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

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

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Chapter VI

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

A. Legal opinions of the Secretariat of the United Nations

(Issued or prepared by the Office of Legal Affairs)

1. ACCESS OF REPRESENTATIVES OF NON-GOVERNMENTAL ORGANIZATIONS TO MEETINGS HELD UNDER THE AUSPICES OF THE UNITED NATIONS [1]

Memorandum to the Chief, Non-Governmental Organizations Section, Economic and Social Council Secretariat

1. You have asked for our advice on a question concerning the access of representatives of non-governmental organizations to meetings held under the auspices of the United Nations.

2. As you are aware, this matter is taken care of in New York by Section 11 of the Headquarters Agreement between the United Nations and the United States.[2] This Section provides 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... (4)[3] representatives of non-governmental organizations recognized by the United Nations for the purpose of consultation under Article 71 of the Charter and (5) other persons invited to the headquarters district by the United Nations or by [a] specialized agency on official business".

3. Headquarters Agreements for the regional economic commissions in Santiago, Bangkok[4] and Addis Ababa,[5] although not referring expressly to representatives of non-governmental organizations, contain a similar provision with respect, *inter alia*, to other persons invited to the Headquarters on official business. Also, while there is no similar provisions in the agreement with Switzerland,[6] as far as we are aware no problem has arisen with respect to access to meetings at the European Headquarters of the United Nations.

4. When meetings are held away from established Headquarters, it is the Secretary-General's policy to conclude a conference agreement with the host country which includes provision for access to the meeting by all persons entitled to attend. Whenever relevant, a provision concerning representatives of non-governmental organizations is included in the conference agreement.

24 March 1971

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[1] See also *Juridical Yearbook*, 1963, p. 167.

[2] United Nations, *Treaty Series*, vol. 11, p. 11.

[3] *Ibid.*, vol. 314, p. 49, article VI.

[4] *Ibid.*, vol. 260, p. 35, article VII.

[5] *Ibid.*, vol. 317, p. 101, article IV.

[6] *Ibid.*, vol. I, p. 163.

2. Question of the display of the United Nations flag on vessels engaged in FAO/UNDP projects [7]

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

This is in reply to your letter of 3 December 1970, from which we note that it is FAO's standard practice to transfer temporarily to receiving Governments fishing vessels engaged in FAO/UNDP projects to ensure their registration under a national flag.

We agree that, in addition to the flag of registration, the United Nations flag may also be displayed on such vessels.

It seems to us that such a display of the United Nations flag is permissible under section 4 (3) of the United Nations Flag Code, which provides, among other matters, that the United Nations flag may be flown from "property occupied by any specialized agency of the United Nations".

As regards the manner of its display, we do not think it would be appropriate for the United Nations flag to be treated as a "house flag" which, as we understand it, is the flag of the steamship company operating a vessel. A "house flag" should be subordinate to the United Nations flag and to national flags.

Your letter appears to suggest that the vessels involved have two or more masts. On this assumption, and in light of the Flag Code and Regulations, we would recommend that the following procedure be observed:

— The United Nations flag should be flown from the top of the mainmast [We understand that the Red Cross flag is flown from the top of the mainmast on United States hospital ships.]

— If it is required by the country of registration that its flag be flown from the top of the mainmast, the United Nations flag should be flown from the top of the foremast; though it is our understanding that under general maritime practice the flag of registration is either flown from the gaff (a boom extending usually from the main mast) or from a flagstaff at the stern.

— If it is required when entering the territorial waters of a particular State (other than the State of registration) that the flag of that particular State be flown as a "courtesy flag" from the top of the mainmast, the United Nations flag should be flown from the top of the foremast.

In the case of a one-masted vessel, the United Nations flag should be flown from the top of the mast. However, problems may arise if it becomes necessary for the "courtesy flag" to be displayed from the top of the mast as well. If such a situation arises we would need to consider the matter further, taking into account the rigging of the particular vessel, and the feasibility of flying more than one flag from the mast top. It seems unlikely to us that the flag of registration would also need to be flown from the top of the mast; for, as mentioned above, we understand that it is usually flown either from a gaff extending from the mast or from a flagstaff at the stern.

A copy of the United Nations Flag Code and Regulations should be sent to the Project Manager of the UNDP project with the request that the flag should be displayed in accordance with the provisions of the Code and Regulations. The personnel aboard the vessels should be advised of the dignity to be accorded the flag, and the importance of their conducting themselves in a manner consistent with the vessel's display of the flag.

2 February 1971

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[7] See also *Juridical Yearbook*, 1963, p. 180.

3. LEGAL STATUS OF DISASTER RELIEF UNITS MADE AVAILABLE THROUGH THE UNITED NATIONS

Excerpt from a report of the Secretary-General[8]

A. *Status of unit in relation to the United Nations*

1. Where a disaster relief unit is "made available through the United Nations" the legal status of the unit in relation to the United Nations could either be that of a subsidiary organ of the United Nations or that of an entity separate in legal status from the United Nations.

1. *Subsidiary organ*

2. If the disaster relief unit is itself established by the United Nations, the unit would be a subsidiary organ of the United Nations. A disaster relief unit of this kind would be similar in legal status to, for example, the United Nations Force in Cyprus (UNFICYP) which was established by the Secretary-General pursuant to a recommendation of the Security Council. As was recommended by the Security Council, the composition and size of UNICYP were established by the Secretary-General in consultation with the Governments of Cyprus, Greece, Turkey and the United Kingdom of Great Britain and Northern Ireland; the Commander of UNFICYP was appointed by the Secretary-General and reports to the Secretary-General.

2. *Entity separate in legal status*

3. A disaster relief unit established by an authority other than the United Nations would not be a subsidiary organ of the United Nations but an entity separate in legal status from the United Nations. Where the United Nations is itself to be associated in the provision, administration or co-ordination of the relief services, however, a contractual or even a less formal relationship might obtain between the United Nations and the authority which established the disaster relief unit.

4. An example of a disaster relief unit of this kind was the Technical Cadre Unit of the Swedish Stand-by force for United Nations Service which was established by the Government of Sweden and was made available recently through the United Nations for service in Peru under a Tripartite Agreement, dated 29 July 1970, between the United Nations and the Governments of Peru and Sweden. The Agreement recognized that the Unit was made available by Sweden at the request of Peru, made through the United Nations, and provided for substantial co-operation between the United Nations, the Government of Peru and the Government of Sweden. Under the Agreement the members of the Technical Cadre Unit were responsible for the performance of their functions solely to the Commander of the Unit, who was appointed by the Government of Sweden.[9]

5. Where on the other hand, a unit, though made available in response to General Assembly resolution 2435 (XXIII),[10] is in fact provided to the receiving country without United Nations involvement, the United Nations would not need to be party to the arrangements with the receiving country. For example, as was noted in the Secretary-General's interim report, dated 12 May 1970, on assistance in cases of natural disasters,[11] the Govern-

[8] Document E/4994, Annex III.

[9] See United Nations, *Treaty Series*, vol. 739 and *Juridical Yearbook*, 1970, p. 36.

[10] The General Assembly in paragraph 5 of resolution 2435 (XXIII) appealed to States Members of the United Nations and members of the specialized agencies to consider offering, through the United Nations or otherwise, emergency assistance to meet natural disasters, including stand-by disaster relief units or the earmarking of similar units for service in foreign countries.

[11] E/4853 and Corr.1, p. 32.

ment of Norway informed the Secretary-General in 1967, in response to the request contained in General Assembly resolution 2034 (XX),[12] that a Surgical Disaster Unit and a Field Hygiene Team had been established for the purpose of giving emergency assistance at the request of a State Member of the United Nations. Both personnel and equipment were organized for transport by air and could be made operative at short notice. Following the 1970 disaster in Peru, a Norwegian unit served in Peru, and the United Nations was not party to the arrangements established with respect to such unit. As was also noted in the Secretary-General's interim report, there have been other national units which have served in relief work abroad under bilateral arrangements with receiving countries.

B. *Use of United Nations flag*

6. The United Nations Flag Code and Regulations regulate the use of the United Nations flag. Use of the United Nations flag by a disaster relief unit which is a subsidiary organ of the United Nations would be clearly permissible under article 4 of the United Nations Flag Code. The relevant provisions of article 4 paragraphs 1 (*a*) and 2, read as follows:

> "4. (1) The flag shall be flown:
>
> "(*a*) From all buildings, offices and other property occupied by the United Nations,
>
> "...
>
> "(2) The flag shall be used by any unit acting on behalf of the United Nations such as any Committee or Commission or other entity established by the United Nations in such circumstances not covered in this Code as may become necessary in the interests of the United Nations.
>
> "...".

7. The use of the United Nations flag by a disaster relief unit which has a legal status separate from that of the United Nations would also be permissible under paragraph 2 of article 4, should the disaster relief unit be brought into such a relationship with the United Nations, for example, a contractual relationship, that the unit could be said to be "acting on behalf of the United Nations".

C. *Agreement with receiving country*

1. *Parties to agreement*

8. Where a disaster relief unit is made available through the United Nations an agreement with respect to the unit would need to be concluded with the receiving country. If the disaster relief unit is a subsidiary organ of the United Nations, the agreement would be entered into between the United Nations and the receiving country.

9. Where the disaster relief unit has a legal status separate from that of the United Nations, the question whether the United Nations should also be a party to the agreement with the receiving country would depend on the degree to which the United Nations would be associated in the relief services. As was noted above, an agreement was concluded between the United Nations, the Government of Peru and the Government of Sweden with respect to the Technical Cadre Unit of the Swedish Stand-by Force for United Nations Service which was made available through the United Nations for service in Peru.

2. *Provisions of agreement pertaining to status of the unit International status and purpose of unit*

10. An agreement with a country receiving a disaster relief unit would need to include provisions recognizing the international status and purpose of the unit; the authority

[12] The General Assembly in paragraph 2 of resolution 2034 (XX) requested Member States, when offering emergency assistance in cases of natural disaster, to inform the Secretary-General of the type of emergency assistance they are in a position to offer.

responsible for command of the unit; and the relationship which may exist between the unit and the United Nations.

11. The Agreement with Peru on the Swedish Technical Cadre Unit, for example, provided that the "Technical Cadre Unit of the Swedish Stand-by Force for United Nations Service" would "be made available through the intermediary of the United Nations for an initial period of up to six months, to aid in reconstruction of the areas devastated in Peru as a result of the earthquake of 31 May 1970", that the members of the Unit would be responsible for the performance of their functions solely to the Commander of the Unit, who would submit reports on the operations of the Unit to the Secretary-General, through his designated representative, and as appropriate to the Government of Peru and the Government of Sweden, and that the United Nations would bear no operational responsibility in connexion with the Unit.

Use of United Nations flag and identification marks

12. As already mentioned, the use of the United Nations flag by a disaster relief unit which is a subsidiary organ of the United Nations, and use of the United Nations flag by a disaster relief unit which, though not a subsidiary organ of the United Nations, could be said to be "acting on behalf of the United Nations" is permissible.

13. The Agreement with Peru with respect to the Swedish Technical Cadre Unit, which was not a subsidiary organ of the United Nations, provided for the display of the United Nations flag by the unit and for the use by the unit of United Nations identification marks:

> "*Article 5.* In recognition that it is acting on behalf of the United Nations, the Unit is authorized to fly the United Nations flag in accordance with the United Nations Flag Code and Regulations. The Unit may display the United Nations flag on its headquarters in Peru and otherwise as may be agreed by the Secretary-General's designated representative. In addition to the United Nations flag, the Unit may also display the flags of Sweden and of Peru. The Commander and members of the Unit may wear their national uniform. Suitable United Nations identification for the Commander and members of the Unit may be authorized by the Secretary-General's designated representative. The Commander and members of the Unit will conduct themselves at all times in a manner consistent with the purposes and principles of the United Nations and with their status under this agreement."

Relationships for co-ordination of functions

14. An agreement with a receiving country would also need to provide for the co-ordination of functions, first, as between the parties to the agreement; and secondly, as between the disaster relief unit and others engaged in the relief services.

15. The Agreement with Peru with respect to the Swedish Technical Cadre Unit provided for these matters as follows: Article 1 provided that the work of the Unit would be carried out together with other work being performed in accordance with decisions of competent United Nations organs and under the general plan of the Government of Peru. Article 2 provided that for the purposes of the agreement each of the parties would designate a representative authorized to act for it on all matters covered by the agreement; and that the assignments of the Unit would be determined by agreement between the representative of the Government of Peru and the representative of the Government of Sweden, with the assistance and advice of the representative of the Secretary-General. Article 3 provided for the submission of reports by the Commander of the Unit to the Secretary-General, through his designated representative, and as appropriate to the Government of Peru and the Government of Sweden. Article 7 provided that although the United Nations would bear no financial or operational responsibility in connexion with the Unit, the Secretary-General's

designated representative might provide good offices to the Governments with respect to any matter arising in connexion with the agreement.

Privileges and immunities

16. The Convention on the Privileges and Immunities of the United Nations, of 13 February 1946, provides for the grant of privileges and immunities to the United Nations, to representatives of United Nations Member States, to officials of the United Nations, and to experts on missions for the United Nations. (The provisions pertaining to representatives of Member States are not of immediate relevance.)

17. Where the receiving country is party to the Convention, the Convention would be applicable in the case of a disaster relief unit as follows:

(*a*) The provisions of articles I, II and III of the Convention on the Privileges and Immunities of the United Nations would be applicable, automatically, to the disaster relief unit where the status of the unit is that of a subsidiary organ of the United Nations. The provisons would not apply to a unit which has a legal status separate from that of the United Nations.

[Article I of the Convention concerns the juridical personality of the United Nations, and recognizes the capacity of the United Nations to contract; to acquire and dispose of property; and to institute legal proceedings. Article II provides for, among other matters, the immunity of the United Nations, its property and assets from legal process, except when immunity is expressly waived by the United Nations; the inviolability of the premises of the United Nations, and the immunity of its property and assets from search and any other form of interference; the immunity of the United Nations from currency controls; its immunity from all direct taxes; and its exemption from customs duties, prohibitions and restrictions with respect to articles imported or exported for official use. Article II also provides for the remission or return, whenever possible, of the amount of duty or tax forming part of the price to be paid on important purchases by the United Nations. Article III deals with the privileges and immunities of the United Nations with respect to communications facilities.]

The provisions of article V and of sections 24 and 25 of article VII of the Convention would apply, automatically, irrespective of whether the disaster relief unit is a subsidiary organ of the United Nations, to officials of the United Nations assigned by the United Nations to work with the unit.

[Article V of the Convention provides for, among other matters, the immunity of United Nations officials from legal process with respect to official acts; their exemption from taxation on salaries and emoluments paid by the United Nations; their immunity from immigration restrictions and alien registration; and their privileges with respect to exchange facilities, repatriation facilities in time of international crisis, and importation of furniture and effects. Article V provides for the waiver by the Secretary-General of the immunity of an official where the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations; and requires that the United Nations co-operate with the authorities of Member States to facilitate the proper administration of justice.

[Sections 24 and 25, article VII, provide for the issuance by the United Nations to its officials of United Nations laissez-passer to be accepted as valid travel documents by the authorities of Members States, and for the grant to holders of United Nations laissez-passer of facilities for speedy travel.]

(*c*) The provisions of article VI of the Convention would apply, automatically, irrespective of whether the disaster relief unit is a subsidiary organ of the United Nations, to

those persons serving with the unit who could be regarded as "experts on missions for the United Nations".

[Article VI of the Convention provides, among other matters, that experts (other than officials within the scope of Article V of the Convention) on missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions. The article provides, in particular, for their immunity from personal arrest or detention and from seizure of baggage; their immunity from legal process with respect to acts done in the course of the performance of their mission; inviolability for all papers and documents; facilities with respect to currency or exchange restrictions; and immunities and facilities with respect to personal baggage. Article VI also makes provision for waiver by the Secretary-General of the immunity of an expert where the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations.]

(*d*) The provisions of section 26 of article VII would apply, automatically, irrespective of whether the disaster relief unit is a subsidiary organ of the United Nations, to members of the unit who, though not holders of United Nations laissez-passer, could be said to be travelling on the business of the United Nations and hold a certificate issued by the United Nations to that effect.

[Section 26 of article VII states that facilities similar to those specified in section 25 shall be accorded experts and other persons who, though not the holders of United Nations laissez-passer, have a certificate stating that they are travelling on the business of the United Nations. Section 25 provides for the grant of facilities for speedy travel to holders of United Nations laissez-passer.]

18. Where provisions of the Convention on the Privileges and Immunities of the United Nations do not apply (where, for instance, the receiving country is not party to the Convention or where, though it is party to the Convention, the disaster relief unit has a separate legal status from the United Nations and it cannot be said that the members of the unit are experts on missions for the United Nations), it would, nevertheless, be open to the receiving country to provide, for example (by specific provision to that effect in the agreement to be concluded with respect to the disaster relief unit), for the grant to the disaster relief unit and its members of privileges and immunities similar to those accorded in the Convention.

19. In the case of the Swedish Technical Cadre Unit (not a subsidiary organ of the United Nations) which served in Peru, the provisions of the Agreement with the Government of Peru (a party to the Convention on the Privileges and Immunities of the United Nations) provided for the grant of privileges and immunities to the Unit and its members. The Government agreed to assure to the Unit, its Commander and its members the conditions necessary to facilitate the performance of the functions of the Unit; to extend to the Unit the provisions of articles I, II and III of the Convention on the Privileges and Immunities of the United Nations; and to extend the provisions of article VI and section 26 of article VII of the Convention to the Commander and the members of the Unit.

3. *Other provisions of agreement*

20. An agreement with a country receiving a disaster relief unit would also need to provide, among other matters, for such questions as the particular area to which the unit is to be assigned; the particular duties to be assigned to the unit; and responsibility for costs.

21. The Agreement with the Government of Peru with respect to the Swedish Technical Cadre Unit left the question of assigned area and the question of duties to be determined by designated representatives of the Government of Peru and the Government of Sweden,

assisted by the representative of the Secretary-General. As regards responsibility for costs, the Agreement provided that the Government of Sweden would bear all costs directly pertaining to the Unit, and that the Government of Peru would bear the cost of material and of local labour. The United Nations bore no financial responsibility.

D. *Conclusions*

22. Accordingly, the formulation of certain conclusions with respect to the status of disaster relief units made available through the United Nations would now appear possible, particularly in the light of the arrangements established for the provision of the Swedish Technical Cadre Unit for services in Peru. These conclusions may be summarized as follows:

(*a*) A disaster relief unit made available through the United Nations would, depending on whether the unit is established by the United Nations or by an authority other than the United Nations, either be a subsidiary organ of the United Nations or have a legal status separate from that of the United Nations;

(*b*) The United Nations can co-operate, to a substantial degree, even in a case where a disaster relief unit has a legal status separate from that of the United Nations;

(*c*) The use of the United Nations flag by a disaster relief unit is permissible where the unit is a subsidiary organ of the United Nations; and also where the unit, though having a legal status separate from the United Nations, can in the circumstances of the case be said to be acting on behalf of the United Nations;

(*d*) An agreement needs to be concluded with the country receiving a disaster relief unit. Where the unit is a subsidiary organ of the United Nations, the agreement would be concluded between the United Nations and the Government of the receiving country. Where the unit has a legal status separate from that of the United Nations, the United Nations, if it is to be associated in the provision, administration or co-ordination of the relief services, may also be party to the agreement;

(*e*) The agreement needs to provide, among other matters, for the co-ordination of the work of the disaster relief unit with the work of other bodies engaged in the relief services; for the privileges, immunities and facilities to be accorded the disaster relief unit in the receiving country; and for the manner in which responsibility for costs is to be borne;

(*f*) As regards privileges and immunities, though provisions of the Convention on the Privileges and Immunities of the United Nations may not be applicable in a given case, it is open to the receiving country to agree to accord to the disaster relief unit and its members privileges and immunities similar to those provided for in the Convention.

23. The question of what might be done by the United Nations to facilitate the speedy conclusion of an agreement with a receiving country establishing the conditions under which a disaster relief unit would be made available is perhaps an aspect to which the Economic and Social Council and the General Assembly may wish to give some consideration, when examining the role of the United Nations in the provision of disaster relief units through the United Nations.

24. While it is clear that such conditions are matters for negotiation and agreement between the parties concerned, it may be considered whether, for the purpose of facilitating and expediting the conclusion of disaster relief units agreements, it would not be initially desirable for certain guidelines to be established for the conclusion of agreements of this kind. The guidelines may, for example, enumerate the elements it would appear desirable to include in a disaster relief unit agreement, and perhaps also propose principles in the light of which parties may make provision for such matters in their agreement. It may be of

assistance in this connexion for consideration to be given among other matters, to the provisions of the Agreement of 29 July 1970 between the United Nations, the Government of Peru and the Government of Sweden concerning the Swedish Technical Cadre Unit which served in Peru; as well as to other agreements of the United Nations under which services are rendered by international personnel within the territory of a State, such as the agreements concluded in connexion with United Nations programmes of technical assistance, assistance under the Special Fund sector of the United Nations Development Programme, assistance under the World Food Programme and in the field of peace-keeping.

13 May 1971

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4. Question of credentials and letters of appointment of observer delegations of States to United Nations organs and conferences convened under the auspices of the United Nations

Internal memorandum

1. You have asked for information concerning the question of credentials and letters of appointment of observer delegations of States to United Nations organs and conferences convened under the auspices of the United Nations.

I. *Conferences*

2. In the case of conferences, the general principle would appear to be that States invited to conferences who do not wish to attend as participants may attend officially as observers, and participate in the discussions whether or not the rules of procedure contain a provision to that effect. With respect to such observers, letters of appointment should in principle be issued. As to the authorities entitled to issue such letters of appointment, they would include, in addition to the authorities entitled to issue credentials, the permanent representative to the United Nations and possibly the ambassador at the seat of the conference. As a rule, States not invited to a conference, have no official observer status. Their representatives however might be accorded distinguished visitor treatment; in such case they would not be required to present credentials or letters of appointment.

3. The rules for the calling of international conferences of States by the Economic and Social Council are contained in General Assembly resolution 366 (IV). Rule 3 provides *inter alia* (1) that the Council shall decide what States shall be invited (2) that the Secretary-General shall send out the invitations and shall give notice to every Member of the United Nations not invited and (3) that such Member may send observers to the conference. The resolution contains no provisions on credentials or letters of appointment for either participants or observers. The rules of procedure of some conferences convened by the Economic and Social Council for example rule 59 of the rules of procedure of the Conference for the Adoption of a Single Convention on Narcotic Drugs and rule 62 of the rules of procedure of the Conference for the Adoption of a Protocol on Psychotropic substances provide that "A State which has been invited to the conference but which is not participating in it by an accredited representative may appoint an observer to it. The name of the observer shall be communicated without delay to the Executive Secretary, if possible not later than twenty-four hours after the opening of the Conference."

4. In practice, there has been several instances where States invited to a conference convened by the General Assembly or the Economic and Social Council have appointed observers to the conference, their representatives being in such case mentioned as observers

in the list of representatives or the Final Act. As far as credentials or letters of appointment are concerned however, the practice is somewhat erratic.

II. *Organs*

A. *Security Council*

5. Rule 14 of the provisional rules of procedure of the Security Council provides that "Any Member of the United Nations not a member of the Security Council and any State not a Member of the United Nations, if invited to participate in a meeting or meetings of the Security Council, shall submit credentials for the representative appointed by it for this purpose. The credentials of such a representative shall be communicated to the Secretary-General not less than twenty-four hours before the first meeting which he is invited to attend."

6. The practice with respect to credentials has not been uniform: in some cases (see for example document S/9519) the request to participate came from the Foreign Minister and stated that the representative appointed to represent his government was "accredited" in that capacity; in other instances, (see document S/10204 and 10207) the letter conveying the composition of the delegation was merely a letter of request to participate sent by the permanent representative.

B. *General Assembly*

7. The debates of the General Assembly and its Committees and subsidiary organs are normally not attended by observers and there is no rule of procedure on the matter. There has however been instances where non-member States have been invited to participate in the work of Main Committees: the Republic of Korea for example has been invited on a number of occasions to attend the debate in the First Committee and the composition of its delegation has in each case been indicated in a letter signed by the Foreign Minister.

8. The General Assembly has rarely authorized observers of States to participate in its subsidiary organs. One such authorization was given in the case of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction: by resolution 2750 C(XXV) of 17 December 1970 the Assembly decided to invite other Member States not appointed to the Committee to participate as observers and to be heard on specific points. This decision was in continuation of a decision included in the report of the First Committee on the item at the twenty-third session that "any Member State wishing to follow the work of the Sea-Bed Committee shall be entitled to accredited observer status".[13]

9. Similarly in the case of the Preparatory Committee for the United Nations Conference on Human Environment, the Assembly decided on 15 December 1969 that interested Member States not appointed to the Committee might designate representatives as accredited observers.

10. In both instances, the States concerned have submitted for their observers letters of appointment similar to those sent for representatives of members and usually signed by permanent representatives.

C. *Economic and Social Council*

11. The rules of procedure of the Council do not deal with the question of how representatives of States not members of the Council but participating in its work under Article 69 of the Charter and rules 75 and 76 of the rules of procedure are to show that they are so

[13] *Official Records of the General Assembly, Twenty-third Session, Annexes*, agenda item 26, document A/7477, para. 19.

empowered. In recent years the practice normally followed is for the permanent mission in New York or, as the case may be, in Geneva to send a letter or note verbale indicating the names of the persons who will represent the State concerned. The term "accredit" is rarely used. In these communications and in the official records of the Council, such persons are normally called observers although neither Article 69 of the Charter nor rules 75 and 76 of the rules of procedure of the Council use this word. The request submitted under rule 19 of the rules of procedure do not deal with communications by which observers are appointed.

16 June 1971

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5. Question whether meetings of a committee or sub-committee of the General Assembly with limited membership may be closed to Member States not members of the committee or sub-committee—Rule 62 of the rules of procedure of the General Assembly

Note prepared at the request of a Working Group of the Special Committee on the Rationalization of the Procedures and Organization of the General Assembly

A legal opinion has been requested on the legality of having meetings of committees and sub-committees of the General Assembly closed to some Member States. The Office of Legal Affairs has also been asked to examine the drafting history of rule 62 of the rules of procedure of the General Assembly in order to ascertain the intention of the General Assembly in providing for private meetings.

At the outset, we should like to stress that as all Members of the United Nations are, under Article 9 of the Charter, members of the General Assembly and, under rule 102 of the rules of procedure, members of the Main Committees there can be no question of a meeting of the General Assembly itself or of a Main Committee from which a Member of the United Nations could be excluded. Participation on the basis of equality in all plenary meetings of the General Assembly, in all meetings of the Main Committees and in all meetings of other bodies whose membership includes all Members of the United Nations is one of the rights and privileges of membership which, subject, of course, to the provisions of Articles 5 and 19 of the Charter, cannot be curtailed.

The present question therefore relates solely to meetings of committees and sub-committees of limited membership.

Turning first to the drafting history and application of rule 62, it may be noted that the essential provisions of the rule were contained in the original draft rules of procedure prepared by the Executive Committee of the Preparatory Commission of the United Nations which were recommended by the Preparatory Commission for adoption as provisional rules of the General Assembly.[14] The text has remained unchanged except for a consequential change in the second sentence which was made at the second session of the Assembly when the provisional rules were reviewed. Originally this second sentence had read, "Meetings of other committees and *subsidiary organs* shall also be held in public unless the bodies concerned decides otherwise" (emphasis supplied). At the second session it was decided to deal with subsidiary organs separately in a special rule (now rule 162). The term "subsidiary organs" in rule 62 was changed to "sub-committees" as it is in the present text.[15] So far

[14] Document PC/EX/A/52/Part II, rule 71.

[15] See document A/C.6/182, p. 26.

as we have thus far been able to ascertain, there was no discussion of the meaning of the words "public" and "private" either at the time of the adoption of the provisional rules or at the time that the alteration of the text was made at the second session.

However, rules of procedure of principal organs of limited membership adopted at approximately the same time also contained provisions referring to private meetings in which the meaning is unmistakable. In particular we would refer to Chapter IX of the provisional rules of procedure of the Security Council in which it is expressly provided that the Security Council shall decide whether its confidential records may be made available to other Members of the United Nations.

While the drafting history gives us little help, practice which the International Court of Justice in its latest advisory opinion has again affirmed as an appropriate method of interpretation, would seem decisive in indicating that it was the intention that organs and committees of limited membership when meeting in private could exclude representatives and members of the United Nations who were not members of the organs concerned. The normal practice, consistently followed from 1946 to the present, has been that when a committee decides to meet in private only members of the Committee and essential Secretariat members are admitted. However, the Committee, as in the case of the Rationalization Committee itself, may decide to close the meeting only to the press and the public and to allow representatives of other Member States to attend.

Turning now to the constitutional issue, it is the opinion of the Office of Legal Affairs that there is nothing in the Charter which prevents the General Assembly from authorizing committees and sub-committees of limited membership to hold meetings in private from which representatives of other members of the United Nations are excluded. Such procedure, which has the support of twenty-five years of practice, does not violate the principle of sovereign equality. This principle assures to each Member of the United Nations that it be considered eligible for appointment to such committees. But a committee of limited membership necessarily requires some difference of status so far as the work of that particular committee is concerned. A member of a committee has all rights of participation including the right to vote. Accredited observers, if authorized by the General Assembly, may be given the right to participate in the discussions, or even to submit proposals but do not have the right to vote. When there is no provision for accredited observers, a Member of the United Nations present in the meeting room does not have the right to speak unless expressly invited by the committee to make a statement. The closing of a meeting of a committee of limited membership to non-members of the committee is therefore only one of many differences and can no more be considered a violation of the principle of sovereign equality than the establishment of organs of limited membership. With respect to such organs there are Charter provisions (Articles 32 and 69) providing for a right for the Members of the United Nations to participate in the meetings of the Security Council and the Economic and Social Council on matters specifically provided for in those articles. But these provisions do not preclude the holding of closed meetings.

In conclusion, it would appear to the Office of Legal Affairs that under rule 62 of the rules of procedure of the General Assembly and in accordance with 25 years of consistent practice, committees and sub-committees of limited membership may be closed to all but members of the committee and essential Secretariat members, and that there is no provision of the Charter in conflict with these rules and practices of the Assembly. Experience over the past 25 years would, it is believed, demonstrate that in exceptional circumstances the holding of such private meetings is essential for the performance of the functions of the committees concerned.

8 July 1971

6. Request by the Council of the European Economic Community to be invited to attend the deliberations of the Second Committee of the General Assembly with observer status

Memorandum to the Secretary of the Second Committee

1. The Deputy Permanent Representative of a Member State to the United Nations, as representative of the country currently retaining the Presidency of the Council of the European Economic Community, has written on 20 October 1971 to the Chairman of the Second Committee of the General Assembly concerning a request by the Council to be invited to attend sessions of the Second Committee as an observer. After setting out considerations on which the request is based, the author of the letter asks advice on the procedure under which the Community's request could be examined by the Second Committee and obtain favourable consideration. The Chairman of the Second Committee has requested an opinion from the Legal Counsel on this request.

2. Before examining the particular request from the European Economic Community it will be useful to briefly review the practice of the General Assembly. Neither the Articles of the Charter of the United Nations nor the rules of procedure of the General Assembly contain any provision dealing with the participation of organizations such as the Community in the Assembly or its Main Committees. There are, however, three forms of participation of intergovernmental organizations which have been established.

3. The first is the participation provided in the Relationship Agreements approved by the General Assembly and concluded with the specialized agencies and the International Atomic Energy Agency.

4. Secondly, certain regional intergovernmental organizations have been accorded permanent observer status by resolutions of the General Assembly (the Organization of American States by resolution 253(III) of 16 October 1948, the League of Arab States by resolution 477(V) of 1 November 1950 and the Organization of African Unity by resolution 2011(XX) of 11 October 1965).

5. Thirdly, it has been recognized by practice that a Main Committee of the General Assembly may invite representatives of intergovernmental organizations to make statements to the Committee on a specific item with respect to which the Committee considers such statements would be useful to its work.

6. From the letter referred to in paragraph 1 above it is understood that the Community is requesting an invitation to attend sessions of the Second Committee as an observer. The Community would wish, on a practical level, that the invitation "should enable its spokesman to occasionally participate in the debate concerning items on which, as required by the Treaty of Rome,[16] it must take a Community position". The Community also wishes that "the invitation should apply to future sessions". It would appear, therefore, that the request is for a standing invitation to participate as an observer in the deliberations of a Main Committee of the General Assembly on any item on which the Community, in accordance with the Treaty of Rome, must take a position, and that the invitation should apply to future sessions as well as to the present session of the General Assembly.

7. An invitation for permanent observer status could clearly be extended to the European Economic Community by resolution of the General Assembly, as was done in the case of the OAS, the Arab League and the OAU. On the other hand, an invitation of the kind described in the previous paragraph goes well beyond existing precedents for decision

[16] United Nations, *Treaty Series*, vol. 294, p. 3.

by the Committee itself. The request if granted would mean that on each item it would be the Community, and not the Committee, which would decide whether the Community should participate in the discussion. Moreover, the request is not only for the present but also for future sessions, and even if granted only for the present session would create a precedent which could hardly be reversed at subsequent sessions. Such invitation would be scarcely distinguishable from full observer status which has only been accorded by action of the General Assembly itself. It is, therefore, the view of the Office of Legal Affairs that the present request, going beyond existing practice, would require General Assembly action. An authorization of this generality is not within the competence of the Committee.

8. It should also be noted that in at least one important aspect the present request differs significantly from other invitations given by the General Assembly to intergovernmental organizations. As the letter points out, under the Treaty of Rome, the European Economic Community has special powers and responsibilities in international economic relations. It is understood that in some instances the Community would be speaking on behalf of, or in place of, its members who are Member States of the United Nations. Thus a decision on the Community's request has important substantive aspects involving not only the Treaty of Rome but the Charter of the United Nations as well. Decisions of this importance should be passed on by the General Assembly and not finally decided at the level of a Main Committee.

9. On the other hand, if the Community does not wish action through a General Assembly resolution, its wishes on the practical level could be met through separate requests to the Committee with respect to each item on which it felt that it had a special interest, including of course those on which, in accordance with the Treaty of Rome, it considered that "it must take a Community position". The Committee could, within existing precedents, decide in each case to invite a representative of the Community to make a statement on the specific item if it considered that the item was of particular concern to the Community and that such statement would be useful to the Committee's work.

10. Before concluding, it may be noted that in the cases recalled by the author of the letter in which the Community has participated as an observer, namely, in the Economic and Social Council, UNCTAD and the Preparatory Committee for the United Nations Second Development Decade, this has been done on the basis of General Assembly or Economic and Social Council resolutions referring to intergovernmental bodies or organizations. Thus in the case of UNCTAD, the General Assembly in resolution 1995(XIX) of 30 December 1964 authorized the Trade and Development Board to make arrangements for representatives of intergovernmental bodies whose activities are relevant to its functions to participate without vote in its deliberations and in those of its subsidiary bodies. Pursuant to this resolution the rules of procedure of UNCTAD organs provide for the participation of intergovernmental bodies, and it is under these rules that the Community participates in the work of UNCTAD. In the case of the Economic and Social Council the question of participation has a long history. One need, however, cite, for example, only Council resolution 1267 B (XLIII) of 3 August 1967 by which the Council invited the Secretary-General, "where he considers it would help to further the aims and work of the Council, to propose to the Council the names of intergovernmental organizations outside the United Nations sytem that should be represented by observers at sessions of the Council". Finally, General Assembly resolution 2411 (XXIII) of 17 December 1968 on international development strategy welcomed the contribution which various intergovernmental organizations not within the United Nations system can bring to the preparation of the Second United Nations Development Decade.

11. In the light of the foregoing, the European Economic Community may be advised: (1) that the General Assembly, through the adoption of a resolution in plenary, could accord

observer status to the Community or could authorize some form of general participation in the deliberations of the Committee, (2) alternatively the Committee itself could, in response to separate requests from the Community with respect to each item on which it feels it has a special interest, decide to invite a representative of the Community to make a statement on that specific item if the Committee considered that the item was of particular concern to the Community and that such statement would be useful to the Committee's work.

15 November 1971

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7. MEANING OF THE SENTENCE "CHAIRMEN OF OTHER COMMITTEES UPON WHICH ALL MEMBERS HAVE THE RIGHT TO BE REPRESENTED AND WHICH ARE ESTABLISHED BY THE GENERAL ASSEMBLY TO MEET DURING THE SESSION SHALL BE ENTITLED TO ATTEND MEETINGS OF THE GENERAL COMMITTEE AND MAY PARTICIPATE WITHOUT VOTE IN THE DISCUSSIONS" IN RULE 38 OF THE RULES OF PROCEDURE OF THE GENERAL ASSEMBLY

Note prepared by the Secretary-General in accordance with a request made by the Chairman of the Special Committee on the Rationalization of the Procedures and Organization of the General Assembly at the 16th meeting of the Committee, on 21 May 1971[17]

1. At its third session in 1948 the General Assembly established an *Ad Hoc* Political Committee composed of all Members of the Assembly to consider and report on a number of agenda items. Although, according to the then existing rule, the General Committee comprised the President of the Assembly, the seven Vice-Presidents and the Chairmen of the six Main Committees, the Chairman of the *Ad Hoc* Political Committee actually took part in the General Committee without the right to vote.

2. The Special Committee on Methods and Procedures of the General Assembly established on 20 April 1949, in examining the rules of procedure of the Assembly, took into consideration the above-mentioned situation and decided to recommend a rule on "participation of Chairmen of *ad hoc* committees". In its report to the Assembly, the Special Committee stated:

> "During the third session of the General Assembly, the Chairman of the *Ad Hoc* Political Committee took part, without the right to vote, in the meetings of the General Committee. It is the opinion of the Special Committee that this is a desirable practice which should be confirmed in the rules of procedure. Accordingly the Special Committee recommends the addition of a new rule 34 (*a*) worded as follows:
>
> "*Rule 34* (a)
>
> "*Participation of Chairmen of* ad hoc *committees*
>
> "Chairmen of committees upon which all Members have the right to be represented, and which are established by the General Assembly to meet during the session, shall beentitled to attend meetings of the General Committee and may participate without vote in the discussions." [18]

3. When the report of the Special Committee was considered by the Sixth Committee at the fourth session of the General Assembly, the Chairman of the Special Committee explained that in recommending the addition of the new rule, the Special Committee "had wished to confirm a practice followed at the previous session of the General Assembly".[19]

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[17] Circulated as document A/AC.149/R.8.

[18] *Official Records of the General Assembly, Fourth Session, Supplement No. 12* (A/937), para. 19.

[19] *Ibid., Sixth Committee*, 146th meeting, para. 25.

4. On the recommendation of the Sixth Committee, the General Assembly adopted the new provision which became the last sentence of rule 38.[20]

5. The history of the said provision indicates that the expression "committees upon which all Members have the right to be represented" was meant to be *ad hoc* committees of the whole established by the Assembly to meet during the session.

24 May 1971

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8. Voting requirements in Main Committees of the General Assembly on proposals to amend the Charter

Note prepared at the request of the Secretary of the Second Committee

1. You have requested an opinion concerning the voting requirements in Main Committees of the General Assembly on proposals to amend the Charter.

2. We would like to point out first that when previous amendments to the Charter were considered by Main Committees (namely by the Special Political Committee at the eighteenth session and by the Sixth Committee at the twentieth session) no question concerning any special voting requirements was raised.[21]

3. While Article 108 of the United Nations Charter lays down special voting requirements for the adoption of amendments to the Charter, namely two-thirds of the members of the General Assembly, this requirement applies only to a vote in plenary where the amendments are adopted. The Main Committee's action is a recommendation to the General Assembly and is governed, as all decisions of Committees of the General Assembly (except on a question of reconsideration) by rules 126 and 127 of the rules of procedure of the Assembly in accordance with which decisions in the Committees of the General Assembly are made by a majority of the members present and voting.

4. In this connexion mention should be made of another Charter requirement concerning voting majorities, namely the provision in Article 18, paragraph 2, that decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting. It is to be noted that that requirement has always been applied only to the decisions of the General Assembly itself taken in plenary and not to decisions of Committees.

9 December 1971

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9. Question whether rule 124 of the rules of procedure of the General Assembly is applicable when a motion for deletion relating to a part of a proposal is submitted after an amendment for deletion of that same part has been rejected

Note addressed to the Secretary of the Second Committee

1. You asked us the following question: is rule 124 of the rules of procedure of the General Assembly concerning the reconsideration of proposals applicable when, after the

[20] General Assembly resolution 362(IV), Annex I, revised rule 33.

[21] Actually, the two draft resolutions recommending the adoption of amendments to Articles 23, 27 and 61 were respectively adopted in the Special Political Committee by 96 votes to 11 with 4 abstentions and by 95 votes to 11 with 4 abstentions and the draft resolution recommending the adoption of an amendment to Article 109 was adopted unanimously by the Sixth Committee (See *Official Records of the General Assembly, Eighteenth Session, Special Political Committee*, 429th meeting, paras. 47 and 48 and *Ibid., Twentieth Session, Sixth Committee*, 897th meeting, para. 23).

rejection of an amendment proposing the deletion of a paragraph in a draft resolution, a motion for division concerning the same paragraph is submitted? In our view, the answer is in the negative. Rejection of an amendment proposing the deletion of a paragraph is not the same as adoption of the paragraph: the considerations which guide a delegation when it votes on a proposal for deletion may be very different from those which motivate it when it expresses its opinion on a paragraph voted on separately.

2. In addition, if we admit that rule 124—and therefore also rule 83 which is the symmetrical provision for plenary meetings—is applicable in the situation under consideration, illogicalities may result. The following example demonstrates this particularly clearly: if in the General Assembly a draft resolution on an important question within the meaning of rule 85 is the subject of an amendment proposing the deletion of one paragraph and if that amendment does not obtain at least two thirds of the votes, the amendment is rejected. Thus 34 per cent of the Members present and voting suffices to defeat the amendment. If we admit that a motion for division concerning the same paragraph, submitted after the rejection of the amendment, falls within the scope of rule 83 concerning the reconsideration of proposals, the same 34 per cent would be allowed to prevent the motion for division from being put to a vote, the result being that a paragraph opposed by 66 per cent of the Members present and voting would be retained in the draft resolution. The application of rule 83 in such a situation would therefore be unjustifiable; in any case, the provisions of rule 91 which enable the majority to prevent a separate vote provide sufficient protection against the efforts of a minority to deprive a proposal of its substance.

3. While the effect in committees is not so great as in the General Assembly, there is still a slight difference in the voting requirements, and the considerations which delegations may take into account may be different. In any case, the considerations of principle advanced in paragraph 1 above are equally valid for rule 83 and rule 124 and, in addition, it would be illogical to interpret differently two symmetrical provisions.

8 December 1971

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10. Question whether there is any legal objection to the proposal that the Preparatory Committee for the United Nations Conference on the Human Environment establish a sub-committee to consider or prepare drafts of international legal instruments

Memorandum to the Secretary-General, United Nations Conference on the Human Environment

1. You have asked whether there is any legal objection to the proposal that the Preparatory Committee for the United Nations Conference on the Human Environment establish a sub-committee or working group to consider and/or prepare a draft or drafts of specific international legal instruments, including conventions and agreements, for possible adoption by the Stockholm Conference and signature by the States represented at that Conference.

2. The Preparatory Committee at its first session decided: "on the basis of rule 162 of the rules of procedure of the General Assembly, to be guided in the conduct of its business by the general principle that the rules of procedure of the General Assembly should apply to the Committee in so far as they were appropriate for the performance of its functions". (See A/CONF.48/PC/6, para. 6, of which the General Assembly took note in resolution 2657 (XXV) of 7 December 1970.)

Rule 162 of the rules of procedure of the General Assembly provides:

> "The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions. The rules relating to the procedure of committees of the General Assembly ..., shall apply to the procedure of any subsidiary organ, unless the General Assembly or the subsidiary organ decides otherwise."

The rules relating to the procedure of committees of the General Assembly include rule 104 which provides:

> "Each Committee may set up sub-committees, which shall elect their own officers."

3. As appears from the preceding paragraph, the Preparatory Committee is a subsidiary organ of the General Assembly. Many subsidiary organs of the General Assembly have themselves established subsidiary organs to assist them in their work.[22] That method was followed for example by the Preparatory Committee for the Twenty-fifth Anniversary of the United Nations and by the Preparatory Committee for the Second United Nations Development Decade which both prepared declarations adopted by the General Assembly at its commemorative session on 24 October 1970. Similarly the United Nations Scientific Advisory Committee which advised on the preparations for the 1963 United Nations Conference on Science and Technology for the Benefit of the Less Developed Areas was assisted, in working out the details of the preparatory work by a Scientific Advisory Panel consisting of twelve members, seven of which served as alternates for members of the Scientific and Advisory Committe while five were nominated from countries selected in such a way as to ensure a wider geographical distribution.[23] Having regard to rule 104, the General Assembly has not considered it necessary, in most instances, to confer express authority for this purpose upon its subsidiary organs. The absence of such express authorization in the resolution establishing the Preparatory Committee should not, therefore, be considered as constituting a legal bar to the subject proposal.

4. Assuming that the working group is to be established from among the Preparatory Committee's membership, it would seem advisable, in order to enhance conditions conducive to reaching agreement on conrete issues, that the group be kept relatively small (15 at most) and be composed of Government experts competent in the field. The group should be geographically balanced as a whole. Furthermore, in view of the obvious interest of a number of specialized agencies in the working group's discussions, experts designated by the agencies most directly concerned should also participate in the group. It might be preferable if discussions were conducted in closed sessions.

5. In the performance of its functions, the subsidiary organ remains under the authority of the body which established it. It receives instructions from that body should report back to it rather than communicate directly with other organs except as authorized by the parent body. Furthermore, the subsidiary organ can only discharge such functions (or part of them, as directed) as have been entrusted to the parent body itself. Since the Preparatory Committee's function is to advise the Secretary-General in the preparations for the Stockholm Conference, any working group established by it would also be assisting the Secretary-General, for example, in the preparation of a particular topic which the Preparatory Committee has approved for inclusion in the Conference agenda. The Preparatory Committee could further specify that for this purpose the working group may meet between sessions of the Committee to continue its work, as necessary.

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[22] For an extensive listing of precedents, see *Repertory of Practice of United Nations organs* and Supplements Nos. 1 and 2, under Article 22.

[23] *Official Records of the Economic and Social Council, Thirty-sixth Session, Annexes*, agenda item 15, document E/3772, para. 8.

6. Apart from the establishment of a working group, other methods have been used for the preparation of first drafts of conventions and agreements to be submitted ultimately to the General Assembly or a plenipotentiary conference:

— A government (or group of governments) has occasionally been asked, or has taken the initiative, to propose a draft treaty text which usually was then referred to some *ad hoc* committee or similar body for further consideration and review prior to being submitted to the competent United Nations organ (or referred by the latter to a plenipotentiary conference) for final consideration and adoption. For example, the Treaty banning nuclear tests in the atmosphere, in outer space and under water and the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea Bed and the Ocean Floor and in the Sub-soil thereof were joint United States/USSR initiatives channelled through the Conference of the Eighteen-Nation Committee on Disarmament.

— The United Nations Secretariat (the Office of Legal Affairs in co-operation with other interested departments) has prepared the first drafts of a number of protocols adopted by the General Assembly between 1946 and 1953, amending certain conventions concluded during the League of Nations period (on narcotic drugs, the suppression of the white slave traffic, the suppression of the circulation of obscene publications, etc.).

— The secretariats of specialized agencies have prepared drafts for a number of international conventions and agreements in their respective fields; to take a recent example the FAO secretariat has prepared the Constitution of the West Africa Rice Development Association which was adopted in 1970 by a Conference of Plenipotentiaries.

— Other intergovernmental organizations or even non-governmental organizations with special competence in particular fields have proposed draft conventions which eventually were signed and entered into force: the 1949 Geneva Conventions on the protection of victims of war for example were based on proposals of the International Red Cross.

Quite often when the subject matter of the proposed regulation was highly technical, the comptetent secretariats have been relied upon to produce drafts, while when the subject matter was predominantly political in nature or humanitarian, governments have taken the initiative. But even at the "second stage" of the drafting process (the "*ad hoc* committee" stage in which governments invariably participate and which precedes the referral of the draft to the General Assembly or other competent organ) co-operation with the competent secretariats has usually continued.

4 February 1971

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11. Question whether a Member State of the United Nations not a member of the Economic and Social Council which has been invited under Article 69 of the Charter and rule 75 of the rules of procedure of the Council to participate in the deliberations of the Council on a matter of particular concern to that Member may be a co-sponsor of a draft resolution submitted on the matter

Statement made by the Director of the General Legal Division at the 1750th meeting of the Economic and Social Council on 5 May 1971

The Director of the General Legal Division, speaking on behalf of the Legal Counsel, said that the question had been raised whether a Member State of the United Nations which was not a member of the Economic and Social Council and which had been invited under

Article 69 of the Charter and rule 75 of the rules of procedure of the Council to participate in the deliberations of the Council on a matter of particular concern to that Member, could be one of the sponsors of a draft resolution submitted on the matter.

Article 69 of the Charter did not define the meaning of participation, except to provide that the non-member of the Council was not entitled to vote. Rule 75, however, provided, *inter alia*, that any Member thus invited might submit proposals which might be put to the vote by request of any member of the Council. The word "proposal" in that rule covered draft resolutions and substantive amendments or motions, as rules 56 and 57 of the rules of procedure indicated; in the rules of procedure of the General Assembly, in fact, draft resolutions were described only by the word "proposals". It was therefore clear that a Member of the United Nations which was not a member of the Council and was participating in accordance with an invitation under rule 75 might itself submit a draft resolution. Since the non-member of the Council might itself submit a draft resolution, it was the opinion of the Office of Legal Affairs that it might join in co-sponsoring a resolution submitted by a member or members of the Council, provided, of course, that the other sponsors so agreed.[24]

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12. Interpretation of Economic and Social Council resolution 1621 A (LI) with regard to the enlargement of the Committee on Natural Resources established by the Council

Memorandum to the Secretary of the Economic and Social Council

1. We refer to your memorandum on the enlargement of the membership of the Committee on Natural Resources. The relevant provisions of Economic and Social Council resolution 1621 A (LI) of 30 July 1971 on this question are the following operative paragraphs:

> "1. *Recommends* the General Assembly to take, at its twenty-sixth session, all necessary steps to amend the Charter to ensure an early enlargement of the Council to 54 members, the additional 27 seats to be allocated in accordance with the present geographical distribution in the Council;
>
> "2. *Decides* to enlarge, in the interim period, the membership of its sessional committees and the Committee on Natural Resources to 54 members as from 1 January 1972;
>
> "3. *Requests* the General Assembly to elect, at its twenty-sixth session in addition to the 9 new members of the Council, 27 States Members of the United Nations to serve on the sessional committees of the Council in accordance with the present geographical distribution of seats in the Council."

2. The wording of operative paragraph 2 indicates that "the interim period" applies to the enlargement of both the membership of the sessional committees and the membership of the Committee on Natural Resources. Operative paragraph 2, in conjunction with operative paragraphs 1 and 3, further indicates that the interim period begins on 1 January 1972 and ends on the date on which the Council itself is enlarged by the addition of 27 members. While this period could be applied to the sessional committees which are committees of the whole membership of the Council, the same could not be said for the Committee on Natural Resources.

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[24] In the listing of co-sponsors, the names of States not members of the Economic and Social Council are accompanied by a foot-note reading as follows: "Under rule 75 of the rules of procedure of the Council" (see for example document E/L.1391/Rev.2).

3. It will be recalled that the Committee on Natural Resources was established by the Economic and Social Council as a standing committee composed of 38 members to be elected by the Council on the basis of equitable geographical distribution (Economic and Social Council resolution 1535 (XLIX) of 27 July 1970, as amended by a decision taken at the 1731st meeting of the Council on 13 November 1970). Thus, in the first place, the membership of the Committee on Natural Resources does not depend on the membership of the Council. Secondly, the members of the Committee are elected by the Council. Consequently, "the interim period" can have no application to the Committee unless, in adopting operative paragraph 2 of its resolution 1621 A (LI), it was the intention of the Council that the membership of the Committee on Natural Resources, after having been increased to 54 members, should be reconstituted at the end of the interim period. The relevant meetings records of the Council, however, do not bear out this intention.

4. The above examination leads to the conclusion that, from the legal point of view, the enlargement of the membership of the Committee on Natural Resources should not be linked to any amendment of the Charter for the enlargement of the Council itself, nor should it be tied to the request of the Council contained in operative paragraph 3 of its resolution 1621 A (LI).

30 September 1971

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13. Question whether the Committee on Crime Prevention and Control is a subsidiary organ of the Economic and Social Council

Memorandum to the Secretary of the Economic and Social Council

1. We refer to your memorandum on the question of the status of the Committee on Crime Prevention and Control.

2. Under General Assembly resolution 415 (V), an *Ad Hoc* Advisory Committee of Experts was selected by the Secretary-General from among the members nominated by each United Nations consultative group in the field of the prevention of crime and the treatment of offenders. The same resolution further stated that "the purpose of such a Committee would be to advise the Secretary-General and the Social Commission".

3. In 1965, the Secretary-General proposed that the expert technical knowledge of the *Ad Hoc* Advisory Committee of Experts on the Prevention of Crime and the Treatment of Offenders should be composed of ten members thus allowing for broader geographic representation.[25] This proposal was endorsed by the Social Commission at its sixteenth session and later approved by the Economic and Social Council in its resolution 1086 B (XXXIX) on 30 July 1965. Operative paragraph 3 of this resolution read as follows:

> "*Agrees* that the expertise of the Advisory Committee of Experts on the Prevention of Crime and the Treatment of Offenders should be made available on a continuing basis, that it should report as appropriate to the Social Commission, and that its membership should be increased from seven to ten".

4. On 21 May 1971 the Economic and Social Council, on the recommendation of the Commission for Social Development, adopted resolution 1584 (L) in which the Council decided "to enlarge from ten to fifteen the membership of the Advisory Committee of Experts on the Prevention of Crime and the Treatment of Offenders established under General Assembly resolution 415 (V), in order to provide the variety of professional expertise

[25] See *Official Records of the Economic and Social Council, Thirty-ninth Session, Supplement No. 12* (E/4061), para. 29.

needed on social defense questions spread over a wider geographical area...". The Council further decided that "the members of the Committee shall be appointed by the Economic and Social Council on the recommendation of the Secretary-General, that the Committee be renamed the Committee on Crime Prevention and Control and that it should report to the Commission for Social Development and, as appropriate on particular aspects, to the Commission on Human Rights and the Commission on Narcotic Drugs".

5. From the last mentioned resolution of the Economic and Social Council, it is clear that the renamed Committee possesses the characteristics of a subsidiary organ of the Council, since it was the Council which determined its size, appointed its members and instructed it to report to certain subsidiary organs of the Council.

6. It is, however, not entirely clear whether, by its resolution 1086 B (XXXIX) which placed the Advisory Committee on a continuing basis, increased the membership of the Advisory Committee from seven to ten and required the Advisory Committee to report to the Social Commission, the Council had already transformed the Advisory Committee into one of its subsidiary organs. Nevertheless for the purpose of the present memorandum, it suffices to conclude that under the terms of Council resolution 1584 (L), the Committee is a subsidiary organ of the Council and should be shown as a standing committee in the annex to the report of the Council.

7 October 1971

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14. Question whether a Member State of the United Nations not within the geographical scope of the Economic Commission for Asia and the Far East may be admitted to membership of the Commission

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

1. You have requested our views on the general question whether a Member State of the United Nations not in the ECAFE region may be admitted to membership of the Commission. In order to place the question in its proper perspective, we have examined the records for the last twenty-four years of both the Commission and the Economic and Social Council. The salient facts as shown by those records are given in Part I below. Part II sets out the conclusions arrived at both from the legal standpoint and in the light of past practice.

I. *Practice concerning the membership of ECAFE*

2. ECAFE was established by the Council in resolution 37 (IV) of 28 March 1947. Its terms of reference included the following provisions:

(1) that the Commission would make or sponsor such investigations and studies of economic and technological problems and development *within territories of Asia and the Far East* as the Commission deems appropriate (paragraph 1 (*b*));

(2) that the territories of Asia and the Far East referred to in paragraph 1 shall include in the first instance British North Borneo, Brunei and Sarawak, Burma, Ceylon, China, India, Indo-Chinese Federation, Hong Kong, Malayan Union and Singapore, Netherlands Indies, Philippine Republic and Siam (paragraph 2); and

(3) that the members of the Commission shall in the first instance consist of Australia, China, France, India, Netherlands, Philippine Republic, Siam, Union of Soviet

Socialist Republics, United Kingdom and United States of America, provided that any State in the area which may hereafter become a Member of the United Nations shall be thereupon admitted as a member of the Commission (paragraph 3).

Thus, of then *original* members of the Commission, six were not within the geographical scope of ECAFE.

3. In the same resolution, the Council requested the Commission to consider at its first session and prepare recommendations concerning:

"(*a*) The membership of the Commission, including the provisions to be made for associating with the work of the Commission any territory or group of territories in the area that may be proposed from time to time by the member Government responsible for the international relations of such territory or group of territories;

"(*b*) Its geographical scope;

"(*c*) Any other changes in or additions to its terms of reference which the Commission may deem necessary or desirable. The Commission shall, in this connexion, take note of all the documents before the Council and its committee and the discussions thereon."

4. At its first session in 1947 the Commission established a committee of the whole to examine the three questions referred to above. The discussion of the Committee centered on the question of associating any territory or group of territories in the area with the work of the Commission. Four proposals were submitted to the Committee: one by the United Kingdom which would grant associate membership, without voting rights, to those territories upon application on their behalf made to the Commission by the metropolitan Power responsible for the conduct of their international relations; one by India which would grant full membership to those territories upon their application to be forwarded by the metropolitan Power concerned; a third by the Soviet Union which would provide that membership of the Commission should comprise all Member countries of the United Nations in Asia and the Far East, with the exception of Turkey since that country was already a member of the Economic Commission for Europe, and that the countries of Asia and the Far East which were not Member States of the United Nations might be admitted by the Commission as consultants on questions of particular concern to them; and a fourth by the Philippines which would provide that in addition to the original membership of the Commission, there should be added any State or States in the area which might subsequently become Members of the United Nations provided: (*a*) that any of the territories within the Commission's geographical scope to be admitted to membership upon election by the Economic and Social Council on the Commission's recommendation and (*b*) that any such territories not elected for membership were to be invited by the Commission to participate in the work of the Commission in a consultative capacity.[26] After extensive discussion, the Committee finally adopted a text along the line of the United Kingdom proposal with the addition that if a territory has become responsible for its own international relations it may be admitted as an associate member of the Commission on itself presenting its application to the Commission.

5. As to the possible changes in the geographical scope of the Commission, the Committee reported that it had no recommendation to submit to the Council as no delegations had proposals to make on this subject. The Committee added, however, that:

"The delegate for Siam drew attention to the possibility that an Economic Commission for the Middle East might be established on which countries west of Iran might be represented. He was therefore of the opinion that the Commission's geographical scope should comprise all countries east of Iran."

[26] See *Official Records of the Economic and Social Council, Fifth Session, Supplement No. 6*, part II, chapter III.

6. The recommendations of the Committee of the Whole, including those concerning associate membership of ECAFE, were adopted by the Economic and Social Council in resolution 69 (V) of 31 July 1947 and incorporated in the Commission's terms of reference.

7 By resolution 105 (VI) of March 1948, the Economic and Social Council, on the recommendation of ECAFE, admitted New Zealand as a member of the Commission. New Zealand was, however not included in the geographical scope of the Commission at that time.

8. At the third session in June 1948 of the Commission, the Executive-Secretary indicated that he had received a request from the Government of Nepal for sending an observer to the session. Nepal had been informed that under the Commission's terms of reference it was not within the geographical scope of the Commission but that its request would be brought to the notice of the Chairman. The Commission, after discussion, adopted a resolution submitted by India requesting the Economic and Social Council to amend the terms of reference of the Commission by enlarging its geographical scope so as to include Nepal.[27] The preambular paragraph of this resolution read as follows:

> "Considering that the Kingdom of Nepal falls geographically within the region of Asia and the Far East and that Nepal is an important territory from the point of view of economic resources necessary for the rehabilitation of the region,"

This recommendation was adopted by the Economic and Social Council in its resolution 144 A (VII) of 2 August 1948 which amended the terms of reference of the Commission by including Nepal "amongst the territories within the scope of the Commission". At its eighth session, the Economic and Social Council further amended the terms of reference of the Commission by including Nepal as an associate member of the Commission (resolution 187 A (VIII) of 11 March 1949) and by including Korea among the territories within the geographical scope of the Commission and adding it to the list of associate members of the Commission (resolution 187 B (VIII) of 10 March 1949).

9. By the end of 1950 through independent admission (as in the case of New Zealand) or automatic admission in accordance with the terms of reference of the Commission, the members and associate members of the Commission were as follows:

(*a*) *Members*: Australia, Burma, China, France, India, Indonesia, the Netherlands, New Zealand, Pakistan, the Philippines, Thailand, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America.

(*b*) *Associate members*: Cambodia, Ceylon, Hong Kong, Korea, Laos, Malaya and British Borneo (i.e. North Borneo, Brunei, Federation of Malaya, Sarawak and Singapore), Nepal and Viet-Nam.

10. By resolution 295 B (XI) of 16 August 1950, the Economic and Social Council decided to appoint an *ad hoc* committee to undertake, in co-operation with the Secretary-General, a comprehensive review of the organization and operation of the Council and its commissions and to submit a report and recommendations thereon to the thirteenth session of the Council.

11. At its seventh session held in February/March 1951 in Lahore, ECAFE had before it a note by the Executive Secretary on the future of the Commission. In section B of this note entitled "Territorial scope and membership", the Executive Secretary stated:

> "The territorial scope of the Commission, as defined in paragraph 2 of its terms of reference, includes 'British North Borneo, Brunei and Sarawak, Burma, Ceylon, China, Hong Kong, India, Indo-Chinese Federation [now Cambodia, Laos and Viet-Nam], Korea, Federation of Malaya and Singapore, Nepal, Netherlands Indies [now Indonesia], Pakistan, Philippine Republic and Siam [now Thailand]'. The Commission may wish to consider whether it would be

[27] *Ibid., Seventh Session, Supplement No. 12*, chapter III.

desirable to include Japan in its geographical scope, in view of the close relations of this country to the territories which are now within the geographical scope of the Commission.

"The members of the Commission consisted, in the first instance, of Australia, China, France, India, the Netherlands, the Philippine Republic, Thailand, the Union of Soviet Socialist Republics, the United Kingdom and the United States of America. Of these ten full members of the Commission, six were countries outside its geographical scope. There are now fourteen full members of the Commission, Burma, Indonesia, New Zealand, Pakistan having been added to the original ten countries. Of the present members, half are countries outside the Commission's geographical scope, a situation which does not exist in other regional economic commissions. The Commission is, therefore, in the position of having among its full members seven non-regional Powers. There is no need for me to emphasize how significantly the participation of these seven non-regional Powers in the Commission's work has contributed to its accomplishments. Nor is it necessary for me to remind the Commission of the fundamental fact that this regional Commission is a subsidiary body of the Economic and Social Council and a part of the United Nations, and that the United Nations while recognizing and recommending the formation of regional bodies, has stressed the underlying fundamental principles of a world economy. The Commission's aim is not to emphasize regional grouping, not to promote regional economic autarchy, not to hinder the development of a universal multi-lateral trading system; and the Commission has always kept in mind the broader question of world economic co-operation. However, the Commission is a commission for Asia and the Far East and it has been argued, in my view not unreasonably, that when the Commission collectively reaches a decision by vote, especially on matters not directly involving countries outside the region, such a decision should in fact reflect the view of the members of the region or the majority thereof; and that a Commission decision reached because the votes of non-regional members outweigh the votes of regional members, or most of them, is anomalous and inappropriate. Yet such decisions have from time to time in fact been taken. While it may not be desirable to make any formal change in the membership of the Commission, member governments might nevertheless wish to employ devices, formal or informal, to ensure that decisions of this regional Commission accurately reflect the views of its regional members. Such devices might include abstention of non-regional members or at any rate the exercise of restraint, in voting, especially on matters predominantly concerning the region." [28]

12. After a brief discussion, this Note was referred by the Commission to its *Ad Hoc* Committee set up to consider the future of the Commission. One of the recommendations of the *Ad Hoc* Committee, which was endorsed by the Commission and included in its report to the Council was as follows:

"In effect, therefore, countries within the region, both members and associate members, have been taking their own decisions in the formulation of which the presence, co-operation and advice of countries outside the geographical scope of the Commission have been most welcome. Member governments feel, however, that the time has come when clearer recognition should be given to the principle that member countries belonging to the region should take their own decisions in the Commission on their own economic problems; and that in doing so they should take full account of the views of the associate members in the region, to be ascertained when not known by referring any specific resolution to a committee. In pursuance of this principle the member countries of the Commission not in the region would be willing, as a general rule, to refrain from using their votes in opposition to economic proposals predominantly concerning the region which had the support of a majority of the countries of the region. The Commission does not consider a more formal expression of this conclusion to be necessary and notes with satisfaction that all members are agreed on the principles which governs their co-operation." [29]

[28] Document E/CN.11/278.

[29] *Official Records of the Economic and Social Council, Thirteenth Session, Supplement No. 7* (E/1981), para. 341. This statement has been referred to as the Lahore Agreement or Lahore Convention.

13. The *ad hoc* Committee set up by the Economic and Social Council and referred to in paragraph 10 above, in its second report to the Council, made a number of recommendations concerning the organization of the regional commissions. One of these recommendations read as follows:

> "The *ad hoc* Committee is of the opinion that consideration of the organization and functions of regional subsidiary organs of the Council requires that somewhat different criteria be applied than in the case of the 'functional' commissions. By their nature and constitution, regional subsidiary organs are primarily concerned with problems affecting the region which they cover and tend to reflect the preoccupations of the countries in that region. It is therefore necessary to assess their usefulness not only from the point of view of the United Nations as a whole but also from the point of view of *the Governments in the region from which their membership is drawn.*" (Italics added.) [30]

This recommendation was approved on 18 September 1951 by the Council in paragraph 40 of its resolution 414 (XIII).

14. By a letter dated 22 February 1963 addressed to the Executive Secretary of ECAFE,[31] the Government of New Zealand, in requesting the extension of the geographical scope of ECAFE to include New Zealand, stated that the point had been reached where extension of the ECAFE region's boundaries to include New Zealand would seem to constitute a natural and logical development. The letter further stated.

> ". . . New Zealand and the countries of the ECAFE region are in close geographic proximity and share a community of interest as developing countries. The New Zealand Government has a deep and continuing concern that the area's problems of development should be solved and it wishes to co-operate as closely as possible with countries in the region in tackling that task. Moreover, unlike all the other non-regional ECAFE members except Australia, New Zealand is not and cannot be included in any of the geographical areas covered by the other United Nations Regional Commissions."

The Executive Secretary of ECAFE also received a communication from the Government of Australia dated 5 March 1963 requesting the extension of ECAFE's geographical scope to include the Commonwealth of Australia and giving reasons for its request similar to those stated by the Government of New Zealand.[32]

15. By resolution 946 (XXXVI) of 5 July 1963 the Economic and Social Council approved, *inter alia*, the recommendation of ECAFE that continental Australia and New Zealand be included in the geographical scope of the Commission and decided to amend the terms of reference of the Commission accordingly.

16. In the preamble of its resolution 1561 (XLIX) on "Calendar of Conferences" adopted on 12 November 1970, the Economic and Social recalled "that the membership of the regional economic commissions, unlike that of the principal organs of the United Nations, *is limited primarily by geographical considerations and that not all Members of the United Nations are eligible for membership in these regional organs.* (Italics added.)

17. In addition to those States or territories referred to in the preceding paragraphs which were admitted to the Commission as full or associate members, others have joined the Commission or have changed their status from associate to full membership in accordance with the Commission's terms of reference. The present composition of ECAFE is as follows:

(*a*) *Members*: Afghanistan, Australia, Burma, Ceylon, China, France, India, Indonesia, Iran, Japan, the Khmer Republic, Laos, Malaysia, the Mongolian People's Republic, Nepal, the Netherlands, New Zealand, Pakistan, the Philippines, the Republic of Korea,

[30] Document E/1995/Add.1.

[31] Document E/CN.11/616.

[32] Document E/CN.11/619.

the Republic of Viet-Nam, Singapore, Thailand, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Western Samoa.

(*b*) *Associate members*: Brunei, Hong Kong, Fiji and Papua and New Guinea.

II. *Conclusion*

18. The foregoing review of the proceedings and decisions of the Economic and Social Council and the Economic Commission for Asia and the Far East shows: (1) that while the majority of the original members of the Commission were non-regional States, the discussions and decisions in both the Commission and the Council immediately after the establishment of the Commission, clearly reflected an assumption of the regional character of the Commission's membership; (2) that in 1951, as the result of a comprehensive review of the organization and operation of regional economic commissions, the Council explicitly recognized that regional economic commissions drew their membership from Governments in the region (see para. 13 above); (3) that all the members and associate members admitted to the Commission since its establishment are, without exception, countries or territories within the geographical scope of ECAFE,[33] and (4) that the limitation of eligibility for membership in regional economic commissions to that based primarily on geographical considerations has most recently received further confirmation from the Council (see para. 16 above).

19. From the legal point of view, the proviso of paragraph 3 of ECAFE's terms of reference merely authorizes the automatic admission to ECAFE of any State in the area which has become a Member of the United Nations. This proviso, standing alone, does not imply that a State not in the area which has become a Member of the United Nations may not be admitted to membership in ECAFE. Moreover, since ECAFE is a subsidiary organ established by the Economic and Social Council, the question of its membership, except for the automatic admission in accordance with paragraph 3 of its terms of reference, is one for the Council to decide. Theoretically it is within the competence of the Council to admit any State to membership of the Commission or even to amend the terms of reference concerning the membership and geographical scope of the Commission. Both in theory and from legal standpoint, therefore, the Council is not precluded from admitting to ECAFE a State which is not in the ECAFE region. Nevertheless, in view of the established practice as well as the repeated affirmation of this practice by the Council itself, as indicated above, it does not seem likely that the Council would now alter this practice by granting membership to a State not in the ECAFE region without compelling reasons.

9 March 1971

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15. Question of the admission to membership of the Economic Commission for Asia and the Far East of a State within the Commission's geographical scope which has become a Member of the United Nations

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

1. You have referred to us the question of the admission of Fiji as a member of the Economic Commission for Asia and the Far East.

[33] The inclusion of continental Australia in the geographical scope of ECAFE has in fact reduced the original non-regional members of ECAFE from 6 to 5.

2. The automatic admission to membership of ECAFE of a State within the Commission's geographical scope which has become a Member of the United Nations is provided for in paragraph 3 of the terms of reference of ECAFE. Under that paragraph, once the State concerned expresses its desire to join ECAFE as a member, the Commission is duty-bound to admit it to membership. The obligation and authority of the Commission to do so was confirmed by the Economic and Social Council in resolution 144 B (VII) in which the Council considered "that the Economic Commission for Asia and the Far East already has authority to deal with applications for membership from areas within its geographical scope".

3. Since Fiji was included in the geographical scope of the Commission (paragraph 2 of the Commission's terms of reference) in 1968[34] and became a Member of the United Nations in 1970, it should be admitted to membership of ECAFE once its desire to be so admitted is ascertained. This action would result in the amendment of paragraphs 3 and 4 of the terms of reference (i.e., the addition of Fiji to the list of members in paragraph 3 and deletion of Fiji from the list of associate members in paragraph 4) for which endorsement by the Economic and Social Council is required.

4. I would therefore suggest that the Commission include in its annual report to the Economic and Social Council: (1) a paragraph concerning admission of Fiji as a member and (2) the following as section II of the draft resolution for action by the Council:

The Economic and Social Council

Takes note of the admission of Fiji as a member of ECAFE;

Approves the consequential amendment of paragraphs 3 and 4 of the Commission's terms of reference.

1 February 1971

16. Application of the Republic of Nauru for full membership in the Economic Commission for Asia and the Far East

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

1. You have asked for our views on any legal aspects connected with the application of Nauru for full membership in the Economic Commission for Asia and the Far East.

2. The status of Nauru, in so far as its application for membership in ECAFE is concerned, is similar to that of Western Samoa. Both States were former Trust Territories and, after they became independent, chose to join not the United Nations but one or two of the specialized agencies (Western Samoa is a member of WHO and Nauru is a member of UPU and ITU). It is clear that the admission of Nauru, like that of Western Samoa, could only be effected by a decision of the Economic and Social Council[35] which would in so doing amend paragraphs 2 and 3 of the terms of reference of ECAFE to include Nauru in the geographical scope of ECAFE and among the members of the Commission. The Council could so decide either on the recommendation of ECAFE or on its own initiative.

3. Another related question arising out of the application of a non-member State for membership in a regional economic commission is that of financial contributions to the

[34] See *Official Records of the Economic and Social Council, Forty-fifth Session, Supplement No. 2* (E/4498), paras. 292-293 and Economic and Social Council resolution 1341 (XLV).

[35] The Council admitted Western Samoa as a member of ECAFE by resolution 946 (XXXVI).

United Nations as a condition of admission. In its resolution 517 (XVII) the Economic and Social Council decided to admit certain non-member States to membership in ECAFE and ECE with the proviso that "in each case the States apply for such membership and agree to contribute annually such equitable amounts as the General Assembly shall assess from time to time in accordance with procedures established by the General Assembly in similar cases". This same condition concerning financial contributions was laid down in Council resolution 594 (XX) in which the Council admitted the Federal Republic of Germany as a member of ECE. However, no such condition was imposed by the Council when it admitted Western Samoa as a member of ECAFE. The last-mentioned resolution was adopted by the Council on the recommendation of ECAFE. The records indicate that the recommendation of ECAFE was reached at a closed meeting of the heads of delegations of the members of the Commission held in the morning of 12 March 1963. While these records do not show clearly why in its recommendation ECAFE had not required Western Samoa to make contributions to its budget, it is possible that the financial situation of Western Samoa was taken into account at the closed meeting. In this connexion, it may be relevant to note that after the Chairman announced at the 282nd meeting of the Commission the unanimous agreement reached at the closed meeting on the admission of Western Samoa, the representative of Western Samoa, who was present at the meeting as an interested party, referred to the insufficient revenues of his Government and stated that because of restricted financial resources and lack of qualified personnel it was improbable that Western Samoa would be able to participate in all the activities of ECAFE.[36] In the case of the application of the Republic of Nauru for membership in ECAFE, it is of course for the Commission (if it wishes to make a recommendation on the application) and the Economic and Social Council to consider whether the financial exemption given to Western Samoa should also be accorded to Nauru.[37]

13 April 1971

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17. Question of the admission of the Cook Islands as an associate member of the Economic Commission for Asia and the Far East

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

1. You have asked for our views on the legal aspects of a possible application for membership on behalf of the Cook Islands, including the procedural steps to be taken on this matter by the Economic Commission for Asia and the Far East and the Economic and Social Council.

2. In its resolution 2064 (XX) of 16 December 1965, the General Assembly considered that the Cook Islands had attained full internal self-government, but reaffirmed "the responsibility of the United Nations under General Assembly resolution 1514 (XV) to assist the people of the Cook Islands in the eventual achievement of full independence, if they so wished, at a future date".

3. Prior to the adoption of this resolution by the Assembly, the representative of New Zealand made the following statement in the Fourth Committee.

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[36] See document E/CN.11/628, pp. 202-203.

[37] By resolution 1605 (LI) of 20 July 1971, the Economic and Social Council approved the recommendation of ECAFE that Nauru be included in the geographical scope of the Commission and admitted as a member of the Commission and decided to amend paragraphs 2 and 3 of the terms of reference of the Commission accordingly.

"Yet the Cook Islands could not be called a sovereign independent State, since its people were still New Zealand citizens and the Cook Islands Parliament, in one clause of a resolution adopted on 26 July 1965, had requested New Zealand, in consultation with the Government of the Cook Islands, to be responsible for the external affairs and defence of the islands . . ." [38]

It is our understanding that no further change has taken place in the status of the Cook Islands.

4. Paragraph 5 of the terms of reference of ECAFE reads as follows:

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

Since the Cook Islands have not become responsible for their own international relations, an application for associate membership of ECAFE will have to be made in accordance with the first sentence of paragraph 5 quoted above. This provision consists of two requirements: first, the territory or group of territories must be within the geographical scope of ECAFE as defined in paragraph 2 of its terms of reference and secondly the application must be made by the member of ECAFE responsible for the international relations of the territory concerned.

5. In regard to the first requirement it may be noted that paragraph 2 of ECAFE's terms of reference enumerates the territories of Asia and the Far East. Consequently in order to become an associate member of ECAFE, the Cook Islands should be named in paragraph 2 of the Commission's terms of reference. As to the second requirement, it is clear that the application must be made by New Zealand on behalf of the Cook Islands.

6. Paragraph 4 of the terms of reference lists the associate members of ECAFE. Therefore, should the Cook Islands be admitted to associate membership, its name should be included in paragraph 4.

7. The foregoing shows that the admission of Cook Islands to associate membership of ECAFE will necessitate the amendment of both paragraphs 2 and 4 of the Commission's terms of reference. These amendments will have to be made by the Economic and Social Council. There is, however, a difference between the effect of amending paragraph 2 and that of amending paragraph 4. Since it is within the competence of ECAFE under paragraph 5 of its terms of reference to consider and decide on any application for associate membership, the amendment of paragraph 4 by the Council is merely a formality. On the other hand, the amendment of paragraph 2 is a prerequisite for a decision of the Commission to admit a territory to associate membership. So long as the territory concerned has not been included in paragraph 2, its admission to associate membership cannot be effected merely by a decision of the Commission.

8. In the light of the above analysis, our view is that the most orderly procedure to deal with a possible application on behalf of the Cook Islands for associate membership in ECAFE would be as follows:

(1) Prior to the examination by ECAFE of an application made by New Zealand for granting associate membership to the Cook Islands, the Economic and Social Council should take a decision to amend paragraph 2 of ECAFE's terms of reference by including the Cook Islands within the geographic scope of the Commission. For this purpose, the Council may, in accordance with rule 17 of its rules of

[38] *Official Records of the General Assembly, Twentieth Session, Fourth Committee*, 1560th meeting, para. 36.

procedure, add an item to the agenda of its organizational meetings in January 1972.

(2) Once paragraph 2 has been amended by the Council to include the Cook Islands within the geographical scope of ECAFE, the application for associate membership, if approved by the Commission, will take effect immediately. In other words, the representatives of the Cook Islands could participate in the work of ECAFE as an associate member without having to wait for the amendment of paragraph 4 of the Commission's terms of reference by the Economic and Social Council, which is in a sense automatic.

9. If it is not possible for the Economic and Social Council to amend paragraph 2 of ECAFE's terms of reference before the application for associate membership made by New Zealand on behalf of the Cook Islands is considered by the Commission, a decision by the Commission in favour of the application will not take effect until paragraphs 2 and 4 of the Commission's terms of reference are amended by the Council. In this event the Cook Islands will not be able to participate at the same session of ECAFE as an associate member. Their representatives may, of course, be included in the delegation of New Zealand for the purpose of attending the session of the Commission.[39]

30 November 1971

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18. Fundamental legal issues raised by the draft of an Asian Clearing Union Agreement to be concluded between the "central banks and monetary authorities" of various countries[40]—Question of the law governing such an agreement—Question whether the Clearing Union thus established would be endowed with legal personality and could claim privileges and immunities—Determination of the entities eligible to become parties to the Agreement

Study prepared for the Economic Commission for Asia and the Far East[41]

1. The fundamental problems posed by the Agreement arise from the fact that it is not intended that the parties thereto should be States or other subjects of international law, but central banks, treasury and other monetary authorities, i.e. entities to which normally international law does not directly apply and which, in particular, do not as a rule enter into agreements governed by it. It would therefore seem that an agreement between such entities would normally be governed by a municipal legal order, to be determined, in the event of a dispute, by applying the conflict of laws rule of the *lex fori* or such conflict of laws rule as might be selected by the arbitral tribunal if the agreement contains an arbitration clause (see paragraph 6 below).

2. There can be no doubt that this conclusion would apply to an agreement between monetary authorities if its substance did not differ from that of an agreement normally governed by municipal law (e.g. a contract of sale between two central banks), especially if the agree-

[39] By resolution 1699 (LIII) of 11 July 1972, the Economic and Social Council approved the recommendation of ECAFE that the Cook Islands be included in the geographical scope of the Commission and admitted as an associate member of the Commission, and decided to amend paragraphs 2 and 4 of the terms of reference of the Commission accordingly.

[40] As contained in ECAFE document TRADE/TLP/ACU (1)/6, pp. 5-22.

[41] In identical letters dated 30 August 1971, the Executive Secretary of ECAFE gave the Governments concerned an account of the main points of this study.

ment related to activities which are outside the functions the institutions perform in the direct fulfilment of their statutory objectives; but it appears unnatural that an agreement between such entities should be governed by municipal law when, as in the case of the Clearing Union Agreement, its substance does not conform neatly to any one of the established categories of private law and, above all, when, as is also the case here, the activities to be undertaken by the parties pursuant to the Agreement are impressed with public interest inasmuch as they are performed in direct furtherance of the purposes for which the institutions have been created.

3. It is for this reason that, according to some authorities, agreements of this type between autonomous public entities should be governed by local systems other than municipal law (see F. A. M. Riad, "L'entreprise publique en droit international privé", Académie de droit international, *Recueil des Cours*, 1963, vol. I, pp. 640-645). However, views differ as to the legal order that should regulate such agreements. Some authors maintain that they are to be governed by general principles of law, while others hold that public international law is applicable. It might also be contended, as has been done in similar cases, that the agreements in question are to be considered as law unto themselves and should therefore be regarded as "legislative contracts". (See, among others, A. Verdross "Quasi-International Agreements and International Economic Transactions", *The Yearbook of World Affairs*, 1964, pp. 230-249 and J. F. Lalive "Contracts between a State or a State Agency and a Foreign Company", *The International and Comparative Law Quarterly*, volume 13, 1964, pp. 987-1021).

4. The question whether the draft agreement under review could create a legal entity, i.e. an institution endowed with legal personality, is related to the difficulties in determining the proper law of the Agreement and also gives rise to uncertainties. Legal persons are, as a rule, created by agreement of a private law nature which, by virtue of private law rules, can have such an effect, by acts of the legislature, by decisions of the executive, or by treaties, i.e. agreements concluded by States or governments under international law. However, as noted earlier, the Clearing Union Agreement does not fall squarely into any one of these categories. It may therefore be doubtful whether it could bring into being a legal entity distinct from the parties. Moreover, even if it could have this effect, it might well be debatable whether the legal person thus created would be a subject of international law or of municipal law.

5. The difficulties outlined could adversely affect the operation of the Clearing Union. For the institution might not be able to function adequately without legal personality, inasmuch as it is required to conclude agreements (Article XI, para. (*b*), Article IX, section 1, paras. (8) and (9); Article V, section 4, last sentence) and presumably the relationship between the Union, on the one hand, and the General Manager and the staff, on the other, would be of a contractual nature (Article X).

6. The fact that, in accordance with Article XIII of the Agreement, certain disputes relating thereto would be settled by arbitration compounds the difficulty of determining the proper law of the Agreement, for it has been held that arbitrators are not bound by the rules of conflict in force at the forum of the arbitration (unlike national tribunals, which are bound by the conflict of laws rules of the *lex fori*), and can thus base their choice of law on the common intention of the parties (which appears to be uncertain in the case of the Clearing Union Agreement, since it contains no choice-of-law provision) or use the connecting factors generally advocated in doctrine and used in case law. (See Part B (*b*) of the arbitral judgement delivered in the dispute between Sapphire International Petroleum Ltd. and the National Iranian Oil Company on 15 March 1963, quoted in *The International and Comparative Law Quarterly*, volume 13, 1964, pp. 1011-1015.)

7. It may also be doubtful whether the Clearing Union, if established solely on the basis of an agreement between central banks and monetary or treasury authorities, would be able to claim privileges and immunities. For as a rule a legal entity carrying on operations in a country can claim privileges and immunities therein only to the extent that they are granted to it by the authorities of that country under national legislation, general international law, or a treaty to which the country is a party.

8. It may be useful, finally, to draw attention to certain difficulties which might arise, in the sphere of municipal law, with regard to the modalities of participation in the Clearing Union. These difficulties relate to the determination of the national agency which is, in conformity with the Clearing Union Agreement, eligible to become a party thereto, and to the question of whether that entity would be empowered to do so. The inclusion of "treasury or other monetary" authorities (article II, para. (*b*)) among the entities eligible to become parties to the Agreement could give rise to difficulties. Opions might differ in a country as to which is precisely the agency that constitutes the "treasury or other monetary authority" of that country. It might occur, in addition, that the agency selected lacks status as a legal person and is thus ill-suited to become a party to the Agreement. It might also be controversial whether in a country having a "monetary and/or treasury authority" distinct from its central bank, participation in the Clearing Union should be through the former or through the latter. In this respect it should be noted that there is apparently no compelling reason why a government of an Asian country should be debarred from becoming a party to the proposed Agreement if it can claim to be the "monetary or treasury authority" of the State in question, the Agreement being open to both central banks and such authorities. Similarly, it is not inconceivable that the monetary or treasury authority of one of the countries qualified to participate in the Clearing Union could claim that in adhering to the Agreement it is exercising the treaty-making power of the State concerned. In this respect see Oppenheim (*International Law—Treatise*, 8th ed., d. I, p. 885): "for some non-political purposes of minor importance, certain minor functionaries are recognized as competent to exercise the treaty-making power of their States". (See also in this connexion, McNair, *Law of Treaties*, 1961 pp. 20-22.) Again, it could occur that a central bank is competent to represent the government of the State under the jurisdiction of which it is placed: section 117 of the Philippine Central Bank Act, as quoted by Aufricht (*Central Banking Legislation*, 1961, vol. I, p. 564), provides that "the Central Bank may be authorized by the Government to represent it in dealings, negotiations or transactions with the International Bank for Reconstruction and Development and with other foreign or international financial institutions or agencies", section 110 of the Monetary Law Act of Ceylon containing a similar provision (Aufricht, op. cit., vol. 1, pp. 320 and 321). It may occur that the national agency ideally qualified to become a party to the Clearing Union is not empowered to do so by the rules of municipal law governing its functions and operations. If any or all of the central banks and/or monetary authorities eligible to become parties to the Agreements lack, on the plane of municipal law, the authority to become bound by its provisions, the States under the jurisdiction of which they are placed might find it expedient to conclude a treaty empowering the entities to co-operate for the purposes of the Agreement. (See, in this respect, article X of the General Treaty on Central American Economic Integration,[42] which might be regarded as the basis for the co-operation between the central banks of Central America referred to in para. 9 below.)

9. One should not conclude from the above remarks that the creation of the Union on the basis of an agreement along the lines of the present draft would necessarily be legally and practically unworkable. By virtue of agreements to which they alone are parties, the central banks of the five Central American countries have set up an international organiza-

[42] United Nations, *Treaty Series*, vol. 455, p. 3.

tion (known as the Central American Monetary Union) and a clearing union. The central banks of the countries of the Latin American Free Trade Association have established a clearing union by a similar method. By an agreement concluded on 13 August 1968 the central banks of the African States established the Association of African Central Banks. The principle that an international legal person can be created by virtue of a treaty is, after all, nothing more than a rule of customary international law, and it may well be that a new customary rule of international law is emerging under which such a legal person could also be created by an agreement concluded solely by autonomous public entities, such an agreement being governed by international law pursuant to another new customary rule. The grant of privileges and immunities to the Clearing Union might not be indispensable for the conduct of its operations. (The Central American Monetary Union and the Central America Clearing House have managed to function despite their inability to claim international privileges on the basis of their constituent instruments.) Moreover, the Clearing Union might conceivably be able to claim privileges and immunities in the territories of participating countries by virtue of its being regarded therein as a foreign public entity (see Riad, op cit., pp. 598-629).

10. If the Clearing Union were set up on the basis of a treaty all the legal difficulties previously outlined would be removed. The Clearing Union could be endowed with full juridical personality, both under the municipal laws of participating countries and under international law, by the constituent treaty. This treaty could grant the Clearing Union such privileges and immunities as the States adopting the treaty would consider necessary or useful for its operations. An alternative formula affording roughly the same advantages would consist in the conclusion of a multilateral treaty providing that the Clearing Union would have the status of a corporation under the laws of the participating country in which it would have its seat. Privileges and immunities could be granted to the Union in the basic treaty, which could provide that it would have international juridical personality. This procedure would be basically similar to that used for the creation of the Bank for International Settlements. (See in this respect, among others, Carlos Flieger, "Multinational Public Enterprises", International Bank for Reconstruction and Development, 1967 and "Corporations formed pursuant to Treaty", 76 *Harvard Law Review 1431*, 1963.) If, instead of applying these procedures, it is decided to establish the Clearing Union on the basis of an agreement like the one currently envisaged, the enactment by the host country of the Clearing Union of a law endowing the Union with personality and granting it privileges and immunities could be a means of strengthening the legal basis of the institution. It must be noted, however, that in strict law the host country would be free to repeal or amend this legislation.

23 July 1971

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19. Conference of European Ministers Responsible for Social Welfare—Provisions of the draft rules of procedure of the Conference concerning the examination of credentials and the elections—Question whether non-European Members of the United Nations might be invited to send observers to the Conference

Memorandum to the Assistant Director, Social Development Division, Department of Economic and Social Affairs

1. You have asked us to review certain provisions of the draft rules of procedure for the Conference of European Ministers Responsible for Social Welfare (hereafter

referred to as the European Conference). You have also requested our views on certain questions pertaining to the Conference.

2. With respect to the *examination of credentials* you propose, in order not to establish too cumbersome a procedure for a regional conference, that the credentials be examined by the Bureau of the Conference (President, Vice-President and Rapporteur).

3. The Office of Legal Affairs has always maintained that for an international conference convened by the United Nations, a credentials committee should be established to examine the credentials of representatives to the Conference and report on them. The basis for this view is that the President and the Vice-Presidents of a conference are not elected to deal with questions of representation and credentials which are of a special legal, political and technical character. As far as the present Conference is concerned, in view of the wish not to establish too cumbersome a procedure for a regional conference which would have approximately thirty participating States and a short duration, the relevant rule may be drafted as follows:

> "The Executive Secretary of the Conference, in consultation with the President, Vice-President and Rapporteur of the Conference, shall examine the credentials and report on them to the Conference without delay."

4. Regarding the *elections*, you raise the question whether the complicated procedure under which "All elections shall be held by secret ballot unless otherwise decided by the Conference" is really required. You add that the usual practice of nominations, seconds and tacit general approach is much simpler.

5. It is true that to our knowledge, no elections by secret ballot have taken place at the conferences convened by the United Nations and consequently the exception (namely, a decision of the conference to the contrary) has become the rule. Nevertheless, the rule has always been included in the rules of procedure of all conferences in order to meet a situation which may arise where there are several candidates for an office and no agreement can be reached on a single candidacy. In such a situation it has not been considered appropriate to hold the election by a show of hands. In any case, under the second part of the rule, the Conference can always follow the usual practice of election by acclamation.

6. With respect to the membership of the European Conference you note that in the present case, unlike that of the 1968 International Conference of Ministers Responsible for Social Welfare, no resolution of the Economic and Social Council provides a basis for deciding on the membership and limiting it to European States Members of the United Nations or members of the specialized agencies and the IAEA. You also note that in 1968 an observer from the Holy See was present although there was no reference in the convening resolution to the possibility of sending observers to the Conference. You therefore ask whether the Holy See might apply again for admission as observer to the European Conference and whether non-European Members of the United Nations might claim to be represented by observers in the Conference.

7. States invited to the 1968 Conference pursuant to Economic and Social Council resolution 1140 (XLI) were "States Members of the United Nations or members of the specialized agencies and the IAEA . . .". Therefore, it was in accordance with that resolution that the Holy See was invited as was also San Marino, though according to the Proceedings of the Conference, it did not participate in the Conference. It may be noted that a number of Members of the United Nations, and the Holy See, decided to send observers to the Conference rather than representatives.[43] An invited State may, of course, choose representation by observers instead of full participation in the Conference by representatives. There-

[43] United Nations publication, Sales No. E.69.IV.4.

fore, if the Holy See and San Marino are entitled to participate in the European Conference, they need not apply for admission as observers to that Conference.

8. There remains to determine what States are entitled to participate in the Conference. The only indication in that respect is contained in the *aide-mémoire* sent by the Secretary-General in a *note verbale* of 17 February 1971 to the European States Members of the United Nations or members of the specialized agencies and the IAEA inviting their comments on the merits of the proposal to convene the European Conference and on the possible agenda of the Conference. The relevant part of the *aide mémoire* reads as follows:

"II. PROPOSALS FOR THE ORGANIZATION OF THE CONFERENCE

"5. Subject to appropriate action by the competent policy-making organs of the United Nations on the basis of a positive outcome of the aforementioned consultations and the availability of the necessary financial and other resources, the proposed Conference would be convened under the United Nations auspices, with the co-operation of the Government of the Netherlands, in accordance with the following arrangements.

Membership

"6. The Secretary-General would invite Governments of European States Members of the United Nations or members of the specialized agencies and the International Atomic Energy Agency to be represented at the Conference by the minister or other official responsible for social welfare, accompanied whenever possible by appropriate senior advisers.

"7. The specialized agencies concerned, the United Nations Development Programme, the United Nations Children's Fund, the World Food Programme and the Economic Commission for Europe would be invited to send representatives to participate in the Conference. European inter-governmental organizations outside the United Nations system and the main non-governmental organizations in consultative status with the Economic and Social Council and active in the social welfare field would be invited to send observers."

This *aide-mémoire* was not published as a document but was referred to in a Note by the Secretary-General (E/CN.5/XXII/CRP.8) submitted to the Commission for Social Development.

9. In connexion with that note, the report of the Commission contains the following passage:

> ... The Commission was informed that the Secretary-General had engaged in consultations with Governments of European States Members of the United Nations or members of its specialized agencies on the merits of the proposal and that the replies received from Governments so far had been favourable. Some members expressed the view that all European States should be invited to participate in the proposed conference.[44]

10. It therefore appears that participation in the Conference is intended to be limited to the European States Members of the United Nations and members of the specialized agencies, although this has not been set out in official records. Therefore the Holy See and San Marino are entitled to be invited to the Conference and it is for their Governments to decide whether they will participate fully or be represented by observers.

27 August 1971

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[44] *Official Records of the Economic and Social Council, Fiftieth Session, Supplement No. 3* (E/4984), para. 128.

20. Question whether the administrative costs of the United Nations volunteers programme can be paid from the special voluntary fund established by General Assembly resolution 2659 (XXV)

Note to the Coordinator, United Nations Volunteers, United Nations Development Programme

1. The question on which a legal opinion has been requested is whether the administrative costs of the United Nations Volunteers Programme can be paid from the special voluntary fund established by operative paragraph 4 of General Assembly resolution 2659 (XXV) of 7 December 1970.

2. Operative paragraph 4 of General Assembly resolution 2659 (XXV) reads as follows:

> "4. *Invites* Governments of States Members of the United Nations and members of the specialized agencies, international non-governmental organizations and individuals to contribute to a special voluntary fund for the support of the activities of the United Nations Volunteers."

By the same resolution the Secretary-General was requested to designate the Administrator of the United Nations Development Programme as the Administrator of the United Nations Volunteers. Subject to the broad guidelines in the preamble and operative paragraphs of the resolution, it would seem clear that the Assembly intended to vest in the Administrator wide discretion in regard to the execution of the Volunteers Programme. He is, however, to report, in conjunction with the Secretary-General, to the General Assembly at its next session on the experience gained, and to make proposals to enable the Volunteers to serve better the aims in view. There is thus an opportunity for the Assembly to decide again on final arrangements for the Programme, after a year's experience.

3. The purpose of the fund is said to be "for the support of the activities of the United Nations Volunteers". The ordinary meaning of the word "support" includes administrative costs as well as such costs in the field as will be paid through the United Nations. On the face of the resolution, therefore, it appears that the Administrator could properly decide to pay administrative costs from the voluntary fund.

4. The preparatory work of the resolution does not modify this interpretation. The Secretary-General submitted to the Economic and Social Council at its forty-ninth session a note on the financial implications of the United Nations Volunteers Programme (E/L.1348). This note stated:

> "3. In accordance with rule 34 of the Rules of Procedure of the Council, the Secretary-General wishes to advise the Economic and Social Council that, inasmuch as the financial support of the voluntary programme, including the appointment of a co-ordinator within the framework of UNDP, would be provided from the Trust Fund, no financial implications would be involved as far as the regular budget of the United Nations is concerned. . . ."

5. The Secretary-General thus expressed the understanding that the "financial support" of the programme would come from the special voluntary fund, and it was also made explicit that the costs resulting from the appointment of a co-ordinator would also be borne by the fund. If the co-ordinator is to be paid from the fund, it would be natural that the costs of his staff and of his office be paid from the same source.

6. In the ensuing debate in the Council and in the General Assembly, several delegations mentioned the financial aspects of the programme, but did not deal very specifically with the administrative costs. There is nothing in the debates to vary the ordinary meaning of the word "support" as used in the resolution, or the understanding stated in the Secretary-General's note.

7. It therefore follows that the administrative costs of the United Nations Volunteers Programme can be borne by the special voluntary fund.

21 May 1971

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21. The respective spheres of application of the procedure for the registration of treaties with the Secretariat and the filing and recording procedure—The purposes of the two procedures

Note addressed to the Office of the Permanent Observer of a non-member State

1. The registration of treaties or international agreements with the Secretariat provided for in article 1 of the regulations to give effect to Article 102 of the Charter [General Assembly resolution 97 (I), as amended by resolutions 364 B (IV) and 482 (V)], applies to instruments to which a State Member of the United Nations is a party; it may be effected by any party and is obligatory for a Member State and optional for a non-member State. [45] Filing and recording, as provided for in article 10 of the regulations, which, like registration, has in view the publication of treaties and international agreements, applies only to treaties or agreements concluded between States not members of the United Nations, in addition to treaties and international agreements transmitted by a Member State which were entered into before the coming into force of the Charter and treaties and international agreements entered into by the United Nations or by one or more of the specialized agencies. Consequently, the filing and recording procedure is not open to non-member States where a Member State is a party to the agreement. Similarly, the registration procedure cannot be used in the case of an agreement to which no State Member of the United Nations is a party. It should, however, be emphasized that the registration procedure and the filing and recording procedure are subject to rules and conditions which are comparable in all respects.

2. The only difference between the two procedures, apart from the fact that registration is obligatory for Member States, relates to the penalty attaching to that obligation; Article 102 (2) of the Charter provides that an international agreement which has not been registered may not be invoked before any organ of the United Nations. However, this penalty could also be applied to a non-member State party to a treaty concluded with a Member State if the latter failed to register (or delayed in registering) the instrument with the Secretariat.

3. In the present state of international relations, the great majority of treaties and international agreements entered into by non-member States are concluded with Member States; as a result, filing and recording is becoming a rare procedure from the standpoint of non-member States, and the penalty provided in Article 102 of the Charter is becoming universal in scope and embracing non-member States. For that reason, registration offers definite advantages for non-member States, particularly those which are parties to the Statute of the International Court of Justice, and especially if they have recognized the compulsory jurisdiction of the Court.

4. The attitude of non-member States towards the registration or the filing and recording of treaties or international agreements to which they are parties cannot and should not be exclusively dictated in any sense by concern with avoiding the possible application of the penalty provided under Article 102 of the Charter. The basic purpose of that Article, which was also that of Article 18 of the Covenant of the League of Nations, is not so much registration as such, which is merely an agreed arrangement for confirming the existence of

[45] See *Repertory of Practice of United Nations Organs*, vol. V, pp. 311-312.

international agreements, as it is the publication of the agreements. That should be borne in mind by non-member States concerned about the development of international law.

5. These observations apply to treaties or international agreements regardless of whether they are bilateral or multilateral. With regard to the latter category, however, it should be noted that, at the second and third sessions of the General Assembly, a technical question concerning the registration of multilateral treaties was raised in the Sixth Committee. [46] At those two sessions, the Secretariat argued that it would be desirable for multilateral agreements to be presented for registration by the Government having the custody of the original document and that that Government should also register all subsequent actions relating to the agreement in question, since that procedure offered the advantage not only of facilitating the work of the Secretariat but also of avoiding duplication in the measures taken by the Governments concerned. The procedure in question, having given rise to no objection, has now become the normal practice.

3 June 1971

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22. Practice of the Secretary-General with regard to the registration of treaties by intergovernmental organizations other than the United Nations and the specialized agencies

Letter to the Legal Adviser of the European Space Research Organization

With regard to the registration by your organization of the Protocol concerning its privileges and immunities signed on 31 October 1963, which entered into force on 18 March 1965, I should like to draw your attention to the provisions of the regulations adopted by the General Assembly to give effect to Article 102 of the Charter. [47] Under article 4 of these regulations, provision is made for the registration of treaties and international agreements by an entity other than one of the parties only in the case of the United Nations and the specialized agencies—where certain conditions must nevertheless be met—to the exclusion of any other international organization. The practice of permitting registration by an intergovernmental organization has, however, been established in cases where the organization in question, in its capacity as depository of the treaty, has been expressly authorized to register the treaty either in the treaty itself or in some other manner, e.g. in a resolution of the competent body in which the contracting parties are represented. It is entirely possible for such authorization to cover all treaties or only certain ones concluded within the framework of the organization and deposited with it. The basis for this practice lies in the fact that when such authorization is granted, the Secretariat can regard the registration requested as equivalent to registration by the contracting parties themselves.

Accordingly, unless the authorization in respect of your organization is contained in the text of the Protocol itself, we should be grateful if you would attach to that instrument the text of the relevant decision. [48]

18 February 1971

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[46] See *Official Records of the Second Session of the General Assembly, Plenary Meetings of the General Assembly*, vol. II, annex 19, pp. 1564-1565, and *ibid., Sixth Committee*, 54th meeting; *Official Records of the Third Session of the General Assembly, Part I, Plenary Meeting of the General Assembly, Annexes*, pp. 61-64 and 300-301, and *ibid., Sixth Committee*, 79th and 80th meetings.

[47] See General Assembly resolutions 97 (I), 364 B (IV) and 482 (V).

[48] The Protocol was registered by the French Government, as depositary, before receipt of the reply from the Legal Adviser of the European Space Research Organization.

23. Position of the Secretary-General regarding possible reservations to multilateral conventions concluded under the auspices of the League of Nations the custody of which has been accepted by the Secretariat under General Assembly resolution 24 (I)

Note verbale *addressed to the Permanent Representative of a Member State*

The Secretary-General of the United Nations has the honour to acknowledge receipt of the Permanent Representative's note transmitting his country's instrument of accession to the Convention concerning the Use of Broadcasting in the Cause of Peace, signed at Geneva on 23 September 1936. [49]

The said instrument of accession contains the following two reservations:

(1) The Member State in question declares that it "will not consider itself bound by the provision of article 7 of the Convention calling for consideration of disputes between the Parties by the International Court of Justice at the request of one of them. Any decision rendered by the Court concerning a dispute between [that State] and another Party to the Convention on the basis of a request submitted to the Court without the consent of [that State] shall be deemed invalid".

(2) The Member State in question declares that it "will apply the principles embodied in the Convention in relation to all States Parties to the Convention on the basis of reciprocity. The Convention will not, however, be interpreted as establishing formal commitments between countries which do not maintain diplomatic relations".

The Secretary-General acts as depositary of conventions concluded under the auspices of the League of Nations in accordance with a resolution adopted by the Assembly of that organization at its last session and a resolution [24 (I)] of the United Nations General Assembly under which "the United Nations is willing to accept the custody of the instruments and to charge the Secretariat of the United Nations with the task of performing for the parties the functions, pertaining to a secretariat, formerly entrusted to the League of Nations". In exercising these functions, the Secretary-General continued to follow the practice of the League of Nations, which he also applied, initially, with respect to conventions concluded under the auspices of the United Nations. In the event that an instrument of ratification or accession was deposited together with one or more reservations, the practice was the following: before the instrument was deposited, the text of the reservation was communicated to the contracting parties. If there was no objection, the reservation was deemed to have been accepted and only then was the instrument deposited with the Secretary-General. If one or more of the parties raised any objection to the reservation, the Government concerned was requested to withdraw its reservation; if it did not, the Secretary-General was unable to accept the instrument for deposit.

In the case of all conventions not containing contrary provisions of which he was the depositary, the Secretary-General followed that practice until 12 January 1952, when he was requested by the General Assembly (resolution 598 (VI)), "In respect of future conventions concluded under the auspices of the United Nations of which he is the depositary: (i) To continue to act as depositary in connexion with the deposit of documents containing reservations or objections, without passing upon the legal effect of such documents; and (ii) To communicate the text of such documents relating to reservations or objections to all States concerned, leaving it to each State to draw legal consequences from such communications".

[49] *League of Nations, Treaty Series*, vol. 186, p. 301.

Subsequently, in resolution 1452 B (XIV) of 7 December 1959, the General Assembly requested the Secretary-General to extend that practice to all conventions concluded under the auspices of the United Nations which did not contain provisions to the contrary.

That resolution, however, did not apply to conventions concluded under the auspices of the League of Nations, which, except for those amended specifically with regard to the transfer of depositary functions by a protocol concluded under the auspices of the United Nations, continue to be covered by the abovementioned General Assembly resolution (24 (I)) concerning the transfer of certain functions pertaining to a secretariat, which do not relate to the substantive rights and obligations of the parties. A draft resolution concerning the practice to be followed in respect of all conventions of which the Secretary-General is the depositary—and consequently all League of Nations conventions—was submitted to the General Assembly at its fourteenth session but was not adopted. [50] During the debates only a few delegations referred to the problem posed by such conventions, and opinions were divided; some held that the rule contained in resolutions 598 (VI) and 1452 B (XIV) should be applied, while others were in favour of maintaining the practice of the League of Nations.

With regard to the instrument of accession accompanied by reservations, which is the subject of this note, it is to be noted that this is the first time since the adoption in 1959 of the resolution cited above that a State has formulated a reservation to a convention concluded under the auspices of the League of Nations which does not contain provisions relating to reservations. It is impossible to draw any indisputable legal conclusion concerning the rule to be followed in this case from the decisions and debates of the General Assembly. However, the Secretary-General, acting as depositary, cannot infringe upon the rights of the parties, some of which would probably raise serious objections if, without instructions from the General Assembly, he were now to apply for the first time a procedure different from that of the League of Nations with regard to a convention concluded under the latter's auspices. The Secretary-General is consequently unable to accept the instrument of accession in question for deposit without first taking certain steps. He will therefore inform the States concerned of the receipt of the instrument of accession and the text of the reservations. Those States will be requested to inform the Secretary-General of their attitude regarding the reservations within the usual 90-day time-limit and to state whether they have any objection to the deposit of the instrument. In the absence of any objection deemed by the State which has raised it as constituting an obstacle to the entry into force of the Convention in respect of the Member State that formulated the reservations, the instrument will be accepted for deposit at the end of the 90-day period and, in accordance with article 12 of the Convention, will take effect 60 days after that date.

Should any difference of opinion arise between the Secretary-General and the Member State concerned or one or more of the parties to the Convention regarding the procedure to be followed with respect to reservations to conventions concluded under the auspices of the League of Nations, the Secretary-General will not fail to bring the question to the attention of the General Assembly so that it may provide him with the necessary clarification concerning the views of the international community as to the law applicable in the matter.

3 December 1971

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[50] See *Officials Records of the General Assembly, Fourteenth Session, Annexes*, agenda item 65, document A/4311, para. 20.

24. Multilateral treaties in respect of which the Secretary-General performs depositary functions—Participation of Member States to such treaties—Notifications of succession

Letter to the Permanent Mission of a Member State

1. I write in reply to your letter concerning the position of your country in respect of the multilateral treaties deposited with the Secretary-General of the United Nations.

2. I should like to refer you, in this regard, to the United Nations publication *Multilateral Treaties in respect of which the Secretary-General Performs Depositary Functions, List of Signatures, Ratifications, Accessions, as at 31 December 1970* (ST/LEG/SER.D/4). [51] This publication covers all multilateral treaties which have been concluded under the auspices of the United Nations or its specialized agencies and the original of which have been deposited with the Secretary-General, as well as certain League of Nations treaties and pre-United Nations treaties referred to in paragraphs 5 to 7 of the introduction to the said publication. It likewise includes the Charter of the United Nations, in respect of which certain depositary functions have been conferred on the Secretary-General, although the authentic text of the Charter is deposited with the Government of the United States of America. All these treaties are enumerated in the table of contents of the publication, pp. v to xiv. The publication provides the information on the status of each of the treaties dealt with therein as at 31 December 1970.

3. I wish also to refer you to the Annex to the said publication, which was issued in a separate volume in loose-leaf form (ST/LEG/SER.D/1, annex and *Supplements Nos. 1 and 2*) giving the final clauses of all treaties concerned, including the clauses setting forth the method whereby States may become parties thereto.

4. It will be recalled that, together with the application for membership in the United Nations, the Government of your country submitted to the Secretary-General, pursuant to rule 135 of the rules of procedure of the General Assembly, a declaration accepting the obligations contained in the Charter of the United Nations. Upon admission to the United Nations your country has thus become bound by the Charter of the United Nations, as amended by General Assembly resolution 1991 A and B (XVIII) of 17 December 1963, the amendments concerned (to articles 23, 27 and 61) having entered into force pursuant to Article 108 of the Charter in respect of all Members on 1 March 1966. It has since become bound also by the amendment to Article 109 of the Charter, which was adopted by General Assembly resolution 2101 (XX) of 20 December 1965 and which entered into force for all Members on 12 June 1968.

5. As of the date of its admission to the United Nations, your country has become *ipso facto* a party to the Statute of the International Court of Justice, in accordance with Article 93 of the Charter. It has not yet taken action under paragraph 2 of Article 36 of that Statute, according to which States parties to the Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligations, the jurisdiction of the International Court of Justice in all legal disputes concerning the matters referred to in that paragraph. Such declarations may be made unconditionally or on condition of reciprocity on the part of several or certain States, or for a certain time, and shall be deposited with the Secretary-General. You will find on page 9 of the above-mentioned publication a list of States which have made such declarations, followed by the text of the declarations themselves.

[51] United Nations publication, Sales No. E.71.V.5.

6. As a Member of the United Nations, your country is entitled to become a party to all treaties covered by the publication mentioned earlier in this letter, except for those treaties which have ceased to be in force and those which are either regional in scope or in which participation is otherwise restricted. It may do so, according to the pertinent final clauses, either by signature followed by ratification, or by accession, or in respect of the treaties which are no longer open for signature, by accession. There are also some treaties to which States may become parties either by signature without reservation as to acceptance (definitive signature), or signature subject to acceptance followed by acceptance, or by acceptance. The originals of all treaties are deposited in the archives of the Secretariat and those of them that are still open for signature may be signed on behalf of your Government at the Headquarters of the United Nations by its representative duly authorized to this effect in full powers.

7. Your country may also become a party to certain of the treaties referred to above by virtue of succession, namely those to which the United Kingdom of Great Britain and Northern Ireland is a party and which, either were made applicable by it pursuant to their territorial clause to the whole or part of the territory now forming your country or were considered, in the absence of such a clause, as applying thereto. In this connexion, I wish to invite your attention to the practice which has developed regarding the succession of new States to the rights and obligations arising out of multilateral treaties applied in their territory, prior to the attainment of independence, by States formerly responsible for their foreign relations. Under this practice, the new States generally acknowledge themselves to be bound by such treaties through a formal notification addressed to the Secretary-General. The effect of such notification, which the Secretary-General in the exercise of his depositary functions communicates to all interested States, is to consider the new State as a party in its own name to the treaty concerned as of the date of independence, thus preserving the continuity of the application of the treaty in its territory. A more detailed description of this practice may be found in the *Yearbook of the International Law Commission, 1962*, vol. II, reproducing document A/CN.4/150, which contains a memorandum prepared by the Secretariat on the succesion of States in relation to general multilateral treaties deposited with the Secretary-General.

8. Ratification, accession, acceptance or succession are all acts by which a State establishes, on an international plane, its consent to be bound by a treaty. Such acts are carried out by deposit with the Secretary-General of an appropriate instrument or notification. The consent of a State to be bound by a treaty may also be expressed by the signature alone where a treaty—as mentioned in paragraph 6 above—provides that States may become parties by signature without reservation as to ratification, acceptance or approval (definitive signature). In accordance with established international practice, an instrument of ratification accession, acceptance, or a notification of succession should be made in a formal document emanating from and bearing the signature of the Head of State or Government or the Minister for Foreign Affairs. The full powers issued to a representative for the purpose of signing a treaty should likewise emanate from one of these authorities and, where appropriate, should expressly confer on him the powers to affix a definitive signature.

9 March 1971

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25. Conditions under which a State may accede to the Agreement establishing the African Development Bank [52]—Form of the instrument of accession

Letter to the Vice-President of a Member State

I have the honour to acknowledge the receipt of your cable confirming that your government has applied for membership in the African Development Bank.

[52] United Nations, *Treaty Series*, vol. 510, p. 46.

Paragraph (2) or article 64 of the Agreement Establishing the African Development Bank, done at Khartoum on 4 August 1963, provides: (*a*) that States which do not acquire membership of the Bank in accordance with paragraph (1) of that article (i.e. States other than signatory States which deposited their instruments of ratification or acceptance of the Agreement before 1 July 1965), may become members by accession to the Agreement on such terms as the Board of Governors of the Bank shall determine; (*b*) that the Government of any such State shall deposit, on or before a date appointed by that Board, an instrument of accession with the Secretary-General of the United Nations; and (*c*) that upon the deposit the State shall become member of the Bank.

Among the terms of accession to be determined by the Board of Governors in accordance with articles 6 (1) and 7 (3), respectively, of the Agreement are: the initial number of shares of the capital stock of the Bank to be subscribed by acceding States and the dates for the payment of amounts subscribed to the paid-up capital stock. Normally, under the terms of accession, the payment of the first instalment of the subscription to the paid-up capital stock is required on or before the date appointed by the Board for the purpose of paragraph (2) of article 64.

Accordingly, after the terms of accession for your country have been established by the Board of Governors, your Government should proceed with the payment to the Bank of the first instalment of its paid-up subscription and the deposit with the Secretary-General of the United Nations of its instrument of accession, both actions to be taken not later than the appointed date. With a view to expediting the procedure, the instrument may be transmitted to the Secretary-General in advance of the payment of the first instalment, in which case the Secretary-General will retain the instrument and will receive it formally in deposit immediately upon confirmation from the Bank that the first instalment of subscription has been paid. With the procedure described above thus completed, your country will become a member of the Bank on the appointed date, in accordance with article 64 (2) of the Agreement.

As regards the form of the instrument of accession, it will be noted that, according to the recognized international practice which the Secretary-General feels obliged to follow, such instrument must be executed either by the Head of State or Government or by the Minister of Foreign Affairs and must contain an expression of the will of the Government on behalf of the State, to be bound by the Agreement.

12 July 1971

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

1. International Labour Office

The following memorandum concerning the interpretation of an international labour Convention was prepared by the International Labour Office at the request of a government:[53]

Memorandum on the Equality of Treatment (Social Security) Convention, 1962 (No. 118), prepared at the request of the Government of the Netherlands, 2 November 1971. Document GB.186/15/3; 186th session of the Governing Body, Geneva, May-June 1972.

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[53] This memorandum will be published in the *Official Bulletin*, vol. LV, 1972.

2. Food and Agriculture Organization of the United Nations

Status of Associate Members of FAO—Assessment of contributions of Qatar and Bahrain to budget for period between declaration of independence and admission to full membership

Opinion submitted by the Legal Counsel to the Deputy Controller

1. I wish to refer to your memorandum of 12 October 1971 in which you ask for advice regarding the present membership status of Bahrain and Qatar in order to determine the financial implications of their applications for membership in the Organization. Bahrain and Qatar were admitted as Associate Members of the Organization by the Conference at its Fourteenth Session (1967) and attained independence on 15 August 1971 and 1 September 1971 respectively. Both Bahrain and Quatar have applied for full membership in the Organization and their applications will be considered at the Sixteenth Session of the Conference in November this year.

2. Under paragraph 3 of Article II of the Constitution only territories which are not responsible for the conduct of their international relations when an application is made on their behalf may be admitted as Associate Members.

3. There is no provision in the Consititution or the General Rules of the Organization laying down that, upon attainment of independence, an Associate Member automatically and as of the date of independence, ceases to be an Associate Member. In the absence of such express provision and bearing in mind that the status of a territory may be subject to controversy, it would not seem appropriate for the Director-General to make a determination on his own initiative on the question whether a territory had attained independence. Nor would it be appropriate for him to draw any consequences flowing therefrom. Instead, it is for the Conference, which is vested with the power to admit new Members and Associate Members, to make such a determination if necessary. It would appear that until such a determination has been made, associate membership is deemed to continue.

4. Past FAO practice confirms the above conclusion. It will be recalled that Chad, Gabon, the Malagasy Republic, Mali and Senegal were admitted to associate membership by the Tenth Session of the Conference in 1959. No provision was made at the time whereby the status of these territories would automatically be converted from associate membership to full membership when they became independent and deposited an instrument of acceptance of the Constitution—although this has been done in the case of other Associate Members who were soon to become independent. These five territories were subsequently admitted to full membership by the Eleventh Session of the Conference in 1961. However, they all became independent between June and September 1960 and were all admitted to membership in the United Nations in September 1960. Their independence was therefore clearly recognized when they became members of the United Nations, but they nonetheless remained Associate Members of FAO for more than a year afterwards—i.e. until the Conference admitted them to full membership in November 1961.

5. A resolution adopted by the World Health Assembly of WHO is also relevant in the above connection. By Resolution WHA 14-45 entitled "Rights and Obligations of Associate Members having attained Independence" [54] the World Health Assembly decided at its Fourteenth Session in 1961 that

> "Associate Members which have attained independence and which expressly state their intention of becoming full members of the Organization shall, during the transitional period which must necessarily elapse before they can become members of the Organization, continue to enjoy the rights and privileges of associate membership".

[54] Official Records of the World Health Organization, No. 110, part I, p. 19.

6. If an Associate Member which has apparently become independent does not apply for membership at the Session of the Conference following its independence, the question of its status may always be raised at the Conference either by Member Nations or by the Director-General. However, this is not the case with respect to Bahrain or Qatar.

7. In conclusion, assuming that Bahrain and Qatar are admitted to full membership at the forthcoming Conference they should continue until that date to be considered as Associate Members. For the purposes of contributions to the budget, they should be assessed as Associate Members for the first three quarters of 1971 and, in accordance with Financial Regulation 5.8, as full members for the last quarter.

26 October 1971

3. Universal Postal Union

Study by the International Bureau on the reservations to the Acts of the Union [55]

I. *Introduction*

1. The International Bureau was instructed in 1970 to make a study on the customary practice followed in regard to reservations and on the specific practice of the Universal Postal Union. This new study forms part of the work assigned to the Executive Council by the 1969 Tokyo Congress in resolution C 44. [56] The work connected with the conditions under which reservations may be made in the Final Protocol to the Parcel Post Agreement (see Vienna Congress resolution CP. 2) was completed by the previous Executive Council and ratified by the 16th Congress.

2. It will be recalled that as a result of this first study, reservations of a general and permanent nature and certain reservations concerning regulations were transferred from the Final Protocol of the Parcel Post Agreement into the Agreement itself, and the same was done with certain reservations concerning insured letters and boxes (see proposals 5000-5003, 6022-6024, 6029-6035 and 6041). On the other hand reservations about rates and those which concerned a small number of countries, or which were of a very special nature, were retained in the Final Protocols in question.

3. Conscious of the need to maintain as far as possible a certain degree of uniformity in the presentation of the Acts of the Union, the Executive Council then looked into the possibility of proceeding on similar lines in regard to reservations to the Convention and the other Acts. An initial scrutiny showed that owing to the compulsory nature of the Convention it was difficult to proceed by simple analogy. The Executive Council therefore proposed to the Tokyo Congress that a full and exhaustive study of the matter should be made by the present Council. The British administration supported this view by submitting a statement, published as Congress - Doc 31, which stressed the desirability of studying the problem of reservations in relation to the general and current practice of public international law. This idea was included in the resolution from which the Committee's mandate stems.

4. The problems arising in connexion with the present study are thus of two kinds. It is necessary to know:

(i) how far UPU practice differs from the general practice of public international law and, in consequence, whether the UPU should bring its practice into line with that general-

[55] Submitted to Committee 3 (General Committee) of the Executive Council under the symbol CE/C.3 - Doc. 19.

[56] See *Juridical Yearbook*, 1969, p. 121.

ly in force at the present time—in particular, with the provisions of the Convention on the Law of Treaties concluded at Vienna in 1969; [57]

(ii) whether the changes made by the 1969 Tokyo Congress to the reservations concerning parcel post and insured letters and boxes should be applied by analogy to the Convention and to the other Acts of the Union.

II. *Reservations in the general practice of international law in the UPU*

A. *Reservations in the general practice of public international law*

5. The above-mentioned Convention of Vienna defines the word "reservation" as "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby its purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State" (article 2, paragraph 1 (*d*) of the Convention). More succinctly, it may be said that a reservation is a provision which derogates from the general legislation.

6. The use of reservations, which is now very common, has developed in step with the proliferation of international treaties and the evolution of procedures for concluding them. Wishing to increase the number of parties to a treaty, the contracting States consented to some of them not applying one or other of the dispositions of that treaty. Moreover, the majority rule relating to the conclusion of treaties sometimes imposes on the minority provisions which are deemed unacceptable for the latter.

7. This system of exceptions attacks the fundamental principle of integrity of a treaty whereby the rights and obligations flowing from the latter are the same for all the parties. The admissibility of the system is thus dictated by considerations of opportunism or legal policy. This partly explains why doctrine in the matter has undergone a well-nigh revolutionary development. At the present time several practices, based on several doctrines, are current. We shall summarize them here, while stressing the fact that each treaty may, and indeed should, settle the problem of reservations on its own account; many treaties do in fact make use of this opportunity. The rules discussed below are only applicable if the treaty contains no provision on the subject of reservations (and objections thereto).

8. Broadly speaking, doctrine and practice agree in accepting that reservations can only be made when a State commits itself provisionally or definitively to a treaty, i.e. at the time when it signs, ratifies, accedes to or accepts the treaty. The UPU is, however, more restrictive in this field, as we shall explain under B below.

9. The procedure governing acceptance of reservations has evolved a great deal. The four following doctrines, among others, may be distinguished:

(a) *Classical doctrine and practice*

10. Classical doctrine and practice require reservations to be accepted by all the contracting parties. According to this practice, which is the oldest one and is based on the classical method of concluding treaties, preferential conditions may not be granted to a State without the unanimous consent of all the parties bound by the treaty. The reservation thus becomes, in one form or another (in the treaty itself or in its final protocol) an integral part of the treaty in question.

11. However well-founded it might be in law, this theory gave rise to serious difficulties of application in the case of treaties to which there were a large number of contracting parties. For this reason new theories arose which aimed to demonstrate that a reservation, in order to be valid, did not require unanimous acceptance.

[57] *Official Records, of the United Nations Conference on the Law of Treaties, Documents of the Conference* (A/CONF.39/11/Add.2, Sales No. E.70.V.5), p. 289.

(b) *Pan-American doctrine and practice*

12. The pan-American practice flourished within the Organization of American States, hence its name. It is based on the following two principles:

"1. The consent of the other parties to the treaty remains, in principle, the condition for the validity of any reservation, the unanimous rejection of which would inevitably make it null and void, i.e. would entail the withdrawal of the party to the treaty which made the reservation.

"2. Although consent is necessary, it need not be unanimous. If certain States do not object to it, the reservation is admitted and the quality of party to the treaty is established. The sole effect of an objection is that the treaty does not come into force between the reserving and the objecting States."

13. Despite the opposition it met from the defenders of the classical practice who charged it with failing to respect the equilibrium and integrity of the treaty by making a multilateral treaty into a series of bilateral treaties, the pan-American practice was destined to become very widely accepted because, responding to the dynamism of codification at international level, it provided a valid, practical and logical solution to a problem vis-à-vis which the classical rule found itself in an impasse. The pan-American practice now governs the treatment of reservations in a number of treaties; since 1952 it has been associated with the classical rule in a practice instituted by the United Nations in connexion with the Convention on the Prevention and Punishment of the Crime of Genocide. [58]

(c) *The doctrine of "contractual freedom"*

14. Mention should be made at this point of the doctrine which maintained that any State can formulate reservations irrespective of the reaction of the other parties and while remaining a party to the treaty. This doctrine, which emphasized the sovereign right of the reserving State, was never applied in practice; but, supplemented by the recognition of the same sovereign right of a party to the treaty to object to the reservations, it contributed to the solution of the problem of the legal effects of reservations (and objections thereto) in the present legislation referred to below (see (*d*)).

(*d*) *Doctrine and practice adopted at the United Nations Conference on the Law of Treaties, Vienna, 1968 and 1969* (Convention of Vienna on the Law of Treaties)

15. According to the Convention on the Law of Treaties (articles 20 and 21), [59] the legal effects of a reservation and of an objection thereto differ according to the subject of the reservation:

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[58] Wishing to put an end to the disputes which frequently arose about the validity of the practice applied by the Secretary-General of the United Nations in respect of treaties for which he acted as a depositary, the General Assembly of the United Nations, by resolution 478 (V), asked the International Court of Justice and the International Law Commission for an opinion on the problem. While the Commission came out in favour of maintaining the classical theory, (see *Official Records of the General Assembly, Sixth Session, Supplement No. 9*), the International Court of Justice pronounced a theory which resembled the pan-American doctrine and which was adopted as general practice by the Assembly (see resolution 598 (VI)), although the Court had emphasized the essentially practical nature of the questions raised and their specific application to the Convention in question (see *I.C.J. Reports 1951*, p. 15).

[59] *Article 20* of the Convention reads as follows:

"1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

"2. When it appears from the limited number of the negotiating States and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

"3. When a treaty is a constituent instrument of an international organization and unless it

(1) If the reservation affects the object and purpose of the treaty or if the application of the treaty in its entirety is an essential stipulation of the contracting parties, the reservation requires acceptance by all the parties (see article 20, paragraph 2 of the Convention—classical practice).

(2) In cases other than those mentioned in (1) above (and except where the treaty is a constituent instrument of an international organization, for which a special procedure is provided), the reservation remains valid even if some of the contracting parties object to it. It does not preclude the entry into force of the treaty as between the reserving and objecting States; only if the objecting State definitely expresses such an intention are the legal relations stemming from the treaty between the reserving and objecting States not established (see article 20, paragraph 4 (*b*) of the Convention). Otherwise it is only those provisions to which the reservation relates which do not apply as between the two States in question, to the extent of the reservation (see article 21, paragraph 3). It will often be difficult to know to which of these two categories certain reservations belong.

B. *Reservations in the practice of the UPU*

16. The only provision of the UPU Acts dealing with reservations is that of article 22, paragraph 6 of the Constitution, [60] according to which reservations are inserted in the Final Protocols. This provision enshrines the principle whereby reservations are admitted only at the time of signature and must have received the prior sanction of Congress. Adopted by the Vienna Congress in 1964, the said provision ratifies a continuous practice which dates back to the origins of the Union and was first enshrined in a formal opinion expressed by the 1929 London Congress.

17. The signatories are not able to formulate reservations at the time of ratification. If, however, they find it absolutely essential to formulate a new reservation after the Acts

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otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

"4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

"(*a*) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;

"(*b*) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;

"(*c*) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

"5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later."

Article 21 of the Convention reads as follows:

"1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

(*a*) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

"(*b*) modifies those provisions to the same extent for that other party in its relations with the reserving State.

"2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

"3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation."

[60] United Nations, *Treaty Series*, vol. 611, p. 7.

have been signed, they may have recourse to the procedure for amending the Acts between Congresses and have the desired additions made to the Final Protocols. However, the conditions of approval are extremely severe since they require a unanimous vote.

18. In the case of accession of a new member country, UPU practice exhibits some degree of flexibility. It accepts, for example, that new member countries may ask to benefit from reservations which their territories enjoyed before independence when they were within the jurisdiction of the Union. It has gone even further by accepting that a new member country may also be accorded the benefit of a reservation which was not previously directly applicable to it but existed in favour of the entity of which the new country formed a part. On the other hand it is not possible at the time of accession to make a reservation which is enjoyed by no other member country.

C. *Desirability of a change in UPU practice*

19. As we have seen, there are substantial differences between UPU practice and the general practice in regard to reservations. The Union adheres neither to the classical practice in its entirety, nor to the pan-American practice, nor to the practice codified by the 1969 Convention of Vienna. Under the system peculiar to it, reservations must be approved by Congress and inserted in the Final Protocols to the Acts. This precludes the possibility of formulating reservations at the time of ratification on approval, and even, with certain exceptions (see paragraph 20 below), at the time of accession or admission to the Union.

20. A few concessions have, however, been made for cases of admission and accession to the Union. It has been accepted that reservations applicable to a country before its independence should remain applicable to that country after it has been admitted as a member of the Union. While this practice is justified by the desire to ensure that the new member country is as favourably placed as it was previously, it is not sactioned by an express provision.

21. It may therefore be said that the special procedure in force within the UPU provides both a control and a brake which appreciably limits the use of reservations. From the viewpoint of international postal exchanges this practice is highly satisfactory. It combats, indirectly, the abuse of reservations while admitting them by a procedure which guarantees that the other contracting countries have the opportunity to state their view on them and to approve them formally by signing the Final Protocol. The UPU practice also respects the interest which member countries' postal administrations have in knowing sufficiently in advance of the entry into force of the Acts signed at a Congress the conditions governing international postal exchanges. Even so, it is unfortunate that article 22, paragraph 6 of the Constitution is not more explicit. In our view it would be desirable to define the application of this provision more clearly, especially for cases of admission and accession, so as to ratify a long-standing and fully justified practice.

III. *Transfer to the Convention and various agreements of reservations appearing in the Final Protocols to these Acts*

22. As we recalled in the introduction, the Committee's mandate also consists in examining whether, by analogy with the action taken at the Tokyo Congress in regard to the reservations concerning postal parcels and insured letters and boxes, similar transfers could be made in the case of the reservations relating to the Convention and the optional Acts of the UPU other than the aforementioned Agreements.

23. In this connexion, a clear distinction should be drawn between the general reservations applicable to all the member countries of the Union and those applicable to a more or less restricted number of member countries.

24. The former do not, strictly speaking, correspond to the definition of a reservation. They are, rather, optional clauses of general scope which are included in the Final Protocols to the Acts in order to highlight the exceptional and restricted use, depending on a clearly defined situation, that is to be made of them. [61]

25. Whether a provision of this kind is inserted in the Convention or in the Final Protocol thereto is thus determined by considerations of opportunism—or, more precisely, of policy—in regard to international postal relations, expressed through legal means.

26. The problem on a very different aspect when we come to consider reservations that are applicable to a more or less restricted number of member countries, for the transfer of such reservations into the body of the Act completely alters their nature. They lose their character as reservations and become provisions of which any member country in a given situation can avail itself. Their terms must be altered accordingly, as it is impossible for a provision of the main Act to list the member countries that may benefit from it.

27. The effect of this procedure is, moreover, to establish within the body of an Act, side by side with the general practice, another practice of an equally official character. This legal situation is, however, contrary to the spirit of uniformity of the conditions governing international postal exchanges. In other words, instead of having one general practice with a few agreed exceptions, we find ourselves with two or three parallel systems.

28. In this connexion one cannot help thinking that precisely such objections could have been made regarding certain transfers effected by the previous Executive Council in respect of postal parcels. However, we must admit that those transfers were of no real consequence. They were not liable to appear obviously out of place, as the reservations in question seemed unlikely to be applied by a greater number of countries than at present; essentially, they were concerned with certain relatively unimportant features peculiar to the Anglo-Saxon system.

29. Lastly, the fundamental importance and compulsory nature of the Universal Postal Convention should be borne in mind. This argues in favour of maintaining regulations that are as uniform as possible. The snags we have pointed out in paragraphs 27 and 28, which could result from the transfer to the Convention of certain reservations appearing in the Final Protocol, ought to be avoided. It must be admitted, however, that some transfers are possible and even desirable, and the steps already taken in regard to parcels and insured letters and boxes cannot be ignored.

IV. *Conclusions*

30. With regard to the two questions underlying this study as set out in paragraph 4, the International Bureau considers that:

(1) the practice followed hitherto by the UPU in regard to reservations still remains fully justified. If it is more restrictive than the general practice of public international law, in particular that codified by the Convention on the Law of Treaties, this is not a defect but a positive quality and an advantage, since the use of reservations must be restricted as far as possible so as not to prejudice the uniform application of the provisions of a treaty.

[61] By way of example we may cite article II of the Final Protocol to the 1964 Vienna Convention (United Nations, *Treaty Series*, vol. 611, p. 105). This article gives administrations which do not concede exemption from postal charges to literature for the blind in their internal service the option of collecting certain charges which may not exceed those in their internal service. A reservation of this kind can undoubtedly be transferred to the Convention. If, however, the legislator — i.e. Congress — decided otherwise, it was precisely in order to endow such collection of charges with a very exceptional character and not to weaken the principle of exemption from charges enshrined in article 9 of the Convention.

This practice is, moreover, safeguarded by the Convention on the Law of Treaties (see article 5); [62]

(2) a few details could usefully be added to the existing provisions so as to regulate more fully or, more precisely, to ratify the practice adopted for formulating reservations at the time of accession or admission to the Union;

(3) as regards the possibility and desirability of taking action, in respect of the Convention and certain Agreements, on the lines of that taken at the Tokyo Congress with regard to the reservations concerning postal parcels and insured letters and boxes, the greatest circumspection is essential because this would involve the risk of making the application of certain reservations universal and of giving an official character to the parallel existence of several systems, which runs counter to the uniformity of legislation normally sought through the adoption of a treaty. The Tokyo precedent requires, however, that a detailed examination should be made of the reservations in question. But that is going beyond the scope of this document. It would accordingly be necessary for the Committees concerned to examine each reservation separately in the light of the principles set out in section III of the present study. An inter-committee working party could, however, be set up to study from the standpoint of the criteria discussed in section III all those provisions currently in force which are in the nature of reservations, with a view to adopting a uniform position on this delicate matter.

7 April 1971

[62] *Article 5* of the Convention reads as follows:

"The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization."