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1974

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

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

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CONTENTS (*continued*)

Chapter VI

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

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

1. Comments on the question of the responsibility of States with regard to the reparation for injuries incurred by agents of international organizations, in particular the United Nations

Note prepared in reply to an enquiry by the Permanent Representative of a Member State

Some basic principles governing this subject have been set out by the International Court of Justice in its advisory opinion of 11 April 1949 (Reparation for Injuries Suffered in the Service of the United Nations, *ICJ Reports 1949*, p. 174). The Court held unanimously that, in the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State (including a State which is not a member), the United Nations as an Organization has the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused to the United Nations. By eleven votes against four, the Court also held that in the above-mentioned circumstances the United Nations had the capacity to bring an international claim with a view to obtaining the reparation due in respect of the damage caused to the victim or to persons entitled through him.

The Court understood the word "agent" as "any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the Organization with carrying out, or helping to carry out, one of its functions—in short, any person through whom it acts" (*ICJ Reports 1949*, p. 177).

The Court also considered the question of how action by the United Nations based on the Organization's right of functional protection is to be reconciled with such rights (as the right of diplomatic protection) as may be possessed by the State of which the victim is a national. It concluded by ten votes against five that when the United Nations as an Organization is bringing a claim for reparation of damage caused to its agent, it can only do so by basing its claim upon a breach of obligations due to itself, and that respect for this rule will usually prevent a conflict between the action of the United Nations and such rights as the agent's national State may possess, and thus bring about a reconciliation between their claims. This reconciliation must depend upon considerations applicable to each particular case, and upon agreements to be made between the Organization and individual States, either generally or in each case.

In a report on reparation for injuries incurred in the service of the United Nations, of 23 August 1949, presented at the fourth session of the General Assembly,[1] the Secretary-General

[1] *Official Records of the Fourth Session of the General Assembly, Sixth Committee*, Annex to the Summary Records of Meetings, agenda item 51, document A/955, para. 15.

proposed "that the General Assembly should accept the advisory opinion of the Court as an authoritative expression of international law on the questions considered". The Secretary-General also suggested that the United Nations should proceed to present claims for the deaths or injury of its agents in cases in which the responsibility of a State might appear to be involved, and at the same time he proposed a procedure to be followed for the settlement of these claims. As chief administrative officer of the Organization, the Secretary-General would:

(*a*) determine which of the cases appear likely to involve the responsibility of a State;

(*b*) consult with the Government of the State of which the victim was a national in order to determine whether that Government had any objection to the presentation of a claim or desired to join in the submission;

(*c*) present, in each such case, an appropriate request to the State involved for the initiation of negotiations to determine the facts, and the amount of reparations, if any, involved.

In the event of differences of opinion between the Secretary-General and the State concerned which could not be settled by negotiation, it would be proposed that the differences be submitted to arbitration. The arbitral tribunal would be composed of one arbitrator appointed by the Secretary-General, one appointed by the State involved, and a third to be appointed by mutual agreement of the two arbitrators, or, failing such agreement, by the President of the International Court of Justice.[2]

By "settlement" of a claim the Secretary-General understood reparations "reasonably adequate to compensate the Organization and the victim or the persons entitled through him" and he asked the General Assembly to allow him discretion with respect to the elements of damage which should be included in any claim and the amount of reparation to be requested, or eventually accepted. The Secretary-General would not advance any claim for exemplary damages.

In resolution 365 (IV) of 1 December 1949, the General Assembly authorized the Secretary-General to act in accordance with the procedure outlined in his proposals. In pursuance of this resolution the Secretary-General formally presented a number of international claims in respect of death or injury of United Nations personnel.

At its seventh session, the General Assembly recommended once more, by resolution 690 (VII) of 21 December 1952, that international claims for reparation presented to governments in connexion with the death of agents of the United Nations be settled by the procedures envisaged in resolution 365 (IV).[3]

With regard to the question of the determination of the responsibility of a State in a case involving the death of an agent of an international organization, it may be noted that such cases show a pattern quite similar to situations of classical State responsibility and traditional principles of State responsibility can be applied.

There are, however, provisions of international law which give the duties of a State a special quality when a particular organization such as the United Nations is concerned. Thus, under the Charter, Members have the obligation to render every assistance to the United Nations in the performance of its functions [Article 2(5) of the Charter]. This general principle may be implemented by special provisions applicable to a particular situation, such as resolutions of the Security Council or special agreements with the States on whose territory the activities take place.

With regard to the responsibility for injury to agents of international organizations, there is also the principle of special duty of protection on the part of a State towards officials with an international function (i.e. international officials in general and not only diplomatic agents).

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[2] *Ibid.*, paras. 17 and 21.

[3] For the report presented by the Secretary-General at the seventh session on the status of claims for injuries incurred in the service of the United Nations and for an account of the consideration of the matter by the Sixth Committee, see *Official Records of the General Assembly, Seventh session, Annexes*, agenda item 57, documents A/2180 and A/2353.

This principle is implemented, e.g. by the Convention on the Privileges and Immunities of the United Nations of 13 February 1946, but was already a firmly established principle in traditional international law. In the famous Tellini case, concerning the responsibility for the assassination of an Italian officer and two of his aides while engaged as a member of a commission sent by the Conference of Ambassadors to survey the boundary between Greece and Albania in 1923, the Committee of Jurists, set up by the League of Nations, asserted that "The recognized public character of a foreigner and the circumstances in which he is present in its territory entail upon the State a corresponding duty of special vigilance on his behalf".[4]

14 August 1974

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2. COMMENTS ON A DRAFT AGREEMENT BETWEEN THE UNITED NATIONS AND A MEMBER STATE ON THE ARRANGEMENTS FOR A SYMPOSIUM TO BE HELD ON THE TERRITORY OF THAT STATE UNDER THE AUSPICES OF THE UNITED NATIONS

Memorandum to the Director, Departmental Administration and Finance Office, Department of Economic and Social Affairs

Having reviewed the comments by the Deputy Permanent Representative of [name of the Member State concerned] on the above-mentioned draft, we find that not all of his suggestions would be in accordance with the practice usually followed by the United Nations in concluding agreements with Member States hosting symposia or seminars of the Organization.

With respect to article VI [concerning facilities, privileges and immunities] of the draft agreement, the Office of Legal Affairs wishes to state as its general view that in addition to the general principles set out in Article 105 of the United Nations Charter, the provisions of the Convention on the Privileges and Immunities of the United Nations[5] constitute the authoritative expression of the minimum measure of privileges and immunities required by the Organization. It is further considered essential that no substantive difference should exist among the provisions on privileges and immunities contained in the agreements concluded with various host countries; the provisions of the draft agreement are therefore of a standard nature and they are, as a consequence, usually included unchanged in the final agreements.

The authorities of the Member State concerned have proposed that at the time of the signing of the agreement an exchange of letters take place under which they would state that "immunity of jurisdiction does not apply to road offences, committed by a privileged person, nor to cases of damage caused by a motor vehicle belonging to or being driven by that person" and that "no exemption of taxes or duties as to foodstuffs, drinks, tobacco and comparable supplies shall be claimed by the United Nations". The view held by the authorities with respect to the limitation in immunity of jurisdiction or in exemption from taxes and duties would not appear to be supported by the principles of Article 105 of the United Nations Charter, nor is it in accordance with the provisions of the Convention on the Privileges and Immunities of the United Nations to which the Member State concerned has acceded. With respect to the immunity enjoyed by United Nations officials and experts under the Convention, the manner in which this immunity may be waived is expressly determined in sections 20 (Officials) and 23 (Experts on missions) of the Convention, which *inter alia* provide that "the Secretary-General shall have the right and the duty to waive the immunity of any official [expert] in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests ot the United Nations". It goes without saying that in determining whether to waive the immunity of a United Nations official or expert the Secretary-General will act with diligence and conscientiousness.

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[4] League of Nations, *Official Journal*, 1924, p. 524.

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

Regarding the exemption of the United Nations from taxes and duties it may be recalled that the report of the Committee of the San Francisco Conference responsible for the drafting of Article 105 of the Charter stated that "if there is one certain principle it is that no member state may hinder in any way the working of the Organization or take any measures the effect of which might be to increase its burdens, financial or other".[6] In the light of this principle, the intent of sections 7 and 8 of the Convention on the Privileges and Immunities of the United Nations would clearly seem to be to relieve the Organization of the burden of all taxes and duties—section 7 providing exemption from all customs duties and direct taxes and section 8 providing for remission or return of excise duties or sales taxes forming part of the price to be paid where the amount involved is important enough to make it administratively feasible. In view of the clear intent of the relevant provisions of the Charter and of the Convention, which has been consistently observed by the United Nations in its dealings with other Member States, it would not seem justifiable to agree to an exceptional arrangement in respect of a particular Member State. The additional expense for the United Nations which would ensue, were it to be agreed that "no exemption of taxes or duties as to foodstuffs, drinks, tobacco and comparable supplies shall be claimed by the United Nations", is by no means negligible. The United Nations would therefore reserve its right to claim exemption as provided in the Convention.

As is the case with the provisions on privileges and immunities, article VII [on liability] of the draft agreement is a standard provision usually included in all conference agreements. The principle underlying the provisions of that draft article is that the Government, and not the United Nations, should bear such risks as may be involved in the provision of premises or transportation, and the employment of local personnel. In this connection it is pertinent to refer to operative paragraph 10 of General Assembly resolution 2609 (XXIV) whereby it was decided that "United Nations bodies may hold sessions away from their established headquarters when a Government issuing an invitation for a session to be held within its territory has agreed to defray, after consultation with the Secretary-General as to their nature and possible extent, the actual additional costs directly or indirectly involved". Should compensation not be recoverable from another party, claims of the nature described in draft article VII might be made on those responsible for the holding of the conference on the premises, namely the Government and the United Nations. In such a situation the effect of draft article VII would be to ensure that the Government, not the United Nations, would be liable for any such claim, which may be considered to constitute *indirect* additional costs to the United Nations within the meaning of General Assembly resolution 2609 (XXIV).

8 January 1974

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3. IMMUNITY OF UNITED NATIONS PROPERTY AND ASSETS FROM SEARCH AND FROM ANY OTHER FORM OF INTERFERENCE—SECTION 3 OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

Aide-Mémoire to the Permanent Representative of a Member State

The Secretary-General has been advised by the United Nations Development Programme that a UNDP project account has been blocked by judicial decision [in the Member State concerned] as a result of a claim against a project vehicle arising out of an accident which involved injury to a government employee assigned "in kind" to the project.

The Court action in ordering the blocking of the UNDP project account is in contravention of the Convention on the Privileges and Immunities of the United Nations to which [name of the Member State concerned] is a party. Section 3 of the Convention provides that:

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[6] *Documents of the United Nations Conference on International Organization*, San Francisco, 1945, vol. XIII, Commission IV (Judicial Organization), p. 683.

"The property and assets of the United Nations, wherever located and by whomever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action."

Furthermore, inasmuch as the court order may have issued from an action brought against the United Nations, its property or assets, it may also be pointed out that Section 2 of the Convention provides that:

"The United Nations, its property and assets wherever located and by whomever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity . . ."

There has been no waiver of immunity in the present case nor does there appear to be a cause of action against the United Nations since *inter alia* under the agreement between the UNDP and [name of the Member State concerned] compensation for injuries or illnesses for government employees assigned to a United Nations project is the sole responsibility of the government, including the local staff assigned "in kind" to the project.

The Secretary-General requests, as a first step, that the Government immediately take the necessary measures to unblock the UNDP project account, so that the project may be continued without interruption.

20 February 1974

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4. QUESTION OF THE EXEMPTION OF THE UNITED NATIONS FROM VALUE-ADDED TAX IN A MEMBER STATE

Letter to the Permanent Representative of a Member State

In the nine months since the introduction of Value-Added Tax (VAT) in your country, the Office of Legal Affairs, at the request of the United Nations and the specialized agencies has closely followed the application of VAT to these organizations. We are pleased to note that in a memorandum of 19 February 1973 the competent authorities in your country stated that the general rule to be followed would be that "the reliefs and concessions which are at present accorded to international organizations on a statutory or concessionary basis will continue to apply and there should be no change in existing entitlements". Our review of the practical implementation of this rule indicates that with respect to the purchase of goods for the official use of the organizations in your country, reimbursement of VAT may be obtained where the purchases involved are substantial and that in practice such reimbursement has been made according to the established administrative procedures.

With respect to services, however, the United Nations offices and specialized agencies have informed us that they have been notified by the competent authorities in your country that exemption from, or reimbursement of, VAT levied on services cannot be granted. Since many services which are now subject to VAT were previously untaxed, the VAT levied on such services constitutes a considerable increase in the financial burden of the organizations and represents a negative change in the organizations' entitlements. Particular concern has been expressed by those organizations carrying out training programmes in your country within the framework of the United Nations Development Programme. We understand that according to the 1972 Finance Act, the provision of services in your country to overseas authorities is zero-rated but that "overseas authorities" has been defined as meaning "overseas governments" thereby excluding international organizations. Having regard, among other considerations, to the fact that the training programmes and related services are carried out by the organizations concerned on behalf of and for the benefit of overseas governments such services should, in the opinion of this Office, be exempt from VAT or zero-rated.

In the case of services procured by the organizations for their own use, it is our opinion that any VAT which is levied, other than charges for public utility services, should be subject to exemption or, at the very least, reimbursement in the appropriate manner, since VAT is clearly a tax whose burden falls on the organizations. We trust therefore that the authorities in your country will accord exemption or make the appropriate administrative arrangements for the reimbursement of this tax.[7]

15 January 1974

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5. EXEMPTION OF THE UNITED NATIONS FROM EXCISE DUTIES AND TAXES ON THE SALE OF MOVABLE AND IMMOVABLE PROPERTY FORMING PART OF THE PRICE TO BE PAID—INTERPRETATION OF SECTION 8 OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

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

To the extent that the decision of the Ministry of Planning and Finance [of a Member State] is based on an interpretation of the international legal obligations of the Government, specifically the Convention on the Privileges and Immunities of the United Nations, it is in our view an erroneous interpretation and one with which we would take issue. Section 8 of the Convention is in fact broader than the narrow interpretation placed upon it by the Ministry. Section 8 refers specifically to exemption from excise duties and from taxes on the sale of movable and immovable property which form part of the price to be paid. It has been the consistent position of the Office of Legal Affairs that a petrol tax forming part of the price to be paid is to be considered as falling under the terms of Section 8 of the Convention[8] and that the question of whether or not a rebate should be granted should be determined by reference to the importance, quantitatively or financially, or the purchase. In the case of petrol, which is a recurring purchase, the amounts involved would normally qualify as important. The United Nations is furthermore normally exempted from excise duties on gasoline required for its operations in the territories of Member States.

In the light of the foregoing, we would advise that the matter be taken up once again with the competent authorities with a view to seeking a reconsideration of their position.

26 February 1974

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[7] It was subsequently agreed by an exchange of notes between the United Nations and the Member State concerned that Section 8 of the Convention on the Privileges and Immunities of the United Nations would be interpreted and applied in that Member State so as to accord the United Nations a refund of car tax and value-added tax on the purchase of new motor cars of local manufacture, and of value-added tax paid on the supply of goods or services necessary for its official activities and which are supplied on a recurring basis or involve considerable quantities of goods or considerable expenditure. Similar agreements have been concluded between most of the specialized agencies and the Member State concerned.

[8] See, for example, *Juridical Yearbook*, 1967, p. 315, and *Juridical Yearbook*, 1972, p. 158.

6. Question whether the United Nations enjoys copyright in the speeches, tape recordings and summaries related to public hearings of the Group of Eminent Persons convened under Economic and Social Council resolution 1721 (LIII) and in technical papers prepared for the Group

Memorandum to the Director, Departmental Administration and Finance Office, Department of Economic and Social Affairs

1. You have asked for my views on a proposal to copyright speeches, tape recordings and summaries related to public hearings of the Group of Eminent Persons, and in technical papers prepared for the Group.

2. Assuming that the material is original, the United Nations would enjoy copyright in the text of the speeches, the tape recordings, the summaries and the technical papers under American law *if:*

(*a*) the United Nations is the rightful owner of the material and,

(*b*) the material has not passed into the public domain through publication.

3. There does not appear to have been a formal agreement as to ownership of the copyright in speeches, tape recordings and summaries, so that the question of ownership must be answered according to the intention of the parties as best their intention can be determined.

4. Since the Group of Eminent Persons was assembled for the advancement of the United Nations interests and its members were presumably paid travel and subsistence allowances by the United Nations, it might be reasonable to conclude that they intended the United Nations to enjoy ownership of the rights to the proceedings at the public hearings.

5. In contrast to the members of the Group, it might be difficult to argue the other speakers subordinated themselves to the interests of the United Nations or that they were compensated in any way for their participation. If the other speakers have been assisting in the abridgement and revision of the summaries as you indicate in your memorandum, there might be a reasonable basis for the conclusion that the other persons intend the United Nations to have a non-exclusive licence, at least with respect to the summaries themselves, if not with respect to the text and tape recordings of their speeches.

6. The owner of copyright in the speeches has the exclusive right to reproduce the speeches, whether as written or as delivered, whether verbatim or abridged. In this case the speeches themselves form the basis for copyright in the texts, the tape recordings and the summaries, and publication *by the owner* of any one of them—text, tape recording or summaries—prior to filing for statutory copyright would cause all of them to pass into the public domain. Publication *by anyone other than the owner* would not cause the material to be dedicated to the public, but rather might constitute an infringement of the copyright.

7. It appears that none of the material has been published to date. As far as the text of the speeches is concerned, the oral presentation of a prepared speech does not constitute publication unless there has been sale or unrestricted distribution of the text, and there appears to have been no such sale or distribution here. Regarding tape recordings, the fact that anyone *could have* taped the proceedings, or that someone *did in fact* tape the proceedings does not by itself imply publication. If, on the other hand, the United Nations tape recordings were made available to others, that situation could result in publication *if* the tape recordings were offered for sale or received unrestricted distribution. As for summaries, the limited distribution of summaries to speakers for the purpose of abridgement and revision does not constitute publication.

8. With respect to the technical papers, there is no doubt that the United Nations is the owner, by virtue of its contractual relationship with the authors, of the papers in question. Distribution of the technical papers appears to have been limited to those who had a direct interest in their contents, so there was no publication which would have passed the material into the public domain. In our opinion, on the basis of facts available, the United Nations has

copyright in the technical papers and could file for statutory protection if it should choose to do so.

20 March 1974

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7. The representation of national liberation movements in United Nations organs

Legal opinion prepared for the Under-Secretary-General, Office for Inter-Agency Affairs and Co-ordination

1. A legal opinion has been requested concerning the procedures for the representation of national liberation movements in the intergovernmental organs of the United Nations, including those of its autonomous organs.

2. The authorizations and procedures adopted in this respect should be distinguished at the outset from those under which representatives of liberation movements, and other persons and organizations, have been permitted or invited to make statements before various United Nations organs as "petitioners", or as individuals or organizations considered capable of furnishing necessary information, or who have appeared before the Security Council under rule 39 of its provisional rules of procedure as persons considered competent to supply information or to give other assistance. Appearances in these latter capacities will not be included in this present survey, which is concerned more specifically with the representation of national liberation movements as such.

The principal authorizing decisions

3. The relevant passages from the principal authorizing decisions by the General Assembly and by the Economic and Social Council calling for the participation of national liberation movements in meetings of United Nations and inter-governmental organs are set out in the annex attached hereto [not reproduced].[9]

4. From these texts it will be seen that the General Assembly has expressly requested United Nations organs, Governments, specialized agencies and other organizations within the United Nations system, in consultation with the Organization of African Unity, to ensure the representation of the colonial Territories in Africa by the national liberation movements concerned, in an appropriate capacity, when dealing with matters pertaining to those territories.

The practice in United Nations organs

5. In the absence of any explicit provision in the Charter or in the pertinent rules of procedure, the procedures thus far adopted for the representation and participation of these liberation movements in the proceedings of United Nations organs are essentially based on practice, following upon the authorizing decisions referred to above. Such practice has arisen primarily in the following four United Nations organs or Committees:

(*a*) The Fourth Committee of the General Assembly;

(*b*) The Special Committee on the Situation with regard to the Implementation of the Declaration of the Granting of Independence to Colonial Countries and Peoples;

(*c*) The United Nations Council for Namibia; and

(*d*) The Economic Commission for Africa.

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[9] Reference is made to the passages in question in paragraphs 2 and 3 of the legal opinion reproduced in sub-section 15 of this chapter.

The Fourth Committee of the General Assembly

6. At the twenty-seventh session of the General Assembly, the Fourth Committee decided to invite, in consultation with, and through the Organization of African Unity, the representatives of the liberation movements concerned to participate in an observer capacity in the examination of the questions of Southern Rhodesia, Territories under Portuguese administration and Namibia.[10] A corresponding decision was also taken by the General Assembly at its twenty-eighth session.[11]

7. In the case of Guinea (Bissau) and Cape Verde, the "Partido Africano da Independencia da Guiné e Cabo Verde" (PAIGC) participated, without the right to vote, in the debates of the Fourth Committee at the twenty-seventh session of the General Assembly. However, following the Proclamation of the State of Guinea-Bissau by the People's National Assembly on 24 September 1973 (see document S/11022, and General Assembly resolution 3061 (XXVIII) of 2 November 1973), Guinea-Bissau ceased to be a colonial territory; it has since been admitted to membership of FAO.

8. With regard to the other colonial territories in Africa included in the General Assembly's decision, the invited representatives of the following liberation movements participated without the right to vote in the discussions of the Fourth Committee of the General Assembly, at its twenty-seventh and/or twenty-eighth sessions, on those agenda items concerning their respective territories:

Zimbabwe African National Union (ZANU) [Southern Rhodesia], Zimbabwe African People's Union (ZAPU) [Southern Rhodesia], Frente Nacional para a Libertação de Angola (FNLA) [Angola], Frente de Libertação de Moçambique (FRELIMO) [Mozambique], South West Africa People's Organization (SWAPO) [Namibia].

9. In the proceedings of the Fourth Committee during the past two General Assembly sessions, the following practices, *inter alia*, seem to have been applied:

(*a*) The representatives of liberation movements were invited through the Organization of African Unity, the invitations being transmitted by the Secretariat after the decision to invite them had been taken by the Fourth Committee.

(*b*) The representatives of liberation movements were seated in the Committee room in seats designated as being for "Observers".

(*c*) They addressed the Committee or spoke when invited or permitted to do so by the Chairman, and, in practice, were recognized by the Chairman when they asked to speak during the course of the debate (subject to the applicable rules of procedure).

(*d*) They were accorded distribution of documents on a comparable basis to that accorded to members of the Committee.

(*e*) On certain occasions a communication from a liberation movement was circulated under cover of a note from the Chairman of the Fourth Committee stating that its circulation had been requested by the liberation movement.

(*f*) Financial provision for the participation of the invited liberation movements in the discussions of the Fourth Committee was authorized by the General Assembly at its twenty-eighth session (although not at its twenty-seventh session).

The Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples

10. In paragraph 14 of its resolution 2878 (XXVI) of 20 December 1971, the General Assembly had endorsed a proposal made by the Special Committee to take steps, in consultation with the Organization of African Unity, to enable representatives of national

[10] *Official Records of the General Assembly, Twenty-seventh Session, Annexes*, agenda item 64, document A/8957, para. 5; *ibid.*, agenda item 65, document A/8889, para. 6; and *ibid.*, agenda item 66, document A/8933, para. 5.

[11] *Ibid., Twenty-eighth Session, Annexes*, agenda item 23, document A/9174; and A/PV.2139, p. 136.

liberation movements in the colonial Territories in southern Africa to participate, in an appropriate capacity, in its deliberations relating to those Territories.

11. In its report to the twenty-seventh session of the General Assembly,[12] the Special Committee stated that it would consider inviting, in connexion with its consideration of the relevant items, and in consultation with and through the Organization of African Unity, the representatives of the liberation movements concerned to participate, whenever necessary and in an observer capacity, in its proceedings relating to their respective countries. At the same time, the Special Committee also recommended that the Assembly make the necessary financial provision to cover the costs of their participation in the Committee's work during 1973. These recommendations were approved by General Assembly resolution 2908 (XXVII) of 2 November 1972.

12. At its twenty-eighth session, the General Assembly approved in its resolution 3118 (XXVIII) a further recommendation by the Special Committee contained in its report[13] to continue the arrangements concerning the participation of the liberation movements in question in the work of the Committee during 1974.

13. On the basis of the foregoing, the Special Committee invited, in consultation with and through the Organization of African Unity, representatives of the national liberation movements concerned to participate, in an observer capacity, in its consideration of their respective territories. In response to these invitations, the following liberation movements took part as observers in the relevant proceedings of the Special Committee during 1973:[14]

Territory	*National liberation movements*
Southern Rhodesia	Zimbabwe African National Union (ZANU)
	Zimbabwe African People's Union (ZAPU)
Angola	Frente Nacional para a Libertação de Angola (FNLA)
	Movimento Popular de Libertação de Angola (MPLA)
Guinea (Bissau) and Cape Verde	Partido Africano da Independencia da Guiné e Cabo Verde (PAIGC)
Mozambique	Frente de Libertação de Moçambique (FRELIMO)
Namibia	South West Africa People's Organization (SWAPO)
Comoro Archipelago	Mouvement de libération nationale des Comores (MOLINACO)

14. An account of the Committee's consideration of these territories, including references to the meetings at which statements were made by the representatives of the national liberation movements concerned, was contained in the Special Committee's report to the twenty-eighth session of the General Assembly.[15] The Special Committee further reported that it had the benefit of receiving valuable information on the Territories concerned through the active participation in its work of representatives of the eight national liberation movements enumerated above, and had taken into account the views expressed by these representatives.[16] For the purposes of their participation at meetings of the Special Committee during 1973, the travel and per diem expenses of representatives of the liberation movements referred to were defrayed by the United Nations.

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[12] *Official Records of the General Assembly, Twenty-seventh Session, Supplement No 23* (A/8723/Rev.1), vol. I, Chap. I, para. 187.

[13] *Ibid., Twenty-eighth Session, Supplement No. 23* (A/9023/Rev.1), vol. II, Chap. VI, para. 14.

[14] *Ibid.*, vol. I, Chap. I, para. 88.

[15] *Ibid.*, vol. III, Chap. VII, VIII and IX, and vol. IV, Chap. XI.

[16] *Ibid.*, vol. I, Chap. I.

15. During the current year, and on the basis of the continuing authorization given by the General Assembly (see paragraph 12 above), the Special Committee has again invited, in consultation with and through the Organization of African Unity, the national liberation movements from the colonial territories referred to in paragraph 13 above to participate in an observer capacity in the Committee's consideration of their respective territories, the former colonial territory of Guinea (Bissau) being no longer included following the proclamation of the independent Republic of Guinea-Bissau. Current arrangements for the participation of these national liberation movements in the Committee's work during 1974 are proceeding on the same basis as in 1973.

The United Nations Council for Namibia

16. The United Nations Council for Namibia (established under the terms of General Assembly resolution 2248 (S-V)) has reported almost since its inception on the question of the participation of the people of Namibia in the work of the Council.

17. In the report of the Council for Namibia to the twenty-seventh session of the General Assembly, it was stated, *inter alia*, that

> "The Council was not able to resolve the question of participation of Namibians in its work. Nevertheless, it was gratified to note that the opportunity given to representatives of Namibian people to regularly attend the meetings of the Council as observers, was accepted by the representative of SWAPO."[17]

18. Following this report, the General Assembly, in paragraph 9 of its resolution 3031 (XXVII), requested the United Nations Council for Namibia, *inter alia*,

> "(b) To ensure the participation in an appropriate capacity of the representatives of the Namibian people in its activities;".

19. The Council for Namibia subsequently reported to the twenty-eighth session of the General Assembly that

> "It [the United Nations Council for Namibia] has granted observer status to SWAPO, the Namibian liberation movement recognized by OAU. The representative of SWAPO in New York participates fully in all the meetings of the Council. Whenever the situation demands, the delegation of SWAPO is led by its President, Mr. Sam Nujoma, who informs the Council of the significance of important developments affecting Namibia and takes an active part in the Council's discussions."[18]

20. In its resolution 3111 (XXVIII) which followed and approved this report, the General Assembly, *inter alia:*

> "2. *Recognizes* that the national liberation movement of Namibia, the South West Africa People's Organization, is the authentic representative of the Namibian people and supports the efforts of the movement to strengthen national unity;
>
> . . .
>
> "18. *Decides*, having regard to paragraph 2 above, to defray the expenses of a representative of the South West Africa People's Organization when accompanying such missions as the United Nations Council for Namibia may determine and whenever called for consultation by the Council, . . .".

21. In practice, representatives of the South West Africa People's Organization have participated fully, in an observer capacity, in the meetings of the United Nations Council for Namibia since 1972, and continue to do so.

The Economic Commission for Africa

22. In its resolution 974 D (XXXVI), the Economic and Social Council decided to expel Portugal from membership in the Economic Commission for Africa, to suspend South Africa

[17] *Ibid., Twenty-seventh Session, Supplement No. 24* (A/8724), vol. I, para. 187.

[18] *Ibid., Twenty-eighth Session, Supplement No. 24* (A/9024), para. 280.

from participating in the work of the Commission, and to amend the terms of reference of the Commission by providing that the non-self-governing territories situated in the geographical area defined as the whole continent of Africa, Madagascar and other African islands, shall be associate members of the Commission.

23. Thereafter the question arose as to how the non-self-governing territories of Angola, Mozambique, Guinea (Bissau) and Namibia—being associate members of the Economic Commission for Africa—should be represented in the Commission and who should designate such representatives. Following consideration by the Economic and Social Council, and by successive sessions of the Economic Commission for Africa, the Commission recommended, in its resolution 194 (IX) of 12 February 1969—which amended its previous resolution 151 (VIII)—concerning "Associate membership for Angola, Mozambique, Guinea called Portuguese Guinea and Namibia (South West Africa)"[19]

> ". . . that the Organization of African Unity should propose the names of representatives of the peoples of the countries in question and inform the Executive Secretary [of the Commission] accordingly to enable him to bring the matter before the General Assembly."

24. In accordance with this recommendation, the Organization of African Unity on 5 November 1970 proposed the names of persons to represent the four territories in question (see document E/CN.14/511), these persons being in each case the President or a senior office holder of the liberation movement recognized by the Organization of African Unity. The representatives proposed by the Organization of African Unity were the following:

Angola	Mr. Agostino Neto President of the Movimento Popular de Libertaçáo de Angola (MPLA) and Mr. Roberto Holden President of the Front National pour la Libération de l'Angola (FNLA)
Mozambique	Mr. Marcellino dos Santos Vice-President in Charge of External Relations for the Frente de Libertaçâo de Moçambique (FRELIMO)
Guinea (Bissau).....	Mr. Amilcar Cabral Secretary-General of the Partido Africano da Independência da Guiné e Cabo Verde (PAIGC)
Namibia	Mr. Sam Nujoma President of the South West Africa People's Organization (SWAPO)

25. In accordance with United Nations practice, this proposed representation required the approval of the General Assembly.

26. In the case of Angola, Mozambique and Guinea (Bissau), the names of the proposed representatives were duly submitted to the General Assembly, which, in operative paragraph 12 of its resolution 2795 (XXVI) expressly approved

> ". . . the arrangements relating to the representation of Angola, Mozambique and Guinea (Bissau) as associate members of the Economic Commission for Africa, as well as the list of the representatives of those Territories proposed by the Organization of African Unity".

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[19] *Official Records of the Economic and Social Council, Forty-seventh Session*, document E/4651, p. 145.

27. In the meantime, the representatives of these latter territories, approved by the General Assembly, had attended the tenth session of the Economic Commission for Africa (first meeting of the Conference of Ministers) at Tunis, in February 1971, as observers.[20]

28. Since, in the case of Namibia, the General Assembly had delegated authority to the United Nations Council for Namibia "to administer South West Africa until independence" and to exercise other governmental functions for Namibia (see General Assembly resolution 2248 (S-V)), it therefore followed that the United Nations Council for Namibia was the appropriate body to approve arrangements for the representation of the Territory in the Economic Commission for Africa. The name of the proposed representative was accordingly submitted to the United Nations Council for Namibia, which approved the nomination at its 98th meeting held on 22 January 1971.[21]

29. There was however no indication that the Namibian representative would be acting on behalf of the Council for Namibia, but rather it was understood that he would act as President of the South West African People's Organization, and in this capacity would be in a position to express the views of the people of Namibia at meetings of the Economic Commission for Africa.

30. In its annual report to the fifty-fifth session of the Economic and Social Council, the Economic Commission for Africa referred to the approval by the General Assembly of the representation of Angola, Mozambique and Guinea (Bissau), contained in General Assembly resolution 2795 (XXVI), and to the approval by the United Nations Council for Namibia, at its 98th meeting, of the representation of Namibia, and reported that, on this basis,

> ". . . the representatives of Angola, Guinea (Bissau), Mozambique and Namibia were invited to participate in the work of the Commission as associate members",[22]

and

> "The representatives of the peoples of Angola, Guinea (Bissau), Mozambique and Namibia had . . . been invited to the third meeting of the Technical Committee of Experts held at Addis Ababa in September 1972".[23]

31. It will be seen therefore that since 1971, Angola, Guinea (Bissau), Mozambique and Namibia have been represented in the Economic Commission for Africa through the President, Vice-President or Secretary-General of their respective national liberation movements, recognized by the Organization of African Unity. Except in the case of Guinea (Bissau), following its accession to independence as the Republic of Guinea-Bissau, this representation of the other three territories remains in effect.

The representation of Namibia

32. Attention has been drawn to the possibility of some inconsistency between concurrent provisions of different General Assembly resolutions relating to the representation of Namibia.

33. On the one hand, the General Assembly has requested United Nations organs and specialized agencies and other organizations within the United Nations system to ensure that Namibia, as a colonial territory in Africa, is represented by the Namibian national liberation movement in an appropriate capacity when dealing with matters pertaining to that territory (e.g. see General Assembly resolutions 2980 (XXVII), para. 7 and 3118 (XXVIII), para. 7).

34. At the same time, the General Assembly has also requested the United Nations Council for Namibia ". . . to represent Namibia whenever it is required" (see General As-

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[20] See *ibid., Supplement No. 5* (E/4997), vol. 1, para. 225.

[21] See *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 24* (A/8424), para. 63.

[22] *Official Records of the Economic and Social Council, Fifth-fifth Session, Supplement No. 3* (E/5253), para. 331.

[23] *Ibid.*, para. 5.

sembly resolution 2871 (XXVI), para. 13 (*a*)) and "To represent Namibia in international organizations, at conferences and on any other occasion as may be required" (see General Assembly resolution 3031 (XXVII), para. 9 (*a*)).

35. The General Assembly also requested ". . . all subsidiary organs of the United Nations, intergovernmental bodies and conferences to ensure that the rights and interests of Namibia are protected and, to that end, among other things, to invite the United Nations Council for Namibia to participate in an appropriate capacity whenever such rights and interests are involved;" (see General Assembly resolution 3111 (XXVIII), section I, para. 17) and ". . . all specialized agencies and other organizations within the United Nations system and the member States thereof to take such necessary steps as will enable the United Nations Council for Namibia, as the legal authority for Namibia, to participate fully on behalf of Namibia in the work of those agencies and organizations;" (see General Assembly resolution 3111 (XXVIII), section II, para. 1).

36. The General Assembly further requested the Secretary-General to invite the United Nations Council for Namibia to participate in the Third United Nations Conference on the Law of the Sea (see General Assembly resolution 3067 (XXVIII), para. 8 (*b*)), and to attend, as an observer, the United Nations Conference on Prescription (Limitation) in the International Sale of Goods (see General Assembly resolution 3104 (XXVIII), para. (*d*)).

37. In the performance of its functions and responsibilities, the United Nations Council for Namibia has attended meetings and conferences both inside and outside the United Nations system. Thus, the Council for Namibia was invited and was represented at the Fifth African Indian Ocean Regional Air Navigation Meeting of ICAO, held at Rome from 10 January to 2 February 1973,[24] at the International Conference of Experts for the Support of Victims of Colonialism and *Apartheid* in Southern Africa organized by the United Nations in April 1973, in co-operation with the Organization of African Unity, in pursuance of General Assembly resolution 2910 (XXVII),[25] at the Fourth ILO African Regional Conference held in Nairobi from 24 November to 7 December 1973, and at the first session of the Third United Nations Conference on the Law of the Sea held in December 1973.

38. The United Nations Council for Namibia has also attended or participated in various meetings of the Organization of African Unity and its subsidiary organs, including meetings of the Council of Ministers (in 1972 and 1973), of the Co-ordinating Committee for the Liberation of Africa (in 1973) and the Bureau for the Placement and Education of African Refugees (in 1970).[26]

39. In its report to the twenty-eighth session of the General Assembly, the United Nations Council for Namibia reported, *inter alia*, that it

> ". . . has continued to represent or to seek representation of Namibia and to protect the interests of the Namibian people at international conferences, in the specialized agencies and institutions of the United Nations system and in other bodies.".[27]

40. At the same time, the United Nations Council for Namibia has participated in meetings of the Security Council, the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, the Special Committee on *Apartheid*, and other United Nations organs during their consideration of the question of Namibia.

41. It would appear therefore that a number of meetings relating to Namibia held by United Nations organs or other intergovernmental organizations have been attended by either or both the United Nations Council for Namibia and the Namibian national liberation

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[24] See *Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 24* (A/9024), para. 203.

[25] *Ibid.*, paras. 198-201.

[26] *Ibid.*, paras. 188 *et seq.* and *ibid., Twenty-fifth Session, Supplement No. 24* (A/8024), para. 89.

[27] *Ibid., Twenty-eighth Session, Supplement No. 24* (A/9024), para. 186.

movement, the South West Africa People's Organization. Since, however, these two bodies do not act in the same capacity or under the same authority, and since, in any event, SWAPO participates in the work of the Council for Namibia as an observer (see paras. 17 to 21 above), their separate or combined attendance at other meetings does not necessarily indicate any inconsistency or conflict.

42. It has been repeatedly established that Namibia has been and remains an international territory under the direct responsibility of the United Nations pending the achievement of Namibian independence (see, *inter alia*, General Assembly resolution 2145 (XXI), paras. 2 and 4; Security Council resolutions 246 (1968), seventh preambular paragraph; 264 (1969), para. 1; 276 (1970), second and fourth preambular paragraphs; 283 (1970), second preambular paragraph; and 301 (1971), para. 1). In the execution of this United Nations responsibility, the General Assembly established the United Nations Council for Namibia to assume administrative and other governmental functions in respect of Namibia (see General Assembly resolution 2248 (S-V)), and until Namibian independence is achieved, no legal governmental authority for Namibia exists other than the United Nations.

43. It follows that in the exercise of its responsibilities for Namibia, the United Nations Council for Namibia acts in the name and with the authority of the United Nations, being a subsidiary organ established under Articles 7 (2) and 22 of the Charter, and being responsible directly to the General Assembly (see General Assembly resolution 2248 (S-V), section II, para. 2). The Namibian national liberation movement (SWAPO), on the other hand, acts as such, and, while it enjoys support from, and close association with, the United Nations in the pursuit of Namibian self-determination and independence, it nevertheless does not possess an organic link with the United Nations, but acts on its own behalf and on behalf of the Namibian people whom it represents.

44. It would appear therefore that the requests by the General Assembly, in the context of the resolutions cited in the annex [not reproduced], that Namibia be represented by the Namibian national liberation movement relates more particularly to the representation of the Namibian people, and in no way prejudices or conflicts with the right and the obligation of the United Nations Council for Namibia to represent Namibia on behalf of the international authority which is legally responsible for the territory until it achieves independence.

45. In spite of the relevance of this distinction, however, which would seem to be implicit in the accumulated decisions and directives of the General Assembly concerning Namibia, the fact that, in different General Assembly resolutions, two separate entities have been called upon to "represent Namibia" may suggest a need for some further clarification in the future, especially having regard to the differing scope and meaning which can be attributed to the terms which have been used.

14 March 1974

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

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

1. Article 19 of the Charter provides, in its first sentence, for a specific consequence if a Member of the United Nations is two years or more in arrears in the payment of its contributions. The text is drafted in such a way that the effect is mandatory and automatic. It provides that a Member "shall have no vote in the General Assembly" if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. By using mandatory language (*shall* have no vote) and describing the cause for which the

measure is imposed as the occurrence of an objectively determinable event, the Charter gives no discretion to, and thus calls for no decision by, the General Assembly.

2. Had the contrary been intended, Article 19 would have been drafted in a different way in order to provide for a decision by the General Assembly. This is shown e.g. by the second sentence of Article 19, which provides that nevertheless the General Assembly "may permit" such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond its control. *Shall* is used in the first sentence, while *may* is used in the second. Likewise, only in the second sentence is reference made to action to be taken by the General Assembly.

3. In addition, it should be noted that, since normally all Members of the United Nations have the right to vote (Article 18, paragraph 1 of the Charter), a provision that "the General Assembly may . . . permit such a Member to vote" would not make sense if the first sentence of Article 19 were not to be understood as mandatory and automatic in its effect.

4. Thus it is clear that the first sentence of Article 19 provides the rule of automatic loss of the vote as a mandatory consequence, while the second sentence permits the General Assembly to make an exception to this rule in a specifically defined circumstance. An interpretation to the contrary would not only render the second sentence of Article 19 superfluous, but would amount to amending a clear provision of the Charter which obviously can only be done by following the procedures of Articles 108 and 109. It may be added that the French, Spanish, Russian and Chinese text of the Charter use the same mandatory language, the French version seemingly being the strongest when expressing the effect as "ne peut participer au vote à l'Assemblée générale. . .".

5. The intention of the drafters of the Charter to give a mandatory and automatic character to the measure provided by Article 19 can be found in the records of the San Francisco Conference. The United Nations, in its practice, has consistently followed this interpretation of Article 19. Thus, previous Presidents of the General Assembly have conducted the proceedings of the Assembly in conformity with the mandatory meaning and automatic effect of the first sentence of Article 19. Member States have shown their acceptance of this interpretation, e.g. by not sending representatives to meetings when they were in arrears within the terms of Article 19. Also the Secretariat has always acted on the understanding that the express language of the first sentence of Article 19 does not call for a decision by the General Assembly to give it effect and the Legal Counsel has already given an opinion setting out the legal considerations on which this understanding is based.[28] It is also interesting to note that specialized agencies with analogous constitutional provisions have followed the same practice of automatic application.

4 April 1974

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9. REQUEST CONTAINED IN GENERAL ASSEMBLY RESOLUTION 3184 C (XXVIII) THAT THE SECRETARY-GENERAL BRING THAT RESOLUTION TO THE ATTENTION OF "ALL MEMBER STATES, AS WELL AS ALL OTHER STATES AND GOVERNMENTS"—QUESTION WHETHER THIS PHRASE SHOULD BE INTERPRETED IN THE SAME WAY AS AN "ALL STATES" CLAUSE

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

1. We have received your memorandum of 5 February 1974, in which you ask for my opinion on the interpretation which should be given to the "all States" formula appearing in General Assembly resolution 3183 (XXVIII), on the World Disarmament Conference, and to the formula "all Member States, as well as all other Governments and States" which is to be found in Assembly resolution 3184 C (XXVIII), on general and complete disarmament.

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[28] See *Juridical Yearbook*, 1968, p. 186.

2. As regards General Assembly resolution 3183 (XXVIII), we wish to confirm your views concerning the current practice of the Secretariat in interpreting an "all States" formula. This practice is clearly set out in the understanding adopted by the General Assembly without objection at its 2202nd plenary meeting on 14 December 1973,[29] whereby "the Secretary-General, in discharging his functions as a depositary of a convention with an 'all States' clause, will follow the practice of the Assembly in implementing such a clause and, whenever advisable, will request the opinion of the Assembly before receiving a signature or an instrument of ratification or accession". While this understanding was adopted in the context of the depositary practice of the Secretary-General, it must also be taken as providing the necessary guidance in other instances where the Secretary-General has to interpret an "all States" formula.

3. The "practice of the General Assembly", referred to in the above understanding, is to be found in unequivocal indications from the Assembly that it considers a particular entity to be a State. Such indications, at the last session, are to be found in resolutions 3067 (XXVIII) and 3104 (XXVIII), in which the General Assembly invited to two United Nations Conferences, in addition to States at this present time coming within the long-established "Vienna formula", the "Democratic Republic of Viet-Nam", which is expressly designated in those resolutions as a "State".

4. In view of the foregoing, the reference in resolution 3183 (XXVIII) to "all States" is to be understood as referring to States Members of the United Nations or members of the specialized agencies or the International Atomic Energy Agency and States parties to the Statute of the International Court of Justice and also to the Democratic Republic of Viet-Nam.

5. It remains to be determined whether the reference in operative paragraph 4 of General Assembly resolution 3184 C (XXVIII) to "all Member States, as well as all other States and Governments" is intended to have a meaning different from an "all States" formula, and, if so, whether the Secretariat is in a position to give effect to a different meaning.

6. The practice of the General Assembly reveals that it has frequently used the term "all Governments" as being synonymous with "all States", and the two terms are often used interchangeably in the same resolution. Use of the word "Government" or "State" therefore does not have a particular significance, unless this is clear from the records and is endorsed by the General Assembly.

7. The draft which became resolution 3184 C (XXVIII) was introduced in the First Committee at its 1968th meeting, and was adopted at the next meeting of the Committee virtually with no discussion. There was certainly no clear indication that the formula used in operative paragraph 4 was meant to be interpreted in a manner different from an "all States" or "all Governments" formula. It will be noted, in this connexion, that operative paragraph 3 of the same resolution contains an "all States" formula. Introducing these two paragraphs, on behalf of the sponsors, the representative of Yugoslavia is recorded as saying the following (A/C.1/PV.1968, p. 23):

> "Operative paragraph 3 invites the governments of all countries to keep the General Assembly suitably informed of their disarmament negotiations, while operative paragraph 4 requests the Secretary-General to bring the present resolution to the attention of all Member States as well as all other governments and States . . ."

This statement does not highlight or indicate in any way a substantive difference between the formula used in operative paragraph 3 or in operative paragraph 4 of the draft resolution. No other representative spoke to the point in the First Committee. The report of that Committee to the General Assembly[30] on this item contains no indication of any difference, and similarly

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[29] See *Juridical Yearbook*, 1973, p. 79.

[30] *Official Records of the General Assembly, Twenty-eighth session, Annexes*, agenda items 29, 32, 33, 34 and 35, document A/9361.

no such difference was alluded to in the General Assembly itself, when the resolution concerned was adopted at the 2205th plenary meeting on 18 December 1973.

8. It is therefore to be concluded that operative paragraph 4 is to be interpreted in exactly the same manner as an "all States" formula, and does not provide a basis for extending that formula to other authorities. Even if some indication existed of a different intention, the Secretariat is not in a position to determine, on its own initiative, what constitutes a "Government" outside of the existing clear directives of the General Assembly.

8 February 1974

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10. QUESTION WHETHER THE EXPENSES OF THE UNITED NATIONS EMERGENCY FORCE (UNEF) SET UP UNDER SECURITY COUNCIL RESOLUTION 340 (1973) AND OF THE UNITED NATIONS DISENGAGEMENT OBSERVER FORCE (UNDOF) SET UP UNDER SECURITY COUNCIL RESOLUTION 350 (1974) ARE "EXPENSES OF THE ORGANIZATION" WITHIN THE MEANING OF ARTICLE 17, PARAGRAPH 2, OF THE CHARTER—DUE DATES OF CONTRIBUTIONS FROM MEMBER STATES TO UNEF AND UNDOF

Memorandum to the Controller

1. You have asked for legal advice on the following questions:

(*a*) Are the expenses of the United Nations Emergency Force (UNEF) and the United Nations Disengagement Observer Force (UNDOF) "expenses of the Organization" within the meaning of Article 17, paragraph 2, of the Charter and thus subject to the sanction contained in Article 19 of the Charter relating to arrears in the payment of financial contributions to the Organization?

(*b*) Within which years do assessed contributions for UNEF and UNDOF become due in terms of the Financial Regulations and Rules?

These questions are examined separately below.

The expenses of UNEF and UNDOF and Article 17, paragraph 2, of the Charter

UNEF

2. The present UNEF was set up pursuant to Security Council resolution 340 (1973) of 25 October 1973. This Force is an entirely new one, and is not a revival of the previous Emergency Force in the Middle East. Consequently, any decisions previously taken by the General Assembly regarding Article 19 of the Charter and the financing of the previous Force are not *per se* applicable to the new UNEF.

3. By its resolution 341 (1973) of 27 October 1973, the Council approved a report of the Secretary-General (S/11052/Rev.1)[31] on the implementation of resolution 340 (1973), and decided that UNEF "shall be established in accordance with the [Secretary-General's] report for an initial period of six months, and that it shall continue in operation thereafter, if required, provided the Security Council so decides".

4. In paragraph 7 of the Secretary-General's report (S/11052/Rev.1) referred to above, it is expressly stated that: "The costs of the Force shall be considered as expenses of the Organization to be borne by Members in accordance with Article 17, paragraph 2, of the Charter". As the Secretary-General's report was expressly approved by the Council in its resolution 341 (1973), it was the clear intent of the Council that the expenses of the new UNEF should be met under Article 17, paragraph 2, of the Charter.

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[31] See *Official Records of the Security Council, Twenty-eighth Year, Supplement for October, November and December.*

5. The power to consider and approve the budget of the Organization is vested in the General Assembly by paragraph 1 of Article 17 of the Charter. Provision for the financing of UNEF was made by the General Assembly in its resolution 3101 (XXVIII) of 11 December 1973. In the preamble to resolution 3101 (XXVIII) the Assembly, *inter alia*, reaffirmed "its previous decisions regarding the fact that, in order to meet the expenditures caused by such operations, a different procedure is required from that applied to meet expenditures of the regular budget of the United Nations". In the operative part of the resolution, the Assembly decided to appropriate an amount of $30 million for the Force, and to request the Secretary-General to establish a special account for the Force. The Assembly further decided to apportion the sum appropriated among all Member States according to a special scale of assessments "as an *ad hoc* arrangement, without prejudice to the positions of principle that may be taken by Member States in any consideration by the General Assembly of arrangements for the financing of peace-keeping operations". No mention is made in the resolution of Article 17, paragraph 2, of the Charter.

6. To the extent that the provisions just mentioned might give rise to doubts as to whether the Assembly regarded the expenses of UNEF as "expenses of the Organization" under Article 17, paragraph 2, of the Charter, those doubts are clearly dispelled by the *travaux préparatoires* leading up to the adoption of the resolution. Introducing the draft resolution which became resolution 3101 (XXVIII), on behalf of its 35 sponsors,* the representative of Brazil said in the Fifth Committee that:

> "The sponsors had taken into account the fact that, in deciding to set up the Force, the Security Council had also decided that the costs of the Force should be considered as expenses of the Organization to be borne by the Member in accordance with Article 17, paragraph 2, of the Charter. The draft resolution complied fully with that decision, since it apportioned the expenses of the Force among all the Members of the United Nations."[32]

The above remarks by the representative of Brazil were recalled expressly in paragraph 5 of the report of the Fifth Committee to the General Assembly on the financing of UNEF.[33] Paragraph 2 of the same report also recalled paragraph 7 of the Secretary-General's report (S/11052/Rev.1), referred to in paragraphs 3 and 4 of this memorandum, regarding the applicability of Article 17, paragraph 2, to the expenses of UNEF, and the Security Council's endorsement thereof. The report contains no indication of any contrary views.

7. It must therefore be concluded that, in line with the relevant decisions of the Security Council, the General Assembly has recognized that the expenses of UNEF are "expenses of the Organization" within the meaning of Article 17, paragraph 2, of the Charter, and in its resolution 3101 (XXVIII) the Assembly has acted accordingly by apportioning those expenses among the membership. It follows that under the decisions so far taken, Article 19 of the Charter is applicable to arrears incurred in respect of the UNEF account.

UNDOF

8. UNDOF was set up pursuant to Security Council resolution 350 (1974) of 31 May 1974. In the preamble to resolution 350 (1974) the Council recorded having heard the statement made by the Secretary-General at the 1773rd meeting of the Counil on 29 May 1974 and in the operative part of the resolution it also took note of the Secretary-General's statement. In his statement the Secretary-General *inter alia* declared that: "it would be my

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*Argentina, Australia, Austria, Brazil, Burundi, Canada, Chad, Chile, Colombia, Cyprus, Ecuador, Ethiopia, Greece, Guatemala, Guinea, Guyana, Japan, Indonesia, Iran, the Ivory Coast, Kenya, Liberia, Nicaragua, Nigeria, Norway, Panama, Peru, Rwanda, Sri Lanka, Togo, Turkey, the United Republic of Tanzania, Uruguay, Venezuela and Yugoslavia.

[32] A/C.5/SR.1603, pp. 4 and 5.

[33] *Official Records of the General Assembly, Twenty-eighth Session, Annexes*, agenda item 109, document A/9428.

intention to set up the Force on the basis of the same general principles as those defined in my report on the implementation of Security Council resolution 340 (1973), contained in document S/11052/Rev. 1, which was approved by the Security Council in its resolution 341 (1973) of 27 October 1973".[34] Among the general principles included in document S/11052/Rev.1, is the principle that the expenses of the Force are "expenses of the Organization" within the meaning of Article 17, paragraph 2, of the Charter.

9. As UNDOF was set up on 31 May of this year, at a time when the General Assembly was not in session, the Assembly has not yet had the opportunity to take the necessary action regarding its financing. In the interim, the Force has been financed out of funds authorized and appropriated for UNEF and UNTSO, from which the personnel of UNDOF have been drawn (see document A/C.5/1614, p. 4). Should the Assembly proceed to make provision for UNDOF in the same manner as it has for UNEF,[35] with due regard to the position of the Security Council on financing, then the conclusions set out in paragraph 7 of this memorandum, regarding the expenses of UNEF, will be equally applicable to UNDOF.

Due dates for assessed contributions to UNEF and UNDOF

10. The second question on which legal advice has been sought relates to the dates on which contributions from Member States to UNEF and UNDOF fall due. In this respect, Regulations 5.3 and 5.4 of the Financial Regulations and Rules provide as follows:

"*Regulation 5.3:* After the General Assembly has adopted the budget and determined the amount of the Working Capital Fund, the Secretary-General shall:

"(*a*) Transmit the relevant documents to Member States;

"(*b*) Inform Member States of their commitments in respect of annual contributions and advances to the Working Capital Fund;

"(*c*) Request them to remit their contributions and advances.

"*Regulation 5.4:* Contributions and advances shall be considered as due and payable in full within thirty days of the receipt of the communication of the Secretary-General referred to in Regulation 5.3 above, or as of the first day of the financial year to which they relate, whichever is the later. As of 1 January of the following financial year, the unpaid balance of such contributions and advances shall be considered to be one year in arrears."

The application of these Regulations in respect of UNEF and UNDOF are examined separately below.

UNEF

11. By its resolution 3101 (XXVIII), the General Assembly appropriated and apportioned the sum of $30 million for the operation of UNEF for the period 25 October 1973 to 24 April 1974. It further authorized "the Secretary-General to enter into commitments for the United Nations Emergency Force at a rate not to exceed $5 million per month for the period from 25 April to 31 October 1974 inclusive, should the Security Council decide to continue the Force beyond the initial period of six months, the said amount to be apportioned among Member States in accordance with the scheme set out in the present resolution". These two periods have to be considered separately as regards the application of the relevant financial regulations.

25 October 1973 to 24 April 1974

12. General Assembly resolution 3101 (XXVIII) was adopted on 11 December 1973. This resolution, as required by Financial Regulation 5.3, was transmitted by the Secretary-

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[34] S/PV.1773, p. 3.

[35] Action along those lines was taken by the General Assembly in resolution 3211 (XXIX) of 29 November 1974.

General to Member States under cover of a *note verbale* dated 19 December 1973, in which it was stated that "the amount of US$30,000,000 appropriated by the General Assembly for the operation of the United Nations Emergency Force from 25 October 1973 to 24 April 1974 has been apportioned among Member States" and that "no provision has been made for financing the Force beyond 25 April 1974".

13. Applying the first sentence of Financial Regulation 5.4 to the amount actually appropriated and apportioned by resolution 3101 (XXVIII)—that is $30,000,000 for the period 25 October 1973 to 24 April 1974—it would appear that contributions became due and payable after the middle of January 1974, that is thirty days after the Secretary-General's communication of 19 December 1973. Applying the second sentence of Regulation 5.4, any unpaid balance of such contributions would be considered one year in arrears as of 1 January 1975.

25 April to 31 October 1974

14. As indicated above, the General Assembly did not appropriate and apportion any amounts for the period after 24 April 1974. Instead, by operative paragraph 4 of resolution 3101 (XXVIII), it authorized the Secretary-General to enter into commitments for UNEF not exceeding $5 million per month for the period 25 April to 31 October 1974, and indicated that this sum would be apportioned among Member States in the same manner as the sum appropriated and apportioned for the period up to 24 April 1974. As there has been no formal appropriation and apportionment of the expenses of UNEF after 24 April 1974, contributions for such expenses will only be due legally after the Assembly has appropriated and apportioned those expenses.[36] Sums received from Member States for the period in question must be considered in the nature of advances, made in anticipation of the Assembly's action.

15. In the light of the foregoing, it is not possible at this stage to indicate with any precision the due date for contributions to the UNEF account for the period 25 April 1974 onwards. This can only be determined after the Assembly has acted and the Secretary-General has sent out the communication referred to in Financial Regulation 5.3. In all probability these contributions will become due as of early 1975.

UNDOF

16. As no provision has yet been made by the General Assembly for the financing of UNDOF, the same considerations apply as in respect of UNEF expenses after 24 April 1974. Contributions to UNDOF will become due within 30 days of any communication sent out by the Secretary-General, under Financial Regulation 5.3, after the Assembly has made the necessary appropriation and determined the apportionment of the expenses of UNDOF to date. Again the due date for contributions will probably be in early 1975.

23 October 1974

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11. Extent to which funds from private sources may be used for disaster relief under General Assembly resolution 2816 (XXVI)

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

1. Our advice has been requested on the use of private funds for disaster relief. For the reasons stated in the following paragraphs, we have concluded that there is no legal obstacle to the use of funds from private sources for disaster relief and that such use would not legally

[36] The relevant amounts have been appropriated and apportioned by General Assembly resolution 3211 (XXIX) of 29 November 1974.

conflict with any arrangement between the United Nations and the League of Red Cross Societies or the International Red Cross.

2. With reference to funds for disaster relief, General Assembly resolution 2816 (XXVI) authorizes the Disaster Relief Co-ordinator "To receive, on behalf of the Secretary-General, contributions offered to him for disaster relief assistance to be carried out by the United Nations, its agencies and programmes for particular emergency situations" (paragraph 1 (*d*)). There appears to be no restriction on the source of the contributions which may be received, and, in the absence of such restriction, contributions from private sources are receivable for disaster relief. A limitation arises only with respect to the timing of contributions from whatever source. In this respect the legislative history[37] indicates that the inclusion of the words "for particular emergency situations" reflects the Assembly's intention that contributions be received for relief of disasters which have already occurred and not for relief of disasters which may occur in future.

3. There was no legal obstacle to the use of funds from private sources at the time of the enactment of Assembly resolution 2816 (XXVI) and no such obstacle appears to have arisen since that time.

4. With reference to the Red Cross, resolution 2816 (XXVI) provides a general role for both the International Red Cross and the League of Red Cross Societies in co-operating with the Disaster Relief Co-ordinator to provide the most effective assistance to States stricken by disaster (paragraph 1 (*a*)), a specific role for the International Red Cross in providing assistance directly to such States (paragraph 1 (*c*)) and a specific role for the League of Red Cross Societies in providing advice to governments in pre-disaster planning (paragraph 1 (*g*)). The general and specific roles of these organizations in paragraphs 1 (*a*), (*c*) and (*g*) appear to be entirely consistent with the Disaster Relief Co-ordinator's right to receive contributions on behalf of the Secretary-General under paragraph 1 (*d*).

5. The relationship with the League of Red Cross Societies and the International Red Cross at the time of the enactment of Assembly resolution 2816 (XXVI) did not constitute an arrangement which would legally conflict with the use of funds from private sources and no such arrangement appears to have been created since that time.

29 October 1974

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12. Use of the term "consensus" in United Nations practice

Summary[38] of a statement[39] made at the 311th meeting of the Population Commission, on 6 March 1974

The Director of the General Legal Division, Office of Legal Affairs, stated that no plenipotentiary conference under United Nations auspices had included in its rules of

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[37] See Economic and Social Council resolution 1533 (XLIX), as well as the report of the Secretary-General to the Council at its fifty-first session (E/4994, paras. 94 and 95), and the debate of the General Assembly at its twenty-sixth session (*Official Records of the General Assembly, Twenty-sixth session*, Third Committee, 1888th and 1890th meetings).

[38] Reproduced in *Official Records of the Economic and Social Council, Fifty-sixth Session, Supplement No. 3A* (A/5462), para. 64.

[39] The statement was made in connexion with a proposal (E/CN.9/L.110) that the rules of procedure of the World Population Conference, 1974, should specify that "the President of the Conference has the possibility to recommend that the decisions on the important matters of substance shall be taken, if possible, by consensus".

The Population Commission subsequently agreed to annex the following recommendation to the revised preliminary draft of the rules of procedure of the Conference, for consideration by the Council:

procedure a provision on consensus,[40] partly due to the fact that it was somewhat difficult to arrive at an exact definition of consensus, and partly because the objective which was usually sought, namely, that every effort should be made to achieve a consensus before a vote was taken, could better be achieved by simply an understanding at the beginning of the conference. In United Nations organs, the term "consensus" was used to describe a practice under which every effort is made to achieve unanimous agreement; but if that could not be done, those dissenting from the general trend were prepared simply to make their position or reservations known and placed on the record.

"The Population Commission considers that it is highly desirable for the World Population Conference, 1974, to reach decisions on the basis of consensus, which is understood to mean, according to United Nations practice, general agreement without vote, but not necessarily unanimity."

By resolution 1835 (LVI) of 14 May 1974, the Council approved as the provisional rules of procedure for the Conference the text of the revised preliminary draft of the rules of procedure, as well as the annex on consensus recommended by the Population Commission. The provisional rules of procedure were adopted by the World Population Conference subject to some amendments unrelated to the question under consideration (see document E/5585, p. 57).

[40] It should be noted, however, that the rules of procedure of the Third Conference on the Law of the Sea, adopted by the Conference on 27 June 1974 (A/CONF.62/30/Rev.1, United Nations publication, Sales No. E.74.I.18) contain a rule 37 on "Requirements for voting", which reads as follows:

"1. Before a matter of substance is put to the vote, a determination that all efforts at reaching general agreement have been exhausted shall be made by the majority specified in paragraph 1 of rule 39.

"2. Prior to making such a determination the following procedures may be invoked:

"(*a*) When a matter of substance comes up for voting for the first time, the President may, and shall if requested by at least 15 representatives, defer the question of taking a vote on such matter for a period not exceeding 10 calendar days. The provisions of this subparagraph may be applied only once on the matter.

"(*b*) At any time the Conference, upon a proposal by the President or upon motion by any representative, may decide, by a majority of the representatives present and voting, to defer the question of taking a vote on any matter of substance for a specified period of time.

"(*c*) During any period of deferment, the President shall make every effort, with the assistance as appropriate of the General Committee, to facilitate the achievement of general agreement, having regard to the over-all progress made on all matters of substance which are closely related, and a report shall be made to the Conference by the President prior to the end of the period.

"(*d*) If by the end of a specified period of deferment the Conference has not reached agreement and if the question of taking a vote is not further deferred in accordance with subparagraph (*b*) of this paragraph, the determination that all efforts at reaching general agreement have been exhausted shall be made in accordance with paragraph 1 of this rule.

"(*e*) If the Conference has not determined that all efforts at reaching agreement had been exhausted, the President may propose or any representative may move, notwithstanding rule 36, after the end of a period of no less than five calendar days from the last prior vote on such a determination, that such a determination be made in accordance with paragraph 1 of this rule; the requirement of five days' delay shall not apply during the last two weeks of a session.

"3. No vote shall be taken on any matter of substance less than two working days after an announcement that the Conference is to proceed to vote on the matter has been made, during which period the announcement shall be published in the Journal at the first opportunity."

13. QUESTION OF THE PARTICIPATION IN MEETINGS OF THE FUNCTIONAL COMMISSIONS OF THE ECONOMIC AND SOCIAL COUNCIL OF STATES NOT MEMBERS OF THE UNITED NATIONS BUT MEMBERS OF A SPECIALIZED AGENCY OR OF THE INTERNATIONAL ATOMIC ENERGY AGENCY OR PARTIES TO THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE[41]

Note to the Director, Division of Human Rights

You have referred to us the question whether the delegation of a non-Member State should have been listed in United Nations document E/CN.4/INF.21 (5 March 1974), "Attendance at the thirtieth session of the Commission on Human Rights (4 February to 8 March 1974)".

With respect to the general question of participation of representatives of non-Member States in meetings of the functional commissions of the Economic and Social Council, it is established practice that such participation requires prior authorization or consent of the Economic and Social Council (for an example of such authorization see Economic and Social Council resolution 557 F (XVIII), paragraph 3 (*b*), of 5 August 1954). This practice is based on the following reasoning:

(1) Rule 72 of the rules of procedure of the functional commissions provides only for the possibility of invitations to States which are Members of the United Nations but are not members of the commissions to participate in the deliberations on matters which are of particular concern to those States. There is no provision in that rule or in any other rule for participation of States that are not Members of the United Nations.

(2) The powers and composition of the functional commissions are defined by the Council (rule 71 of the rules of procedure of the Economic and Social Council[42] and Article 68 of the Charter); the rules of procedure of the functional commissions and their subsidiary bodies are drawn up by the Council (rule 74 of the rules of procedure of the Council[43]) and amendments to the rules can be made only by the Council (rule 77 of the rules of procedure of the functional commissions).[44] Consequently, the power of a functional commission to deal with the question of participation of non-Member States is limited in the context of those provisions.

The question of whether a non-Member State which had not been granted observer status by the Commission, but which had attended public meetings of the Commission, should be included in the attendance record of the session concerned, had been discussed in the Human Rights Commission on several occasions. In those instances the Commission decided not to include the States in question in its attendance record. For example, in 1967, a proposal to include in the report of the Commission a non-Member State which was present at the meetings of the Commission was withdrawn after discussion of the matter in the Commission (see E/CN.4/SR.941, pages 4-6) and a corrigendum was subsequently issued to delete the name of that State when it had been inadvertently listed in the Commission's report (see *Official Records of the Economic and Social Council, Forty-second Session, Supplement No. 6* (A/4322), Corrigendum). In accordance with the same practice, a non-Member State was not listed or mentioned in the report of the Commission on Human Rights on its twenty-ninth session in 1973, although an official of that State had been present at the session and had made a statement to the Commission (see *Official Records of the Economic and Social Council, Fifty-fourth Session, Supplement No. 6* (E/5265), paragraphs 3 and 264 and Annex I).

For the reasons stated above, the non-Member State to which you refer has rightly been omitted from the attendance list of the thirtieth session of the Commission on Human Rights.

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[41] The States in question are hereafter referred to as "non-Member States".

[42] The corresponding rule in the current rules of procedure of the Economic and Social Council (E/5715) is rule 24.

[43] Rule 27.2 of the current rules.

[44] Rule 78 of the current rules.

As to the fact that a non-Member State was included in the attendance list of the third special session of the Population Commission, it should be noted that the Commission held its third special session in its capacity as the intergovernmental preparatory body of the World Population Conference, and that the State in question had been invited to participate in that Conference. In such a case, the requirement of prior authorization or consent of the Economic and Social Council for granting observer status to non-Member States in practice has not been applied, because it is understood that all States invited to an international conference have a role to play in the preparatory work of the conference. This link between participation in the Conference itself and in the preparatory body is indicated in an explanatory note under the relevant section of the attendance list annexed to the report of the Population Commission on its third special session.[45]

15 April 1974

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14. QUESTION WHETHER A CHANGE OF GOVERNMENTAL AFFILIATION OR NATIONALITY OF AN EXPERT WOULD AFFECT HIS MEMBERSHIP IN THE *Ad Hoc* WORKING GROUP OF EXPERTS OF THE COMMISSION ON HUMAN RIGHTS

Memorandum to the Director, Division of Human Rights

1. This is in reply to your memorandum on the above-mentioned subject.

2. The resolutions relating to the composition of the *Ad Hoc* Working Group of Experts are resolution 9 (II) of the Economic and Social Council and resolution 2 (XXIII)[46] of the Commission on Human Rights. In addition, a decision taken by the Commission on 3 April 1973,[47] as stated in your memorandum, is also relevant.

3. In paragraph 3 of its resolution 9 (II), the Economic and Social Council authorized the Commission on Human Rights "to call in *ad hoc* working groups of *non-governmental experts* in specialized fields or *individual experts* without further reference to the Council, but with the approval of the President of the Council and the Secretary-General" (italics added).

4. In paragraph 3 of its resolution 2 (XXIII), the Commission on Human Rights decided "to establish, in accordance with resolution 9 (II) of 21 June 1946 of the Economic and Social Council, an *Ad Hoc* Working Group of *Experts composed of eminent jurists and prison officials* to be appointed by the Chairman of the Commission" (italics added).

5. On 3 April 1973, in appointing the members of the Working Group, the Commission on Human Rights again stated that the Working Group should be composed of "experts in their personal capacity".

6. It is therefore clear that the experts composing the Working Group are chosen on their personal qualifications and in their personal capacity. Any change in governmental affiliation does not and should not affect their membership in the Working Group.

7. We note that when the present members of the Working Group were appointed on 3 April 1973, there was an indication of their nationality. As in the case of other United Nations organs of experts, such an indication is usually given as evidence of geographical distribution and should not be regarded as a criterion based on individual nationality. In other words, a change of nationality of an expert does not affect his membership in the Working Group unless the Commission considers that such a change would disturb the agreed pattern of geographical representation and decides to replace the expert in question. It may be noted in this connexion

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[45] *Official Records of the Economic and Social Council, Fifty-sixth Session, Supplement No. 3A* (E/5462), p. 67.

[46] *Official Records of the Economic and Social Council, Forty-second Session, Supplement No. 6* (E/4322), p. 76.

[47] *Ibid., Fifty-fourth Session, Supplement No. 6* (E/5265), p. 92.

that although neither the resolutions referred to in paragraphs 3 and 4 above nor the decision mentioned in paragraph 5 made any reference to geographical distribution as a basis for the appointment of the experts, the proceedings leading to the adoption of Economic and Social Council resolution 9 (II) show that the provision for *ad hoc* working groups had originated in the idea of calling regional conferences of experts. Moreover, a very large majority of United Nations organs have been established with due regard to geographical representation of their membership. We have therefore assumed that geographical distribution may have been a consideration in the composition of the *Ad Hoc* Working Group of Experts. In the present case, however, the change of affiliation does not alter the geographical pattern. There is therefore no doubt that the two experts concerned may continue to serve as members of the *Ad Hoc* Working Group.

4 January 1974

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15. Representation of national liberation movements in the work of the Economic Commission for Africa

Legal opinion prepared for the Acting Secretary of the Economic Commission for Africa

1. Our advice has been requested concerning the representation of National Liberation Movements in the work of the Economic Commission for Africa, pursuant to relevant decisions of the General Assembly, including, *inter alia*, General Assembly resolution 3118 (XXVIII), paragraph 7.

2. In so far as particular reference has been made to paragraph 7 of General Assembly resolution 3118 (XXVIII), it should be pointed out that this provision was addressed primarily to specialized agencies rather than to organs of the United Nations itself, such as the Economic Commission for Africa. Similar requests to specialized agencies and other organizations were also contained in General Assembly resolutions 2704 (XXV), paragraph 10, 2874 (XXVI), paragraph 9, 2980 (XXVII), paragraph 7, and 3163 (XXVIII), paragraph 10.

3. In general, however, as will be shown below, the General Assembly has requested United Nations organs, in consultation with the Organization of African Unity (OAU), to ensure the participation or representation of the colonial territories in Africa by the national liberation movements concerned, in an appropriate capacity, when dealing with matters pertaining to those territories (see, *inter alia*, General Assembly resolutions 2621 (XXV), paragraph 6(*c*), 2795 (XXVI), paragraph 12, 2878 (XXVI), paragraph 14, 2908 (XXVII), eighth preambular paragraph, 2918 (XXVII), paragraph 2, and 3113 (XXVIII), paragraph 2, in addition to the resolutions cited in paragraph 2 above).

4. The question which is the subject of this opinion would appear to involve two main issues which need to be considered separately, namely:

(*a*) the participation of national liberation movements in meetings of the Economic Commission for Africa when it deals with matters pertaining to their respective territories, in accordance with the resolutions cited in paragraph 3 above; and

(*b*) the representation of associate members of the Economic Commission for Africa under the terms of articles 6, 7 and 8 of the terms of reference of ECA,[48] and rules 11, 12 and 13 of the rules of procedure of ECA.[49]

5. Although these two questions may to some extent overlap, they are essentially different, and will be treated separately below.

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[48] Reproduced in *Official Records of the Economic and Social Council, Fifty-first Session, Supplement No. 5* (E/4997), vol. 1, p. 152 *et seq.*

[49] *Ibid.*, p. 156 *et seq.*

Participation of liberation movements in meetings of the Economic Commission for Africa (otherwise than as representatives of associate members of ECA)

6. A summary of past practice of the United Nations with respect to the representation of national liberation movements from colonial territories in United Nations organs or committees is contained in a separate opinion, dated 14 March 1974.[50] It should be added that further practice in this regard continues to develop both under previous General Assembly decisions and also as a result of recent decisions relating to specific meetings or conferences.

7. It will be noted that General Assembly resolutions have in the past referred to "liberation movements" of colonial countries and peoples (General Assembly resolution 2621 (XXV)), to "liberation movements in the colonial Territories in Africa" (General Assembly resolutions 2704 (XXV), 2874 (XXVI), 2980 (XXVII), 3118 (XXVIII) and 3163 (XXVIII), decision taken by the General Assembly at its 2139th meeting on 3 October 1973, and Economic and Social Council resolution 1804 (LV)), to "liberation movements in the colonial Territories in southern Africa" (General Assembly resolution 2878 (XXVI)) and to the "liberation movements ... of Angola, Mozambique, Guinea (Bissau) and Cape Verde, Namibia and Southern Rhodesia" (General Assembly resolution 2908 (XXVII) etc.). At the same time, the General Assembly has required that the liberation movements in question be those recognized by the OAU, and that their participation be arranged in consultation with the Organization of African Unity, (e.g. see General Assembly resolutions 2704 (XXV), 2874 (XXVI), 2878 (XXVI), 2980 (XXVII), 3113 (XXVIII), 3118 (XXVIII) and 3163 (XXVIII)).

8. For the purposes of the Economic Commission for Africa, (being a commission established by the Economic and Social Council under Article 68 of the Charter), the resolutions referred to above would appear to require that those liberation movements of the colonial Territories in Africa, recognized by the OAU, should be invited, in consultation with the OAU, to participate in an appropriate capacity in the deliberations of the Economic Commission for Africa relating to their respective territories.

9. Such participation would not necessarily mean that the liberation movements in question would formally represent their respective territories, this question being linked with the existence or otherwise of one or more authorities claiming to be the government entitled to represent a State, or recognized as the government having responsibility for the international relations of a non-self-governing territory.

10. However, even where a Member State as administering Power continues to be responsible for the international relations of a non-self-governing territory, and on this basis to represent the territory in intergovernmental organs, it would nevertheless be possible for both the administering Power and one or more recognized liberation movements to participate simultaneously although in different capacities (as occurred, for example, in the Fourth Committee of the General Assembly at its twenty-seventh and twenty-eighth sessions when considering the question of Southern Rhodesia).

11. Specific provision for such participation by liberation movements in meetings of the Economic Commission for Africa (otherwise than as representatives of associate members of the Commission) could be made by means of an appropriate amendment to the rules of procedure of ECA. Such an amendment, if made by the Commission in accordance with rules 79 and 80, might, for example, provide for the participation of liberation movements recognized by the Organization of African Unity on a basis comparable to that now applied to Member States not members of the Commission under the terms of rules 70 and 71.

The representation of associate members of the Economic Commission for Africa

12. Paragraph 6 of the terms of reference of the Economic Commission for Africa (as amended by Economic and Social Council resolutions 974 D (XXXVI) of 5 July 1963 and 1343 (XLV) of 18 July 1968) provides as follows:

[50] See p. 149 of this *Yearbook*.

"6. The following shall be associate members of the Commission:

"(*a*) The Non-Self-Governing Territories situated within the geographical area defined in paragraph 4 above [i.e. the whole continent of Africa, Madagascar and other African islands];

"(*b*) Powers other than Portugal responsible for international relations of those Territories".

13. According to this text, the non-self-governing territories within the defined area are associate members, and also those powers recognized as being responsible for their international relations. It has not followed from this, however, that there has been, or could properly have been separate representation of the territories, in addition to representation through an administering power recognized as having continuing responsibility for the territory's international relations.

14. Moreover, under rule 11 of the rules of procedure of ECA, an associate member is represented by "an accredited representative", in the singular, and although the latter may be accompanied by alternate representatives and advisers (under rule 12), there is no provision for dual or multiple representation of a single associate member by two or more different authorities or entities. While it is always possible for the Commission to amend its rules of procedure, it would doubtless take into account the impracticability of an arrangement permitting separate or rival delegations to be seated concurrently as representatives of a single member or associate member.

15. In a situation where more than one authority claims to be the government entitled to represent a Member State, and the question becomes the subject of controversy, United Nations practice requires that the matter be considered by the General Assembly (see General Assembly resolution 396 (V)). However, in the case of a non-self-governing territory so classified by the General Assembly, or a liberation movement not claiming to be the government of an independent State, it would seem unlikely that conflict would arise concerning the legal aspects of international representation by the recognized administering Power, pending the granting of independence in accordance with the Declaration contained in General Assembly resolution 1514 (XV).

16. It would appear that the question of the formal representation of an associate member otherwise than by an administering Power recognized as being responsible for its international relations has thus far only arisen in the case of Angola, Mozambique, Guinea (Bissau) and Namibia. It will be recalled that the representatives of these four territories were proposed by the Organization of African Unity under the terms of ECA resolution 194 (IX) of 12 February 1969,[51] and was approved, in the case of Angola, Mozambique and Guinea (Bissau) by the General Assembly in paragraph 12 of its resolution 2795 (XXVI), and in the case of Namibia, by the United Nations Council for Namibia at the latter's 98th meeting on 22 January 1971.[52]

17. It should be noted, however, that in these instances there did not exist an administering Power competent and able to represent these territories in the Economic Commission for Africa (other than the United Nations itself, through the United Nations Council for Namibia, in the exercise of its direct responsibility for the international territory of Namibia).

18. In the case of the remaining six associate members (namely Comoro Archipelago, French Territory of the Afars and the Issas, Seychelles, Southern Rhodesia, Spanish Sahara and Saint Helena), formal representation has been provided through an administering Power recognized as having continuing responsibility for their international relations, as well as for the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (see, by analogy, the references to these administering Powers contained in

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[51] *Official Records of the Economic and Social Council, Forty-seventh Session*, document E/4651, vol.I, p. 145.

[52] See *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 24* (A/8424), para. 63.

General Assembly resolutions 3161 (XXVIII), paragraphs 5, 6 and 7; 3156 (XXVIII), paragraphs 3 and 6 to 9; 3115 (XXVIII), paragraphs 3 to 6, 8 and 9; 3162 (XXVIII), paragraphs 4 and 7, and the relevant sections of the report 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.[53] It is our understanding that until the recognized international responsibility of these administering Powers ceases, their formal representation of the six territories in question would continue, although without precluding the concurrent participation of liberation movements in the manner referred to in paragraphs 6 to 11 above.

19. Finally, mention should be made of the apparent need for some clarification concerning the current position of Guinea-Bissau in relation to the Economic Commission for Africa.

20. Following the Proclamation of the State of Guinea-Bissau by the People's National Assembly on 24 September 1973 (see document S/11022, and General Assembly resolution 3061 (XXVIII) of 2 November 1973), the former Guinea (Bissau) ceased to be a non-self-governing or colonial territory, and has since been admitted to membership of FAO and WHO. It follows that the former Guinea (Bissau) ceased to be an associate member of the Economic Commission for Africa under paragraph 6 (*a*) of the terms of reference (quoted in paragraph 12 above), and, at the same time, since it is not a "power" responsible for the international relations of a non-self-governing territory, it is not an associate member within the meaning of paragraph 6 (*b*) of the terms of reference.

21. Since, moreover, membership of the Commission is defined in paragraph 5 of the terms of reference of the Commission as being open to the States listed in that paragraph ". . . and to any other State in the area which may hereafter become a Member of the United Nations . . .", the fact that Guinea-Bissau has not at this time become a Member of the United Nations would also seem to exclude the new Republic from membership of ECA under the existing terms of reference. The latter, however, could be amended by the Economic and Social Council to include Guinea-Bissau under paragraph 5, and if this is desired an appropriate proposal could no doubt be submitted to the Economic and Social Council at its next session.[54]

Conclusion

22. In conclusion it has been noted that the General Assembly has requested United Nations organs, in consultation with the Organization of African Unity, to ensure the participation or representation of the colonial territories in Africa by the national liberation movements concerned, in an appropriate capacity, when dealing with matters pertaining to those territories.

23. This requirement does not, however, exclude the representation of a non-self-governing territory by an administering Power recognized as having responsibility for the territory's international relations. On the other hand, neither does the formal representation of a non-self-governing territory by an administering Power exclude the simultaneous participation by the liberation movement concerned in meetings dealing with the territory in question.

24. In general, therefore, the Economic Commission for Africa is called upon to ensure, in consultation with the Organization of African Unity, the participation in an appropriate capacity of national liberation movements from the colonial territories in Africa recognized by the Organization of African Unity.

25. At the same time, with regard to the formal representation of these territories as associate members of the Economic Commission for Africa, it would appear that they may conveniently be divided under the following three categories:

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[53] *Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 23* (A/9023/Rev.1).

[54] The Republic of Guinea-Bissau having become a Member of the United Nations on 17 September 1974 has since that date been a member of the Economic Commission for Africa.

(*a*) Non-self-governing territories formerly under Portuguese administration, the representation of which by their respective liberation movements requires the approval of the General Assembly;

(*b*) The international territory of Namibia, for which the United Nations has direct responsibility, pending the achievement of Namibian independence, and the representation of which is assured by or with the approval of the United Nations Council for Namibia:

(*c*) The remaining six non-self-governing territories qualifying as associate members of the Economic Commission for Africa (under paragraph 6(*a*) of the Commission's terms of reference), namely Comoro Archipelago, French territories of the Afars and the Issas, Seychelles, Southern Rhodesia, Spanish Sahara and Saint Helena, the formal representation of which is currently provided by the administering Powers recognized as having responsibility for the international relations of the territories in question, pending the granting of independence, but without prejudice to the simultaneous participation in meetings of the national liberation movements concerned on the basis previously described.

26. Finally, the need for clarification concerning the position of Guinea-Bissau in relation to the Economic Commission for Africa has been summarized in paragraphs 19 to 21 above.

18 June 1974

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16. Question whether the establishment of a committee jointly by the United Nations Economic Commission for Asia and the Far East[55] and the Food and Agriculture Organization of the United Nations would require formal approval by the Economic and Social Council

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

There exists no provision in the United Nations Charter or in the rules of procedure of the Economic and Social Council and other principal organs referring specifically to the establishment of joint bodies by the United Nations and specialized agencies. The establishment of such bodies should however be considered permissible under specific circumstances. Of the three existing precedents, two concern bodies established on the basis of approval by the General Assembly. These are the Liaison Committee established by article II of the Agreement between the United Nations and the International Development Association,[56] and the United Nations/FAO Intergovernmental Committee on the World Food Programme established under General Assembly resolution 1714 (XVI). The third precedent, which is the only instance of a joint body established under a resolution of the Economic and Social Council, is the Working Group convened by the Secretary-General in joint sponsorship with ILO under Economic and Social Council resolution 585 F (XX) of 23 July 1955. To our knowledge no precedent exists of a body set up by a regional economic commission jointly with a specialized agency. Given the exceptional character of such joint bodies and the lack of any mention thereof in ECAFE's terms of reference, we believe that the establishment of a committee jointly by ECAFE and FAO requires formal approval by the Economic and Social Council. This is in line with paragraph 13 of ECAFE's terms of reference[57] and rule 57 of ECAFE's rules of

[55] Now Economic and Social Commission for Asia and the Pacific (ESCAP).

[56] United Nations, *Treaty Series*, vol. 394, p. 221.

[57] Reading as follows:

"The Commission may after discussion with any specialized agency functioning in the same general field, and with the approval of the Council, establish such subsidiary bodies as it deems

procedure.[58] No formal approval by the Council is, however, required for the establishment exclusively by ECAFE of a committee to be serviced jointly by ECAFE and FAO. A precedent for such a committee is the ECE Timber Committee. Should a joint ECAFE/FAO body be envisaged the question of the authority which should receive its report or approve its recommendations would be governed by its terms of reference as the Economic and Social Council sees fit to prescribe (on the recommendation of ECAFE if the proposal is first submitted to ECAFE).

27 March 1974

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17. USE IN RESOLUTIONS, DECISIONS OR CONCLUSIONS ADOPTED BY THE TRADE AND DEVELOPMENT BOARD OR ITS SUBSIDIARY BODIES OF THE WORDS "AS ADOPTED" IMMEDIATELY FOLLOWING REFERENCES TO AN EXISTING RESOLUTION

Note submitted to the Trade and Development Board during the first part of its fourteenth session[59]

Background

1. Prior to the thirteenth session of the Trade and Development Board there had been several instances in which the representatives of countries in Group B[60] proposed, as amendments to certain draft resolutions being considered by a deliberative body of UNCTAD, the insertion of the words "as adopted" immediately following the references to another resolution—whether of UNCTAD or another United Nations body—which had been previously adopted. Examples are to be found in resolution 6 (VI) of the Committee on Manufactures[61] and resolution 5 (VI) of the Committee on Invisibles and Financing Related to Trade.[62] It was explained by the sponsors of this insertion that, because their countries had not

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appropriate, for facilitating the carrying out of its responsibilities." (*Official Records of the Economic and Social Council, Fifty-seventh Session, Supplement No. 5* (E/5469), p. 192.)

[58] Reading as follows:

"After discussion with any specialized agency functioning in the same field, and with the approval of the Economic and Social Council, the Commission may establish such continually acting subcommissions or other subsidiary bodies as it deems necessary for the performance of its functions and shall define the powers and composition of each of them. Such autonomy as may be necessary for the effective discharge of the technical responsibilities laid upon them may be delegated to them." (*Ibid.*, p. 196.)

[59] Circulated by the UNCTAD Secretariat, with the approval of the Legal Counsel of the United Nations, under the symbol TD/B/L.351.

[60] For the list of the countries in Group B, see General Assembly resolution 2904 (XXVIII) of 26 December 1972.

[61] "*Considering* that the particular responsibilities of UNCTAD in respect of non-tariff barriers have been recognized in its decisions 2 (III), 1 (IV) and 1 (V), as adopted, and reaffirmed in Conference resolution 76 (III), as adopted . . ." (first preambular paragraph).

. . .

"*Recalling* General Assembly resolution 3040 (XXVII) of 19 December 1972, as adopted, . . ." (fourth preambular paragraph).

[62] "*Taking note* of resolution 59 (III) adopted by the United Nations Conference on Trade and Development on 19 May 1972, and particularly paragraph 6 thereof, as adopted," (first preambular paragraph).

"*Taking note* of paragraph 1 of General Assembly resolution 3039(XXVII) of 19 December 1972, as adopted, . . ." (second preambular paragraph).

subscribed to the resolution or resolutions previously adopted, and because these countries had not changed their position since, the term "as adopted" was needed to record that position.

2. The same proposal for the insertion of these words had also been made in other UNCTAD *fora*, prior to the thirteenth session of the Trade and Development Board; on those occasions when the opinion of the UNCTAD secretariat was sought, the secretariat expressed the view, for reasons set out below, that it would be unnecessary and undesirable to insert these words. In these instances the representatives in question did not insist on the inclusion of the words "as adopted" in the draft resolution under consideration.

Thirteenth session of the Trade and Development Board

3. At the thirteenth session of the Board, during discussion of the draft decision on Special Measures in Favour of the Least Developed among the Developing Countries (TD/B/L.340/Rev.1) submitted by the Group of 77, the spokesman for the countries members of Group B proposed that the words "as adopted" should be inserted after the reference to Conference resolution 62(III) in paragraph 1 of the draft decision. The spokesman for the Asian countries members of the Group of 77 accepted that proposal, on the understanding that the following footnote should be added: "The inclusion of these words in the text was objected to by the developing countries. It was agreed that this matter, dealing with the use of these words, should be the subject of a discussion in depth at the fourteenth session of the Board."[63]

4. The following additional resolution and decision, subsequently adopted at the thirteenth session, include the words "as adopted" as well as the footnote: resolution 101(XIII) and decision 102(XIII).

Analysis

5. The inclusion of the words "as adopted" to modify or qualify the reference in resolutions, decisions or agreed conclusions to previously adopted resolutions is undesirable; since the term is nowhere defined and since its meaning is unclear, it could be understood to refer either to the method of voting on the resolution (by show of hands or by roll-call) or to the fact that it was adopted without vote, by consensus, by acclamation or otherwise, or to the fact that explanations of vote or explanations of position where there was no vote were given. Furthermore, the inclusion of these words in respect of a selection of previously adopted resolutions and the absence of these words in respect of other previously adopted resolutions leads to an apparent and ambiguous distinction between the status of the two groups of resolutions. Finally, in the more than twenty-five years of United Nations practice in adopting resolutions, no need had been felt to include this qualification in resolutions. In this connection, it should be pointed out that in United Nations editorial practice, the term "as adopted" in reference to a resolution has always been used—in reports and not in the text of a resolution—to denote the final text of the resolution, as distinct from the text of the draft resolution.

6. As stated above, the inclusion of these words is unnecessary. The fact that a State or a number of States have expressed reservations at the time of the adoption of a given resolution or have otherwise explained the reasons why they could not then support or accept that resolution, remains part of the legislative history of that resolution. While it is common practice for States to restate, during discussions of draft resolutions containing references to previously adopted resolutions, their previous opposition to such resolutions, it could not be maintained that failure to do so would imply *post hoc* acceptance by those States. Hence there is no need to include the words "as adopted" in a draft resolution when reference is made to a previously adopted resolution.

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[63] *United Nations Conference on Trade and Development, Trade and Development Board, Official Records, Thirteenth Session*, 380th meeting, paras. 5 and 6.

Should the Board agree with the above analysis, it may wish to record such agreement in the report on its present session; this could then serve, also, as guidance to the main Committees of the Board and to other UNCTAD bodies.[64]

2 August 1974

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18. Question whether the United Nations Industrial Development Organization may finance its operational activities by means of voluntary contributions from sources other than Governments

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

This is in reply to your letter of 25 January 1974 concerning the UNIDO Scheme for the Exchange of Information on Industrial Projects among Industrial Development Financing Institutions.

Paragraph 22 of General Assembly resolution 2152 (XXI) establishes the ways in which UNIDO's expenses for operational activities shall be met. On the basis of the said provision, UNIDO is precluded not only from raising fees from the participants to some of its operational activities as a compensation for services rendered by it in the framework of such activities, but also from accepting voluntary contributions from sources other than governments.

It is true that in a memorandum of 10 November 1970 prepared by the Office of Legal Affairs on voluntary contributions for UNIDO's Pesticide Programme, it was said that the Secretary-General could in his discretion accept voluntary contributions from private as well as governmental sources, and that this authority of the Secretary-General might be exercised to accept voluntary contributions to finance operational activities of UNIDO. It must be pointed out, however, that the situation envisaged in the memorandum of 10 November 1970 was quite different from the situation now under examination. In the former case the issue was only whether the Secretary-General could accept two specific contributions (of $10,000 and $18,000) offered by two private sources, for the stated purpose of "assisting UNIDO in continuing its pesticide training programme". In the latter case instead, a permanent arrangement is envisaged, with the purpose of making the Scheme for the Exchange of Information self-financing through contributions which, in the future, would regularly come from private sources. In this case, therefore, the Secretary-General would not simply accept specific private contributions, but would also in a way commit himself to accept such contributions in the future, as the Scheme's permanent source of financing.

The result just described, however, would not be consistent with the rule that each donation must be examined by the Secretary-General on its own merits so that he may exercise his discretion to accept it, nor with the requirement that the acceptance of each donation be made in accordance with the relevant financial rules. It should be recalled that, under Financial Rule 107.7, approval by the General Assembly is necessary whenever the acceptance of a voluntary contribution may involve, directly or indirectly, an immediate or ultimate financial liability for the Organization, and that in all other cases, approval by the Secretary-General or the Controller is required under Financial Rule 107.5.

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[64] At its 410th meeting held on 12 September 1974, the Trade and Development Board decided to defer consideration of the question until the fifteenth session. At its 441st meeting held on 16 August 1975, in the course of its fifteenth session, the Board agreed with the secretariat analysis contained in document TD/B/L.351 and recommended that this agreement should serve as guidelines for the main Committees of the Board and its subsidiary bodies. The Board noted in particular that, as stated in paragraph 6 of the above-mentioned note by the secretariat, the fact that Governments may not judge it necessary to reiterate reservations previously stated did not mean that such reservations had been withdrawn (see the report of the Board on the first part of its fifteenth session, document TD/B/584, paras. 298 and 299).

Allowing some operational activities of UNIDO to be permanently financed through voluntary contributions from private sources would in any case appear to be in direct conflict with the provision of paragraph 22 of General Assembly resolution 2152 (XXI), which indicates quite clearly the sources from which the expenses for operational activities of UNIDO shall be met.

6 February 1974

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19. Question of the participation in the Preparatory Committee of the 1974 World Food Conference of States not members of the United Nations but members of a specialized agency or of the International Atomic Energy Agency or Parties to the Statute of the International Court of Justice[65]

Note to the Secretary of the Economic and Social Council

I. *Establishment of the Preparatory Committee*

1. In operative paragraph 1 of resolution 1831 (LV) adopted by the Economic and Social Council on 11 December 1973 and entitled "World Food Conference", the Council decided, subject to the adoption by the General Assembly of the draft resolution which recommended the convening of a World Food Conference under the auspices of the United Nations, "to establish an intergovernmental preparatory committee [for the World Food Conference] open to all States Members of the United Nations, which shall report to the Economic and Social Council on the progress of its work."

2. On 17 December 1973, the General Assembly adopted without change, as resolution 3180 (XXVIII), the draft resolution recommended by the Council.

3. The Preparatory Committee for the 1974 World Food Conference is thus a subsidiary body of the Council established under Article 68 of the Charter.

II. *The question of the participation of non-Member States in the meetings of United Nations organs (other than organs of which such States are members)*[66]

A. *The Economic and Social Council and its subsidiary organs*

(a) *The Council and its sessional committees*

4. The Council has, on some occasions, invited observers for non-Member States to make statements in the Council on matters of particular concern to those States. For example, at its 746th meeting on 3 August 1953, the Council invited the observer for Libya to speak in connexion with the question of assistance to Libya;[67] at its 1785th meeting on 20 July 1971, the Council invited the observer for Switzerland to make a statement in connexion with Switzerland's admission to membership in ECE;[68] at its 1846th meeting on 13 December 1972, the Council invited the observer for the German Democratic Republic to make a statement in connexion with that State's admission in ECE;[69] at its 1852nd meeting on 17 April 1973, the Council invited the observer for Bangladesh to make a statement in connexion with that State's admission to ECAFE;[70] on other occasions, the Council had included observers for non-

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[65] The States in question are hereafter referred to as "non-Member States".

[66] Certain subsidiary organs of the Council such as ECAFE (now ESCAP) and ECE and of the General Assembly such as UNCTAD and UNIDO, include non-Member States among their members.

[67] *Official Records of the Economic and Social Council, Sixteenth Session*, 746th meeting, paras. 24 *et seq.*

[68] *Ibid., Fifty-first Session*, 785th meeting, paras. 7 *et seq.*

[69] *Ibid., Resumed Fifty-third Session*, 1846th meeting, paras. 31 and 32.

[70] *Ibid., Fifth-fourth Session*, 1852nd meeting, paras. 34 and 35.

Member States in its list of participants although the records did not show that those States had made statements.

5. In a legal opinion given on 9 July 1954, it was pointed out that "there is no provision in the Charter of the United Nations or in the rules of procedure of the Economic and Social Council which provides for the participation of or the making of statements by representatives of States not Members of the United Nations". Referring to such invitations extended by the Council and its committees of the whole, the opinion concluded that the organ concerned acted on the basis of its own interest and as a matter of its own discretion and that "the non-Member State itself has no right to be heard, but is dependent upon the decision of the Council normally taken through its President".

6. At the Council's sixteenth session in 1953, the Social Committee, a sessional committee of the Council, decided by 14 votes in favour to none against, with 3 abstentions, to hear the observer for Italy (a non-Member State at the time), who had asked to be allowed to reply to a statement by the representative of Yugoslavia concerning alleged discrimination against Yugoslav subjects in Italy and in Zone A of the Free Territory of Trieste.[71]

7. At the 723rd meeting of the Social Committee held on 14 May 1973, a statement was made by the "First Secretary of the Permanent Observer Mission of Bangladesh" in connexion with an item on human rights.[72]

(b) *The functional commissions and the regional economic commissions*

8. In a legal opinion dated 16 October 1968,[73] the Office of Legal Affairs held that the Economic and Social Council's practice of inviting non-Member States, on occasion, to participate in its proceedings, "does not automatically apply to the [Council's] functional commissions". The opinion drew attention to the fact that "the powers and composition of the commissions are defined by the Council (rule 71 of the Council rules of procedure)[74] and observed that "the rules of procedure of the functional commissions and their subsidiary bodies are drawn up by the Council (rule 74 of the Council rules of procedure);[75] and amendments thereto can be made only by the Council (rule 77 of the rules of procedure of the functional commissions[76])." The legal opinion then went on to state that there was "no practice indicating the competence of a functional commission or its sub-commissions, in the absence of prior authorization from the Economic and Social Council, to invite non-Member States to participate in their deliberations" noting that "when a non-Member State has been invited, it has been only with such prior authorization by the Council." The precedents cited in the opinion concerned the Commission on Narcotic Drugs and the Commission on International Commodity Trade.

9. In a legal opinion dated 11 February 1972,[77] the Office of Legal Affairs dealt with the question of the participation of non-Member States in regional economic commissions in connexion with the possible attendance of an observer for the Holy See at the twenty-eighth session of ECAFE. In this opinion the Office of Legal Affairs, referring to the practice established by the Economic and Social Council in its resolutions 515 B (XVII), 581 (XX), 616 (XXII), 617 (XXII), 763 D (XXX), 860 (XXXII), 861 (XXXII) and 925 (XXXIV), concluded that "the grant of observer status at meetings of a regional economic commission to a State

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[71] See *Repertory of United Nations Practice*, vol. III, Article 69, para. 42.

[72] E/AC.7/SR. 723. An opinion on the question was orally given at the same meeting by the Office of Legal Affairs.

[73] See *Juridical Yearbook*, 1968, p. 204.

[74] The corresponding rule in the current rules of the Economic and Social Council is rule 24.

[75] Rule 27 of the current rules.

[76] Rule 78 of the current rules.

[77] See *Juridical Yearbook*, 1972, p. 173-174.

which is not a Member of the United Nations requires a decision of the Economic and Social Council."

(c) *Standing committees*

10. A most recent case is that of the Committee on Natural Resources.[78] There were requests from two non-Member States for participation in the third session of the Committee held in February 1973. The report of the Committee on that session included a note by the Secretariat reading as follows:

> "*Note by the Secretariat*: Requests to participate as observers in the session of the Committee on Natural Resources were received from Bangladesh and the German Democratic Republic. However, the granting of observer status to States not Members of the United Nations requires prior authorization of the Economic and Social Council, which was not then in session. The Secretariat extended facilities in accordance with established practice to enable representatives of these States to follow the proceedings at the public meetings of the Committee."[79]

(d) *Committees established by the Council for the preparation of international conferences*

11. As early as 9 April 1947, in reply to an inquiry concerning the attendance of observers from non-Member States at the meetings of the Preparatory Committee of the United Nations Conference on Trade and Development, the Office of Legal Affairs held that it was within the competence of the Preparatory Committee to invite such observers if it deems such action advisable.

12. The Federal Republic of Germany was represented by an observer at the first session of the Preparatory Committee of the United Nations Conference on Trade and Development, convened under Economic and Social Council resolution 917 (XXXIV)[80] and statements were made by the observer for the Federal Republic of Germany at the Committee's third session (at the 61st meeting on 12 February 1964[81] and at the 63rd meeting on 13 February 1964).[82]

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[78] There has been one case where a standing committee of the Economic and Social Council, acting on its own authority, has invited a non-Member State to make a statement in the committee. The case occurred in 1953 in the course of the Council's sixteenth session. During this session, the Chairman of the Technical Assistance Committee, one of the Council's standing committees existing at the time, informed the Committee that the observer for Libya, which was then a non-Member State, had expressed a desire to make a statement in the Committee in connexion with the points on the agenda of the latter, adding that there was no rule of procedure governing the hearing of representatives of States that were not Members of the United Nations, and that it therefore rested with the Committee to take its own decision on the matter. A member of the Committee proposed that "the observer be granted a hearing", and the Committee so agreed (*Repertory of United Nations Practice*, vol. III, Article 69, para. 41). It should be noted that, as indicated above, the Libyan Government had been represented by an observer during the Council's sixteenth session in connexion with agenda item 21 of the Council's agenda at that session, entitled "Question of assistance to Libya (General Assembly resolution 515 (VI))" and that in the Committee the observer for Libya spoke on that subject.

[79] *Official Records of the Economic and Social Council, Fifty-fourth Session, Supplement No. 4* (E/5247), p. 1.

[80] At the opening meeting of the Preparatory Committee's first session, on 22 January 1963, following upon the election of the Committee's officers, the representative of the USSR "noted that the Committee was conducting its business in the presence of an observer from the Federal Republic of Germany, while the German Democratic Republic was not admitted," adding that he "considered it quite arbitrary to refuse the German Democratic Republic an opportunity to be present at the activities of the specialized agencies, as well as the business of the United Nations". He concluded his statement by observing that "his delegation was confident that that injustice would disappear". None of the other representatives commented on this statement by the USSR. (See E/CONF.46/PC/SR.1.)

[81] E/CONF.46/PC/SR.61.

[82] E/CONF.46PC/SR.63.

B. *The General Assembly and its subsidiary organs*

(a) *The General Assembly and its Main Committees*

13. With the exception of the ceremonial occasion when Pope Paul VI addressed the Assembly at its twentieth session[83] no State that is not a Member of the United Nations has spoken in the plenary meetings of the General Assembly.

14. On two occasions the proposals to grant the floor to a representative of a non-Member State or to invite non-Member States to participate in the discussion in plenary meetings were rejected by vote.[84] On both occasions, however, the President referred to the practice of the Assembly that the views of non-Member States were heard by the Main Committee dealing with the item concerned and not by the Assembly in plenary.[85] On the second occasion, the President added that a proposal to invite non-Member States to participate in the discussion was not a departure from the rules of procedure and that there was nothing in the rules of procedure to prevent the General Assembly from taking a decision thereon.

15. There are many cases where Main Committees of the General Assembly heard representatives of non-Member States on the basis of decisions taken by the Committees concerned on their own authority. This has occurred when the Committee in question has considered that those States had a direct and immediate interest in the matter under discussion.[86]

16. A number of the most recent cases of invitations extended by Main Committees to non-Member States concerned Switzerland, which, at the twenty-third, twenty-fourth, twenty-sixth and twenty-eighth sessions of the General Assembly was invited by the Sixth Committee to participate in its deliberations on specific agenda items allocated to that Committee.

17. In requesting permission to participate in the work of the Sixth Committee on the "Draft Convention on Special Missions" (twenty-third and twenty-fourth sessions) and on the "Draft Convention on the Prevention and Punishment of Crimes against Diplomatic Agents and other Internationally Protected Persons" (twenty-eighth session), Switzerland drew attention to and set forth the grounds for its particular concern in those matters.[87] It should be noted, however, that in both cases valid reasons other than Switzerland's particular concern were set forth in Switzerland's request. As regards the third item on which Switzerland requested permission to participate in the work of the Sixth Committee, namely on the review of the role of the International Court of Justice (twenty-sixth session), it should be observed that the only ground adduced by Switzerland in support of its request was its entitlement as a

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[83] *Official Records of the General Assembly, Twentieth Session, Plenary Meetings*, 1347th meeting, held on 4 October 1965.

[84] *Official Records of the Fourth Session of the General Assembly, Plenary Meetings*, 245th meeting, held on 18 November 1949 and *Official Records of the General Assembly, Fifth Session, Plenary Meetings*, 292nd meeting, held on 6 October 1950.

[85] After observing, in paragraph 23 of its report to the General Assembly, that a means of lightening the task "of any given Main Committee would be to consider directly in plenary meeting, without preliminary reference to committee, certain questions which fall within the terms of reference of the Main Committee", the Special Committee on Methods and Procedures of the General Assembly established under General Assembly resolution 271 (III) of 29 April 1949 stated, in the same paragraph, its opinion:

> "that this procedure would be especially appropriate for certain questions the essential aspects of which are already familiar to Members, such as items which have been considered by the General Assembly at previous sessions and which do not require either the presence of representatives of non-member States or the hearing of testimony".

(For text, see Annex I to the rules of procedure of the General Assembly, document A/520/Rev.12, p. 39.)

[86] For examples of such invitations, see *Repertory of United Nations Practice*, vol. 1, Article 21, paras. 91-93.

[87] Documents A/C.6/389 (reproduced in *Official Records of the General Assembly, Twenty-third session, Annexes*, agenda item 85) and A/C.6/421.

party to the Statute of the International Court of Justice to participate in the amendment of the Statute of the Court.[88]

18. It should be noted that in connexion with the Sixth Committee's consideration at the twenty-fourth session of the draft Convention on Special Missions, Switzerland submitted an amendment to the draft Convention that was put to a vote[89] although the Sixth Committee's decision allowing Switzerland to participate in its work relating to this item did not expressly confer upon Switzerland the right to submit formal proposals.[90] However, when it decided at the General Assembly's twenty-eighth session to invite Switzerland to take part, without the right to vote, in the work of the Sixth Committee on the draft Convention on the Prevention and Punishment of Crimes against Diplomatic Agents and other Internationally Protected Persons, the Sixth Committee did so on the understanding that Switzerland could not submit formal proposals or amendments during consideration of the item.[91]

(b) *Subsidiary organs*

19. It does not appear from a preliminary examination, that the question has arisen of participation by non-Member States in a subsidiary organ of the Assembly whose membership is limited to Member States.

(c) *Committees established by the General Assembly for the preparation of international conferences*

20. In its resolution 2581 (XXIV) adopted on 15 December 1969, the General Assembly established a Preparatory Committee for the United Nations Conference on the Human Environment which the General Assembly, by resolution 2398 (XXIII) of 3 December 1968, had decided to convene in 1972. The Preparatory Committee was to consist "of highly qualified experts nominated by the Governments" of twenty-seven Members of the United Nations designated therein. At the same session, the Assembly decided that "any interested Member State not appointed to the Preparatory Committee . . . might designate highly qualified representatives to act as accredited observers at sessions of the Committee, with the right to participate in its discussions". In its resolution 2850 (XXVI) of 20 December 1971, the General Assembly requested the Secretary-General to invite to participate in the Conference "States Members of the United Nations or members of the specialized agencies or of the International Atomic Energy Agency".

21. Participation in the first of the four sessions held by the Preparatory Committee was limited to the members of the Committee and certain other Members of the United Nations that were represented by observers. At the Committee's second session, held in February 1971, four non-Member States, namely, the Federal Republic of Germany, the Holy See, the Republic of Viet-Nam and Switzerland, were represented by observers.[92] Some of these observers made statements in the Committee at that session. No observers for non-Member States participated at the Committee's third and fourth sessions, held in September 1971 and March 1972, respectively.

III. *Analysis of the issues involved in the request by a non-Member State to participate in the work of the Preparatory Committee of the 1974 World Food Conference*

A. *Question whether a preparatory committee established by the Economic and Social Council for the preparation of an international conference can itself take a decision to invite a non-Member State to participate in its meetings*

22. The above review of past practice shows that, as a general principle, participation by a non-Member State in the work of a subsidiary body of the Economic and Social Council of

[88] Document A/C.6/407.

[89] *Official Records of the General Assembly, Twenty-fourth Session, Annexes*, agenda item 87, document A/7799, para. 179.

[90] *Ibid., Twenty-third Session, Annexes*, agenda item 85, document A/7375, para. 5.

[91] *Ibid., Twenty-eighth Session, Annexes*, agenda item 90, document A/9407, para. 4.

[92] A/CONF.48/PC.9.

which it is not a member[93] requires a prior authorization of the Council. This rule does not apply to a committee established by the Council for the preparation of an international conference in which non-Member States are invited to participate, it being understood that all States invited to the conference have a role to play in the preparation for the conference.

B. *The requirement of particular or special interest*

23. Under Article 69 of the Charter, the Economic and Social Council is required to invite any Member of the United Nations not represented on the Council to participate without vote in its deliberations" on any matter of particular concern to that Member." *A fortiori* the same criterion applies to the participation by a non-Member State in the work of a subsidiary organ of the Council. The Council's practice is in keeping with this view. With respect to the Main Committees of the General Assembly, there is no provision in the Charter or in the rules of procedure of the Assembly concerning the participation of non-Member States, but the practice shows that the Main Committees have consistently applied the "special concern" criterion in authorizing representatives of non-Member States to make statements at their meetings.

24. It is for the organ concerned to determine whether a matter under discussion is of particular concern to a non-Member State. This determination is normally implied in the decision of the organ granting hearing or participation in its deliberations to the representative of a non-Member State at the latter's request.

25. In the case of international conferences, non-Member States invited to participate in such conferences are considered as having a role to play in their preparation and the "special concern" criterion is therefore more literally applied within the relevant preparatory committees.

C. *Scope of participation*

26. The precedents show that when a non-Member State has been granted participation in connexion with an agenda item or a subject of particular concern to that State, it is usually referred to as "observer" State and its participation is limited to making occasional statements.

27. In a few cases, the representative of a non-Member State was granted full participation in the discussion of the items concerned except the right to vote or to submit proposals in its own name. (For one exception in regard to the submission of proposals, see paragraph 18 above.) In two of these cases, the body concerned (i.e., the Sixth Committee) was considering draft articles prepared by the International Law Commission with a view to the adoption of a convention; had those draft articles been referred to international plenipotentiary conferences, the non-Member State concerned would have been invited as full participant. The third case was based on the special qualification of the Non-Member State (see paragraph 17 above).

28. Although precedents show that participation of non-Member States in the preparatory committees of international conferences convened by the Economic and Social Council or the General Assembly has been limited to attending the meetings or making one or a few statements, it appears that those non-Member States which are invited by the convening organ to participate in the conference may be accorded full participation except the right to vote or to submit proposals in their own name.

IV. *Concluding observations*

29. The foregoing survey shows that the preparatory committee of an international conference convened by the United Nations may accede to the request of a non-Member State invited to the conference to participate in the committee's discussions without the right to vote or to submit proposals, if the committee is satisfied that such participation would be useful to its preparatory work.

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[93] See foot-note 66 above.

30. In the case of the Preparatory Committee of the Human Environment Conference, however, four non-Member States participated at the second session of that Committee, at a time when the General Assembly had not yet decided on the question of participation (see paragraphs 20 and 21 above). The Preparatory Committee on the World Food Conference is now in the same situation with regard to the requests for participation by certain non-Member States, for neither the General Assembly nor the Economic and Social Council which has been entrusted with over-all responsibility for the Conference has taken a decision on the question of participation in the Conference.

31. It may be noted that the Economic and Social Council, at its 1885th meeting on 18 October 1973, decided to invite "the governing bodies of the organizations of the United Nations system, as appropriate, to consider" the question of the convening of the World Food Conference "as a matter of priority and to submit their reports to the Economic and Social Council". In response to this invitation, the FAO Conference considered the question in detail at its seventeenth session. In its report to the Economic and Social Council, the FAO Conference expressed the belief that the Conference should be held at the ministerial level and "should enjoy the full participation of all States Members of the United Nations and members of the specialized agencies and of the International Atomic Energy Agency including those not members of FAO" (E/5441, paragraph 2). Moreover, the Secretary-General of the United Nations, in his report to the Economic and Social Council on the convening of the Conference, after referring to the need for a co-operative effort, under the auspices of the United Nations, on the part of all the organizations concerned within the United Nations system and on the part of Governments, stated that it would be desirable that the Conference be held at the ministerial level and that "it enjoy the widest possible participation" (E/5443, paragraph 15). The report of the FAO Conference was noted with satisfaction and the report of the Secretary-General was noted with appreciation by the Economic and Social Council in its resolution 1831 (LV).

32. While participation in the Preparatory Committee of the World Food Conference by non-Member States, under the existing circumstances and in view of a previous similar instance, is not legally objectionable, it would be preferable if in the future the question of the participation in an international conference were to be decided upon by the convening organ before non-Member States are admitted to take part in the preparatory body of that conference.

12 February 1974

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20. Question of the termination of the Trusteeship Agreement for the Territory of New Guinea

Opinion of the Legal Counsel[94]

1. The Charter of the United Nations does not contain a specific provision on the termination of Trusteeship Agreements.

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[94] Prepared at the request of the Trusteeship Council and reproduced in *Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 4* (A/9604), para. 219.

The background of this opinion can be summed up as follows:

At the forty-first session of the Trusteeship Council, held from 3 to 14 June 1974, the Special Representative of the Administering Authority (Australia) for Papua New Guinea explained that a resolution of the General Assembly was required for the termination of the Trusteeship Agreement on New Guinea. The date of independence would be decided upon close to or soon after the closure of the twenty-ninth session of the United Nations General Assembly and the date of independence would occur before the opening of the thirtieth session of the General Assembly. If Papua New Guinea was required to wait until the last quarter of 1975 for the resolution [which would terminate the Trusteeship Agreement], there

2. In the absence of such provision, the United Nations has developed a practice in conformity with the principles of the Trusteeship System as set out in the Charter, and with the general principles of international law governing the termination of international agreements. Some basic guiding principles in this respect have been the provision of Article 76 *b* of the Charter and the principle that for the termination of an agreement the consent of all the contracting parties must be obtained, unless some other method is specified in the agreement itself.

3. The procedure which has thus been established since the first termination of a Trusteeship Agreement, in 1956-1957, is characterized by due consideration for the respective roles and responsibilities of all parties concerned.

4. According to this procedure, a Trusteeship Agreement for a non-strategic area is terminated pursuant to a resolution of the General Assembly.

5. It has been a consistent practice of the General Assembly to adopt such a resolution in anticipation of the actual accession to independence of the Territory to which it refers.

6. In the resolution, the General Assembly, with the agreement of the Administering Authority, resolves to terminate the Trusteeship Agreement, but suspends the effect of this provision until the date on which the Territory will accede to independence. The formula used to this effect either refers to a specific date, if this is already determined at the time the General Assembly adopts the resolution, or merely states that the Trusteeship Agreement shall cease to be in force on the date on which the Territory shall become independent, without any more specific reference. In the latter case, the Administering Authority is requested to notify the Secretary-General of the United Nations as soon as the date of independence has been determined, and the Secretary-General is requested to communicate this notification to all Member States and to the Trusteeship Council.

7. When authorizing the termination of the Trusteeship Agreement, the General Assembly, in the same resolution, notes the full attainment of the objectives of the trusteeship which justifies the termination, by taking note and expressing the approval of the work done by all parties concerned and by determining the actions still to be taken, in particular by the Administering Authority.

8. In the light of what has been set out above, it should be concluded that the procedure which has been proposed by the representative of Papua New Guinea and by the representative of Australia in the Trusteeship Council with regard to the termination of the trusteeship of the Territory of New Guinea, is in conformity with the practice of the United Nations, the principles of the Charter and international law in general.[95]

18 October 1974

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would indeed be an unfortunate and unacceptable delay. The difficulty could be avoided if the Council would agree to recommend to the General Assembly that action be taken at the twenty-ninth session in anticipation of Papua New Guinea's independence. Such an action would require the Council's recommendation and the Assembly's agreement that, on the date on which Papua New Guinea became independent, the Trusteeship Agreement for the Territory of New Guinea, approved by the General Assembly on 13 December 1946, would cease to be in force. Under that arrangement, the General Assembly would request the Government of Australia to notify the Secretary-General of the United Nations of the date on which Papua New Guinea would accede to independence and on which the Trusteeship Agreement would cease to be in force. The Agreement would then automatically be terminated with effect from the date of independence. (*Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 4* (A/9604), paras. 213 and 216-218.)

[95] The Trusteeship Council noted that in response to its request for an official and formal opinion from the Legal Counsel, the latter stated that the procedure proposed by the Special Representative was in conformity with the practice of the United Nations, the principles of the Charter and international law in general. Accordingly, the Council recommended that the General Assembly, at its twenty-ninth session,

21. Extent to which obligations of specialized agencies as regards relations with South Africa vary under the terms of paragraph 6 of General Assembly resolution 3118 (XXVIII) and of paragraph 13 of General Assembly resolution 3151 G (XXVIII)

Memorandum to the Under-Secretary-General for Inter-Agency Affairs and Co-ordination

1. I refer to your memorandum of 6 March 1974, in which you drew attention to paragraph 6 of General Assembly resolution 3118 (XXVIII) [entitled "Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples by the specialized agencies and the international institutions associated with the United Nations"], and to paragraph 13 of General Assembly resolution 3151 G (XXVIII) [entitled "Policies of *apartheid* of the Government of South Africa"] and requested advice as to the extent to which the obligations of specialized agencies vary under the terms of these two paragraphs.

2. It should be noted at the outset that, while both of these resolutions referred to relations with South Africa, there is a significant distinction between the two contexts in which each was adopted. In the observations which follow, therefore, we shall first examine briefly the paragraphs to which you referred in the separate contexts of the two resolutions in which they were contained. (The texts of the two paragraphs in question are set out in paragraphs 10 and 21 below.)

General Assembly resolution 3118 (XXVIII) and the granting of independence to colonial countries and peoples

3. General Assembly resolution 3118 (XXVIII) is concerned with the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples by the specialized agencies and the international institutions associated with the United Nations.

4. In this connexion, it may be recalled that among the factors impeding the granting of independence to the colonial territories in southern Africa (in particular, to Angola, Mozambique, Southern Rhodesia and Namibia, the latter being at present illegally occupied by South Africa), the General Assembly has attached particular importance to the actions and policies of the Governments of South Africa and Portugal in supporting or maintaining colonial or illegal régimes currently exercising authority in these territories.

5. Thus, the General Assembly has expressly referred to the "collaboration between the régimes of South Africa and Portugal and the illegal racist régime of Southern Rhodesia for the preservation of colonialism in southern Africa" (e.g. see General Assembly resolution 2621 (XXV) para. 3 (*c*)), and has repeatedly deplored "the continued refusal of the colonial Powers, especially Portugal and South Africa, to implement the Declaration and other relevant resolutions on the question of decolonization, particularly those relating to the Territories under Portuguese domination, Namibia and Southern Rhodesia", (see General Assembly resolutions 2708 (XXV), fourth preambular paragraph; 2878 (XXVI), fourth preambular paragraph; and 2908 (XXVII), fourth preambular paragraph).

6. At its twenty-eighth session, the General Assembly condemned "the continued colonialist and racialist repression of millions of Africans by the Governments of Portugal and South Africa" (see General Assembly resolution 3163 (XXVIII), fourth preambular para-

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agree that on the date on which Papua New Guinea should become independent, the Trusteeship Agreement for the Territory of New Guinea, approved by the General Assembly on 16 December 1946, should cease to be in force. The Council also recommended that the General Assembly should request the Government of Australia to notify the Secretary-General of the date on which Papua New Guinea acceded to independence and on which the Trusteeship Agreement ceased to be in force. (*Ibid.*, para. 222.) These recommendations were endorsed by the General Assembly in resolution 3284 (XIX) of 13 December 1974.

Papua New Guinea became independent on 16 September 1975 and was admitted to the United Nations on 10 October 1975.

graph), and repeated its previous condemnations of "South Africa for its persistent refusal to withdraw from the international Territory of Namibia. . ." (see General Assembly resolution 3111 (XXVIII), I, para. 3). The General Assembly further condemned "the continued illegal presence and intensified military intervention of South African forces in the Territory [of Southern Rhodesia (Zimbabwe)], which assist the racist minority régime and seriously threaten the sovereignty and territorial integrity of neighbouring African States" (see General Assembly resolution 3115 (XXVIII), tenth preambular paragraph).

7. In addition, the Security Council, for its part, has repeatedly condemned the Government of South Africa for its refusal to withdraw from the international Territory of Namibia (e.g. see Security Council resolutions 264 (1969), para. 6; 269 (1969), para. 21, 276 (1970), para. 1 and 301 (1971), para. 4), and has also noted with grave concern that "the Governments of the Republic of South Africa and Portugal have continued to give assistance to the illegal régime of Southern Rhodesia, thus diminishing the effects of the measures decided upon by the Security Council" (see Security Council resolution 277 (1970), fourth preambular paragraph), and has demanded "the immediate withdrawal of South African police and armed personnel from the Territory of Southern Rhodesia" (*ibid.*, para. 7).

8. It is accordingly for the purpose of removing these impediments to the granting of independence to the colonial territories in southern Africa that the General Assembly has, on repeated occasions, requested specialized agencies to withhold assistance to, or collaboration with South Africa and Portugal until they renounce their policies of racial discrimination and colonial domination and oppression, (e.g. see General Assembly resolutions 2105 (XX), para. 11; 2311 (XXII), para. 4; 2426 (XXIII), paras. 8 and 9; 2708 (XXV), para. 7; 2874 (XXVI), para. 7 and 2980 (XXVII), para. 6).

9. In adopting its latest resolution on this subject (resolution 3118 (XXVIII) of 12 December 1973), the General Assembly had before it, *inter alia*, the report 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, in Chapter VI of which the Special Committee had forwarded to the General Assembly the text of a resolution adopted by the Special Committee at its 946th meeting on 28 August 1973,[96] paragraph 6 of which contained the text of what became paragraph 6 of General Assembly resolution 3118 (XXVIII).

10. The text of this paragraph reads as follows:

> "*The General Assembly*,
>
> ". . .
>
> "6. *Urges once again* the specialized agencies and other organizations within the United Nations system, in accordance with the relevant resolutions of the General Assembly and the Security Council, to take all necessary measures to withhold any financial, economic, technical or other assistance from the Governments of Portugal and South Africa and the illegal régime in Southern Rhodesia, to discontinue all kinds of support to them until they renounce their policies of racial discrimination and colonial oppression and to refrain from taking any action which might imply recognition of the legitimacy of these régimes' colonial and alien domination of the Territories concerned;"

11. In substance this operative paragraph re-affirmed the content of the corresponding paragraphs of previous General Assembly resolutions (see para. 8 above), subject to some limited modifications and the addition of a concluding phrase (comprising the last 25 words of the paragraph).

12. It would seem clear, therefore, that this operative paragraph related specifically to the granting of independence to colonial countries and peoples in Africa, and was designed to preclude any assistance to or collaboration with three régimes which had been found to be actively opposing United Nations objectives in this regard.

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[96] *Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 23* (A/9023/Rev.1), vol. II, p. 226.

General Assembly resolution 3151 (XXVIII) and the policies of apartheid *of the Government of South Africa*

13. General Assembly resolution 3151 (XXVIII), on the other hand, concerns the policies of *apartheid* of the Government of South Africa within the Republic of South Africa, which is not a colonial territory, but which, by pursuing policies of *apartheid* and racial discrimination continues to violate the provisions of the United Nations Charter, and repeated resolutions of both the Security Council and the General Assembly, and is thereby acting in defiance of its international obligations and seriously disturbing international peace and security. (See, *inter alia*, Security Council resolutions 181 (1963), 182 (1963), 191 (1964), 282 (1970) and 311 (1972).)

14. Within this context, attention has been drawn to a number of different matters relating to the United Nations objective of promoting the total eradication of *apartheid*. Thus, in previous resolutions, the General Assembly has requested specialized agencies, *inter alia*, to deny technical and economic assistance to (see General Assembly resolution 2054 A (XX), para. 10), to withhold the benefits of international co-operation from (see General Assembly resolution 2506 B (XXIV), para. 10), and to discontinue collaboration with (see General Assembly resolution 2923 E (XXVII), para. 12) the Government of South Africa for so long as it pusues its policies of *apartheid* and racial discrimination. In its latest resolution on this subject (resolution 3151 (XXVIII)), the General Assembly again called upon States to withhold assistance.

15. At the same time, attention has also been drawn to the effect of the policies of *apartheid* of the Government of South Africa on the possibilities of representation for the people of South Africa. In 1964, the Security Council had endorsed and subscribed to the conclusion that "all the people of South Africa should be brought into consultation and should thus be enabled to decide the future of their country at the national level", (see Security Council resolution 191 (1964), para. 5). The Security Council has also recognized "the legitimacy of the struggle of the oppressed people of South Africa in pursuance of their human and political rights as set forth in the Charter of the United Nations and the Universal Declaration of Human Rights" (see Security Council resolutions 282 (1970), third preambular paragraph and 311 (1972), para. 3).

16. The General Assembly, for its part, has on repeated occasions affirmed the legitimacy of the struggle of the oppressed people of South Africa to eliminate, by all means at their disposal, *apartheid* and racial discrimination and to attain majority rule in the country as a whole, based on universal adult suffrage (see General Assembly resolutions 2671 F (XXV), para. 2, 2775 F (XXVI), para. 5 and 2923 E (XXVII), para. 10). In its latest resolution, the General Assembly likewise re-affirmed that "the struggle of the oppressed people of South Africa by all available means for the total eradication of *apartheid* is legitimate and deserves support by the international community" (see General Assembly resolution 3151 G (XXVIII), para. 2).

17. At the same time, and taking into account the disenfranchisement of the majority of the people of South Africa, the General Assembly, at its twenty-fifth, twenty-sixth and twenty-seventh sessions, declined to approve the credentials of the delegation of the Government of South Africa, having on each occasion adopted a resolution which:

> "*Approves* the report of the Credentials Committee, except with regard to the credentials of the representatives of South Africa."[97]

18. Moreover at its twenty-eighth session, the General Assembly, at its 2141st plenary meeting on 5 October 1973, and by a recorded vote of 72 in favour to 37 against, with 13 abstentions, adopted an amendment to the first report of the Credentials Committee reading as follows:

> "The General Assembly rejects the credentials of the representatives of South Africa."

[97] See General Assembly resolutions 2636 (XXV) of 14 December 1970, 2862 (XXVI) of 20 December 1971 and 2948 (XXVII) of 8 December 1972.

19. These decisions of the General Assembly disapproving or rejecting the credentials of the representatives of South Africa were construed by successive Presidents of the General Assembly not to have the effect of suspending South Africa from the exercise of the rights and privileges of membership. Thus, following the decision taken at the twenty-eighth session (at the 2141st meeting), rejecting the credentials of the representatives of South Africa, the President of the General Assembly stated, *inter alia*,:

> ". . . I have come to the same conclusion reached by my predecessors the Presidents of the twenty-fifth and twenty-sixth sessions of the General Assembly. 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 is tantamount to a vehement condemnation of the policies followed by the Government of South Africa. It is a new solemn warning to that Government but, apart from that, it does not affect the rights and privileges of South Africa as a Member of the Organization, including the right of the delegation of South Africa to participate in this General Assembly."[98]

20. Before adopting its resolution 3151 (XXVIII), the General Assembly had considered the report of the Special Committee on *Apartheid* to the twenty-eighth session.[99] Paragraphs 229 and 230 of that report read as follows:

> "229. The Special Committee, therefore, recommends that the General Assembly continue to decline to accept the credentials of the representatives of the South African régime. That régime has no claim to represent the people of South Africa: it has, in fact, prevented the participation of the genuine representatives of the South African people in the Government and in international organizations. The Assembly should call on all specialized agencies and intergovernmental agencies to deny membership or privileges of membership to the South African régime, and to report to the next session of the General Assembly on the action taken by them.
>
> "230. On the other hand, the General Assembly should authorize the Special Committee to invite, in consultation with OAU, the representatives of the liberation movement of the South African people to participate in its meetings. It should also request the specialized agencies of the United Nations to take similar action."

21. In the light of the findings and principles referred to in the foregoing, General Assembly resolution 3151 G (XXVIII) proceeded to state the following in its operative paragraphs 11 and 13:

> "*The General Assembly*,
>
> ". . .
>
> "11. *Declares* that the South African régime has no right to represent the people of South Africa and that the liberation movements recognized by the Organization of African Unity are the authentic representatives of the overwhelming majority of the South African people;
>
> ". . .
>
> "13. *Requests* all specialized agencies and other intergovernmental organizations to deny membership or privileges of membership to the South African régime and to invite, in consultation with the Organization of African Unity, representatives of the liberation movements of the South African people recognized by the Organization of African Unity to participate in their meetings;".

22. From the conclusion (stated in operative paragraph 11 quoted above) that the South African régime has no right to represent the people of South Africa, it seems logically to follow that this régime should not be recognized in intergovernmental organizations as having a right which it does not, in fact, have. Accordingly, in as much as it would be inconsistent with this conclusion for the South African régime to exercise the rights and privileges of membership of

[98] A/PV.2141, p. 37.

[99] *Ibid., Supplement No. 22* (A/9022).

a specialized agency, the General Assembly requested that such rights and privileges be denied to the South African régime.

23. The specific methods and possibilities for giving effect to this request would depend upon the constitutional instruments of each organization or agency, and in particular, no doubt, on those provisions governing membership, suspension or expulsion, and the conditions which govern more specifically the exercise of the rights, privileges and obligations of membership.

24. In the case of the United Nations, it may be recalled that membership in the Organization attaches to a State and not to a government régime, and, following the rejection of the credentials of the South African representatives in the manner described in paragraphs 17 to 19 above, United Nations action has not thus far been taken in respect of South Africa under the provisions of Articles 5 or 6 of the Charter, providing for suspension or expulsion. These factors, however, arise in the particular context of the United Nations and its constitutional instruments and structure, which differ in a number of respects from those of the specialized agencies.

25. There would appear to be no statements or documents recorded at the twenty-eighth session of the General Assembly, other than document A/9022 cited in paragraph 20 above, which could provide more specific clarification, or a basis for an analytical interpretation of paragraph 13 of General Assembly resolution 3151 G (XXVIII). However, in the light of the background summarized in the foregoing, it would be our understanding that, by adopting the request to specialized agencies contained in this paragraph, the General Assembly expressed the desire that the specialized agencies, acting under their separate and differing constitutional instruments and procedures, would be able to comply with this request.

Conclusion

26. In conclusion, therefore, it would appear that the two requests to specialized agencies referred to in your inquiry differ in several respects. In the first place, the action requested is not the same in the two cases, and neither are the procedural steps required to give them effect. At the same time, they differ in the contexts in which they were made and in the immediate and specific objectives which they were designed to serve. It would nevertheless appear that the effect of these two requests, to the extent that they are both complied with, would to at least some extent merge, in so far as a denial of the rights and privileges of membership to the South African régime could in itself preclude the granting of assistance or support to the Government of South Africa.

22 March 1974

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22. IMMUNITY OF UNITED NATIONS OFFICIALS FROM LEGAL PROCESS IN RESPECT OF WORDS SPOKEN OR WRITTEN AND ALL ACTS PERFORMED BY THEM IN THEIR OFFICIAL CAPACITY—SECTIONS 18 AND 20 OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

Memorandum to the Director, Greeting Card Operation, United Nations Children's Fund

1. You have asked what advice should be given to a UNICEF staff member who informed you that she might be asked to appear as a witness before a tribunal of a Member State. We note that it is in her capacity as a UNICEF officer concerned with greeting cards that the staff member knew the person about whom she would be called upon to testify.

2. Under Section 18 of the Convention on the Privileges and Immunities of the United Nations, United Nations officials are "immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity". This means that the staff

member concerned may not be compelled to appear and indeed should not appear as a witness without specific authorization.

3. On the other hand, Section 20 of the Convention provides that "The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and be waived without prejudice to the interests of the United Nations". If this evidence is important to the case, it is entirely possible that permission would be granted for her to appear. However, such appearance would require specific authorization.

4. The staff member concerned may give a written statement on the understanding that it does not result therefore that she would appear in any proceedings. Her statement should be restricted to plain facts as she herself recalls them or can check on the records.

17 May 1974

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23. EXTENT OF THE IMMUNITY FROM LOCAL PROSECUTION ENJOYED BY UNITED NATIONS OFFICIALS UNDER EXISTING INTERNATIONAL AGREEMENTS

Letter to the Assistant to the Secretary-General of an international organization

The question with which you are concerned is whether an internationally recruited staff member having committed a serious offence within the country of his duty station could be prosecuted and punished under the law of the country to whose territory he is returned.

As concerns United Nations staff below the Assistant Secretary-General level, whether internationally or locally recruited and whether or not "seconded" from government service, their immunity under the Convention on the Privileges and Immunities of the United Nations is limited to acts committed in the course of their official duties. A staff member would have no special immunity from local prosecution for a criminal offence by virtue of his United Nations employment. Whether or not he was prosecuted would not be a matter of direct concern to the United Nations although the Organization would intervene to ascertain whether in fact his official functions were involved and to offer such general assistance and good offices as the particular situation required, e.g. obtaining counsel, advising family and officials of his own government, etc. Appropriate disciplinary measures under the Staff Regulations and Rules of the United Nations would be considered independently of the action of either the local government or his home government. There have in fact been cases of arrest and prosecution of internationally recruited staff in the country of their duty station. In some instances their return to their home country after conviction or even prior to prosecution was arranged but without United Nations intervention.

Apart from those holding the rank of Assistant Secretary-General or above, United Nations officials do not have "diplomatic" status under the Convention on the Privileges and Immunities of the United Nations. However in some countries where United Nations offices are maintained, senior United Nations staff below that level are by special agreement accorded diplomatic privileges and immunities. In adddition, under the Headquarters Agreements between host governments and the United Nations for the economic commissions all officials are immune from "personal arrest or detention". Nonetheless, we have had, so far as I know, no occasion to consider the problem of jurisdiction over offences committed by such staff.

Of course, immunity granted to officials is justified in terms of the effective functioning of the Organization. Under section 20 of the Convention on the Privileges and Immunities of the United Nations, it would always be incumbent on the Secretary-General to waive the immunity from arrest or prosecution in any case "where in his opinion the immunity would impede the course of justice and can be waived without prejudice to the interest of the United Nations".

1 April 1974

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24. PUBLICATION OF AN ARTICLE PREPARED BY A FORMER STAFF MEMBER WHILE STILL IN THE SERVICE OF THE UNITED NATIONS—OBLIGATIONS DERIVING IN THIS REGARD FROM STAFF REGULATION 1.5

Letter to a former staff member

We have received your letter of 17 October 1974 requesting a legal opinion concerning the publication of an article prepared by you while you were still in the service of the United Nations and to which you made certain additions after you had left the service. You explain that some of these additions are objected to by your former Division.

The United Nations exercises strict control over publications by its staff members, who, under Staff Rule 101.6 (*e*), cannot submit for publication articles, books or other materials relating to the purpose, activities or interests of the United Nations without the prior approval of the Secretary-General. The criteria for such approval are stated in the Staff Regulations, in particular in Regulation 1.4, which refers to the need for international civil servants to avoid any action or public pronouncement which may adversely reflect on their status and to the reserve and tact incumbent upon them by reason of their international status (thus making clear that purely diplomatic considerations could be involved), and in Regulation 1.5, which refers to the need to protect information known to staff members by reason of their official position which has not been made public.

When a staff member leaves the service of the United Nations, however, Staff Regulation 1.4 ceases to apply to him, and the only obligation which continues to apply in regard to publication is Staff Regulation 1.5, which reads as follows:

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

That is to say that, when a staff member ceases to have that status, he will still have to seek and obtain the authorization of the Secretary-General if he wishes to publish any information known to him by reason of his official duties, which has not already been made public, but the Secretary-General's permission to publish is not otherwise required, since Staff Rule 101.6 (*e*) no longer applies.

We are not fully informed about the nature of your latest additions to your article, and hence cannot judge whether any problem of confidential information is involved. There would seem to be no such problem, however, if the information was known to you otherwise than by reason of your official duties, or if you obtained it from statements in published documents or official records.

The statements you have added to your article may be matters of opinion with which your former Division does not agree, or matters of fact that your duty of reserve and tact would have prevented you from publishing while you were still an international civil servant. In either case, the Secretariat would be entitled to expect that a foot-note reference—in the form commonly used in publications by persons who have, or have had, an official status—be appended to your name, to the effect that the views expressed herein are those of the author and do not necessarily represent the views of the United Nations Secretariat or of the Division concerned. The Secretariat would also be entitled to use any right of reply which might be available to it.

While the Secretariat is entitled to ask that it be made explicit that the views expressed are yours and not necessarily those of your former Division, the fact of your former position is part of your bibliographical data, as much as your date of birth or university degrees, and can be published without any need for approval on behalf of the United Nations.

23 October 1974

25. POSITION OF THE SECRETARY-GENERAL WITH RESPECT TO THE DISCHARGE OF ADMINISTRATIVE AND DEPOSITARY FUNCTIONS IN RELATION TO TREATIES CONCLUDED UNDER THE AUSPICES OF THE UNITED NATIONS

Cable to the Legal Liaison Officer, Geneva Office of the United Nations

All treaties concluded under United Nations auspices should be worded to confer depositary or administrative functions on the Secretary-General only and not on any subordinate official because the United Nations Charter centralizes the authority and responsibility for Secretariat actions in the Secretary-General. It is for him to decide which subordinate official will in fact perform functions on his behalf. He has assigned all depositary functions to the Office of Legal Affairs because of the extreme importance that those functions be performed in legally correct and absolutely consistent manner, and that all information on United Nations treaties be available in and published by one office. The custody of the originals of amendments to treaties is a characteristic depositary function, and so is the circulation of certified true copies of them since only the custodian of the original can certify copies on behalf of the Secretary-General.

29 August 1974

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26. FORMAL ASPECTS OF THE FORMULATION AND WITHDRAWAL OF RESERVATIONS TO MULTILATERAL TREATIES IN RESPECT OF WHICH THE SECRETARY-GENERAL PERFORMS DEPOSITARY FUNCTIONS

Letter to the Legal Adviser of the Permanent Mission of a Member State to the United Nations

I refer to your letter of 4 June 1974 in which you mention that the Government of your country are about to withdraw some reservations made in respect of the Convention on the Political Rights of Women of 31 March 1953[100] and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages of 10 December 1962.[101] You have enquired about the form in which the notifications of withdrawal should be made.

In this connexion, reference is made to the following paragraph from the report of the Secretary-General entitled "Depositary practice in relation to reservations":

> "Reservations made at the time of ratification or accession are included in the text of the instrument transmitted by the State concerned or in a document accompanying the instrument and emanate either from the Head of State or Government, or from the Minister for Foreign Affairs. They are sometimes formulated by the duly accredited Permanent Representative to the United Nations of the State concerned, acting under instructions from his Government."[102]

In our view, the first sentence formulates the general rule, and the second sentence the exceptional cases. As a general principle, similar considerations would seem to apply to the withdrawal of reservations as apply to their formulation and the instruments of withdrawal should emanate from the State authorities competent to take treaty actions on the international plane.

It is true that, on several occasions, there has been a tendency in the Secretary-General's depositary practice, with a view to a broader application of treaties, to receive in deposit withdrawals of reservations made in the form of notes verbales or letters from the Permanent

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[100] United Nations, *Treaty Series*, vol. 193, p. 135.

[101] *Ibid.*, vol. 521, p. 231.

[102] Document A/5687, para. 19.

Representative to the United Nations. It was considered that the Permanent Representative duly accredited with the United Nations and acting upon instructions from his Government, by virtue of his functions and without having to produce full powers, had been authorized to do so.

In this regard, the Vienna Convention on the Law of Treaties does not contain any reference as to the form of notifications of withdrawals, nor, to our recollection, has that point been directly dealt with either by the Vienna Conference on the Law of Treaties or the International Law Commission when preparing the draft articles on the law of treaties. A general indication, however, may be derived from article 2, paragraph 1 (*c*) of the Vienna Convention which defines "full powers" as "a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty. . . or for accomplishing any other act with respect to a treaty." Clearly the withdrawal of a reservation constitutes an important treaty action and one of those for which the production of full powers should certainly be contemplated. It would appear only logical to apply to a notification of withdrawal of reservations the same standard as to the formulation of reservations since the withdrawal would entail as much change in the application of the treaty concerned as the original reservations.

Our views, therefore, are that the withdrawal of reservations should *in principle* be notified to the Secretary-General either by the Head of State or Government or the Minister for Foreign Affairs, or by an official authorized by one of those authorities. While such a high level of procedure may prove somewhat burdensome, the fundamental safeguard which it provides to all concerned in regard to the validity of the notification more than make up for the resulting inconvenience.

11 July 1974

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27. CONVENTION ON A CODE OF CONDUCT FOR LINER CONFERENCES—PRACTICE FOLLOWED BY THE SECRETARY-GENERAL WITH RESPECT TO RESERVATIONS TO A MULTILATERAL TREATY IN THE ABSENCE OF ANY PROVISION IN THE TREATY RELATING TO THE ACCEPTANCE OF RESERVATIONS

Letter to a private individual

You inquired whether governments can sign and ratify the Convention on a Code of Conduct for Liner Conferences[103] with reservations as to (*a*) particular trades and (*b*) particular code provisions. The only provision in the Convention relating to reservations is the following:

"*Article 53*

"(1) The depositary shall notify the signatory and acceding States of:

"...

"(*d*) reservations to the present Convention and the withdrawal of reservations;

"..."

The possibility of making reservations is thus explicitly (although indirectly) recognized by the Convention. Since the Convention does not go beyond this point, and in particular does not specify any procedure as to the acceptance of reservations, the Secretary-General, as the depositary of the Convention, would follow the established practice in that matter, and in particular the instructions of the General Assembly. This means that the Secretary-General

[103] Text in document TD/CODE/11/Rev.1.

would circulate among all States concerned, without attempting to pass judgement on its legal effects, any reservation that might be made upon signature, ratification, etc. It would then be incumbent upon the States concerned to decide to what extent the Convention should be considered as being in force between themselves and the State that made the reservation. Thus, they might decide that the Convention as a whole will not apply between themselves and the reserving State (a rare occurrence), or that it will not apply only to the extent that the provision affected by the reservation is concerned. They may, more typically, refrain from any comment. Finally, it should be noted that ratifications, acceptances, etc., accompanied by reservations are, under the established practice, taken into account for the purpose of computing the initial date of entry into force of the Convention.

5 September 1974

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28. QUESTION WHETHER A STATE WHICH IS A DEPOSITARY FOR A MULTILATERAL AGREEMENT TO WHICH IT IS NOT A PARTY CAN REGISTER SUCH AGREEMENT WITH THE SECRETARIAT—PRACTICE OF THE SECRETARY-GENERAL IN THIS RESPECT

Note verbale to the Permanent Observer of a non-member State

The Secretariat of the United Nations has the honour to refer to the recent request for information from the Office of the Permanent Observer concerning the procedure for registration of a multilateral agreement by a depositary State if it is not itself a party to that agreement.

Having considered the relevant provisions of the regulations of the General Assembly to give effect to Article 102 of the Charter (article 1, paragraph 3, and article 4),[104] as well as the practice concerning those provisions[105] and the recent evolution of international law, as shown, for example, in articles 76 and 80 of the Vienna Convention on the Law of Treaties of 1969,[106] the Secretariat has reached the conclusion that the designation of a depositary in a multilateral agreement can be considered to be equivalent to authorization for the said

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[104] These provisions read as follows:

"Article 1

. . .

"3. Such registration may be effected by any party or in accordance with article 4 of these regulations.

"Article 4

"1. Every treaty or international agreement subject to article 1 of these regulations shall be registered *ex officio* by the United Nations in the following cases:

"(*a*) Where the United Nations is a party to the treaty or agreement;

"(*b*) Where the United Nations has been authorized by the treaty or agreement to effect registration;

"(*c*) Where the United Nations is the depositary of a multilateral treaty or agreement.

"2. A treaty or international agreement subject to article 1 of these regulations may be registered with the Secretariat by a specialized agency in the following cases:

"(*a*) Where the constituent instrument of the specialized agency provides for such registration;

"(*b*) Where the treaty or agreement has been registered with the specialized agency pursuant to the terms of its constituent instrument;

"(*c*) Where the specialized agency has been authorized by the treaty or agreement to effect registration."

[105] See *Repertory of United Nations Practice*, vol. V, Article 102, paras. 69 and 70.

[106] Under the terms of article 76 of the Convention, the depositary may be one or more States, an international organization or the chief administrative officer of the organization.

depositary to register the agreement on behalf of the parties under article 1, paragraph 3, of the regulations.

Consequently, the Secretariat is prepared to register any multilateral agreements which the Government of [name of the non-member State] may wish to transmit to it in its capacity as depositary for the purposes of Article 102 of the Charter.

16 January 1974

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29. PRACTICE OF THE SECRETARIAT WITH RESPECT TO THE REGISTRATION (OR FILING AND RECORDING) OF A MULTILATERAL TREATY BY AN INTERGOVERNMENTAL ORGANIZATION IN ITS CAPACITY AS DEPOSITARY OF THE TREATY

Letter to the Legal Adviser of the Permanent Mission of a Member State to the United Nations

1. I refer to your letter of 3 September 1974 concerning the procedure for registration of treaties, under Article 102 of the Charter, by international organizations.

2. Your letter raises two questions, namely:

(1) whether an intergovernmental organization which is the depositary of a multilateral treaty could, although not being a party thereto, submit the treaty for registration (or filing and recording) in the absence of an express provision requiring or authorizing it to do so, and

(2) whether, in the case of a bilateral agreement between an intergovernmental organization and a Member State of the United Nations that agreement, again in the absence of an express provision, could be submitted for registration (or filing or recording) by the organization.

3. The latter question calls for a straightforward affirmative answer. Under article 1, paragraph 3, of the General Assembly Regulations to give effect to Article 102 of the Charter of the United Nations, registration of an international agreement may be effected by any party thereto. Intergovernmental organizations such as the European Economic Community, which are not parties to the Charter, do not, of course, have an obligation to register but they have the option to do so by virtue of their status as a party to the agreement: in fact, hundreds of international agreements have been registered by intergovernmental organizations that were parties thereto—mainly by the International Bank for Reconstruction and Development and the International Development Association.

4. Regarding the first question, namely, whether an intergovernmental organization, such as the OECD, the EEC or the EURATOM, could on the sole basis of its capacity as a depositary register multilateral treaties, the answer is also affirmative. However, the situation, until recently, had not been clear, and some explanations may be useful.

As you know, the General Assembly Regulations to give effect to Article 102 of the Charter do not provide for registration by States or organizations that are not parties to the international agreement considered, except in those special cases contemplated by article 4 (registration *ex officio* by the United Nations and registration by the specialized agencies).

On the other hand, the Sixth Committee of the General Assembly had taken note, at the second and third sessions, of the Secretariat's suggestion that it would be desirable to have

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Article 80 reads as follows:

"*Registration and publication of treaties*

"1. Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.

"2. The designation of a depositary shall constitute authorization for it to perform the acts specified in the preceding paragraph."

multilateral agreements registered by the depositary Government rather than by another party, and it had reported accordingly to the General Assembly.[107] The practice so advocated quickly generalized and, in following it, the Secretariat came to accept for registration multilateral agreements submitted by an intergovernmental organization which, in its capacity as depositary, was expressly authorized to effect registration—the reason being that submission by the intergovernmental organization concerned could be considered as being tantamount to registration by the parties themselves.[108] In such cases, the registration records would show that the registration had been effected on behalf of the parties.

Such was the state of affairs when, around December 1973, the Government of a non-Member State indicated that they desired to register a number of international agreements in respect of which the State in question, without being a party, had been entrusted with the functions of depositary.[109] Since this was the first such request from a Government (all previous instances having involved intergovernmental organizations), the Secretariat undertook at that time to review the relevant provisions of the General Assembly Regulations, its own related practice and the recent developments in the field of international law—mainly as they were reflected in articles 76 to 80 of the Vienna Convention on the Law of Treaties. Article 80 of the Convention was found particularly striking since it specifically provided that "the designation of depositary shall constitute authorization for it to perform the acts [relating to registration or filing and recording and publication of treaties]". Although the Convention on the Law of Treaties was not in force, the provision referred to above clearly pointed to the existence of a consensus among governments on considering that the depositary of multilateral agreements could act on behalf of the parties as far as registration was concerned. Accordingly, the Secretariat informed the Government of the non-Member State that it would process international agreements that the latter Government might submit for registration in its capacity as depositary. Submissions by intergovernmental organizations that perform depositary functions in respect of agreements would also be processed on the same basis, even in the absence of express authorization from the parties.

11 September 1974

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30. AGREEMENT ESTABLISHING THE ASIAN RICE TRADE FUND—METHODS OF ALTERING THE EXISTING PROVISIONS OF THE AGREEMENT[110]

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

1. It has been proposed by one of the signatories of the Agreement establishing the Asian Rice Trade Fund that the Fund should be enabled to purchase rice not only from countries members of the Asian Rice Fund but also from any other source. In view of the fact that this would confer a new dimension to the Agreement and that the existing provisions would have to be altered accordingly, the question of the procedure to be applied has been raised.

2. For the purpose of altering the existing provisions, it would be desirable to convene a Conference at Bangkok under the auspices of ECAFE. Such a conference would have the following alternative before it. It could either adopt a protocol amending the present Agreement, that is, an ancillary instrument changing portions of the text, or it could adopt a complete new Agreement. Either course could be followed whether or not the present

[107] *Official Records of the Second Session of the General Assembly, Sixth Committee*, 54th meeting and *ibid., Plenary Meetings*, Annex 19; see also *Official Records of the Third Session of the General Assembly, Part I, Sixth Committee*, 79th meeting and document A/613.

[108] See *Repertory of United Nations Practice*, vol. V, Article 102, paras. 69 and 70.

[109] See sub-section 28 of this chapter

[110] See also *Juridical Yearbook*, 1972, p. 180.

Agreement had entered into force. If the fundamental nature and purpose of the present Agreement are to be changed (as might possibly be the case if the above-mentioned proposal were to be accepted), it would be preferable to make a whole new Agreement.

3. If before the present Agreement enters into force a new conference adopts a whole new Agreement, intended to replace the existing one, and all the signatories of the existing text expressly agree, then the old Agreement could be regarded as a dead letter, and instruments of acceptance of it, should any be presented thereafter, would not be received in deposit by the depositary. If the present Agreement should have entered into force, then the new Agreement, when in force, would supersede the one as between States parties to both treaties.

4. The only precedent in the United Nations for the amendment of a treaty before it had entered into force is the International Agreement on Olive Oil, 1956, which was amended by a Protocol done at Geneva on 3 April 1958;[111] that Protocol was adopted by the Olive Oil Conference held in 1958. In that case, the amendments made in the text were of a quite minor and technical character, and no fundamental revision of the Agreement was undertaken.

5. If a new conference is held to revise or replace the Agreement establishing the Asian Rice Trade Fund, it would seem desirable to invite not only the signatories of that Agreement but also all the States entitled to become parties thereto on an equal footing. This was done in the case of the Olive Oil Conference of 1958, referred to in the preceding paragraph. In the normal course, all States entitled to become parties to the existing Agreement would also be entitled to become parties to the Agreement as amended (see article 40, paragraph 3 of the Vienna Convention on the Law of Treaties[112]), and in that case it would be useful to ask them to participate in the conference so that they can express their views about the text.

23 May 1974

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31. International Sugar Agreement, 1973—Authorities competent to sign the relevant instrument of ratification or effect approval of the Agreement

Note verbale to the Permanent Representative of a Member State

The Secretary-General of the United Nations has the honour to confirm the receipt on 26 December 1973 of the note of the same date notifying him that the Government of [name of the Member State concerned] has, in accordance with the relevant constitutional procedures, approved the International Sugar Agreement, 1973, subject to the declaration reproduced in the said note.

Article 33 of the International Sugar Agreement provides as follows:

"*Article 33*

"*Ratification*

"The Agreement shall be subject to ratification, acceptance or approval by the signatory Governments in accordance with their respective constitutional procedures. Except as provided in Article 34, instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations not later than 31 December 1973."

Under established international practice which the Secretary-General feels obliged to follow, instruments of ratification should be signed by the Head of State or Government or by

[111] United Nations, *Treaty Series*, vol. 302, p. 121. For the text of the International Agreement on Olive Oil, 1956, as amended by the Protocol of 3 April 1958, see *ibid.*, vol. 336, p. 177.

[112] This paragraph reads as follows:

"3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended."

the Minister for Foreign Affairs, or by a person to whom appropriate full powers have been issued by one of the aforementioned authorities.[113] This practice is reflected in article 7 of the Vienna Convention on the Law of Treaties,[114] a provision which, as it was adopted at the Vienna Conference without any negative votes, can be taken as being accepted as law.

It is therefore assumed that the Government of [name of the Member State concerned] will forward by 15 October 1974, in accordance with article 34, paragraph 1, of the Agreement,[115] its formal instrument of approval of the International Sugar Agreement, 1973. Alternatively, it might prefer to send full powers authorizing its Permanent Representative to the United Nations either to effect approval of the Agreement subject to the declarations contained in the note of 26 December 1973, or to approve treaties in general.

Upon receipt of a formal document, the deposit of the instrument will be effected, and all States concerned will be informed thereof. Meanwhile, the note referred to above is considered to be a notification of provisional application for the purpose of article 35 of the Agreement.[116]

All States concerned have already been informed accordingly.

21 February 1974

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[113] See *Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements* (ST/LEG/7), paras. 37 *et seq.*

[114] This article reads as follows:

"*Full powers*

"1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:

"(*a*) he produces appropriate full powers; or

"(*b*) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.

"2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

"(*a*) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;

"(*b*) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;

"(*c*) representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ."

[115] Article 34, paragraph 1, of the Agreement reads as follows:

"*Notification by Governments*

"1. If a signatory Government is unable to comply with the requirements of Article 33 within the time-limit specified in that Article, it may notify the Secretary-General of the United Nations, not later than 31 December 1973, that it is undertaking to seek ratification, acceptance or approval in accordance with the constitutional procedures required, as rapidly as possible and in any case not later than 15 October 1974. Any Government for which conditions of accession have been established by the Council in agreement with that Government may also notify the Secretary-General of the United Nations that it is undertaking to satisfy the constitutional procedures required to accede to the Agreement as rapidly as possible and at least within a six-month period of such conditions being established.

". . ."

[116] Article 35 of the Agreement reads as follows:

"*Indication to apply the Agreement provisionally*

"1. Any Government which gives a notification pursuant to Article 34 may also indicate in its notification, or at any time thereafter, that it will apply the Agreement provisionally.

32. Procedure for extending the International Coffee Agreement, 1968, as extended

Letter to the Executive Director, International Coffee Organization

I am replying to your letter of 9 August 1974, inquiring about the procedure for a further extension of the International Coffee Agreement, 1968, as extended.

The first extension of the 1968 Agreement[117] was made pursuant to article 69 (2) of that Agreement.[118] That paragraph, however, was deleted from the Agreement as extended, and hence the procedure it provided for is no longer available. That procedure for extension, while it could quite properly be agreed to by the parties to the original Agreement, is not a part of the customary international law relating to treaties, and hence can be used only to extend a treaty which contains an express provision permitting it.

The extension of the duration of a treaty by means of a protocol is, however, a procedure which is well established in customary law and is not infrequently resorted to in practice. There would therefore be no legal difficulty if the Council chooses to approve an extending protocol rather than a complete new Agreement.

A protocol which extends the duration of a treaty beyond what was originally provided would seem to fall within the meaning of the expression "new Agreement" in article 69, paragraph 4, of the Agreement as extended.[119] The special majority provided in that paragraph would therefore be necessary for the adoption by the Council of an extending protocol.[120]

28 August 1974

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33. Status of Dominica, St. Lucia and St. Vincent, dependent territories of the United Kingdom, in respect of the International Cocoa Agreement, 1972

Letter to the Executive Director, International Cocoa Organization

I acknowledge receipt of your letter of 24 September 1974, concerning the status of Dominica, St. Lucia and St. Vincent in respect of the International Cocoa Agreement, 1972.[121]

You have noted that all three of the territories in question are listed in Annex C of the Agreement as exporting countries producing exclusively fine or flavour cocoa, while the United Kingdom is listed in Annex D as an importer. The United Kingdom, in extending the application of the Agreement to the three territories, has notified that St. Lucia will become a

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"2. During any period the Agreement is in force, either provisionally or definitively, a Government indicating that it will apply the Agreement provisionally shall be a provisional Member of the Organization until it deposits its instrument of ratification, acceptance, approval or accession, and thus becomes a Contracting Party to the Agreement, or the time limit for the deposit of its instrument in accordance with Article 34 has elapsed, whichever is earlier."

[117] See *Juridical Yearbook*, 1971, p. 174 *et seq.*

[118] The relevant provision reads as follows:

"(2) The Council after 30 September 1972 may, by a vote of the majority of the Members being not less than a distributed two-thirds majority of the total votes, either renegotiate the Agreement or extend it, with or without modification, for such a period as the Council shall determine . . ."

[119] The relevant provision reads as follows:

"(4) The Council may, by a vote of 58 percent of the Members having not less than a distributed majority of 70 percent of the total votes, negotiate a new Agreement for such period as the Council shall determine."

[120] During its twenty-fifth session held in London from 16 to 27 September 1974, the International Coffee Council approved by resolution No. 273 of 26 September 1974, a Protocol for the continuation in force, until 30 September 1976, of the International Coffee Agreement, 1968, as extended with modification.

[121] United Nations, *Treaty Series*, vol. 882.

separate member of the Organization, but Dominica and St. Vincent will not do so. These notifications are made by the United Kingdom, which ratified the Agreement on 2 August 1973, in the exercise of its rights under Article 70 and Article 3 of the Agreement.

The International Cocoa Agreement, 1972, follows in general the pattern of commodity agreements in regard to dependent territories which has existed in its present form since the International Coffee Agreement, 1962. That pattern involves dealing separately with several related, but quite distinct, problems. These problems are:

(i) *Participation in the Agreement.* The actions to become, provisionally or definitively, party to a commodity agreement must obviously be taken by the State, since dependent territories have no capacity to bind themselves by treaties on the international plane.

(ii) *Territorial application of the Agreement.* The tradition of commodity agreements has been to provide in effect that the agreements do not apply to any dependent territories until their extension to such territories is notified by the State having ultimate responsibility for their international relations. Unless such notifications are made, the agreements apply only to the metropolitan territory of the country in question. This tradition is followed in Article 70 of the Cocoa Agreement.

(iii) *Membership in the Organization.* Once a State is party to an agreement and has extended its application to one or more of its dependent territories, the question arises, in case the metropolitan territory and dependent territory are in opposite categories with respect to importation and exportation, of the manner in which the different territories will participate in the operation of the agreement. The 1948 Havana Charter of the International Trade Organization,[122] from which the efforts of the United Nations in the field of commodity agreements ultimately stem, already envisaged in article 69 that a State which wished to do so could arrange for separate representation of its dependent territories which stand in a different position from itself in regard to trade in the commodity in question; but any such arrangements were left entirely to the decision of the State concerned, which has thus the option of deciding whether to treat all its territories as a single unit for the purposes of the agreement, or to arrange for separate representation of some of them which are in a different trade category. This system is followed in Article 3 and Article 70, paragraph 2, of the Cocoa Agreement.

(iv) *Voting in the Council and representation in the Executive Committee.* Only the members of the Organization have votes, which under Article 11 of the Cocoa Agreement they may, if they so desire, arrange to have cast by another member in the same category regarding exportation or importation. Likewise only members of the Organization participate in the election of the Executive Committee under Article 16. If a dependent territory is not a separate member, it obviously has no votes and does not participate separately in the election of the Committee.

The fact that a dependent territory is actually an exporter and is even mentioned as such in an Annex of the Cocoa Agreement, may or may not have any legal effect with regard to the operation of the Organization, depending upon what actions are taken by the State ultimately responsible for the international relations of that territory. If the State, though it has become a party, does not extend the application of the Agreement to that territory, it likewise remains outside the scope of the Organization. Even if a State party has extended the Agreement to the territory, and the Agreement thus applies there, the territory has no separate status or voting rights in the Organization unless the State makes a notification that the territory is a separate member; if that is done, the territory acquires voting rights and all the other rights and duties of membership in the category in which it is listed in the Annex, but it cannot do so under any other circumstances.

Article 3 of the Cocoa Agreement allows wide latitude to the Contracting Parties (i.e. States) in regard to arrangements concerning their dependent territories. The rights of a Party under that article may be exercised "if any Contracting Party, including the territories for

[122] *United Nations Conference on Trade and Development*, Final Act and Related Documents (E/CONF.48/78 and Corr.1 and 2, United Nations publication, Sales No. 1948.II.D.4).

whose international relations it is for the time being ultimately responsible and to which this Agreement is extended in accordance with paragraph (1) of Article 70, consists of one or more units that would individually constitute an exporting member and one or more units that would individually constitute an importing member". The word "units" is not a precise one; while "territories" may in some contexts perhaps be given a definite legal meaning, it is much harder to do the same with "units". The United Kingdom has determined that the metropolitan country plus Dominica and St. Vincent constitute one "unit" which is an importing member (and, incidentally, also a "producing member" under article 2 (*p*)), and that St. Lucia, which is an exporting member, constitutes another "unit". Obviously the exports of flavour cocoa from Dominica and St. Vincent are not sufficient to outweigh the imports of the metropolitan United Kingdom and change the category of that "unit" with respect to the cocoa trade. In case of a dispute, the Council is competent to decide the issue, in accordance with Article 61 of the Agreement; but we are not aware of any legal basis upon which the division by the United Kingdom of its territories into "units" for the purposes of the Cocoa Agreement could successfully be challenged in such a proceeding.

18 October 1974

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

FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

QUESTION WHETHER STAFF RULE 302.40643 IS CONSISTENT WITH ARTICLE VIII.3 OF THE FAO CONSTITUTION

Opinion prepared by the Legal Counsel at the request of the Committee of the Whole of the FAO Council[123]

. . .

3. In accordance with Staff Rule 302.40643, the principle of recruitment of staff on as wide a geographical basis as possible is not applicable to the General Service category.

4. The Representative of the Philippines is of the opinion that this Staff Rule is incompatible with Article VIII.3 of the Constitution, and also with Rule XXXVIII.1 of the General Rules of the Organization and Staff Regulation 301.042.[124]

5. At the outset it should be recalled that the Constitution, as a treaty to which all Members of FAO are parties, is the supreme law of the Organization, and therefore any subsidiary legislation enacted by FAO organs or authorities must be consistent with the Constitution. The various categories of relevant subsidiary legislation may be classified according to the following hierarchical order:

(i) The General Rules of the Organization, adopted by the FAO Conference in accordance with Article IV-2 of the Constitution;

(ii) The Staff Regulations, promulgated by the Director-General with the approval of the Council, as provided in Rule XXXVIII.3 of the General Rules of the Organization;

(iii) The Staff Rules, enacted by the Director-General in accordance with Staff Regulation 301.00.

6. It is clear, therefore, that any Staff Rule enacted by the Director-General must be consistent with the Staff Regulations, the General Rules and ultimately the Constitution.

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[123] Circulated as document CL 64/LIM/6.

[124] See Annex 1 to this opinion.

7. The principal provisions, directly relevant to the question under consideration, are:

Staff Rule 302.40643

"The provisions of Staff Regulation 301.042 concerning recruitment of staff on as wide a geographical basis as possible shall not apply to the recruitment of staff in the General Service category."

Staff Regulation 301.042

"The paramount consideration in the appointment, transfer, or promotion of the staff shall be the necessity for securing the highest standards of efficiency, competence and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible."

Rule XXXVIII.1 of the General Rules of the Organization

"The staff of the Organization shall be appointed by the Director-General, having regard to paragraph 3 of Article VIII of the Constitution. . . ."

Article VIII.3 of the Constitution

"In appointing the staff, the Director-General shall, subject to the paramount importance of securing the highest standards of efficiency and of technical competence, pay due regard to the importance of selecting personnel recruited on as wide a geographical basis as is possible."

8. It should now be considered whether it was permissible for the Director-General to exclude, in Staff Rule 302.40643, the General Service category from the application of the principle of recruitment "on as wide a geographical basis as is possible".

9. As regards the literal meaning of Article VIII.3 of the Constitution (and the similar expression used in Staff Regulation 301.042), it should be observed that the Director-General was directed to "pay due regard" to the importance of selecting personnel on as wide a geographical basis as is possible. Thus the Constitution did not require that the Director-General should, in all cases and for all categories, apply the principle of geographical distribution, but instead directed him to pay due regard to that principle.

10. Thus, in the application of that principle to the FAO staff, the Director-General was given certain discretionary powers, which, according to a generally accepted rule of public law, must be exercised reasonably, and not in a capricious or arbitrary manner.

11. A brief survey of the circumstances relating to the adoption of the policy at present laid down in Staff Rule 302.40643 will show that such policy has met the standards indicated in the preceding paragraph.

12. The Sixth Session (November 1951) of the FAO Conference, by resolution No. 65/51, decided to adopt the United Nations Salary, Allowance and Leave System for FAO, "recognizing the desirability of uniformity with respect to such matters in the United Nations and the Specialized Agencies". The system came into effect from 1 January 1952.

13. As was explained in FAO Administrative Memorandum No. 313 of 30 July 1951, "One of the principal features of the new salaries and allowances plan of the United Nations is the separation of all posts into two general groups, one comprising posts to be filled by international recruitment (Professional and Principal Officer Categories), and the other comprising posts which can best be filled by recruiting from the immediate area in which the duty station is located (General Service Category)."

14. A corollary of the policy of recruiting locally the General Service staff is that the principle of geographical distribution cannot apply to this category.

15. The practice of excluding certain categories from the principle of geographical distribution has been applied in the United Nations since its early days. In addition to the General Service category, other categories excluded are the professional posts with language requirements and the manual workers.[125]

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[125] Repertory of United Nations Practice, vol. V, Article 101, para. 32.

16. Perhaps the most comprehensive explanation of the reasons for the adoption of this United Nations policy is to be found in the Report of the Committee of Experts on Salary, Allowance and Leave Systems (generally known as the Flemming Report), submitted to the Fourth Session of the General Assembly in 1949. Paragraph 75 of the Flemming Report reads:

> "The Committee realizes it might be argued that the local recruitment policy it is advocating is not fully consistent with the principle of wide geographic distribution as stated in the Charter. It does not believe, however, it was ever the intention of the General Assembly to insist upon this principle being applied to an unreasonable extent. Its application to the entire staff of an international organization would be enormously expensive and in the Committee's opinion would not result in any corresponding contribution to the essential purpose which the General Assembly had in mind of ensuring that the Secretariat is adequately representative of national cultures and experience, particularly at what might be very broadly regarded as the professional and policy-making levels. Accordingly, it considers that the desirability of broad geographic distribution of staff on the one hand, and the importance of prudent and economical administration on the other, can be properly reconciled by grouping staff for salary purposes on a basis of those recruited internationally and paid in accordance with an international salary scale subject to adjustment where appropriate by a salary differential, and those whose recruitment for practical and budgetary reasons should be restricted as far as possible to the local area where the United Nations activity is situated, and who should therefore be paid in accordance with local prevailing rates."[126]

17. The same considerations apply, of course, to the policy followed by FAO in this respect.

18. It is important to point out that the Charter of the United Nations contains a provision practically identical to that of Article VIII.3 of the FAO Constitution. Article 101.3 of the Charter reads:

> "The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible."

19. The similar provisions of the United Nations Charter and the FAO Constitution have been consistently interpreted as permitting the exclusion of certain categories, in particular the General Service category, from the application of the principle of geographical distribution. The Governing Bodies of the United Nations and FAO have been aware of this practice and have repeatedly endorsed it, directly or indirectly. For example, the General Assembly has "Noted with appreciation"[127] the information submitted to it under the title "Staff in professional and higher level posts subject to geographical distribution as of 31 August 1968".[128] Similarly, the FAO practice has been repeatedly endorsed by the Conference and Council, as shown in Annexes II and III.

20. In summary:

(1) Article VIII.3 of the FAO Constitution does not prescribe that the principle of geographical distribution must be applied to all categories of FAO staff;

(2) In enacting Staff Rules 302.40643 by which the General Service category was excluded, the Director-General acted reasonably, and not in a capricious or arbitrary manner as shown by the fact that:

(i) the exclusion was in conformity with the common system of United Nations organizations;

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[126] *Official Records of the Fourth Session of the General Assembly, Fifth Committee*, Annex to the Summary Records of Meetings, vol. II, agenda item 39, document A/C.5/331 and Corr.1.

[127] General Assembly resolution 2480 (XXIII) of 21 December 1968.

[128] Document A/7334, p. 53.

(ii) there were sound and reasonable grounds for adopting the policy laid down in Staff Rule 302.40643.

(3) The FAO Conference and Council have long been aware of this policy and have repeatedly endorsed it, directly or indirectly.

21. It is concluded therefore that Staff Rule 302.40643 is compatible with Article VIII.3 of the Constitution, as well as with Rule XXXVIII.1 of the General Rules of the Organization and Staff Regulation 301.042.

ANNEX I

Statement by the Representative of the Philippines at the Second Meeting of the Committee-of-the-Whole

Mr. Chairman:

On the topic of "other matters" in item 27 (*d*) of the agenda, my delegation would like to submit for the consideration of the Council a proposal.

Our proposal is to abrogate Staff Rule 302.40643. This Rule reads thus, "The provisions of Staff Regulation 301.042 concerning recruitment of staff on as wide a geographical basis as possible shall not apply to the recruitment of staff in the General Service category."

Our reasons for making this proposal are: first, the Staff Rule referred to is unconstitutional and, second, it is discriminatory to most member States of FAO.

In FAO there are four categories of rules governing the appointment of its staff, namely: the Constitution, the General Rules, the Staff Regulations and the Staff Rules. As we all know, the Constitution is the highest authority among them. The General Rules rank second, the Staff Regulations rank third and the Staff Rules come last. Now, Art. VIII, par. 3 of the FAO Constitution expressly directs that in appointing the staff, the Director-General shall, subject to the paramount importance of securing the highest standards of efficiency and of technical competence, pay due regard to the importance of selecting personnel recruited on as wide a geographical basis as is possible." Rule XXXVIII of the FAO General Rules requires that the staff of FAO be appointed in accordance with the above constitutional provision. To implement these two legal provisions, Staff Regulation 301.042 provides that "due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible."

Mr. Chairman, Staff Rules are issued on the authority of the Director-General alone. They cannot validly contravene a constitutional provision. We do not think there can be two opinions on this proposition.

Art. VIII of the Constitution has set down a policy which the Director-General cannot override because he is not above the Constitution. Yet since 1951 the rule under reference has remained in the Staff Rules of the Organization and was being invoked by management as justification for limiting recruitment of FAO personnel in the General Service category to nationals of the host country and other neighboring States since 1951. No wonder, Mr. Chairman, if we look at Appendix D of the report of the 32nd Session of the Finance Committee, we find that out of 2036 positions in the General Service category, only 15 come from Latin America, 2 from Africa and from only one country of said region (Tunisia), 2 from the Socialist countries and only 1 from Asia.

Mr. Chairman, what is deplorable about the Staff Rule which I have referred to is that it is not only contrary to the FAO Constitution but above all it is patently discriminatory to most of the member States of FAO which all contribute to the regular budget of the Organization. This Staff Rule is offensive to the dignity and self-respect of the excluded member States of FAO and should not be permitted to remain in the Staff Rules of the Organization.

For the reasons just stated, we propose its abrogation. In case no consensus can be reached in favor of our proposal, we move that a vote on it be taken by roll call voting.

ANNEX II

Extract from Report of 8th Session of Conference—4-25 November 1955

Geographic Distribution of Staff

427. Some delegates, referring to Art. VIII of the Constitution concerning geographic distribution of staff emphasized the necessity for achieving a more suitable representation of certain countries on the

Professional staff, particularly in what were described as the policy making levels, whether in posts charged to the Regular Programme or to Technical Assistance funds. The Conference noted the assurances of the Director-General that the principle of equitable geographic distribution among the Professional staff had always been kept in view, as far as possible, and that it would continue to be taken into account in future recruitment for vacancies.

428. The Conference adopted the following resolution:

Resolution No. 50/55
Geographic Distribution of Staff

The Conference,

Considering that, in accordance with paragraph 3 of Article VIII of the Constitution, the Director-General shall pay "due respect to the importance of selecting personnel recruited on as wide a geographical basis as possible" as well as efficiency and technical competence; Considering that, while it accepts the assurances given by the Director-General as satisfactory, it feels that thus far the provision of the said Article with regard to the geographical basis of the staff has not been fulfilled;

Requests the Director-General to take proper measures to re-establish the necessary equilibrium, bearing the said principle constantly in mind when filling vacancies that may occur in the various categories of professional staff and any new posts that may be established.

ANNEX III

EXTRACT FROM REPORT OF 27TH SESSION OF COUNCIL—31 OCTOBER-1 NOVEMBER 1957

Geographical Distribution of Staff

13. The Council at its Twenty-sixth Session had asked the Director-General to report upon the system to be followed in future in measuring the geographical distribution of the Professional staff of the Organization. This report, as well as information on the present geographical distribution of the Professional staff, was submitted to the Twenty-seventh Session of the Council.

14. The Council again expressed its satisfaction with the progress reported in achieving still more equitable geographical distribution in the staff and commended the Director-General for his report and suggestions. It approved the following broad principles which should in future govern geographical distribution.

Adoption of the weighed or so-called UNESCO system modified to provide that (1) each Member Nation should in so far as practicable be represented by at least one Professional appointment; (2) in general, geographical considerations should not prejudice the promotion of existing Professional staff; (3) the post of the Director-General should not be included in establishing the points of representation.

15. The Council stressed the necessity of ensuring that paramount importance be placed on competence and efficiency in recruitment. Subject only to this paramount consideration due regard should be paid to geographical distribution.

16. The Council also agreed to the proposal of the Director-General to continue advertising Professional vacancies to Member Governments as presently practised, and to implement it by a procedure whereby early each year a list of available vacancies contemplated for that year would be distributed to all Member Governments.