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1969

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

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

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Chapter VI

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

A. Legal opinions of the Secretariat of the United Nations

(Issued or prepared by the Office of Legal Affairs)

1. IMMUNITY FROM CENSORSHIP OF UNITED NATIONS PUBLIC INFORMATION MATERIAL, IRRESPECTIVE OF MODE OF DISTRIBUTION

Memorandum to the Chief of Centre Services, External Relations Division, Office of Public Information

1. In your memorandum, you ask whether United Nations films could be submitted to censorship in a specific Member State.

2. The United Nations is not in a position to submit its films to censorship, since it would be contrary to the Charter and to the Convention on the Privileges and Immunities of the United Nations to which the Member State concerned acceded without reservations. The position of the United Nations in this regard derives, in general terms, from Article 105 of the Charter and, more specifically, from Sections 3, 4 and 7 (*c*) of the Convention on the Privileges and Immunities of the United Nations. These sections of the Convention provided as follows:

> "*Section 3.* The premises of the United Nations shall be inviolable. The property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.
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> "*Section 4.* The archives of the United Nations, and in general all documents belonging to it or held by it, shall be inviolable wherever located.
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> "...
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> "*Section 7.* The United Nations ... shall be
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> "...
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> "(*c*) exempt from customs duties and prohibitions and restrictions on imports and exports in respect of its publications."

3. As you will appreciate, a demand to censor United Nations films would constitute interference as prohibited in Section 3 of the Convention. As regards Section 4, United Nations films are part of United Nations documentation, and censorship therefore would be in violation of this section which provides for inviolability of documentation "wherever located". United Nations films are also covered by the exemption under Section 7 (*c*) since they are a part of United Nations publications.

4. Furthermore, if a government were to demand, in particular, the right to censor United Nations material and if that demand were complied with, the question would arise of a contravention of Article 100 of the Charter, under which a Member State is required

to refrain from influencing the Secretariat in the discharge of its responsibilities and the latter is prohibited from receiving instructions from any authority external to the Organization.

5. The concrete case described in your memorandum concerns United Nations films proposed for screening in commercial cinemas in the Member State concerned by the United Nations Information Centre. The question was raised whether a distinction could be drawn between United Nations films intended "for screening in commercial cinemas" and films "shown at public or private group-screenings".

6. It is our opinion that no such distinction can be made in relation to the Convention on the Privileges and Immunities of the United Nations. The establishment of the Information Centre on the territory of the Member State concerned was, as is always the case, effected in accordance with resolutions of the General Assembly under which both Member States and the Secretary-General are to further the public information work of the United Nations as spelled out in General Assembly resolutions 13 (I) of 13 February 1946, 595 (VI) of 4 February 1952 and 1405 (XIV) of 1 December 1959.

7. In particular, resolution 595 (VI) approved the "Basic Principles Underlying the Public Information Activities of the United Nations" as suggested by Sub-Committee 8 of the Fifth Committee on Public Information.[1] Under paragraph 8 of the Basic Principles, it is anticipated that the United Nations Department of Public Information should "promote and where necessary participate in the production and distribution of documentary films, film strips, posters and other graphic exhibits on the work of the United Nations". Concerning the mode of distribution, paragraph 10 of the Annex to the Basic Principles states:

> "Free distribution of materials is necessary in the public information activities of the United Nations. The Department should, however, as demands increase and whenever it is desirable and possible, actively encourage the sale of its materials. Where appropriate, it should seek to finance production by means of revenue-producing and self-liquidating projects."

8. It is thus a long-established principle that distribution of United Nations public information material may take place through commercial channels. It follows that there is no foundation for distinguishing between various forms of distribution as long as the activities are performed within the scope of the above-mentioned General Assembly resolutions.

7 January 1970

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2. Publication rights of the United Nations in lectures delivered by participants in a United Nations seminar

Memorandum to the Director of the Resources and Transport Division

1. You have requested our opinion on whether permission should be obtained from the various lecturers who attended a United Nations Seminar for their lectures to be published under a proposed arrangement between the United Nations and a private publishing firm. You indicate that these lecturers include staff members, holders of special service contracts, oil company representatives and national civil servants. We note that you are writing to all of them because they were promised the opportunity to correct manuscripts before publication. We also note that they were given to understand that these lectures would ultimately be published in a United Nations document.

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[1] See *Official Records of the General Assembly, Sixth Session, Annexes*, agenda item 41, document A/C.5/L.172.

2. From the legal viewpoint, a person who accepted an invitation to lecture does not necessarily thereby give permission to publish, although this permission may be inferred from the surrounding circumstances; nor does he give up his rights to publish himself or to permit others to do so.

3. Of course, the United Nations has publication rights in the lectures of staff members by virtue of the Staff Rules. So far as the holders of special service contracts are concerned, if their contracts simply referred to lectures, it is not certain whether the United Nations obtained publication rights in such lectures. As for government consultants and representatives of petroleum enterprises, etc., they or their own companies or their Governments may well have whatever property rights exist in the lectures.

4. We would advise that your letters to the lecturers should inform them of the Organization's intention to arrange for publication by a private publisher and to copyright the publication as a whole in the name of the United Nations. The lecturers' sending in their corrected manuscripts after receiving such a letter would show their agreement to this procedure and indicate the necessary permission.

5. We would however observe that the United Nations appears to be in no position to assert exclusive right to publish the various lectures, and it is essential to avoid assuming any obligations or making any representation to the publisher in this regard.

5 March 1969

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3. Privileges and immunities of the members of the Committee on the elimination of racial discrimination

Memorandum to the Director, Division of Human Rights

1. I have received your memorandum inquiring about the status, privileges and immunities of the members of the Committee on the Elimination of Racial Discrimination and members of *ad hoc* conciliation commissions established under article 12 of the International Convention on the Elimination of All Forms of Racial Discrimination.[2] In our opinion, members of the Committee and members of the conciliation commissions are to be considered experts on missions for the United Nations within the meaning of sections 22, 23 and 26 of the Convention on the Privileges and Immunities of the United Nations and section 11 of the Headquarters Agreement with the United States, and are entitled to the privileges, immunities and facilities therein laid down.

2. The International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature on 7 March 1966, does not expressly provide for the status of the members of the Committee. Nevertheless the Convention gives indications from which that status can be inferred.

3. There is a group of organs which, though their establishment is provided for in a treaty, are so closely linked with the United Nations that they are considered organs of the Organization. These include the former Permanent Central Opium Board (established by an Agreement of 1925[3] but made a United Nations organ by General Assembly resolution 54 (I) of 19 November 1946 and the protocol of amendment annexed thereto), the former Drug Supervisory Body (established by a Convention of 1931[4] but made a United

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[2] United Nations, *Treaty Series*, vol. 660.

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

[4] *Ibid.*, vol. CXXXIX, p. 301.

Nations organ by the same resolution and protocol), the International Bureau for Declarations of Death (established by the Convention on the Declaration of Death of Missing Persons, [5] adopted by a United Nations conference on 6 April 1950), the Appeals Committee established under the Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium [6] (adopted by a United Nations conference on 23 June 1953), and the International Narcotics Control Board (established under the Single Convention on Narcotic Drugs, [7] adopted by a United Nations conference on 30 March 1961). Other similar organs are provided for in United Nations conventions which have not yet entered into force. Except for the mode of their creation, these organs are in the same position as recognized subsidiary organs of the United Nations. The Committee established under the Convention on the Elimination of All Forms of Racial Discrimination falls in the same category.

4. That Convention, which in article 8 (paragraph 1) establishes the Committee, was adopted by the General Assembly in resolution 2106 (XX) of 21 December 1965. Of the organs referred to in the preceding paragraph, only the Permanent Central Opium Board and the Drug Supervisory Body share with the Committee on the Elimination of Racial Discrimination the distinction of having been made United Nations organs by a treaty which is at the same time a decision of the General Assembly. In the other cases, it has been necessary for the Assembly to decide to undertake the functions conferred on the United Nations by treaties adopted at a conference, and thereby to confer the status of United Nations organs on the bodies in question. Where the treaty itself is also a decision of the Assembly, however, no such separate decision on assumption of functions and conferment of status is required.

5. The mode of creation of the Committee, the nature of its functions, their similarity to those of subsidiary organs, and the continuing administrative and financial ties which bind it to the United Nations remove all doubt that it is a United Nations organ, and it is thus without significance that the Third Committee rejected a proposal of the name "United Nations Committee on Racial Discrimination". [8] None of the other organs referred to in paragraph 3 above has the words "United Nations" in its name, so that decision is not a strong basis for argument.

6. The purpose of the Convention, and consequently of the Committee, is, according to the preamble, to advance certain principles of the United Nations Charter. One of the main functions of the Committee (under article 9) is to make annual reports to the General Assembly, and that function is like the typical activity of subsidiary organs. Another main function of the Committee is consideration of allegations by a party that another party is not giving effect to the provisions of the Convention (article 11), and the Committee may also be given competence by a declaration of a party to consider claims of violation submitted by individuals or groups of individuals (article 14). Under article 15 and General Assembly resolution 2106B (XX), the Committee has functions relating to petitions from inhabitants of Trust and Non-Self-Governing Territories. These functions seem to be of a judicial or quasi-judicial character; that character, however, does not prevent the Committee from being a United Nations organ. The various narcotics bodies referred to in paragraph 3 above perform quasi-judicial functions, and the Appeals Committee established under the 1953 Opium Protocol is of a fully judicial nature. Functions of these

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[5] United Nations, *Treaty Series*, vol. 119, p. 99.

[6] *Ibid.*, vol. 456, p. 56.

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

[8] *Official Records of the General Assembly, Twentieth Session, Annexes, agenda item 58*, document A/6181, paras. 104 (*a*) and 110 (*a*) (i).

types can also be performed by subsidiary organs; the International Court of Justice, in its advisory opinion of 13 July 1954 on the Effect of Awards of Compensation made by the United Nations Administrative Tribunal (*I.C.J. Reports 1954*, p. 47) has recognized the legal capacity of the General Assembly to establish judicial bodies for the fulfilment of its purposes.

7. Under article 10, the secretariat of the Committee is provided by the Secretary-General of the United Nations, and the meetings of the Committee are normally held at United Nations Headquarters. These are important connexions with the Organization, and they ensure that the bulk of the expenses of the Committee, which will be for servicing meetings and for the secretariat, will be borne by the regular budget of the United Nations. Article 8, paragraph 6, of the Convention provides that "States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties". The travel and subsistence costs of members, however, are a minor fraction of the total expenses of the Committee, and the payment of part of the expenses of an organ by some means other than the regular budget of the United Nations does not prevent that body from being a United Nations organ. As regards the expenses of the Permanent Central Opium Board, the Drug Supervisory Body and the International Narcotics Control Board, there are special arrangements for the assessment of contributions from States not members of the United Nations which take part in activities concerning narcotic drugs. It may be added that in practice the members of the Committee will be paid their travel and subsistence costs from a suspense account alimented by the United Nations Working Capital Fund, as the contributions of the parties are not paid in advance of expenditure. Recognized subsidiary organs can also be financed by other means than the regular budget (e.g. UNIDO, UNRWA etc., which depend upon voluntary contributions, and UNCTAD, to which contributions are made by participating States which are not members of the United Nations). In view of all these facts, the rejection by the Third Committee of a proposal to have all the expenses of the Committee borne by the regular budget of the United Nations[9] is not significant.

8. The General Assembly rejected a proposal that it should itself elect the members of the Committee[10] and provided in article 8 of the Convention that the members should be "elected by States Parties from among their nationals". This does not prevent the Committee from being a United Nations organ. Two members of the Drug Supervisory Body were appointed by the World Health Organization, the International Bureau for Declarations of Death is appointed by the Secretary-General, and the Appeals Committee under the Protocol of 1953 is appointed by the President of the International Court of Justice or the Secretary-General; thus the status of United Nations organs does not require any particular mode of election. The same is true of ordinary subsidiary organs. Thus, for example, under Assembly resolution 1995 (XIX) of 30 December 1964, the Trade and Development Board is elected by UNCTAD, and the membership of other subsidiary organs has been left to be decided by the President of the Assembly (e.g. the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States) or by the Secretary-General (e.g. the Tribunals for Libya and Eritrea).

9. What has been said above concerning the Committee applies with equal force to *ad hoc* conciliation commissions established under article 12 of the Convention. Those commissions, like the Committee itself, are part of the machinery for the execution of the Convention and for the settlement of disputes about its application and interpretation; and the Convention aims at applying principles of the Charter. The secretariat of the

[9] *Ibid.*, paras. 109 and 110 (*f*) (i).

[10] *Ibid.*, paras. 104 (*c*) and 110 (*a*) (vi).

Committee, provided by the Secretary-General, also serves commissions (article 12, paragraph 5), and their meetings "shall normally be held at United Nations Headquarters ..." (article 12, paragraph 4), with the result that the bulk of the expenses of commissions will be borne by the United Nations. The facts that commissions have judicial or quasi-judicial functions, that members are appointed by the Chairman of the Committee, and that the expenses of their members are to be shared by the parties to the dispute do not prevent them from being United Nations organs.

10. Members of the Committee and members of commissions serve "in their personal capacity" (article 8, paragraph 1 and article 12, paragraph 2), and are therefore not representatives of Governments. It follows that they have the same status, privileges and immunities as those of members of other United Nations organs who serve in a personal capacity, that is, those of experts on mission.

15 September 1969

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4. REPRESENTATION OF MEMBER STATES ON ONE OR MORE OF THE ORGANS OF THE UNITED NATIONS BY THEIR PERMANENT REPRESENTATIVES TO THE ORGANIZATION —REQUIREMENT OF A SPECIFIC AUTHORIZATION TO THAT EFFECT

Letter to the Permanent Representative of a Member State

I have the honour to refer to your inquiry concerning the question of representation of Member States on various organs of the United Nations by their permanent representatives to the Organization.

In this regard, I invite your attention to General Assembly resolution 257 (III) of 3 December 1948 on the Permanent Missions to the United Nations and, in particular, its operative paragraphs 1 and 4 containing the following recommendations:

> "1. That credentials of the permanent representatives shall be issued either by the Head of State or by the Head of the Government or by the Minister of Foreign Affairs, and shall be transmitted to the Secretary-General;
>
> "...
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> "4. That the Member States desiring their permanent representatives to represent them on one or more of the organs of the United Nations should specify the organs in the credentials transmitted to the Secretary-General."

The permanent representatives of more than two thirds of the Member States at present accredited to the Organization have been authorized in their credentials to represent their Governments in all or some of the United Nations organs, in accordance with the above-mentioned resolution.

Where such authorization was not originally conferred on a permanent representative and the Government concerned would wish to extend his credentials to this effect, it could do so at any time in a *communication addressed to the Secretary-General stating*, with reference to the original credentials, that the permanent representative *has henceforth been authorized*, in the exercise of his functions, *to represent his country in all (or in specified) organs of the United Nations.* Such communication should emanate from any of the authorities entitled to issue the credentials under paragraph 1 of the above-mentioned resolution. [11]

12 September 1969

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[11] See also *Juridical Yearbook*, 1964, p. 225.

5. Problem arising out of the simultaneous consideration by two Main Committees of the General Assembly of proposals bearing on the same question

Statement made by the Legal Counsel at the 1715th meeting of the First Committee on 9 December 1969

1. The Legal Counsel said that at the request of the representative of the Soviet Union, his opinion had been requested on the following question:

> "Is it lawful for the First Committee to adopt a political decision on an organizational matter which will become a component part of the consideration by the Fifth Committee of the same organizational matter, along with other component parts of this consideration, such as the request which initiated this organizational matter and the report of the Secretary-General on financial implications?"

2. He understood that the "political decision" referred to in this question was a decision to be taken by the First Committee whether to recommend that the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction should hold one of its sessions in Geneva.

3. The issue arose because two Main Committees, the First and the Fifth, were simultaneously considering proposals bearing on this question. The Fifth Committee under agenda item 76 on the "Pattern of Conferences" was considering the general question of which United Nations organs might meet in Geneva; while the First Committee under agenda item 32 was considering the specific question of the place of meeting of a session of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction. Each was acting within its own competence and neither was legally precluded from adopting recommendations on the matter. Should there be a conflict between the recommendations of the two Main Committees, this conflict would be resolved by the General Assembly itself, which alone was competent to take the final decision on the matter.

4. It was likewise within the competence of one Main Committee to make recommendations to another on a matter, aspects of which were being dealt with by each Committee. It was, of course, within the competence of the Committee to whom the recommendation was made to decide what weight it would give to such recommendations in making its own recommendation to the General Assembly. And it was, of course, the General Assembly itself which must make the final decision, should differences of views persist.

5. The question put by the representative of the Soviet Union brought out the fact that the Fifth Committee was dealing on a broader basis with a question of principle relating to an organizational matter—the pattern of conferences—while the First Committee was dealing with a possible exception to that principle. United Nations practice, however, made it clear that Committees are competent to recommend such exceptions, and the General Assembly, acting within its rules of procedure, is competent to decide to make such exceptions.

6. Question whether it is proper for the General Assembly or its Main Committees to direct that statements made be deleted from the records

Note to the Chairman of the Third Committee

1. At the 1714th meeting of the Third Committee, on 25 November 1969, the question was raised of expunging certain statements from the summary records of the Committee. [12]

2. Under rule 60 of the rules of procedure of the General Assembly, the responsibility for preparing records is vested in the Secretariat. There is no provision in those rules which would permit any exception to the general principle that all statements shall be properly recorded in the records. The basic legal position, therefore, is that deletion of statements from the records is not a matter lying properly within the competence of a Committee. The rules exist to bring order to the proceedings, and to protect the rights of all, including the minority.

3. This basic position regarding deletion of statements from the records is supported by the precedents, except for one case.

4. The question of the deletion of statements from the records has arisen on a few occasions in the past in the General Assembly and its Main Committees. One of them occurred in the Third Committee itself at its 398th meeting on 22 January 1952. On that occasion the issue arose of expunging from the records a statement made by one representative, and a reply by another, on an issue which was not before the Committee and which the Chairman ruled to be out of order. The Chairman nevertheless ruled—and her ruling was not challenged—that both statements should appear in the official records. The principle behind this ruling was summed up at the meeting in question by the representative of the USSR who, speaking in support of the Chairman's ruling, said:

> "The official records should reproduce accurately, truly and impartially all that occurred at meetings. The record could not be arbitrarily distorted at the request of any delegation; that would amount to falsification." [13]

5. The only instance where the foregoing principles have been departed from occurred in the Fifth Committee, at its 1087th meeting on 5 November 1965. On that occasion, the Committee voted by 39 votes to 16 with 16 abstentions to expunge from the records a statement made at the previous meeting by a representative who had been ruled out of order by the Chairman for seeking to discuss an issue not germane to the item before the Committee. [14] However, bad precedents are to be departed from and not followed. The practice of the plenary, which surely must guide the Committees, is to the contrary of this precedent.

6. At the 1034th plenary meeting, on 11 October 1961, the representative of Liberia proposed that a statement made by another representative in the general debate should be deleted from the record. At the following meeting, on the same day, and after considerable discussion, the representative of Liberia withdrew his proposal. In so doing, he referred to another of the basic principles involved. He said:

> "Many of the African representatives have appealed to us to withdraw our motion. We do not do so on account of South Africa but on account of the principle laid down in the Declaration

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[12] *Official Records of the General Assembly, Twenty-fourth Session, Third Committee*, 1714th meeting, para. 23.

[13] *Official Records of the General Assembly, Sixth Session, Third Committee*, 398th meeting, para. 22.

[14] *Ibid., Twentieth Session, Fifth Committee*, 1087th meeting, paras. 1-4.

of Human Rights that each Member has the right to say what he likes and to write what he likes—although South Africa has violated every clause in that Declaration." [15]

7. Principle and precedent therefore strongly support the conclusion that the records must faithfully reflect what was said, and that it is not proper for a Committee to direct that statements made be excluded.

26 November 1969

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7. Question whether a statement made in response to an invitation of the Second Committee of the General Assembly by the Chairman of the Commission on International Development set up by the International Bank for Reconstruction and Development can be considered as one of a private character

Opinion of the Legal Counsel submitted in response to a request made at the 1265th meeting of the Second Committee [16]

1. At its 1265th meeting on 3 November 1969, the Second Committee of the General Assembly decided to request a legal opinion on the following question:

> Can it be considered that a statement made in the capacity of "Chairman of the Commission on International Development set up by the International Bank for Reconstruction and Development" will mean that a United Nations platform is being given to a private person?

The present opinion is confined solely to the question which has been posed by the Committee and does not deal with aspects not strictly necessary for an answer to it.

2. The Second Committee had previously decided without objection to invite Mr. Lester Pearson, Chairman of the Commission on International Development, to participate in its work [1264th meeting held on 24 October 1969]. Subsequently, in reply to an inquiry from the representative of the Union of Soviet Socialist Republics, the Chairman affirmed that Mr. Pearson had been invited in his capacity "as Chairman of the Commission on International Development, and not as an individual" [1265th meeting].

3. The Commission on International Development was formed by Mr. Pearson at the invitation of the International Bank for Reconstruction and Development issued through its President. While working independently, the Commission was financed by the World Bank. Its task was to conduct a thorough review of the recent history of international co-operation for development, with a view to submitting conclusions and recommendations covering such co-operation over the next two decades. In carrying out its functions, regional meetings were held in Latin America, Africa, Asia and the Middle East, during which the views of some seventy Governments of developing countries were presented. The Chairman also had discussions with a number of Governments of developed countries, and with United Nations agencies and other international organizations. In addition, he attended international meetings which provided an opportunity to talk with business and financial leaders.

4. The report of the Commission, as requested by the Bank, was submitted to the President of the Bank on 15 September 1969, in time to be available to the Annual Meeting of the Bank's Board of Governors in October 1969. In its *Preface* the Commission particularly expressed the hope that its report would be of some assistance to United Nations discussions now being held in preparation for the Second Development Decade.

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[15] *Ibid., Sixteenth Session, Plenary meetings*, 1034th meeting, para. 35.

[16] Document A/C.2/L.1067.

5. It is clear from this brief review of the work of the Commission, that the functions which the Commission and its Chairman performed could have been carried out directly by the Bank through its own staff had it chosen to do so. The Bank wished, however, to have an independent appraisal of development assistance by an international group of "stature and experience". Its study was not intended to be of a private, but of a public, character, to be utilized by the Bank. It was also hoped that it would be useful to the United Nations. In fact, from references made to the Commission's Report by many delegations in the Second Committee, it appears that the Committee is interested in that Report.

6. Thus the Commission performed functions of an official character at the initiative, and with the financial support, of the World Bank. As made clear by the invitation extended by the Second Committee and by the statement of the Chairman of that Committee, Mr. Pearson has been invited because of his status as Chairman of the Commission and because of his role in the preparation and presentation of the Commission's report. Consequently, his statement made in the Second Committee in response to this invitation cannot properly be considered as one having a private character.

7. In view of the foregoing, the question set forth in paragraph 1 above must be answered in the negative.

5 November 1969

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8. Eligibility for technical assistance under United Nations programmes of an inter-governmental organization composed of three Member States of the United Nations

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

1. This is with reference to the memorandum you sent to us concerning the request for assistance submitted to UNIDO by the Regional Co-operation for Development which, as we understand it, is an inter-governmental organization established by Iran, Pakistan and Turkey.

2. The question which appears to be involved from the legal point of view is whether an intergovernmental organization as distinguished from its member Governments may request and receive assistance under United Nations programmes. In our opinion, a request submitted by an intergovernmental organization for assistance could be considered: (*a*) if the request is made on behalf of the member Governments who themselves are entitled to such assistance and the Governments authorize such a request and (*b*) if the member Governments agree with the United Nations body responsible for providing the assistance on the arrangements, including the question of the applicable agreements, that are to govern the provision of such assistance. Should the arrangements call for undertakings to be given by the intergovernmental organization, it would be necessary to obtain the Governments' agreement that these undertakings would be performed if not by the intergovernmental organization, by the Governments themselves.

25 August 1969

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9. Question of applicability to psychotropic substances of the Single Convention on Narcotic Drugs, 1961 [17, 18]

Opinion prepared for the Commission on Narcotic Drugs [19]

The power of the Commission to place substances under provisional control is not unlimited; it is not just any substance which can be placed under provisional control. In particular, it is evident that a substance cannot be placed under provisional control if there is reason to consider that it is outside the scope of the [1961] Convention. Therefore the draft resolution, [20] though it proposes only provisional and not final control, nevertheless raises the question whether in fact the amphetamines are within the scope of the Convention. If the answer is in the affirmative, there can be no legal objection to the adoption of the draft resolution; but if the answer is in the negative, the adoption of the draft resolution is outside the competence of the Commission.

Article 3 of the 1961 Convention lays down the criteria for the inclusion of a substance in Schedule I, whose measures of control are proposed to be applied provisionally to six substances by the draft resolution. The criterion is that "the substance is liable to similar abuse and productive of similar ill effects as the drugs in Schedule I".

In accordance with this criterion, WHO must first make a finding, and then, if the finding is affirmative, the question is brought before the Commission for decision. In connexion both with the finding and decision, it is necessary to bring to bear any appropriate materials bearing on interpretation of the criterion.

The criterion is one of similarity in respect to liability to abuse and to ill effects. But there are widely varying possible degrees of similarity, and the question arises how similar a substance must be in order to be within the scope of the Convention. As this question is not clarified by the language of the Convention, the history of its drafting must be taken into account. It is not enough, as a basis for a finding or a decision, that there should be some degree of similarity as regards liability to abuse and ill effects; there must be the degree of similarity contemplated by the authors of the 1961 Convention.

The question of the degree of similarity is an important one, because, depending upon how broadly the criterion is applied, the scope of the Convention, and hence the onerousness of the obligations of the Parties, may be enormously increased. If one substance with a relatively small degree of similarity is added to a schedule, then it would follow logically that other substances having the same limited degree of similarity should also be added, and the process might continue until the responsibilities of the Parties, and of the international organs that administer the Convention, were transformed out of all proportion to anything that was envisaged by the authors, or by States when they ratified or acceded.

During the drafting of the 1961 Convention in the Commission and in the 1961 Conference, all delegates had in mind the existence of three types of substances having some similarly to the drugs about whose inclusion in the scope of the Convention there was no

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

[18] See also *Juridical Yearbook*, 1966, p. 244.

[19] Also reproduced in the report of the twenty-third session of the Commission on Narcotic Drugs (*Official Records of the Economic and Social Council, Forty-sixth Session*, document E/4606/Rev.1).

[20] Moved by the delegation of Sweden and asking that the Commission decide, according to article 3, subparagraph 3 (ii) of the 1961 Convention, that pending its decision as provided in subparagraph (iii) of the same paragraph, the Parties shall apply provisionally to the following substances: Amphetamine, Dexamphetamine, Metamphetamine, Methylphenidate, Phenmetrazine and Pipradol—all measures of control applicable to drugs in Schedule I of the said Convention (document E/CN.7/L.304).

doubt. These three types of substances were amphetamines, having a degree of similarity to cocaine, and barbiturates and tranquillizers, having a degree of similarity to morphine. The discussions relating to these substances are important in the present connexion as showing the understanding of the draftsmen in regard to the degree of similarity which would be required under the criterion established in article 3 of the Convention.

When we look at the reports of the Narcotics Commission over the years when the 1961 Convention was being drafted, we find, first, that in 1955 the Commission rejected a draft resolution proposing to place amphetamines under international narcotics control, and that it stated in its report that control measures at the national level would be sufficient. [21]

In 1956 the Commission again returned to the question of amphetamines, and referred in its report to its 1955 decision rejecting international control. At the same time it adopted a resolution recommending only that Governments should provide adequate national control measures. [22]

In 1957 the Commission considered barbiturates and tranquillizers, but took no steps to bring them within the scope of the 1961 Convention; it only adopted two resolutions relating to national measures of control. [23] In 1958 the Commission completed its work on the drafting of the 1961 Convention, but thereafter in its reports for 1959 to 1962 repeated its views that barbiturates and tranquillizers did not fall within the scope of the narcotics treaties, and that effective national control measures would be sufficient. [24]

At the outset of the 1961 Conference which adopted the Single Convention it was therefore the general understanding that the Convention did not cover amphetamines, barbiturates and tranquillizers. This understanding was voiced by officials of the Conference and by delegations. For example, both the Executive Secretary of the Conference and the Chairman of the Technical Committee explained to that Committee, without any contrary opinion being expressed, that it would not be within the Committee's terms of reference to include barbiturates and tranquillizers in the Schedules which were then being prepared.

The most illuminating discussion, however, occurred in plenary in the closing days of the Conference. The plenary then considered a draft resolution on control of barbiturates, which was amended to cover amphetamines and tranquillizers as well. [25] The resolution had two operative paragraphs, the first recommending national measures of control, and the second recommending that the United Nations and WHO should examine the necessity and possibility of adopting adequate measures for the international control of the substances. The wording of the draft resolution itself showed that the substances were not considered as being within the scope of the 1961 Convention, as there would have been no point in examining the necessity and possibility of adopting measures of international control if the Convention were considered applicable. One of the sponsors of the draft also explained that he was not proposing the inclusion of any provision in the Convention itself, but only a resolution for inclusion in the Final Act. [26]

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[21] *Official Records of the Economic and Social Council, Twentieth Session, Supplement No. 8* (E/2768/Rev.1), para. 154.

[22] *Ibid., Twenty-second Session* (E/2891), paras. 324 and 328.

[23] See *Official Records of the Economic and Social Council, Twenty-fourth Session, Supplement No. 10* (E/3010/Rev. 1), p. 49.

[24] See for example *ibid., Thirty-fourth Session, Supplement No. 9* (E/3648), pp. 30-31.

[25] United Nations Conference for the Adoption of a Single Convention on Narcotic Drugs, *Official Records*, Vol. II, p. 295, E/CONF.34/L.38 and Corr.1.

[26] *Ibid.*, Vol. I, 40th meeting, p. 200.

The question of the competence of the Conference to consider the proposal was raised. The President said that it would have been out of order if it had been made in connexion with the Convention. This statement was not challenged. But he went on to say that, as what was involved was a draft resolution, the Conference was competent to consider recommendations which were cognate to the general subject with which it was dealing. [27] The President's view therefore was that while amphetamines, barbiturates and tranquillizers were cognate to the general subject and could hence be dealt with by a resolution, they could not have been dealt with by an amendment to the Convention. After further discussion, the draft resolution was voted on, but failed to obtain the necessary two-thirds majority.

It therefore appears that there was an understanding at all stages of the drafting of the 1961 Convention that it was not applicable to amphetamines, barbiturates and tranquillizers. This understanding must be taken into account in determining the degree of similarity to drugs in Schedule I which would be required if those types of substances are to be placed under the international control of the Convention. It results that there would be serious legal doubts regarding an affirmative decision that the required degree of similarity is present. These doubts would not be practically important if all the Parties were agreed on the matter, but that does not appear to be the case.

If the substances in question are outside the scope of the Convention and could not legally be placed in Schedule I, then they should not be placed under provisional control pursuant to article 3, sub-paragraph 3 (*ii*). It follows that it would not be legally correct for the Commission to adopt the draft resolution before it. From the legal point of view, the best method of dealing with the very serious situation, which has aroused the concern of the author of the draft and many other delegations as well, would be to advance as rapidly as possible toward the adoption of a new international instrument.

20 January 1969

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10. Establishment of United Nations information centres—Question whether the agreement of the Governments concerned is required

Memorandum to the Secretary-General

1. You have asked our views on the establishment of a United Nations information centre in South Africa pursuant to resolution 2439 (XXIII).

2. I have examined relevant resolutions and practice in this regard and it seems clearly established that an information centre can only be set up at the request or with the consent of the Government concerned. General Assembly resolution 1405 (XIV) of 1 December 1959 on public information activities of the United Nations "Requests the Secretary-General, *with the agreement of the Governments concerned*, to establish such new information centres as appear necessary and practicable, particularly in those regions where mass information media are less developed ..." (italics added).

3. Likewise, General Assembly resolution 1410 (XIV) of 5 December 1959 concerning dissemination of information on the United Nations and on the International Trusteeship System in Trust Territories noted a report of the Secretary-General which stated that "new information centres may be established only after the host State concerned

[27] *Ibid.*, p. 199.

has requested or agreed to the establishment of a United Nations information centre and after the Assembly has provided the necessary funds ..." [28]

4. While resolution 2439 (XXIII) requesting the Secretary-General "to establish a United Nations Information Centre in South Africa" does not refer to the question of consent, the same principles and practices should apply.

29 January 1969

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11. Legal issues raised in connexion with a proposal under which resort to future General Assembly resolutions concerning unforeseen and extraordinary expenses would be subject to a certification by the Secretary-General that the proposed expenditure cannot be deferred "without serious detriment to the United Nations"—Proposed amendment to rule 3.8 of the Financial Regulations

Memorandum to the Director of the Budget Division, Office of the Controller

1. Our opinion has been requested on three questions arising from the report of the Advisory Committee on Administrative and Budgetary Questions to the General Assembly at its twenty-third session [29] entitled "Unforeseen and extraordinary expenses". Two of these questions (Questions A and B) relate to paragraph 29 (*b*) of that report and the third one (Question C) to a proposed amendment of Financial Regulation 3.8.

Questions A and B

2. In order to summarize the context in which we understand the first two questions arise, we shall first set out briefly what we understand to be their common origin.

Paragraph 29 (b) *of the Advisory Committee's report—Certification as to "serious detriment to the United Nations"*

3. In each of the first two questions to be considered, specific reference is made to a proposal contained in paragraph 29 (*b*) of the Advisory Committee's report, under which one of the conditions to be met before resort may be had to future annual resolutions of the General Assembly concerning unforeseen expenses (in order to finance unforeseen expenditure which cannot be met within existing appropriations) would be that the Secretary-General should certify that the proposed expenditure is in the nature of an emergency, and therefore cannot be deferred until the next financial year "without serious detriment to the United Nations". This provision is among those annexed to the draft resolution proposed by the Advisory Committee, and which, under operative paragraph one of that draft resolution, would henceforward govern "the matters dealt with therein" (see Annex I of the report).

4. The effect of the proposed certification as to "serious detriment to the United Nations" would be to rebut a presumption set forth in paragraph 28 of the Advisory Committee's report that an unforeseen expenditure which cannot be financed from within existing appropriations "shall be deferred until provision therefor can be made by the General Assembly in the normal manner for the next financial year".

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[28] *Official Records of the Trusteeship Council, Twenty-fourth Session, Annexes*, agenda item 13, document T/1467.

[29] *Official Records of the General Assembly, Twenty-third Session, Annexes, agenda item 74*, document A/7336.

5. It would appear, therefore, that this new provision would preclude, within a current financial year, unforeseen expenses in respect of which the Secretary-General did not feel able to provide the required certification. In the past, such expenses were precluded if the Secretary-General did not feel able to certify that provision therefor could be made in the annual General Assembly resolution relating to unforeseen and extraordinary expenses (see Financial Regulation 13.2).

6. It is understood that the proposed determination by the Secretary General as to whether or not the deferral of a particular expenditure would involve "serious detriment to the United Nations" has given rise to the following two questions upon which a legal opinion has been sought, namely:

(A) Would the proposed provision concerning the certification by the Secretary General as to "serious detriment to the United Nations" curtail the "sovereign powers of Member States in respect of work programmes"?

(B) Would this determination as to "serious detriment to the United Nations" introduce a political concept which would be "alien to the spirit of the Financial Regulations"?

Would the proposed provision concerning the certification curtail the powers of Member States in respect of work programmes?

7. It is assumed that this reference to "the sovereign powers of Member States in respect of work programmes" relates to those powers exercised by Member States through the instrumentality of competent United Nations organs and bodies charged with responsibilities for such work programmes. For it is primarily through the latter, rather than in their separate sovereign capacities, that Member States determine and control United Nations work programmes, and each such organ or body is vested with such powers as are provided for in its constituent instruments. In our opinion, these legal powers (which in the case of organs and bodies other than the General Assembly do not now include the power to commit funds within the United Nations budget beyond those which have been appropriated by the General Assembly) would not in themselves be diminished by the adoption of the formula here referred to.

8. It may be added, moreover, that the powers of Member States in respect of work programmes include those which they exercise as Members of the General Assembly, which latter, under the provisions of Article 17 of the Charter, is required to "consider and approve the budget of the Organization" and to apportion the expenses of the Organization between its Members. Accordingly, notwithstanding the adoption of the Advisory Committee's proposals, it would still remain within the power of Member States to determine the financing of the Organization's work programmes, in respect of both foreseen and unforeseen expenses, through such collective decisions as may in the future be adopted by the General Assembly.

9. The ability of a United Nations organ or body such as those referred to above to give urgent effect to its wishes may sometimes depend, not only on the limits of its own powers, but to some extent also on the scope of the authority delegated to the Secretary-General by a different or higher organ. It has, for example, been the practice of the General Assembly in its annual resolution concerning unforeseen and extraordinary expenses to authorize the Secretary General himself, subject to certain conditions, to enter into commitments to meet such expenses in excess of existing appropriations. By extending or reducing the scope of this delegated authority, the General Assembly may thereby be extending or reducing the ability of the Secretary General to secure the financing of certain

types of activity which may from time to time be desired, *inter alia,* by one of the United Nations organs or bodies concerned with work programmes.

10. Nevertheless, even if such a change affects the possibility of supplementing the power of a particular organ through the exercise by the Secretary General of powers delegated independently to him, this would not alter the legal powers of the former. Thus, if the certification proposed by the Advisory Committee were in fact to result in additional restrictions as to what can be done urgently in certain circumstances, this would follow from a change in the authority delegated to the Secretary-General in relation to unforeseen expenses in general, and would not be a curtailment of the pre-existing legal powers of Member States or of United Nations organs or bodies having responsibility for work programmes.

Would the determination as to "serious detriment to the United Nations" introduce a political concept alien to the spirit of the Financial Regulations?

11. In our opinion, this is not a strictly legal question. The legal power of the General Assembly to include or exclude particular provisions in, or from, the Financial Regulations, is governed by the terms of the Charter, and, in our view, there is no legal basis for declaring that a particular concept may not be included only by reason of its being allegedly "alien to the spirit of the Financial Regulations". Moreover, this would hardly seem to be a quality susceptible of legal definition.

12. The General Assembly is not precluded by the Charter from delegating authority in relation to the control of various aspects of the Organization's finances (subject always to the continued overriding authority of the General Assembly under Article 17 of the Charter), and such delegations have in fact been made in the past. Accordingly, even if it should be the case that a determination by the Secretary-General as to serious detriment to the United Nations might involve a "political concept", it would, in our opinion, be for the General Assembly alone to decide whether or not to empower the Secretary-General to make this determination, and subject to what conditions, if any (it being understood that the provisions of the Charter and relevant decisions of United Nations principal organs would, in any event, govern the exercise of any such power delegated).

Question C

Would the appropriating powers of the General Assembly be affected by an amendment to Financial Regulation 3.8 seeking to replace the words "whenever necessary" by "... if required for additional expenses authorized under the terms of the resolution of the General Assembly relating to unforeseen emergency expenses."?

13. The existing Financial Regulation 3.8 reads as follows: "Supplementary estimates may be submitted by the Secretary-General whenever necessary".

14. The appropriating powers of the General Assembly, which are derived from Article 17 of the Charter, are not themselves impaired by the adoption of regulations and procedures to be followed in the administration of the Organization's finances, such as the proposed amendment to Financial Regulation 3.8. By adopting a provision such as this, the General Assembly issues a directive which, until it is cancelled or superseded by a further decision of the General Assembly, remains binding on the Secretary-General and on all United Nations organs. A similar consequence results from other Financial Regulations which have been adopted by the General Assembly, which may limit some of the options available in administering the Organization's finances for so long as the General Assembly chooses to retain such limitations, but which do not thereby limit the continuing power of the General Assembly to rescind or amend any regulation emanating from itself.

15. In the event that the proposed amendment to Financial Regulation 3.8 should result in fewer supplementary estimates being submitted to the General Assembly, and consequently in a less frequent exercise by the latter of its appropriating power, then it could be said that the General Assembly would have regulated, to this extent, the timing and manner in which it shall exercise its appropriating powers. The powers in question, however, would remain intact.

16. The procedural limitation resulting from the proposed amendment to Financial Regulation 3.8 would also not affect the legal powers of the General Assembly to apportion funds if, for example, a new development occurred after the submission of the regular annual budget, concerning which the General Assembly wished to take emergency action involving additional expenditure or which might give rise to the convening of a special, or an emergency special session which, in turn, might wish to authorize additional expenditure. If, however, such an eventuality should occur following the adoption of the proposed amendment to Financial Regulation 3.8, the General Assembly might, perhaps, find it necessary to call for supplementary estimates going beyond the limits of the amended regulation, and to this extent to modify the latter, or authorize an exception thereto. Althought the General Assembly would not lack the power to do this, the possibility is mentioned in order that this procedural consequence of the proposed amendment may be taken into account.

17. For the reasons outlined above, the proposed amendment to Financial Regulation 3.8, would not, in our opinion, affect the existence or scope or efficacy of the General Assembly's powers of appropriation, and neither would it affect the continuing power of the General Assembly to regulate the manner in which these powers should be invoked, in accordance with such procedures as it may from time to time consider appropriate and in conformity with the Charter.

Conclusion

18. In the light of the foregoing, it is to be concluded, firstly, that the adoption by the General Assembly of the proposed certification procedure would not curtail the existing legal powers of Member States or of United Nations organs having responsibility for work programmes (these powers having never included the power to commit funds within the United Nations budget beyond those which have been appropriated by the General Assembly). Secondly, it would be for the General Assembly to determine, subject to the provisions of the Charter, what concepts it is appropriate to include in the Financial Regulations. Thirdly, the proposed amendment to Financial Regulation 3.8 would not affect the continued existence of the appropriating powers of the General Assembly, but would represent an exercise by the Assembly of its powers under Article 17 of the Charter to take decisions on budgetary questions.

19. If Member States, through the exercise of their sovereign powers in the General Assembly, were to accept that unforeseen and extraordinary expenses can be incurred only on occasions where deferral of those expenses would be of "serious detriment to the United Nations", it would clearly be their intention that, while such expenditures would not be entirely debarred, they would be incurred only rarely. For it is only in very exceptional circumstances that deferral of an expenditure for a few months to permit its consideration through the regular procedure by the General Assembly before funds are committed, would give rise to serious detriment to the Organization.

10 July 1969

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12. Participation in certain "closed" multilateral treaties concluded under the auspices of the League of Nations—Succession under customary international law or accession under General Assembly resolutions 1903 (XVIII) and 2021 (XX)

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

The Secretary-General of the United Nations has the honour to acknowledge the receipt of the Permanent Observers' note relating to certain multilateral treaties concluded under the auspices of the League of Nations.

In answering the question contained in the note, it is desirable first to clarify that declarations of succession on the one hand, and accession pursuant to General Assembly resolutions 1903 (XVIII) of 18 November 1963 and 2021 (XX) of 5 November 1965 on the other hand, are completely separate and independent methods of becoming parties to the treaties under discussion. A new State, to whose territory one of the treaties has been made applicable by action of the predecessor State formerly responsible for its foreign relations, can succeed to the status of party to the treaty by transmitting to the Secretary-General, as depositary, a declaration of succession signed by the Head of State or Government or Minister for Foreign Affairs of the new State. Such a declaration may be made with respect to particular named treaties, or it may be general and relate to all treaties made applicable to the territory before its independence. Both types of declaration make the new State, as from the date of independence, a party in its own right to those treaties by which the wording of the declaration indicates that it intends to recognize that it is bound. This possibility of succession is recognized under customary international law, and existed both before and after the General Assembly resolutions of 1963 and 1965.

Alternatively, any State falling into one of the categories defined in operative paragraph 4 of resolution 1903 (XVIII), which had been unable under the terms of final clauses of the treaties in question to accede to them, could, after the adoption of resolution 1903 (XVIII) and 2021 (XX), accede to any of them by depositing an instrument of accession with the Secretary-General. This possibility existed after the adoption of those resolutions whether the State was a new or an old one, and whether or not the treaty had ever previously been made applicable to its territory. Some States which had the option of making declarations of succession preferred instead the method of accession, with the result that the treaty became binding upon them only on the date of deposit of the instrument of accession or on the expiry of the prescribed delay from that date, as the case may be according to the provisions of the treaty concerned, and there was no continuity of application of the treaty.

Thus, in reply to the question posed, it follows that a declaration of succession, under the conditions described above, renders a newly independent State party to a treaty, and it is not necessary for such a State to take any additional step such as deposit of an instrument of accession. This was the case before the adoption of resolutions 1903 (XVIII) and 2021 (XX), and continues to be the case afterwards. The resolutions dealt with the question of *accession* to the treaties, while the question of *succession*, being based on customary international law, was wholly unaffected by those resolutions.

21 August 1969

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13. Convention on the Inter-governmental Maritime Consultative Organization—Deposit of an instrument of acceptance containing declarations apparently amounting to a reservation to the Convention—Practice of the Secretary-General

Note verbale *to the* Chargé d'affaires a.i. *of the Permanent Mission of a Member State*

The Secretary-General of the United Nations presents his compliments to the *Chargé d'affaires a.i.* of the Permanent Mission and has the honour to acknowledge the receipt of his note forwarding for deposit with the Secretary-General an instrument of acceptance by his Government of the Convention on the Inter-Governmental Consultative Maritime Organization, signed at Geneva on 6 March 1948.[30]

The instrument stipulates that the Government accepts the above-mentioned Convention and thereby considers itself bound by it subject to the following declarations:

> "In accepting the Convention on the Inter-Governmental Maritime Consultative Organization the Government of ... declares that any measures which she may adopt for giving encouragement or assistance to her national shipping and shipping industries (for instance, such as loan financing of national shipping companies at reasonable or even concessional rates of interest or the allocation to ... cargo ships owned or controlled by the ... Government, or the reservation of coastal trade for national shipping) and such other matter as she may adopt with the object of promoting the development of her own national shipping, are consistent with the purposes of the Inter-Governmental Maritime Consultative Organization as defined in Article 1(*b*) of the Convention. Accordingly any recommendations relating to this subject that may be adopted by the Organization will be re-examined by the Government of ... The Government of ... further expressly states that her acceptance of the above-mentioned Convention neither has nor shall have the effect of altering or modifying in any way the law on the subject in force [on her territory]."

Although the above stipulations are designated in the instrument as "declarations", their contents and, in particular, the last sentence thereof, would seem to amount to a reservation in that it could be interpreted as in some sense derogating from, or at least to a certain extent amending for the purposes of membership in the Organization of the Member State concerned, the terms of the Convention, unless it has clearly not been intended as such.

The clarification on this point appears essential, inasmuch as involved is a convention embodying a constituent instrument of an international organization and, therefore, under the recognized rules of international law recently confirmed in the Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969 (see article 20, paragraph 3),[31] a reservation to such an instrument, unless it otherwise provides, requires the acceptance of the competent organ of that organization.

The Convention in question contains no provisions regarding reservations and the Secretary-General, in accordance with the established depositary practice, does not receive for definitive deposit an instrument of acceptance of the Convention expressed subject to a reservation, but transmits the text of a reservation to the Inter-Governmental Maritime Consultative Organization for its consideration and informs the State concerned accordingly. The Secretary-General then makes his actions conform, in respect of such instrument, with the decision of the competent organ of the Organization.

It will be pertinent to recall, in this connexion, that the declarations contained in the instrument of acceptance in question are essentially similar to a declaration made by the

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[30] United Nations, *Treaty Series*, vol. 289, p. 48.

[31] Document A/CONF.39/27 and Corr.1.

Government of India in its instrument of acceptance, which was submitted for deposit with the Secretary-General on 6 January 1959. As that declaration could have been construed as a reservation, the Secretary-General declined to receive the instrument for definitive deposit and referred the matter to the Organization.

Pending the decision of the Organization, the question of the Indian reservation in its wider aspect relating to the procedure to be followed generally by the Secretary-General in relation to reservations to multilateral treaties was considered by the General Assembly at its fourteenth session. In a statement made during the debate in the Sixth Committee, [32] the representative of India explained that the Indian declaration was a declaration of policy and that it did not constitute a reservation. In its resolution 1452 (XIV) of 7 December 1959, the General Assembly, *inter alia*, noted the said statement, expressed the hope that, in the light of that statement, an appropriate solution might be reached in the Inter-Governmental Maritime Consultative Organization at an early date to regularize the position of India, and requested the Secretary-General to transmit the resolution, together with relevant records and documentation, to the Organization.

The Council of the Organization was seized with the question at its third session and on 1 March 1960 adopted resolution number C.1 (III) in which it took, *inter alia*, the following action: (*a*) took note of the statement made on behalf of India as recorded in the resolution of the General Assembly referred to above; (*b*) noted that the declaration therefore has no legal effect with regard to the interpretation of the Convention; (*c*) considered India to be a member of the Organization. As a result of that resolution, the instrument of acceptance of the Convention by the Government of India was formally deposited with the Secretary-General.

Having regard to the foregoing considerations, the Secretary-General, before proceeding with the deposit of the instrument of acceptance of the Convention by the Government of the Member State concerned, would appreciate it if that Government would clarify its position regarding the declarations contained therein, in the sense that they have been intended as declarations of policy and do not constitute a reservation. Such a clarification formally communicated to the Secretary-General by the said Government would obviate the necessity of referring the question to the Organization for its consideration and would permit the Secretary-General to receive the instrument for definitive deposit.

3 July 1969

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14. Exclusive authority of the Secretary-General as regards permission to execute the waivers of privileges and immunities required by a Member State from staff members maintaining or seeking permanent resident status in that State—Policy of the United Nations in that respect

Memorandum to the Chief of the Rules and Procedures Section, Office of Personnel

1. You have asked whether the Secretary-General's delegation of authority to the Administrator of the United Nations Development Programme (UNDP) and to the Executive Director of the United Nations Children's Fund (UNICEF) can be viewed as including authority to permit staff members to waive privileges and immunities of the United Nations. The Secretary-General's authority with respect to the Organization's privileges and immunities (of which those applicable to officials are, of course, only a part) is not essentially a personnel matter; and without an express provision on this point, no such delegation

[32] *Official Records of the General Assembly, Fourteenth Session, Sixth Committee*, 614th meeting.

could be inferred from the delegation of powers relating to administration of the Staff Regulations and Rules on appointment and selection of staff.

2. In our view, the authority has not been formally delegated and, moreover, it should not be.

3. Authority to waive privileges and immunities is vested exclusively (except for his own privileges and immunities, which the Security Council may waive) in the Secretary-General. The immigration law of the Member State concerned, in its provision requiring waivers of immunity as a condition for United Nations staff members to acquire or maintain resident status in that State, does proceed on the apparent assumption that at least some of the privileges and immunities accorded to United Nations officials as such can be waived by them personally. Nonetheless, the Charter, the Convention on the Privileges and Immunities of the United Nations[33] and the Staff Regulations make it clear that, so far as the United Nations is concerned, in its relations with staff members, privileges and immunities are not perquisites of staff members: on the contrary, they are the prerogatives of the Organization itself and are related to the Organization's functions, and it is reserved to the Secretary-General to determine when they should be waived. Accordingly, permission to staff members to execute the waivers is tantamount to a waiver of the United Nations immunity.

4. Policy on the conditions under which a staff member is permitted to waive should, in our view, be uniformly applied throughout the Organization. The policy formulated and maintained by the Secretary-General, pursuant to General Assembly expression of intention and understanding, is against appointing persons having permanent resident status in the Member State concerned as staff members in the professional category and against permitting staff members in the professional category to waive privileges and immunities as is necessary to acquire such status. Exceptions have been limited to cases where the staff member seeking permission is stateless, *de facto* or *de jure*. In the case of general service staff, the policy is to grant requests for permission to execute the waiver.

5. Notwithstanding the suggestion that geographical distribution is less important a consideration for the recruitment of professional staff for UNICEF and UNDP than for other United Nations professional staff, we do not think this would justify excluding staff of these organs from the Organization's policy in regard to the waivers. Although consideration of geographical distribution weighed heavily in the formulation of the General Assembly's position on the subject, it cannot be assumed to have been the only consideration; nor can it be said that in principle geographic distribution is irrelevant to the appointment and selection of UNICEF and UNDP professional staff.

11 July 1969

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15. Issuance of visas to members of the families of United Nations officials assigned in the United States

Letter to a private person

You may wish to have the following information on the international law basis and the established procedures for the United Nation's facilitating the entry into the United States of members of families of United Nations officials. Of course, the right to a United States visa under United States law as such is not within the purview of the United Nations.

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

Article 105, paragraph 2, of the Charter of the United Nations provides that "Representatives of the Members of the United Nations and officials of the Organization shall ... enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization".

The General Assembly, in accordance with Article 105, paragraph 3, of the Charter, proposed to the Members of the United Nations the Convention on the Privileges and Immunities of the United Nations which is considered to set forth in detail the obligations of Members under Article 105, paragraph 2, of the Charter. Under Article V, Section 18 (*d*) of the Convention, officials of the United Nations shall "be immune together with their spouses and relatives dependent on them, from immigration restrictions and alien registration".

Apart from the Charter and the Convention, the Agreement between the United Nations and the United States on the Headquarters of the United Nations [34] provides in Article IV, Section 11, that

> "The federal, State or local authorities of the United States shall not impose any impediments to transit to or from the headquarters district of: (1) representatives of Members or officials of the United Nations, or of specialized agencies as defined in Article 57, paragraph 2, of the Charter, or the families of such representatives or officials." [The requirement of reasonable evidence to establish that the persons claiming the rights granted by Section 11 come within the classes described in that section is specifically envisaged in Section 13 (*c*) of the Agreement.]

From the point of view of the United Nations, the United States statutory provision for entry of officers and employees of the United Nations (International Organizations Immunity Act, 22 USCA, section 288d (*a*); 8 USCA, section 1101 (*a*) (15) G(*iv*)) implements the United States obligations as a Member of the United Nations and as the host country for the United Nations Headquarters. The procedure followed by the United Nations for securing entry for family members of officials is as follows: The official himself completes a United Nations form entitled "Request for Visa". In making this request the staff member accepts responsibility for keeping the United Nations Office of Personnel informed of members of his family residing in the United States. On the basis of this request, the United Nations itself requests (if considered proper) the issuance of a visa.

20 February 1969

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16. Income tax exemption of United Nations staff members under the Convention on the Privileges and Immunities of the United Nations—The emoluments paid by the United Nations should not be taken into account in setting the rate of tax on non-exempt income

Memorandum to the Director of the Accounts Division, Office of the Controller

1. You raise the question whether a Member State party to the Convention on the Privileges and Immunities of the United Nations is entitled to enforce a law providing that United Nations emoluments of staff members are to be taken into account in establishing the rate of tax on their non-exempt private income. Our view is that a party to the Convention is not entitled to make use of United Nations emoluments for any tax purposes.

2. The same position has been taken by UNESCO. It may also be mentioned that in a case decided by the Court of Justice of the European Communities in December 1960 (*Bulletin for International Fiscal Documentation*, vol. XV (1961), p. 285), that Court held

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[34] *Ibid.*, vol. 11, p. 12.

that article 11 (*b*) of the Protocol on the Privileges and Immunities of the European Coal and Steel Community, [35] which *mutatis mutandis* is identical with section 18 (*b*) of the Convention on the Privileges and Immunities of the United Nations, prevented the Belgian Government from taking the official salary of an official of the Coal and Steel Community into account in setting the rate of tax on non-exempt income, It may be convenient to summarize the more important lines of reasoning in the correspondence and the judgement referred to above.

3. *Literal meaning of the Convention.* Section 18 (*b*) of the Convention on the Privileges and Immunities of the United Nations provides that "Officials of the United Nations shall be exempt from taxation on the salaries and emoluments paid to them by the United Nations". If the rate of tax on non-exempt income is set by taking account of exempt income from the United Nations, then the exempt income is part of the legal basis for the tax. If that is the case, then there is "taxation on the [United Nations] salaries and emoluments", which is forbidden by the Convention. The Court of Justice of the European Communities held that the literal meaning of the same language in the Protocol on the Privileges and Immunities of the European Coal and Steel Community prevented the exempt income from being taken into account.

4. *Purposes of the immunity: independence of the staff.* The principal purpose of the immunities which staff members enjoy under the Convention on the Privileges and Immunities of the United Nations is to protect and ensure the independent exercise of their functions with the Organization (Article 105 of the Charter). Accordingly, their official salaries are intended to be wholly exempt from national jurisdiction; but if they are taken into account in setting the tax on other income, they must be reported on in national tax returns, there are various governmental controls and administrative steps which apply to them, and a means exists by which the independence of the staff may be impaired.

5. *Purposes of the immunity: independence and efficiency of the Organization.* The United Nations must have complete freedom to select the best possible staff. If, however, official salaries are to be taken into account in setting taxes on non-exempt income, there may be a serious deterrent to persons considering service with the United Nations. This is particularly true with short-term service, where United Nations compensation is often substantial, but will be far less attractive if it has the effect of putting earnings during the rest of the year into a much higher tax bracket.

6. *Inequities among international officials.* The Court of the European Communities found that there would be a serious inequity between two officials who had the same gross salaries from a Community and the same private income from outside sources, if the Government of one of them took the Community salary into account in setting tax rates and the other did not. It may be pointed out that the effect of the judgement of the Court of the European Communities was probably to free all the officials of all the Communities (European Economic Community, Euratom, European Investment Bank as well as the Coal and Steel Community), in all the countries members of those Communities, from having their official salaries used as the basis of their private taxes. Some of those countries are the ones which have sought to take United Nations salaries into account in setting the rates on private incomes. It would be obviously unjust to United Nations officials if they—who are protected by exactly the same treaty language as officials of the Communities—suffered a tax disavantage which the latter were free from.

7. *Analogy to diplomatic immunities.* The best analogy to the immunity of United Nations salaries is that of diplomatic salaries in the receiving State; full exemption is required, though for somewhat different reasons, in both cases. No State, as far as we are aware,

[35] United Nations, *Treaty Series*, vol. 261, p. 239.

has ever tried to take the salaries of diplomats into account in setting taxes on their non-official incomes, and some of the countries that have tried to do it with United Nations officials have clear statutory provisions preventing it in the case of diplomats.

8. *False analogy to double taxation arrangements.* The attempt to take exempt United Nations salaries into account for tax purposes seems to have originated in misapplication of a device found in some double taxation agreements. But the situation under discussion, where there is on the one had a complete exemption and on the other taxable income, is completely different from that dealt with in double taxation arrangements, where both States have the undoubted legal right to tax the full income at their usual rates, but wish, for reasons of policy and fairness, to avoid doing so. The United Nations salaries are *exempt*, and it is not a matter of option for Governments bound by the Convention to decide whether to tax them or not.

9. *Conclusion.* For the foregoing reasons we are of the opinion that it is not legally correct for a party to the Convention on Privileges and Immunities to take account of United Nations salaries in establishing tax rates on non-exempt private income. We also agree with you that such a State should not ask for nor be informed about United Nations salaries and if a case arises which is not merely a low-echelon discussion between an individual staff member and subordinate officials but rather a dispute between the United Nations and a Member, we could consider submitting the matter to the General Assembly with the object of securing a request for an advisory opinion from the International Court of Justice. If the General Assembly took such action, the advisory opinion would, under section 30 of the Convention, be binding.

16 October 1969

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17. Question whether the Secretary-General could agree to a request by a Member State that its nationals be appointed only on a temporary basis and with the prior approval of the governmental authorities

Letter to the General Counsel, International Bank for Reconstruction and Development

You have asked for my reaction to the *note verbale* from the Ministry of Foreign Affairs of a Member State of the United Nations which proposes that international organizations' employment contracts with its nationals should be only on a temporary basis, and that "in the meantime" such employment contracts should receive the prior endorsement of the Ministry.

From the United Nations point of view, both these proposals run counter to the Secretary-General's authority and duty under Article 101 of the United Nations Charter relating to the appointment of staff, which provides as follows:

> "1. The staff shall be appointed by the Secretary-General under regulations established by the General Assembly.
>
> "...
>
> "3. The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible."

They also run counter to the obligations of the Member State concerned to recognize the exclusively international character of the Secretary-General's responsibility with respect to recruitment, as set out in Article 100 of the Charter which reads:

> "1. In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization....

"2. Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary General and the staff and not to seek to influence them in the discharge of their responsibilities."

The Secretary-General could not, in my opinion, agree to limit appointments of nationals of the Member State concerned to fixed-term appointments and thus exclude them as a group from other types of appointments, including career appointments, provided for in the Staff Regulations and Rules. Nor would it be proper for him to condition appointments of such nationals on their Government's approval.

This does not preclude consultations with the Government about appointments or the consideration of Government views. The United Nations has in the past for example recognized the need, particularly of developing countries, to retain within their country or their government services scarce technical and professional personnel; consideration of such interests when exercising appointment power is entirely consistent with the Charter. Similarly the Secretary-General may take into account, when considering appointments, information from Governments relating to suitability. Receipt of such information may assist him in securing the standards of efficiency, competence and integrity referred to in the Charter. We have, however, had occasion to reject requests that the Secretary-General undertake as an obligation to consult a Government on appointments, although Governments receiving assistance are by some UNDP Agreements entitled to be consulted on technical assistance experts to be assigned to projects within the country.

We have in the past also rejected requests by Governments that conditions of service for locally recruited United Nations staff conform to conditions or in some cases to "form contracts" or "forms of agreement" established under local law or by government authorities. [36]

17 July 1969

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

International Labour Office

The following memoranda concerning the interpretation of certain international labour Conventions were prepared by the International Labour Office at the request of the Governments concerned: [37]

(*a*) Memorandum on the Maternity Protection Convention (Revised), 1952 (No. 103), prepared at the request of the Government of Poland, 30 July 1969. Document G.B.180/19/2; 180th session of the Governing Body, Geneva, May-June 1970.

(*b*) Memorandum on the Guarding of Machinery Convention, 1963 (No. 119), prepared at the request of the Government of Norway, 11 December 1967. Document G.B.180/19/2; 180th session of the Governing Body, Geneva, May-June 1970.

(*c*) Memorandum on the Invalidity, Old-Age and Survivors' Benefits Convention, 1967 (No. 128), prepared at the request of the Government of Denmark, 19 September 1969. Document G.B.180/19/2; 180th session of the Governing Body, Geneva, May-June 1970.

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[36] See *Juridical Yearbook*, 1965, p. 236.

[37] These memoranda are to be found in the *Official Bulletin*, Vol. LIII, No. 4, October 1970.