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1966

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

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

CONTENTS (continued)

CONTENTS (continued)

Chapter VI

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

A. Legal opinions of the Office of Legal Affairs of the United Nations

1. Resumed participation of Indonesia in the activities of the United Nations

Aide-mémoire to the Secretary-General

Introduction

1. By telegram of 19 September 1966, the Ambassador of Indonesia to the United States of America transmitted the following message to the Secretary-General:

> "With reference to the letter of 20 January 1965 from the First Deputy Prime Minister and Minister for Foreign Affairs of Indonesia and to your letter of 26 February 1965 in answer thereto, I hereby have the honour upon instruction of my Government to inform you that my Government has decided to resume full co-operation with the United Nations and to resume participation in its activities starting with the twenty-first session of the General Assembly. A delegation headed by the Foreign Minister will arrive to attend the Assembly."

Upon receipt of this telegram, the Secretary-General circulated it to the Security Council (S/7498) and to the General Assembly (A/6419).

2. The previous history of this matter, and some of the practical issues arising from the foregoing telegram are briefly set out in the present aide-mémoire.

Previous history of the matter

3. By letter of 20 January 1965, the First Deputy Prime Minister and Minister for Foreign Affairs of Indonesia confirmed information orally given the Secretary-General on 31 December 1964 that "Indonesia has decided at this stage and under present circumstances to withdraw from the United Nations." The principal reason advanced for this decision related to the seating of Malaysia as a member of the Security Council for the year 1966. The letter also stated, in answer to an earlier appeal by the Secretary-General not to adopt this course of action, that "Indonesia still upholds the lofty principles of international co-operation as enshrined in the United Nations Charter." Finally, it was requested that the Secretary-General make arrangements for the Indonesian Mission in New York to "maintain its official status" until 1 March 1965.

4. Upon receipt of the foregoing letter, the Secretary-General circulated it to the Security Council (S/6157) and to the General Assembly (A/5857), these being the two bodies concerned with membership questions, and transmitted it directly to all Governments of Member States, as the Governments of the States Parties to the Charter. He also held private consultations with Members of the Organization (i.e. members of the Security Council and heads of regional groups). Neither the Security Council, nor the General Assembly, took any formal action on the Indonesian letter.

5. In the course of the Secretary-General's consultations just mentioned, he distributed an informal aide-mémoire, dated 29 January 1965, concerning the letter he had received from Indonesia. That aide-mémoire noted, *inter alia*, that the letter "gives rise to a situation for which there is no precedent in the history of the Organization and for which no express provision is made in the Charter." It concluded with certain comments on "some practical effects of the letter of 20 January 1965". It was suggested that, after consultations with Member States, the Secretary-General would give instructions "for the necessary administrative actions (such as the removal of the Indonesian flag, name-plate, etc.) to be taken at the relevant time".

6. After the consultations with Member States mentioned in paragraph 4 above, the Secretary-General, on 26 February 1965, replied to the letter of 20 January 1965 from the Indonesian Foreign Minister. This reply (S/6202-A/5899) recorded the steps taken by the Secretary-General in paragraph 4 above, and continued:

> "Your statement that 'Indonesia has decided at this stage and under present circumstances to withdraw from the United Nations' and your assurance that 'Indonesia still upholds the lofty principles of international co-operation as enshrined in the United Nations Charter' have been noted.
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> "As you requested, arrangements have been made for the Indonesian Mission in New York to 'maintain its official status' until 1 March 1965.
>
> "In conclusion, I wish to express the profound regret which is widely felt in the United Nations that Indonesia has found it necessary to adopt the course of action outlined in your letter and the earnest hope that in due time it will resume full co-operation with the United Nations."

7. On 1 March 1965, pursuant to the Secretary-General's instructions, the necessary "administrative actions" were taken by the Secretariat to remove the Indonesian name-plate, flag, etc. Thereafter, Indonesia ceased to be listed as a Member of the Organization, or of United Nations principal and subsidiary organs of which it had been a member solely by virtue of its membership in the United Nations itself. Furthermore, the name of Indonesia does not appear in resolution 2118 (XX) of 21 December 1965, whereby the Assembly fixed the scale of assessments of Member States for the financial years 1965, 1966 and 1967 (nor is it assessed in the same resolution as a non-member for the expenses of certain organs in which non-members participate).

Some practical effects of the telegram of 19 September 1966

8. From the telegram set out in paragraph 1 of this aide-mémoire, which refers to the decision of the Government of Indonesia "to resume full co-operation with the United Nations", it would appear that that Government considers that its recent absence from the Organization was based not upon a withdrawal from the United Nations but upon a cessation of co-operation. The action taken by the United Nations in the past on this matter would not appear to preclude this view. After it has been ascertained whether this is the general view of the membership, the Secretary-General would give instructions for the necessary administrative actions to be taken for Indonesia to participate once again in the proceedings of the Organization. It may be assumed that, from the time that Indonesia resumes participation, it will meet in full its budgetary obligations. For the period of non-participation, if it is the general view that the bond of membership continued, it would be the intention of the Secretary-General to negotiate a requisite payment with the representatives of Indonesia.

22 September 1966

2. EXEMPTION OF THE UNITED NATIONS FROM CENTRAL EXCISE DUTY ON GASOLINE PURCHASED FOR OFFICIAL VEHICLES OF THE UNITED NATIONS DEVELOPMENT PROGRAMME—SECTIONS 7 (*a*) AND 8 OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS[1]

Memorandum to the Acting Director of the Bureau of Administrative Management and Budget, United Nations Development Programme

1. You have referred to us the question whether the Resident Representative of the United Nations Development Programme in a Member State may claim a refund of "central excise duty" paid by his office on the purchases of gasoline for official vehicles. We note that the Ministry of External Affairs of the Government concerned has declined to recognize the exemption of the United Nations from the said excise duty and has referred to section 8 of the Convention on the Privileges and Immunities of the United Nations as the basis for its position.

2. From the correspondence attached to your memorandum it is not clear to us whether the "central excise duty" paid by the Office of the Resident Representative on the purchase of gasoline for its official vehicles formed part of the price of the gasoline or whether the said duty figured as a separate item on the invoice. Only if the duty in fact formed part of the price of the gasoline could section 8 of the Convention be applicable. The said section reads as follows:

> "*Section 8.* While the United Nations will not, as a general rule, claim exemption from excise duties and from taxes on the sale of movable and immovable property which form part of the price to be paid, nevertheless, when the United Nations is making important purchases for official use of property on which such duties and taxes have been charged or are chargeable, Members will, whenever possible, make appropriate administrative arrangements for the remission or return of the amount of duty or tax."

3. Should it be the case that the central excise duty in question in fact formed part of the price paid, the Resident Representative may, on the basis of the latter part of the above-quoted section 8 of the Convention, request the Government to "make appropriate administrative arrangements for the remission or return of the amount of duty". He may do so in view of the fact that purchase by his office of gasoline for official use was on a recurring basis and amounted to a sizeable sum per month on the average. Both the recurring nature of the purchases and the amount of the duty involved render the purchases of gasoline "important" in the sense of the section 8 of the Convention. We have consistently taken this position vis-à-vis various Governments in similar cases and these Governments, for instance Canada and the United Kingdom, have taken appropriate measures for the exemption or refund of similar taxes.

4. Should it be found that the "central excise duty" paid by the Office of the Resident Representative in fact figured as separate items on the invoices, it would be a "direct tax" on the UNDP within the meaning of section 7 (*a*) of the Convention. Under the said section 7, "the United Nations ... shall be: (*a*) exempt from all direct taxes...".

5. In view of the foregoing, we are of the opinion that the Resident Representative may further pursue the matter with the Government with a view to securing a refund of the amounts of "central excise duty" paid by his office on the purchases of gasoline for vehicles of his office. He may further request an exemption, or appropriate arrangements for the remission or return, of the duty in respect of future purchases. Should his efforts be unsuccessful, we shall be glad to render further assistance.

6 October 1966

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

3. Question whether telegrams sent by a United Nations Information Centre are entitled to press rates or other favourable treatment—Section 9 of the Convention on the Privileges and Immunities of the United Nations[2]

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

1. According to your memorandum of 6 October 1966, the Director of a United Nations Information Centre in a Member State states that he intends to approach the authorities "with a request to grant press rates to OMNIPRESS cables emanating from this office". Before doing so, he wishes to have advice as to whether there exists some legal background to such a request.

2. It is our understanding that cablegrams to and from United Nations Information Centres are, by their content, differentiated into various classes. One of these is what is known as "press telegrams" which, under international regulations, are confined to "telegrams, the text of which is made up of information and news for publication in newspapers and other periodical publications or for radio sound or television broadcasting." In contemplating making a request to the authorities for press rate, the Director of the Information Centre apparently has in mind only such press telegrams and not others.

3. If our understanding is correct, we are of the opinion that the Director of the Information Centre would be well-advised to ask the Government to grant the press rate for press telegrams that his centre may send. In so doing, he will find support in the Convention on the Privileges and Immunities of the United Nations, to which the Government is a party. Section 9 of the said Convention provides, in part, that "the United Nations shall enjoy in the territory of each Member ... press rates for information to the press and radio". You may wish to so advise the Director, and we shall appreciate being informed of developments.

4. With regard to telegrams from the Information Centre which are not in the nature of press telegrams, we might add that under section 9 of the above Convention the Information Centre should enjoy "treatment not less favourable than that accorded by the Government ... to any other Government including its diplomatic mission in the matter of ... rates and taxes ...".

1 December 1966

4. Patent practice and policy of the United Nations

Memorandum to the Bureau of Operations and Programming. United Nations Development Programme

1. The practice of the United Nations with respect to work financed by it which is susceptible to patent or copyright is to retain for itself the proprietary rights in the work, including the right to take out any copyright or patent in such work. Provisions reflecting this practice may be found in Staff Rules 112.7 and 212.6, in United Nations special service agreements, and in other agreements entered into by the United Nations with contractors, including agreements relating to a project in which the United Nations is Executing Agency for the UNDP (Special Fund).

2. The foregoing practice is a manifestation of a general policy aimed at the widest possible dissemination and use of work performed under the auspices of or financed by the Organization and is thus directed not so much towards acquiring a source of revenue in the

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

form of royalties from the use of patent rights but to ensuring the general availability of techniques developed by the Organization or under its aegis. In retaining the rights in question, the Organization prevents any single individual or entity from taking out a patent or copyright over a work and from acquiring exclusive rights to control its exploitation and use. The Organization itself does not normally take out patents or copyrights. It achieves its purposes by publication or disclosure of the work, which has the effect of yielding it into the public domain.

3. It has of course been recognized that cases may arise in which it is necessary or appropriate to grant to an outside entity or person the right to take out a patent or a copyright on work performed under the auspices of the United Nations, such as when the provision of a financial incentive to others is required to encourage the development or exploitation of a work.

4. The foregoing practice and policy would seem to be as valid for the UNDP as for the United Nations, if not more so.

5. In this connexion, it may be noted that patent rights are assets in the same way as other intangible assets and thus constitute property from the point of view of both the Organization and the Special Fund. There is no provision in the Financial Regulations of the Special Fund which relates specifically to such assets, but the Financial Rules of the United Nations contain provisions dealing with the disposal of property in general, e.g., United Nations Financial Rules 110.32(*c*) and 110.33(*a*)(ii). The Financial Regulations of the Special Fund stipulate (Article 22.2, SF/2/Rev.1) that the appropriate provisions of the United Nations Rules should apply in regard to any matter not specifically governed by the Special Fund Regulations.

19 September 1966

5. PROTECTION OF THE EMBLEM OF THE UNITED NATIONS DEVELOPMENT PROGRAMME—ARTICLE 6 *ter* OF THE CONVENTION OF PARIS FOR THE PROTECTION OF INDUSTRIAL PROPERTY AS REVISED AT LISBON ON 31 DECEMBER 1958—QUESTION WHETHER THE EMBLEM SHOULD, OR COULD, BE REGISTERED AS A TRADEMARK

Memorandum to the Assistant to the Administrator, United Nations Development Programme

1. The Convention of Paris for the Protection of Industrial Property as revised in Lisbon on 31 October 1958 contains specific measures of protection for "armorial bearings, flags and other emblems, abbreviations and titles of international inter-governmental organizations". Under article 6 *ter* of the revised Convention, the countries of the Union have agreed to "refuse or to invalidate the registration and to prohibit by appropriate measures the use, without authorization by the competent authorities, either as trademarks or as elements of trademarks", of emblems of inter-governmental organizations. These provisions would be applicable, in our opinion, to the UNDP emblem, even if it is used only as a decorative device and together with the United Nations emblem.

2. In order that this protection of the UNDP emblem should be effective under the Convention, it is necessary that the countries of the Union should be formally notified of the existence of the emblem through the International Bureau of the Union, which is located in Geneva. As soon as the UNDP symbol is formally approved a suitable communication should therefore be addressed to the International Bureau. We shall be glad to assist you in formulating it.

3. In the light of the foregoing, it is doubtful whether it is necessary or even appropriate to seek trademark registration in the United States. It is indeed questionable whether

emblems pertaining to United Nations activities are suitable for trademark registration. In this connexion, you may note that a "Model Law on Trademarks and Trade Names and Unfair Competition" adopted by the Council of the International Chamber of Commerce in November 1959 specifically states in its article 3 that "Armorial bearings, flags and other emblems, abbreviations or titles of international inter-governmental organizations" shall not be deemed trademarks and cannot be validly registered.

23 March 1966

6. Status of a draft resolution submitted at a previous session of the General Assembly

Memorandum to the Secretary of the Economic and Social Council

1. Concerning the status of draft resolutions submitted at a previous session of the General Assembly and relating to an agenda item which had been postponed from that previous session to the succeeding one, we have reviewed recent practice of the main committees of the General Assembly. We have not, however, been able to find a definitive decision on the point in question.

2. In the cases examined, draft resolutions have normally been resubmitted in slightly altered form at the later session of the Assembly. When so resubmitted they have been issued under a new symbol number and not as a revision of the previous document. The following examples may be noted:

(i) At its fifteenth session the General Assembly included on its agenda the item "Question of Oman" (agenda item 89). During the consideration of the item in the Special Political Committee the representatives of Afghanistan, Guinea, Indonesia, Iraq, Jordan, Lebanon, Libya, Morocco, Saudi Arabia, Sudan, Tunisia, the United Arab Republic, Yemen and Yugoslavia submitted a draft resolution (A/SPC/L.67). No action was taken on this draft resolution and the Committee decided to recommend to the General Assembly that further consideration of the item be deferred until its sixteenth session. At its 995th plenary meeting, on 21 April 1961, the Assembly took note of the report of the Committee.

In accordance with the General Assembly's decision of 21 April 1961, the item entitled "Question of Oman" was included in the agenda of the sixteenth session of the Assembly (agenda item 23). A group of States composed of the sponsors of the draft resolution in document A/SPC/L.67 and of Syria submitted a draft resolution (A/SPC/L.78) similar (but not identical) in substance with that in document A/SPC/L.67. This draft resolution was adopted by the Special Political Committee. However, the General Assembly failed to adopt it.

(ii) At its fifteenth session, the General Assembly included in the agenda the item entitled "The Korean question: report of the United Nations Commission for the Unification and Rehabilitation of Korea" (agenda item 21). During the consideration of this item in the First Committee the representatives of Australia, Belgium, Colombia, France, Greece, Luxembourg, the Netherlands, the Philippines, Thailand, Turkey, South Africa, the United Kingdom and the United States submitted a draft resolution (A/C.1/L.269). No action was taken on this draft resolution, and the Committee decided to recommend to the General Assembly that consideration of the item should be adjourned until the sixteenth session.

At the sixteenth session of the Assembly, where the Korean question was discussed (agenda item 20), the representatives of the States which have sponsored the draft resolution in document A/C.1/L.269 and of Canada and New Zealand submitted a draft resolution (A/C.1/L.305) resembling in many aspects the draft in document

A/C.1/L.269. The fifteen-power draft resolution was adopted by the Committee and by the General Assembly at its 1087th meeting, on 20 December 1961.

(iii) At the request of Honduras (A/5022) the General Assembly included in the agenda of its sixteenth session the item entitled "Organization of peace" (agenda item 96). An explanatory memorandum on the question submitted by Honduras contained a draft resolution. The question was not discussed at the sixteenth session. At its 1083rd plenary meeting, on 19 December 1961, the General Assembly decided to include this item in the agenda of the sixteenth session but to place it on the provisional agenda of the seventeenth session.

The item "Organization of peace" was included in the agenda of the Assembly's seventeenth session (agenda item 23). Honduras submitted a draft resolution (A/L.403) which repeated verbatim the provisions of the draft resolution in document A/5022 with the only exception that a committee to be established by the General Assembly was to submit its report to the eighteenth session of the General Assembly while, according to the previous text, this report was to be submitted to the Assembly's seventeenth session.

The General Assembly decided, at the request of Honduras, to postpone until its eighteenth session the consideration of the item. However the item was not included in the agenda of the eighteenth session.

3. A special case which may be noted concerns the draft declaration on the right of asylum, consideration of which was begun in the Third Committee at the seventeenth session of the General Assembly in 1962. The Assembly did not complete its work on this item at its seventeenth session and successively postponed it to the eighteenth, nineteenth and twentieth sessions, at which latter session it was allotted to the Sixth Committee.

4. During the seventeenth session several amendments to the draft declaration were proposed in the Third Committee and issued as documents at that Committee. These were listed in notes by the Secretary-General at subsequent sessions (see A/5461, para. 3 (18th session) and A/5926, para. 4 (20th session)).

5. The Sixth Committee, to which the item was referred at the twentieth session, established a Working Group to examine procedural questions arising in connexion with this item. One of these procedural items was "whether the amendments to the draft declaration submitted to the Third Committee are to be considered as still subsisting, or whether they should be resubmitted". The report of the Working Group (A/C.6/L.581) contains the following conclusion:

> "12. In discussing the above question, attention was drawn to the fact that the amendments previously submitted took the form of Third Committee documents. It was agreed that the Secretary-General should consult with the sponsors of amendments previously submitted and ascertain whether they wished those amendments to be presented, with or without modification, to the Sixth Committee. In all cases where the sponsors indicated that they maintained their amendments, they would be issued as Sixth Committee documents."

6. The foregoing conclusion was incorporated in the report of the Sixth Committee (A/6163, para. 13).

7. While no records of the discussion in the Working Group have been published, it is understood that the members chose a pragmatic solution to the particular problem before them and specifically avoided any decision of principle on the question whether the amendments were still subsisting. It seems preferable to continue to deal with issues of this kind on a practical basis by ascertaining, to the extent that this is possible, the wish of the sponsors. There is no rule of procedure dealing specifically with this issue. Likewise, United Nations practice does not furnish a basis for a definitive conclusion, nor does parliamentary practice appear to provide a consistent or appropriate analogy.

8. If, however, it becomes necessary to formulate an opinion, the following is suggested as a basis for decision.

9. The provisional agenda of a regular session under rule 13 (*c*) of the rules of procedure of the General Assembly will include "all items the inclusion of which has been ordered by the General Assembly at a previous session." However, the provisional agenda, under rules 21 and 22, must be submitted to the General Assembly for approval and items may be amended or deleted by the Assembly by a majority vote of the members present and voting. As the carry-over of an agenda item from one session to the next is not automatic but must be approved at the latter session, it may be argued that the presumption should be against a draft resolution submitted at one session automatically carrying over to the next.

10. It would, therefore, appear that generally a draft resolution submitted at one session will not be before the subsequent session unless (1) it is resubmitted, (2) there is an express desire on the part of the sponsors to maintain it, or (3) the General Assembly in recommending postponement and/or in placing the item on the agenda has expressly transmitted all documents relating thereto. This conclusion seems to be borne out by the recent consideration of the item on permanent sovereignty over natural resources in the Second Committee. Under this item a draft resolution submitted by Ceylon and Ecuador (A/C.2/L.806/Rev.1) at the previous session was not taken up at the current session although the co-sponsors had not expressly withdrawn it.

11. There are, however, special cases such as the draft International Covenants on Human Rights and similar texts before the Third Committee in which these texts and related proposals of governments have continued before successive sessions of the General Assembly. (see document A/6342, particularly paragraph 2.)

14 November 1966

7. Explanation of vote by the proposer of a proposal or of an amendment—Rule 90 of the rules of procedure of the General Assembly

Memorandum to the Executive Office of the Secretary-General

1. In regard to the question which was put to us this morning, the attention of the President of the General Assembly should be drawn to the unequivocal provision of rule 90 of the rules of procedure that he "shall not permit the proposer of a proposal or of an amendment to explain his vote on his own proposal or amendment". This rule, however, does not bar the intervention of (*a*) a "proposer of a proposal" to explain his vote on an amendment before or after the amendment has been adopted or rejected by the Assembly or (*b*) a "proposer of an amendment" to explain his vote on the proposal before or after the proposal has been adopted or rejected by the Assembly. The term "proposer" must be deemed to cover "co-sponsor" of a proposal. There is, of course, nothing to prevent a "proposer of a proposal or of an amendment" to intervene in exercise of his right of reply or for the purpose of raising a point of order in accordance with the Assembly's rules of procedure.

2. On one occasion, a co-sponsor of a draft resolution was permitted to explain the vote of his delegation after the resolution had been adopted by the Assembly (see A/PV. 1405, paras. 247-253). On another occasion, a co-sponsor of a draft resolution was given the floor to make a statement after the adoption of the resolution (see A/PV.1356, paras. 64-68). Other similar cases might have existed. From a legal point of view, a practice which is clearly contrary to the provisions of a rule of procedure cannot negate the rule itself. But we feel that the President should be informed of the existence of those cases together with the legal position set forth herein. Should the question of the application of rule 90 be raised from the floor when a proposer or co-sponsor has asked to explain his vote, the

President would have no choice but to apply the rule by refusing the floor to the proposer or co-sponsor.

19 October 1966

8. SUSPENSION OR ADJOURNMENT OF THE MEETING—WITHDRAWAL AND RE-INTRODUCTION OF PROPOSALS—INTRODUCTION OF AN AMENDMENT AFTER THE CLOSURE OF DEBATE—RULES 119 AND 121 OF THE RULES OF PROCEDURE OF THE GENERAL ASSEMBLY

Note to the Chairman of the Third Committee of the General Assembly

1. In connexion with the various questions raised in the Third Committee, we would like to submit the observations set out below.

Suspension or adjournment of the meeting

2. Rule 119 of the rules of procedure of the General Assembly provides as follows:

"During the discussion *of any matter*, a representative may move the suspension or the adjournment of the meeting. *Such motions shall not be debated, but shall be immediately put to the vote.* The Chairman may limit the time to be allowed to the speaker moving the suspension or the adjournment of the meeting." (Italics added.)

The wording of the foregoing rule makes it clear that adjournment may be proposed at any juncture of the discussion, and that a motion for adjournment has absolute priority over all other matters before a committee, as it is to be put immediately to the vote, without debate.

Withdrawal and re-introduction of proposals

3. When a proposal has been withdrawn, or not pressed to a vote, there is nothing in the rules of procedure to prevent the author from re-introducing it or raising it again at a later date either in its original or in an amended form if the time-limit for the submission of proposals has not lapsed. On some occasions in the past, even when the time-limit has lapsed, a proposal has in fact been entertained when no objection to its submission was raised. In the present case, since there was no objection at the time the proposal was submitted and since the Committee proceeded with its discussion, there is no reason why the Chairman should not put it to the vote.

Introduction of an amendment after closure of debate

4. Rule 121 of the rules of procedure provides as follows:

Rule 121

"Proposals and amendments shall normally be introduced in writing and handed to the Secretary-General, who shall circulate copies to the delegations. As a general rule, no proposal shall be discussed or put to the vote at any meeting of the committee unless copies of it have been circulated to all delegations not later than the day preceding the meeting. The Chairman may, however, permit the discussion and consideration of amendments, or of motions as to procedure, even though these amendments and motions have not been circulated or have only been circulated the same day."

This rule vests in the Chairman a discretion to permit the consideration of oral amendments subject to any prior decisions of the Committee regarding the time-limit for the submission of proposals or amendments. However, even if the time-limit has passed and debate has closed, committees have entertained amendments the purpose of which is to solve a procedural difficulty facing the committee. In the light of such a practice, a chairman is not necessarily required to rule such an amendment out of order.

9 December 1966

9. RESPONSIBILITIES OF A CHAIRMAN OF A COMMITTEE OF THE GENERAL ASSEMBLY WITH RESPECT TO THE CIRCULATION OF COMMUNICATIONS FROM NON-MEMBERS—RULE 108 OF THE RULES OF PROCEDURE OF THE GENERAL ASSEMBLY

Memorandum to the Secretary of the Special Committee on the Policies of Apartheid of the Government of the Republic of South Africa

1. You have asked for our views on the responsibilities of a chairman of a subsidiary organ of the General Assembly with respect to communications addressed to the chairman by non-members and requesting that their contents be circulated or brought to the attention of the members of the subsidiary organ concerned. It is our understanding that the communications involved are ones not specifically requested from a non-member by the relevant subsidiary organ. You have also asked for some information with respect to the means usually adopted in handling such communications, particularly when they emanate from areas or authorities the status of which is unclear.

2. Pursuant to rule 162 of the rules of procedure of the General Assembly, the procedures of committees of the Assembly normally apply to the procedure of subsidiary organs. It is our understanding that this is the situation in the case in question.

3. Unlike the rules of procedure of certain other principal organs, the General Assembly's rules do not lay down any specific procedures for handling communications addressed to the Assembly, or its presiding officers. Nor do rules 108 and 109, concerning the functions of a chairman of a committee of the Assembly, invest him with any specific responsibility with respect to communications addressed to him by non-members and dealing with some topic with which the committee over which he presides is seized. However, rule 108 invests the chairman with broad powers, including the power to "put questions" and, subject to the rules, to exercise "complete control of the proceedings of the committee...". Rule 109 provides that "the Chairman, in the exercise of his functions, remains under the authority of the committee."

4. Taking account of the broad powers vested in the chairman by rule 108, it would appear that a chairman is not precluded and, indeed, may deem it his responsibility to consult with the members of his committee with respect to the manner in which a communication received from a non-member, and requesting transmission to the committee, should be handled. In so doing, under rule 109, the chairman is "under the authority of the committee", the decision of which is final.

5. As regards past practice with respect to communications from non-members, it would appear that, for the past several years, no communications received from non-members and addressed to the President, on subjects on which comments were not specifically requested from such non-members, have been circulated to the plenary meetings of the Assembly in the full "A" series. A number of such communications have, at the request of a Member State, been circulated under cover of a *note verbale*. On a very few occasions a number have also been circulated to main committees of the Assembly, as committee documents, when the non-member concerned has a direct and immediate interest in the agenda item concerned (i.e. the Republic of Korea and the Democratic People's Republic of Korea with respect to the Korean question).

6. The practice of subsidiary organs of the Assembly in respect of communications of the nature here involved does not appear to have been entirely uniform. In one subsidiary organ two such communications have been informally circulated without document symbol. Considerations of time have not permitted any detailed enquiry into the practices of other subsidiary organs. However, no examples in the last few years have been brought to our attention where a communication of the nature here envisaged has been circulated in document form without a specific written request from a Member State.

7. Some variation from the General Assembly practice of circulation under cover of a *note verbale*, as described in paragraph 5 above, appears to exist in the practice of certain other principal organs, such as the Economic and Social Council and the Security Council. In the Economic and Social Council, for example, a few communications of the nature here envisaged have, provided this is requested by a Member State, been circulated as an annex to the letter from the Member State concerned. A similar example also exists in the recent practice of the Security Council.

2 August 1966

10. ELIGIBILITY OF WESTERN SAMOA TO PARTICIPATE IN THE JOINT UNITED NATIONS/FAO WORLD FOOD PROGRAMME

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

1. This is in response to your letter of 18 February 1966 concerning the eligibility of Western Samoa to participate in the Joint United Nations/FAO World Food Programme.

2. With respect to your inquiry as to the basis for its participation in the Special Fund, Western Samoa became a member of the WHO on 16 May 1962. Accordingly, it meets the requirement in General Assembly resolution 1240 (XIII) of membership in the United Nations or one of the specialized agencies or the International Atomic Energy Agency and is eligible to participate in the Special Fund. The Agreement between the Special Fund and the Government of Western Samoa signed on 5 June 1963 reflects this eligibility.

3. Although it is true, as you say, that Western Samoa is a member of ECAFE, the United Nations Secretariat has in the past hesitated to determine on its own responsibility that membership in a regional economic commission satisfies the requirement of membership in the United Nations for purposes of determining eligibility to participate in United Nations assistance programmes, such as the regular programme of technical assistance under General Assembly resolution 200 (III). What the Secretariat did in the case of the regular programme was to bring to the attention of the Technical Assistance Committee the general question of the participation of non-member States which were formerly Trust Territories and were members of a regional economic commission.[3] Thus the Commissioner for Technical Assistance informed the Technical Assistance Committee in June 1963 (E/TAC/L.302, p. 10) that the Secretariat would with the agreement of the Committee consider such States eligible to receive assistance under resolution 200 (III). The report of the Technical Assistance Committee on this point reads as follows:

> "With respect to the operation of the programme, the Commissioner drew attention to the fact that certain countries had not been considered eligible for technical assistance under General Assembly resolution 200 (III) although other resolutions did not exclude them. These were States which were former trust territories and which were members of regional economic commissions but not members of the United Nations. The Commissioner proposed, particularly in the light of resolution 1527 (XV) of the General Assembly and resolution 231 of the Economic Commission for Asia and the Far East, that the Secretary-General should make the interpretation that such States were eligible to receive assistance under resolution 200 (III). In commenting upon this proposal a number of members of the Committee agreed that the interpretation suggested by the Commissioner should be made." (E/3783, para. 49).

The same solution could be utilized in the case of the World Food Programme and the question brought to the United Nations/FAO Inter-Governmental Committee.

4 March 1966

[3] See *Juridical Yearbook*, 1963, pp. 172-174.

11. Participation by Puerto Rico in ECLA seminars and conferences

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

1. The letters transmitted to us on the subject of Puerto Rican participation in ECLA conferences and seminars seem to us to raise the following questions:

(i) Whether Puerto Rico's participation in ECLA conferences and seminars is permissible;

(ii) If such participation is not permissible, whether there are ways in which Puerto Ricans might participate in ECLA conferences and seminars;

(iii) Whether it would be appropriate for the ECLA Secretariat to regularly keep the Government of Puerto Rico advised as to ECLA's activities, in particular, as to conferences and seminars being organized by ECLA.

2. The Commission's terms of reference do not, as you know, contain provisions which could be regarded as entitling Puerto Rico to participate in the Commission's sessions, or in meetings of its committees or sub-committees, or in conferences or seminars convened by the Commission; nor do the Commission's terms of reference contain provisions which could be regarded as empowering the Commission to invite such participation. The Economic and Social Council has not specifically authorized such participation or specifically empowered the Commission to do so. In these circumstances it would not, in our opinion, be permissible for Puerto Rico to participate in ECLA conferences and seminars, in the absence of specific authorization by the Economic and Social Council. We should, in this connexion, draw attention also to the rules adopted by the General Assembly, in resolution 366 (IV), for the calling of international conferences by the Economic and Social Council. The rules do provide, in rule 4, for "a territory which is self-governing in the fields covered by the terms of reference of the conference but which is not responsible for the conduct of its foreign relations" being invited to participate, but the rule requires, as conditions precedent to such an invitation, the approval of the State responsible for the conduct of the territory's foreign relations and a decision by the Economic and Social Council in favour of such participation.

3. Notwithstanding Puerto Rico's inability to participate in ECLA conferences and seminars, it would of course be possible for the Government of the United States (which is a member of ECLA and the authority responsible for Puerto Rico's international relations) to include Puerto Ricans in its own delegation to conferences and seminars of interest to Puerto Rico, or, in cases where such conferences or seminars involved the participation of experts, to designate experts from Puerto Rico. This, however, is a matter entirely within the discretion of the United States Government.

4. We are doubtful as to whether it would be appropriate for ECLA to keep the Government of Puerto Rico regularly advised on ECLA's activities. Puerto Rico is not a member or an associate member of ECLA, and for the Secretariat to keep Puerto Rico so informed would create a precedent which may give rise to difficulties in the future. It would seem to us that the appropriate source from which the Government of Puerto Rico should obtain such information is the Government of the United States which, as a member of ECLA, is regularly kept advised by the Secretariat as to ECLA's activities and programmes.

1 June 1966

12. ADDITIONAL PLEDGE BY THE NETHERLANDS GOVERNMENT TO THE UNITED NATIONS DEVELOPMENT PROGRAMME FOR PURPOSES OF INDUSTRIAL DEVELOPMENT—QUESTION OF THE ESTABLISHMENT OF A TRUST FUND BY THE ADMINISTRATOR OF THE UNITED NATIONS DEVELOPMENT PROGRAMME—QUESTION OF THE ESTABLISHMENT OF A TRUST FUND BY THE SECRETARY-GENERAL

Memorandum to the Director of the Division of Financial Management and Administrative Policy, United Nations Development Programme

1. This refers to your memorandum of 20 December 1965, and subsequent consultations, requesting our views on some questions arising from the Netherlands Government's offer of an additional contribution to the UNDP in the field of industrial development.

2. In the course of the discussion in the Second Committee of the General Assembly on agenda item 40 (activities in the field of industrial development) the Netherlands representative made the following statement on 6 November 1965:

> ". . . [The Netherlands] Government had decided to make, before the end of 1965, an additional contribution to the United Nations Development Programme amounting to 3 million guilders. Conforming to paragraph 15 of the Secretary-General's report (A/6070/Rev.1), that sum would be earmarked for special industrial services. The additional contribution would be given on the understanding that it should indeed be supplementary—not a substitute of what the United Nations Development Programme would in any case spend on activities in the field of industrial development." (A/C.2/SR.1004, para. 28.)

3. We understand that some other governments intend to make contributions for the purpose of industrial development on terms similar to those indicated by the Netherlands Government.

4. In your memorandum it is stated that, in view of the conditions attached to it, the Netherlands' offer could not be accepted as a contribution to "the resources" of either the Special Fund or the Expanded Programme of Technical Assistance. In order to overcome the difficulty you have suggested that a trust fund be established by the Administrator of the UNDP for the purpose of administering the funds donated by the Netherlands Government on the terms and conditions specified by the Netherlands representative at the Second Committee.

5. The first question to be considered is whether, under the applicable resolutions and rules, the Administrator of the UNDP would have the authority to establish a trust fund for the above-mentioned purpose.

6. General Assembly resolution 2029 (XX) establishing the UNDP provides in paragraph 2 that the principles, procedures and provisions governing the Expanded Programme of Technical Assistance and the Special Fund not inconsistent with the resolution shall continue to apply to the relevant activities of the UNDP. In particular, paragraph 1 provides that "the special characteristics and operations of the two programmes, as well as two separate funds, will be maintained and that, as hitherto, contributions may be pledged to the two programmes separately". Accordingly, the basic resolutions governing the Special Fund and the Expanded Programme of Technical Assistance are applicable to the extent that they are compatible with resolution 2029 (XX), and in particular the financial regulations of the Special Fund and of the Expanded Programme of Technical Assistance apply to the functions and the administration of the UNDP.

7. Article 4.1 of the Financial Regulations of the Special Fund (SF/2/Rev.1) reads:

> "There shall be established a Special Fund Account to which shall be credited all voluntary contributions, counterpart contributions in cash provided under gross project budgets, payments towards local operating costs, donations and miscellaneous income for the Special Fund and against which all payments on behalf of the Special Fund shall be charged."

Article 2.4 of the Financial Regulations of the Expanded Programme of Technical Assistance (TAB/CM/1170) reads:

> "All contributions of countries whether in cash, services or materials shall be credited to the Special Account."

8. Neither the Financial Regulations of the Special Fund nor those of the Expanded Programme of Technical Assistance contain any provision for the establishment of trust funds or for the payment of contributions into any account other than the Special Fund Account or the Special Account of the Expanded Programme of Technical Assistance. Accordingly, the Administrator would not seem to be vested with the formal authority to establish a trust fund for the purpose of administering additional voluntary contributions from the Netherlands and other governments for industrial development.

9. While it would not be legally permissible to accept the Netherlands contribution as a contribution to the UNDP to be credited to a trust fund set up by the Administrator, it may be considered whether this and other similar contributions could be accepted by the Secretary-General for purposes and under conditions such as those indicated by the Netherlands representative.

10. Regulation 7.2 of the Financial Regulations of the United Nations provides that

> "Voluntary contributions, whether or not in cash, may be accepted by the Secretary-General provided that the purposes for which the contributions are made are consistent with the policies, aims and activities of the Organization...".

11. Contributions for the purpose of industrial development would clearly meet the requirements of Financial Regulation 7.2. In this connexion, it may be recalled that the Economic and Social Council, in paragraph 6 of its resolution 1030A (XXXVII), specifically requested the Secretary-General

> "... to draw the attention of Governments of States Members of the United Nations or members of the specialized agencies to his authority to receive voluntary contributions for special purposes in accordance with sections 7.2 and 7.3 of the United Nations Financial Regulations, and to inform them that such voluntary contributions may be made for activities in the field of industrial development, including joint or participation projects."

12. Under Regulation 7.3 of the Financial Regulations of the United Nations,

> "Moneys accepted for purposes specified by the donor shall be treated as trust funds or special accounts under Regulations 6.6 and 6.7."

13. The Regulations governing trust funds established by the Secretary-General for the purposes specified by the donor are as follows:

> "*Regulation 6.6.* Trust funds, reserve and special accounts may be established by the Secretary-General and shall be reported to the Advisory Committee.
>
> "*Regulation 6.7.* The purpose and limits of each trust fund, reserve and special account shall be clearly defined by the appropriate authority. Unless otherwise provided by the General Assembly, such funds and accounts shall be administered in accordance with the present Regulations."

14. It follows from the foregoing provisions that it would be permissible for the Secretary-General to accept voluntary contributions from the Netherlands and other governments for purposes of industrial development; that such contributions could be credited to a trust fund; and that the Secretary-General, being the "appropriate authority" under Financial Regulation 6.7, could define the purpose and limits of the trust fund in accordance with the terms specified by the donors provided, of course, that such terms are consistent with the policies, aims and activities of the Organization.

15. In his statement in the Second Committee the Netherlands representative said that the special industrial services financed from his Government's additional contribution

should be rendered on the basis of a co-operative effort of UNDP and—as long as UNIDO does not yet exist—the Centre for Industrial Development. He also said that the contribution would be given on the understanding that it would be supplementary to the UNDP activities in the field of industrial development.

16. In order to comply substantially with these and similar conditions laid down by other prospective donors, and at the same time to make it possible to commence industrial development projects financed from these contributions without delay, it is suggested that the Secretary-General should establish a trust fund to be administered in accordance with the following purposes, limits and conditions:

(i) The Secretary-General will establish a trust fund under United Nations Financial Regulations 6.6 and 6.7 for the purpose of receiving voluntary contributions from States Members of the United Nations or members of the specialized agencies for expanded activities in the field of industrial development.

(ii) Activities to be financed from the trust fund will consist of:

(*a*) Special industrial services of the type listed in paragraph 10 of the report of the Secretary-General on organizational arrangements for industrial development and provision of additional financing on a voluntary basis for operational activities (A/6070/Rev.1); and

(*b*) Other activities in the field of industrial development additional to those carried out by the UNDP and the Centre for Industrial Development.

(iii) Disbursements from the trust fund will be authorized, for activities referred to in paragraph (ii), by the Secretary-General upon the joint recommendation of the Administrator of the UNDP and the Commissioner for Industrial Development.

(iv) The Secretary-General will issue periodic reports to the contributing governments, at least twice a year, on the activities financed from the trust fund and the financial status of the fund. Copies of such reports will also be communicated to the competent United Nations organs.

17. While the arrangement suggested in the preceding paragraphs would seem legally permissible and administratively feasible for the purpose of accepting and utilizing without delay the contributions from the Netherlands and other governments, the question arises whether this arrangement may be continued after the establishment of UNIDO.

18. Paragraph 2 of General Assembly resolution 2089 (XX) provides that the operational activities of UNIDO

"... shall be financed from voluntary contributions to it by Governments of the States Members of the United Nations and members of the specialized agencies and of the International Atomic Energy Agency, as well as through participation in the United Nations Development Programme on the same basis as other participating organizations."

19. It follows that after the establishment of UNIDO voluntary contributions by governments made directly to the Organization will be administered in accordance with the financial procedures to be prepared by the *Ad Hoc* Committee of thirty-six Member States established under paragraph 6 of General Assembly resolution 2089 (XX); in addition, UNIDO will be entitled to participate in the UNDP "on the same basis as other participating organizations".

20. The question of whether, when UNIDO comes into existence, it would still be permissible to carry out substantial activities in the field of industrial development financed from a third source, namely a trust fund established by the Secretary-General, should be re-examined in the light of any decision as may be adopted by the General Assembly with respect to United Nations assistance in the field of industrial development and in particular

with respect to the scope of responsibility of UNIDO. Accordingly, in our view, the trust fund arrangement suggested in this memorandum should be reviewed after the establishment of UNIDO, and if necessary appropriate changes may have to be agreed with the donors.

21. It is concluded:

(i) It would not be legally permissible for the Administrator of the UNDP to establish a trust fund for the purpose of administering the contributions from the Netherlands and other Governments. However, it would be permissible for the Secretary-General to accept such voluntary contributions and to credit them to a trust fund to be administered in accordance with the purposes, limits and conditions indicated in paragraph 16 (i), (ii), (iii) and (iv) above. This trust fund could then be used without delay to finance projects for industrial development.

(ii) The trust fund arrangements should be reviewed when UNIDO comes into existence in the light of any decision as may be adopted by the General Assembly with respect to United Nations assistance in the field of industrial development and in particular with respect to the scope of responsibilities and the financial administration of UNIDO. Any necessary modification of those arrangements would then be made with the concurrence of the donors.

27 January 1966

13. USE OF FUNDS FROM THE TECHNICAL ASSISTANCE COMPONENT OF THE UNITED NATIONS DEVELOPMENT PROGRAMME FOR THE PROVISION OF OPERATIONAL PERSONNEL TO GOVERNMENTS—QUESTION WHETHER THE GOVERNING COUNCIL OF THE UNITED NATIONS DEVELOPMENT PROGRAMME MAY ALLOCATE FUNDS FOR SUCH PROVISION WITHOUT FURTHER REFERENCE TO THE ECONOMIC AND SOCIAL COUNCIL AND THE GENERAL ASSEMBLY

Memorandum to the Secretary of the Governing Council of the United Nations Development Programme

1. In your memorandum of 1 June 1966, you have raised the question whether action on the part of the Economic and Social Council and the General Assembly would be necessary in order to continue the use of funds from the technical assistance component of UNDP for the provision of operational personnel to governments.

2. The question should be considered from the point of view of:

(i) the continuation of the authorization given in Economic and Social Council resolution 951 (XXXVI) and General Assembly resolution 1946 (XVIII) to use expanded programme funds to meet requests from governments for operational personnel; and

(ii) the actual allocation of funds from the technical assistance component of UNDP for the purpose of meeting specific requests presented in the usual way by governments within their duly approved country programmes.

3. The first involves a basic policy decision as to the use of technical assistance funds. The existing authorization to use such funds for operational personnel was given by the General Assembly on the recommendation of the Economic and Social Council, covers only the years 1964 to 1966, and would thus expire with the present calendar year. As noted in your memorandum, the resolutions of these two organs on this point expressly indicate that such authorization was given on an experimental basis. Moreover, the Assembly asked the Economic and Social Council to review in due course the results of this experiment and report thereon to the General Assembly at its twenty-first session, which indicates that the Assembly expected to take the final decision on the question of continuing the authorization under discussion. In the light of these considerations and of the fact that the plenary financial powers of the Organization reside in the General Assembly, action

on the part of the latter would be necessary in order to continue beyond its stated cut-off date the authorization given in the earlier resolutions. From the legal point of view, a decision by the Governing Council of UNDP to continue such authorization would require approval on the part of the Economic and Social Council and the Assembly.

4. As regards the question whether the Governing Council of UNDP may allocate funds for the provision of operational personnel without further reference to the Economic and Social Council and the General Assembly, it would be legally possible for the Governing Council to do so, provided of course that the earlier authorization for the years 1964 to 1966 is extended by the Economic and Social Council and the Assembly as indicated above either permanently or with respect to the years for which Governing Council approval is sought. As noted by you, the understanding in the Second Committee of the General Assembly, recorded in its report, was that

> "... the new Governing Council of the United Nations Development Programme would have, in respect of both the Expanded Programme and the Special Fund sectors of its activities, the same final authority to allocate funds as was previously vested in the Governing Council of the Special Fund." (A/6111, para. 23.)

While it also appears (*ibid.*) that some members of the Second Committee questioned whether such an understanding was consistent with paragraphs 1 and 2 of the draft resolution which subsequently became resolution 2029 (XX), the foregoing passage from the report of the Committee provides a legal basis to interpret the terms of reference of the Governing Council as granting it final authority on the allocation of funds for specific operational assistance projects in the same way as for other projects which qualify for financing from the technical assistance component of the UNDP under the resolutions of the Economic and Social Council and the Assembly.

5. The report (DP/TA/1/Add.1) submitted by the Administrator to the second session of the Governing Council recommends that the latter continue authorization to use funds from the technical assistance component beyond 1966 for the provision of operational personnel by the participating agencies. Since, as explained above, action on the part of the General Assembly and the Economic and Social Council would also be required, the Governing Council should, in our opinion, recommend to the Economic and Social Council that the latter in turn recommend to the General Assembly continuation of the authorization given earlier by it at its eighteenth session and perhaps make such authorization permanent. The review which the Economic and Social Council is required to undertake would provide an appropriate occasion for the adoption of such a recommendation, which could then be transmitted in the report to the General Assembly at its twenty-first session under the terms of the last paragraph of Assembly resolution 1946 (XVIII). Should the General Assembly decide to place the existing experimental authorization on a permanent basis, it would be possible thereafter for the Governing Council of the UNDP to give final approval to the allocation of funds for the provision of operational personnel to governments as part of their country programmes without further reference to the Council and the General Assembly.

3 June 1966

14. FUND FOR THE ECONOMIC DEVELOPMENT OF BASUTOLAND, BECHUANALAND AND SWAZILAND—QUESTION WHETHER CONTRIBUTIONS FROM NON-MEMBER STATES SHOULD BE INVITED—QUESTION WHETHER CONTRIBUTIONS FROM NON-GOVERNMENTAL SOURCES SHOULD BE ACCEPTED—INTERPRETATION OF PARAGRAPH 7 OF GENERAL ASSEMBLY RESOLUTION 2063 (XX) OF 16 DECEMBER 1965

Memorandum to the Director of the Department of Trusteeship and Non-Self-Governing Territories

1. This is in reply to your memorandum of 14 January 1966, in which you request our opinion on two questions relating to General Assembly resolution 2063 (XX).

2. The text of paragraph 7 of the resolution offers little direct guidance for determining what Governments it would be appropriate for the Secretary-General to approach with a view to soliciting contributions to the Fund for the Economic Development of Basutoland, Bechuanaland and Swaziland. However, the General Assembly resolution is an endorsement of the recommendation 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 on a proposal of the Secretary-General contained in paragraph 19 of his report on Basutoland, Bechuanaland and Swaziland (A/5958). In his proposal the Secretary-General stated that "such a fund would be made up of voluntary contributions by Member States...". No reference here is made to any other States. However, having regard in particular to the purpose of the Fund, which is the economic development of the three Territories, and the specific reference to the co-operation of the Special Fund, the Technical Assistance Board and the specialized agencies—all of whose activities involve the participation of certain non-Member States—as well as the experience of similar United Nations activities in the past, it would not appear to us to be inconsistent with the resolution if the Secretary-General were to add to the category of potential donors member States of the specialized agencies who are not Member States of the United Nations.

3. There is nothing in the report of the Secretary-General (A/5958), the debates of the Special Committee (A/AC.109/SR.369, 372, 383-387), the debates of the Fourth Committee (A/C.4/SR.1539, 1543, 1545, 1546, 1549, 1551 and 1552), nor in General Assembly resolution 2063 (XX) which would indicate that contributions from non-governmental sources were contemplated with respect to the Fund for Economic Development. However, on the basis of regulation 7.2 of the Financial Regulations and relevant financial rules, it is possible for the Secretary-General to accept voluntary contributions from suitable non-governmental sources, if the purposes for which such contributions are made are consistent with the policies, aims and activities of the Organization. Contributions from non-governmental sources intended for the Fund for Economic Development established by resolution 2063 (XX) could therefore be accepted consistently with the above-mentioned regulation.

10 February 1966

15. Draft International Covenant on Economic, Social and Cultural Rights—Legal implications of a proposal to extend participation in the Covenant to all States

Statement made by the Legal Counsel at the 1409th meeting of the Third Committee of the General Assembly on 1 November 1966

1. The Legal Counsel, replying to [a] question asked by the Hungarian representative at the previous meeting as to whether any multilateral treaties deposited with the Secretary-General provided for the participation of "all States" or "any State" and, if so, whether the Secretary-General had encountered any difficulties in that regard, said that none of the multilateral treaties concluded under the auspices of the United Nations contained such a provision. A number of League of Nations treaties contained the provision that they would remain open for accession by members of the League of Nations and any non-member States and the Secretary-General had received a number of ratifications and accessions to those treaties since their transfer to the custody of the United Nations. However, all the instruments of ratification or accession had emanated from States Members of the United Nations, and, therefore, no question had arisen in regard to their deposit.

2. The problem of the "all States" formula had been considered by the General Assembly in connexion with the question of extended participation in League of Nations

treaties. The Secretary-General, in his statement at the 1258th plenary meeting,[4] had declared that when he addressed an invitation or when an instrument of accession was deposited with him, he had certain duties to perform: he must ascertain that the invitation was addressed to, or the instrument emanated from, an authority entitled to become a party to the treaty in question and, furthermore, where an instrument of accession was concerned, the instrument must, *inter alia*, be brought to the attention of all other States concerned and the deposit of the instrument must be recorded in the various treaty publications of the Secretariat, provided it emanated from a proper authority. If he were to invite or to receive an instrument of accession from an area in the world the status of which was not clear, he would be in a position of considerable difficulty unless the Assembly gave him explicit directives on the areas coming within the "any State" formula. Accordingly, if the Secretary-General received an instrument from one of the areas the status of which was unclear, he would refer it to the General Assembly for advice on the action which he should take.[5]

16. DRAFT INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS—QUESTION WHETHER, IN THE ABSENCE OF A TERRITORIAL APPLICATION CLAUSE, A STATE PARTY WOULD BE AUTOMATICALLY BOUND TO APPLY THE COVENANT'S PROVISIONS TO ALL ITS TERRITORIES

Statement made by the Legal Counsel at the 1411th meeting of the Third Committee of the General Assembly on 2 November 1966

1. The Legal Counsel wished to answer the Mauritanian representative's question whether, in the absence of a territorial application clause such as was contained in article 28, a State, on becoming a party to the Covenant, would be automatically bound to apply the provisions of the Covenant to all its territories.

2. He referred, in answering that question to the practice followed in that respect by the Third Committee and by the Secretary-General as depositary of multilateral agreements concluded under United Nations auspices. During the discussions in the Committee at

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[4] *Official Records of the General Assembly, Eighteenth Session, Plenary Meetings, vol. II*, 1258th meeting, paras. 99-101.

[5] The following statement relating to a similar matter was made by the Legal Counsel at the 918th meeting of the Sixth Committee of the General Assembly on 25 October 1966:

1. The Legal Counsel, replying to [a] question by the New Zealand representative, said that the amendment contained in document A/C.6/L.598 [by which the General Assembly would invite all States to send delegations to participate in the work of an international conference of plenipotentiaries on the law of treaties] would confer on the Secretary-General, as the authority issuing invitations to the conference, a function that he had repeatedly declined to assume, as he considered it to be outside his sphere of competence.

2. Some delegations had expressed confidence that the Office of Legal Affairs would be able to advise the Secretary-General in the interpretation of the all-States formula so as to enable a satisfactory solution to be reached. But even though it was theoretically true that there were various legal tests for determining whether or not an entity was a State, it was practically true that in the United Nations the question was primarily a political one that should properly be decided by the competent organs and not by the chief administrative officer of the Organization. He had therefore been instructed to inform the Committee that the Secretary-General still adhered to the position he had expressed at the 1258th plenary meeting of the General Assembly on 18 November 1963, which had been cited by several representatives in the course of the debate. In other words, the Secretary-General considered that it was outside his proper sphere of competence to decide the highly political and controversial question of whether certain entities, not Members of the United Nations or members of the specialized agencies or parties to the Statute of the International Court of Justice, came within the all-States formula. If that formula were adopted, the Secretary-General would immediately ask the Sixth Committee and the General Assembly for a list of those States covered by the formula other than Members of the United Nations, members of the specialized agencies and parties to the Statute of the Court.

the second session of the General Assembly on the transfer to the United Nations of the functions and powers exercised by the League of Nations under the 1921 Convention for the Suppression of the Traffic in Women and Children, the 1933 Convention for the Suppression of the Traffic in Women of Full Age and the 1923 Convention for the Suppression of the Circulation of and Traffic in Obscene Publications, each of which contained a territorial application clause, it had been proposed that the relevant clauses should be deleted. Those clauses permitted the acceding States to exclude from the application of the Conventions any or all of their territories, whereas article 28 of the draft Covenant provided for its application to all territories. Those who had favoured deletion of the clauses he had mentioned had pointed out that the Conventions in question were of humanitarian character and should therefore be applied as widely as possible, while States having responsibility for the external affairs of non-metropolitan territories had argued, *inter alia*, that some of those territories enjoyed local autonomy and self-government, and that their consent had to be secured in advance. The Third Committee (63rd meeting) had recommended the deletion of the territorial clause from the Conventions in question and its recommendation had been adopted by the General Assembly on 20 October 1947 (resolution 126 (II)).

3. Turning to the practice followed by the Secretary-General, he recalled that, in the case of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946 (resolution 22 (I)), and the Convention on the Privileges and Immunities of the Specialized Agencies, adopted by the General Assembly on 21 November 1947 (resolution 179 (II)), the Secretary-General had, as a matter of principle, taken the position that, in view of their nature, those Conventions should be regarded as applying to the territories for whose international relations the acceding States were responsible; that, indeed, appeared to be in accordance with the practice followed by the States Parties to those conventions.

4. It appeared therefore that, in principle, the absence of a territorial application clause from a treaty laid upon States which became parties to it an obligation to apply it to their non-metropolitan territories. However, the nature of the treaty and the intention of the negotiating States had to be taken into account.

5. The practice of the Secretariat had recently been confirmed by the International Law Commission, which had given final approval in 1966 to draft articles on the law of treaties. Article 25 of that draft provided the following:

> "Unless a different intention appears from the treaty or is otherwise established, the application of a treaty extends to the entire territory of each party."[6]

The Commission's commentary on that article stated in paragraph (2):

> "State practice, the jurisprudence of international tribunals and the writings of jurists appear to support the view that a treaty is to be presumed to apply to all the territory of each party unless it otherwise appears from the treaty. Accordingly, it is this rule which is formulated in the present article."[7]

6. The answer to the Mauritanian representative's question therefore was that, in the absence of a territorial clause, a State on becoming a party to the Covenant would be bound in principle to apply the provisions of the Covenant to all its territories.

[6] See *Official Records of the General Assembly, Twenty-first Session, Supplement No. 9*, p. 44.
[7] *Ibid.*, p. 45.

17. DRAFT PROTOCOL TO THE CONVENTION OF 28 JULY 1951 RELATING TO THE STATUS OF REFUGEES[8]—QUESTION OF THE ADOPTION BY THE GENERAL ASSEMBLY OF AN INSTRUMENT AMENDING OR EXTENDING AN INTERNATIONAL INSTRUMENT CONCLUDED PREVIOUSLY AT A CONFERENCE OF STATES

Memorandum to the Director of the Legal Division. Office of the United Nations High Commissioner for Refugees

1. We refer to recent discussions here at Headquarters during which you asked us to inform you of instances in which the General Assembly has adopted or approved a protocol or other instrument amending, revising or extending an international instrument which had previously been concluded at an international conference of States, without convening a new international conference for this purpose.

2. We would like to place the following information at your disposal. You will recall that the General Assembly has taken action in order to extend, revise or amend certain international instruments concluded under the auspices of the League of Nations.

3. By resolution 54 (I) of 19 November 1946 the General Assembly approved the Protocol[9] amending the Agreements, Conventions and Protocols on Narcotic Drugs concluded at the Hague on 23 January 1912, at Geneva on 11 February 1925 and 19 February 1925, and 13 July 1931, at Bangkok on 27 November 1931 and at Geneva on 26 June 1936.

4. The Protocol in question, dated 11 December 1946, amended the enumerated instruments, all of which had been previously concluded at international conferences. It is of interest to note that the first of these instruments had been concluded at an international conference convoked by the Government of the Netherlands.

5. The relevant paragraphs of General Assembly resolution 54 (I) are as follows:

"*The General Assembly*,

Desirous of continuing and developing the international control of narcotic drugs,

Approves the Protocol which accompanies this resolution;

Urges that it shall be signed without delay by all the States who are Parties to the Agreements, Conventions and Protocols mentioned in the Annex;

Recommends that, pending the entry into force of the aforesaid Protocol, effect be given to its provisions by the Parties to any of these Agreements, Conventions and Protocols;

Instructs the Secretary-General to perform the functions conferred upon him by the Protocol, signed on 11 December 1946, amending the international Agreements, Conventions and Protocols relating to narcotic drugs which were concluded in the years 1912, 1925, 1931 and 1936;

..."

6. The General Assembly has also taken similar action with respect to other international instruments. We should mention in this connexion General Assembly resolution 126 (II) of 20 October 1947 approving the Protocols[10] to amend the Convention for the Suppression of the Traffic in Women and Children concluded at Geneva on 30 September 1921, the Convention for the Suppression of the Traffic in Women of Full Age concluded at Geneva on 11 October 1933, and the International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications concluded at Geneva on 12 September 1923. The relevant paragraphs of General Assembly resolution 126 (II) are as follows:

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[8] United Nations, *Treaty Series*, vol. 189, p. 137.

[9] *Ibid.*, vol. 12, p. 179.

[10] *Ibid.*, vol. 53, p. 13 and vol. 46, p. 169.

"*The General Assembly*,

Desirous of continuing international co-operation in order to suppress the traffic in women and children and in obscene publications,

Approves the Protocols which accompany this resolution;

Urges that they shall be signed without delay by all the States which are Parties to the above-mentioned Conventions;

Recommends that, pending the entry into force of the aforesaid Protocols, effect be given to their provisions by the Parties to any of the Conventions;

Instructs the Secretary-General to perform the functions conferred upon him by the aforesaid Protocols upon their entry into force;

..."

7. The international instruments in question had been concluded at international conferences convened in Geneva under the auspices of the League of Nations.

8. Reference should also be made to General Assembly resolution 256 (III) of 3 December 1948 by which the Assembly approved the Protocol[11] amending the International Agreement of 18 May 1904 and the International Convention of 4 May 1910 for the Suppression of the White Slave Traffic, and the Protocol[12] amending the Agreement of 4 May 1910 for the Suppression of the Circulation of Obscene Publications. Each of the enumerated instruments had been concluded at international conferences convoked by the French Government.

9. We trust that the foregoing examples will be of interest to you. It is of course true that the examples cited do not completely meet the point you raised. The Protocols in question approved by the relevant resolutions of the General Assembly contained amendments, extensions or revisions of previous international instruments which had been concluded at conferences convened under the auspices of the League of Nations or, in certain cases, by individual States. The General Assembly has not taken action to approve or adopt protocols amending, revising or extending international instruments which had been previously concluded at international conferences convened under the auspices of the United Nations. Nonetheless it is believed that the precedents cited above may be of assistance in supporting the action to be proposed to the General Assembly in respect of the Draft Protocol to the Convention of 28 July 1951 relating to the Status of Refugees.

10. You may also wish to take note of the procedure followed with respect to the Protocol[13] extending the period of validity of the Convention on Declaration of Death of Missing Persons. In that instance the basic instrument, which had been concluded at an international conference, was extended without referral of the matter to a new international conference and indeed without action by the General Assembly. The proposed Protocol was circulated at the request of one Party to the other Parties to the Convention and, subsequently, to other States entitled to become Parties to it. The Protocol provided that it would enter into force upon the deposit of the second instrument of accession with the Secretary-General. Accordingly, it entered into force on 22 January 1957.[14]

16 November 1966

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[11] *Ibid.*, vol. 30, p. 23.

[12] *Ibid.*, vol. 30, p. 3.

[13] *Ibid.*, vol. 258, p. 392.

[14] By resolution 2198 (XXI) of 16 December 1966, the General Assembly took note of a Protocol extending the scope of the Convention and requested the Secretary-General to transmit it to the States mentioned in Article V thereof, with a view to enabling them to accede to the Protocol.

18. PROCEDURE FOR AMENDING THE SCHEDULES ANNEXED TO THE SINGLE CONVENTION ON NARCOTIC DRUGS, 1961 [15]—INTERPRETATION OF ARTICLES 3 AND 47 OF THE CONVENTION

Letter to the Director of the Division of Narcotic Drugs, United Nations Office at Geneva

1. You will have received already our cable of 29 November in reply to your letter of 21 October 1966, asking for advice on the implementation of the Single Convention on Narcotic Drugs, 1961 in connexion with recommendations by the World Health Organization to amend the Schedules annexed to the Convention. Here follows a more detailed reply to your letter.

2. Our answer to your first question is that the outstanding recommendations by the WHO for amending Schedules I and III of the Single Convention, as contained in document E/CN.7/463/Add.2 and Corr. 1 [English only] and 2 [Spanish only] and in a recent communication from the WHO cited in your letter, should be treated in accordance with the amendment procedure set forth in article 3 and that article 47 is not applicable to these proposed amendments.

3. We base this conclusion on the following reasons.

There are two articles in the Single Convention dealing with the question of amendments to the Convention and the Schedules annexed to it: (*a*) Article 47 which provides the procedure for amending the Convention, and (*b*) Article 3 which sets forth the procedure for amending the Schedules annexed to the Convention.

According to article 47, the procedure set forth in this article applies to "an amendment to this Convention". Does it mean that the term "Convention" embraces the Schedules or excludes them for the purpose of this article?

It appears that the term "Convention" in the context of article 47 should be understood as meaning only the Convention as such and thus excluding the Schedules annexed to it.

This is evident if we consider article 47 in the light of the provision of article 11 (*u*) defining the Schedules as "the correspondingly numbered lists of drugs or preparations annexed to this Convention, as amended from time to time in accordance with article 3", and if we take into consideration that this provision of article 1 was included in the Single Convention in the course of the Plenipotentiary Conference in 1961 in place of paragraph 5 of article 2 of the third draft of the Single Convention (E/CN.7/AC.3/9) [16] which stipulated that the Schedules formed an integral part of the Convention.

It is also relevant to recall that an amendment proposed by Canada and the United Kingdom (E/CONF.34/L.29), [17] which forms the basis of the present article 47, in paragraph 4 clearly stipulated that "the provisions of this article shall not apply to the amendment of the Schedules in accordance with article 3...". This paragraph did not raise any objections when the amendment was discussed at the Conference. [18] Although this paragraph was withdrawn by the sponsors of the amendment, this was done on the understanding that the amendment of the Schedules was one of the functions of the Commission on Narcotic Drugs for which provision would be made elsewhere in the Convention.

To recapitulate, the scope of application of article 47 of the Single Convention is limited to the provisions of the Convention as such, excluding the Schedules annexed thereto, and

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

[16] *United Nations Conference for the Adoption of a Single Convention on Narcotic Drugs, Official Records*, vol. II, p. 3.

[17] *Ibid.*, p. 50.

[18] *Ibid.*, vol. I, pp. 175-177.

the procedures provided for in this article cannot be considered as an alternative to those specifically set forth in article 3 for the purpose of amending the Schedules.

The procedures for amending the Schedules are contained in article 3 of the Single Convention and this article is the sole source in the Convention of such procedures.

This follows from the language of articles 11 (*u*), 3 and 8 (*a*) of the Convention. It also seems to have been the general understanding at the Plenipotentiary Conference, as expressed by delegates during the consideration of the amendment procedures for the Convention and the Schedules, and the functions of the Commission on Narcotic Drugs etc., that the procedure for amendment of the Schedules should differ from that of article 47 and should be formulated in a separate article.

In considering the question of the applicability of articles 3 and 47 it is necessary to have in mind that as distinguished from article 47 which provides that only Parties to the Convention are entitled to submit amendments under this article, article 3 stipulates that amendments to the Schedules may be submitted both by a Party and by the WHO. Therefore, for this reason alone, the amendments proposed by the WHO cannot be dealt with under article 47 but only in accordance with article 3.

4. In raising the question concerning the applicability of article 3 or 47 to the amendments of the WHO you mention that at the Commission's twentieth session reference was made to the discussions at the Plenipotentiary Conference when some of the proposals now being made by the WHO had been voted down. Indeed, the proposal of the WHO to delete the words "when such material is made available in trade" from Schedule I corresponds to a similar proposal which was debated and finally rejected at the Conference.[19]

There may arise in this connexion a question whether this proposal of the WHO falls within the scope of article 3 and in particular, whether the Commission is authorized under article 3 to take a decision on this proposal.

In our opinion the fact that a proposed amendment to a Schedule was rejected at the Conference at the time when the lists of drugs and substances to be included in the Schedules were debated has no legal bearing on the requirements of article 3.

The Convention does not differentiate between the provisions of the Schedules approved at the Conference and those introduced into the Schedules later. It also does not differentiate between those provisions of the Schedules which were included unanimously or were included as a result of the rejection of an opposing proposal.

Article 3 does not provide any objective criteria to indicate what kind of amendments to the Schedules are contemplated or permissible but the general tenor of the article is that the World Health Organization has a duty to initiate the prescribed amendment procedures whenever it is satisfied on the information before it that an amendment should be considered by the Commission. Although it cannot be said that the WHO is the only body authorized to initiate action for amendment of the Schedules, it can be said that the Convention relies heavily on the WHO to determine when action for amendment should be commenced.

Therefore, for the purpose of amending the Schedules in accordance with article 3 all the provisions of the Schedules have the same legal standing. From the legal standpoint the proposal of the WHO concerning the deletion of the words "when such material is made available in trade" from Schedule I, as well as any other similar proposal contained in document E/CN.7/463/Add.2 and Corr. 1 [English only] and 2 [Spanish only], falls within the provisions of article 3, notwithstanding that it may repeat an analogous proposal rejected at the Plenipotentiary Conference in 1961. Further, and as article 3 does not stipulate otherwise, a decision of the Commission on Narcotic Drugs taken in accordance with the

[19] *Ibid.*, p. 193.

recommendations of the WHO to delete the above-mentioned words from Schedule I, would be legally tenable as being within the lawful powers of the Commission.

5. A further question which may arise in connexion with the recommendations of the WHO is under which particular provisions of article 3 the Commission would have to act on these recommendations.

Under article 3 the Commission may take the following actions in accordance with the recommendations of the WHO: to add a substance not already in Schedules I or II to those Schedules (paragraph 3 (iii)); to add a preparation to Schedule III (paragraph 4); to place a drug already in Schedule I in Schedule IV (paragraph 5); to transfer a drug from Schedule I to Schedule II or from Schedule II to Schedule I (paragraph 6 (*a*)); and to delete a drug or a preparation from a Schedule (paragraph 6 (*b*)). Therefore the Commission may, by virtue of the provisions of article 3, make three types of changes in the Schedules: to add a narcotic drug to a Schedule, to delete a narcotic drug from a Schedule and to transfer a narcotic drug from one Schedule to another.

In the case of the first of the WHO recommendations to add a new paragraph after the entry "Trimeperidine" in Schedule I, it is clear that since the Commission's decision to add this new paragraph in Schedule I would amount to the addition of a new drug to the Schedule, the Commission is empowered to act under the provision of paragraph 3 (iii) of article 3.

The difficulty, however, arises with regard to the other outstanding recommendations of the WHO designed to delete only certain words and expressions in the entry "Concentrate of Poppy Straw" in Schedule I and in sections 1, 2 and 3 of Schedule III, which do not seem to fall within the specified types of amendments which the Commission is expressly authorized to make in accordance with article 3 of the Convention.

In spite of this possible discrepancy between the scope of amendments to be submitted under paragraph 1 of article 3 and the scope of amendments on which the Commission may take decisions under paragraphs 3-6 of article 3, in our opinion it appears to be appropriate, in order to avoid a hiatus in the machinery of narcotics control, to reach the conclusion that the Commission is authorized by necessary implication to take those decisions on the amendments to the Schedules which do not constitute an action expressly provided for in paragraphs 3-6 of article 3, and that such decisions should be considered as taken in accordance with article 3 which in turn would permit the invocation of the provisions of paragraphs 7-9 of article 3.

6. The following considerations might be submitted in favour of such interpretation of the Single Convention.

Article 3 of the Single Convention provides for the procedures under which the Commission is authorized to make rather far-reaching changes in the scope of narcotics control either by adding to or deleting from a Schedule, or by transferring from one Schedule to another and thus radically changing the scope of the applicable measures of control. In comparison with these wide powers, amendments limited to changes within a Schedule, as in the case with the amendments recommended by the WHO, would be as a rule less significant from the viewpoint of changes in the scope of narcotics control, and therefore it would be illogical if the Commission would not have a right to make such amendments to the Schedules.

Although comparatively not very significant, the amendments recommended by the WHO are, nevertheless, not merely of a technical nature. According to the explanation of the WHO cited in your letter, the proposed amendment of Schedule I would enable extension of control to all stages of the concentrate of poppy straw, while the proposed amendments of Schedule III would clarify and emphasize the essential criteria for exemption of preparations under this Schedule. Thus these amendments are designed to introduce changes in Schedules I and III, as a result of which the amended entries would differ from the original ones in substance and in a way may be viewed as new provisions of the Schedules.

For these reasons the amendments in question, which are submitted in the form of deletions of certain expressions from Schedules I and III, might have been submitted by resorting to the following alternate procedure to achieve the same purpose: first, to delete completely from the Schedules the entries to be amended, and second, to add to the Schedules new entries which would differ from the deleted ones to the extent corresponding to the deletions proposed by the WHO. In this case no question would arise with regard to the powers of the Commission to take decisions on the recommendations of the WHO under review, since the Commission's decisions would be based on the provisions of paragraphs 6 and 3 (iii) of article 3.

Finally, it seems to be useful to recall that the text of article 3 of the third draft of the Single Convention[20] did not contain an enumeration of the actions which the Commission on Narcotic Drugs might take in order to amend the Schedules. All that article provided for was that the Commission might amend any of the Schedules and place a substance in Schedule IV. And although in the course of the Plenipotentiary Conference this draft article was considerably enlarged to contain, in particular, the enumeration of certain actions which the Commission may take to amend the Schedules, there is nothing in the proceedings of the Conference to indicate that this was done intentionally in order to prevent the Commission from taking the actions not directly specified in paragraphs 3-6 of article 3 of the Single Convention, e.g. to prohibit indirectly the Commission from introducing in the Schedules the amendments such as those contained in the recommendations of the WHO in question.

7. With regard to your second question we would suggest the following observations.

According to article 3, paragraph 5 of the Single Convention, the Commission on Narcotic Drugs may place a drug contained in Schedule I in Schedule IV if the WHO finds that such a drug is particularly liable to abuse and to produce ill-effects and that such liability is not offset by substantial therapeutic advantages not possessed by substances other than drugs in Schedule IV. Such decision of the Commission becomes effective with respect to each Party on the date of its receipt of a corresponding notification, and the Parties thereupon take such action as may be required by the Convention (article 3, paragraph 7).

However, according to article 2, paragraph 5, the drug placed in Schedule IV under article 3, paragraph 5, may be subject to measures of control other than those applicable to the drugs in Schedule I only at the discretion of a Party itself. Support for this view can be found in the opinion of the Working Group on the Revised Draft Administrative Guide which was submitted to the Commission on Narcotic Drugs at its twentieth session (E/CN.7/L.281). Paragraph 14 of the Report of this Group states that "the purpose of Schedule IV is to show separately the substances that are particularly dangerous and consequently can be made the object of stricter national control at the discretion of governments". Thus, for instance, notwithstanding the decision of the Commission to place a drug in Schedule IV, it remains with the Party concerned to prohibit the use of such a drug except for amounts which may be necessary for medical and scientific research only.

As for the functions of the WHO in connection with the inclusion of a drug in Schedule IV, they are limited only to supplying the Commission with a finding set forth in article 3, paragraph 5 and a recommendation to place the drug in Schedule IV. The Convention does not empower the WHO to make other recommendations concerning the drugs in Schedule IV, nor does it permit the WHO to impose or include conditions in its recommendation to place a drug in Schedule IV. This can only be interpreted as meaning that findings or recommendations of the WHO other than those set forth in article 3, paragraph 5 should be considered as falling outside the scope of the Single Convention and, however competent and well-founded they may be, of no legal consequence for the Parties to the Convention.

30 November 1966

[20] *United Nations Conference for the Adoption of a Single Convention on Narcotic Drugs, Official Records*, vol. II, p. 3.

19. Procedural and organizational problems involved in a possible diplomatic conference on the law of treaties[21]

Memorandum by the Secretary-General

Introduction

1. In the course of the consideration by the Sixth Committee at the twentieth session of the General Assembly of agenda item 87, relating to the reports of the International Law Commission on the work of its sixteenth session and the first part of its seventeenth session, the representative of Israel,[22] with the support of the representatives of Austria, Canada and Sweden,[23] requested that the Secretariat should prepare, for submission to the next session of the General Assembly, a paper discussing the problems of procedure and organization likely to arise in a possible codification conference on the law of treaties. The Secretariat agreed to the preparation of such a paper,[24] which would be informally discussed with the International Law Commission. The first draft of the present memorandum, prepared in accordance with the request of the Sixth Committee, has been the subject of informal consultations with the International Law Commission during its eighteenth session in the summer of 1966, after which the memorandum was revised and completed for submission to the General Assembly.

2. The International Law Commission has recommended "that the General Assembly should convene an international conference of plenipotentiaries to study the Commission's draft articles on the law of treaties and to conclude a convention on the subject" (see A/6309, para. 36). This memorandum explores the implications of that recommendation, but it is not intended to prejudice the decision of the General Assembly on that question.

3. The practice of past codification conferences will first be examined as a background for the discussion of a possible future conference on the law of treaties. The memorandum will also examine the nature of the Commission's draft articles on the law of treaties, with a view to identifying any special characteristics and problems of the draft which may create special requirements in regard to the organization and procedures of the conference.

I. Previous codification conferences

4. The first codification conference which may be mentioned in the present connexion is the Conference for the Codification of International Law, held at The Hague in 1930 under the auspices of the League of Nations. In the period of the United Nations, five conferences have been convened to deal with areas of the law which have been studied by the International Law Commission. The first was the United Nations Conference on the Law of the Sea, which met in Geneva from 24 February to 27 April 1958. It adopted four conventions, one optional protocol, nine resolutions, and a Final Act. The second conference was the United Nations Conference on the Elimination or Reduction of Future Statelessness, of which the first part was held in Geneva from 24 March to 18 April 1959, and the second part in New York from 15 to 28 August 1961. This conference adopted the Convention on the Reduction of Statelessness, four resolutions and a Final Act. The third conference was the Second United Nations Conference on the Law of the Sea, which met in Geneva from 17 March to 26 April 1960. This conference, which was called for the purposes of considering further the questions of the breadth of the territorial sea and

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[21] Document A/C.6/371.

[22] See *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 840th meeting, paras. 4 and 5; 850th meeting, para. 42.

[23] *Ibid.*, 851st meeting, para. 26; 845th meeting, para. 15; and 844th meeting, para. 13.

[24] *Ibid.*, 850th meeting, para. 43.

fishery limits, which had not been resolved at the first Conference on the Law of the Sea, was not successful in dealing with those questions, and adopted only two resolutions and a Final Act. The fourth conference was the United Nations Conference on Diplomatic Intercourse and Immunities, held in Vienna from 2 March to 14 April 1961. This conference adopted the Vienna Convention on Diplomatic Relations, two optional protocols, four resolutions and a Final Act. The most recent conference was the United Nations Conference on Consular Relations, held in Vienna from 4 March to 22 April 1963. This conference adopted the Vienna Convention on Consular Relations, two optional protocols, three resolutions and a Final Act.

5. The conferences whose experience seems likely to be the most useful in planning for a Conference on the Law of Treaties are the first Conference on the Law of the Sea and two Vienna Conferences on Diplomatic and Consular Relations. The Conference on the Elimination or Reduction of Future Statelessness was relatively small, since only thirty-five States attended the first part and thirty States attended the second part, and consequently the problems of procedure were quite different from those of the others, which were each attended by approximately ninety States. The second Conference on the Law of the Sea did not have the problem of dealing with an extensive draft prepared by the International Law Commission, but only examined certain questions which had not been settled by the first conference.

II. Nature of the draft articles on the law of treaties

6. The draft articles on the law of treaties as finally adopted by the International Law Commission at its eighteenth session consist of seventy-five articles, and thus are comparable in length with the longest drafts submitted to previous codification conferences (those considered by the First Conference on the Law of the Sea and by the Conference on Consular Relations, each of which had seventy-one articles). The draft on the law of treaties is more complex than any draft which the Commission has yet prepared. The parts of the draft are intimately interrelated, and consistency of terminology and a close relationship between the articles in the different parts of the draft must be maintained. At previous conferences, the connexion between the various parts was not so close, and it was not difficult to consider separately, for example, the various branches of the law of the sea, or to separate the provisions on consular privileges and immunities from the other parts of the draft on consular relations. In the draft on the law of treaties such a division may be more difficult.

7. Some indication of the relative complexity of the various topics dealt with in the drafts submitted to codification conferences may perhaps be gathered from the number of meetings devoted by the International Law Commission to each. On this basis, it would appear that the law of treaties is by far the most difficult topic with which the Commission has yet dealt. By the end of its eighteenth session in summer 1966, the Commission, between 1961 and 1966, had devoted 229 meetings, in whole or in part, to the law of treaties. To this figure may be added the 60 meetings which the Commission, with different Special Rapporteurs, devoted to the topic between 1950 and 1960, making a total of 289 meetings. The next most difficult subject, the law of the sea, took 175 meetings (in whole or in part) between 1950 and 1956; consular relations took 110 between 1956 and 1961; diplomatic relations 64 in 1957 and 1958; and statelessness 51 between 1952 and 1954. There are, however, two circumstances which make these figures somewhat unreliable as a guide to the probable length of conferences on the various topics. The first is that by resolution 1103 (XI) of 18 December 1956 the General Assembly increased the number of members of the Commission from fifteen to twenty-one, and by resolution 1647 (XVI) of 16 November 1961 from twenty-one to twenty-five; and the length of discussions tends to vary with the number of members participating. The second is that it may be argued that, if the Commission, with the participation of members from a broad spectrum of different legal systems, has

been able to work out compromise texts on many controversial issues, those issues should be considerably simpler to deal with in a codification conference.

III. Preparation for the conference

8. Before all previous codification conferences except the Second Conference on the Law of the Sea, the General Assembly has requested the comments of Governments on the final draft prepared by the International Law Commission. The General Assembly may find especially strong reasons for doing so again in regard to the Commission's final text on the law of treaties, since there are considerable differences in drafting and arrangement between the first draft circulated for comments of Governments and the final text adopted by the Commission, which became available to Governments only shortly before the discussions at the twenty-first session of the Assembly; moreover, the draft deals with some of the most complex questions of modern international law. In addition to the comments of Governments, the General Assembly may wish to invite comments on the draft on the law of treaties from the Secretary-General and from the Directors-General of those specialized agencies which serve as depositaries of multilateral conventions, since they have special experience of the problems arising in connexion with depositary procedure. The period allowed for the preparation of the comments of Governments has been about one year, and in some cases has been greater.

9. For example, the first Conference on the Law of the Sea, dealing with a draft submitted by the Commission in 1956, was convened by General Assembly resolution 1105 (XI) of 21 February 1957, and began on 24 February 1958. The Second Conference on the Law of the Sea was convened by General Assembly resolution 1307 (XIII) of 10 December 1958, and began on 17 March 1960. The draft on diplomatic intercourse and immunities was first considered by the General Assembly in 1958, when the Assembly adopted resolution 1288 (XIII) of 5 December 1958, reserving the question of the body which should be entrusted with the formulation of a convention on the topic; at the following session the Assembly adopted resolution 1450 (XIV) of 7 December 1959, pursuant to which the Conference began on 2 March 1961. Thus in the case of diplomatic relations something over two years elapsed, and two sessions of the Assembly discussed the topic, between the first receipt of the Commission's report and the holding of the Conference. This delay was in part due to the decision to hold the Second Conference on the Law of the Sea in 1960. On consular relations, the Commission's report was received in 1961. The General Assembly by resolution 1685 (XVI) of 18 December 1961 decided to convene the Conference in March 1963, but the general discussion of the draft articles took place only at the seventeenth session of the Assembly in 1962. At that session the Assembly adopted resolution 1813 (XVII) of 18 December 1962, whereby it, *inter alia*, invited States to submit amendments in advance of the opening of the Conference. Thus the interval between submission of the draft to the Assembly and the beginning of the Conference was one year and a few months, though the draft was before two successive sessions of the General Assembly.

10. The Secretariat has always prepared the draft agenda of a conference, the draft rules of procedure, a memorandum on the methods of work and procedures of the conference, and nearly always a guide to the draft articles to be considered and a bibliography. These documents, together with the comments received from Governments, have been published in time for consideration before the opening of the conference. It is assumed that the same kinds of background documents would be prepared for a conference on the law of treaties.

11. In connexion with the first of the United Nations codification conferences, that on the Law of the Sea, the Secretary-General was requested by General Assembly resolution 1105 (XI)

> "... to invite appropriate experts to advise and assist the Secretariat in preparing the conference, with the following terms of reference:

"(*a*) To obtain, in the manner which they think most appropriate, from the Governments invited to the conference any further provisional comments the Governments may wish to make on the Commission's report and related matters, and to present to the conference in systematic form any comments made by the Governments, as well as the relevant statements made in the Sixth Committee at the eleventh and previous sessions of the General Assembly;

"(*b*) To present to the conference recommendations concerning its method of work and procedures, and other questions of an administrative nature;

"(*c*) To prepare, or arrange for the preparation of, working documents of a legal, technical, scientific or economic nature in order to facilitate the work of the conference;".

In all other cases, however, there has been no formal appointment of experts and the Secretariat, at the request of the General Assembly in the various relevant resolutions, has made the preparations for the conference with the assistance only of informal consultations with interested delegations. While the assistance of experts was desirable in the case of the first Conference on the Law of the Sea because it was the first codification conference and because of the wide range of technical, scientific and economic matters which had to be considered, the experience accumulated in previous codification conferences and the more purely legal nature of the draft on the law of treaties seem to make the assistance of experts unnecessary in this case. The General Assembly can consider as fully as need be any problems of procedure or organization which appear important, and appropriate instructions can be given to the Secretary-General during the discussion of the relevant item at the present session of the General Assembly, possibly on the basis of a study by a working group of the Sixth Committee if such a group is found necessary.

12. It would be highly desirable if during the period of preparation for the conference on the law of treaties delegations could consult one another in order to explore the possibilities of agreement and compromise on various issues on which controversy would otherwise be likely to arise in the conference. It would not, however, seem useful to formalize these discussions in a preparatory committee, but would be preferable to leave them on an informal basis. The initiative for such discussions can appropriately be left in the hands of the Governments concerned. The resolution convening the conference could contain a paragraph like operative paragraph 11 of General Assembly resolution 1105 (XI), convening the first Conference on the Law of the Sea, which

"*Calls upon* the Governments invited to the conference and groups thereof to utilize the time remaining before the opening of the conference for exchanges of views on the controversial questions relative to the law of the sea;".

IV. The date of the conference

13. The drafts of the Commission with the full commentaries are generally not available until September of the year in which they are submitted; thus it is difficult for Governments to formulate their positions on the drafts in the General Assembly of the same year. In the cases of diplomatic and consular relations, the General Assembly had the Commission's drafts before it at two successive sessions. Moreover if, as suggested above, the General Assembly desires to leave a period for the preparation of written comments on the draft by Governments, it follows that the conference can take place no earlier than the spring of 1968, or later if it is desired to leave a longer interval for preparation. In the informal discussions in the International Law Commission, there was no suggestion of a date earlier than 1968; two members stated that it was desirable to hold the conference in that year in order to avoid loss of momentum. Two others suggested that 1969 would also be a possible date, and one member expressed a preference for 1969. All previous codification conferences have begun in February or March. In view of the pattern of other meetings, it would be difficult to begin a conference on the law of treaties at another time of year.

V. The question of the division of the draft articles among two or more main committees

14. The first Conference on the Law of the Sea had five main committees, four of which were referred various sections of the draft articles prepared by the International Law Commission. The Conference on Consular Relations had two main committees. Three of the conferences, however, conducted their business first in a Committee of the Whole, to which the entire draft or question before the conference was referred, and then in final plenary meetings. The question arises whether division of the articles among committees is desirable in the case of the draft on the law of treaties. A decision on this question is essential because the whole time schedule and consequently the financial implications of the conference depend upon it.

15. In the informal discussions in the International Law Commission the number of members favouring the division of the draft articles between two committees and the number opposing it were nearly equal. Those who doubted the advisability of such a division stressed the unity and interdependence of the parts of the draft. The arbitrary nature of any scheme of division, the difficulties of co-ordination of the work of two committees, the size of the delegations necessary for a conference with two committees, and the difficulty of transferring provisions from parts dealt with by one committee to parts dealt with by another. Other members, however, including the Special Rapporteur on the Law of Treaties, saw no technical or theoretical objections to a division; it was suggested that co-ordination could be effectively dealt with by a drafting committee with appropriate powers, or that the plenary conference could meet whenever necessary to resolve divergencies that might arise between the committees.

16. If it is desired to divide the draft articles, one distinction which might be considered is between, on the one hand, the articles which deal primarily with the birth of treaty obligations and with events during their life, and, on the other hand, those which deal primarily with the modification, invalidity and extinction of such obligations. As the second group of articles would be somewhat smaller than the first, some general provisions (Parts I [25] and VI, both of which deal with the general scope of the draft as a whole) could be added to the work of the committee dealing with the second group. This division might be the basis of organization of the conference into two main committees; in view of the nature of the draft articles, it does not seem possible to have more than two. Undoubtedly there is an arbitrary element in any scheme of division, but the following allocation of articles could serve as an initial basis of discussion:

First committee:

	Articles
Part II. (Conclusion and entry into force of treaties) articles 5-22	18
Part III. (Observance, application and interpretation of treaties) articles 23-34	12
Part VII. (Depositaries, notifications, corrections and registration) articles 71-75	5
TOTAL	35

Second committee:

	Articles
Part I. (Introduction) articles 1-4	4
Part IV. (Amendments and modification of treaties) articles 35-38	4
Part V. (Invalidity, termination and suspension of the operation of treaties) articles 39-68	30
Part VI. (Miscellaneous provisions) articles 69-70	2
TOTAL	40

[25] Article 2 entitled "Use of terms" in Part I would of course be of equal concern to the two committees, and would be reviewed by the Drafting Committee near the end of the conference.

17. It still remains to discuss which committee should deal with the preamble to the Convention on the Law of Treaties, with the final clauses of the convention, and with the Final Act of the conference. There is also a possibility that the conference, like other codification conferences, may decide to draft one or more optional protocols. The preparation of these texts could be assigned from the outset to whichever committee appeared to have the lighter workload, or alternatively, since none of these texts could in any event be drafted before the final stages of the conference, a decision on assignment could be delayed until the relative rates of progress of the two committees became clear.

VI. Estimated duration of the conference

18. From the standpoint of United Nations budget and conference planning, and equally from that of participating Governments, the duration of the conference must be estimated accurately in advance; it is not possible to leave the question of duration to be decided at the conference in the light of the progress made, though a conference which was unable to finish its work in the time allotted could of course decide to recommend a second session or a new conference at a later date. An estimate of duration is particularly difficult in the case of a conference on the law of treaties, because of the importance and difficulty of the problems which are to be discussed.

19. It is assumed that there will be no need for a general debate at the conference, since general views of the draft can be expressed in the Sixth Committee or in written comments, and since there do not seem to be any special circumstances which would make such a debate particularly useful. It has been the practice of all the codification conferences to dispense with a general debate, except for the first and second Conferences on the Law of the Sea, where the committees devoted between ten and twenty-three meetings to a general debate. It can therefore be expected that, at the conference on the law of treaties, the two committees or the Committee of the Whole can start at once to examine the articles one by one.

20. The draft to be considered contains seventy-five articles. The attempt must be made to estimate how long it will take to examine those articles. Statistics regarding previous codification conferences may be of help, but the special nature of the articles on the law of treaties must be borne in mind. For examination of articles at the committee stage, the best rate of progress was that made by the Committee of the Whole at the Conference on Diplomatic Intercourse and Immunities, which examined forty-five articles prepared by the Commission in a total of forty-one meetings, extending over twenty-one working days. The next most rapid progress was made by the First Committee at the Conference on Consular Relations, which received thirty-three articles drafted by the Commission, and examined them in a total of thirty-five meetings extending over twenty working days. Work in committees of other conferences has been slower. It results that the best rate of progress which can be hoped for at the committee stage is an average of one article per meeting. At previous conferences committees have in general met twice a day.

21. At this rate, the examination of a draft of seventy-five articles by a committee of the whole would require a minimum of thirty-seven and a half working days, or seven and a half weeks. In view of the complexity of the articles on the law of treaties and also in view of the need to prepare new texts not based on the draft articles (a preamble, final clauses, a final act and possibly protocols), more time must be allowed, and if it is found impossible to divide the articles between two committees, the duration of the committee stage alone of a conference on the law of treaties would probably be eight and a half or nine weeks. The entire first Conference on the Law of the Sea took place in about nine weeks, but all other codification conferences have been considerably shorter.

22. On the other hand, if it is decided to divide the draft articles between two committees, the length of the committee stage would be reduced, but the need for co-ordination of

the texts produced by the two committees would mean that the estimated time for a committee of the whole could not simply be cut in half. A duration of five weeks for the two committees seems probable.

23. The length of the plenary stage is more difficult to estimate, since there has been considerable variation in past codification conferences, and since the rate of progress evidently depends upon how satisfactorily problems are settled at the committee stage and by the drafting committee. The plenary stage of a conference having a committee of the whole would probably last four weeks. If it is decided to have two main committees, additional time will be required for the plenary, with the help of the drafting committee, to settle divergencies in substance and terminology between the committees, and five weeks would have to be allowed for the plenary stage.

24. Thus it appears that the total duration of the conference can be estimated as follows:

A. *Conference with a Committee of the Whole:*

	Weeks
Committee stage	9
Plenary stage	4
TOTAL	13

B. *Conference with two main committees:*

	Weeks
Committee stage	5
Plenary stage	5
TOTAL	10

VII. Suggested division of the conference into two parts, with an interval between them

25. It has been suggested by various persons of experience, including initially a member of the International Law Commission and later the representative of Austria,[26] that a conference on the law of treaties, after full debate and thorough consideration of the draft articles, should adjourn for several months in order to give Governments time to reconsider the results reached at the first phase of the conference. Only after such an interval, in their view, should the conference reconvene and in a second reading elaborate the final text.

26. This suggestion would allow more time for reflection by Governments, and would avoid a situation where mere pressure of time might tend to prevent arriving at the most satisfactory solution of technical and political problems. Great pressure of time has undoubtedly existed in some of the codification conferences, and while its effect on the resulting conventions would be difficult to assess and may in some respects have been beneficial by promoting agreement, similar pressure might better be avoided in dealing with a subject as complicated as the law of treaties. A division of the conference into two parts might also make it easier for Governments to send representatives of the high technical qualifications required by the subject. While it might be difficult for Governments or universities to spare their experts in treaty law for as long as ten or even thirteen weeks at a stretch, they might better be able to do so for two shorter periods. In the informal discussions in the International Law Commission, a considerable majority of the members who spoke accepted the idea of dividing the conference into two parts.

[26] See *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 851st meeting, para. 25.

27. On the other hand, division of the conference might perhaps create a risk that new representatives would be sent to the second part and that they, lacking experience of the first part, would tend to be ineffective and would needlessly prolong the plenary debate. There is also a risk of reopening with renewed zeal the issues fought out at the committee stage. In the informal discussions in the International Law Commission, two members opposed division of the conference on the grounds that it would involve needless duplication of work, that it might harden the divergent positions of Governments and might result in the replacement of open discussion by private negotiations, perhaps even by restricted or bilateral negotiations.

28. Nevertheless, on balance, it seems more advantageous to divide the conference into two parts. At the first part the plenary would hold only the few meetings necessary to elect officers, constitute the necessary committees and take the other decisions relevant to the general organization of the conference. Thereafter it would adjourn,[27] to enable the two committees or the committee of the whole to complete an examination of the entire draft and to adopt a text for consideration by the plenary at the second part of the conference. At the first part, the drafting committee would also review all articles adopted to ensure the conformity of the text as a whole. At the second part of the conference, the plenary would take up and finalize the text adopted at the first part. The General Assembly could instruct the Secretary-General, in issuing invitations to the conference, to stress the importance of having the same representatives at both parts, and to state that credentials, unless the issuing Government expressly stated otherwise, would be regarded as valid for both parts. As for the danger of repetition of debates, it would be hoped that Governments, in issuing their instructions for the second part of the conference, would not insist on raising again issues which had been squarely decided by considerable majorities at the first part; but even if there would be some repetition of debate, it is evident that general satisfaction with solutions is more important than brevity of discussion.

29. What dates should be set for the first and second parts of the conference, and what should be the interval between the parts? The dates of the session of the International Law Commission must also be borne in mind, as many of its members, and also its secretariat, may be expected to attend the conference. If the first part were to begin in February, then that part would occupy the months of February and all or part of March. Thereafter a gap of several months would be necessary, in order not to conflict with the annual session of the Commission, which normally meets from early May to mid-July. The second part could not therefore begin before late July at the earliest, and would extend into August which, because of normal scheduling of vacations, is not usually considered a convenient month for a large conference of plenipotentiaries. Postponing the second part until September would produce a conflict with the normal date of opening of the General Assembly.[28] The second part could, however, be held after the end of the Assembly in January, and thus there would be an interval of nearly a year between the two parts. Though this solution might produce a certain loss of momentum, it may be the most practical one.

VIII. Committees of the conference other than main committees

30. It may be assumed that the conference would have, in addition to a committee of the whole or two main committees, the other organs which have been usual at codification conferences. These would include:

[27] If two committees were decided upon, it might be necessary for the plenary to hold occasional meetings to decide upon points of divergence between the two committees.

[28] It may be recalled that the General Assembly opened late in 1952, 1956 and 1964, and that 1968 will be a year in the same quadrennial cycle. Delay in opening the Assembly in 1968 would considerably simplify the planning of the conference, but is now such an uncertain prospect that it must here be left out of account.

(*a*) A General Committee of possibly twenty-one members (as at the Conference on Consular Relations),[29] composed of the President of the Conference (who would preside over the Committee), the Chairman of the Committee of the Whole or the chairmen of the main committees, and as many Vice-Presidents of the conference as are necessary to make up the total of twenty-one members;

(*b*) A Drafting Committee. While for effectiveness of work it is desirable to keep the Drafting Committee as small and as highly qualified as possible, political and geographical considerations may require a membership of fifteen,[30] to allow the composition to follow the model of the Security Council. The functions of the Drafting Committee are discussed in paragraphs 42-43 below;

(*c*) A Credentials Committee of nine members, as at the General Assembly and all codification conferences except that on statelessness (where the President and Vice-Presidents examined credentials).

31. The Drafting Committee and Credentials Committee would each elect a single presiding officer, the Chairman, in accordance with the general practice of such committees.

IX. Draft rules of procedure of the conference

32. As has been stated above, the rules of procedure of the first and second Conferences on the Law of the Sea and the Diplomatic and Consular Conferences are substantially similar, while the rules of the Conference on Statelessness, being designed for a conference of relatively limited participation, were on a different model. The rules of the four conferences are mainly based on or inspired by the rules of procedure of the General Assembly. The following Assembly rules are the basis for rules of the four conferences: 25-29, 31-39, 41-42, 45-47, 51-56, 69-84, 88-98, 101-102 and 105.

33. The main differences from the General Assembly's rules are dictated by the different nature of the work of a conference. Some of the more important of the provisions which differ from those of the General Assembly will be examined hereafter.

34. *Basic Proposal.* The rules of the Diplomatic and Consular Conferences provide in rule 29 that "The draft articles adopted by the International Law Commission shall constitute the basic proposal for discussion by the Conference." It is desirable to maintain this rule, which makes explicit a basic assumption made by the General Assembly in convening codification conferences.

35. *Voting.* While the rules of procedure of the General Assembly provide for voting in accordance with the relevant provisions of the Charter, the rules of the two Conferences on the Law of the Sea and of the Diplomatic and Consular Conferences provided that in the plenary, decisions on matters of substance should be taken by a two-thirds majority of the representatives present and voting, and decisions on matters of procedure should be taken by a simple majority of such representatives; in committees and sub-committees, however, all decisions were taken by a majority of the representatives present and voting, except in the case of reconsideration. These rules were adopted as the most suitable after exhaustive consideration of the alternatives by the experts appointed to advise the Secretary-General on the preparation for the first Conference on the Law of the Sea.

36. It was suggested by the representative of Austria that this system of voting led to a vagueness in the resulting text as political compromises had to be made to secure a two-

[29] At the first and second Conferences on the Law of the Sea the General Committee was composed of nineteen members. At the Conference on Diplomatic Intercourse and Immunities it consisted of twenty-two members.

[30] The Drafting Committee at the first Conference on the Law of the Sea and the two Vienna Conferences were composed of nine and twelve members respectively.

thirds majority in plenary.[31] The voting methods of a conference on the law of treaties will no doubt merit the attention of the General Assembly when it comes to decide whether to convene such a conference. There are numerous and varied precedents in the rules of procedure of United Nations conferences.

37. The same voting rule as in the four codification conferences has been adopted by certain other United Nations conferences called upon to draft conventions, e.g., the United Nations Conference on International Commercial Arbitration, 1958, the United Nations Conference for the Adoption of a Single Convention on Narcotic Drugs, 1961, and the United Nations Conference on Transit Trade of Land-locked Countries, 1965.

38. On the other hand, a rule requiring only a simple majority for all decisions has sometimes been adopted. The Conference on the Elimination or Reduction of Future Statelessness, 1959 and 1961, and a number of other United Nations conferences including the United Nations Maritime Conference, 1948, the Conference on Freedom of Information, 1948, the United Nations Conference on Road and Motor Transport, 1949, the Conference on Declaration of Death of Missing Persons, 1950, the Conference on the Status of Refugees and Stateless Persons, 1951, the Conference on Maintenance Obligations, 1956, and the Conference of Plenipotentiaries on a Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 1956, all adopted a rule providing that decisions on all questions were made by a simple majority of representatives present and voting.

39. The Conference on the Statute of the International Atomic Energy Agency, 1956, had a rule whereby decisions to amend the provisions of the existing basic draft were taken by a two-thirds majority and—unless otherwise provided for—all other decisions were taken by a simple majority.

40. The Hague Codification Conference in 1930 had very complicated provisions[32] whereby committees could embody in draft conventions or protocols any provisions adopted by a two-thirds majority of the delegations present; provisions which had secured only a simple majority could be the object of special protocols if requested by at least five delegations and decided by simple majority; and recommendations and *vœux* could be adopted by simple majority. In the full conference, however, all texts had to obtain only a simple majority of the delegations present. Thus The Hague Conference followed nearly the converse of the rules of the United Nations codification conferences.

41. Thus, on the basis of precedent, there is a wide choice concerning methods of voting. It may be doubted, however, that any other method would produce markedly superior results to the one used at the four codification conferences. A requirement of more than a simple majority at the committee stage might well have the effect of preventing the adoption of important parts of a draft convention. A vote by simple majority in committee allows the conference to know accurately the views of delegations on the issues presented, and to take all necessary steps to arrive at compromise solutions. Moreover, the requirement of a two-thirds majority in plenary seems important in the case of a codification conference as the resulting text must obtain the widest acceptance if it is to serve its purposes. In the informal consultations with the International Law Commission, all of the members who spoke on the subject favoured a two-thirds voting rule for final decisions on questions of substance.

42. *Drafting Committee.* One of the essential differences between the procedure of a codification conference and the General Assembly is that all of the conferences except the

[31] See *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 851st meeting, para. 23.

[32] League of Nations, document C. 351.M.145.1930.V, annex 1.

second Conference on the Law of the Sea have had Drafting Committees. The Drafting Committee at the first Conference on the Law of the Sea and the Conference on Diplomatic Intercourse and Immunities were "responsible for the final drafting and co-ordination of the instruments approved by the countries of the Conference". This rule was revised for the Conference on Consular Relations to provide that the Drafting Committee, in addition to responsibilities and co-ordination of all texts adopted, whether by the committees or the plenary, "shall give advice on drafting as requested by other committees and by the Conference". Thus the competence of the Drafting Committee at the Consular Conference was broader than under the other rules, and it reviewed not only the texts approved by the committees of the Conference, but also those approved by the plenary itself, before those texts were finally adopted; moreover, there was a provision for advice by the Drafting Committee at stages earlier than adoption of texts. The rule as formulated for the Consular Conference worked well in practice, and should be followed in any future conference.

43. In the informal consultations with the International Law Commission, it was agreed by the members that the Drafting Committee should be given broad authority regarding the drafting and co-ordination of the text. Some members suggested that a procedure should be followed like that in the International Law Commission whereby, after discussion and before texts are put to a vote, the Drafting Committee examines the points of view expressed and tries to formulate a text that will be generally satisfactory.

44. Some of the conferences have used less formal drafting groups to prepare texts on certain questions. While this practice is useful in settling political differences, it would seem preferable to refer all problems relating to drafting to the Drafting Committee, which can take an over-all view of the whole of the draft articles.

45. *General Committee.* The first Conference on the Law of the Sea and the Conference on Consular Relations both had more than one main committee, and consequently a possible need for the co-ordination of the work of committees was apparent. The rules of those two conferences, therefore, provided that committees could refer questions affecting the co-ordination of their work to the General Committee which might make such arrangements as it thought fit, including the holding of joint meetings of committees or subcommittees and the establishment of joint working groups. At the first Conference on the Law of the Sea, in particular, the General Committee played a very active part in co-ordinating the work of the various committees of the Conference. Rule 50 of the rules of procedure of the Consular Conference had a provision inspired by rule 42 of the General Assembly, to the effect that the General Committee might meet from time to time to review the progress of the conference and its committees and to make recommendations for furthering such progress; it would also meet at such other times as the President deemed necessary or upon the request of any other of its members. This rule was, in fact, acted upon during the Consular Conference, when the General Committee made various recommendations concerning the progress of the conference. It seems a useful addition which should be incorporated in the rules of a conference on the law of treaties. One member of the International Law Commission suggested that, if divergencies arose between the main committees of the conference, the plenary conference should at once meet to settle the matter. If this procedure seems useful at the conference, it could be arranged through a recommendation of the General Committee.

46. *Experts and observers.* The rules of the four conferences provide that the conference "may invite to one or more of its meetings any persons whose technical advice it may consider useful for its work". This rule has generally been applied through the invitation of experts, in particular of the persons who served as Special Rapporteurs of the International Law Commission on the topic being considered by the conference, and it is assumed that similar arrangements should be made in advance of a conference on the law of treaties. One member of the International Law Commission stressed that the Special Rapporteur

and the Secretariat should be entitled to give explanations of the Commission's draft, so that there would be no risk of misunderstanding it in the conference.

47. There is also a rule on observers of specialized agencies and inter-governmental bodies invited to the conference, who may participate, without the right to vote, in the deliberations of the conference and its main committees, upon the invitation of the President or Chairman, and may also have their written statements distributed to delegations.

48. *Division of proposals and amendments.* The representative of Austria raised the question whether rules based on those of the General Assembly were really appropriate to the proceedings of a codification conference and whether additional changes might not be advisable.[33] In particular, he expressed the view that the application of rules like General Assembly rule 91 on division of proposals and amendments and rule 92 on voting on amendments had unfortunate effects. Though the application of these rules may sometimes be complicated, in the view of the Secretariat they are necessary to the work of a codification conference. If restrictions are placed upon the possibility of separate vote on parts of proposals or amendments, the result may be that the whole proposal or amendment is rejected, and that may have more serious effects than would be the case if only a few words are deleted.

49. *Order of voting on amendments.* While the rule on voting on amendments may sometimes be complicated to apply in view of the fact that the amendment "furthest removed in substance from the original proposal" must be voted on first, some order of priority must be set for voting on amendments, and the "furthest removed" rule is no more difficult to apply than any other system would be.

50. *Limitation of the number of speakers on motions for division.* It must be observed, however, that in codification conferences there have been special difficulties in observing the provisions of rules based on Assembly rule 91 to the effect that when a motion for division has been made, "permission to speak on the motion for division shall be given only to two speakers in favour and two speakers against". The effect of the deletion of a few words from complicated legal texts like those before codification conferences is often difficult to understand at first, since other related provisions of the draft may be affected. While the limitation of the number of speakers on a motion for division is useful in the General Assembly, which generally considers simpler texts and where motions for division are generally made late in the debate upon particular proposals and amendments, the circumstances are different in codification conferences where such motions are sometimes made at the very outset, and can scarcely be dealt with until a considerable number of delegations have had an opportunity to express their views. It is therefore suggested that in the rules of future codification conferences the sentence quoted above limiting the number of speakers on the motion for division should be omitted.

51. *Powers of the President.* The representative of Austria also suggested that:

> "... It would be desirable for the President to be able to suspend a meeting or adjourn debate on an agenda item in order to give delegates time for reflection. In addition, the President should be authorized to suspend a meeting briefly for the purpose of consulting with heads of delegations, vice-presidents of the conference or a representative of the United Nations Secretariat. Furthermore, delegations should have the possibility of moving the short suspension of a meeting, in order to ascertain, by examination and by consultation, the legal implications of new amendments or of a proposed separate vote. At a codification conference delegations should even be encouraged by the chairman to ask questions concerning the legal implications of amendments and of a proposed separate vote."[34]

[33] See *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 851st meeting, para. 23.

[34] *Ibid.*, para. 24.

52. As for the suggested conferment on the President of the power to suspend a meeting or adjourn a debate, it is to be expected that a conference would normally agree to such suggestions out of courtesy to its President, whenever he felt such measures were necessary to untangle a difficulty. There may be doubts, however, about giving the President an absolute right to such measures by means of the rules of procedure, since to do so might be in conflict with the rule, based on rules 36 and 109 of the General Assembly, which enunciates the fundamental principle that the President, in the exercise of his functions, remains under the authority of the conference. The other suggestions of the representative of Austria seem likewise better to leave to practice than to incorporate in formal rules.

X. Summary and conclusions

53. The present memorandum, in accordance with the requests of delegations at the twentieth session of the General Assembly, is based on the hypothesis that a conference of plenipotentiaries on the law of treaties will be held, as has now been recommended by the International Law Commission, but is not intended to prejudice the decision of the General Assembly on that question.

54. The draft articles on the law of treaties are closely interrelated, and the draft is the most complex which the Commission has ever prepared (see paras. 6 and 7 above). These facts make necessary the thorough preparation of a conference, in which Governments and depositaries would have a new chance to consider and comment on the draft articles as finally redrafted, rearranged and approved by the Commission in 1966 (see paras. 8 and 9 above). This need means that a conference could begin no earlier than the spring of 1968, or possibly later if it is desired to leave a longer interval for preparation. In the interval, the Secretariat would prepare a draft agenda, draft rules of procedure, a memorandum on methods of work and procedures, a guide to the draft articles and a bibliography (see para. 10 above). There would be no need to provide for other formal steps in preparation for a conference, but it would be hoped that Governments would use the time for informal discussions of the main issues.

55. The question arises whether the draft articles can appropriately be divided between two main committees, or whether on the other hand they must be dealt with by a Committee of the Whole, in preparation for their final adoption by the plenary conference (see paras. 14 and 15 above). On this question the opinions expressed in the International Law Commission were nearly equally divided. One division of the draft articles which might be considered is between those dealing with the birth of treaty obligations and events during their life, and the articles dealing with the modification, invalidity and termination of such obligations. Various general provisions at the beginning and end of the draft, as well as the preamble and final clauses of the convention, the Final Act of the conference, and any other texts which had to be prepared, could be referred to whichever committee made the best progress in its work (see paras. 16 and 17 above).

56. It appears that a conference which had a Committee of the Whole would last about thirteen weeks, and that one which divided up the work between two main committees would last about ten weeks (see paras. 18-24 above). On balance, it appears that it would be advantageous to divide the conference into two parts, the first consisting principally of the committee stage and the examination by the Drafting Committee of texts prepared at that stage, and the second part consisting of final consideration and adoption by the plenary conference. If the first part begins in February of one year, the second part could perhaps most easily be held in January of the following year (see paras. 25-29 above).

57. It is presumed that the conference would have the usual specialized committees including a General Committee, a Drafting Committee and a Credentials Committee (see paras. 30 and 31 above).

58. The draft rules of procedure of a conference would mainly follow those of previous codification conferences (particularly the Conference on Consular Relations) which are based on the rules of procedure of the General Assembly (see paras. 32-52 above). The only departure would be in the rule on division of proposals and amendments, where in the light of experience at previous conferences it seems undesirable to limit the number of speakers on a motion for division (see para. 50 above).

59. The present memorandum does not attempt to deal with the financial implications of holding a conference nor with its general bearing on the pattern of United Nations conferences, because at the present time there are several basic choices which remain open for discussion. After the discussion in the Sixth Committee has proceeded to a point where the general current of opinion has become clear, appropriate statements will, if necessary, be made on those matters.

20 September 1966

20. QUESTION WHETHER THE AMENDMENTS TO THE CHARTER SHOULD BE REGISTERED

Internal memorandum

1. On re-examining the question of registration of the amendments of the United Nations Charter, we are inclined to believe that the amendments should be registered. While in one sense amendments are "subsequent actions" to an agreement (the Charter) which is not itself registered, they also constitute an agreement which could be registered separately.

2. In this connexion it has been pointed out, *inter alia*, that:

(i) Declarations of new Members accepting the obligations of the Charter are registered as separate agreements;

(ii) Declarations accepting the jurisdiction of the International Court of Justice are likewise registered;

(iii) The Secretariat of the League of Nations registered amendments to the Covenant even though the Covenant itself had not been registered;

(iv) Amendments to the Constitution of the International Labour Organisation have been registered although the original Constitution was not registered with the League of Nations.

3. Doubts had originally been entertained about the registration because the amendments had been considered as part of a General Assembly resolution which was not itself registrable. However, on re-consideration, it would seem that while the resolution itself would not be subject to registration, the amendments might well be. It has been noted in this connexion that amendments to the WHO Constitution, which were also put forward by way of resolutions, were registered. The difference is that in the case of WHO its Constitution was itself registered.

4. While believing that there are arguments on both sides we are of the opinion that the weight of argument and precedent would be in favour of registration of the amendments.

14 March 1966

21. OBLIGATION TO REGISTER INTERNATIONAL AGREEMENTS UNDER ARTICLE 102 OF THE CHARTER — LEGAL EFFECT OF THE REGISTRATION BY ONE OF THE PARTIES — ARTICLE 3 OF THE REGULATIONS TO GIVE EFFECT TO ARTICLE 102 OF THE CHARTER (GENERAL ASSEMBLY RESOLUTION 97 (I) OF 14 DECEMBER 1946)

Letter to the Permanent Mission of a Member State

1. Thank you for your letter of 9 May 1966 regarding the registration of an agreement concluded between your Government and the Governments of. . . .

2. In our letter to you of 21 February 1966, we may not have sufficiently clarified the position as to the legal effect of the registration of an agreement by one of the parties thereto. The pertinent provision of article 3 of the Regulations to give effect to Article 102 of the Charter of the United Nations stipulates that the "registration by a party, in accordance with article 1 of these regulations, relieves all other parties from the obligation to register". Thus, in accordance with the said article 3, only one registration is required and once an agreement has been registered by one of the parties, the obligation to register under Article102 of the Charter has been fulfilled for all parties. An agreement may be registered jointly by two or more contracting parties — such registration actually has been effected on several occasions — but it cannot be registered twice.

3. The perusal of the records of the second part of the first session of the General Assembly, which adopted the Regulations, leaves no doubt on this point (see memorandum summarizing the discussion in Sub-Committee 1 of the Sixth Committee of the second part of the first session, which drafted the Regulations, document A/C.6/124).

4. In implementing the provision of article 3 of the Regulations, it has been the practice of the Secretariat, whenever an agreement previously registered by another party is received for registration, to inform the party concerned that the agreement has already been registered, indicating the date of registration, the number under which the agreement was registered and the name of the party which effected the registration, and to call its attention to article 3 of the Regulations, stating that the obligation of registration has already been fulfilled. It may be of interest to recall in this regard that, on a few occasions, where through an oversight an agreement has been registered twice, the second registration has subsequently been cancelled.

5. Furthermore, under the above-mentioned practice, the Secretariat checks the transmitted documentation with that provided earlier by the party which registered the agreement and, if any discrepancies are discovered, they are called to the attention of the parties. Corrections resulting from consultation with the parties are recorded and published in the *Treaty Series.*

6. Having noted that the text of the Agreement transmitted for registration by your Mission and that of the Agreement previously registered by the other Government are identical, save for minor drafting discrepancies and different names of signatories, a circumstance explainable by the fact that the Agreement was drawn up simultaneously in the two capitals, it was concluded that the two versions actually constitute one agreement. Consequently, in accordance with the above-mentioned practice, we informed you in our letter of 21 February 1966 that the Agreement had already been registered and that, pursuant to article 3 of the Regulations to give effect to Article 102 of the Charter of the United Nations, no separate registration on the part of your Government was required. At the same time, we suggested the inclusion of an appropriate note in the *Treaty Series,* when publishing the text of the Agreement registered by the other party, indicating that one of the originals of the Agreement was signed on the same date in your country and specifying the names of the plenipotentiaries who signed that original. We also suggested that certain discrepancies of a purely drafting nature could also be indicated in that note should your Government so wish.

7. In the light of the foregoing, we are sure you will appreciate that a separate registration of the Agreement would be contrary to the provision of article 3 of the Regulations and the practice followed by the Secretariat under that article.

We should, therefore, be obliged if you would refer the matter to your Government for further consideration.[35]

7 June 1966

[35] By a letter of 15 July 1966, the Permanent Mission of the Member State concerned indicated its agreement with the procedure suggested in the letter reproduced above.

22. REQUEST BY THE GOVERNMENT OF A MEMBER STATE THAT THE PRIVILEGES AND IMMUNITIES OF UNITED NATIONS OFFICIALS ASSIGNED TO A SEMINAR TO BE HELD IN THAT STATE SHOULD NOT APPLY IN CASE OF TRAFFIC INFRINGEMENTS — SECTION 18 (*a*) OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS[36]

Memorandum to the Chief of the Section for Europe, Middle East and Inter-regional Projects of the Bureau of Technical Assistance Operations, Department of Economic and Social Affairs

1. You have referred to us a question concerning the privileges and immunities of "officials of the United Nations Secretariat assigned to" a seminar to be held in the territory of a Member State.

2. It appears that in the letter of the Director of the Bureau of Technical Assistance Operations, dated 10 November 1965, addressed to the Permanent Representative of the State concerned to the United Nations, it is proposed that: "According to established practice, officials of the United Nations Secretariat assigned to the Seminar shall be accorded privileges and immunities similar to those provided under articles V and VII of the Convention on the Privileges and Immunities of the United Nations." In response, the Deputy Permanent Representative, by letter of 26 April 1966, states as follows:

> "10. The ... authorities are ready and willing to accord privileges and immunities in accordance with article V and VII of the Convention on the Privileges and Immunities of the United Nations *with the exception, however, that the immunities will not apply in case of traffic infringements.* If so desired, the exact terms can be specified in an exchange of letters as was done when the Governing Council of the United Nations Special Fund held its summer meeting (1964) in The Hague."[37] (Italics added.)

3. The proposal of the Government (in italics in the text) is tantamount to a modification of section 18 (*a*) of the Convention and is, *per se*, unacceptable. The said section reads as follows:

> "Section 18. Officials of the United Nations shall:
> (*a*) be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity".

Furthermore, the Government, being a party to the Convention on the Privileges and Immunities of the United Nations, is already bound to accord "officials of the United Nations Secretariat assigned to the Seminar" all the privileges and immunities provided in articles V and VII of the Convention, which include section 18 (*a*), even without the clause which it sought to modify. The letter of the Deputy Permanent Representative makes reference to an exchange of letters covering the meeting of the Governing Council of the United Nations Special Fund held in 1964 in The Hague. In fact an examination of the record shows that the article proposed by the Netherlands concerning traffic offences was dropped from the final text of the Agreement, and it was made clear that the United Nations could not accept an alteration of the obligations of the Netherlands under the Convention to which it is a party.

4. It is however to be noted that under section 18 (*a*), officials of the United Nations are immune from legal process only in respect of "words spoken or written and all acts performed by them in their official capacity". Accordingly, an official of the Secretariat would be immune in case of traffic infringements only if he was at the time acting in his official capacity. Conversely, driving for personal convenience would not be covered by the immunity. We would therefore have no objection if the proviso proposed by the Government refers only to traffic infringements incurred in a non-official capacity. As

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

[37] See *Juridical Yearbook*, 1964, p. 26.

officials of the Secretariat assigned to the Seminar will be unlikely to drive automobiles during the short duration of the Seminar for personal pleasure, a proviso in this sense would not be of much significance. Hence it will be best if the Government could be persuaded to withdraw its amendment.

25 May 1966

23. SPECIAL INTERNATIONAL STATUS OF AN OPEX OFFICER — INTERPRETATION OF ARTICLE II, PARAGRAPHS 3 AND 4, OF THE MODEL AGREEMENT FOR THE PROVISION OF OPERATIONAL, EXECUTIVE AND ADMINISTRATIVE PERSONNEL

Memorandum to the Senior Deputy Director of the Bureau of Technical Assistance Operations, Department of Economic and Social Affairs

1. We wish to refer to your memorandum of 11 May 1966, with copy of letter from an OPEX officer in a Member State, dated 21 February 1966. The question is raised as to the implications of the "special international status" that is said to attach to OPEX officers, in terms of the OPEX Agreement with the Government concerned.

2. The "Agreement between the United Nations and the Government... for the provision of operational, executive and administrative personnel" provides:

"Article II

Functions of the Officers

"1. The officers to be provided under this Agreement shall be available to perform administrative, executive or managerial functions, including training, for the Government, or, if so agreed by the United Nations and the Government, in other public agencies or public corporations or public bodies, or in national agencies or bodies other than those of a public character.

"2. In the performance of the duties assigned to them by the Government, the officers shall be solely responsible to, and under the exclusive direction of, the Government; they shall not report to nor take instructions from the United Nations or any other person or body external to the Government except with the approval of the Government. In each case the Government shall designate the authority to which the officer will be immediately responsible.

"3. The Parties hereto recognize that a special international status attaches to the officers made available to the Government under this Agreement, and that the assistance provided the Government hereunder is in furtherance of the purposes of the United Nations. Accordingly, the officers shall not be required to perform any function incompatible with such special international status or with the purposes of the United Nations.

"4. In implementation of the preceding paragraph, but without restricting its generality or the generality of the last sentence of paragraph 1 of article I, any agreements entered into by the Government with the officers shall embody a specific provision to the effect that the officer shall not perform any functions incompatible with his special international status or with the purposes of the United Nations."

3. It will be seen that, in the above-quoted article, paragraph 1 defines the nature of the functions which the OPEX officer shall perform "for the Government". Paragraph 2 establishes the subordination of the OPEX officer to the Government, namely, that he "shall be solely responsible to, and under the exclusive direction of the Government", and that he "shall not report to nor take instructions from the United Nations". As a reservation to these positive and general provisions, paragraphs 3 and 4 impose a negative and exceptional qualification to the effect that the OPEX officer "shall not be required to perform any function incompatible with [the] special international status [which attaches to the OPEX officer] or with the purposes of the United Nations."

4. The question raised by the OPEX officer is: what functions may be regarded as "incompatible" with his "special international status or with the purposes of the United

Nations". Reference to the contract (which is the same as the standard text for all OPEX officers) signed by the officer with the United Nations may throw some light on this question. Paragraph 2 of article III of this contract, amplifying paragraphs 3 and 4 of article II of the OPEX Agreement with the Government, reads as follows:

> "2. The officer shall conduct himself at all time with the fullest regard for the aims of the United Nations and in a manner befitting his status under this contract. He shall not engage in any activity that is incompatible with the purposes of the United Nations or the proper discharge of his duties with the Government. ... He shall avoid any action and in particular any kind of public pronouncement which may adversely reflect on his status, or on the integrity, independence and impartiality which are required by that status. While he is not expected to give up his national sentiments or his political and religious convictions, he shall at all times bear in mind the reserve and tact incumbent upon him by reason of his status."

5. Having regard, however, to the origin and object of OPEX, it is obvious that the restrictions implicit in paragraphs 3 and 4 of article II of the Agreement must be given a restrictive interpretation. The expression "purposes of the United Nations" apparently refers to those purposes enumerated in Article I of the Charter of the United Nations. Thus, for instance, activities or utterance against "international peace and security" (or those advocating war); those contrary to the "principle of equal rights and self-determination of peoples", or those detrimental to "international co-operation" may be said to be "incompatible with the purposes of the United Nations". As for the "special international status" that is said to attach to an OPEX officer, this too can only have a very narrow meaning, in view of the provisions of paragraphs 1 and 2 of article II of the Agreement as discussed in paragraph 3 of this memorandum. It means, we think, that an OPEX officer may not engage in activities or make pronouncements which are normally reserved for nationals of the country to which he is assigned. For example, activities of a political nature would be "incompatible with the special international status" attaching to the OPEX officer.

6. The foregoing paragraph deals with generalities. With reference to the specific queries of the officer as to whether one of the functions entrusted to him, namely, "direct intervention on behalf of the Government" "in the programming and co-ordination of bilateral aid activities", was incompatible with his "special international status" or with "the purposes of the United Nations", the answer is clearly in the negative. As an officer of the Government, he need have no compunction in performing such functions and he should do so with the interests of the Government primarily in view. Such functions, if performed in good faith in the interests of the Government, cannot be incompatible with the purposes of the United Nations. Indeed, they are apparently conducive to the purpose of the United Nations in extending OPEX assistance to the Government. That purpose is, to quote the preamble of the OPEX Agreement, "to join in furthering the development of the administrative services" of the Government. The same may be said of all the functions entrusted to him as specified in the letter of 11 November 1965 from the Ministry of Public Works to which he referred.

24 May 1966

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

1. International Labour Office

The following memorandum concerning the interpretation of international Labour Conventions was prepared by the International Labour Office at the request of a Government:

Memorandum concerning the interpretation of the Minimum Age (Fishermen) Convention, 1959 (No. 112), prepared by the International Labour Office at the request of the Government of the Republic of China, 15 November 1966, *Official Bulletin*, vol. L, No. 3, July 1967. English, French, Spanish.

2. United Nations Educational, Scientific and Cultural Organization

(a) *The autonomy of the International Institute for Educational Planning Internal Note by the Legal Adviser*

1. The meaning of the term "autonomy", with respect to the Institute, can only be considered in relation to its legal status.

2. The Institute has been established "within the framework of" UNESCO by a resolution of the General Conference. It is therefore legally part of UNESCO and any autonomy which it may enjoy is an autonomy within UNESCO. To the outside world, the Institute is but one of the forms which the activities of UNESCO may take and its aims and functions can be but a part of the aims and functions of UNESCO.

3. The term "autonomy" or other similar terms do not appear in the Statutes of the Institute. It is clear, however, from the debates of the twelfth session of the General Conference, as well as from the provisions of the Statutes as they were adopted, that the intention was to recognize to the Institute "a high degree of intellectual and administrative autonomy", as indicated in the report of the Working Party of the twelfth session of the General Conference (12C/Resolutions, p. 292).

4. This intention is reflected in various clauses of the Statutes. The Institute has its own "policy" and "activities" the nature of which is determined by the Institute's Governing Board. It also has its own "budget" which is adopted by the Governing Board. It is again the Board which decides "how the funds for the operation of the Institute are to be used" and which approves "the draft programme of work and budget estimates" prepared by the Director of the Institute.

5. The programme and budget of the Institute are therefore distinct and separate from the programme and budget adopted for the rest of the Organization by the General Conference although the "annual allocation" to the Institute, as determined by the General Conference, appears in the general budget of the Organization.

6. As regards the Director and the staff of the Institute, the decision to establish the Institute as part of UNESCO and partaking of the legal personality of UNESCO necessarily implied that the persons working for the Institute would be, in law, employees of UNESCO and that their official acts would, in relation to the outside world, engage the responsibility of UNESCO.

7. The only question which arose was the purely internal one of determining the exact status the members of the staff of the Institute would enjoy within UNESCO.

8. The decision of the General Conference was to give to the Director and the members of the staff of the Institute the status of "officials of UNESCO within the meaning of ArticleVI, Section 18, of the Convention on the Privileges and Immunities of the Specialized Agencies".

9. The staff of the Institute were not made officials of UNESCO "for the purpose of" the Convention but "within the meaning of" it. They are, therefore, officials of UNESCO in the same sense as all the other persons who are considered officials of UNESCO under the Convention.

10. Being officials of UNESCO, members of the staff of the Institute are, as a consequence, subject to the same Regulations and Rules and to the same conditions of service

as the other officials of UNESCO. There have been, however, departures from this basic position, some of which originated with the General Conference, others with the Director-General.

11. In paragraphs 2 and 3 of Article VII of the Statutes, the General Conference has introduced two provisions specially applicable to the staff of the Institute and which relate to the working hours of the specialized and teaching staff and to the loan of staff members to international institutions and governments.

12. The Director-General, under the Constitution, appoints the staff of the Secretariat in accordance with Staff Regulations approved by the General Conference and which "embody the fundamental conditions of service and the basic rights, duties and obligations of members of the Secretariat of UNESCO". The Director-General, as Chief Administrative Officer of UNESCO, enforces these Regulations and is empowered to lay down and enforce staff rules consistent with these Regulations.

13. Under the "Regulations", staff members are subject to the authority of the Director-General and are responsible to him in the exercise of their functions.

14. While the Director of the Institute is appointed "on the recommendation of the Board" and the Board is "consulted as to the appointment of the senior officials of the Institute", no provision of the Statutes appears to give the Governing Board any other competence in staff matters.

15. As indicated in document IGB/8 submitted to the Governing Board at its first session, in order to meet the special personnel requirements and operating conditions of the Institute which rendered it necessary to depart in some respects from the UNESCO Staff Rules, the Director-General has made certain changes in the Staff Rules to meet these needs. This document also indicates that in the application of the Staff Regulations and Staff Rules to the staff of the Institute the Director-General delegates his authority to the extent possible under these Regulations and Rules to the Director of the Institute.

16. It appears from the above that the Staff Regulations adopted by the General Conference apply to the Director and the staff of the Institute as officials of the Organization; that the Staff Rules enacted by the Director-General apply to them, except in so far as they have been modified by the enacting of special rules applicable to the Institute; that the Director-General's authority under these Regulations and Rules for their enforcement can be delegated to the Director of the Institute "to the extent possible under these Regulations and Rules".

4 May 1966

(b) *Suspension and resumption of participation in the activities of UNESCO by Czechoslovakia, Hungary and Poland*

Letter to the Secretariat of the United Nations

In answer to your letter of 29 April 1966, we transmit the following information on the circumstances in which Czechoslovakia, Hungary and Poland were led to suspend and then resume their participation in the activities of UNESCO.

Poland

On 5 December 1952, the Director-General received a communication from the Chargé d'Affaires *ad interim* of the Polish People's Republic in France, announcing, on the instructions of his Government, Poland's decision to withdraw from the organization. The communication was brought to the notice of the General Conference, which was then

holding its seventh session in Paris and which, on the recommendation of the General Committee, adopted the following resolution on 11 December 1952 (7C/Resolution 0.13):

"The General Conference,

"Having taken note of the communication addressed to the Director-General by the Chargé d'Affaires *ad interim* of the People's Republic of Poland in France, announcing, on the orders of his Government, Poland's decision to withdraw from the Organization,

"1. Declares that the allegations contained in the aforesaid communication are completely unfounded; and

"Considering that the Organization was set up to ensure the co-operation of all the nations of the world in the field of education, science and culture,

"Considering that the member States of UNESCO have, in consequence, recognized the universal character of the purposes and functions of the Organization, which has always faithfully observed the principle of universality in all its activities,

"2. Invites the Government of the People's Republic of Poland to reconsider its decision, and to resume its full collaboration in the Organization's activities."

It should be noted that at that time UNESCO's Constitution made no provision for the withdrawal of member States.

Hungary and Czechoslovakia

The Director-General later received communications from the Governments of Hungary and Czechoslovakia, the texts of which are reproduced in annexes I and II of document 2XC/6.

These communications were transmitted to the Chairman of the Executive Board (33EX/20), which, at its thirty-third session (April 1953), took the decisions referred to in paragraph 5 of that document. The document also contains a note by the Secretariat on the situation with regard to the withdrawal of member States (annex V).

At its second extraordinary session (July 1953), the General Conference adopted the following resolution on the communication from the Hungarian Government (2XC/Resolution 9.1):

"The General Conference,

"Having taken note of the communication addressed to the Acting Director-General by the Hungarian Minister for Foreign Affairs, announcing, on the orders of his Government, Hungary's decision to withdraw from the Organization,

"9.11 Declares that the allegations contained in the aforesaid communication are completely unfounded; and

"Considering that the Organization was set up to ensure the co-operation of all the nations of the world in the field of education, science and culture,

"Considering that the member States of UNESCO have, in consequence, recognized the universal character of the purposes and functions of the Organization, which has always faithfully observed the principle of universality in all its activities,

"9.12 Invites the Government of Hungary to reconsider its decision, and to resume its full collaboration in the Organization's activities."

It adopted a similar resolution on the communication from the Czechoslovak Government (2XC/Resolution 9.2).

At the same session, the General Conference adopted a resolution (2XC/9.4) in which, while hoping that UNESCO would continue to adhere to the principle of universality of membership but recognizing that withdrawals might at times become inevitable involving certain serious financial problems in drawing up the biennial budget of the Organization, it requested the Director-General and the Executive Board to consider the matter of withdrawals from the Organization and if appropriate draft amendments to the Constitution to provide for such withdrawals.

At its eighth session (November 1954), the General Conference considered and adopted a proposal to make provision in UNESCO's Constitution for a procedure for the withdrawal of member States, but it also had before it applications from Czechoslovakia, Hungary and Poland concerning the resumption of collaboration with the Organization and payment of their arrears of contributions. These applications were considered by the Committee on Contributions of the General Conference, which submitted two reports on the matter to the Administrative Commission (8C/ADM/30 and Add.1). In those reports, the Committee, *inter alia*, expressed the opinion "that Hungary had never ceased to be a member of UNESCO and that there was no basis for the cancellation of the contribution for 1953". It also found that "apart from the fact that no provision for withdrawal appears in the Constitution of UNESCO, the Governments concerned did not appear to have complied with the provisions for joining the Organization which would have been necessary if they had withdrawn". The Administrative Commission's report includes a passage on the collection of contributions from these member States (8C/Resolution, annex 2, section 17).

The General Conference adopted the resolutions appearing in document 8C/ADM/30 Add.1. These resolutions are the only texts governing the resumption of collaboration with the Organization by these States. As the report of the Committee on Contributions indicates, these texts are the result of negotiations with the delegations concerned, but do not constitute, strictly speaking, an agreement between the Organization and those States concerning the regularization of their previous situation.

The provision on the withdrawal of member States adopted at that session, which now appears in paragraph 6 of article II of the Constitution, reads as follows:

"Any Member State or Associate Member of the Organization may withdraw from the Organization by notice addressed to the Director-General. Such notice shall take effect on 31 December of the year following that during which the notice was given. No such withdrawal shall affect the financial obligations owed to the Organization on the date on which the withdrawal takes effect. Notice of withdrawal by an Associate Member shall be given on its behalf by the Member State or other authority having responsibility for its international relations."

On 5 April 1955, the Union of South Africa gave the Director-General notice of withdrawal in accordance with that provision. The withdrawal took effect on 31 December 1956. Indonesia gave the Director-General notice of withdrawal on 12 February 1965. This withdrawal will not take effect until 31 December 1966.

16 May 1966

(c) *Re-eligibility of members of the Executive Board (Part of a term of office)*

Internal Memorandum

1. The question was raised at the eighth session of the General Conference by the Japanese delegation which submitted a memorandum on the subject (8C/JUR/4).

2. The question was put in terms of the change of the Board's structure. It was examined by the Legal Committee at its sixth meeting (see 8C/Proceedings, p. 900).

3. The summary records contain the following passage:

"(72) The Chairman put to the vote the principle that any previous term served by a member of the Executive Board should be taken into account with regard to his re-eligibility, any part of a term being counted as a full term.

(73) The principle as enunciated by the Chairman was adopted by 7 votes to none, with 4 abstentions."

4. The report of the Legal Committee on this question is found in 8C/JUR/6. This report was adopted by the Administrative Commission (see 8C/Resolutions, page 81).

5. The question was raised again at the ninth session of the General Conference with reference to the specific case of persons elected to replace members who had resigned or died. It was examined by the Legal Committee at its first meeting (see 9C/Proceedings, pp. 672 and 677).

6. The report of the Legal Committee on the question is found in 9C/ADM/16. It contains the following passage:

> "The Committee noted that although the reports of the Legal Committee and the Administrative Commission at the eighth session of the General Conference specifically referred only to the terms of office of members of the Board which expired prematurely as a result of the amendment of Article V, paragraph 13 of the Constitution, the question put to the vote by the Chairman of the Legal Committee in 1954 had been couched in such very general terms as to cover not only the case of members whose term of office had been curtailed to two years as a result of the revision of the Constitution but also the case of persons elected to replace members who resigned or died while in office."

7. The Committee thought that the interpretation given in 1954 should be "confirmed and maintained".

8. The Administrative Commission endorsed the Legal Committee's conclusions on this point and recommended that the General Conference adopt them (see 9C/Resolutions, pp. 127 and 128).

18 May 1966

(d) *Interpretation of Article XIV, paragraph 2, of the Convention for the Establishment of the International Computation Centre*

Internal Memorandum

By note of 9 May 1966, you requested advice from the Bureau of Legal Affairs regarding a question of interpretation raised by the Director of the International Computation Centre.

As you know, the Secretariat of UNESCO has no special competence to interpret the provisions of an Agreement concluded between States. However and subject to this reservation, the Bureau of Legal Affairs offers the following comments.

1. Under Article XIV, paragraph 2, "acceptance", i.e. deposit of an official instrument of acceptance with the Director-General of UNESCO, renders the State on behalf of which the deposit is effected a party to the Convention.

2. This means, under general principles of international law, that no further step is required nor indeed possible to render the State concerned bound by the Convention.

3. If the constitutional requirements in a particular State make it necessary for the Government to secure Parliamentary approval, such a procedure should precede the deposit of an instrument of acceptance and not follow it. This is however a matter of internal concern for each State and the Director-General of UNESCO, as depositary of the Convention, will not enquire as to whether the required internal procedure has been followed.

4. He will not, however, following the United Nations practice, accept as a valid instrument of acceptance within the meaning of Article XIV, paragraph 2, an instrument which makes the acceptance of the Convention subject to the subsequent approval, consent or ratification of Parliament.

5. Should an instrument be deposited subject to such a condition, past practice indicates that the Director-General would inform the State concerned that the instrument would be kept in abeyance until such time as he may receive official notification that the stated condition has been fulfilled. Only then would the instrument be accepted for deposit and registered with the Secretariat of the United Nations in accordance with Article 102 of the Charter. Deposit would be considered to have been effected on the date on which official notification has been received that the stated condition has been fulfilled.

6. It follows from the above that a State can be considered to be a member of the Centre and entitled to be represented in the General Assembly with the right to vote only when it has completed all formalities required to become bound by the Convention.

7. Such a State can, however, if a Member of the United Nations, of UNESCO or of any other specialized agencies, send an observer to sessions of the General Assembly in accordance with Article 4, 2) of the Rules of Procedure of the General Assembly.

3 June 1966

(e) *Memorandum on the practice regarding the implementation of Article XIII of the Constitution of UNESCO*

Memorandum to the Secretariat of the United Nations

1. Article XIII of the Constitution of UNESCO, as adopted by the Conference for the establishment of the United Nations Educational, Scientific and Cultural Organization held in London in November 1945, provides as follows:

> 1. Proposals for amendments to this Constitution shall become effective upon receiving the approval of the General Conference by a two-thirds majority; provided, however, that those amendments which involve fundamental alterations in the aims of the Organization or new obligations for the Member States shall require subsequent acceptance on the part of two-thirds of the Member States before they come into force. The draft texts of proposed amendments shall be communicated by the Director-General to the Member States at least six months in advance of their consideration by the General Conference.
>
> 2. The General Conference shall have power to adopt by a two-thirds majority rules of procedure for carrying out the provisions of this Article.

2. The provisions of this Article remain unchanged to this day.

3. Both draft proposals for a constitution submitted to the London Conference (draft submitted by the Conference of Allied Ministers of Education and French proposals) provided for adoption of amendments by the General Conference by a two-thirds majority and further ratification by two-thirds of the Member States.

The C.A.M.E. draft further provided that any agreement which would bring the new organization into relationship with the United Nations "may, if approved by the Conference by a two-thirds majority, involve modification of the provisions of this constitution, provided that no such agreement shall modify the purposes and limitations of the Organization".

4. The Commission of the London Conference which considered these various proposals, recognized "that, while it was necessary, in creating this new structure, to provide for ratification by States, the method of having all amendments to the Constitution submitted for ratification by individual members was a difficult and dilatory one and it was hoped that some progress might be made in future toward modifying it. Meanwhile, it would be desirable to make distinction between amendments of substance which would require ratification and adjustments of form which could be adopted by a two-thirds majority of the Conference. . . . It was proposed that the text should specify which were the articles

for which amendments would require ratification and which were those which would not, but it was agreed that this point could only be decided by the General Conference. (*Ninth Meeting, Second Commission,* November 13, 1945.) At its following meeting, the same Commission again "agreed that the Conference should decide whether an amendment involved a fundamental alteration or new obligations". (*Tenth Meeting, Second Commission,* November 13, 1945.)

5. At the Ninth Plenary Meeting, on November 15, 1945, the Chairman of the Second Commission further stated that "the question as to where alterations are fundamental and when no obligations are being incurred is one on which the General Conference must take decisions under the Rules of Procedure".

6. Amendments to the Constitution have been adopted by the General Conference at all of its sessions except the first, eleventh and thirteenth sessions. The texts of the various resolutions adopted by the General Conference for the purpose of amending the Constitution are annexed to this Memorandum.

7. In no case has it been considered that the amendment under consideration required subsequent acceptance.

8. In accordance with paragraph 2 of Article XIII of the Constitution, the General Conference adopted, at its sixth session, a new Section XIX of its Rules of Procedure entitled "Procedure for the amendment of the Constitution". This Section, as subsequently amended, reads as follows:

Rule 103 (Const. XIII.1)

DRAFT AMENDMENTS

The General Conference shall not adopt a draft amendment to the Constitution unless the draft has been communicated to Member States and Associate Members at least six months in advance.

Rule 104

PROPOSALS FOR SUBSTANTIVE CHANGES IN DRAFT AMENDMENTS

The General Conference shall not introduce substantive changes in draft amendments under the terms of the preceding rule unless the proposed changes have been communicated to Member States and Associate Members at least three months before the opening of the session.

Rule 105

AMENDMENTS OF FORM

The General Conference may, however, without prior communication to Member States and Associate Members, adopt any changes in the drafts and proposals referred to in Rules 103 and 104 which are purely matters of drafting, and any changes designed to embody, in a single text, substantive proposals communicated to Member States and Associate Members in accordance with the provisions of Rules 103 and 104.

Rule 106

INTERPRETATION OF AMENDMENTS

In case of doubt, a proposed amendment shall be deemed to be an amendment of substance unless on a vote being taken there is a two-thirds majority of the members present and voting in favour of interpreting the amendment as an amendment of form falling under the provisions of Rule 105.

9. The amendment to the Constitution adopted by the General Conference at its fourth session contains the following *considerandum*:

"*Considering* that this amendment does not involve any fundamental alterations in the aims of the Organization or new obligations for the Member States".

Similar wording is to be found in the amendments adopted at the fifth and sixth sessions but not in the amendments subsequently adopted at the seventh, eighth, ninth, tenth and twelfth sessions.

10. The report of the Procedure Committee of the fourth session *(4C/Resolutions, p. 83)* states that the Committee noted that the amendment under consideration "did not involve any fundamental alterations in the aims of the Organization or any new obligations for the Member States and that there was no necessity for this amendment to be accepted on the part of two-thirds of the Member States before coming into force".

11. The reports of the Procedure Committee to the fifth session *(5C/Resolutions, p. 129)* and to the sixth session *(6C/Resolutions, p. 84)* contain similar statements.

12. The first report of the Legal Committee to the tenth session of the General Conference states that the Committee considered that the amendment under consideration "did not involve fundamental alterations in the aims of the Organization or new obligations for the Member States and would therefore become effective upon receiving the approval of the General Conference by a two-thirds majority" *(10C/ADM/2)*. This statement was noted by the Administrative Commission which recommended the adoption of the amendment by the General Conference *(10C/Resolutions, p. 127 and 128)*.

13. Under Article IV, paragraph 8, (*a*) of the Constitution, decisions in the General Conference are made by a simple majority except in cases in which a two-thirds majority is required by the provisions of the Constitution or of the Rules of Procedure of the General Conference. Although a two-thirds majority is required for the adoption of amendments to the Constitution and for the adoption of regulations governing the procedure for amendment to the Constitution, as well as for the determination of an amendment of form (see Rule 106 quoted above), there does not appear to exist any two-thirds majority requirement for the determination of an amendment as involving fundamental alterations in the aims of the Organization or new obligations for the Member States.

31 August 1966