that the General Assembly approved the relationship agreement which made it a specialized agency of the United Nations. [71] It was provided therein that any member could file a complaint against any other member for failure of effective observance of an international labour convention to which both were parties; that the complaint could be referred to a Commission of Enquiry; and that the Commission was empowered to indicate in its report economic sanctions against the member at fault, which could, as a last resort, be applied by the other members. [72]

It is not desired to draw any conclusion as to whether the legal situations under the treaties which have just been mentioned constitute fully applicable precedents in regard to the problem under discussion in the Subcommittee. It may nevertheless be observed that in some circumstances States have considered that the provisions of the Charter on sanctions by the Security Council did not necessarily exclude the possibility of providing for sanctions in certain other agreements.

12 September 1972

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23. Draft articles on succession of States in respect of treaties—Procedure followed by the World Health Organization concerning the succession of newly independent States to WHO regulations

Letter to the Director of the Legal Division, World Health Organization

In your letter of 28 September 1972, you have analysed on the light of the draft articles on succession of States in respect of treaties, recently adopted by the International Law Commission, [73] the procedure followed by WHO concerning the succession of newly

[68] United Nations, *Treaty Series*, vol. 456, p. 3.

[69] *Ibid.*, vol. 520, p. 151.

[70] Reproduced in E/CONF.58/6 and Corr.1 and 2.

[71] United Nations, *Treaty Series*, vol. 1, p. 183.

[72] Article 28, paragraph 2 of the ILO Constitution as it existed until 20 April 1948, date of entry into force of the Instrument for the Amendment of the Constitution, adopted by the International Labour Conference at its twenty-ninth session, Montreal, 9 October 1946: *ibid.*, vol. 15, p. 35.

[73] *Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 10* (A/8710/Rev.1).

independent States to WHO Regulation's and have drawn my attention to certain difficulties in that respect.

In my opinion, the International Law Commission has rightly chosen the "contracting in" procedure *as a general rule* for participation of a newly independent State in multilateral treaties applied to the territory to which the succession of States relates prior to the date of the succession. That procedure, embodied in articles 11 and 12 of the Commission's draft is supported by recent State practice, is consistent with the general law of treaties as codified in the 1969 Vienna Convention on the Law of Treaties, and takes duly into account basic principles of general international law and of the Charter of the United Nations, such as the principle of self-determination and the principle of the sovereign equality of States. To formulate the general rule on the matter in terms of a "contracting out" procedure would be tantamount to making the presumption that a newly independent State *consents to be bound by any treaty* previously in force internationally with respect to its territory, unless within a reasonable time it declares a contrary intention. This latter approach, suggested in 1968 by the International Law Association, has been criticized by several delegations in the Sixth Committee of the General Assembly during the last years and does not correspond to the practice followed by the Secretary-General as depositary of multilateral treaties. As indicated by the International Law Commission, in paragraph 36 of its report [74] "one thing is to admit on the plane of policy the general desirability of a certain continuity in treaty relations upon the occurrence of a succession and another thing to convert that policy into a legal presumption".

Having based in articles 11 and 12 the general rule in a "contracting in" procedure, article 4 of the Commission's draft deals, *inter alia*, with the specific case of *treaties adopted within an international organization* along the same lines as article 5 of the Vienna Convention on the Law of Treaties. Article 4 provides that the draft articles apply to the effects of succession of States in respect of any treaty adopted within an international organization "without prejudice to any relevant rules of the organization". This proviso safeguards any present or future rules of international organizations with regard to treaties adopted within them and makes it clear that the application of the draft articles to those treaties is not intended to impair the application to them of the relevant existing rules of the international organization concerned, including established "contracting out" procedures. Moreover, article 11 itself expressly states, in its opening words, that the general rule on the position of newly independent States in respect of the predecessor State's treaties, namely the "clean slate" principle, is "subject to the provisions of the present articles", a part of which is, of course, article 4.

In paragraph (13) of its commentary to article 4, the Commission recalls that in the context of that article *the term "rules"*, as in article 5 of the Vienna Convention on the Law of Treaties, applies "both to written rules and to unwritten customary rules of the organization, but not to mere procedures which have not yet reached the stage of mandatory legal rules". The WHO "contracting out" procedure for participation in Regulations adopted by the Health Assembly under article 21 of the WHO Constitution is established, as you are well aware, in article 22 of the Constitution itself according to which such Regulations "shall come into force for *all Members* after due notice has been given of their adoption by the Health Assembly except for such Members as may notify the Director-General of rejection or reservations within the period stated in the notice" (emphasis supplied). This constitutional provision has been supplemented by the final provisions of the International Sanitary Regulations [75] adopted by the Health Assembly, Articles 105 to 113 of which elaborate in detail certain aspects of the WHO "contracting out" procedure. It seems

[74] *Ibid.*

[75] United Nations, *Treaty Series*, vol. 175, p. 215.

beyond any doubt whatsoever that that procedure is quite a "rule" of the Organization—a constitutional written rule conveniently supplemented by provisions inserted in the Regulations themselves—and not a mere procedure which has not yet reached the stage of a mandatory legal rule. As established, that "rule" of the Organization is safeguarded by article 4 and the opening words of article 11 of the Commission's draft.

But the question arises whether the "contracting out" procedure established by those written rules of the Organization is able to solve by itself the problem of ensuring continuity in the participation of a newly independent State in Regulations applied or extended prior to independence to the territory to which the succession of States relates. Paragraph 2 of Article 109 of the International Sanitary Regulations provides that any State which becomes a Member of the Organization after the date fixed for the entry into force of the Regulations and which is not already a party hereto "may notify its rejection of, or any reservation to, these Regulations within a period of *three months* from the date on which that State becomes a Member of the Organization. *Unless rejected, these Regulations shall come into force with respect to that State, subject to the provisions of Article 107* [Reservations], *upon the expiry of that period*" (emphasis supplied). It is obvious from this wording that continuity in the participation of newly independent States in Regulations previously applied or extended to the territory to which the succession of States relates cannot be preserved on the basis of that provision, although it embodies a "contracting out" procedure. A legal basis other than the "contracting out" procedure established by the written rules of the WHO has to be found for ensuring such a continuity.

It appears from your letter that you are inclined to believe that the *practice* followed hitherto by the WHO Secretariat of considering WHO Regulations as continuing to bind newly independent States if they were in force previously for the territory to which the succession of States relates has not become an unwritten or customary rule of the Organization within the meaning of the term "rule" in article 4 of the Commission's draft. You are of course in a better position than we are to appreciate if that is the case. Allow me nevertheless to observe that sometimes a "secretariat practice" is nothing else but a reflection of the general position taken on a legal question by member States or by the competent representative organ of the Organization concerned. A "secretariat practice" may be also a starting point for a true legal rule of an organization when by reason of their conduct it appears that member States or the competent representative organ of the Organization apply generally such a practice and accept it as an unwritten or customary rule of the Organization.

Assuming that the said WHO Secretariat practice is not a "rule" of the Organization falling under article 4 of the Commission's draft, the question arises whether it is advisable to establish within WHO specific legal rules on the matter or whether the general régime of the Commission's draft is quite enough to preserve the desired continuity. The answer to that question is essentially a matter of legal policy to be decided by WHO. In this connexion, it should be borne in mind that the real problem is not one of "contracting out" *versus* "contracting in", but rather a question of the *kind* of "contracting out" or "contracting in" procedure adopted. After all, both procedures are based on the same principle, namely the consent of the participating State.

For instance, the "contracting in" procedure adopted by the International Law Commission as a general rule for participation of newly independent States in multilateral treaties is supplemented by certain provisions of the draft intended to facilitate continuity in treaty relationships in the event of a succession of States, such as paragraph 2 or article 18 (Effects of a notification of succession) and paragraph 1 of article 22 (Provisional application of multilateral treaties). According to the first of these two provisions and subject to the exceptions listed in sub-paragraphs (*a*) to (*c*), when a newly independent State, having

made a notification of succession, is considered a party to a treaty which was in force at the date of the succession of States, "the treaty is considered as being in force in respect of that State from the date of the succession of States". And paragraph 1 of article 22 provides that a multilateral treaty which at the date of a succession of States was in force in respect of the territory to which the succession of States relates is considered as applying provisionally between the newly independent State and a particular State party to the treaty by express or tacit agreement between them. On the other hand, a "contracting out" procedure as the one embodied in paragraph 2 of Article 109 of the International Sanitary Regulations quoted above does not mention provisional application and prevents considering the Regulations as being in force in respect of a newly independent State from the date of the succession. Actually, it could even be claimed, on the basis of paragraph 2 of Article 109 that the general rule of article 18, paragraph 2 of the Commission's draft does not apply, because sub-paragraph (*a*) of that article excepts form the rule treaties providing "otherwise".

Moreover, although a certain kind of "contracting out" procedure may be, in some well defined contexts, the best *prima facie* solution to ensure continuity, such an approach entails also some inherent problems. As you said in your letter, governmental authorities have difficulties with the existing constitutional procedures for the adoption and entry into force of WHO Regulations and in some cases purport to "ratify" Regulations, even after the date that they entered into force for the State concerned. These difficulties could still be greater in the always sensitive context of a succession of States, particularly when it involved a newly independent State.

I understand your concern for avoiding procedures which might encourage reservations where none had existed before. But I doubt that depriving altogether newly independent States participating in WHO Regulations through a succession procedure of the possibility of making reservations, otherwise expressly permitted, will be the best solution to facilitate continuity. On the contrary it might lead newly independent States to exercise their right of "contracting out" of the Regulations creating a more serious, wider and longer discontinuity. On the other hand, Article 107 of the International Sanitary Regulations provides a strong safeguard by centralizing in the Health Assembly the control of the compatibility of a reservation with "the character and purpose" of the Regulations. The provisions of Article 107 of the Regulations as a rule of the WHO are, in any event, preserved by article 4 of the Commission's draft.

With regard to cases of State succession other than those of newly independent States the Commission's draft distinguishes: (*a*) transfer of territory; (*b*) uniting of States; (*c*) dissolution of a State; (*d*) separation of part of a State. The provisions on transfer of territory (article 10) follow the traditional "moving treaty frontiers" rule. Those concerning uniting of States (article 26), dissolution of a State (article 27) and the State which continues to exist in case of a separation (paragraph 1 of article 28) are based on the principle of continuity. Only the new State emerging from a separation is assimilated in the Commission's draft to the régime provided for newly independent States (paragraph 2 of article 28).

If in the light of the general régime of the International Law Commission's draft it is considered advisable to establish specific WHO written rules concerning State succession in respect of WHO Regulations, a possible procedural solution to formulate them might be, as you suggested, to include express clauses dealing with the matter in future WHO Regulations. A solution of that kind would be, in my opinion, quite compatible with the draft articles prepared by the Commission. Another procedural solution could be the adoption by the Health Assembly of a resolution formulating the rules and requesting the Director-General to act accordingly in the performance of its functions as depositary of

the Regulations. This course of action would have the advantage of testing the practice hitherto followed in the matter by the WHO Secretariat and, if the resolution was appropriately drafted, could not only be viewed as a rule for the future but also as a recognition of that practice as an already existing rule of the WHO.

30 November 1972
