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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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Chapter VI

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

A. Legal opinions of the Secretariat of the United Nations

(Issued or prepared by the Office of Legal Affairs)

1. National legislation providing for the levying of certain air travel taxes—The United Nations should be exempt from such taxes under section 7 (*a*) of the Convention on the Privileges and Immunities of the United Nations

Letter to the Permanent Representative of a Member State

1. I have the honour to refer to a note of the Permanent Mission of your country concerning the imposition on the United Nations of certain air travel taxes under an Act of 1970.

2. The Secretariat of the United Nations had previously received from the Mission of your country the text of a News Release dated 1 July 1970 announcing that the Treasury Department was studying whether employees of international organizations were exempt from the new air travel taxes. Pending completion of the study, air carriers and their agents were instructed to collect the charges from such employees, it being understood that persons paying the taxes could apply for refund if it were to be concluded that they were not liable for them.

3. In the Note referred to in paragraph 1 above, the Mission of your country advised that "the Department of the Treasury . . . has decided that foreign Governments and diplomatic and consular personnel, as well as officials of international organizations, are liable for the payment of these fees or taxes. No exemption is allowable because the taxes are actually user charges for specific services rendered and are paid into the Airport and Airway Trust Fund and used exclusively for the construction, maintenance, and administration of the airport and airway system . . ." With this Note was forwarded a copy of an Opinion of the General Counsel of the Department of the Treasury, dated 14 April 1971 and entitled "Applicability of the Air Travel Taxes to Diplomatic, Consular Officials and International Organizations".

4. The Secretariat of the United Nations in oral discussions immediately informed the Mission that it was unable to agree with the position taken by your Government in this matter and requested that this position be re-examined. In this connexion, it was pointed out that such a position was contrary to that which had been consistently applied in interpreting the Convention on the Privileges and Immunities of the United Nations in similar cases arising in other States.

5. The Opinion of the General Counsel of the Treasury Department, on which the position of your Government appears to be based, has been studied very carefully, but the Secretariat remains of the opinion that the United Nations is entitled to exemption from the taxes imposed under the Act of 1970. While reserving the right to claim exemption from any of the taxes imposed under the Act whenever the occasion arises, the Secretariat hereby formally requests that, with specific reference to the taxes in question, the Government recognize the United Nations exemption therefrom.

6. It is to be understood that exemption is only sought where the incidence of the tax falls on the United Nations, that is, whenever travel or shipment is undertaken at the expense of the United Nations by officials or experts or by others duly authorized to travel at the

expense of the Organization. With regard to taxes on travel undertaken by United Nations officials or experts at their own expenses, as well as on shipments for private purposes, no exemption is claimed.

I. *Convention on the Privileges and Immunities of the United Nations*

7. The exemption is sought on the basis of the Convention on the Privileges and Immunities of the United Nations,[1] which has been acceded to by your country. Section 7(*a*) of the Convention provides:

> "The United Nations, its assets, income and other property shall be:
>
> "(*a*) exempt from all direct taxes; it is understood, however, that the United Nations will not claim exemption from taxes which are, in fact, no more than charges for public utility services."

It is submitted that the taxes for which exemption is sought are within the purview of the exemption provided in Section 7(*a*).

8. There can be no doubt that the charges in question constitute direct taxes. This appears clearly, *inter alia,* from the reports and proceedings quoted in the Treasury Counsel's Opinion. The fact that they are characterized as "user taxes" does not remove them from the category of direct taxes—it merely describes their incidence.

9. The question, therefore, is whether these taxes are "*no more* than charges for public utility services" (emphasis added). In this connexion it should be noted that the term "public utility services" is much narrower than the term "public services" and has been interpreted most restrictively in the application of the Convention. The taxes here in question cannot, for a number of reasons, be considered as coming within the quoted phrase.

10. In the first place, the term "public utility services" has a restricted connotation applying to particular supplies or services rendered by a government or by a corporation under government regulation, for which charges are made at a fixed rate according to the amount of supplies furnished or services rendered.

11. In the second place, the "charges", in accordance with established practice in applying the Convention, must be for services that can be specifically identified, described, itemized and calculated according to some predetermined unit. While "transportation" is an accepted public utility, it is the fare for such transportation (exclusive of taxes) that is a charge for that public utility service. For example, in the case of a government-owned bus company it is the fare, and not any tax added thereto for any purpose, such as the construction of highways, that would qualify as a charge for public utility services.

12. Moreover, the purpose of the tax clearly indicates that it is more than a charge for public utility services. It appears from the 1970 Act that the Trust Fund into which the taxes in question are to be paid is to be utilized primarily for the capital expenditures incurred in establishing and developing a national system of airports. The Act sets out, as the reason for its adoption,

> "That the Nation's airport and airway system is inadequate to meet the current and projected growth in aviation.
>
> "That substantial expansion and improvement of the airport and airway system is required to meet the demands of interstate commerce, the postal service, and the national defense.
>
> ". . ."

13. The Act also specifies that the assets in the Trust Fund be available to meet expenditures incurred under Title I of the Act, which provides for the preparation and implementation of a "national airport system plan for the development of public airports" and those "which are attributable to planning, research and development, construction, or

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

operation and maintenance" of air traffic control, navigation and communication for the airways system.

14. The expenditures in question are clearly intended to be largely of a capital nature, and would, if the airways system were in private hands, be financed from capital funds raised by the sale of stocks or bonds, and not from current revenues. Since the system is governmentally owned, these capital expenditures would normally be borne by the general tax revenues either immediately or gradually, as bonds issued for the purpose are repaid.

15. While it is true that public utility charges normally do include an element for return on or repayment of capital, this is generally merely incidental to the portion of the charges designed to cover current expenditures for labour and materials. Moreover, the capital in question would be that already invested in the infrastructure used to provide the services for which the charges are rendered, rather than that required for the future expansion of the system, the cost of which must in the first instance be borne either by existing stockholders through retained earnings or by new investors in equity or debt securities.

16. While some of the revenues produced by the taxes here under consideration may be used for current operation and maintenance, and thus are of the type for which a utility could normally charge its customers, this is clearly not the principal destination of these taxes. It cannot, therefore, be said that these taxes are "no more" than public utility charges, as specified by Section 7(*a*) of the Privileges and Immunities Convention for taxes as to which no exemption is to be claimed by the United Nations.

17. If such exemption were not claimed by and granted to the United Nations, then the Organization would, in effect, be forced to use its resources to build up the aeronautical infrastructure of one of its members, that is of a host State, in which of necessity a significant proportion of flights by its staff members originate or terminate.

18. It is not disputed that the United Nations through its staff members travelling on official business will benefit from the proposed national airport system but that is not the criterion specified in Section 7(*a*) of the Convention. Staff members also benefit from police and fire protection, public health and sanitary measures, the work of the meteorological office and the countless other protective and supportive services of a modern government. These are financed by taxes paid by the nationals and residents of the country, except to the extent that certain persons are exempted from such contributions for various policy reasons—such as international civil servants whose taxation by national authorities would merely burden the coffers of the organization employing them. It appears to the United Nations Secretariat that the aeronautical facilities and charges here under consideration, which later would burden directly the Organization itself, fall within the category of services and taxes covered by the above principle.

19. The United Nations has, therefore, consistently taken the position that taxes that are not merely substitutes for charges for current services are covered by the general exemption granted by Section 7(*a*) of its Privileges and Immunities Convention. This issue is discussed in the Secretariat study on *Relations between States and Intergovernmental Organizations*[2] which is cited in the Treasury Counsel's Opinion. The cited page quotes a letter from the Legal Counsel of the United Nations reading in pertinent part as follows:

> "I am sure it is not necessary to refer to the fact that the public utilities supervised by such governmental bodies in any of a large number of countries are principally gas and electricity, water and transport. For example, Quemner, *Dictionnaire Juridique* gives the following entry:
>
> '*Public utilities, public services corporation*—services publics concédés (transports, gaz, électricité, etc.).'"

[2] *Yearbook of the International Law Commission, 1967*, vol. II, p. 247.

The letter continues

> "I think it is clear that the Convention had specifically in mind the payment by the United Nations of water and electricity charges on the grounds that the costs as billed are no more than the *quid pro quo* for commodities or services received; . . ."

It is further stated

> "The authorities in international law generally seem to make a distinction as to whether the services rendered by a municipality or other public agency are special ones for which a special charge is made, with definite rates payable by the individual in his character as a consumer and not as a general taxpayer according to fixed principles of real property taxation."

This reasoning is equally applicable, *mutatis mutandis*, with respect to the taxes in question, as is the argument set forth in the *United Nations Juridical Yearbook*, 1968, pages 184 and 185.

20. The following paragraph of the 1967 study contains an extract from a note from the Secretary-General in which representations are made to the Government of a Member State that had sought to levy fees for various airport facilities provided to United Nations aircraft. Although distinguishable as regards its actual incidence from the case under discussion, the following arguments advanced there are of direct applicability in the present case:

> "In the view of the Secretariat of the United Nations, charges exacted by a Government upon aircraft for landing or parking at its airport constitute a direct tax, in respect of which the United Nations is exempt pursuant to Section 7(*a*) of the Convention on the Privileges and Immunities of the United Nations. That section provides that the United Nations shall be 'exempt from all direct taxes'. Such charges are levied for the mere fact of calling or stopping at an airport. They cannot be considered as 'charges for public utility services' from which the United Nations, by the terms of the same Section 7(*a*) of the Convention, will not claim exemption.
>
> "The term 'public utility' has a restricted connotation applying to particular supplies or services rendered by a government or a corporation under government regulation for which charges are made at a fixed rate according to the amount of supplies furnished or services rendered. The 'handling charges' actually levied at . . . Airport would fall into this category and, as may have been noted, the Secretariat has consistently refrained from claiming exemption from such handling charges. Similarly, the Secretariat will not claim exemption, for example, from payment of rental for hangar storage space or for electricity charges, for the lighting of runways during night landing or take-off; these are in the realm of public utility charges.
>
> ". . .
>
> "As concerns the feeling of the Government that the payments made were for actual services rendered, the Secretary-General wishes to emphasize that, both as a matter of principle and as a matter of obvious practical necessity, charges for actual services rendered must relate to services which can be specifically identified, described and itemized. Moreover, it follows that the charge would then differ for each aircraft or each landing according to some predetermined unit (such as a day, a night, the mere act of landing on the runway or parking on the apron, or the type of aircraft), then clearly the Organization is being subjected to a standard rate of assessment in the nature of a tax.
>
> "If, therefore, the Government, in the light of these criteria, should adhere to the views that the payments in question were for actual services, the Secretary-General would ask to be furnished (and the auditors would no doubt eventually require) an itemized account showing the specific services provided on each occasion, the cost of each service, and how the total was arrived at. The Secretary-General is satisfied that the submission of such a voucher would be normal practice wherever a party is billed for specific services. Thus, labour is normally charged by hours of work provided, electricity by kilowatt-hour,

etc. On the other hand, if the charges have been established by fixed statutory or regulatory fee, it would seem evident that Section 7(*a*) is applicable.

". . ."

21. The position taken by the United Nations as to the interpretation of the Convention has generally been accepted by its Members, and indeed the effectiveness of a multilateral instrument of this type requires that the parties thereto accept such uniformity of interpretation. The summary of international practice in part V of the Treasury Counsel's Opinion, which asserts that in a number of countries aviation-related taxes are imposed on international organizations, does not indicate either the nature of these taxes, which in some instances are purely public utility charges (such as discussed in the Note quoted in the previous paragraph), or whether any genuine taxes are imposed on the United Nations by States parties to the Convention.

II. *Intent of the legislative authorities*

22. The Treasury Counsel's Opinion demonstrates that the legislative authorities of your country intended that the taxes here in question be charged to all users of the civil aviation system, including international organizations. However, it is by no means clear that in so doing those authorities expressed an intention "to abrogate or restrict the application" of any relevant treaties; therefore, such a purpose should not be implied.

23. As pointed out in the Opinion, your country has in the past granted and at present still grants exemptions from various excise taxes to diplomatic, consular and international personnel and organizations, on various bases and for different reasons: as a customary courtesy, on the basis of reciprocity, because of the requirements of customary international law, because of provisions of domestic legislation or administrative rulings, etc. While the legislative authorities evidently decided that these considerations should not limit the imposition of the taxes here in question on normally protected persons and organizations, there is no evidence that it was aware that in some instances exemptions are required by treaties or that it in any way wished to abrogate or limit such treaties. Indeed, it appears more than likely that the impact of that treaty on the legislation then under consideration was never explicity taken into account.

III. *Conclusion*

24. On the basis of the foregoing considerations, the Secretariat of the United Nations trusts that the Government of your country will agree that the United Nations is, by virtue of Section 7(*a*) of the Convention on the Privileges and Immunities of the United Nations, entitled to exemption from the taxes imposed under the Act of 1970. Consequently it is hoped that the Government will find it possible to review and reverse the position taken by the Department of the Treasury concerning the liability of the United Nations for the payment of those taxes.

20 June 1973

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2. PROTECTION OF THE UNITED NATIONS FLAG AND EMBLEM—GENERAL ASSEMBLY RESOLUTIONS 92 (I) AND 167 (II) AND ARTICLE 6 *ter* OF THE CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY—EMBLEMS PROTECTED UNDER OTHER INTERNATIONAL AGREEMENTS

Letter to a private person

We believe that in your examination of the question of the protection of the Olympic symbol and banner, the manner in which the United Nations emblem and flag are protected

would be of interest to you. The United Nations emblem and flag are protected under resolutions adopted by the General Assembly of the United Nations.

General Assembly resolution 92(I) of 7 December 1946 concerns the United Nations emblem. It provides, among other matters, that States Members of the United Nations "should take such legislative or other appropriate measures as are necessary to prevent the use, without authorization by the Secretary-General of the United Nations, and in particular for commercial purposes by means of trade marks or commercial labels, of the emblem . . . of the United Nations." A number of Member States, pursuant to that resolution, adopted special legislation for the protection of the emblem. Other Member States, considering that their existing legislation would adequately provide the necessary protection, deemed special legislation unnecessary.

General Assembly resolution 167(II) of 20 October 1947 concerns the United Nations Flag. It is pursuant to that resolution that the United Nations Flag Code and Regulations were established by the Secretary-General.

We have found that this system of protection, namely the two General Assembly resolutions together with the willingness of Member States to act pursuant thereto, is in practice a reasonable, practical and effective arrangement.

The discretionary authority vested in the Secretary-General to permit use of the emblem by non-United Nations bodies or persons enables authorization to be granted for the emblem's use in affirmations of support for the United Nations. However, it is required, then, that the words "United Nations" or the letters "UN" be placed above the emblem, and the words "We believe" or "Our hope for mankind" be placed below the emblem.

Use of the United Nations Flag by non-United Nations bodies or persons is permissible under article 5 of the Flag Code to demonstrate support of the United Nations.

As the emblem and flag of an "international intergovernmental organization", the United Nations emblem and flag are also protected, to some degree, under article 6 *ter* of the Paris Convention for the Protection of Industrial Property of 20 March 1883, as revised at Stockholm on 14 July 1967, which is administered by the World Intellectual Property Organization.

You will note that article 6 *ter* (*b*) of the Paris Convention refers to emblems which are protected under other international agreements. One such emblem would be the Red Cross emblem. The Red Cross emblem is protected under chapter VII of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of 12 August 1949;[3] and under chapter VI of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, also of 12 August 1949.[4]

We do not believe that we are in a position to advise on the particular steps which the International Olympic Committee should take to ensure the protection of the Olympic symbol and banner. It seems to us, however, that a basic element, whether protection is sought by way of an international convention or by way of a resolution of the International Olympic Committee, is the willingness of governments to act. Consultations between the International Olympic Committee and governments would therefore appear necessary.

4 June 1973

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

[4] *Ibid.*, p. 85.

3. QUESTION WHETHER NON-UNITED NATIONS BODIES ESTABLISHED OR MAINTAINED WITH THE PARTICIPATION OF THE ORGANIZATION MAY USE THE UNITED NATIONS EMBLEM ON THEIR STATIONERY—QUESTION OF THE USE OF UNITED NATIONS DECALS ON EQUIPMENT

Memorandum to the Chief, Human Resources Projects Section, Asia and Middle East Branch, Office of Technical Co-operation

1. You have asked whether the various bodies listed in your memorandum may use the United Nations emblem on their stationery.

2. The Asian Institute for Economic Development and Planning was established by the Economic Commission for Asia and the Far East (resolution 43 (XIX) dated 11 March 1963).[5] It is, therefore, a subsidiary organ of the Commission and may, as a United Nations body, use the United Nations emblem on its stationery.

3. As to the use of the United Nations emblem by non-United Nations bodies, the fact that the United Nations had a role in the establishment of a non-United Nations body or the fact that the United Nations provides assistance to a non-United Nations body does not, in our opinion, render use of the United Nations emblem on the stationery of such a body appropriate.

4. Authorization is granted for use, by non-United Nations bodies, of the United Nations emblem (with the letters "UN" placed above the emblem and "We believe" or "Our hope for mankind" placed below the emblem) as a demonstration of support for the United Nations. However, such use of the United Nations emblem, as a demonstration of support for the United Nations, would not appear to be a solution in the cases mentioned in your memorandum.

5. As you have noted, the Asian Centre for Development Administration when established will not be a United Nations body. Accordingly, use of the United Nations emblem on the stationery of the Centre will not in our opinion be appropriate. Similarly, use of the United Nations emblem on the stationery of the two Regional Demographic Institutes mentioned in your memorandum, both of which we note from your memorandum have independent juridical personality, is not in our opinion appropriate.

6. Use of olive branches in the emblems of non-United-Nations bodies is not objectionable. We would, also, have no objection to a notation acknowledging United Nations assistance (for example, the words "The .... is assisted by the United Nations"), being included on the stationery of a non-United Nations body.

7. You also ask for our views on the use of UN decals on equipment at UNDP projects. Use of UN decals on United Nations owned equipment is in order. Use of UN decals on equipment not owned by the United Nations would be permissible, in our view, where (*a*) the equipment is provided for the exclusive use of the United Nations and is being exclusively used by the United Nations; and (*b*) identification of the equipment as equipment in United Nations use is deemed advisable.

11 July 1973

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[5] *Official Records of the Economic and Social Council, Thirty-sixth Session, Supplement No. 2* (E/3735), p. 50.

4. CONDITIONS UNDER WHICH RESEARCHERS APPOINTED BY THE UNITED NATIONS UNDER SPECIAL SERVICE AGREEMENTS MAY PUBLISH THE RESULTS OF THEIR WORK—PUBLICATION RIGHTS OF THE UNITED NATIONS

Summary of a memorandum to the Acting Director, Office of Technical Co-operation

1. We refer to your memorandum requesting advice on the conditions under which researchers serving under special service agreements for country studies for a technical co-operation project should be able to publish the results of their work. You recall that in a previous case where not only the researcher and his institution but also his government were interested in public availability of a country study, it was agreed that the United Nations, if it should decide not to arrange for the publication of the study in full, would impose no impediment to its publication in whole or in part either by the subscriber or by others.

2. If all relevant considerations are the same, we see no objection to your applying the same rule to all the project's researchers whether by making the provision in their agreements or by granting any requests for permission on the same terms. This would, if course, be on the clear understanding that such private publication would have to be preceded by a decision by the United Nations not to publish the material itself.

3. In the absence of such a decision, the United Nations should retain all rights, and the results of the study should not be published privately until after publication by the United Nations. As concerns subsequent private publication, the study would, depending on whether the United Nations published it without or with copyright, either be in the public domain or be available for republishing only to the United Nations or persons authorized by it.

4. We agree that any private publication should mention that the work was done as part of a United Nations project, and when United Nations permission for publication is sought and granted, the permission should be conditioned on appropriate United Nations credit.

22 June 1973

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5. POWERS OF REPRESENTATIVES TO THE GENERAL ASSEMBLY—PRACTICE OF THE CREDENTIALS COMMITTEE—DECISIONS TAKEN BY THE ASSEMBLY IN CERTAIN SPECIFIC CASES IN THE LIGHT OF THE REPORT OF THE COMMITTEE

Letter to the New York Liaison Office of the United Nations Educational, Scientific and Cultural Organization

1. We refer to your letter of 14 November 1973 in which you transmitted a request for information concerning the practice followed in examining the credentials of representatives to the General Assembly.

2. As you know, the procedure for the examination of credentials is the subject of rules 27, 28 and 29 of the rules of procedure of the General Assembly. The *Repertory of Practice of United Nations Organs* (volume I, Articles 1-22 of the Charter; supplement No. 1 to volume I, Articles 1-54 of the Charter; and supplement No. 2 to volume II, Articles 9-54 of the Charter) provides certain interesting although succinct information concerning this procedure in connexion with Article 9.

We shall confine this letter to answering the precise question raised in the request for information.

When is the Credentials Committee constituted?

3. The Committee is constituted at the opening of each session of the General Assembly, at the first meeting. Traditionally, this question appears as item 3 of the Assembly's agenda, following:

(1) The opening of the session by the Acting President, and

(2) The minute of silence.

4. In accordance with rule 28 of the rules of procedure, the nine members of the Credentials Committee are appointed by the General Assembly on the proposal of the President. If there are no objections, the proposal of the President is considered as being accepted without a vote.

Does the Committee meet more than once?

5. Generally speaking, the Committee meets once at the beginning of the session, during the second or third week, to consider a memorandum of the Secretary-General concerning the status of credentials received by the latter, and at a second meeting, held at the end of the session, it considers the situation of the representatives whose powers in due form had not been received at the time of the first meeting. The Committee may, of course, meet at any time to consider questions within its jurisdiction, either on its own or at the request of the General Assembly.

When does the Committee submit its first report to the General Assembly?

Does it submit one, two or more reports?

6. The Committee reports to the General Assembly immediately after the first examination of credentials. Generally speaking, it submits two reports to the Assembly (one report following each of its customary meetings), but may submit more if necessary.[6]

At the current session, the Committee met two or three weeks after it was constituted in order to consider a specific case: has this happened at previous sessions?

7. At the twenty-fifth session, the Credentials Committee met on 26 October 1970 to examine, as a matter of urgency, the credentials of the representatives of South Africa. At the fifteenth session, in 1960, it met at the beginning of the session, immediately after the admission of the Congo-Leopoldville to the Organization.

Has the Assembly ever decided, prior to the twenty-eighth session, to "reject the credentials" of the representatives of a Member State, and if so, what were the consequences with regard to the rights and privileges of that State?

8. At its twenty-fifth, twenty-sixth and twenty-seventh sessions, after considering the reports of the Credentials Committee concluding that all credentials should be accepted, the General Assembly on each occasion adopted a resolution approving the report "except with regard to the credentials of the representatives of South Africa". At the twenty-fifth session, when that formulation was used for the first time, the President of the General Assembly, after consulting the Legal Counsel (see document A/8160),[7] provided in the meeting the following interpretation, which was not contested: a vote in favour of the aforementioned formulation would mean "on the part of this Assembly, a very strong condemnation of the policies pursued by the Government of South Africa. It would also constitute a warning to that Government as solemn as any such warning could be. But, apart from that, [the formulation] would not seem to me to mean that the South African delegation is unseated or cannot continue to sit in this Assembly; if adopted, it will not affect the rights and privileges of membership of South Africa."[8]

9. At its twenty-eighth session, the General Assembly, on a point of order adopted when the Minister for Foreign Affairs of South Africa was about to take the floor in the general

[6] See, for example, with regard to the twenty-fifth session, *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 3, documents A/8142 and A/8142/Add.1.

[7] Reproduced in the *Juridical Yearbook*, 1970, p. 169.

[8] A/PV.1901.

debate, decided to suspend its 2140th meeting until the Credentials Committee had reported to it on the credentials of the representatives of South Africa. The Committee having concluded in its report[9] that the credentials were in order, the General Assembly, on the basis of an amendment proposed by Syria,[10] decided to add to that report a paragraph reading: "The General Assembly rejects the credentials of the representatives of South Africa". The President of the General Assembly was led to give his interpretation of the vote in an open meeting; he adopted the same interpretation as his predecessors, and concluded: "Since it is not held that the credentials of South Africa are not in keeping with the terms of rule 27 of the rules of procedure, the vote that has just taken place . . . does not affect the rights and privileges of South Africa as a Member of the Organization."[11] The Chairman of the African Group, speaking on behalf of 41 States, then stated that the group did not intend to challenge "the ruling or the personal interpretation" of the President, but intended to study the implications of the ruling and to take any appropriate steps at a future stage.

23 November 1973

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6. PRIORITY OF DRAFT RESOLUTIONS BEFORE THE GENERAL ASSEMBLY—A DRAFT RESOLUTION SUBMITTED AT ONE SESSION WILL NOT NORMALLY BE BEFORE A SUBSEQUENT SESSION UNLESS *inter alia* THERE IS AN EXPRESS DESIRE ON THE PART OF THE SPONSORS TO MAINTAIN IT—WHERE AN AGENDA ITEM HAS VARIOUS SUBITEMS, THE RELEVANT RESOLUTIONS ARE VOTED ON IN THE ORDER OF SUBMISSION REGARDLESS OF THE SUBITEM TO WHICH THEY RELATE—A DRAFT RESOLUTION RETAINS ITS STATUS EVEN IF IT IS REVISED

Memorandum to the Under-Secretary-General for Political and Security Council Affairs

I. *Historical background*

1. At its 1939th plenary meeting during the twenty-sixth session, the General Assembly decided, on the recommendation of the General Committee (A/8500, para. 18), to include the following items in the provisional agenda of the twenty-seventh session:

"Withdrawal of United States and all other foreign forces occupying South Korea under the flag of the United Nations.

"Dissolutions of the United Nations Commission for the Unification and Rehabilitation of Korea.

"Question of Korea: report of the United Nations Commission for the Unification and Rehabilitation of Korea."

2. These three items were therefore included in the provisional agenda of the twenty-seventh regular session (A/8760), numbered respectively 35, 36 and 37. In addition, on 17 July 1972, Algeria and twelve other Member States had requested the inclusion in the provisional agenda of that session of an item entitled "Creation of favourable conditions to accelerate the independent and peaceful rehabilitation of Korea" (A/8752), which was included as item 96 on the provisional list; a number of new sponsors were added subsequently, and on 15 September 1972 the sponsors communicated to the Secretary-General a draft resolution under the proposed item (A/8752/Add.9).

3. The General Committee recommended to the Assembly that items 35 and 36 not be included in the agenda, and that items 37 and 96 be included in the provisional agenda of the twenty-eighth session (A/8800/Rev.1). The Assembly accepted this recommendation at its 2037th meeting.

[9] A/9179.

[10] A/L.700.

[11] A/PV.2141.

4. The two items were therefore included as numbers 40 and 41 on the preliminary list of items to be included in the provisional agenda of the twenty-eighth regular session (A/9000), in the annotated preliminary list (A/9090) and in the provisional agenda (A/9100).

5. On 10 September 1973 the representatives of Algeria and 21 other States constituting most of those that had co-sponsored the resolution in document A/8752/Add.9 addressed a letter to the Secretary-General transmitting a draft resolution relating to item 41 ("Creation of favourable conditions to accelerate the independent and peaceful rehabilitation of Korea"), indicating that the new draft replaced that contained in the 1972 document; that letter was circulated the same day (A/9145). Later on 10 September 1973 the representatives of Australia and twelve other States addressed a note verbale to the Secretary-General in which they requested that a draft resolution relating to item 40 of the provisional agenda ("Question of Korea, report of the United Nations Commission for the Unification and Rehabilitation of Korea") be circulated as an official document of the Assembly "for the information of Member States"; this was done on the same day in document A/9146. The reason for the difference in the presentation of the two draft resolutions was that the Secretariat had indicated to the sponsors of resolution A/9146 that they could not at that stage introduce a draft resolution with respect to an item not yet placed on the agenda by the Assembly and allocated to a Committee; on the other hand, the sponsors of resolution A/9145 could, under rule 20 of the rules of procedure of the General Assembly, introduce a revision of the draft resolution that they had previously presented with respect to an item they had proposed for the agenda of the previous session of the Assembly.

6. On 20 September, the General Committee considered the provisional agenda, and with respect to items 40 and 41 the Chairman announced that he understood that "there was a general sentiment that those items should be recommended for inclusion as subitems of a single item under the heading "Question of Korea". The Committee then "decided to recommend to the General Assembly that items 40 and 41 should be combined into a single item and included in the agenda" (A/BUR/SR.206, pp. 3-4; A/9200, para. 19). At the afternoon meeting on 21 September of the General Assembly, the President called attention to item 41 as recommended by the General Committee "which contains two subitems under the single heading 'Question of Korea'"; the Soviet representative "did not object to the recommendation of the General Committee that the two questions concerning Korea be merged as two subparagraphs of one general item". The Assembly thereupon decided, without objection, to include item 41 as recommended by the General Committee. Later, at the same meeting, the Assembly approved the recommendation of the General Committee (A/9200, para. 27, p. 23) that item 41 be allocated to the First Committee (A/PV.2123, pp. 6-10 and 16).

7. Immediately after the Assembly had decided on the allocation of items to the First Committee, the representatives of Japan and the United States presented to the Secretary of that Committee in his office, on their behalf and on behalf of sixteen other States, the same draft resolution that they had presented on 10 September. Slightly later the sponsors of the "Algerian" resolution informed the Secretary of the Committee that they wished to maintain the revised draft they had introduced on 10 September. The "Algerian" draft was therefore re-published as document A/C.1/L.644 and A/C.1/L.644/Corr.1 under the names of 32 sponsors, and the other draft was re-published as document A/C.1/L.645 with 18 sponsors.

II. *Legal considerations*

8. Both rules 80 and 122 of the rules of procedure of the General Assembly[12] provide that "proposals and amendments shall normally be submitted in writing to the Secretary-General, who shall circulate copies to the delegations." Rules 93 and 133[13] provide that "if two or more proposals relate to the same question, the General Assembly/committee shall, unless it decides otherwise, vote on the proposals in the order in which they have been submitted." The

[12] Numbered 78 and 120 respectively in the current rules of procedure.

[13] Numbered 91 and 131 respectively in the current rules of procedure.

question therefore is: what is "submission" within the meaning of these rules? The prevailing practice is that submission means the written submission provided for in rules 80 and 122.[14]

9. There is no rule explicitly providing for the introduction of proposals with respect to any question before that question has been placed as an item on the agenda by the General Assembly and before it has been allocated to a Committee. However, rule 20 does provide that "all items proposed for inclusion in the agenda shall be accompanied . . . if possible . . . by a draft resolution." Consequently, it can be concluded that as to items proposed by Member States for inclusion in the agenda the proposer may submit therewith a draft resolution. With respect to sponsors other than those that introduced the item or with respect to items not so introduced, there is no authority in the rules for the submission of draft resolutions in advance.

10. The question of the status of resolutions introduced at a previous session of the Assembly was examined in a memorandum dated 14 November 1966,[15] from which it appears that up to then no definitive decision had been reached on that point. However, the memorandum concludes that "generally a draft resolution submitted at one session will not be before the subsequent session unless (1) it is resubmitted, (2) there is an express desire on the part of the sponsors to maintain it, or (3) the General Assembly in recommending postponement and/or in placing the item on the agenda has expressly transmitted all documents relating thereto." Since then, there have been no relevant decisions or changes in the rules or practice. In the present case, it is clear that alternative (3), an express decision of the Assembly to transmit all relevant documents to a later session, has not taken place; the "Algerian" draft comes under alternative (2) as a revision (see paragraph 12 below) of the draft resolution submitted in September 1972, which the sponsors desired to maintain. This would have been the case even if, as implicity assumed in the 1966 memorandum, the item and the draft would have been discussed at the previous session of the Assembly; *a fortiori,* it should apply to an item and draft that was merely postponed by the Assembly, without any substantive consideration.

11. There appears to have been no decision whatsoever relating to the status of resolutions introduced with respect to items on the provisional agenda when these items are later included in the agenda in an altered form: i.e., change of title, or combination with another item. In the present case it seems clear from para. 6 above that items 40 and 41 of the provisional agenda were not altered at all by their merger under a single heading, especially since each survived under a separate subheading, corresponding to its original title and neither the debates in the General Committee nor in the Assembly suggested any desire to alter the items otherwise. It should be noted that where an agenda item has various subitems, the draft resolutions are voted on in the order of submission, regardless of the subitem to which they relate. This was illustrated at both the twenty-second and twenty-third sessions when the Korean item was considered in the First Committee, respectively with three and with four subitems. In both instances, four drafts were introduced (respectively A/C.1/L.399/Rev.1, L.401 and Add.1 and 2, L.404 and Add.1-3 and L.405 and Add.1, and A/C.1/L.453 and Add.1, L.454 and Add.1, L.455 and Add.1 and 2 and L.461), and these were voted on in the order of their submission which did not correspond to that of the relative subitems.[16]

12. In accordance with established practice, a draft resolution retains its status even if it is revised.[17]

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[14] Only once, in the Special Political Committee at the eighteenth session, did the Chairman rule and the Committee decide that as between two draft resolutions submitted in writing, priority would be given to the one first orally introduced during the debate in the Committee (*Official Records of the General Assembly, Eighteenth Session,* Special Political Committee, 405th meeting, paras. 41-85).

[15] *Juridical Yearbook,* 1966, p. 227-229.

[16] See *Official Records of the General Assembly, Twenty-second session, Annexes,* agenda item 33, document A/6906; and *ibid., Twenty-third Session, Annexes,* agenda item 25, document A/7460.

[17] See, e.g., *Official Records of the General Assembly, Third Session,* First Committee, 213rd to 215th and 221st meetings.

13. The draft published as document A/C.1/L.644 and Corr.1 thus maintained its continuous status in spite of the transmission from one session of the Assembly to the next (para. 10 above), the merger of the item under which it was originally proposed with another item (para. 11 above) and a slight revision of text (para. 12 above). Having maintained its status it also maintained its priority with respect to alternative drafts, and the Secretariat attempted to reflect this in the numbering of the documents (see para. 7 above).

28 September 1973

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7. OFFICERS OF SUBSIDIARY ORGANS OF THE GENERAL ASSEMBLY—UNDER THE RULES OF PROCEDURE OF THE ASSEMBLY, SUCH OFFICERS ARE ELECTED AS INDIVIDUAL REPRESENTATIVES

Memorandum to the Secretary of the Working Group on the Financing of UNRWA

1. The Working Group on the Financing of UNRWA[18] is a subsidiary organ of the General Assembly and under rule 163 of the rules of procedure of the Assembly, the rules relating to the procedure of committees of the General Assembly apply, unless the Assembly or the subsidiary organ decides otherwise. The General Assembly has taken no contrary decision and consequently unless the Working Group were itself to decide otherwise, the election of officers is governed by rule 105 of the rules of procedure of the General Assembly.[19] This rule provides, *inter alia,* that "in the case of other committees [committees other than Main Committees], each shall elect a Chairman, one or more Vice-Chairmen and a Rapporteur. These officers shall be elected on the basis of equitable geographical distribution, experience and personal competence . . ."

2. Under this rule, and in accordance with normal practice for Committees and subsidiary organs of the General Assembly, the Chairman and other officers are elected as individual representatives and not as Member States or delegations. This is indicated by the rule which includes individual qualifications ("experience and personal competence") among the criteria for selection. The procedure under General Assembly rule 105 is in contrast with the practice in the Security Council where the presidency, under rule 18 of the provisional rules of procedure of the Council, is held in turn by member States on the Security Council. The Security Council thus has no provision for Vice-President since it is the delegation which holds the presidency. In this connexion, it will be noted that in General Assembly Committees and subsidiary organs, under rule 107, it is a Vice-Chairman and not another member of the Chairman's delegation who is designated to serve in the absence of the Chairman.

3. It should also be noted that under rule 107, if any officer of the Committee is unable to perform his functions, a new officer is to be elected for the unexpired term. While, in practice, it very often occurs that the new officer is a member of the same delegation as his predecessor, under the rules this is by election (which in some cases may take the form of explicit or tacit confirmation) and not by automatic succession.

4. Of course the subsidiary organ under rule 163 is free to depart from this normal procedure if it so decides and there are cases in which subsidiary organs have adopted other procedures with respect to the Chairman. The United Nations Commission for the Unification and Rehabilitation of Korea, for example, adopted a method of rotation modelled on that of the Security Council. In practice the vast majority of the subsidiary organs apply rule 105 and elect their officers as individual representatives.

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[18] Established by General Assembly resolution 2656 (XXV) of 7 December 1970.

[19] This rule has since been amended by the General Assembly. Rules 105, 107 and 163 referred to in this memorandum are numbered 103, 105 and 161 respectively in the current version of the rules of procedure of the General Assembly.

5. As to the terms of office, there is no uniform practice. Some subsidiary organs re-elect officers each year, while others continue with the same officers. This depends on the decision or the practice of the subsidiary organ concerned.

12 January 1973

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8. United Nations resolutions restricting relations and collaboration with South Africa until the latter has renounced its policies of racial discrimination and *apartheid*

Note prepared for the Assistant Administrator and Director, Regional Bureau for Africa, United Nations Development Programme

1. Questions have arisen from time to time concerning the propriety of United Nations participation in development or other activities involving certain types of relationship with the Republic of South Africa. It may therefore be useful to summarize the more relevant directives incorporated in resolutions of United Nations principal organs which have the effect of restricting such activity.

2. It may be noted at the outset that the policies and restraints contained in the resolutions referred to below constitute directives with which those who act under the authority of the General Assembly, or of other principal organs of the United Nations, are bound to comply. For whether or not such resolutions are considered legally binding by States, United Nations organs are bound to apply such resolutions to their own actions, irrespective of the positions which may be taken by individual governments in the conduct of their own affairs.

3. As will be shown below, United Nations participation in activities which are designed to promote or enlarge economic or trade relations, or other forms of collaboration with South Africa would, in general, be in conflict with current United Nations decisions.

Synopsis of pertinent resolutions

4. On repeated occasions the General Assembly has requested that States and international organizations and institutions should not assist[20] in any way or collaborate[21] with the South African Government until the latter has renounced its policies of racial discrimination and *apartheid*. The General Assembly has also called for a boycott of all South African goods,[22] and has requested States to refrain from exporting goods, including all arms and ammunition, to South Africa.[23] The General Assembly has also appealed to States, *inter alia*, to discourage the establishment of closer economic and financial relations with South Africa, particularly in investment and trade, and also to discourage loans by banks to the Government of South Africa or South African companies.[24] The General Assembly has further urged States to terminate official relations with the Government of South Africa and to terminate all military, economic, technical and other co-operation with South Africa.[25]

5. In one of its more comprehensive requests, the General Assembly has specifically invited all States:

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[20] See General Assembly resolutions 2105(XX), para. 11; 2189(XXI), para. 9; 2311(XXII), para. 4; 2326(XXII), para. 8; 2426(XXIII), para. 4; 2506 B (XXIV), para. 10; 2548(XXIV), para. 6; 2555(XXIV), para. 6; 2704(XXV), para. 9; 2874(XXVI), para. 7; and 2908(XXVII), para. 9.

[21] General Assembly resolutions 2506 B (XXIV), para. 5; and 2704(XXV), para. 8.

[22] General Assembly resolution 1761(XVII), para. 4.

[23] *Ibid.*

[24] General Assembly resolution 2202 A (XXI), para. 5(*b*).

[25] General Assembly resolution 2671 F (XXV), para. 7.

"(*a*) to desist from collaborating with the Government of South Africa, by taking steps to prohibit financial and economic interests under their national jurisdiction from co-operating with the Government of South Africa and companies registered in South Africa;

"(*b*) to prohibit airlines and shipping lines registered in their countries from providing services to and from South Africa and to deny all facilities to air flights and shipping services to and from South Africa;

"(*c*) to refrain from extending loans, investments and technical assistance to the Government of South Africa and companies registered in South Africa;

"(*d*) to take appropriate measures to dissuade the main trading partners of South Africa and economic and financial interests from collaborating with the Government of South Africa and companies registered in South Africa;".[26]

6. At its twenty-seventh session, the General Assembly re-affirmed and enlarged existing restraints in this regard. In three of the resolutions adopted at that session, the General Assembly again requested all States, specialized agencies and other organizations to withhold assistance from, discontinue collaboration with, and deny commercial and other facilities to the Government of South Africa for so long as it pursues its policies of *apartheid* and racial discrimination.[27] The General Assembly also invited:

"all organizations, institutions and information media to organize in 1973, in accordance with the relevant resolutions adopted by the United Nations, intensified and co-ordinated campaigns with the following goals:

"(*a*) Discontinuance of all military, economic and political collaboration with South Africa;

"(*b*) Cessation of all activities by foreign economic interests which encourage the South African régime in its imposition of *apartheid;*

"(*c*) . . ."[28]

7. With regard to the need for reinforced and obligatory sanctions, the General Assembly, at its twenty-seventh session, also reaffirmed "its conviction that economic and other sanctions, instituted under Chapter VII of the Charter and universally applied, constitute one of the essential means of achieving a peaceful solution of the grave situation in South Africa".[29]

This view concerning the necessity for economic sanctions universally applied has been repeatedly expressed on previous occasions, both by the General Assembly[30] and, *inter alia,* by the Special Committee on the Policies of *Apartheid* of the Government of the Republic of South Africa.[31]

8. It should further be added that all activities are prohibited which would contravene either directly or indirectly the Security Council resolutions establishing the arms embargo against South Africa which is currently in force.[32] In particular, this would preclude making

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[26] General Assembly resolution 2506 B (XXIV), para. 5.

[27] General Assembly resolutions 2908(XXVII), para. 9; 2980(XXVII), para. 6; and 2923 E (XXVII), paras. 12 and 13.

[28] General Assembly resolution 2923 E (XXVII), para. 16.

[29] *Ibid.*, para. 7.

[30] General Assembly resolutions 2054 A (XX), para. 6; 2307(XXII), para. 3; 2396(XXIII), para. 4. Measures under Chapter VII of the Charter were recommended *inter alia* in General Assembly resolutions 2506 B (XXIV), para. 9; 2671 F (XXV), para. 6; and 2775 F (XXVI), para. 13.

[31] Reports of the Special Committee (S/5426, para. 517; S/5717, para. 15; S/6073, paras. 640 and 641). The same recommendation was also contained in the Report of the Group of Experts established in pursuance of the Security Council resolution of 4 December 1963 (*Official Records of the Security Council, Supplement for April, May and June 1964,* document S/5658, Annex, para. 121)

[32] Security Council resolutions 181 (1963), 182 (1963), 191 (1964), 282 (1970), and 311 (1972).

available any materials, or products or assistance, capable of being used for military purposes, or in the manufacture or maintenance of arms, ammunition, or military vehicles or equipment.

The situation of Botswana, Lesotho and Swaziland

9. A factor which has not been overlooked is the continued economic dependence of Botswana, Lesotho and Swaziland on South Africa in many important respects, and the fact of continued relations between these countries and South Africa. For our present purposes, however, our primary concern is not with the existence of such relationships between States, but rather with the propriety or legality of action by the United Nations itself, and especially of action which would be calculated to enlarge or reinforce these relationships with South Africa.

10. Prior to the independence of Botswana (on 30 September 1966), Lesotho (on 4 October 1966), and Swaziland (on 6 September 1968), and the admission of these States to the United Nations,[33] the General Assembly had been concerned to secure their territorial integrity and sovereignty,[34] and with ways and means of ensuring their greater economic independence vis-à-vis the Republic of South Africa.[35] At the same time, both before and subsequent to their independence, the United Nations has also been concerned with the evident need on the part of these three States for assistance in the area of economic and social development.[36]

11. However, the decisions and policies thus far adopted in General Assembly resolutions have not envisaged (or permitted) action by the United Nations itself which would further reinforce and enlarge economic relationships with South Africa, especially if this would be profitable to the latter, or would further increase the dependence of Botswana, Lesotho or Swaziland or any other State, on South Africa.

Conclusion

12. In the event that Member States should wish to allow exceptions to be made to the provisions of existing resolutions, this can be authorized by the organ from which the resolution in question emanated. In the meantime, however, it is not open to the Secretariat, on its own responsibility, to make such exceptions.

13. Restrictions of the kind discussed in the foregoing cannot fail to have at least some economic consequences (especially so far as United Nations assistance is concerned), as was clearly envisaged when the resolutions in question were adopted. While it is for governments to determine their own needs and policies and actions in the light of such General Assembly resolutions, the assistance which organs of the United Nations can properly give is not unlimited in scope, being provided at all times under the authority of the Charter and the decisions of United Nations principal organs.

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[33] Botswana, on 17 October 1966, by General Assembly resolution 2136 (XXI), Lesotho, on 17 October 1966, by General Assembly resolution 2137 (XXI) and Swaziland, on 24 September 1968, by General Assembly resolution 2376 (XXIII).

[34] General Assembly resolutions 1817 (XVII), 1954 (XVIII), 2063 (XX) and 2134 (XXI).

[35] See the report by the Secretary-General on Basutoland, Bechuanaland and Swaziland (*Official Records of the General Assembly, Twentieth Session, Annexes*, agenda item 23, document A/5958) requested by the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (A/5800/Rev.1, chap. VIII, para. 365).

[36] General Assembly resolutions 1817 (XVII), 1954 (XVIII), 2063 (XX) and 2134 (XXI). A Fund for the Economic Development of Basutoland, Bechuanaland, and Swaziland was established under operative paragraph 7 of General Assembly resolution 2063 (XX) of 16 December 1965. On 29 September 1966, the General Assembly noted that contributions so far pledged had not been sufficient for the Fund to be brought into operation (see General Assembly resolution 2134 (XXI), fifth preambular paragraph). In that same resolution, the General Assembly expressed its concern regarding the economic and social situation in these three territories, "and their imperative and urgent need for United Nations assistance". (*ibid.*, fourth preambular paragraph).

14. Accordingly, this note has been prepared with a view to facilitating the consideration, on a case by case basis, of requests for action or assistance which could involve relations of collaboration with South Africa.

28 March 1973

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9. UNITED NATIONS POLICY OF SANCTIONS IN RELATION TO RHODESIAN COMMERCE—COMMENTS ON WHETHER THE AUTHORITIES OF A STATE COULD LEGALLY EXERCISE SOME CONTROL OR EXERT SOME INFLUENCE ON COMMERCIAL COMPANIES REGISTERED IN THAT STATE

Summary of a memorandum to the Acting Director, Security Council and Political Committees Division, Department of Political and Security Council Affairs[37]

1. I refer to your memorandum in which you request my views on whether the authorities of a State could legally exercise some control or exert some influence upon commercial companies which are apparently registered in that State and which conduct business outside its territory. The Government concerned has declared its readiness to take steps, independently and without thereby recognizing any legal obligation, to prevent the possibility of its territory being used to circumvent the United Nations policy of sanctions in relation to Rhodesian commerce.

2. You have pointed out that this question has been discussed by the Committee established in pursuance of Security Council resolution 253 (1968), certain companies established in the State concerned having apparently been engaged in transactions of benefit to Southern Rhodesia. . .

3. I have noted that the authorities of the State concerned have commented very briefly on the activities of one of those companies and have stated that they "have no legal or practical means of intervening outside the territory of the [country]."

4. This comment seems to me to deal only partially with the means available to the authorities concerned to influence the firms in question. . . It would, for example, seem that these authorities may be in a position to require that the companies concerned desist from engaging in the transactions in question as a condition of the continuance of their registration in the country.

5. The authorities also comment that "Under public international law, each State is entitled to apply legal rules only in its own territory; the authorities cannot therefore take steps which would contravene positive international law."

6. If this comment is intended to convey that a State may only enforce its national legislation within its own territory, it is no doubt correct, but not pertinent to the question under review. If on the other hand the comment is intended to assert that public international law precludes a State from enacting laws having extra-territorial effect and providing for enforcement within the territory of the legislating State, then it is at variance with both law and precedent.

7. With regard to the law, reference is made to a pertinent passage in the Judgement of the Permanent Court of International Justice in the case of the SS "Lotus":

> "Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.

[37] The full text of the memorandum is reproduced in document S/11178/Add.1, Annex I, pp. 59 *et seq.*

"It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable."[38]

8. With regard to precedent, the United Kingdom Trading with the Enemy Act of 1939 (2 and 3 Geo 6(c) 89), the United States Trading with the Enemy Act (50 USCA), and more recently, the United Kingdom-Southern Rhodesia (Petroleum) Order of 1965 (ST/1965 No. 2140), and the Southern Rhodesia (Prohibitive Export and Import) Order of 1966 (SI/1966 No. 41) all provide clear examples of national legislation controlling the activities of nationals and legal persons not only at home but also abroad and providing for enforcement at home of penalties in respect of contraventions by them abroad without such legislation being regarded as in conflict with public international law.

8 May 1973

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10. Amendment to Article 61 of the Charter increasing the membership of the Economic and Social Council from twenty-seven to fifty-four members—Question whether, during the period between the entry into force of the amendment and the time when the General Assembly elects the new members, the Council should meet in its old composition or whether interim arrangements should be made to permit it to convene with fifty-four members

Note to the Secretary of the Economic and Social Council

1. By its resolution 2847 (XXVI) of 20 December 1971, the General Assembly adopted the following amendment to the Charter and submitted it for ratification by the States Members of the United Nations:

"*Article 61*

"1. The Economic and Social Council shall consist of fifty-four Members of the United Nations elected by the General Assembly.

"2. Subject to the provisions of paragraph 3, eighteen members of the Economic and Social Council shall be elected each year for a term of three years. A retiring member shall be eligible for immediate re-election.

"3. At the first election after the increase in the membership of the Economic and Social Council from twenty-seven to fifty-four members, in addition to the members elected in place of the nine members whose term of office expires at the end of that year, twenty-seven additional members shall be elected. Of these twenty-seven additional members, the term of office of nine members so elected shall expire at the end of one year, and of nine other members at the end of two years, in accordance with arrangements made by the General Assembly.

[38] *P.C.I.J.*, Series A, No. 9, pp. 18 and 19.

"4. Each member of the Economic and Social Council shall have one representative."

2. The foregoing amendment entered into force on 24 September 1973, the requirements of Article 108 of the Charter regarding ratification being met on that date by the deposit of an instrument of ratification by the United States of America.

3. The resumed fifty-fifth session of the Economic and Social Council is scheduled to take place at United Nations Headquarters from 15 to 18 October 1973. The question therefore arises whether the Council should, at that time, meet in its old composition of twenty-seven members or whether arrangements should be made to permit it to convene with fifty-four members, such arrangements being of an interim nature pending the election by the General Assembly of thirty-six Member States to serve on the Council in accordance with Article 61, paragraph 3 of the Charter, as amended, and the entry into office of those Member States on 1 January 1974, in accordance with rule 141 of the rules of procedure of the General Assembly.[39] This rule provides, *inter alia,* that "the term of office of members of Councils shall begin on 1 January following their election by the General Assembly and shall end on 31 December following the election of their successors." In this connexion, a suggestion has been made that, as an interim arrangement, the General Assembly should elect for a term of office commencing on the day of election and ending on 31 December 1973 those twenty-seven States currently serving on the sessional committees of the Economic and Social Council in addition to the existing members of the Council.

4. The situation which has now arisen is, *mutatis mutandis,* identical with that which arose in 1965 when a previous amendment to Article 61 of the Charter, enlarging the membership of the Economic and Social Council, entered into force. On that occasion, a legal opinion was issued indicating that there was no obstacle to the Council meeting in its old composition pending the implementation by the General Assembly of the amendment by electing the new members of the Council and their entry into office in accordance with rule 141 of the rules of procedure.[40] That opinion was in fact followed, the Council meeting in 1965 for a resumed session in its old composition after the entry into force of the amendment concerned. At that time no argument was raised that the Council was not properly constituted.

5. The legislative history of General Assembly resolution 2847 (XXVI) adopting the present amendment to the Charter, and Economic and Social Council resolution 1621 (XLI) recommending that amendment, does not reveal any understanding that there should be a departure from the procedures followed in 1965, or that interim arrangements should be made of the nature indicated in paragraph 3 above. In other words, there is no indication that a departure should be made from the regular procedure whereby the Economic and Social Council would meet for the remainder of this year in its old composition and the General Assembly would at its current session elect the requisite number of members, to take office on 1 January 1974, in order to permit the Economic and Social Council to meet in that year in its new composition.

6. An interim arrangement whereby the General Assembly would first elect to the Council for a term of office ending on 31 December 1973 the additional members of the sessional committees of the Council, and then elect the Member States to take office on 1 January 1974, would not, therefore, accord with precedent and does not seem to have been foreseen when the present amendment to the Charter was adopted. Furthermore, such an arrangement might be difficult to reconcile with paragraph 3 of Article 61 of the Charter, as amended, which lays down precise procedures to be followed in the "first election after the increase in membership of the Economic and Social Council" and for determining the term of office of the members so elected. In view of this difficulty, and as there is an established precedent indicating that there is no bar to the Council meeting in its old composition for the duration of this year, there would appear to be no necessity for any interim arrangement of the

[39] Numbered 139 in the current rules of procedure.

[40] See *Juridical Yearbook,* 1965, pp. 224–225.

nature which has been suggested. Such an arrangement would only be possible, perhaps by analogy to by-elections provided for in rule 142[41] of the rules of procedure of the General Assembly, if there were a consensus in which all Member States participated that the arrangement should be followed and if there was general agreement on those States to serve until 31 December 1973.[42]

28 September 1973

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11. Question of the relationship between the terms of office of the officers of the Economic and Social Council and the terms of office of the States members of the Council of which the officers are representatives

Note prepared for the Director, Legal Division, World Health Organization

A. *Rules 21 and 23 of the rules of procedure of the Economic and Social Council: history and relevant practice*

1. The rules of procedure the Council adopted at the Council's first session[43] included two rules reading respectively as follows:

"*Rule 17*

"The President and Vice-Presidents shall hold office until their successors are elected at the first meeting of the Council following the next regular session of the General Assembly, and shall be eligible for re-election."

"*Rule 19*

"If the President ceases to be a representative of a member of the Council or is incapacitated, the first Vice-President shall serve for the unexpired term. If the first Vice-President ceases to be a representative of a member of the Council or is incapacitated, the second Vice-President shall take his place."

2. Rule 17 was in harmony with rule 78 of the provisional rules of procedure of the General Assembly, adopted by the Assembly at the first part of its first session,[44] which read:

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[41] Numbered 140 in the current rules of procedure.

[42] At the 2152nd meeting of the General Assembly, on 12 October 1973, the President of the General Assembly stated the following (translation from Spanish):

"... I have held consultations in order to ascertain whether a consensus could be arrived at on an interim arrangement which would permit the Council to hold its resumed session with a full complement of fifty-four members.

"The interim arrangement proposed was to the effect that the additional twenty-seven members of the sessional committees of the Council already elected by the Council for this year should be empowered to serve on the Council itself for a term of office commencing on the day action is taken by the General Assembly and ending 31 December 1973.

"I am happy to announce that a consensus has been reached among all the regional groups to the effect that we adopt the interim arrangement I have just described."

The General Assembly then decided that the twenty-seven additional members of the sessional committees would become members of the Council for the period 12 October 1973-31 December 1973.

[43] *Official Records of the Economic and Social Council, First year: first session*, 12th meeting (16 February 1946).

[44] *Official Records of the General Assembly, First Part of the First Session*, Plenary Meetings, Second plenary meeting (11 January 1946).

"The term of office of each member [of the Councils] shall begin immediately on election by the General Assembly and shall end on the election of a member for the next term."

At the second part of its first session, the Assembly, by its resolution 87(I) of 9 November 1946, amended this rule to read:

"The term of office of members [of the Councils] shall begin on 1 January following their election by the General Assembly, and shall end on 31 December following the election of their successors."

In so far as the Economic and Social Council is concerned, the term of office of its members prescribed in this rule (which has become rule 141 of the Assembly's rules of procedure[45]) has remained unchanged.

3. As a result of the modification by the General Assembly of rule 87 of its rules of procedure referred to above, the Council decided, as its fourth session,[46] to amend rule 17 of its rules of procedure to read:

"The President and the Vice-Presidents shall hold office until their successors are elected at the first meeting of the Council on or after 1 January in each year and shall be eligible for re-election."

Rule 19 remained unchanged.

4. Rules 17 and 19, however, did not take into consideration a situation where the State of which an officer was a representative ceased to be a member of the Council. Thus, the opening meeting of the Council's sixth session (122nd meeting on 2 February 1948), which was the first session held in 1948, was initially presided over by the officer elected as first Vice-President in 1947, notwithstanding the fact that Czechoslovakia, the State of which that officer was a representative, was no longer a member of the Council in 1948.

5. This difficulty was brought to the attention of the Office of Legal Affairs by the Secretariat of the Council. In document E/883, which was issued on 26 July 1948, and for the preparation of which the Office of Legal Affairs was duly consulted, the Secretary-General recommended that rule 19 (former rule 17) and rule 21 (former rule 19) of the rules of procedure of the Council be amended to read:

"*Rule 19*

"The President and Vice-Presidents shall hold office until their successors are elected at the first meeting of the Council on or after the first of January in each year and shall be eligible for re-election, *provided that the President or a Vice-President shall cease to hold office should the term of office of the member of which he is a representative expire before his term of office is completed.*"

"*Rule 21*

"If the President ceases to be [a] *the* representative of a member of the Council or is *so* incapacitated *that he can no longer hold office,* or *should the Member of the United Nations of which he is the representative cease to be a member of the Council,* the First Vice-President shall [serve for the unexpired term] *take his place.* If the First Vice-President ceases to be [a] *the* representative of a member of the Council or is *so* incapacitated *that he can no longer hold office or should the Member of the United Nations of which he is the representative cease to be a member of the Council,* the Second Vice-President shall take his place."

6. Document E/883 was before the Council at its seventh session in connexion with agenda item 45 entitled "Revision of Rules of Procedure of the Council." However, the

[45] Numbered 139 in the current rules of procedure.

[46] *Official Records of the Economic and Social Council, Second year: fourth session,* 51st meeting (28 February 1947).

Committee on Procedure that the Council set up at that session was not able to undertake a comprehensive revision of the rules of procedure during the session (the amendments in question as suggested by the Secretary-General being among those it was unable to consider). By its resolution 177(VII) of 28 August 1948, the Council asked the Committee to revise the Council's rules of procedure on the basis of the proposal contained in document E/883.

7. At its 16th meeting on 13 January 1949, the Committee had before it a French proposal[47] to amend rules 19 and 21 to read respectively as follows:

"*Rule 19*

"The President and the Vice-Presidents shall hold office until their successors are elected. They shall be eligible for re-election. None of them may however hold office after the expiration of the term of office of the member of which he is a representative."

"*Rule 21*

"If the President ceases to be a representative of a member of the Council or is incapacitated, or should the Member of the United Nations of which he is a representative cease to be a member of the Council, the first Vice-President shall take his place. If this latter is in the same case, the second Vice-President shall take his place."

8. The French proposal in respect of rule 19 was adopted by the Committee without change and without substantive discussion. It is, however, interesting to note that, before the adoption of this rule, the representative of France stated that "some difficulties might arise if the membership of the three countries whose representatives were President and Vice-Presidents of the Council should expire at the same time, but such an eventuality was not very probable", whereupon the representative of the United States observed that he "thought that the Council would keep that possibility in mind when electing its officers".[48] Subject to drafting changes, the French proposal in respect of rule 21 was also adopted by the Committee without substantive discussion. As thus adopted the text, with minor drafting changes, read as follows:

"*Rule 21*

"If the President ceases to be a representative of a member of the Council or is incapacitated, or if the Member of the United Nations of which he is a representative ceases to be a member of the Council, the first Vice-President shall take his place. In similar circumstances, the second Vice-President shall take the place of the first Vice-President."

9. By its resolution 217(VIII) of 18 March 1949, the Council adopted revised rules of procedure including rules 20 and 22 which were identical, respectively, with rules 19 and 21, as recommended by the Committee on Procedure.

10. Thus, the revised rule, although establishing a relationship between the terms of office of the Council's officers and the terms of office of States members of the Council of which the officers were representatives, still did not resolve the difficulty that would arise if at the opening meeting of a given year all the States represented by the officers elected the previous year had ceased to be members of the Council. This difficulty thereafter arose on three occasions in the Council.

11. At the opening of the Council's tenth session (344th meeting on 7 February 1950), the three States of which the Council's officers were representatives had ceased to be members of the Council, as their terms of office had expired on 31 December 1949 and they had not been re-elected. The meeting was opened by the representative of the Secretary-General, acting as Temporary President, who proposed that the representative of New Zealand should be asked

[47] E/AC.28/W.18.

[48] E/AC.28/SR.16, p. 2.

to preside over the meeting until the election of the new President. The representative of New Zealand took the chair (following the raising of a point of order unrelated to the situation in respect of the officers of the Council) without any objection being raised. The President and the two Vice-Presidents were then elected at the same meeting. The same situation occurred at the twenty-seventh (1959) and thirty-first (1961) sessions, of which the former was opened by the Secretary-General and the latter by the Under-Secretary-General for Economic and Social Affairs.

12. At the opening meetings of the seventeenth (1954), twenty-third (1959), thirty-third (1962) and fortieth (1966) sessions, a representative of the Secretary-General acted as president prior to the election of the new President although the Council had one or two officers whose countries continued to be, or had been re-elected, members of the Council, the reason for this being that these officers were no longer members of their countries' delegations at the respective sessions of the Council.

13. Rule 22 of the Council's rules of procedure (see paragraph 9 above), which had been renumbered 23, was amended by the Council in its resolution 1193 (XLI) of 20 December 1966.[49] As revised by that resolution, this rule, which is still numbered 23 and has not undergone further change, reads:

> "If the President or any of the Vice-Presidents ceases to be a representative of a member of the Council or is incapacitated, or if the Member of the United Nations of which he is a representative ceases to be a member of the Council, a new President or Vice-President, as the case may be, shall be elected for the unexpired term."

14. After the revision of rule 23 in 1966, the Council changed its practice in the following two years by electing new officers at the last meeting of a given year to replace the officers who could not continue in office because the terms of office of the members of the Council which they represented would expire at the end of that year. Thus the term of office of Dahomey, a State member of the Council in 1967, was due to expire on 31 December of that year. One of the Council's Vice-Presidents in 1967 was the representative of Dahomey. At its 1515th meeting on 18 December 1967, the Council, acting under rule 23, elected as Vice-President the representative of Libya to replace the representative of Dahomey "for [his] unexpired term".[50] Two of the officers elected the following year, namely the President, who was the representative of Venezuela, and one of the Vice-Presidents, who was the representative of Norway, represented States whose terms of office as Council members were due to expire on 31 December 1968. At its last meeting of 1968, which was the 1577th meeting on 19 December 1968, the Council, again acting under rule 23, elected as President the representative of Uruguay and as Vice-President the representative of Sweden to replace, as from 1 January 1969, the two officers precluded from holding office in 1969 under rule 21 of the rules of procedure. At that meeting, however, the propriety of this action was questioned by two representatives, who considered that the provision in rule 23 that called for the replacement of an officer representing a State that ceased to be a member of the Council applied only to the situation where a State ceased to be represented on the Council for reasons other than the normal expiration of its term of office.[51]

15. In 1969, the Council refrained from electing officers to replace two of its officers (the President and one of the Vice-Presidents) who were precluded from holding office in 1970 because the terms of office as Council members of the States they represented were due to expire on 31 December 1969. . . . It may further be noted that all the officers elected in 1970 and 1971 belonged to the delegations of States that continued to be members of the Council

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[49] It should be noted that in this resolution the Council also amended rule 20, thereby increasing the number of Vice-Presidents from two to three and amending their titles so as to exclude ordinal numbers therefrom.

[50] That is, for the period from 1 January 1968 until the election, at the first meeting of 1968, of a Vice-President from the African Group.

[51] *Official Records of the Economic and Social Council, Resumed Forty-fifth Session*, 1577th meeting, paras. 74-89.

during the year following their election, so that the difficulty under consideration did not actually arise. Nor did it arise in 1972 for, although one of the Vice-Presidents elected in 1971 was the representative of a State whose term of office was due to expire on 31 December 1971, that State was re-elected a member of the Council prior to the Council's last meeting in 1972.

16. Another practice to be noted is that from the forty-eighth session (held in 1970) to the fifty-fourth session (which began in January 1973) inclusive, the Council has elected as President the retiring Vice-President belonging to the geographical group from which the President is to be drawn in accordance with the geographiccaical rotation provided in the Annex to Council resolution 1193 (XLI) of 20 December 1966. This practice presupposes that the retiring officer so elected represents a State whose term of office as member of the Council did not expire on 31 December of the year immediately preceding the election. It should be noted, however, that in 1974 the presidency is to be held by the Western European and other States and the Vice-President from that group in 1973 represents a State—New Zealand—whose term of office as Council member expires on 31 December 1973. . .[52]

17. The functions that the President of the Council may be called upon to perform individually under the rules of procedure while the Council is not in session consist in (*a*) communicating to the members of the Council, through the Secretary-General, requests made by any such member or by the Secretary-General for alterations of the dates of regular sessions (rule 3), as well as requests made by the Trusteeship Council, any Member of the United Nations or a specialized agency for the holding of special sessions (in cases where the President and the three Vice-Presidents have not, within four days of the receipt of such a request, notified the Secretary-General of their agreement thereto), (*b*) convening special sessions (rule 4, last paragraph) and (*c*) notifying Members of the United Nations, the President of the Security Council, the President of the Trusteeship Council, the specialized agencies and the non-governmental organizations in consultative status, through the Secretary-General, of the date of the first meeting of each session (rule 7). Rules 4 and 5 assign to the President functions exercised jointly with the other officers: under the former rule the President and the three Vice-Presidents may agree to a request for the holding of a special session of the Council made by the Trusteeship Council, any Member of the United Nations or a specialized agency, whereas under the latter the President may, with the concurrence of the three Vice-Presidents, call special sessions of the Council and fix the dates thereof.

18. For the most part these functions involve situations that have not arisen in practice. The special session held by the Council on 24 March 1952, was called by the General Assembly (in its resolution 549 (VI) of 5 February 1952).[53] As for the notifications called for in rule 7, it should be noted that in practice they are made by the Secretary-General without the participation of any of the officers of the Council. This would probably apply to any communication made pursuant to rules 3 or 4.

19. One of the amendments to the Council's rules of procedure that the Secretary-General proposed to the Council in 1967[54] related to the functions discharged by the officers of the Council when the latter is not in session. The amendment in question sought to add at the end of rule 23 a sentence reading as follows: "If an unforeseen vacancy occurs when the

[52] In 1974, the Council elected as President the representative of Finland (see *Official Records of the Economic and Social Council, Organizational Session for 1974*, 1887th meeting held on 7 January 1974), thus setting aside, in this particular instance, the practice described in paragraph 16.

[53] Subsequent to the drafting of this note however, the Council held on 17 September 1973 a second special session to deal with "Measures to be taken following the natural disaster in Pakistan". The session was convened on the basis of a letter dated 11 September 1973 from the Permanent Representative of Pakistan to the United Nations addressed to the President of the Council, containing a request regarding the possibility of convening a special session of the Council (E/5417). By letter dated 12 September 1973, addressed to the Secretary-General of the United Nations, the President of the Council indicated that, as the other members of the Bureau were in agreement with the proposal, he wished, under the provisions of rule 4, to convene the Council for a special session (E/5418).

[54] *Official Records of the Economic and Social Council, Forty-second Session, Annexes*, agenda item 21, document E/4313.

Council is not in session, the member of the Council of which the President or the Vice-President, as the case may be, was a representative shall designate another representative to fill the vacancy until a successor is elected by the Council." This amendment was not considered by the Council. The decision of the Council in 1969 to hold organizational meetings early in January[55] has met the major difficulties which the proposal had sought to resolve.

B. *Conclusions*

(1) *With regard to the question whether the Council elects its officers in such a way as to ensure that they are not precluded from holding office the following year by reason of the fact that the States they represent are no longer members of the Council*

20. The conclusion to be drawn from the Council's practice as described herein seems to be that the Council does not adhere to any consistent pattern in this respect, except that from the thirty-second session up to the present, at least one of the officers elected by the Council in a given year was not precluded from holding office at the first meeting of the first session of the following year by reason of his representing a State that was no longer a member of the Council that year.

(2) *With regard to the question as to who presides at the opening of the first session of a given year if for any reason none of the officers are available*

21. The practice of the Council is consistent in this respect: in such circumstances the opening meeting is initially presided over by the Secretary-General or his representative.

(3) *With regard to the question as to who assumes the functions of President while the Council is not in session if for any reason none of the officers are available*

22. These functions are set out in paragraph 17 above. There are no precedents to go by to resolve such a difficulty, which the amendment proposed by the Secretary-General and referred to in paragraph 19 above sought to overcome.

8 May 1973

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12. QUESTION WHETHER A MEMBER STATE WHICH IS MEMBER OF THE ECONOMIC AND SOCIAL COUNCIL MAY INCLUDE IN ITS DELEGATION TO THE COUNCIL AN OFFICIAL FROM ANOTHER MEMBER STATE NOT MEMBER OF THE COUNCIL—QUESTION WHETHER SUCH AN OFFICIAL COULD MAKE A STATEMENT IN THE COUNCIL ON BEHALF OF HIS OWN COUNTRY

Memorandum to the Office for Inter-Agency Affairs

1. You have referred to us the question whether it is possible for a Member State which is a member of the Economic and Social Council to include in its delegation to the Council officials from another Member State which is not a member of the Council. In this connexion, I would like to refer to a legal opinion given in 1965. After stating that "there is no voting or representation by proxy at meetings or conferences of the United Nations", the opinion went on to say

> "Although there is no such express prohibition, representation of more than one government by a single representative has never been permitted and interested governments have been so informed. However, representation of a member by a national of another State (or by a member of a different delegation) has been permitted in cases where the representative does not simultaneously serve as a representative of both States."[56]

The answer to your question is therefore in the affirmative.

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[55] *Ibid., Forty-seventh Session,* 1637th meeting held on 8 August 1969.

[56] *Juridical Yearbook,* 1965, p. 224.

2. As to whether the non-national so appointed by the State member of the Economic and Social Council as a member of its delegation could make a statement on behalf of the government of his own country which is not a member of the Council, I agree with you that this should not be done and that the government in question could resort to rules 75 and 76 of the rules of procedure of the Council.[57] The principle which prohibits a member of one delegation from representing another delegation applies, in our view, both with respect to voting and in regard to the making of statements. It would be even more inconsistent with this principle if a delegate of a State member of the Council should speak on behalf of a State which is not a member of the Council.

7 March 1973

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13. QUESTION OF THE ESTABLISHMENT OF A SUB-COMMISSION OF THE COMMISSION ON NARCOTIC DRUGS—REQUIREMENT OF AN AUTHORIZATION BY THE ECONOMIC AND SOCIAL COUNCIL—METHOD OF REPORTING AND COMPOSITION OF THE PROPOSED SUB-COMMISSION

Letter to the legal Liaison Officer, United Nations Office at Geneva

This is in reply to your letter of 5 January 1973, to which a preliminary answer was sent by cable on 19 January 1973. Your letter concerns the possibility that at the current (twenty-fifth) session of the Commission on Narcotic Drugs a draft resolution may be submitted by which that body would establish a sub-commission on a permanent or standing basis.

Three basic questions would appear to be involved in such a proposal: (1) whether the Commission could, on its own authority, establish a permanent sub-commission, (2) whether the Commission could require its sub-commission to report directly to the Economic and Social Council and (3) whether the sub-commission could be composed of States. Ancillary to the last question is the question whether States not members of the Commission are eligible for membership in the sub-commission.

In regard to the first question, rule 66 of the rules of procedure of the functional commissions of the Council provides that the commissions shall "set up such sub-commissions as may be authorized by the Council". It is therefore clear that a functional commission may establish a sub-commission only if it has been authorized to do so by the Council.[58] This need for the authorization of the Council as a condition precedent to the establishment of sub-commissions (as distinct from the committees provided for in rules 20-22[59] of the above-mentioned rules of procedure) is also reflected in the terms of reference of the Commission on Narcotic Drugs, which state that "the Commission may make recommendations to the Council

[57] Rules 75 and 76 read as follows:

"*Rule 75*

"The Council shall invite any 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 it of particular concern to that Member. Any Member thus invited shall not have the right to vote, but may submit proposals which may be put to the vote by request of any member of the Council.

"*Rule 76*

"A committee may invite any Member of the United Nations which is not one of its own members to participate in its deliberations on any matter which the committee considers is of particular concern to that Member. Any Member thus invited shall not have the right to vote, but may submit proposals which may be put to the vote by request of any member of the committee."

[58] *Repertory of Practice of United Nations Organs*, volume III, Article 68, paras. 24-29.

[59] Under rule 20, the commissions, in consultation with the Secretary-General, may, at each session, "set up such committees as are deemed necessary and refer to them any questions on the agenda for study and report".

concerning any sub-commission which it considers should be established" (Council resolution 9 (I) of 16 February 1946, paragraph 3).

As to the second question, normally a subsidiary organ is required to report to its own parent body which in the present case is the Commission on Narcotic Drugs. In exceptional cases, the Economic and Social Council has decided that a sub-commission should report to the Council on certain matters (see Economic and Social Council resolution 197 (VIII) of 24 February 1949 and also resolution 5 (III) of 3 October 1946). That is why in our cable it was suggested that the Commission should recommend to the Council that the proposed sub-commission report directly to the Council only if the Commission has compelling reasons for proposing such a method of reporting.

With respect to the third question concerning the composition of the sub-commission, it may be recalled that at the time the Council adopted resolution 100 (V) of 12 August 1947 setting forth the original rules of procedure of the functional commissions (rule 55 of which was identical with present rule 66), the Council had already set up functional commissions, some of which had established sub-commissions. Every *standing* sub-commission was composed exclusively of indiviudals serving in their personal capacities. This is reflected in the language of rule 70 of the rules of procedure of the functional commissions[60] and also explains why in the course of the debates in the Council that led up to resolution 100 (V) delegates appear to have assumed that all sub-commissions of functional commissions dealing with specialized subjects would be composed of individual experts. (See the record of the 113th plenary meeting of the Council, held during the Council's fifth session, on 12 August 1947.) The situation has not changed since then, for every one of the standing sub-commissions set up thus far by functional commissions of the Council (and of which the only one still in existence is the Sub-Commission on Prevention of Discrimination and Protection of Minorities, a sub-commission of the Commission on Human Rights) has been likewise composed solely of individuals serving in their personal capacity.

It should be noted, however, that none of the sub-commissions set up so far has been established by the Commission on Narcotic Drugs, which differs from the other existing functional commissions in that it is composed of States whose representatives are not subject to confirmation by the Economic and Social Council.

The formula proposed in our cable [under which the proposed sub-commission, like some functional commissions would be composed of States each of which should nominate a qualified representative to be confirmed by the Commission on Narcotic Drugs] strikes a balance between the practice in respect of the composition of sub-commissions and this special characteristic of the Commission on Narcotic Drugs. It has the further advantage of being in line with the provisions of rule 70 of the rules of procedure of the functional commissions. However, if the Commission feels strongly that its sub-commission should be composed of States which should appoint their representatives, rather than nominate them subject to confirmation, this is also legally possible taking into account the exceptional nature of the composition of the Commission itself and assuming that some criteria will be laid down by the Commission in the selection of the States for membership in the sub-commission.

States eligible for membership in the Commission but not represented thereon may also be eligible for membership in the sub-commission, regardless of whether or not a sub-commission has a larger membership than that of the Commission. Both the language of rule 66 of the rules of procedure of the functional commissions and the precedents that exist of subsidiary bodies including in their membership States not represented on their parent bodies support this view.

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[60] Rule 70 reads as follows:

"When a member of a sub-commission is unable to attend the whole or part of a session and, with the consent of his Government and in consultation with the Secretary-General, has designated an alternate, such alternate shall have the same status as a member of the sub-commission, including the right to vote."

States which are not members of the sub-commission could participate in the deliberations of that body in accordance with rule 72 of the rules of procedure of the functional commissions, which would apply to the sub-commission in question by virtue of rule 71 thereof.[61]

24 January 1973

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14. CONSTITUTIONAL AND ADMINISTRATIVE QUESTIONS RAISED BY A RESOLUTION OF THE CONFERENCE OF MINISTERS OF THE ECONOMIC COMMISSION FOR AFRICA, INVITING THE EXECUTIVE SECRETARY OF THE COMMISSION TO PRESENT BEFORE THE EXECUTIVE COMMITTEE OF THE CONFERENCE REPORTS RELATING TO STAFF CONDITIONS

Opinion of the Legal Counsel[62]

1. Before the adoption by the Conference of Ministers of the Economic Commission for Africa of resolution 242 (XI) on "Reporting on staff and administrative questions",[63] the Executive Secretary of the Commission expressed certain reservations concerning that resolution, in particular concerning its operative paragraph 4. The tenor of these reservations is set forth in document E/5253/Add.2 (E/CN.14/591/Add.2) of 6 July 1973.

2. The operative part of resolution 242 (XI) reads as follows: (The Conference of Ministers)

"1. *Confirms* the interest of the Conference of Ministers in administrative questions relating to the secretariat of the Commission and its working;

"2. *Requests* the Executive Committee to include reports on administrative questions as a standing item on the agenda of its meetings;

"3. *Requests* the Executive Secretary to provide reports on administrative questions of interest to the Executive Committee or that he may wish to bring to their notice;

"4. *Invites* the Executive Secretary to present before the Executive Committee, having taken into account the views of the ECA Staff Committee, reports relating to staff conditions and other questions of interest to the Executive Committee."

3. The question was asked in the Economic Committee of the Economic and Social Council on what grounds the aforementioned resolution did not conform with the constitutional principles and administrative arrangements of the United Nations established by the Charter and Staff Regulations of the United Nations.

4. According to Article 101 of the Charter of the United Nations, "The staff shall be appointed by the Secretary-General under regulations established by the General Assembly".

5. The General Assembly issued regulations under which the Secretary-General, as the Chief Administrative Officer of the United Nations Organization, was entrusted with their implementation. As the General Assembly has pointed out:

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[61] At its twenty-fifth (1973) session, the Commission on Narcotic Drugs recommended the Economic and Social Council to adopt a resolution authorizing the establishment of a Sub-Commission on Illicit Drug Traffic and Related Matters in the Near and Middle East (*Official Records of the Economic and Social Council, Fifty-fourth Session, Supplement No. 3* (E/5248), resolutions 6 (XXV) and 7 (XXV)). By its resolution 1776 (LIV) of 18 May 1973, the Council authorized the establishment of the Sub-Commission and decided that the representatives of the members of the Sub-Commission and of its working groups would be nominated by their Governments, in consultation with the Secretary-General and subsequently confirmed by the Council.

[62] Circulated as document E/AC.6/L.515.

[63] *Official Records of the Economic and Social Council, Fifty-fifth Session, Supplement No. 3* (E/5253), p. 94.

"The Staff Regulations embody the fundamental conditions of service and the basic rights, duties and obligations of the United Nations Secretariat. They represent the broad principles of personnel policy for the staffing and administration of the Secretariat. The Secretary-General, as the Chief Administrative Officer, shall provide and enforce such staff rules consistent with these principles as he considers necessary".

6. On the other hand, the General Assembly, under rule 156 of its rules of procedure, established an Advisory Committee on Administrative and Budgetary Questions and, under rule 101, set up as one of its Main Committees an Administrative and Budgetary Committee (Fifth Committee) to deal with administrative and budgetary questions.

7. There are thus *only two organs* of the United Nations which were given, as their terms of reference, the duty to assist the General Assembly in dealing with administrative questions, including personnel and budgetary questions.

8. Under established practice, the Secretary-General reports yearly to the General Assembly on administrative questions. His report is submitted to the Advisory Committee which submits any comments it may deem appropriate to the Fifth Committee. The Fifth Committee, after discussion, submits its own report with recommendations to the General Assembly.

9. Neither the Economic Commission for Africa nor any other organ of the United Nations, principal or subsidiary, has been given, in its terms of reference, any competence to deal with administrative questions.

10. Consequently, in the absence of specific terms of reference, the Economic Commission for Africa lacks a statutory ground on which it can request the Secretary-General or his representative to perform tasks which fall solely within the competence of the General Assembly, including the organs it established for that purpose, and that of the Secretary-General.

11. There is nothing in the Charter of the United Nations which would permit an organ, principal or not, to add to its competence or to impinge on the competence of another organ of the United Nations.

12. In this connexion, it is to be noted that under paragraph 16 of the terms of reference of the Economic Commission for Africa:[64] "The Secretary-General of the United Nations shall appoint the Executive Secretary of the Commission", and that "the staff of the Commission shall form part of the Secretariat of the United Nations", which under Article 7 of the Charter of the United Nations is a principal organ of the United Nations.

13. It has been suggested that the fact that the terms of reference do not prohibit expressly the Economic Commission for Africa from dealing with personnel questions would seem to imply that it is permitted to do so. This argument does not stand up to scrutiny. Indeed, the terms of reference under which an organ operates are there to determine what it may and should do, and not what it may not and should not do; and there are many things such an organ cannot do.

14. It may well be that the present controversy is due to a misunderstanding of the constitutional implications of the Conference of Ministers' request, since the Conference itself, in the preambular part of resolution 242 (XI), notes

"the value of the periodic reports on administrative questions and on staff conditions *presented before the Advisory Committee on Administrative and Budgetary Questions and the Fifth Committee in maintaining the viability, the effectiveness and the efficiency of the United Nations Secretariat as a whole*".

15. It is admittedly to be welcomed when a United Nations organ shows a genuine interest in matters related to the Staff. But at issue is whether such interest can be shown in a formal manner when the organ in question lacks competence therefor. To admit this would

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[64] *Ibid., Fifty-first Session, Supplement No. 5* (E/4997), Annex VI.

amount to including in the agenda of such organ a potentially standing item, leading in turn to discussions and recommendations that are not within its authority.

16. No one would of course question the fact that interest in staff matters is being shown informally. But if it is preferred to express such interest in a formal manner, then the correct approach would be for the representatives of the Governments concerned to present any questions or suggestions they may have before the organs competent to deal with the matter, i.e. the General Assembly and its Fifth Committee, or the Secretary-General himself.

12 July 1973

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15. QUESTION OF THE PARTICIPATION IN THE WORLD POPULATION CONFERENCE, 1974 OF NON-GOVERNMENTAL ORGANIZATIONS AND INTERGOVERNMENTAL ORGANIZATIONS NOT WITHIN THE UNITED NATIONS SYSTEM—DATE OF ISSUANCE AND CONTENTS OF THE LETTERS OF INVITATION

Memorandum to the Acting Director, Office of the Secretary-General of the World Population Conference, 1974

1. You have asked for our advice on the question of the participation in the World Population Conference, 1974 of non-governmental organizations and intergovernmental organizations not within the United Nations system.

2. With respect to non-governmental organizations, paragraph 34 of Economic and Social Council resolution 1296 (XLIV) reads as follows:

> "CONSULTATION WITH INTERNATIONAL CONFERENCES CALLED BY THE COUNCIL
>
> "34. The Council may invite non-governmental organizations in categories I and II and on the Roster to take part in conferences called by the Council under Article 62, paragraph 4, of the Charter of the United Nations. The organizations shall be entitled to the same rights and privileges and shall undertake the same responsibilities as at sessions of the Council itself, unless the Council decides otherwise."

This provision consists of three elements: (*a*) only the Economic and Social Council may invite non-governmental organizations to take part in conferences called by the Council; (*b*) the Council has discretion to invite some or all of the non-governmental organizations in consultative status with it and (*c*) once the organizations are invited by the Council to a conference, they should be entitled to the same rights and privileges and should undertake the same responsibilities as at sessions of the Council itself, unless the Council decides otherwise. It is therefore clear that the Council must take a decision concerning the participation of non-governmental organizations.

3. We have examined the formulations of such invitations by the Council in the past. The most commonly used terms appear to be: "appropriate non-governmental organizations", "interested non-governmental organizations" or "non-governmental organizations in this field". In our view, when the term "appropriate" is used, it is for the Secretary-General to decide which are the appropriate organizations to invite. When the term "interested" is used, it is for the organizations themselves to decide and to inform the Secretariat whether they wish to participate in the conference concerned. Therefore when the Population Commission considers the question of the invitation of non-governmental organizations with a view to making a recommendation to the Economic and Social Council, you may wish to draw its attention to this distinction.

4. Regarding intergovernmental organizations not within the United Nations system, the convening resolution normally provides for invitation of such organizations that are concerned with the subject of the conference. Unless the matter has already been considered and the Secretariat has definite guidance as to which organizations should be invited, we would suggest

that such a provision be considered by the Population Commission for recommendation to the Economic and Social Council.[65]

5. As to the date of issuance and contents of the letters of invitation, you may wish to consider the following points:

(1) Letters of invitation are sent out only after the decision on invitees has been taken by the competent organ which in the present case is the Economic and Social Council.

(2) In addition to indications on the date and place of the Conference, letters of invitation usually contain:

(*a*) That part of the provisions of the convening resolution which relates to participants;

(*b*) A request for designation of delegations;

(*c*) If it is deemed desirable, a summary of the essential terms of reference of the Conference, thus drawing attention to the main purpose of the Conference (the full text of the relevant resolution or resolutions may of course be annexed);

(*d*) Any other matters which in the opinion of the Secretariat should be brought to the attention of the participants.

(3) Letters of invitation are normally accompanied by the provisional agenda of the Conference.

1 October 1973

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16. ALLEGATIONS RELATING TO MASSACRES IN A NON-SELF-GOVERNING TERRITORY—POWER OF THE SECRETARY-GENERAL UNDER THE CHARTER TO INVESTIGATE SUCH ALLEGATIONS SUBJECT TO THE CONSENT OF THE GOVERNMENT CONCERNED—DISCRETION HE MAY EXERCISE IN THAT RESPECT—THE SPECIAL COMMITTEE ON THE SITUATION WITH REGARD TO THE IMPLEMENTATION OF THE DECLARATION ON THE GRANTING OF INDEPENDENCE TO COLONIAL COUNTRIES AND PEOPLES IS COMPETENT TO EXAMINE THE ALLEGATIONS IN QUESTION UNDER THE GENERAL MANDATE GIVEN TO IT BY THE GENERAL ASSEMBLY

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

1. You have asked for a legal opinion concerning the authority of the Secretary-General, of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (Committee of 24) and of a Working Group of the Commission on Human Rights to investigate various allegations relating to massacres of the indigenous population in a Non-Self-Governing Territory.

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[65] At its third special session (4-15 March 1974), the Population Commission recommended that the Economic and Social Council should authorize the Secretary-General of the Conference to invite to participate in the Conference: (1) the intergovernmental organizations listed in Annex IV (*a*) of the Commission's report to the Council; (2) the non-governmental organizations listed in Annex IV (*b*) of that same report, as well as any other non-governmental organizations in consultative status with the Council which might, before the Council's fifty-sixth session, also express the wish to be represented. (*Official Records of the Economic and Social Council, Fifty-sixth Session, Supplement No. 3 A* (E/5462), para. 46.) The Council, by resolution 1835 (LVI) of 17 May 1974 authorized the Secretary-General to invite . . . "(*c*) the intergovernmental organizations listed in the report of the Population Commission on its third special session and the regional banks to be represented at the Conference by observers . . . (*e*) the non-governmental organizations listed in that report and in the note by the Secretary-General (E/5481) to be represented by observers." It further authorized the Secretary-General of the Conference "to invite additional intergovernmental organizations and the non-governmental organizations in consultative status with the Economic and Social Council that may express the wish to be represented by observers at the Conference".

2. The Secretary-General has inherent powers under the Charter to engage in fact-finding activities, always provided that he has the consent of the Government or Governments concerned[66] . . . However, though the Secretary-General has inherent powers in particular circumstances to undertake fact-finding, he is under no obligation to use those powers; unless some competent organ directs him to engage in fact-finding, he can decide whether to do so or not in the exercise of his free discretion and in the light of his judgment whether such an activity would be likely to have any useful result. In the present case he will no doubt wish to take account of the fact that allegations about the massacres are already before United Nations deliberative bodies, whose views on how those allegations should be dealt with must naturally be given the most serious consideration.

3. The Committee of 24 is competent to examine the allegations under its general mandate as laid down in General Assembly resolutions 1654 (XVI) of 27 November 1961 and 1810 (XVII) of 17 December 1962. It is also seized of at least one petition on the subject, which it is competent to deal with pursuant to General Assembly resolution 1970 (XVIII) of 16 December 1963.

4. With respect to the competence of the *Ad Hoc* Working Group of Experts established by the Commission on Human Rights to deal with violations of human rights in southern Africa, resolution 7 (XXVII) of the Commission *inter alia* requested the Working Group to examine the effects of colonialism in the territory in question, and therefore the Group's competence is clear.

17 July 1973

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17. ENVIRONMENT FUND ESTABLISHED BY GENERAL ASSEMBLY RESOLUTION 2997 (XXVII)—QUESTION OF THE APPLICATION TO THE FUND OF THE UNITED NATIONS FINANCIAL REGULATIONS AND RULES

Memorandum to the Under-Secretary-General for Administration and Management

1. You have asked for advice on the question of the application of the United Nations Financial Regulations and Rules to the Environment Fund established by General Assembly resolution 2997 (XXVII) of 15 December 1972.

2. The general rule is that the United Nations Financial Regulations and Rules govern the administration of all financial activities of the United Nations except as may otherwise be provided by the General Assembly, or specifically exempted therefrom by the Secretary-General himself. In the present case, this general rule is reinforced by express provision in paragraph 1 of section III of General Assembly resolution 2997 (XXVII) which states that the Environment Fund shall be a voluntary fund established "in accordance with existing United Nations financial procedures". It follows that in the absence of an express provision to the contrary in General Assembly resolution 2997 (XXVII), the Environment Fund is governed by the United Nations Financial Regulations and Rules.

3. The only other pertinent provisions of General Assembly resolution 2997 (XXVII) are paragraph 7 of section III which authorizes the Governing Council "to formulate such general procedures as are necessary to govern the operations of the Environment Fund" (underlining supplied) and paragraph 2(h) of section II which entrusts the Executive Director with the responsibility "to administer, under the authority and policy guidance of the Governing Council, the Environment Fund referred to in section III below". It is to be noted that nowhere in the resolution is the Governing Council empowered to make its own financial regulations and rules.

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[66] See *Repertory of Practice of United Nations Organs*, especially Supplement No. 2, Article 98, paras. 279-282, 291 and 308-311.

4. There is no inconsistency as between on the one hand the authority of the Governing Council and that of the Executive Director respectively with regard to the operations and administration of the Fund and on the other hand the applicability of the United Nations Financial Regulations and Rules. In our view, therefore, the general rule that all financial activities of the United Nations should be governed by the United Nations Financial Regulations and Rules, reinforced as this general rule is by the express provision of paragraph 1 of section III of General Assembly resolution 2997 (XXVII), is in no way qualified with respect to the Environment Fund by either paragraph 7 of section III or paragraph 2(h) of section II.

5. Accordingly, we consider that paragraph 7 of section III and paragraph 2(h) of section II have to be interpreted as empowering the Governing Council to provide guidance to the Executive Director in his administration of the Fund within the framework and always subject to the application of the United Nations Financial Regulations and Rules.

6. We consider that the questions here involved are of the utmost importance, not only where the Environment Fund itself is concerned, but also in relation to other existing situations or new cases which may arise in the future. We believe that a very thorough study should be undertaken by the competent services, so that a policy may be established which is consistent with legal principle and with the requirements of good administration. It cannot be permitted that, through the process of interpretation of piecemeal and ambiguous resolutions, *de facto* amendments to fundamental provisions of the Charter are brought about.

15 March 1973

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18. Convention on the Privileges and Immunities of the United Nations—Inclusion of additional categories of personnel among the categories of officials to which the provisions of articles V and VII of the Convention shall apply

Note by the Secretary-General[67]

1. Article V, section 17, of the Convention on the Privileges and Immunities of the United Nations states:

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

In pursuance of this provision, the Secretary-General proposed to the General Assembly, at the second part of its first session, the categories of officials to which the provisions of article V, section 17, and article VII of the Convention should apply. The General Assembly adopted resolution 76 (I) of 7 December 1946, in which it approved the granting of privileges and immunities referred to in articles V and VII of the Convention "to all members of the staff of the United Nations, with the exception of those who are recruited locally and are assigned to hourly rates".

2. It is to be noted that, in consequence of the action taken by the Secretary-General and by the General Assembly in the aforementioned resolution, the only officials of the United Nations who at present come within the purview of the Convention are "members of the staff of the United Nations". Other officials of the United Nations who are not members of the staff of the United Nations, do not, under present circumstances, come within the purview of the Convention. The Secretary-General wishes to draw the attention of Members to instances where the Assembly has appointed or participated in the appointment of members of

[67] Circulated as document A/C.5/1584/Rev.1 and Rev.1/Corr.1.

subsidiary bodies, and where he considers application of the provisions of the Convention would be appropriate.

3. In each such case, the governing criteria are the following:

(*a*) The official in question must be engaged on a full-time or substantially full-time basis to the point where he is effectively precluded from accepting other employment.

(*b*) The official must be a member of a body responsible directly to the General Assembly.

4. Based upon these criteria, the officials of the United Nations whom the Secretary-General proposes to include within the provision of articles V and VII of the Convention are as follows:

(a) *Inspectors serving in the United Nations Joint Inspection Unit*

The members of the Unit are appointed by the Secretary-General, in their personal capacity, on the basis of nominations by eight countries designated by the President of the General Assembly and are responsible, as a unit, only to the Assembly. All inspectors serve full-time. By the very nature of the terms of reference of the Unit, as set forth in paragraph 67 of document A/6343, its members are not regarded as staff members, and thus their names have not so far been included in the list of officials submitted to Governments of Members under the terms of article V of the Convention.

(b) *The Chairman of the Advisory Committee on Administrative and Budgetary Questions (ACABQ)*

The Chairman of ACABQ, along with the other members, is appointed by the General Assembly, in his personal capacity, under the provisions of rules 157 and 158 of the rules of procedure of the General Assembly.[68] He is appointed as an ordinary member of the Advisory Committee and is elected annually to the post of Chairman by the members of the Committee. As a result of a proposal put before the Assembly by the Secretary-General at the twenty-sixth session,[69] the Assembly approved the payment of an honorarium to the Chairman of ACABQ in the amount of $25,000 per annum (net). In his submission to the Assembly, the Secretary-General gave as justification for his proposal the following:

(i) The increasing demands of the post of Chairman on the time and availability of the incumbent;

(ii) As a result, the stage had been reached where the Chairman's independent earning capacity had virtually disappeared;

(iii) It was felt that the Committee would wish at all times to have first call on the services of its Chairman and, consequently, it would be impossible for him to be, at the same time, actively engaged on behalf of his Government or other body.

To all intents and purposes, therefore, the Chairman of ACABQ may be considered to be engaged full time in the performance of his duties for the Committee and thus for the United Nations. As in the case of the Inspectors, the Chairman of ACABQ has not hitherto been included in the listing of officials submitted to Governments of Members in accordance with article V of the Convention on Privileges and Immunities of the United Nations.

5. The Secretary-General feels that this would be an appropriate time to regularize the situation as it relates to these members of subsidiary bodies of the General Assembly. This action would also serve as a precedent in any similar cases that might arise in the future, such as that of any full-time commissioners of the International Civil Service Commission, once it is duly constituted. However, it is expected that these will be extremely limited in number. Accordingly, the Secretary-General proposes to include the Inspectors members of the Joint Inspection Unit and the Chairman of ACABQ in the categories of officials to which the provisions of articles V and VII of the Convention on the Privileges and Immunities of the

[68] Numbered 155 and 156 in the current rules of procedure.

[69] A/C.5/1365.

United Nations shall apply and to make known the names of these officials to the Governments of Members, as provided in article V, section 17, of the Convention.

6. Should the Fifth Committee decide to approve the Secretary-General's proposal contained herein it may wish to include an appropriate paragraph in its report to the General Assembly on this item. Alternatively, a resolution similar to the original resolution 76 (I) of 7 December 1946 could be submitted to the Assembly, along the lines of the attached draft [not reproduced].[70]

7 December 1973

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19. REQUEST BY THE GOVERNMENT OF A MEMBER STATE THAT UNITED NATIONS TECHNICAL ASSISTANCE EXPERTS SIGN A DECLARATION UNDER AN ACT ON STATE SECURITY[71]

Internal memorandum

. . . Concerning the request by [a Member State] that a "United Nations adviser" sign a declaration under the State Security Act, the position which we have taken in the past (cases have arisen in two other Member States) has been that signature of such declarations is incompatible with the Conventions on the privileges and immunities of the United Nations and of the specialized agencies. As you point out, it is difficult to argue, however, that signature of the declaration is inconsistent with immunity from legal process *per se*.

As against this is the fact that a United Nations or specialized agency official is required, under the pertinent staff rules—based directly on the Charter and other constituent instruments—to owe his primary obligation to the organization, from whom alone he may receive instructions. In previous cases which have arisen, it has been found that the submission of reports by the official to the organization was, on a strict reading of the declaration, either precluded or was subject to the scrutiny of the government concerned. This would have had the effect of impairing the effectivity of the expert in the performance of his functions and of the UNDP programme in question, as well as imposing a possible (and unwarranted) criminal penalty on a legitimate and normal consequence of the relationship between an expert and his agency. As a matter of principle, the United Nations (or specialized agency) cannot grant Governments the right to control communications between the expert and headquarters, or indeed between the expert and, say, the local resident representative. Furthermore, acceptance on the part of the expert or the organizations of the applicability of the State Security Act and of the penal provisions prescribed could be deemed to constitute a waiver of the immunity from legal process in respect of official acts. There is no sanction in the Conventions for such a general advance waiver, and the Secretary-General (or, in the case of FAO, the Director-General) in whom authority to make waivers in specific cases rests, thus has no basis for permitting signatures of the declaration in its present form.

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[70] At its 2206th meeting, on 18 December 1973, the General Assembly adopted its resolution 3188 (XXVIII) reading as follows:

"*The General Assembly*,

"*Having considered* the proposals of the Secretary-General that, in accordance with article V, section 17, of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946, the categories of officials to which the provisions of articles V and VII of the Convention shall apply should include the members of the Joint Inspection Unit and the Chairman of the Advisory Committee on Administrative and Budgetary Questions,

"*Approves* the granting of the privileges and immunities referred to in articles V and VII of the Convention on the Privileges and Immunities of the United Nations to the members of the Joint Inspection Unit and the Chairman of the Advisory Committee on Administrative and Budgetary Questions."

[71] See also *Juridical Yearbook*, 1964, p. 260.

In view of the foregoing, the UNDP Assistant Regional Representative should, in our opinion, be asked to seek to persuade the Government not to press its request that the expert concerned sign the declaration. It may be that the Government will find the declaration unnecessary if the UNDP representative were to stress to it the fact that experts are already prohibited, in the case of United Nations officials, by regulation 1.5 of the Staff Regulations,[72] from communicating to unauthorized persons unpublished information acquired in the course of their duties. There is the possibility, of course, that the national authorities will then argue that since regulation 1.5 so provides, there should be no obstacle to signing the declaration, which merely amplifies the regulation. This, however, ignores the question of the staff member's obligation to the organization and the privity of communication between the expert and the organization, as well as the "general waiver" issue.

Nevertheless, should it not prove possible to persuade the Government to give up its request for signature of the declaration, then in our view it should be modified in order to protect the position of FAO and to take account of its legal provisions.

8 January 1973

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20. REQUEST BY A MEMBER STATE THAT ITS NATIONALS CONSIDERED FOR APPOINTMENT UNDER A UNITED NATIONS PROJECT SHOULD NOT ENJOY ON ITS TERRITORY THE PRIVILEGES AND IMMUNITIES NORMALLY EXTENDED TO NON-NATIONAL UNITED NATIONS OFFICIALS—SUCH A REQUEST WOULD BAR THE GRANTING TO THE PERSONS CONCERNED OF UNITED NATIONS STAFF APPOINTMENTS

Memorandum to the Technical Assistance Recruitment Service

1. We refer to your memorandum concerning the communication you received from the Government of a Member State on the matter of the privileges and immunities to be accorded by that Government to two of its nationals being considered by the United Nations for appointment under a regional project.

2. We note that the Government has indicated that the two persons concerned "being nationals of the host country will not be exempted from income and other taxes and they will not be accorded the privileges and immunities which are normally extended to other [non-national] United Nations officials . . . under the Convention on the Privileges and Immunities of the United Nations while they are serving in the country".

3. If the two persons in question are to receive United Nations staff appointments, the proposal made by the Government on privileges and immunities could not be considered to be in accord with the Convention on the Privileges and Immunities of the United Nations to which the Member State concerned is a party.

4. The Convention provides in article V for the privileges and immunities to be accorded "officials of the United Nations"; and it is required under the Convention, therefore, that nationals of the Member State concerned who are officials of the United Nations be accorded privileges and immunities in accordance with the Convention.

5. The proposal referred to in paragraph 2 above is, thus, not a proposal with which we can agree.

6. Should the Government of the Member State concerned find difficulties in granting privileges and immunities to its nationals employed by the United Nations under the project, an alternative may be that the Government employ the persons concerned and assign them to the project with appropriate reimbursement being made by the United Nations Development Programme.

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[72]The specialized agencies have a similar regulation.

7. We note from your memorandum that the Government has agreed to the release of its two nationals "on secondment". We wonder whether the Government's intention is that its two nationals, while continuing to remain government officials and while continuing to be paid by the Government, would be assigned by the Government to the project, with appropriate reimbursement being made by UNDP. The two persons concerned would, in such circumstances, not be appointed and paid by the United Nations, and would not be officials of the United Nations. They would remain officials of their Government, and the Convention on the Privileges and Immunities of the United Nations would not be applicable in their cases.

13 December 1973

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21. QUESTION OF THE ISSUANCE OF A VISA TO AN OFFICIAL OF A REGIONAL ECONOMIC COMMISSION—UNDER BOTH THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS AND THE RELEVANT HEADQUARTERS AGREEMENT, OFFICIALS OF THE COMMISSION REGARDLESS OF THEIR NATIONALITY ARE ENTITLED TO THE ISSUANCE OF ANY VISA WHICH MAY BE REQUIRED TO RETURN TO THEIR DUTY STATION

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

1. You have requested a legal opinion as to the legal right of a member of the staff of a regional economic commission to obtain a visa from the host country in order to return to his duty station.

2. The Convention on the Privileges and Immunities of the United Nations to which the country concerned is a party provides in Article V, Section 18 that "officials of the United Nations shall be immune, together with their spouses and relatives dependent on them, from immigration restrictions and aliens registration". This provision has been taken to mean that States Parties to the Convention are bound to issue visas to officials to the United Nations without any restrictions. In addition, the Convention, in Article VII, Section 25, provides for a speedy handling of applications for visas from the holders of United Nations Laissez-Passer when such applications are accompanied by a certificate that the applicants are travelling on the business of the United Nations.

3. The headquarters agreement for the regional economic commission concerned provides that the appropriate authorities shall impose no impediment to transit to or from the headquarters of the commission of, among others, officials of the commission and their families.

4. In view of the foregoing, there can be no doubt that from a legal point of view an official of the commission concerned, regardless of his nationality, has the right to return to his duty station and to the issuance of any visa which may be required for entry into the host country.

13 November 1973

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22. EXEMPTION OF UNITED NATIONS OFFICIALS FROM THE OBLIGATION OF SUBMITTING A TAX RETURN WITH RESPECT TO THEIR UNITED NATIONS INCOME—SUCH INCOME IS TO BE CONSIDERED AS NON-EXISTENT FOR INCOME TAX PURPOSES AND SHOULD NOT IN PARTICULAR BE TAKEN INTO ACCOUNT IN DETERMINING THE TAX RATE ON INCOME FROM OTHER SOURCES

Note verbale to the Permanent Representative of a Member State

The Secretary-General of the United Nations presents his compliments to the Permanent Representative and has the honour to acknowledge receipt of his note which states that, under

the terms of the Internal Revenue Code, nationals of his country are required to file an income tax return if their annual gross income exceeds a specified amount. It is assumed that, in keeping with the exemption, referred to in the note, of United Nations salary and emoluments from national taxation under the Convention on the Privileges and Immunities of the United Nations, tax is not in fact levied on United Nations income in excess of the specified amount.

As regards the wish expressed in the note that United Nations officials of the nationality of the State concerned should nevertheless file an annual income tax return, the Secretary-General would point out that, in accordance with the principle of exemption, United Nations salary and emoluments are considered as non-existent for income tax purposes. United Nations officials are in consequence not required to submit a return unless the income from non-United Nations sources is in excess of the specified amount, nor may United Nations income be taken into account in determining the rate of tax on any additional income. Thus, in the opinion of the Secretary-General, United Nations officials of the nationality of the State concerned would be obliged to submit an income tax return only in so far as they may have other income in excess of the specified amount referred to in the first paragraph above.

The note states that a fine is payable when a national passport is extended or renewed and the holder did not file a return. Since, for the reasons explained, United Nations officials are not, in the view of the Secretary-General, under an obligation to file a return where their sole source of income is from the United Nations, and since their need for a passport is directly related to their United Nations employment, the Secretary-General would express the wish that the authorities concerned would take the necessary steps to waive this fine, at least in the case of officials whose income from non-United Nations sources is below the specified amount.

9 January 1973

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23. TECHNICAL CO-OPERATION PROGRAMME OF THE UNITED NATIONS—QUESTION WHETHER COMMUNICATION BY THE ORGANIZATION TO A MEMBER STATE OF INFORMATION CONCERNING ITS NATIONALS SERVING AS ASSOCIATE EXPERTS UNDER THE PROGRAMME WOULD BE COMPATIBLE WITH THE RELEVANT PROVISIONS OF THE CHARTER AND THE STAFF REGULATIONS

Memorandum to the Deputy Chief, Technical Assistance Recruitment Service, Office of Personnel

1. You have asked for our views on two proposals of the Government of a Member State concerning its nationals serving as associate experts with the Organization pursuant to Economic and Social Council resolution 849 (XXXII).

2. Under the first of these proposals, the nationals of the Member State in question serving as associate experts would submit to their Government a "substantive report" aimed at providing it with the information required to assess the training which an associate expert receives during his assignment on a project, and to determine the extent to which the services performed by him during such assignment correspond to his job description. The report would be prepared and signed by the associate expert and transmitted through the Organization to the Government, with the Organization entitled to make such comments thereupon as it may deem necessary.

3. We find it difficult to reconcile such a proposal with the principle laid down in the Charter that the responsibilities of the Secretary-General and the staff shall be exclusively international in character, and with Staff Regulation 1.1 which states: "Members of the Secretariat are international civil servants. Their responsibilities are not national but exclusively international. By accepting appointment, they pledge themselves to discharge their functions and to regulate their conduct with the interests of the United Nations only in view." It is evident that associate experts are staff members, as provided for by paragraph 4 of the

Annex to resolution 849 (XXXII).[73] It appears equally evident that reports by a staff member concerning his service with the Organization fall within the purview of his "international responsibilities" and cannot therefore be submitted by him to his Government directly or through the Organization. It is recognized that the Government concerned has a special interest in the personnel it provides to serve as associate experts with the Organization. The salaries and other identifiable costs of such personnel are paid by the Organization from the voluntary contributions made by that Government specifically for such purposes. Additionally, it appears that one of the principal purposes of the Government in providing such personnel is to enable them to receive training during their service on a project. We are unable to agree, however, that these considerations render inapplicable the relevant provisions of the Charter and the Staff Regulations to the associate expert programme, so as to provide a legal basis for the submission by associate experts to their Government of the proposed "substantive reports" through the Organization.

4. We would also draw attention to the standard basic agreement between the United Nations Development Programme (UNDP) and recipient Governments which appears to be relevant here. Paragraph 5 of article III of the standard basic agreement states: "The Parties shall consult each other regarding the publication as appropriate of any information relating to any project or the benefits derived therefrom." In our opinion, the term "publication" in this context denotes the act of making known or divulging to any party other than the UNDP, recipient Government, or executing agency, any information relating to a project or the benefits derived therefrom. We further consider that the expression "any information" is not to be narrowly interpreted as meaning only classified information. It appears therefore that if the proposed "substantive reports" would involve disclosure to the Government concerned of information relating to a project or to the benefits derived therefrom, the Organization, acting as executing agency on behalf of the UNDP, would be legally obliged to submit the proposed reports to the UNDP and recipient Government for consultation prior to any transmission to the Government concerned. Accordingly, even in the absence of the fundamental objections mentioned in paragraph 3 above, the propriety of the transmission of the proposed "substantive reports" to the Government would be influenced by the outcome of the consultations between the UNDP and recipient Government.

5. Under the second proposal, the nationals of the Member State concerned serving as associate experts would receive from the Organization a "performance report" evaluating their service and conduct during the relevant period of their service on a project and a copy thereof would be transmitted by the Secretary-General to the Government. It appears that the Government has indicated that if the Secretary-General is not prepared to agree to transmit to it copies of such reports, it will examine the possibility of requiring a person to sign, prior to his appointment as an associate expert, a binding commitment to transmit to it copies thereof.

6. We would call attention to the Administrative Instruction which states that a specific form (Form P.91 (3-56)—PROF) shall be used for periodic reports on the service and conduct of all staff members in the professional category. As all associate experts are within this category, it appears that the Organization is obliged to use the said form for such periodic reports.

7. In our opinion, the proposal that the Secretary-General transmit to the Government copies of periodic reports given to its nationals serving as associate experts with the Organization is not consistent with the exclusively international character of the Secretary-General's responsibilities under the Charter. We would add, however, that there appears to be no objection from the legal point of view to the Secretary-General providing in his discretion to the Government concerned a copy of a certification of service issued to an Associate Expert pursuant to Staff Rule 109.11, which states: "Any staff member who so requests shall, on

[73] Paragraph 4 of the annex to the resolution reads as follows: "Volunteer personnel will be required to take a United Nations oath of office and be subject to the appropriate staff rules and regulations of the executing agency. They will be subject to the authority of the executive head of the executing agency and his representatives in the field."

leaving the service of the United Nations, be given a statement relating to the nature of his duties and the length of his service. On his written request the statement shall also refer to the quality of his work and his official conduct."

8. We see no legal impediment to an associate expert transmitting to his Government, or to any other party, a copy of periodic reports given him by the Organization—provided this is done on a voluntary basis. In our opinion, the imposition by the Government of a requirement that a person sign, prior to his appointment as an associate expert, a binding legal commitment to submit to it copies of his periodic reports would improperly restrict the freedom of the Secretary-General to appoint his staff and, additionally, would impinge on the principle that Member States shall not seek to influence the staff in the performance of their duties.

26 February 1973

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24. Legal aspects of the establishment of a trade union at the Geneva Office of the United Nations

Memorandum to the Under-Secretary-General for Administration and Management

1. You have asked for our views on the legal status of the recently established *Union syndicale du personnel des Nations Unies à Genève.*

2. A first question to be considered is that of the right of the staff to organize. Several references were made by representatives of the *Union syndicale du personnel des Nations Unies à Genève* to the Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organize adopted by the General Conference of the International Labour Organisation (ILO) in 1948.[74] This Convention is of course only applicable to those States that ratified it and not to any intergovernmental organizations they may belong to. If States feel obliged to bring the provisions or the principles of such treaties to bear on an international organization, they can do so by means of appropriate resolutions in the organization.

3. Leaving aside the question of the applicability of ILO Convention No. 87 to the United Nations, it should be noted that the right of persons to organize and in particular to participate in trade unions is also specified in articles 20 and 23 (4) of the Universal Declaration of Human Rights—an instrument that is, as far as relevant, applicable to the United Nations itself. Moreover, the right of the staff to organize itself has never been denied and it is indeed provided for in Staff regulation 8.1 of the Staff Regulations and in rule 108.1 of the Staff Rules. The Administrative Tribunal has specifically held that the creation of the Staff Association was in recognition of and satisfied the right to organize specified in the Universal Declaration.[75]

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[74] United Nations, *Treaty Series,* vol. 68, p. 17.

[75] Paragraphs 11 to 13 of the Judgement in question (No. 15, Robinson *v.* the Secretary-General of the United Nations), as reproduced in *Judgements of the United Nations Administrative Tribunal,* Numbers 1 to 70, 1950-1957, pp. 43-53, read as follows:

"11. The right of association is recognized by articles 20 and 23(4) of the Universal Declaration of Human Rights, adopted by the third General Assembly. The Tribunal notes that the Secretary-General has taken steps to make known to the staff his clear views that the staff should be organized in an association with rights of representation to the Administration. The Tribunal is satisfied that the principle of the right of association to which the United Nations are solemnly pledged is admitted on all sides to be a principle which must prevail also inside the organization's own Secretariat.

"12. The Secretary-General took a number of steps to implement this right of association. Regulation 15 of the Provisional Staff Regulations prescribed that 'the Secretary-General shall provide machinery through which members of the staff may participate in the discussion of questions relating to appointments and promotions.'. Rule 135 of the Staff Rules provided that 'A Staff Committee, elected by staff members to represent their views, shall be consulted on general questions relating to staff administration and welfare . . .'. The Staff Association of the United Nations

4. The establishment and functioning of the Staff Association[76] does not necessarily exhaust the right of staff members to organize themselves or to form trade unions. Generally speaking, staff members may form or join any type of association not incompatible with their status as international civil servants or with the law of the host State, to the extent that that law applies within the headquarters or office concerned. However, as indicated below, this right does not impose an obligation on the Organization to negotiate with such a union or association outside the established machinery, or to grant it any special facilities.

5. The right to organize trade unions is not synonymous with the right to insist that the employer bargain collectively. This is indicated, for instance, by the fact that the ILO, a year after adopting Convention No. 87 referred to above, adopted the Convention (No. 98) concerning the Application of the Principles of the Right to Organize and to Bargain Collectively.[77] Incidentally, that Convention which was also referred to by the representatives of the *Union syndicale,* specifically "does not deal with the position of public servants engaged in the administration of the State" (article 6), and therefore could in no event be applied, even by analogy, to international civil servants.

6. In the United Nations, the right of collective bargaining and the method by which it is to be exercised are defined in the Staff Regulations and Rules (primarily those cited in note 76 above). All staff members may participate in the election of the Staff Council, which in turn elects the Staff Committee, and these two organs then interact with the administration on the Joint Advisory Committee, which deals with general problems, and also in the selection of members to serve on joint bodies dealing with individual cases (such as the Appointment and Promotion Board and Committee, the Joint Disciplinary Committee and the Joint Appeals Board); in addition, the Regulations of the United Nations Joint Staff Pension Fund and Appendix D to the Staff Rules provide other methods by which separately elected staff representatives can participate in both general and particular decisions affecting certain types of staff benefits. In this scheme, established by the General Assembly and elaborated by the Secretary-General, it is not foreseen that staff members or representatives should address themselves directly to the General Assembly or its organs.[78] Though the Secretary-General has from time to time forwarded communications from the Staff Council and from the Federation of International Civil Servants Associations (FICSA) to the Fifth Committee to illustrate the questions he has considered, any right of staff members to direct access (either in writing or in person) to such organs would have to be provided by the General Assembly, which has only specified the general rule that "representatives of the staff" have the right to be heard by the

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Secretariat was established, the rules of which provide in article 4 that 'all members of the staff of the United Nations are members of the Staff Association.'. This Staff Association elects a Staff Council which in turn elects a Staff Committee.

"13. It is clear, therefore, that the right of association is recognized for the staff of the United Nations . . .".

The ILO Administrative Tribunal did not avail itself of its one opportunity up to now to declare whether staff members of an international organization can legally join a trade union (Judgement No. 87 (Di Giuliomaria *v.* Food and Agriculture Organization of the United Nations), summarized in the *Juridical Yearbook,* 1965, p. 214).

[76]The representatives of the *Union syndicale* have argued that the Staff Association is not provided for in the Staff Regulations, and therefore should not be given any special status vis-à-vis other organizations of staff members. However, a Staff Council is provided for in regulation 8.1 of the Staff Regulations and in rules 108.1-108.2 of the Staff Rules, and a Staff Committee in rules 110.2 and 111.2 of the Staff Rules; all of which are organs of the Staff Association (in New York now called the Staff Union).

[77]United Nations, *Treaty Series,* vol. 96. p. 257.

[78]The International Civil Service Advisory Board (ICSAB) has specifically reported that it considers it inadmissible for staff representatives to participate in actual debates of legislative organs for the purpose of upholding views in opposition to those of the Executive Head (Report on Standards of Conduct of the International Civil Service, 1954 (COORD/CIVIL SERVICE/5, 1965 edition), para. 30).

Advisory Committee on Administrative and Budgetary Questions;[79] in context it is clear that these representatives must be those selected in accordance with the provisions specified by the Assembly itself in the Staff Regulations, which call for the election of a Staff Council.

7. Thus the procedures for collective bargaining in the United Nations necessarily define the means by which any staff member or group or union of staff members can participate in this process: by winning elections to the Staff Council and the Staff Pension Committee, or by influencing the persons who have done so. However, no union that circumvents this democratic process by appealing to some fraction of the electorate has the right to insist that the administration deal with it directly rather than through the established organs of consultation. The United Nations, which must provide uniform or comparable conditions of employment in many offices throughout the world in order to maintain the civil service nature of the Secretariat and to assure the transferability of staff, would be particularly handicapped if it had to negotiate with persons who did not have a collective mandate from the entire staff.

8. The right to organize and to bargain collectively does not automatically imply a right to use facilities of the employer, except perhaps to the minimal extent necessary for non-obtrusive contacts with other staff members.[80] Again no analogy can be drawn with the facilities granted to the Staff Association and to its organs, since these are by definition representing the majority of the staff and are responsible for carrying out particular functions defined in the Staff Regulations and Rules.

ANNEX

TRADE/LABOUR UNIONS IN INTERNATIONAL ORGANIZATIONS

1. *The United Nations system*

In the United Nations, FAO appears to be the only organization in which the question of representation of staff members by trade unions has ever been seriously raised. This occurred first in 1963-64 (see Judgement No. 87 of the Administrative Tribunal of ILO in the case Di Giuliomaria *v.* FAO), and the issue was raised again in 1970/71, when the structure of staff representation through the regular Staff Association had completely broken down and some of the local General Service staff (who constitute a separate constituency in the FAO Staff Council) considered affiliation with a local trade union. One immediately apparent obstacle was the affiliation of all these unions with national political parties in Italy, whose involvement in the internal operations of an international organization would at best be awkward.

2. *The European Co-ordinated Organizations (Council of Europe, ELDO, ESRO, NATO, OEDC, WEU)*

In both OEDC and the Council of Europe (and possible in some of the other "co-ordinated organizations") a number of staff members belong to trade unions, such as the "Council of Europe Staff Trade Union (P.S.I.-I.C.F.T.U.)", which is affiliated with the International Confederation of Free Trade Unions. However, these unions appear to function mostly through the statutory staff associations, i.e.,

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[79] General Assembly resolution 14 A(I). Similar rights have been granted in other international organizations: thus in ILO, the Financial and Administration Committee of the Governing Body hears representatives of the Staff Union on matters directly affecting the staff, without, however, permitting them to participate in the debate or to include matters in the agenda. Similarly, the Finance Committee of the FAO Council (a body somewhat corresponding to the Advisory Committee on Administrative and Budgetary Questions hears representatives of the Staff Council, though occasionally the FAO Council itself has permitted representatives to address it. Only in the European Communities have the unions won more general rights of direct consultation with organs of both the Commission and the Council of Ministers (see paragraph 3 of the Annex to this memorandum).

[80] This appears, for instance, from the fact that the ILO in 1971 formulated a separate Convention on this subject, the Convention (No. 135) concerning the Protection and Facilities Afforded to Workers' Representatives in the Undertaking, designed to supplement Convention No. 98 and thus presumably subject to the same limitations (described in para. 5 above). While the representatives of the *Union syndicale* did not cite this Convention, they did refer to ILO Recommendation No. 143, which was adopted in conjunction with it and has the same scope.

they attempt to accomplish their objectives by winning elective posts in these associations and then using that vantage to negotiate with the administration within the normal channels established within the respective staff regulations.

3. *European Communities*

The widest unionization within the staff of an international organization has occurred in the European Communities. By 1971 three unions and one professional association (which in effect differs from a union only in name) had attracted the active membership of some 10 to 40% (the actual figures are confidential, estimates vary—but a short strike in December 1970 received nearly 100% co-operation) of the then 5,000 employees of the Commission in Brussels—while these and other unions had also obtained members among the Commission's employees elsewhere as well as among the employees of other organs of the Communities (the Council of Ministers, the Parliament, the Court, etc.). Two of the unions are affiliated with the socialist International Federation of Unions of Public Officials (London) and through it with the International Confederation of Free Trade Unions; the other is affiliated with the International Christian Federation of Public Officials and through it with the World Confederation of Labour (formerly the International Federation of Christian Trade Unions); the European Civil Service Federation is unaffiliated. The right of Community officials to "be members of trade unions or staff associations of European officials" is now specifically provided for in Article 24a of the Staff Regulations of Officials of the European Communities.[81]

These unions in the European Communities function in part by winning posts in the statutory staff associations (which are provided for in the staff regulations). However, instead of utilizing these associations as the primary means of furthering their demands, they in effect caused the associations to restrict themselves largely to formal matters (administration of various social programmes), while the unions demanded to negotiate directly with the administration. They secured the right to negotiate directly with the Commission in July 1970, and after further pressures (including both a short strike and the withdrawal of staff representatives from all joint bodies, which were thus prevented from functioning) obtained the right of direct consultation with the Council of Ministers (which is ultimately responsible for conditions of employment throughout the Communities). Certain amendments to the Staff Regulations that were being considered in 1971 would have codified this right of consultation, but in the current Regulations, adopted on 5 March 1972, that right is still not specified.

28 June 1973

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25. Procedure for extending and modifying the International Coffee Agreement, 1968[82]—Under Article 69, paragraph 2 of the Agreement such extension and modification may be effected by way of a resolution of the International Coffee Council—Provisions which such a resolution ought to contain

Letter to the International Coffee Organization

In view of the fact that the International Coffee Agreement, 1968 will terminate, under Article 69, paragraph 1, on 30 September 1973, you ask for our opinion whether, under Article 69, paragraph 2 of the Agreement,[83] the International Coffee Council may simply adopt a resolution extending the Agreement and specifying the modifications in it, or whether on the

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[81] Reproduced in the Supplement to the *Official Journal of the European Communities*, Number C.12 of 24 March 1973.

[82] United Nations, *Treaty Series*, vol. 647, p. 3.

[83] Article 69, paragraph 2 reads as follows:

"The Council after 30 September 1972 may, by a vote of a majority of the Members having not less than a distributed two thirds majority of the total vote, either renegotiate the Agreement or extend it, with or without modification, for such period as the Council shall determine. Any Contracting Party, or any dependent territory which is either a Member or a party to a Member group, on behalf of which notification or acceptance of such a renegotiated or extended Agreement has not been made by the date on which such renegotiated or extended Agreement becomes effective, shall as of that date cease to participate in the Agreement."

other hand it should adopt a protocol to be sent to the Secretary-General of the United Nations for signature and acceptance by Contracting Parties.

It would always be possible for the Council to choose to extend and modify the Agreement by means of a protocol, or to replace it by a whole new Agreement (as was done in 1968). Article 69, paragraph 2, however, provides a simpler and more expeditious means of effecting the extension and modification, which does not necessarily involve a protocol. That paragraph provides that the Council after 30 September 1972 may, by a prescribed special vote, extend the Agreement, "with or without modification, for such period as the Council shall determine". Extension and modification under this provision result, not from the conclusion of any new treaty, but simply from the decision of the Council, taken by the required special vote. As we understand that the Council normally records its decisions in the form of resolutions, a resolution would be appropriate in this case.

Though the Council can extend and modify the Agreement by a resolution, the effect of that decision can be avoided by any Contracting Party or dependent territory which is a Member or party to a Member group; if it, by the date on which the extended Agreement becomes effective, has not made a notification of acceptance, it "shall as of that date cease to participate in the Agreement", and it loses its right to a share of the proceeds of liquidation of the Organization in accordance with Article 68, paragraph 2. Article 69, paragraph 2 speaks of "notification of acceptance of such a renegotiated or extended Agreement", and accordingly it is the whole Agreement which must be accepted, rather than a separate protocol.

It may be helpful to give you our views about certain provisions which an extending and modifying resolution ought to contain, and the procedures to be followed in connexion therewith.

The Council's resolution should request the Contracting Parties to the Agreement, on their own behalf and on behalf of any of their dependent territories which are Members or parties to Member group, to transmit to the Secretary-General of the United Nations, as depositary, their notifications of acceptance of the Agreement as extended and modified by the resolution, in such manner that the notifications reach the Secretary-General on or before 30 September 1973. It should also specify that such notifications should be signed by the Head of State or Government or Minister for Foreign Affairs, or made under full powers signed by one of the foregoing. These requirements will be explained below.

Article 69, paragraph 2 does not expressly state to whom the notifications are to be made, though Article 71 requires the Secretary-General of the United Nations to notify all Contracting Parties "of the date to which the Agreement is extended . . . under Article 69", and Article 70, paragraph 1, which deals with an analogous situation, expressly states that notifications of acceptance of amendments are to be sent to the Secretary-General. As stated in article 77, paragraph 1(*c*) of the Vienna Convention on the Law of Treaties,[84] however, a normal function of the depositary of a treaty is "receiving and keeping custody of any instruments, notifications and communications relating to" the treaty. This principle has been recognized in our practice; the amendment clause of the Constitution of the World Health Organization (article 73)[85] does not expressly state to whom acceptances of amendments adopted by the World Health Assembly are to be sent, but the Assembly has by resolution decided that they should be deposited with the Secretary-General, the depositary of the Constitution.[86]

The date of 30 September 1973 is the last date on which notifications of acceptance may be made. Article 69, paragraph 2 of the Agreement provides that they must be made "by the date on which [the] renegotiated or extended Agreement becomes effective", if cessation of participation is not to result. Since the Agreement remains in force until 30 September 1973, the extended and modified Agreement will, if the Council so decides, become effective only on 1 October 1973. The notifications must therefore be made by that date, i.e., on 30 September

[84] Reproduced in the *Juridical Yearbook*, 1969, p. 140.

[85] United Nations, *Treaty Series*, vol. 14, p. 185.

[86] *Ibid.*, vol. 377, p. 380.

1973 at the latest. That date happens to fall on a Sunday, but no account need be taken of that fact in the Council's resolution, since our Secretariat has a well-established practice for dealing with treaty time-limits that fall on weekends.

The notifications of acceptance are legal instruments that have the effect of preventing loss of participation in the Agreement. Under established international practice, such instruments should be signed by the Head of State, Head of Government or Minister for Foreign Affairs, or should be made pursuant to full powers signed by one of them, since such signatures bind the State in respect of treaties.

As soon as the Council adopts the extending and modifying resolution, we would be obliged if you would notify us by cable, so that we may be prepared in case any State is prompt in sending the Secretary-General a notification of acceptance. We would also be grateful if you would send us promptly a certified copy of the resolution in all the languages in which it was adopted, with a certification by the Executive Director that it was adopted in accordance with article 69, paragraph 2 of the Agreement. The Council's decision is subject to registration under article 2 of the Regulations to give effect to Article 102 of the Charter, as a "subsequent action which effects a change in . . . the terms, scope or application" of the Agreement. In accordance with the Regulations and our practice, we shall then proceed to register the decision *ex officio*. This is the procedure we have followed in the somewhat similar case of amendments of the WHO Constitution.[87]

21 March 1973

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26. Agreement establishing the Asian Rice Trade Fund[88]—Extension of the time limits for signature and acceptance provided for by the Agreement

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

1. We have received your memorandum of 15 August 1973, by which you transmitted a copy of a letter from the Special Assistant to the Executive Secretary of the Economic Commission for Asia and the Far East, requesting legal advice on the interpretation to be given to article 17 (i) of the above-mentioned Agreement. Also enclosed with your memorandum were a copy of an aide-mémoire accompanying the Special Assistant's letter, a copy of a letter dated 31 July 1973 from the Ambassador of the Republic of Viet-Nam in Bangkok, informing the Executive Secretary of ECAFE that his Government had decided to join the Asian Rice Trade Fund and had authorized him to sign the latter, as well as a copy of the Agreement itself.

2. In the aide-mémoire it is noted that while, under article 17 (i) of the Agreement, the last day for signature was 30 June 1973, ECAFE received shortly after that date informal indications that other countries—in addition to the Republic of Viet-Nam which subsequently sent the notification referred to above—were interested in participating in the Agreement. The aide-mémoire goes on to suggest various approaches that might be adopted in order to allow further participation in the Agreement, mainly through a liberal interpretation of article 17 (i).

[87] The International Coffee Council, by resolution No. 264 adopted at its Twenty-second session (12-14 April 1973), approved the extension of the Agreement—made subject to certain modifications—to 30 September 1975. Under the resolution, the Agreement as modified shall remain in force among those Contracting Parties that notified their acceptance to the Secretary-General by 30 September 1973, if on that date such Parties represent at least 20 exporting members holding a majority of the votes of the exporting members and at least 10 importing members holding a majority of the votes of the importing members. The necessary number of notifications of acceptance had been received by 30 September 1973 to enable the Agreement to be extended.

[88] Drawn up by the Intergovernmental meeting on the Establishment of an Asian Rice Trade Fund, convened by the United Nations Economic Commission for Asia and the Far East at Bangkok, Thailand, from 12 to 16 March 1973.

3. The provisions dealing with the conditions for participation therein are to be found in articles 1 (ii) and (iii) and articles 17 (i) and 18, which read as follows:

"*Article 1*

". . .

"(ii) The Rice Fund shall consist initially of those members, not being less than three, that shall have acceded to this Agreement as hereinafter provided."

"(iii) Other eligible developing countries as specified in clause (i) above may apply for membership of the Rice Fund and may become members on the unanimous decision of all of the existing members of the Rice Fund and by accession to this Agreement."

"*Article 17*

"(i) The original of this Agreement in a single copy in the English language shall remain open for signature by the fully accredited representatives of the parties to this Agreement at the United Nations Economic Commission for Asia and the Far East until 30 June 1973. Thereafter, the Agreement shall be transmitted to the Secretary-General of the United Nations."

"*Article 18*

"This Agreement shall be subject to acceptance by the signatory Governments in accordance with their respective constitutional procedures.

"Instruments of acceptance shall be deposited with the Secretary-General of the United Nations by 1 July 1974."

4. There is no doubt that, as noted in paragraph 2 of the aide-mémoire, the last date for signing the Agreement was indeed 30 June 1973; it would do violence to both the letter and the spirit of article 17 (i) if the second sentence of that article were taken as meaning that the Agreement may be signed after 30 June 1973 at some other location than Bangkok.

5. In the present circumstances, two methods could be envisioned in order to allow countries beyond the current four signatories to participate in the Agreement:

(a) *Accession under article 1 (iii):*

Under that provision an eligible developing country may become a member of the Rice Fund upon the unanimous decision of all of the existing members of the Fund and by "accession" to the Agreement. Although the Agreement does not contain specific clauses to that effect, accession under article 1 (iii), under the prevailing international practice, could be effected through the deposit of an instrument of accession with the Secretary-General, the instrument to take effect on the date of deposit or on the date when unanimous consent is reached, whichever is later. Article 1 (iii), however, obviously refers to a situation where the Agreement has already entered into force. Hence it follows that those States which did not sign the Agreement by 30 June 1973 cannot now apply for membership in the Rice Fund nor accede to the Agreement before the conditions of article 19 have been fulfilled, i.e. before the Agreement has entered into force as a result of the deposit of instruments of acceptance by at least three of the present four signatories.[89] Upon the unanimous decision of those three signatories, eligible States could then deposit their instrument of accession with the Secretary-General, thus becoming parties to the Agreement and members of the Rice Fund on the date of such deposit.

[89] Article 19 reads as follows:

"This Agreement shall enter into force when not less than three of the parties to this Agreement have deposited instruments of acceptance."

(b) *Extension of the time limit for signature provided for by article 17 (i):*

The four signatories, if they are unanimous, could also decide to extend the time-limit for signature of the Agreement beyond the date of 30 June 1973 initially provided for by article 17 (i). Since such an action could be construed simply as a suspension of the time-limit in article 17 (i), a record of concurrence by the four signatories would be sufficient for that purpose, without the text of the Agreement having to be modified. Eligible States could then sign the Agreement, and subsequently deposit their instrument of acceptance in accordance with article 18.

6. Therefore, if there seems to be some practical urgency about giving effect to the Republic of Viet-Nam's desire to sign, without waiting for entry into force, the following procedure could be used:

(*a*) The Executive Secretary of ECAFE should as soon as possible get in touch with the present four signatories of the Agreement and the eligible States interested in becoming parties thereto with a view to determining a new time-limit for signing the Agreement, and inform the Legal Counsel accordingly. That new time-limit should not be set beyond 1 July 1974 (the time-limit provided for by article 18 for acceptance of the Agreement following signature) unless it is also decided, in the same conditions, to extend the time-limit for acceptance.

(*b*) The original of the Agreement and all related documents (full powers for signature, authentic texts of declarations, texts of all decisions and documents issued in the course of negotiating the Agreement and all other pertinent information) should be forwarded as soon as possible to Headquarters so that the depositary functions may be taken over by the competent service in conformity with the usual depositary procedure.

(*c*) Upon receipt of the information and documents mentioned above, the Secretary-General would send a formal communication to the present signatories asking their consent for the extension of the time-limit for signature. He would also inform all eligible States of the new time-limit and the status of the Agreement.

(*d*) Further signatures would be received at Headquarters, in New York.[90]

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

1. INTERNATIONAL LABOUR ORGANISATION

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

(*a*) Memorandum concerning Convention No. 14 on Weekly Rest (Industry), 1921, prepared at the request of the Government of Luxembourg, 21 May 1973. Document GB.193/21/1; 193rd Session of the Governing Body, May-June 1974.

(*b*) Memorandum concerning Convention No. 32 on the Protection against Accidents (Dockers) (Revised), 1932, prepared at the request of the Belgian Government, 21 November 1973. Document GB.193/21/1; 193rd Session of the Governing Body, May-June 1974.

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[90] By a communication dated 5 March 1974, the Secretary-General informed eligible States that as of that date, the Agreement had been signed by Bangladesh, India, the Philippines and the Khmer Republic and that the signatories had decided on 29 November 1973 to extend to 31 May and 1 December 1974 respectively the time-limits provided for in articles 17 and 18 of the Agreement.

(*c*) Memorandum concerning Convention No. 81 on Labour Inspection, 1947, prepared at the request of the Government of Luxembourg, 10 August 1973. Document GB.193/21/1; 193rd Session of the Governing Body, May-June 1974.

(*d*) Memorandum on Convention No. 114 on Fishermen's Articles of Agreement, 1959, prepared at the request of the Government of the Netherlands, 5 December 1973. Document GB.193/21/1; 193rd Session of the Governing Body, May-June 1974.

(*e*) Memorandum concerning Convention No. 127 on Maximum Weight, 1967, prepared at the request of the Government of Nigeria, 16 April 1973. Document GB.193/21/1; 193rd Session of the Governing Body, May-June 1974.

(*f*) Memorandum concerning Convention No. 128 on Invalidity, Old-Age and Survivors' Benefits, 1967, prepared at the request of the Government of Finland, 1 June 1973. Document GB.193/21/1; 193rd Session of the Governing Body, May-June 1974.

(*g*) Memorandum concerning Convention No. 134 on the Prevention of Accidents (Seafarers), 1970, prepared at the request of the Government of Poland, 11 June 1973. Document GB.193/21/1; 193rd Session of the Governing Body, May-June 1974.

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2. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

(Legal opinions issued by the Office of the Legal Counsel)

(*a*) TAXABILITY OF A CITIZEN OF A MEMBER STATE UNDER AN OPAS CONTRACT

Memorandum to the Personnel Division

1. We wish to refer to your memorandum of 22 December 1972 concerning the question whether FAO-derived income received by a national of a member State under an OPAS contract is subject to income tax in that State.

2. Under the terms of Article VI, Section 19 (*b*) of the Convention on the Privileges and Immunities of the Specialized Agencies to which the State concerned has acceded "officials" of the specialized agencies enjoy the same exemptions from taxation in respect of the salaries and emoluments paid to them by the specialized agencies, and on the same conditions, as are enjoyed by officials of the United Nations.

3. To this effect, Section 18 of the same Article requires that each specialized agency will specify the categories of officials to which the provisions of Article VI (and Article VIII—*laissez-passer*) shall apply, and communicate them to the Governments of all States parties to the Convention in respect of that agency. In pursuance of the provision of Section 18, the FAO Conference, by resolution 71/59 (1959), confirming its previous practice in line with United Nations General Assembly resolution 76 (I) of 7 December 1946, approved the granting of the privileges and immunities referred to in Articles VI and VIII of the Convention to all officials of FAO "with the exception of those officials recruited locally who are paid on the basis of hourly rates".

4. It should be considered whether OPAS officers are to be regarded as "officials" for the purpose of the Convention. In this connexion it should be recalled that OPAS officers are not appointed by the United Nations or the specialized agencies, but by the Governments to which they are assigned. The officers enter the service of the requesting Government; perform functions as national civil servants or other comparable government employees and therefore are under the exclusive direction of the Government and do not report or receive instructions from the United Nations or specialized agencies. As regards salaries and emoluments, OPAS officers receive from the Government an amount equivalent to the salary of national officials of comparable rank, supplemented by an additional stipend and allowances to be paid by the

Organization concerned, so that they receive in total approximately the same remuneration as international civil servants of equivalent category.

5. The legal status of the OPAS officers is governed by the following documents:

(*a*) The OPAS Standard Agreement covering the relationship between the Organization and the Government.

(*b*) The Contract between the United Nations or specialized agency and the officer.

(*c*) The relationship contract or arrangements between the Government and the officer concerned.

Therefore, since OPAS officers are not appointed by the organizations in accordance with their Staff Regulations or Rules, they do not have the legal status of officials or staff members and therefore do not fall within the scope of Article VI, Section 19 (*b*) of the Convention on the Privileges and Immunities of the Specialized Agencies for tax exemption purposes. This conclusion is confirmed by the provisions of Article VII.3 of the contract between the Organizations and the OPAS officers in which it is specifically stated that they do not have the status of "an official or a staff member" of the organizations although any relevant matter for which no provision is made in the contract shall be settled according to the administrative practices of the organizations.

6. Since OPAS officers are not "officials" for the purposes of the Convention on the Privileges and Immunities of the Specialized Agencies, they do not enjoy the tax exemption granted under Article VI, Section 19 (*b*). However, the Standard Agreement on Operational Assistance between the United Nations and Specialized Agencies and the employer Governments states in Article IV, paragraph 5 (*b*) as follows:

> "The Government recognizes the officers shall:
>
> "(*a*) . . .
>
> "(*b*) be exempt from taxation on the stipends, emoluments and allowances paid to them by the Organizations."

Thus OPAS officers enjoy tax exemption which, however, is limited: (*a*) only to the part of their income received from the organizations; (*b*) only in respect of the employer Government for which the officers perform their duties. We are not aware of any other document, provision or agreement with the State concerned or other countries whereby OPAS officers enjoy income tax exemption in the country of their nationality.

7. Finally, it should be pointed out that Article II.3 of the relationship contract between the organizations and OPAS officers, provides:

> "The Organization shall reimburse any income taxes which may be levied by the country of the officer's nationality or normal residence on the salary and related emoluments received from the Government, and on the stipend and any of the allowances or emoluments paid by the Organization. This reimbursement shall be computed without regard to any income except that mentioned in the preceding sentence."

Thus OPAS officers are entitled to reimbursement of income tax levied by their countries of nationality or normal residence.

27 February 1973

(*b*) Reimbursement of income tax levied by a member State

Memorandum to the Assistant Director-General, Administration and Finance Department

1. We wish to refer to your memorandum of 13 August 1973. In your memorandum you raise the question whether staff members may claim from FAO the reimbursement of income tax that they have paid in the circumstances described below.

2. The attachment to your memorandum shows how the tax assessment of a staff member was calculated and in particular the effect that an FAO-derived income has on allowances provided for in the current taxation laws. To the best of my knowledge, the income tax authorities of the State concerned always calculate the entitlement to allowances of a person who is considered a non-resident for income tax purposes, taking into account that person's total income from all sources, irrespective of whether all such income is liable to income tax.

3. In accordance with this practice, where FAO staff members are concerned, no income tax is levied directly on their FAO-derived income, but their FAO-derived income is added to their income from all other sources for the purpose of calculating entitlement to allowances.

4. This practice results, presumably invariably, in a reduction of the allowances that would have been granted to a staff member on his private income (i.e. non-FAO-derived income) had such private income been his sole income. In other words, the staff member suffers a higher incidence of taxation on his private income as a consequence of having an FAO-derived income.

5. The question therefore arises whether a staff member may claim reimbursement of the income tax he has paid in an amount equivalent to the difference between the assessment which takes into account his FAO-derived income and the assessment that would have been made on his private income had he had no FAO-derived income. While entitlement to reimbursement of income tax is governed primarily by FAO's Staff Rules and Manual provisions, the question you have raised also affects the interpretation of the Convention on the Privileges and Immunities of the Specialized Agencies to which the State concerned is a party.

6. The relevant Staff Rules and Manual provisions are to be found in Manual Section 309 which was promulgated on 1 August 1972. The Staff Rule which is most relevant to the question under consideration is Staff Rule 302.3153 which reads as follows:

> "*Limitations of Reimbursement.* A staff member whose terms of employment entitle him to tax reimbursement is entitled to reimbursement of the difference between the minimum total income tax legally payable and actually paid for the period of his FAO service, and the amount that would have been payable if he had had no FAO income. The determination of the tax that would have been payable on non-FAO income takes into account all exemptions, deductions, and credits allowed by the laws and regulations of the jurisdiction concerned."[91]

The wording of this provision would clearly appear to mean that a staff member is entitled to claim that the Organization place him in exactly the same position in which he would have found himself had he had no FAO-derived income. Therefore, if a staff member is deprived of all or part of the allowances that he would have received with respect to his private income, it would follow that he could invoke Staff Rule 302.3153 and claim reimbursement of the difference.

7. The above conclusion is indeed borne out by the circumstances preceding the enactment of Staff Rule 302.3153 in its present form. You may recall that towards the end of 1969 the Consultative Committee on Administrative Questions (CCAQ) considered the question of reimbursement of income taxes, and in particular the United Nations' proposal to adopt a new practice regarding the reimbursement of United States income tax. Basically, the new United Nations practice was designed to eliminate all indirect effects that United Nations-derived remuneration might have on the taxation of private income. Thus the United Nations

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[91] The corresponding provision which had previously been in force was Staff Rule 302.31591, which reads as follows:

> "A staff member whose terms of employment entitle him to tax reimbursement, and who is employed by the Organization (i) during an entire taxable year, or (ii) during part of a taxable year, and who has no non-FAO earned income in such years, shall be reimbursed by FAO the minimum tax payable on his FAO-derived income only. This is computed without regard to any unearned income he may have, but takes into account all exemptions and deductions allowed by the relevant laws and regulations of the country concerned."

would reimburse the difference between the total tax paid with United Nations-derived income included, and the tax payable if United Nations-derived income had been excluded. Previously the United Nations reimbursed the tax which would have been due if the United Nations-derived income had been the sole income.

8. The whole question was the subject of a paper submitted by the United Nations (Doc. CCAQ/SEC/92(FB) of 11 December 1969) and a report of a Special Working Group of CCAQ (Doc. CCAQ/SEC/97 (FB) of 15 January 1970). The United Nations went ahead with the application of its proposal despite the reservations of a number of Specialized Agencies.

9. In May 1970, the FAO Finance Committee endorsed the new United Nations practice and the Director-General issued DGB 70/24 on 24 June 1970, which in substance relates exclusively to the reimbursement of United States income tax. In your memorandum of 13 August 1973 you refer to the Legal Counsel's memorandum of 16 March 1971. In this memorandum, which was primarily devoted to a specific form of allowance provided for under United States income tax legislation and to the interpretation of DGB 70/24, two main conclusions were reached:

(i) that since FAO had adopted the new reimbursement practice introduced by the United Nations, a staff member's liability to income tax on his private income should be restricted to the tax that he would have paid had he had no FAO-derived income;

and

(ii) that, with respect to individual allowances or other tax benefits, it would be impracticable for the Organization to take into account any social purposes that might underlie specific legislative provisions as a criterion for deciding whether or not to reimburse taxes paid.

10. Probably on account of the greater financial implications, both for the agencies and for individual staff members, arising from the reimbursement of United States income tax, comparatively little attention appears to have been paid to the effects of the income tax legislation of other countries on emoluments received from organizations in the United Nations family, DGB 70/24 related only to the reimbursement of United States income tax. However, it was pointed out in document CCAQ/SEC/97(FB) that if the procedure proposed by the United Nations were adopted, staff members who were British nationals and whose international salaries were taken into account when they submitted claims for abatement of tax on their other income, would also expect to be reimbursed under the same conditions as staff.

11. It would seem axiomatic that all staff members entitled to the reimbursement of income tax should receive the same treatment irrespective of where they were taxed. It therefore follows that the practice applicable to staff members paying United States income tax, as set forth in DGB 70/24, should apply equally to those paying income tax in other countries.

12. Thus, the circumstances leading up to the introduction of Staff Rule 302.3153 (quoted in paragraph 6 above) in August 1972 leave little room for doubt that this Staff Rule was intended to give general application to the practice set forth in DGB 70/24 with respect to the reimbursement of United States income tax. That is to say staff members should be placed in exactly the same position as they would have been in had they had no FAO-derived income whatever.

13. It should be noted, however, that Staff Rule 302.3153 provides that the Organization only reimburses the "minimum legally-due tax". The question therefore arises whether the tax authorities of the member State concerned are entitled, under the Convention on the Privileges and Immunities of the Specialized Agencies to which that State is a party, to take FAO-derived income into account, in any manner whatsoever, when assessing income tax due by FAO staff members. If such a practice were contrary to the provisions of the Convention, staff members could be required to contest the current practice and seek exemption before claiming reimbursement.

14. In the above connexion there seems little doubt that it would be contrary to the Convention for a party to apply a higher basic rate of taxation to private income as a result of taking into account the FAO-derived income—see the legal opinion of the United Nations Legal Office annexed to document CCAQ/SEC/92(FB). The position is somewhat less clear in cases where the FAO-derived income is only taken into account in connexion with entitlement to specific allowances. Indeed a party to the Convention might contend that allowances were granted in order to afford relief from taxation to low-income groups or to cover circumstances which do not prevail where a person receives a substantial income from an international agency. However, as indicated in paragraph 14 of the Legal Counsel's memorandum of 16 March 1971, this contention is not persuasive.

15. The question of the consistency of the practice of the member State concerned with the Convention has been raised on a number of occasions in the past. It also transpires that that practice has been consistently applied for a great many years and that there seems little chance of obtaining its reversal. Under the circumstances, failure to contest a ruling by the tax authorities concerned to the effect that all sources of income including FAO-derived income should be taken into account when assessing allowances can scarcely be considered a reason for withholding the reimbursement of the taxes so paid. However, before charging any such reimbursement to the Tax Equalization Fund it might be opportune to inform the authorities concerned of the Organization's proposed action.

16. In the light of the considerations set out above, it is concluded that staff members are entitled, under Staff Rule 302.3153, to claim the reimbursement of income tax in an amount which would place them in the position that they would have been in had their FAO-derived income not been taken into account when determining their entitlement to allowances.[92]

19 September 1973

(*c*) Applicability of FAO personnel practices to the World Food Programme

Memorandum to the Director, Personnel Division

1. We wish to refer to your memorandum of 13 March 1973 requesting an opinion on whether FAO personnel practices are applicable to the UN/FAO World Food Programme (WFP).

2. WFP General Regulation 14(i) provides as follows:

> "The Executive Director[93] will administer the staff of the Programme in accordance with FAO Staff Regulations and Rules and such special rules as may be approved by the Secretary-General and the Director-General, after consultation with the Executive Director."

Since no "special rules" have been approved by the Secretary-General and the Director-General, the FAO Staff Regulations and Staff Rules, and by implication any subsidiary legislation promulgated by the Director-General to supplement these provisions, are applicable to staff members assigned to WFP.

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[92] As a result of the legal opinion appearing above, the Assistant Director-General, Administration and Finance Department of FAO, issued for distribution to all staff an Administrative Circular the last paragraph of which reads as follows:

> "Staff members whose income tax assessment on their private income is higher than it would have been had their FAO-derived income not been taken into consideration in the calculation, are thus entitled to claim reimbursement of the difference in accordance with Staff Rule 302.3153."

[93] Official appointed by the Secretary-General of the United Nations and the Director-General of FAO to head the joint United Nations/FAO administrative unit operating the World Food Programme, see WFP General Regulation 14(*a*) and (*b*).

3. Pursuant to General Regulation 14(i), the Executive Director is only expressly required to administer the staff of WFP in accordance with the FAO Staff Regulations and Staff Rules. There is no provision in the General Regulations of WFP, or elsewhere, which specifies that FAO personnel practices shall be applied in respect to staff administered by the Executive Director.

4. The question therefore arises whether a distinction may be drawn between provisions contained in the Staff Regulations and the Staff Rules on the one hand, and personnel practices on the other hand, and if so, whether General Regulation 14(i) should be interpreted as including the application of such practices.

5. Since the Staff Regulations and Staff Rules, and the Manual Sections which supplement them, are applicable to staff members assigned to WFP in virtue of General Regulation 14(i) and form part of their terms and conditions of appointment, such staff members have a legal right to the application of these provisions.

6. Although personnel practices to some extent reflect the manner in which the provisions contained in the Staff Regulations and Staff Rules are to be applied, unlike these provisions, they do not give rise to legal obligations for FAO towards the staff members concerned. In particular, such practices—which may relate to the type or duration of appointments that are normally granted in given circumstances, recruitment policies and many other topics—may be applied in individual cases or to given units or categories of staff as a matter of discretion.

7. Consequently, from the legal point of view, there is an essential difference between the provisions laid down in the Staff Regulations and Staff Rules and mere practices introduced by the Director-General to give effect to personnel policies that take into account the manifold considerations of an administrative, budgetary or other nature which arise from time to time.

8. A distinction does therefore exist between the provisions of the Staff Regulations and Staff Rules, and personnel practices; consequently, in the light of the wording of General Regulation 14(i) FAO's personnel practices are not automatically applicable to WFP.

9. In considering the question whether General Regulation 14(i) should nevertheless be interpreted as including personnel practices, there are certain factors which should be borne in mind. First, WFP is a joint FAO/United Nations Programme with an inter-governmental committee which under General Regulation 9 provides, *inter alia,* general guidance on the administration of the Programme. Under General Regulation 14(i) it is the Executive Director who is vested with responsibility for administering the staff of WFP. The Director-General, in administering the staff of FAO, adopts the personnel practices that he deems appropriate. In the absence of any clear indication to the contrary it would appear normal for the Executive Director to have a similar authority to devise personnel practices suited to the particular exigencies of WFP.

10. Secondly, the fact that under General Regulation 14(i) "special rules" approved by the Secretary-General and the Director-General in consultation with the Executive Director may be promulgated, shows that even the terms and conditions of appointment of WFP staff may differ from those of FAO. This lends support to the view that it was not intended that FAO's personnel practices should automatically apply to WFP.

11. As the assignment of staff to and from WFP to FAO programmes is not infrequent there are doubtless a number of policy and practical reasons which militate in favour of harmonizing and co-ordinating the practices applied in FAO and WFP. However, the Executive Director of WFP is not legally bound to apply the FAO personnel practices in the administration of WFP.

22 May 1973

(*d*) GRANTS FROM FAO

Memorandum to the Director, Policy Analysis Division

1. We wish to refer to your memorandum of 18 May 1973 in which you enquire whether FAO is legally in a position to make a grant. You raised this question in connection with a letter which the Director-General has received from the President of the International Association of . . .[94] asking whether FAO could make a grant of $10,000 to finance the travel of some agricultural economists from Asia and Africa to attend a conference to be held in São Paulo, Brazil, in August this year.

2. While grants are not specifically provided for in the Basic Texts of FAO, there is no provision in the Constitution, the General Rules of the Organization or the Financial Regulations which would prohibit FAO from making a grant, so long as the purpose of the grant is within the scope of the Organization's Programme of Work and Budget.

3. Therefore, in the present case there would be no legal objection to FAO making a grant to the International Association of . . .[94] provided that there is a chapter in the current budget to which such a grant may properly be charged.

4. If FAO were to provide a grant it would seem desirable to draw up an agreement or arrange for an exchange of letters in which provision could be made for consultations between FAO and the Association on the themes and topics to be dealt with at the proposed conference.

13 June 1973

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3. UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION

(Legal opinion issued by the Office of International Standards and Legal Affairs)

QUESTION OF UNESCO'S EXEMPTION FROM THE VALUE-ADDED TAX IN FRANCE[95]

1. The value-added tax has always been regarded as an indirect tax, and exemption from it has always been considered within the context of article 16 of the Agreement of 2 July 1954 between the Government of the French Republic and the United Nations Educational, Scientific and Cultural Organization regarding the headquarters of UNESCO and the Privileges and Immunities of the Organization on French Territory,[96] known as the Headquarters Agreement. The question of its being a direct tax has never been raised, and that point has therefore not been discussed.

2. The system of exemption defined in article 16 of the Headquarters Agreement ("any such taxes levied in respect of purchases made or activities undertaken officially by the Organization may be reimbursed by lump sums to be agreed . . .") was not applied for very long. The French tax authorities had granted the Organization exemption at the source (agreement by an exchange of letters dated 1949); tax exemption was granted to suppliers and contractors dealing with the Organization upon presentation, in respect of each order, of a certified statement from the Organization referring to article 16 of the Headquarters Agreement and stating the nature, amount and date of the tax-free deliveries and services in question. This system is the most favourable ever accorded to the Organization.

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[94] Full name of Association seeking a grant omitted.

[95] Memorandum prepared in response to a request for information from the Legal Counsel of the United Nations.

[96] United Nations Legislative Series, *Legislative texts and treaty provisions concerning the legal status, privileges and immunities of international organizations*, vol. II (ST/LEG/SER.B/11), p. 240.

3. In 1967 the French authorities wished to modify this system of exemption, it being understood, however, that there could be no question of a reconsideration of the exemption from taxes on turnover hitherto enjoyed by the Organization. Following a decision by the Executive Board of UNESCO, which had been seized of the question by the Director-General, and an exchange of letters,[97] a new system came into force in July 1967 which provides that "the Organization shall be reimbursed for all indirect taxes in respect of activities undertaken officially and which form part of the cost of goods sold and services rendered to it and activities involving movable or immovable property, including building activities". For that purpose, the Organization makes a request each month to the Ministry of Foreign Affairs (Department of Protocol) for reimbursement of taxes, enclosing the invoices of the suppliers to whom the amounts disbursed the previous month relate and a statement of those invoices. The Ministry for Economic and Financial Affairs grants the Organization an advance to cover those taxes on a monthly basis. The advance is subject to equalization each month. It may thus be said that the system currently in force is that of exemption from tax by reimbursement of the amounts levied, this reimbursement being, in the main, effected before the expenditures have been made.

4. Neither article 16 of the Headquarters Agreement nor the exchanges of letters of 1949 and July 1967 contain the notion of a "major purchase". This legal concept is unknown in relations between UNESCO and France. . . . Exemption has always been granted regardless of the price of the goods, services or activities.

. . .

6. Goods imported by the Organization for its official use are exempt from the value-added tax. In the case of goods imported by staff members, a distinction should be drawn.

Whatever their grade, officials are, provided they formerly resided abroad, granted the right to import free of duty their furniture and personal effects at the time of their installation in France.

Non-French officials, whatever their grade, may temporarily import motor cars free of duty, under customs certificates without deposits.

Distributions of tobacco, imported or purchased free of duty, are made each month to all staff members.

Alcoholic beverages imported free of duty by virtue of the privileges of the Director-General are distributed regularly to officials having diplomatic status. Alcoholic beverages (whisky) are also distributed by way of exception and in small quantities to officials not having diplomatic status.

Finally, staff members of diplomatic grade and of non-French nationality may import free of duty (temporarily) certain personal and household effects in limited quantity.

. . .

8. Permanent delegates of member States accredited to the Organization enjoy such privileges, immunities and facilities as are accorded to diplomats of equal rank belonging to foreign diplomatic missions accredited to the French Government (Headquarters Agreement, art. 18, para. 1), and, if they are accredited to the Organization with the rank of ambassador or minister plenipotentiary, they are accorded the same status as heads of diplomatic missions (art. 18, para. 3). In UNESCO's reply to the questionnaire on the status, privileges and immunities of representatives of member States accredited to the specialized agencies, which the Assistant Director-General for International Standards and Legal Affairs sent you with a covering letter dated 2 March 1965, for the purposes of the International Law Commission,[98] he explained to you the fiscal status accorded to such permanent delegates in France. . . .

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[97] *Juridical Yearbook*, 1967, p. 89.

[98] This letter contains, in particular, the following passage:

"The fiscal régime applying to permanent delegations is in principle the same as that applying to embassies.

9. The information obtained seems to indicate that diplomatic missions in France are not accorded more extensive exemption from the value-added tax than the Organization. Nor does the exemption from this tax accorded to heads of diplomatic missions and other officials of such missions appear, from the information obtained, to be more extensive than that accorded to senior officials of the Organization (Headquarters Agreement, art. 19, paras. 1 and 2).

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4. UNIVERSAL POSTAL UNION

(Opinion given by the International Bureau)

CURRENCY OF PAYMENT FOR INTERNATIONAL ACCOUNTS

(Universal Postal Convention, article 10 and Detailed Regulations, article 103)

By virtue of article 11, paragraph 2, of the General Regulations of the Union, the International Bureau was called on to give its opinion on the currency to be used for the liquidation of international accounts according to article 103, paragraphs 4 and 5, of the Detailed Regulations of the Convention.[99]

If reference is made to the correspondence submitted to the International Bureau, the question may be summarized in the following terms:

To take into account the current monetary position and in application of article 103, sections 4 and 5, of the Detailed Regulations, a creditor administration A asked all administrations which normally settled all their postal debts in U.S. dollars to use in future the currency of country A, converting the debt expressed in gold francs at the official rate fixed by the monetary authorities of that country and approved by the International Monetary Fund.

However, administration B maintains that by using the U.S. dollar it liquidates its debts in gold-based currency and that therefore the creditor can nominate the currency for payment only if there are several currencies in existence which meet the definition of gold-based currency given in article 103, section 4, of the Detailed Regulations of the Convention. As the currency of the creditor country is not a gold-based currency within the meaning of this paragraph, the request of administration A appears inadmissible to it. Moreover, as the U.S. dollar has a gold equivalent recognized by the International Monetary Fund, this currency also

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"Delegations pay only taxes for services rendered (road-sweeping, sewerage, collection of household refuse) and the 'tax on real property', if the permanent delegate is the owner of immovable property.

"Permanent delegates are exempt from the 'tax on movable property' (a tax levied on residents of France in respect of rented or occupied accommodation) in respect of their principal residence but not in respect of their secondary residence."

[99] Paragraphs 4 and 5 of article 103 of the Detailed Regulations read as follows:

"4. The transfer of funds referred to in paragraph 3 shall be made:

"(*a*) in principle in a gold-based currency, that is to say the currency of a country where the Central Issuing Bank or other official issuing authority buys and sells gold against the national currency at fixed rates determined by law and under an agreement with the Government. If the currencies of several countries satisfy these conditions, the creditor country shall designate the currency which suits it;

"(*b*) if the creditor agrees, in its own or any other currency.

"5. When the currency of payment does not satisfy the definition of a gold-based currency, consideration shall be given as to whether it can be related to gold either direct (special agreement between the countries concerned—equivalent fixed by the International Monetary Fund—internal law—agreement between the Government and an official issuing authority) or through the intermediary of a gold-based currency with which it is linked by a fixed relationship. Conversion shall be carried out in accordance with the gold equivalent determined in these circumstances and accepted by both parties.".

meets section 5 of article 103 of the Detailed Regulations. On principle, administration B liquidates its debts in U.S. dollars.

An examination of the two currencies' position in relation to gold shows that the central bank of country A is dispensed from converting banknotes into gold. Consequently the currency of that country does not meet the definition of a gold-based currency within the meaning of our Acts. However, the monetary authorities of that country have fixed a parity which is always recognized by the International Monetary Fund. Consequently its currency can thus be directly related to gold through the intermediary of this gold equivalent within the meaning of section 5 of article 103 of the Detailed Regulations of the Convention.

Until 15 August 1971 the Federal Reserve Bank of the United States of America bought and sold gold at the fixed price of 35 U.S. dollars per fine ounce. However, such transactions were accepted only on condition that they were made on behalf of governments or central banks of countries with which the United States of America maintained diplomatic relations and which used gold to back their currency reserves or for international settlements.

Since 15 August 1971 this external convertibility of the dollar into gold has been suspended and the U.S. dollar no longer meets the requirements of article 103, section 4 (*a*), of the Detailed Regulations. Under an agreement which several countries made at Washington on 18 December 1971 concerning the general realignment of currency parities (Smithsonian Institute Agreement), the U.S. dollar was devalued by 7.89 per cent. The gold definition of the dollar was thus changed from 0.888671 grammes of fine gold (35 U.S. dollars per fine ounce of gold) to 0.818513 grammes of fine gold (38 U.S. dollars per fine ounce of gold).

This new parity became official only by decision of the American Congress on 9 May 1972, but already from 18 December 1971 certain countries liquidated their international commercial transactions on the basis of the new rate, which the International Monetary Fund also applied in its publications from the same date.

On 12 February 1973, the International Monetary Fund was informed that the President of the United States had asked Congress to bring the parity of the dollar from 0.921053 SDR units to 0.828948 SDR units, equivalent to 42.2222 U.S. dollars per fine ounce of gold or to 2.5374 gold francs. Since then the International Monetary Fund has been applying this new rate, which was ratified by the United States monetary authorities only in October 1973.

In its reply the International Bureau gave the following opinion:

Under article 10 of the Universal Postal Convention, international accounts arising from postal traffic may be effected in accordance with the current international obligations of the countries concerned, and in this case the provisions of the Detailed Regulations have only a supplementary character. Moreover, section 2 of article 103 of the Detailed Regulations offers still further procedures which can be used for liquidating postal accounts.

However the two administrations concerned cite only sections 4 and 5 of article 103 of the Detailed Regulations of the Convention. This being so, it can be assumed that these administrations wish to pay their debts within the framework of these provisions only.

The first question is therefore which of the two parties, the creditor or the debtor, can choose the currency for payment.

Where there is but one gold-based currency, the reply is simple. The creditor must accept payment in gold-based currency. At the present time when no currency meets the definition of article 103, section 4 (*a*), of the Detailed Regulations of the Convention, this case has become purely theoretical.

It is therefore necessary to choose another currency conforming to subparagraph (*b*) of that paragraph. This provision makes no distinction between the currency of the creditor or any other currency when requiring the consent of the creditor. In fact article 103 is conceived from the point of view of the debtor who must liquidate the debt and of the creditor who demands payment due. The debtor may propose the currency of the creditor but the latter is not obliged to accept it.

As consent is necessary, the initiative can also come from the creditor. The latter does appear to have a certain advantage. As his consent is required, it is possible for him to impose his choice by a simple process of exclusion. However it should be noted that in practice it is advisable not to interpret this possibility too literally.

It is possible that the currency proposed for the liquidation does not suit the other party if this currency is neither negotiated nor quoted on its financial markets. The debtor can thus have difficulties in procuring the currency concerned whereas the creditor can have difficulties in converting the instrument of payment into cash. Moreover it is possible that one of the parties concerned is not sufficiently informed of changes in the gold equivalent of the money in question and lacks reference-points to compare the gold equivalents of other currencies which could be more favourable to it without however putting the other party at a disadvantage. In practice, therefore, endeavours should be made to reach agreement between the two parties as regards the currency for payment.

The second problem concerns the conversion rate to be applied. In the present monetary situation, only currencies which can be related directly to gold in accordance with section 5 of article 103 of the Detailed Regulations are still suitable as a basis for liquidating postal accounts. In the case under discussion, neither of the two parties proposes to use such a currency.

Under the Detailed Regulations of the Convention it is sufficient for the conversion rate chosen to be based on a gold equivalent based on a special agreement between the countries concerned, on the equivalent fixed by the International Monetary Fund, an internal law or an agreement between the Government and an official issuing authority. The case of the U.S. dollar proves that at least for a certain time there can be considerable divergence between the different equivalents so determined. It is therefore necessary that an administration should propose not only the currency for payment but also the conversion rate which it wishes to apply as well as its legal basis so as to enable regular verification by both sides.

In the present case the creditor administration can thus propose that its debtor should convert the gold debts into currency of the creditor country at the official parity of that currency. If, on the other hand, the debtor administration prefers to retain the U.S. dollar as currency for payment, as this currency suits it best, it must take account of the fact that the U.S. dollar is not a gold-based currency but a currency which can be related to gold. Consequently this administration should state the conversion rate which it wishes to apply and the legal source of this rate, which must also be recognized by the creditor administration. The latter could thus give better consideration to the position of the debtor administration in order to reach definite agreement as to the currency to be used in reciprocal arrangements.

Furthermore, attention is drawn to the advantage which our rules offer to the debtor which liquidates its accounts in the currency of the creditor country. By virtue of section 9 of article 103 of the Detailed Regulations of the Convention, the risks caused by changes in the equivalents which occur between the dispatch of the instrument of payment and its encashment are in this case entirely borne by the creditor administration. If another currency which can be related to gold is used, this risk is shared.

Finally, as it is necessary for the two administrations concerned to reach agreement, and in view of the scope of article 10 of the Convention, it is suggested that the administrations concerned should seek an equitable solution taking into account as much as possible the present practice of their countries as regards reciprocal international obligations.
